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

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

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

1. OBJECT, SCOPE AND DEFINITIONS

1.1 Object

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

1.2 Scope

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

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

1.3 Definitions

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

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

2. ADMINISTRATIVE COOPERATION

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

The Swiss delegation has always resisted an obligation to act on behalf of debtors being imposed under the Convention on the Central Authorities in large part due to the difficulties these authorities would encounter if they had to carry out the same activity on behalf of the creditor and debtor (see, too, 2.5 of the comments made by Switzerland regarding the tentative draft Convention of October 2005, in the Preliminary Document no. 23 of June 2006: “... The right granted to the debtor to request, via the Central Authorities, a modification of a maintenance decision is, in our opinion, likely to cause a conflict of interests for the Central Authorities which are already taking steps on behalf of the creditor. At the very least this right would substantially complicate the course of the proceedings. It is important also not to lose sight of the problems regarding costs which the authorities will face …”). Now the Drafting Committee has included a clause stipulating that the Central Authorities have a duty to locate the creditor (and this also prior to the submission of an application under the Convention, see Art. 7). This clause is no longer in keeping with the objective of the Convention, which is to guarantee recovery of maintenance by the (often needy) creditor.

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

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

2.3 International judicial assistance and cooperation between administrative authorities

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

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

2.4 Central Authority costs

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

3. APPLICATIONS THROUGH CENTRAL AUTHORITIES

3.1 Subsidiarity

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

3.2 Available applications

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

3.3 Activities on behalf of the debtor

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

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

3.4 Content of the application

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

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

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

3.6 Processing of applications

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

3.7 Effective access to proceedings

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

4. RECOGNITION AND ENFORCEMENT

4.1 Scope of the chapter

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

a) may be modified by a judicial authority; and

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

4.2 Right to be heard (Art. 19 e)

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

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

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

4.4 Documents (Art. 21)

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

5. ENFORCEMENT BY THE REQUESTED STATE

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

6. GENERAL PROVISIONS

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

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

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

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

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

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

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

7. OTHER IMPORTANT POINTS

7.1 Standard forms

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

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

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

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

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

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

7.2 Establishment of parentage

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