Proposals and Comments of the United States of America

THE TREATMENT OF COSTS IN PRELIMINARY DOCUMENT NO. 29

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

(ARTICLES 3(c), 6(2), 7, 8, 14 and 40)

I. INTRODUCTION

1. We -- the States and organizations participating in this nearly six-year negotiation -- have overcome many obstacles in our journey toward achieving our goal: a modern, comprehensive, global child support convention that improves procedures and ensures better results for children. At this Diplomatic Session, we need to preserve the progress we have made, and continue to make progress on the remaining open issues. If we retreat, we are in danger of falling backwards to where we started. We should not be focused upon the status quo at this stage in our proceedings.

2. We have all agreed that States wishing to apply the new Convention will have to contemplate making changes to their internal processes in order to ensure a progressive, sustainable process for the future. Indeed, the United States is in consultation with representatives from our courts and our state agency partners, to consider what changes we will need to make in our own laws and procedures. It is vital to the success of the Convention that, in these final deliberations, we must all be forward-thinking and mindful of what is best for children and families, not for maintaining our own internal institutions and operations.

3. A system that is virtually cost-free for an applicant who uses the Central Authority is essential to ensure equity and broad application, and to promote continuing improvements. Such a system benefits the government and the taxpayers as well, as in most countries the burden of providing for children who do not receive child support will fall on them and not on the parents, who should bear primary responsibility for their support. It is our fervent hope that we will conclude this Diplomatic Session with a consensus that all States should provide virtually cost-free services to international applicants in child support cases processed through Central Authorities. The United States will not join a convention that imposes unequal treatment on States and applicants with respect to costs. We believe that any system that does not assure virtually cost-free services to all applicants would represent a step backwards.

II. SUMMARY OF UNITED STATES POSITION ON ARTICLE 14

4. Articles 3(c), 6(2), 7, 8, and 40 all address costs in some respect. The focus of debate to this point has been primarily upon Article 14[1], which directly addresses Effective Access to Services and contains at present two options, with other options having been proposed in papers submitted during the last Special Commission.

5. The United States opposes Option 1 in Article 14, and would almost certainly not become a party to the Convention if that Option were adopted. Option 1 would allow the provision of free legal assistance in child support cases to be subject to a means test. This would impose a financial burden where no such burden currently exists on those in need of child support in international cases involving the United States.

6. We strongly prefer Option 2, although in its present form it includes one possible provision that, in our view, would undermine the rest of the Article. Option 2 would require States to provide free legal assistance in child support cases under Chapter III (i.e., cases that are processed through the Central Authorities), with specified limited exceptions. There are no exceptions for applications for recognition and enforcement of a child support decision. With respect to other applications (i.e., establishment of a decision, including parentage, and modification), there are three potential exceptions: one for the cost of genetic testing, one for "manifestly unfounded" applications, and one for exceptionally wealthy applicants. We oppose any exception for "exceptionally wealthy" applicants, not because we believe such persons are deserving of free legal assistance, but because the exception is unnecessary, will not work, and could be abused. Based on our experience with the administrative difficulties of charging and collecting costs across U.S. state lines, and the inherent burden of applying a means test, the United States has rejected these policies in its interstate child support program as impractical and unworkable. Judgment by the requested State as to who is exceptionally wealthy, without objective standards and with no personal contact with the applicant, poses the risk of abuse and unfair treatment. We cannot see how it would be possible for the requested State to implement such a system fairly when the cost of living and circumstances of the applicant in the requesting State could never be adequately assessed with complete accuracy and fairness.

7. The United States submitted a compromise proposal (Working Document No. 127) to the May 2007 Special Commission under which the requested State could recover its costs through retaining a small percentage of amounts collected on behalf of exceptionally wealthy applicants. This approach may bear further discussion.

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[1] The reference to Article 14 includes Option 1 and all parts of Option 2 (14, 14 *bis* and 14 *ter*).

8. Our strongly preferred option, however, remains the provision of virtually cost-free services to all child support applicants, with possible exceptions for genetic testing and manifestly unfounded applications. Because of Article 6(2)'s flexible language, there is no assurance of a minimum level of performance under the Convention. Any option other than virtually cost-free services under Article 14 would require us to reconsider not only Article 8 (which provides that Central Authority services are to be provided at no cost), but also our commitment to provide expansive services under Article 6(2), when we expect that some other countries may provide U.S. applicants much less.

III. INTERRELATIONSHIP OF COST PROVISIONS UNDER THE CONVENTION

Introduction

9. What follows is a more detailed discussion of the above positions and of the interrelationship among Articles 3(c), 6(2), 7, 8, 14 and 40, as well as other costs issues that have been raised, e.g., costs related to debtors' requests for modification, appeals, and public bodies. Articles 6, 7, 8 and 14, in particular, are closely intertwined.

10. Article 6 sets forth the functions of Central Authorities, Article 8 addresses the costs of Central Authorities (which shall be borne by the Central Authority, "save for exceptional costs or expenses" under Article 7)[2], and Article 14 addresses the costs of legal assistance. Article 3(c) defines "legal assistance" and Article 40 provides that nothing in the Convention prevents the recovery of costs from the unsuccessful party, and that the recovery of maintenance must take precedence over the recovery of costs. The final text of any one of these Articles will affect the ultimate meaning of, and may invite changes to, the text of the others.

11. Article 6 is currently flexible as to which services a Central Authority must itself provide and which services may be provided by others. Article 8 only prohibits imposing charges for the services that the Central Authority itself provides. If the final text of Article 14 does not provide for virtually cost-free legal assistance for child support services which are NOT furnished by the Central Authorities, then there will be an unacceptable imbalance between those States, such as the United States and a number of others, whose Central Authorities provide comprehensive services and other States, whose Central Authorities provide very limited services and refer the applicant to private attorneys who, under Article 14, would be able to charge large fees. Articles 8 and 14 must mirror each other to ensure parity.

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[2] See comment below under discussion of Article 8. We believe that the exception allowing for charging for services under Article 7 should be reconsidered in light of the further consideration of Articles 6, 8 and 14.

Article 3(c)

12. This definition of legal assistance is acceptable to the United States, provided that Article 14 provides for virtually cost-free legal assistance in child support cases. We note that the definition is very broad, and covers services that otherwise might not, strictly speaking, be considered "legal." We are concerned, however, that this definition does not appear to include such costs of essential services as those associated with location and ongoing enforcement outside of the court system, for which there may be additional charges, if not provided by the Central Authority. In the United States and many other countries, the Central Authorities perform all of these services. In some other countries, it is our understanding that the Central Authorities perform few if any of these services. If Article 14 does not provide virtually cost-free legal assistance, then we would need to have the definition of "legal assistance" further clarified.

Article 6(1) and (2)

13. Articles 6(1) and (2) set forth the specific functions of the Central Authority. The only inflexible, absolute obligation in the entire list is the obligation in Article 6(1)a) to transmit and receive applications. ALL of the other obligations are extremely flexible, and permit a wide variation in the level of service that is actually provided by a Central Authority.

14. The benefit of the flexible formula in Article 6 (1) and (2) is that it will allow widespread ratification of the Convention by both those countries with highly developed systems and also those countries in the process of developing or improving their child support enforcement systems. A State with a highly-developed Central Authority system will have a much greater capacity to carry out the Central Authority functions than a State whose Central Authority must delegate operations to public bodies and others using labor-intensive and expensive procedures. It is expected that these latter States will gradually improve their capacity to carry out the Central Authority functions in a more efficient and effective manner. A mandate for cost-free services will expedite such advancements.

15. An inevitable result of this flexible formula is that some countries' Central Authorities will be doing a lot, and others may be doing very little. A State whose Central Authority provides a very high level of service to foreign applicants will not necessarily receive the same level of services for its applicants. As a State with a highly effective child support system, under which the Central Authority provides comprehensive services (including locating the debtor and his or her assets, monitoring payments, and automating enforcement measures), we stress that our acceptance of Article 6 in its present form has been a major compromise for the United States.

16. We would, of course, greatly prefer to receive from other States approximately the same level of services we intend to provide their nationals. However, given the critical

importance of the subject matter of the Convention, we want the Convention to be widely ratified. We are optimistic in believing that countries that are parties to the Convention are much more likely to quickly develop or enhance their child support systems than those countries who are not parties to the Convention. For these reasons, in the spirit of compromise and faith in ALL countries' desire to continually improve their systems, we are willing to accept Article 6, although it will guarantee little immediate improvement in services to our children whose parents live abroad.

Article 8 Central Authority Costs

17. We support paragraph 1, which states that each Central Authority shall bear its own costs.

18. Paragraph 2 provides that a Central Authority may not impose costs for its services, except for exceptional costs arising from requests under Article 7. Given the entirely flexible nature of the Central Authority's obligations under Article 6, and the discretionary nature of Article 7, the cost of providing Article 6 services for an Article 7 request should also be absorbed by the Central Authority as costs under Article 6. Therefore, we propose putting a period after "under the Convention" and deleting the rest of paragraph 2.

19. So long as Article 14 provides for virtually cost-free legal assistance in child support cases, we agree that a Central Authority should not impose charges on an applicant in child support cases. If Article 14, however, allows charges for legal assistance when that legal assistance is not provided by the Central Authority, then the United States would consider the Convention a step backwards and an invitation for disparate treatment of applicants in different countries. It is our hope that, even though there may be no assurance of a standard level of service in different countries, at least we may all commit to providing whatever services may be furnished without cost to the applicant in child support cases. If Article 14 were to allow charges for legal assistance then Article 8 would have to be changed to allow a Central Authority to charge when it provides legal assistance. We emphasize that the United States would be unlikely to join any Convention that allowed for significant charges for costs under either Article 8 or Article 14.

Article 14 Effective Access to Procedures

Option 1

20. The United States strongly opposes Option 1, which would allow the provision of free legal assistance in child support cases to be subject to a means test. Many low or moderate income individuals do not qualify for free legal assistance in their own country, much less in another country that may consider their relative means with no

comprehensive understanding of the cost of living in the requesting country. The vast majority of users of U.S. child support agencies are people of low or moderate income who cannot afford to pay costs to pursue their claims, but Option 1 gives no assurance that current recipients of free services in the requesting State will receive equivalent protections in the requested State.

21. Supporters of Option 1 argue that this Option is as far as they are willing or able to go at the current time. They urge that it be adopted so that there will be wide ratification of the Convention. However, there comes a point where the benefits of wide ratification are outweighed by the detriments resulting from the compromises required to obtain that wide ratification. A widely ratified convention that does not improve the status quo and encourage further enhancements over current practices is, in the view of the United States, an unfortunate step backwards.

Option 2

22. With one caveat (see paragraphs 24-29, below), we support Option 2 (Articles 14, 14 *bis* and 14 *ter*), which would provide for free legal assistance in all child support cases, with a few, specific exceptions. We oppose the possible inclusion in Article 14 *bis* of language that would allow charges for services when the applicant's financial circumstances are exceptionally strong.

23. One objection to Option 2 by some States is that they do not provide such services to their own nationals, and that to do so for people from other countries would be considered to be discriminatory. But discrimination is treating two people who are similarly situated differently. Foreign and domestic applicants are not similarly situated. Foreign child support applicants face many more obstacles than do domestic applicants, e.g., language differences, distance challenges, and unfamiliar procedures.

24. Another objection by some is simply the reluctance to accept an obligation to absorb any additional costs at all. We would counter by assuring these countries that there are cost-effective ways to provide free legal assistance, and there are ways to minimize the need for such assistance in both administrative and judicial systems. The continuation of the work of the Administrative Co-operation Working Group in some form under the Convention would build opportunities for countries to share their best practices with other countries that are Parties to the Convention, as well as with those that are making efforts to develop their child support systems so that they may become Parties. (See descriptions of these efforts in the Report of the Administrative Co-operation Working Group to the Diplomatic Conference.)

Exceptionally strong financial circumstances (Article 14 bis(2)c))

25. Under Option 2, there are no exceptions to the obligation to provide free legal assistance in child support applications for recognition and enforcement of a decision under Article 10(1)a) and b). There is, however, a proposed exception to allow

charges in child support cases to an applicant who is 'extremely wealthy' when the application is for establishment of a child support order (including establishing parentage if necessary) and modification of a decision (Article 10(1)c), d), e) and f)). We strongly oppose this proposed exception.

26. There are three options that address the issue of 'extremely wealthy' child support applicants: Option A would allow the requested State to refuse free legal assistance if it decides that it is manifest that the applicant's financial circumstances are exceptionally strong, taking into account the cost of living in the requesting State. Option B would allow the requested State to refuse such free assistance, but the determination of whether the applicant should be provided free legal assistance, "taking into account costs foreseen in the requested State," would be made by the requesting State. Option C would be to delete this exception completely. We strongly support Option C, deleting this exception altogether. The imposition of costs is unnecessary, unworkable, and inherently subject to abuse.

27. An exception for exceptionally wealthy people is unnecessary because those people will not use the Central Authority system. No matter how good the government-supported systems may be, they will not provide the personally-tailored services that a highly paid private attorney can provide. While there has been much hypothetical discussion of 'exceptionally wealthy' applicants, no one has pointed to actual situations where a person of exceptionally strong financial circumstances has shown a preference for the government's standardized program services.

28. An exception for exceptionally wealthy people is also unworkable, especially if the determination of means is made by the requested State. It is likely to cost the requested State more to determine who is "exceptionally wealthy," with any meaningful account for the cost of living where the applicant lives,[3] than the requested State will save by not providing cost-free services in all child support cases. The determination will inevitably result in complications and long delays as an applicant presents evidence, or challenges assumptions, regarding his or her financial circumstances and the cost of living where he or she lives. If the requesting State makes the determination, under Option B, similar problems will persist and there will certainly be disagreements and dissatisfaction when the requested State takes issue with the findings.

29. Most importantly, an exception for the exceptionally wealthy applicant, whichever State makes the determination, would be subjective. The text of the proposed exception does not give any guidance as to what constitutes "exceptionally strong" financial circumstances, nor do we believe there is an acceptable definition of that term. A requesting State could conceivably decide that "exceptionally strong financial

[3] Even within a particular country, the cost of living varies drastically from one geographical area to the next, and even, in some municipalities, from one block or township to the next.

circumstances" describes individuals who do not meet that country's own means test. Similarly, as noted above, insufficient weight could be accorded the cost of living in the requesting State, either due to lack of proper investigation or inherent bias. This exception, on its face, invites controversy between States and could create a huge loophole in the Convention.

30. In the United States, we have consistently rejected applying means tests to applicants for child support services and have prohibited States from charging each other for virtually all services in interstate cases. The administrative burden of seeking income information internationally, accounting for differences in standards of living, applying a means test, charging and collecting fees, as children wait for child support they desperately need, seems short-sighted, ill-advised and against the shared vision of ensuring prompt child support services for children. The complexity of such a system is onerous whether it applies to all cases or to just to one segment of the population.

31. We would not be interested in joining a Convention that allowed a requested State arbitrarily to refuse free services to an applicant it considered exceptionally wealthy, with no objective criteria for determining who meets this definition. In theory, we might consider such an exception if there were agreed, fair, objective criteria for determining what constitutes exceptional wealth in a particular country, and whether a particular applicant meets that criteria. In terms of what constitutes exceptional wealth, it appears to us that we would first have to agree in the convention to a number. A certain amount of income per year, or assets greater than a certain amount, or income more than a certain number of times the poverty level, are just some possibilities. Given that all of the examples of "exceptionally wealthy" individuals given by the proponents of this provision at the May 2007 Special Commission were U.S. movie stars who are probably multimillionaires, the number would need to be extremely high. Since "exceptionally wealthy" can mean different things in different countries, would we then have to determine what wealthy movie stars in every country earn, so that we could agree on a figure for each country. Once we had agreed on a definition of "exceptionally wealthy," we would then have to develop critieria for assessing whether an individual applicant was "exceptionally wealthy." Such criteria would necessarily have to address the issues of assessing the cost of living and special circumstances of the applicant in the requesting State, transmitting and verifying information essential to the determination, and permitting objections and appeals in the event of disputes. Just from describing what we would have to do to establish objective standards, it is obvious to us that it would be impossible to do so. The administrative cost of applying any such criteria in an individual case would far outweigh any savings gained by identifying the rare exceptionally wealthy applicant.

Additional concerns with Option 2

32. We have several additional concerns with the details of Option 2, which we share below.

Appeals

33. Whereas an applicant is always free to pursue an appeal on his or her own, Central Authorities need the discretion to decide whether or not to appeal a decision. Therefore, free legal assistance for appeal procedures should be subject to a merits test. First of all, let us clarify what we mean by "appeal." To us, this is not the first level review of an application for recognition and enforcement under Article 20(5). . We interpret the reference to appeal procedures in Option 2 to refer to the possibility of "further appeal" which is referred to in Article 20(10), or to the appeal of an establishment or modification decision made pursuant to applications under Article 10(c), (d), (e) or (f). We should note that such appeals of child support decisions in the United States are rare, because the first-level tribunal's discretion is severely constrained by mandatory child support guidelines. There is very little likelihood of success in appealing a decision that is within the applicable guidelines.

34. But, even where there is a chance of success on appeal, there are reasons why a Central Authority might not appeal a particular decision. For example, the cost of the appeal may exceed the amount at issue. A reasonable person spending his or her own money would not appeal in such a case, and there is no reason why a Central Authority should be required to pay for such an appeal. Or a Central Authority might make a strategic decision not to appeal a decision if there is a reasonable chance that it will lose the appeal and the negative appellate decision will set a precedent that must be followed by all other tribunals in the same jurisdiction.

Treatment of Debtors (14 *bis* 1)

35. The only application a debtor is permitted to make under the Convention is an application to modify a decision under Article 10(2). Paragraph 282 of the Convention Explanatory Report comments:

36. "The applications in Articles 10(2) *a)* and *b)* are Chapter III applications. They are therefore subject to the general obligation to provide assistance in Article 6 and to provide effective access to procedures in Article 13. [NOTE: In the current draft the correct reference is to Article 14]."

37. In order for a debtor applicant to receive effective access to procedures, we strongly believe that he or she should receive the same free legal assistance as the creditor when seeking modification of a child support order. In many cases, the original decision will be made in the State of the creditor's residence. The debtor, when he wishes to modify that decision because of changed circumstances, will always be residing in another State. Article 15 severely restricts the debtor's ability to modify the decision in any State other than the State where the creditor resides. The debtor will thus be forced to proceed in a foreign country. If we want to encourage States to comply with Article 15, and debtors to act promptly to modify a decision so that

arrears do not accumulate, we should provide debtors with free legal assistance in these cases, as highlighted by the Explanatory Report.

Public Bodies

38. Public bodies should receive free legal assistance under Article 14. There is no justification for penalizing a public body for providing assistance to needy children to make up for the child support the noncustodial parent failed to pay.

Direct Applications

39. Article 14 does not mention direct applications. In fact, as it applies only to applications under Article III, it would exclude direct applications from the provision of free legal assistance. We think that this is the correct approach. Central Authorities are able to control costs by developing streamlined, cost-effective procedures. If an applicant wants the benefit of virtually free legal assistance, he or she should be required to use the Central Authorities' services.

Recovery of costs from collections

40. The United States submitted a compromise proposal (Working Document No. 127) to the May Special Commission. Under this proposal, the requested State could recover its costs from applicants it determined to be exceptionally wealthy. It would do so by keeping a certain percentage of the amount collected (e.g., 10%). While this option has all the disadvantages described above (lack of any objective standard for deciding who is exceptionally wealthy, administrative burden of making this determination, etc.), at least it would only charge an applicant where the Central Authority had been successful in collecting child support. In this way, applicants would be guaranteed results and child support income before incurring any costs. Recovery of costs from collections ensures successful access to, and delivery of services. Further discussion of this concept may be warranted.[4]

IV. CONCLUSION

[4] If cost recovery from collections was accepted as a means of recovering the cost of legal assistance from exceptionally wealthy applicants, Article 40 might need to be modified.

41. In the United States, we have begun consultations on necessary changes to our system as a result of compromises we have already accepted. However, we repeat that there comes a point where the benefits of wide ratification are outweighed by the detriments resulting from the compromises required to obtain that wide ratification. A widely-ratified convention that does not significantly improve procedures and also serve as a catalyst for further enhancements is not much of an accomplishment. We believe that tipping point is reached in Article 14. The Convention cannot succeed unless it provides virtually cost-free legal services for child support cases. Anything less would be a step backwards. Unless virtually free legal assistance is provided in all child support cases, our progress to date – a draft convention that establishes an amazing system of administrative cooperation and comprehensive procedures for the prompt handling of all applications -- will be an empty promise for many needy families.