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Inter-American Convention on the Taking of Evidence Abroad

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II. Inter-American Convention on the Taking of Evidence Abroad*

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that the United States sign and ratify the Inter-American Convention on the Taking of Evidence Abroad and the Additional Protocol with the following reservation and declarations:

- a) **Reservation:** In ratifying the Convention, the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Convention, and not with respect to States which have ratified or acceded only to the Convention.
- b) **Declaration:** The United States declares its understanding that the Protocol is designed to clarify the application of the Convention generally and that, in keeping with that general objective, should be read as modifying the Convention where appropriate.
- c) **Declaration:** The United States further declares its understanding that Article 14 of the Convention stands for the proposition that, in the event States party to the Convention and Protocol are party to another convention dealing with the same subject, the objective of promoting judicial cooperation calls for such States to proceed under the convention containing the least restrictive rule with respect to the matter in question.

REPORT

I. Summary of Report

In 1975 and 1984, respectively, the Inter-American States negotiated an Inter-American Convention on the Taking of Evidence Abroad (the "Inter-American Evidence Convention" or "Convention"), and an Additional Protocol to the Inter-American Convention on Taking of Evidence Abroad (the "Protocol"). The Convention has been ratified by the vast majority of Latin American countries. The Convention together with the Protocol (which is designed to clarify and supplement the Convention) establish procedures which do not currently exist for taking evidence in one State Party for use in civil or commercial

*This Report was approved by the House of Delegates at the Los Angeles meeting in November 1989. The Report was prepared by Lucinda A. Low from the Inter-American Law Committee.

litigation in another State Party. They complement the procedures for service of process (and other documents) established by the Inter-American Convention on Letters Rogatory (the "Letters Rogatory Convention"), which the United States ratified in 1986, and from which U.S. litigants have benefitted since its entry into force for the United States on August 27, 1988.

The Letters Rogatory Convention represented one of the first instances of U.S. participation in a private international law convention developed by the Inter-American States, and the first instance of participation in a convention dealing with international judicial assistance. Adherence to the Inter-American Evidence Convention and Protocol would represent an expansion of cooperation in the area of international judicial assistance. U.S. participation in this Convention and Protocol would save U.S. citizens time, effort, and expense. Finally, the Convention and Protocol improve upon the principal other multilateral treaty in this area with respect to the difficult subject of discovery of documents.

The principal provisions of benefit to U.S. litigants discussed in this Report are the following:

- Mandating the designation by each State Party of a Central Authority to receive, transmit and otherwise facilitate the processing by judicial authorities of letters rogatory;
- Providing for alternative means for the obtaining of evidence (testimony or documents) via the letter rogatory or through diplomatic and consular officials;
- Adopting forms in multiple languages to provide in a uniform format the information required for a letter rogatory and a certificate of execution of the letter rogatory;
- Providing a method for obtaining documents in the "discovery" phase of U.S. litigation;
- Permitting litigants to request special procedures and formalities which may improve the quality of evidence obtained and enhance its usefulness in U.S. litigation, as well as permitting the presence of U.S. counsel in foreign evidence-gathering proceedings;
- Eliminating the requirement for legalization when letters rogatory are transmitted through a Central Authority or through consular or diplomatic channels; and
- Reducing delay in the execution of a letter rogatory by providing a procedure for prepayment of the estimated costs and by requiring that execution not be delayed pending payment of the balance of the actual costs.

II. Background to Negotiation of the Convention and Additional Protocol

Since 1972, the United States has been party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague

Evidence Convention").¹ Nineteen countries in addition to the United States are currently party to this Convention, which provides for a variety of methods for the obtaining of evidence in one signatory country for use in judicial proceedings of a civil or commercial nature in another signatory country.

Although, as discussed below,² the Hague Evidence Convention's utility has been adversely affected by its provision permitting States Party to decline to use its procedures for discovery of documents, it has facilitated the taking of evidence abroad in some circumstances.

Unfortunately, Inter-American participation in the Hague Evidence Convention is limited. Of all the Latin American countries, only Argentina, Chile, Mexico, and Venezuela are currently members of the Hague Conference on Private International Law, and only Argentina is party to the Hague Evidence Convention. Because of this non-participation in the Hague Evidence Convention and because of a perceived need for a regional multilateral convention dealing exclusively with the subject of taking evidence abroad,³ in 1975, at the First Inter-American Specialized Conference on Private International Law ("CIDIP-I"), the Member States of the Organization of American States ("OAS") drafted and negotiated the Inter-American Convention on the Taking of Evidence Abroad.⁴

Although the United States participated in CIDIP-I, it was not one of the countries initially to sign the Inter-American Evidence Convention. At the Second Inter-American Specialized Conference on Private International Law ("CIDIP-II"), held in Montevideo, Uruguay in 1979, the delegates approved a resolution, supported by the United States, which called for preparation of an additional protocol to the Convention to clarify and improve certain aspects of the Convention. Such a Protocol was subsequently drafted by the United States and proposed and adopted by the delegates at the Third Inter-American Specialized Conference on Private International Law ("CIDIP-III") in La Paz, Bolivia in 1984.⁵ During the course of the negotiation and adoption of the Protocol, the

1. Done at The Hague, October 26, 1968, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (entered into force October 7, 1972). The text of the Hague Evidence Convention is reprinted following 28 U.S.C.A. § 1781 (West Supp. 1989).

2. See Section III.A.4 of this Report.

3. The Inter-American Convention on Letters Rogatory, OAS, Treaty Series, No. 43, reprinted in I.L.M. 339 (1975) (entered into force for the United States, Aug. 27, 1988), provides in Article 2(b) that its provisions may be applied to letters rogatory the purpose of which is the taking of evidence as well as those issued for purposes of service of process. In ratifying the Letters Rogatory Convention and accompanying Protocol, however, the United States made a reservation precluding its application to evidence-taking.

4. OAS, Treaty Series, No. 44, reprinted in 14 I.L.M. 328 (1975). The Inter-American Evidence Convention was one of several treaties (including the Letters Rogatory Convention) approved by delegations which the Organization of American States ("OAS") invited to CIDIP-I, held in Panama.

5. Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, OAS, Treaty Series, No. 65, reprinted in 24 I.L.M. 472 (1985).

United States made clear that its adherence to the Inter-American Evidence Convention and Protocol would be accompanied by the reservation set forth in the recommendation accompanying this report. That reservation specified that the United States will apply the Convention only to countries that also adhere to the Protocol. This reservation is necessary because the United States believes that the clarifications and supplemental rules set forth in the Protocol are essential to achieving the full benefits of the regime established by the Convention.⁶ The United States made a similar reservation upon ratification of the Letters Rogatory Convention, which also has been modified by a subsequent protocol.

Currently, thirteen countries have ratified the Convention: Argentina, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Another five (Bolivia, Brazil, Colombia, the Dominican Republic, and Ecuador) have signed but not yet ratified it. The Convention entered into force on January 16, 1976.

The Protocol has been ratified by one country (Mexico) and signed but not ratified by ten others. It will enter into force thirty days after deposit of instruments of ratification and accession by two States Parties to the Convention. Were the United States to ratify the Convention and Protocol, a number of other Inter-American States would likely follow suit.⁷

The United States is party to one other Inter-American Convention in the field of international judicial assistance—the Letters Rogatory Convention, which it ratified, following the ABA's recommendation, in 1986, and which entered into force for the United States on August 27, 1988.⁸ The Letters Rogatory Convention establishes a regime for the service of documents comparable to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Hague Service Convention").⁹ The Inter-American Evidence Convention complements the Letters Rogatory Convention.

6. The statements herein regarding the U.S. delegation's position are based on the author's personal knowledge and on information received from delegation members. Although notes and other materials have been submitted, the U.S. delegation which attended CIDIP-III has never submitted a formal report to the U.S. government regarding the conference and, specifically, the drafting and adoption of the Protocol.

7. A similar phenomenon occurred following U.S. ratification of the Letters Rogatory Convention and Protocol.

8. The United States is party to a Protocol on Uniformity of Powers of Attorney Which Are to Be Utilized Abroad, 56 Stat. 1376, T.S. 982, 161 U.N.T.S. 229, and to an Inter-American Convention on Facilitation of International Waterborne Transportation, signed at Mar de Plata June 7, 1963, entered into force January 11, 1981, T.I.A.S. ____.

Another Inter-American Convention, the Inter-American Convention on International Commercial Arbitration, received the advice and consent of the U.S. Senate to ratification in 1986. However, Congress has not yet enacted the necessary federal implementing legislation amending the Federal Arbitration Act. The American Bar Association has supported U.S. ratification of the Commercial Arbitration Convention.

9. *Done* at The Hague, Nov. 15, 1965, T.I.A.S. No. 6638 (1969), 20 U.S.T. 361 (entered into force for the United States, Feb. 10, 1969).

III. Key Features of the Inter-American Evidence Convention and the Protocol

The Inter-American Evidence Convention and Protocol are concerned with the means and procedures for obtaining evidence (both testimony and documents) in one State for use in proceedings in another State, the circumstances under which a State may refuse to allow evidence to be taken, the availability of special procedures, such as cross-examination or preparation of a transcript, testimonial privileges, the compelling of testimony, costs and expenses incurred in taking testimony, legalization and translation requirements, and other matters.

Rather than attempting a detailed analysis of the Convention and Protocol, Part A of this section will highlight the main features of the regime the Convention and Protocol create and the benefits it offers to U.S. litigants and practitioners. Part B will identify some remaining questions arising out of the Convention and Protocol, and suggest how they might be addressed. Throughout the discussion, where appropriate, the provisions of the Convention and Protocol will be compared to those of the Hague Evidence Convention.

A. PRINCIPAL BENEFITS

1. *Designation of a Central Authority*

The Convention makes several references to the role of a Central Authority of the States of origin and destination of a letter rogatory, but does not expressly require States Party to designate such an Authority. Article 1 of the Protocol, however, requires each State Party to designate a Central Authority and to communicate its designation at the time of deposit of its instrument of ratification.

As in the Letters Rogatory Convention and the Hague Evidence and Service Conventions, the designation of a Central Authority is critical to the proper functioning of the regime established by the Convention and Protocol. The Central Authority is one of the principal channels for the transmission of letters rogatory. The Central Authority in the State of destination will receive a letter rogatory requesting evidence and is obligated to transmit it to the appropriate judicial or other authority for processing. The Central Authority receives the executed letter rogatory back from the authority which processed it, certifies its execution, and returns it to the Central Authority of the State of origin.

2. *Alternative Means for Taking Evidence*

The principal method prescribed by the Convention and Protocol for the taking of evidence is the letter rogatory. It is analogous to the letter of request under the Hague Evidence Convention. However, the Protocol also permits the taking of evidence by diplomatic or consular agents. (Protocol, Arts, 9–13). This gives flexibility to U.S. litigants to choose the method best suited to their needs.

These methods of taking evidence are more limited than those permitted by the Hague Evidence Convention, which permits commissioners, as well as diplomatic or consular agents, to take evidence. Given that many States Party to the Hague Evidence Convention have made reservations to the commissioner method, however, the gap between the two Conventions is, in practical terms, much narrower.¹⁰

The Protocol's provisions for taking evidence by diplomatic and consular agents address a number of problems that litigants using this method have encountered. For instance, Article 11 permits diplomatic or consular agents to request the competent local authorities to apply measures of compulsion. These measures *must* be applied if the local authority finds that domestic requirements for applying such measures in local proceedings have been met. (This is somewhat stronger than the comparable provision in the Hague Evidence Convention, Article 13.)¹¹

3. *Standardization of Forms for Letters Rogatory and Related Documents*

The Protocol specifies two forms in four languages for use in connection with letters rogatory for the taking of evidence—Form A, which is for the letter rogatory itself, and Form B, a certificate of execution of the letter rogatory. Both are contained in an Annex to the Protocol. Both promote standardization of the letter rogatory procedure and facilitate use of the Convention.

Form A. In addition to information about the parties, the proceedings, the types of information requested and from whom, and deadlines, this form contains several items dealing with additional formalities or special requirements, *e.g.*, oaths or affirmations, and notice of the date, time and place of the taking of evidence. Having the form will substantially assist counsel in preparing letters rogatory.

Form B. This form contains a certification that the testimony or information requested has been taken/obtained and attaches the respective testimony or documents. Alternatively, the reasons why the testimony or information has not been taken/obtained must be set forth.

4. *Obtaining Documentary Evidence in Discovery*

Perhaps the major point on which the Convention and Protocol will be judged is their treatment of the subject of documentary discovery. This is an area in which the Hague Evidence Convention has been notably unsuccessful in bridging the gap between common-law and civil-law methods of obtaining evidence. The

10. Furthermore, Article 14 of the Inter-American Evidence Convention allows States that already permit the taking of evidence by commissioners to continue to do so, and to enter into bilateral or multilateral agreements so permitting. In any event, commissioners are used much less frequently than consular officials, so their omission probably causes no real hardship to U.S. litigants.

11. Among the eleven States which have signed and/or ratified the Protocol, two, Brazil and Chile, have made reservations to these articles that will preclude use of the alternative procedures.

Hague Evidence Convention has been the subject of much controversy and, in recent years, frequent litigation, centering around its Article 23, which permits States Party, by reservation, to decline to permit use of the letter of request for "pre-trial discovery." This litigation culminated in the 1987 United States Supreme Court decision in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, ___ U.S. ___, 107 S. Ct. 2542, 96 L.Ed. 2d 461. In *Aerospatiale*, the Court held, 5-4, that the Convention is not the exclusive or mandatory means of obtaining evidence abroad where a U.S. court has jurisdiction over a foreign party. The Court, citing § 437 of the Restatement (Revised) of Foreign Relations Law of the United States (Tent. Dr. No. 7, 1986) (approved May 14, 1986), directed the lower courts to engage in a detailed comity analysis to determine whether discovery should be conducted under the Federal Rules of Civil Procedure or under the Convention procedures. However, it failed to articulate precise rules for how that analysis should be conducted.

In the wake of *Aerospatiale*, the lower courts have gone in both directions, some expressing great sensitivity towards the Convention, others virtually ignoring it.¹² The net result is that the increase in judicial cooperation which supporters of the Hague Evidence Convention hoped to achieve has not been fully realized. U.S. litigants seeking evidence from a foreign party subject to the jurisdiction of a U.S. court often prefer to take evidence under the Federal Rules of Civil Procedure, rather than the more time-consuming (and often less familiar) procedures of the Convention. Foreign parties resist U.S. discovery efforts, invoking where possible the "blocking" statutes of foreign countries where documents or records are located. The result in such cases can be jurisdictional conflicts. Thus the Hague Evidence Convention, while undoubtedly helpful in a great many instances, has not "bridged the gap" between common- and civil-law evidence-taking methods as successfully as many originally hoped.

Article 9 of the Inter-American Evidence Convention allows a State to decline to execute a letter rogatory whose purpose is the "pretrial discovery of documents."¹³ This provision, similar to that of the Hague Evidence Convention, was recognized as a problem by the drafters of the Additional Protocol. They proposed—and were ultimately successful in obtaining—the CIDIP-III delegates' agreement to a provision in the Protocol that would allow the exhi-

12. *Compare, e.g., Sandsend Fin. Consultants v. Wood*, 743 S.W.2d 364 (Tex. App.—Houston (1st Dist.) 1988) (holding that trial court has unfettered discretion to determine whether to follow Convention procedures and rejecting use of Convention) with *Hudson v. Herman Pfauter GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987) (burden should be placed on party opposing use of Convention to demonstrate that its use would frustrate interests of obtaining evidence and in promoting effective functioning of judicial system).

13. Actually, the provision reads that "the authority of the State of destination may refuse execution of a letter rogatory whose purpose is the taking of evidence *prior to judicial proceedings* or 'pretrial discovery of documents' as the procedure is known in Common Law countries" (emphasis added). This language provides evidence that, as some have long argued with respect to the Hague Evidence Convention, the prohibition is based on a misunderstanding of U.S. discovery procedures.

bition and copying of documents provided certain requirements were met. These requirements, three in number, represent a compromise between the more open-ended U.S. view of discovery and the civil-law view which opposes "fishing expeditions." The three requirements are:

- that the judicial proceeding for which the documents are requested has been initiated;
- that the documents requested are "reasonably identified by date, contents, or other appropriate information"; and
- that the letter rogatory specify facts and circumstances indicating that the requesting documents "are or were in the possession, control, or custody of, or are known to, the person from whom the documents are requested."

Protocol, Art. 16.

In addition, States ratifying the Protocol may declare that they will process a letter rogatory seeking discovery of documents only if the letter identifies the relationship between the evidence or information requested and the pending proceeding. The one ratifying State to date, Mexico, has made such a declaration.¹⁴

Although obviously untested, this provision of the Protocol offers some hope that the Inter-American Evidence Convention will be more viable than its Hague counterpart. It is perhaps not everything a U.S. litigator would want, but it represents the most that could be achieved by the United States and is a substantial improvement over the only other multinational treaty regime in this area.

5. Allowance of "Special Procedures"

One of the problems that arises in cross-border evidence-gathering, particularly of testimony, is that the ultimate product may not be in a form that is useful to a U.S. litigant. This can arise, for example, because testimony is not taken under oath or because no verbatim transcript is prepared.

The Convention (Art. 6) and Protocol (Art. 15) address this problem by requiring that the authority of the State of destination executing a letter rogatory honor a request to follow special procedures or formalities requested by the initiating party, subject to certain exceptions. The Convention provides for an exception if "the observance of those procedures or of those formalities is contrary to the laws of the State of destination or impossible of performance." The Protocol attempts to narrow this, by requiring honor "unless they [the special procedures requested] cannot be followed by it [the State of destination] or they are incompatible with the fundamental principles of the legislation or the mandatory rules of the State of destination." It is unclear whether the narrower provision of the Protocol has the effect of superseding the provision of the Convention. Although the Protocol is a subsequent treaty (suggesting that its provisions should prevail in the event of conflict) and is obviously designed to

14. Of the ten States which have signed but not ratified the Protocol, only one, Brazil, has made a reservation to Article 16.

clarify the Convention, Article 17 of the Protocol states that “the provisions of this Protocol shall be interpreted in such a way as to complement” those of the Convention. To avoid any doubt on this issue, it may be advisable for the United States to declare its understanding that the standard of Article 15 of the Protocol should be applied in lieu of that of Article 6 of the Convention.¹⁵

The Protocol also expressly allows the legal representatives of the parties to attend the execution of a letter rogatory, with their participation being subject to the law of the State of destination (Art. 5).

6. *Elimination of Legalization Requirement*

Legalization requirements are always burdensome, but they are notoriously so in Latin American countries. Thus, the Convention’s elimination of a legalization requirement when letters rogatory are transmitted or referred through consular or diplomatic channels or through a Central Authority (Convention, Art. 13) is a real benefit to U.S. litigants.

7. *Payment of Processing Costs*

The Convention and Protocol provide that the State of destination shall not charge for the processing of a letter rogatory by its Central Authority or by its judicial or other authorities. (Protocol, Art. 6). However, that State may seek payment from the requesting party for “those services which, in accordance with its local law, are required to be paid for directly by that party.” *Id.* This might include copying costs, experts’ fees, documentary fees, or others.

Article 7 of the Protocol requires a State, at the time of deposit of instruments of ratification or accession, to attach a schedule of services with costs for those services identified individually. A State should also include a single fixed amount which it estimates will “reasonably” cover the cost of all the services. In charging a party initiating a letter rogatory, a State is not limited to this fixed amount, but cannot delay or prevent the processing of a letter rogatory pending collection of any excess amount. (Protocol, Art. 6). At the time a request for evidence is made, the requesting party must either pay the fixed amount, or designate a responsible person in the State of destination. (*Id.*)

These provisions are similar to those in the Letters Rogatory Convention and have worked well in practice under that Convention. Essentially, they ensure that payment considerations will not delay execution of letters rogatory.

15. The issue of the relationship between the Convention and Protocol arises in other areas as well. It may therefore be desirable for the United States to declare that the Protocol is designed to clarify the application of the Convention generally, and in keeping with that general objective, should be read to modify the Convention where appropriate.

The issue does not arise to the same degree with respect to the Letters Rogatory Convention and its Additional Protocol, because the latter contains no analog to Article 17, quoted above, of the Additional Protocol to the Inter-American Evidence Convention.

B. REMAINING QUESTIONS AND AREAS OF CONCERN

The foregoing discussion has focused on areas where the Convention and Protocol appear to benefit U.S. litigants and practitioners the most. In evaluating documents such as these, however, one must also ask whether areas of concern remain.

1. *Translation Requirement*

In fact, most of the concerns expressed about the Convention prior to adoption of the Protocol have been addressed by the Protocol.¹⁶ One remaining concern is the Convention's requirement that the letter rogatory, and all appended documentation, be duly translated into the official language of the State of destination. (Art. 10(2)). Undeniably this imposes a burden on parties initiating requests; but *quaere* whether it is an unreasonable burden.

2. *Exclusivity*

A second concern, brought to the fore by the *Aerospatiale* decision, is whether the Inter-American Evidence Convention and Protocol represent the exclusive means for taking evidence located in a State Party. This subject was apparently not discussed by the delegates who adopted the Convention and Protocol, and nothing in the language of the Convention or Protocol suggests that it should be exclusive. Under the approach used by the U.S. Supreme Court in the *Aerospatiale* case,¹⁷ it seems most likely that the Inter-American Evidence Convention and Protocol would be found to be non-exclusive.

Thus, as with the Hague Evidence Convention, where a U.S. court has jurisdiction over a party, that party would be subject to the methods generally permitted in applicable federal or state rules of civil procedure to obtain such documents. One would hope, however, that by offering a more workable mechanism, the Convention would become more attractive to litigants, and would be the method favored by U.S. courts as well.

Some might feel that, at the time of its signature and/or ratification, the U.S. should declare whether it believes the Convention procedures to be exclusive or non-exclusive. The problem with this approach is that, if the United States declares it to be non-exclusive, that practically invites U.S. litigants to ignore the Convention. On the other hand, declaring its exclusivity may unduly hamstring U.S. litigants if the Convention proves in practice to be less workable than it currently appears to be.

16. See Low, *International Judicial Assistance Among the American States—The Inter-American Conventions*, 18 INT'L LAW. 705, 712 (1984).

17. In *Aerospatiale*, the Court looked to the text of the Hague Evidence Convention, the context in which it was adopted, the negotiations, and the practical construction adopted by the parties, to determine whether it should be regarded as exclusive or non-exclusive. 55 U.S.L.W. at 4845. It found nothing in the Convention's preamble or text which suggested a mandatory character. Similarly, a review of the provisions of the Inter-American Evidence Convention and Protocol provides no evidence of an intention to abrogate existing procedures for the obtaining of evidence.

A middle ground is to recognize the non-exclusive nature of the Convention, but to recognize that it should be the preferred method of taking evidence located in a State Party. Such a "preferred use" approach both promotes the treaty regime, and, perhaps more appealing to individual litigants, probably increases the likelihood that any ensuing judgment would be recognized and enforced by a State Party.

3. *Applicability of More Than One Treaty Regime*

Another question is whether the Inter-American Evidence Convention will take precedence over the Hague Evidence Convention for States which are party to both (currently not a problem, since Argentina has not ratified the Protocol). Normally, when two countries are party to more than one agreement covering the same subject matter, the later in time to become effective (as between them) prevails. However, Article 14 of the Convention states that it will not

limit any provisions regarding letters rogatory for the taking of evidence abroad in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties. . . .

The Hague Evidence Convention is clearly such an agreement; the question arises therefore whether this provision could be construed as meaning that the Hague Evidence Convention's limitation on pretrial discovery is not affected by the less restrictive provisions of the Inter-American Evidence Convention, regardless of when the Hague Evidence Convention is ratified in relation to ratification of the Inter-American Evidence Convention. To preserve the benefits of the Inter-American Evidence Convention, it might make sense for the United States to declare that it understands Article 14 of the Convention to stand for the proposition that States which are party to more than one convention on the taking of evidence should, in the interest of promoting judicial cooperation, proceed in a specific case under the convention which contains the less restrictive rules.

4. *Scope*

A final question is whether the U.S. should expand the scope of application of the Convention beyond "civil and criminal" matters.¹⁸ Article 15 of the Convention allows States to extend its application, by declaration, to "criminal, labor, and contentious administrative cases" and "arbitrations and other matters within the jurisdiction of special courts." Two States, Chile and Colombia, have done so.

The workability of the Convention in these other areas has not been examined. Until it has been, and until some experience with the Convention has been accumulated, it seems unwise to expand its scope.

IV. Section Recommendation

The Section of International Law and Practice has examined carefully the arguments for U.S. signature and ratification of the Convention and Protocol, especially in light of the problems surrounding the Hague Evidence Convention.

¹⁸ As with the Hague Evidence Convention, this term is not defined.

The Section did not recommend signature and ratification of the Convention prior to adoption of the Protocol. With the adoption of the Protocol, the Section believes that the regime for taking evidence established by the Convention would afford a substantial benefit to U.S. litigants and practitioners, comparable, and in one area even superior, to those being enjoyed under the Hague Evidence Convention.

Most of the major Inter-American States are already party to the Convention, and would likely become party to the Protocol as well if the United States ratifies these treaties. Although in recent years U.S. trade and investment with Latin American countries has not grown as quickly as they have with some other parts of the world, the internationalization of economic activity makes it increasingly important for countries to develop the "infrastructure" to address the issues arising out of international commercial and other relationships. The Letters Rogatory Convention, U.S. ratification of which this Association supported, is one part of this infrastructure. This Convention is another part.

In these circumstances, the Section believes that U.S. interests will be well served by an effective treaty regime for taking evidence in the territories of the Inter-American States. Accordingly, the Section recommends that the House of Delegates endorse U.S. signature and ratification of the Convention and Protocol. As indicated above, such signature and ratification should occur on the assumption that the Convention and Protocol, although not the exclusive means for taking evidence in States which ratify it, should be regarded as the preferred means.

U.S. ratification of the Convention and Protocol will mean that private litigants may soon begin to explore the benefits that will accrue from the facilitation of the taking of evidence among the State Party to the Convention. In addition, the United States will take a further step towards increased judicial cooperation with its Hemispheric neighbors.

This Recommendation and Report was submitted to the Section of International Law and Practice by Lucinda A. Low on behalf of the Section's Committee on Private International Law. The Recommendation and Report were approved by vote of the Council of the Section of International Law and Practice on November __, 1989. Copies of the foregoing have been submitted to the Section of Litigation, the Section on Business Law, and the Judicial Administration Division, which are believed to be the only other Sections or Divisions of the Association with an interest in this subject.

Respectfully submitted,
James R. Silkenat, Chairman,
Section of International Law
and Practice

February, 1990