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International Judicial Assistance Among the American States— the Inter-American Conventions

The work of the Hague Conference on Private International Law in the area of international judicial assistance[1] is familiar to most international lawyers. Less well known is the recent work of the Inter-American States in the same area. Two Inter-American Specialized Conferences on Private International Law held in the 1970's (CIDIP-I and CIDIP-II)[2] produced two

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[1]The Hague Conference prepared two conventions in this area to which the United States is party: (1) the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters (the "Hague Service Convention"), Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163, to which the United States became party in 1969, *see* Fed. R.C.P. 4(i); 28 U.S.C.A. at 73 *et seq.* (West Supp. 1983); and (2) the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 to which the United States became party in 1972, *see* 28 U.S.C.A. § 1781 (West Supp. 1983).

[2]The Latin American countries have historically been quite active in the area of codification of private international law. The Bustamante Code on Private International Law (86 L.N.T.S. 111) was drafted in 1928 and ratified by fifteen Latin American states. *See* K. Nadelmann, *The Need for Revision of the Bustamante Code on Private International Law*, 65 AM. J. INT'L L. 782 (1971). The Montevideo Treaties of 1889 and 1939–40 also deal with rules of private international law. *See* 37 AM. J. INT'L L. Supp. 95 *et seq.* (1943). The United States was not a party to either the Code or the Treaties.

In 1965, the Inter-American Council of Jurists recommended convocation of a specialized conference on private international law to revise and update the Bustamante Code. The Inter-American Juridical Committee, an organ of the Organization of American States ("OAS"), which acts as an advisory board to the OAS on judicial matters, made similar

conventions and a protocol dealing with service of process and other documents and the taking of evidence abroad—the Inter-American Convention on Letters Rogatory and an Additional Protocol thereto,[3] and the Inter-American Convention on the Taking of Evidence Abroad.[4] The United

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recommendations at its meetings in 1966 and 1968, and in 1971, the General Assembly of the OAS approved a resolution convoking CIDIP-I. AG/Res. 48 (V-O/71). CIDIP-I was held in Panama in January 1975. The United States participated in the conference, which produced six Inter-American Conventions: The Inter-American Convention on International Commercial Arbitration (OEA–Ser. A/20 (SEPF)); The Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices (OEA/Ser. A/19); The Inter-American Convention on the Legal Requirements of Powers of Attorney to Be Used Abroad (OEA/Ser. A/23); and the Conventions on Letters Rogatory and the Taking of Evidence Abroad, discussed respectively at notes 4 and 5, *infra*. The United States has since signed but not ratified the Letters Rogatory Convention and the Convention on International Commercial Arbitration.

CIDIP-II was convened by resolution of the OAS General Assembly on May 19, 1975 (AG/Res. 187 (V-O/75)) to continue the work of CIDIP-I. It was held in Montevideo, Uruguay, from April 23-May 8, 1979. The Conference adopted six Conventions: another Convention on Conflicts of Laws Concerning Checks (OEA/Ser. A/26); a Convention on Conflicts of Laws Concerning Commercial Companies (OEA/Ser. A/27); a Convention on Execution of Preventive Measures (OEA/Ser. A/29); a Convention on Proof of and Information on Foreign Law (OEA/Ser. A/30); a Convention on General Rules of Private International Law (OEA/Ser. A/31); and a Convention on Domicile of Natural Persons in Private International Law (OEA/Ser. A/32). The United States has signed none of these to date. The Conference also adopted an Additional Protocol to the Letters Rogatory Convention, with the support of the U.S. delegation, which had placed this item on the CIDIP-II agenda and prepared drafts of a Protocol. *See* Final Act, CIDIP-II/85 rev. 7, May 8, 1979, OEA/Ser. K/XXI 2, p. 6. The United States subsequently signed this Protocol (*see infra* note 4). CIDIP-II also approved a resolution calling for the preparation of studies and proposals on the U.S. proposal for an Additional Protocol to the Inter-American Evidence Convention. CIDIP-II/Res. VI (79), Final Act, *supra*, at 15. The results of these studies and proposals were before the conference at CIDIP-III, held in La Paz, Bolivia in May 1984, pursuant to a 1980 resolution of the OAS General Assembly (AG/Res. 505 (X-O/80)). *See infra* notes 38, 39.

Most of the OAS Member States, as well as certain countries having observer status to the OAS (most notably Canada) have sent delegations to the Inter-American Conferences. *See* A. Golbert and Y. Nun, *Latin American Laws and Institutions*, 446, 451 (1982) (discussing CIDIP-I and CIDIP-II).

[3]Inter-American Convention on Letters Rogatory [hereinafter cited as the "Letters Rogatory Convention" or the "Convention"], signed in Panama on January 30, 1975, at CIDIP-I, OEA/Ser. A/21 (English), *reprinted at* 14 I.L.M. 339 (1975); Additional Protocol to the Inter-American Convention on Letters Rogatory [hereinafter cited as the "Letters Rogatory Protocol" or the "Protocol"], signed in Montevideo, Uruguay, on May 8, 1979, at CIDIP-II, OEA/Ser. A/33 (English), *reprinted at* 18 I.L.M. 1238 (1979). Both the Convention and Protocol have received the number of ratifications (two) required for them to enter into force. (Convention, Art. 22; Protocol, Art. 10). The Letters Rogatory Convention has been ratified by 11 states (Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, the United States, and Uruguay) and has been signed but not ratified by five others (Bolivia, Brazil, Colombia, Nicaragua, and Venezuela). The Letters Rogatory Protocol has been ratified by four states (Bolivia, Brazil, Colombia, Nicaragua, and Venezuela) and has been signed but not ratified by 13 others (Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Panama, Paraguay, the United States, and Venezuela). The United States signed both documents in 1980. *See* 20 I.L.M. 312 (1981).

[4]Signed in Panama on January 30, 1975, at CIDIP-I, OEA/Ser. A/22 (English), *reprinted at* 14 I.L.M. 328 (1975) [hereinafter cited as the "Evidence Convention"].

States has signed the Letters Rogatory Convention and Protocol,[5] and they are expected to be transmitted to the Senate for ratification in the near future. The Evidence Convention has not yet been signed by the United States. The third Inter-American Specialized Conference on Private International Law (CIDIP-III), which met earlier this year in La Paz, Bolivia, adopted an additional Protocol to that Convention,[6] which may result in U.S. signature of that Convention as well.

This article will not attempt to analyze either of the Conventions or the Protocols in detail. Rather, it will provide a brief overview of these documents, then comment, in the case of the Letters Rogatory Convention and Protocol, on the reasons for ratification and, in the case of the Evidence Convention, on the problems with that Convention and the extent to which they are remedied by the recently adopted Protocol.

I. The Letters Rogatory Convention and Protocol

A. Brief Overview of the Convention and Protocol

The Letters Rogatory Convention and Protocol together create a system for service of process and other judicial documents among Inter-American States in several respects similar to that established by the Hague Service Convention.[7]

The Convention and Protocol apply to Letters Rogatory whose purpose is to effect "procedural acts of a merely formal nature, such as service of

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[5]*See supra* note 2. The United States was not among the original signatories to the Letters Rogatory Convention. Although the Convention had its supporters in the U.S. bar, *see, e.g.*, Carl, *Service of Judicial Documents in Latin America*, 53 Denv. L. J. 455 (1976), the prevailing view among academics as well as practitioners was that it was poorly drafted, fraught with ambiguity, and in general highly inferior to the Hague Service Convention. The Protocol was the idea of U.S. practitioners, who believed that U.S. participation in an Inter-American judicial assistance treaty would be desirable and that the Convention's major flaws could be remedied or at least ameliorated sufficiently to make it acceptable. The U.S. played a major role in drafting the Protocol, and signed it and the Convention at the same time. Its view, expressed at CIDIP-II, was that it would not be prepared to ratify the Convention without the Protocol and would seek a reservation to the effect that the Convention would be applicable between the United States and only those nations that also adhere to the Protocol. *See* Report of the United States Delegation to the Second Inter-American Specialized Conference on Private International Law, June 11, 1979, p. 12 (available at the Office of International Conferences, U.S. Department of State); and P. Trooboff, Current Developments: *The Second Inter-American Specialized Conference on Private International Law*, 73 Am. J. Int'l L. 704 (1979).

[6]Additional Protocol to the Inter-American Convention of [sic] the Taking of Evidence Abroad, OEA/Ser.K/XXI.3, May 21, 1984 (provisional version). The Conference also approved an Annex to the Protocol containing a form for letters rogatory and a certificate of execution. Annex to the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, OEA/Ser.K/XXI.3, May 22, 1984.

[7]*See supra* note 1.

process, summonses, or subpoenas abroad"[8] and which are issued in conjunction with proceedings involving "civil or commercial" matters.[9] For letters rogatory falling within their scope, the Convention and Protocol delineate procedures and requirements for the transmission and execution of letters rogatory, including, by virtue of the Protocol, the mandatory use of three forms: one on which a letter rogatory is prepared; a second on which notice of essential information about the proceeding giving rise to the letter rogatory is given to the receiving party; and a third on which execution of the letter rogatory is certified by the appropriate authority of the State of execution.[10]

As far as transmission is concerned, the Letters Rogatory Convention offers several options: transmission through judicial channels; transmission through diplomatic or consular channels; or transmission through a Central Authority.[11] As a practical matter, however, with the important exception of border areas (for which the Convention has a special rule having potentially great utility for U.S. litigants in states bordering on Mexico),[12] transmission through the Central Authority or via diplomatic channels will usually be

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[8]Letters Rogatory Convention, Art. 2(a); Protocol, Art. 1. The Convention is limited to those acts specified in Article 2 and does not apply to "acts involving measures of compulsion" (*e.g.*, attachment). Convention, Art. 3. Article 2(b) of the Convention provides that, absent a reservation by a State party, the Convention can be applied to the taking of evidence and the obtaining of information abroad. Since the taking of evidence is the subject of a separate Inter-American Convention, Article 2(b) seemed to many to be confusing and undesirable. The Protocol makes no reference to Article 2(b), but limits its scope to the "procedural acts" covered by Article 2(a) of the Convention.

[9]As with the Hague Conventions, there is no definition of "civil or commercial" in the Letters Rogatory Convention, presumably because the meaning of this term was thought to be so well-known as to obviate the need for definition. *See* Report of United States Delegation on Eleventh Session of Hague Conference on Private International Law, 8 I.L.M. 785, 808 (1969). (In fact, experience with the Hague Conventions has shown that there is wide divergence among States as to what this term comprises. *See* Report on the Work of the Special Commission on the Operation of the Service Convention, 17 I.L.M. 312, 317–20 (1977).) Under Article 16 of the Convention, States may extend the Convention to criminal and tax matters, "contentious-administrative" cases, arbitration, and other matters within the jurisdiction of specialized courts.

[10]Letters Rogatory Protocol, Art. 3. The forms are similar to the forms used in connection with the Hague Service Convention.

[11]Letters Rogatory Convention, Art. 4. Article 2 of the Protocol clarifies that states are obliged to establish a Central Authority and to inform the OAS General Secretariat of that authority. Unlike the Hague Service Convention, which permits direct transmission to the Central Authority of the State of destination, bypassing the Central Authority of the State of origin, the Letters Rogatory Convention and Protocol contemplate transmission through the Central Authority of the State of origin. *E.g.*, Protocol, Art. 4. This apparently was the price for removal of the legalization requirement, discussed at note 14 and accompanying text *infra*. Report of the United States Delegation to the Second Inter-American Specialized Conference on Private International Law, *supra* note 5, at 9.

[12]Article 7 of the Letters Rogatory Convention provides that:

> Courts in border areas of the States Parties may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization.

preferable to transmission via the judicial channel, since the legalization requirement is eliminated only in the former two instances.[13]

The documents that must accompany a letter rogatory are specified in the Convention and Protocol.[14] Some of those documents, in addition to the letter rogatory, must be translated into the language of the State of the letter's destination. If those documents or the letter is not translated, that State is not required to execute the letter.[15]

If requested, a special procedure or additional formalities may be used in executing a letter, unless such procedure or formalities are contrary to the law of the State of execution, which law governs generally the manner of execution.[16]

A letter rogatory that complies with all of the requirements of the Convention and Protocol may still be refused execution if it is deemed contrary to the public policy (*ordre public*) of the State of destination.[17] And even if a letter is executed, such execution does not imply a commitment to recognize or execute any ensuing judgment.[18]

Costs and expenses payable in connection with a letter rogatory are

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[13]Letters Rogatory Convention, Art. 5(a). The Convention does provide that due legalization is "presumed" when a document has been legalized by the competent consular or diplomatic agent. *Id.* Even an abbreviated legalization requirement, however, is more onerous than none at all.

[14]Letters Rogatory Convention, Art. 8; Protocol, Art. 3. The requisite accompanying documents include: the complaint; any documents attached thereto; any ruling ordering the issuance of a letter rogatory; and a form containing "essential information" for the person to be served or the authority to receive the documents.

[15]Letters Rogatory Convention, Art. 5; Protocol, Art. 3. The Protocol limits the documents that must be translated to the complaint, the text of the letter rogatory, and the notice of essential information. (Since the latter two will be on pretranslated forms, the amount to be translated will be relatively minor.) The Protocol also clarifies the requirement stated in Article 8, paragraph a of the Convention that the complaint and supporting documents must be authenticated, by providing that the seal of the judicial or administrative authority issuing the letter is sufficient authentication. *Id.*

[16]Letters Rogatory Convention, Art. 10. The provision for special procedures or additional formalities is similar to Article 5(b) of the Hague Evidence Convention, which has been infrequently used. *See* Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637, 648 (1980). It does, however, enable U.S. litigants to effect service of process outside the United States in conformity with any requirements of federal or state laws for service that may differ from the procedures of the State where service is to be made.

[17]Letters Rogatory Convention, Art. 17. This provision, standard in virtually all Inter-American Conventions, is broader than the comparable provision of the Hague Service Convention, Article 13, which allows a State to refuse a request for service only if it deems that compliance "would infringe its sovereignty or security." Moreover, the Letters Rogatory Convention does not contain any provision similar to that, also found in Article 13 of the Hague Service Convention, that a State may not refuse to execute a letter "solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject matter of the action or its internal law would not permit the action upon which the application is based."

[18]Letters Rogatory Convention, Art. 9. However, service in accordance with the Convention should greatly reduce if not eliminate the risk that a court of the State of execution would refuse to recognize or enforce an ensuing judgment on the ground of improper service.

limited to those normally payable under local law for services other than those of the Central Authority of the State of destination and its judicial or administrative authorities.[19] The party requesting execution may opt for an advance payment procedure, devised in the Protocol in order to prevent delay in execution; or the party may appoint a person in the State of destination who will be responsible for costs.[20]

B. Benefits to Be Derived from U.S. Ratification of the Letters Rogatory Convention and Protocol

The Letters Rogatory Convention and Protocol would unquestionably expedite and facilitate efforts of U.S. litigants to serve process and other documents in other Inter-American countries. Instead of being subjected to the vagaries of each country's laws, litigants could simply look to the Convention procedures.[21] Onerous requirements of legalization and translation would be eliminated or substantially reduced. Transmission would be facilitated by the establishment of a Central Authority in each State. The use of standardized forms would facilitate preparation of a letter rogatory and reduce the risk of a letter's being deemed unacceptable. Costs would be reduced or even possibly eliminated.

Against these advantages, it could be argued that the Letters Rogatory Convention, even with the Protocol, is still not as attractive as the Hague Service Convention. Since no Latin American country is party to the Hague Convention at present, however, nor is any (or at least any significant number) likely to become party in the near future, that argument is without real force. At least for the present,[22] the alternative is not the Hague Convention, but no convention at all.

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[19]Letters Rogatory Convention, Art. 12; Protocol, Art. 5. (*Compare* Hague Service Convention, Art. 12.) Each State, at the time of its ratification or accession to the Protocol, is to provide the General Secretariat of the OAS with a schedule of services for which fees may be charged and the fees therefor. Protocol, Art. 6. States may declare that they will not charge for execution, on the basis of reciprocity. *Id.* Art. 7.

[20]Protocol, Art. 5.

[21]Local law would, of course, still be relevant as to certain issues, *e.g.*, the acceptability of a "special procedure" (*see* Convention, Art. 10).

[22]Article 15 of the Letters Rogatory Convention provides that:

> This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by States Parties. . . .

Thus, the United States could declare upon ratification that, in the event an Inter-American State became party to the Hague Convention, that Convention, rather than the Inter-American Convention, would be applicable to matters between the United States and that State falling within the scope of both Conventions.

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

A. Overview of the Convention

The Inter-American Convention on the Taking of Evidence Abroad (the "Evidence Convention") addresses: the means and procedures for obtaining evidence (either testimony or documents) in one State for use in proceedings in another State falling within the Convention's scope; the bases upon which a State may refuse to allow evidence to be taken; the availability of such "special procedures" as cross-examination, preparation of a verbatim transcript, and other matters of great import in common-law proceedings but not typical of civil-law countries; the testimonial privileges that may be claimed by witnesses; the ability to compel testimony; costs and expenses incurred in taking testimony; and other matters.

Like the Letters Rogatory Convention, the Evidence Convention applies to civil or commercial matters, with states having the option to expand its coverage to other types of matters.[23]

The vehicle chosen for taking evidence by the Convention is, again, the letter rogatory, which must be issued by a judicial authority in the State where the proceeding is pending and addressed to a "competent authority" in another State.[24] The transmission options and legalization requirements in the Evidence Convention are essentially the same as those contained in the Letters Rogatory Convention.[25] There is no provision, however, like Article 7 of the Letters Rogatory Convention, permitting direct transmission of letters between border areas.[26]

The general rule under the Convention is that a letter rogatory that is within the scope of the Convention, that meets the requirements of the Convention so far as content and accompanying documentation,[27] translation,[28] and legalization[29] are concerned, and that satisfies any financial

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[23]Evidence Convention, Arts. 1, 15. The matters are the same as provided in the Letters Rogatory Convention. *See supra* note 9.

[24]Evidence Convention, Art. 2. There are, however, no provisions in this Convention comparable to those in the Hague Evidence Convention for the taking of evidence by consuls or commissioners. The Evidence Convention does not preclude States from "the continuation of more favorable practices" for taking evidence than are provided in the Convention (Art. 14), so that states that permit other procedures, *e.g.*, the commission, notice or stipulation procedures contemplated by Rules 28(b) and 29 of the Federal Rules of Civil Procedure, would not be precluded from continuing to do so.

[25]Evidence Convention, Arts. 1, 13. *See supra* notes 11, 13.

[26]*See supra* note 12.

[27]*See* Evidence Convention, Art. 4.

[28]Evidence Convention, Art. 10(2), requires translation of the letter rogatory and appended documentation into the official language of the State of destination.

[29]*Id.* Art. 10(1). *See also supra* note 25.

conditions imposed by the State of destination[30] must be executed in accordance with its terms, provided that the procedure requested is not "contrary to legal provisions in the State of destination that expressly prohibit it."[31] There are two exceptions: (1) if the letter rogatory is "manifestly" contrary to the public policy of the State of destination;[32] and (2) if the purpose of the letter rogatory is

> the taking of evidence prior to judicial proceedings or "pretrial discovery of documents" as the procedure is known in common law countries.[33]

The Evidence Convention calls for the authority of the State of destination to accept additional formalities or special procedures in the taking of evidence (*e.g.*, administration of an oath, preparation of a verbatim transcript, or cross-examination), unless these are "contrary to the laws of the State of destination or impossible of performance."[34] With respect to testimonial privileges, the Convention provides that a witness may invoke any privilege available under the law of the State where the evidence is to be taken, or, if specified in the letter rogatory or confirmed by the requesting authority, under the law of the State of the letter rogatory's origin.[35] Finally, with respect to compulsion, the Convention provides that the authority of the State of destination "*may* apply the measures of compulsion provided for in its law."[36]

B. Comments on the Evidence Convention

The Inter-American Evidence Convention is deficient in a number of serious respects, particularly when compared with the Hague Evidence Convention.

Completely lacking is any provision for the taking of evidence by diplomatic officers, consular agents or commissioners, comparable to Chapter II of the Hague Evidence Convention, even though these procedures are more expeditious than the letters rogatory procedure. There is no express obligation to create a Central Authority. There is no specific provision for participation of counsel. The circumstances under which testimony or documents may be compelled are ill-defined. The translation requirement is

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[30]*Id.* Art. 2(2); *see also id.* Art. 7.

[31]*Id.* Art. 2(1).

[32]*Id.* Art. 16.

[33]*Id.* Art. 9. This provision is similar to Article 23 of the Hague Evidence Convention. Both reflect civil-law countries' misunderstanding of and hostility to our discovery procedure.

[34]*Id.* Art. 6. This is similar to Article 9 of the Hague Evidence Convention.

[35]*Id.* Art. 12. Article 11 of the Hague Evidence Convention contains similar provisions, but also allows States to declare to respect privileges recognized under the laws of third States.

[36]*Id.* Art. 3 (emphasis added). *Compare* Hague Evidence Convention, Art. 10 ("the requested authority *shall* apply the appropriate measures of compulsion") (emphasis added).

extensive. There are no standard forms for letters rogatory. The cost provisions are completely open-ended. Finally, there is the prohibition on pretrial discovery which, although paralleling the Hague Convention provision, is highly unfortunate.

Following the resolution at CIDIP-II,[37] the United States appointed a group of experts to prepare a draft protocol. The draft prepared by the Meeting of Experts[38] addressed all of the foregoing problems. The Inter-American Juridical Committee approved a subsequent draft on August 21, 1980, for presentation at CIDIP-III.[39] While adopting in *haec verba* many of the provisions of the Experts' draft,[40] the Juridical Committee's draft regrettably omitted the provisions for the taking of evidence by diplomatic officers, consuls, or commissioners, and the provision permitting pretrial discovery.[41]

The Protocol adopted by the CIDIP-III conferees[42] restores in substance virtually all of the provisions of the Experts' draft omitted by the Inter-American Juridical Committee. Articles 9 through 13 of the Protocol provide for the taking of evidence by diplomatic or consular agents on terms similar to those of the same articles of the Experts' draft.[43] The major difference is that the taking of evidence by commissioners—a controversial subject—is omitted.[44] In addition, in perhaps its most important contribu-

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[37]*See supra* note 2.

[38]Draft Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, from the Final Report of the First Meeting of Experts on Private International Law, held in Washington, D.C., April 9–15, 1980, OAS/Ser. K/XXI.1, RE/DOC/11/80 rev. 1.

[39]Draft Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad approved by CIDIP-I in Panama in 1975, OEA/Ser. K/XXI. 3, CIDIP-III/4, March 11, 1983, at 3.

[40]Articles 1 and 3–9 of the Juridical Committee's draft are identical to provisions in the Experts' draft. Article 2 of the Juridical Committee's draft is a modified version of Article 2 of the Experts' draft. (The modifications are less desirable than the deleted provisions of the Experts' draft.)

[41]Articles 9–13 and 15 of the Experts' draft. (Article 14 of the Experts' draft became Article 9 of the Juridical Committee's draft.)

[42]*See supra* note 6.

[43]Diplomatic or consular agents are permitted by these articles to "tak[e] evidence or obtain[] information" both from their own nationals and from host- or third-country nationals (Article 9). However, when evidence is to be taken or information obtained from persons who are not of the same nationality as the diplomatic or consular agent, the host State may, by declaration, impose conditions upon, or limit the powers of, the diplomatic or consular agent (Article 10). The diplomatic or consular agent is entitled to have applied the "appropriate" measures of compulsion available in the host State upon his request to the competent authorities and satisfaction of the host-State requirements for the taking of such measures (Article 11). The same privileges apply to the taking of evidence by diplomatic or consular agents as apply with letters rogatory (Article 12). Evidence may be taken according to the procedures of the State of origin, provided that such procedures are not contrary to an express prohibition in the laws of the State of destination (Article 12). Use of the procedures afforded by these articles does not preclude later resort to a letter rogatory (Article 13).

[44]At first blush this would seem to make the Inter-American Convention significantly narrower than the Hague Convention, which permits the taking of evidence by commissioners.

tion, the Protocol sets forth in Article 16 standards for the execution of letters rogatory that call for the exhibition and copying of documents, which standards implicitly override the Evidence Convention's prohibition in Article 9 on "pretrial discovery of documents."[45] The remaining provisions of the Protocol are substantially similar to those of the Experts' and Inter-American Juridical Committee's drafts.[46]

With the Protocol and its Annex,[47] the Evidence Convention offers simplified, ascertainable procedures and forms for taking evidence in Latin American countries. Signature and ratification of these instruments by the United States in the near future would be a benefit to U.S. litigants and should be supported.

Because several countries party to the Hague Convention have declared their opposition to the use of commissioners in their territory or have imposed restrictions on the use of commissioners, the difference is not as great as first appears. For the country declarations, see the text following 28 U.S.C.A. § 1781 (West Supp. 1983). In addition, by virtue of Article 14 of the Evidence Convention, states that already permit the taking of evidence by commissioners are permitted to continue to do so, and bilateral or multilateral agreements so permitting may be entered into. In any event, because commissioners are used far less frequently than consular officials, their omission is unlikely to impose any real hardship on U.S. litigants.

[45]Article 16 of the Protocol establishes three requirements for execution: (1) "the judicial proceeding has been initiated;" (2) "the documents are reasonably identified by date, contents, or other appropriate information," and (3) "the letter rogatory specifies those facts and circumstances causing the requesting party reasonably to believe that the requested documents are or were in the possession, control, or custody of, or are known to, the person from whom the documents are requested."

The article allows the person from whom the documents are requested to object to their production or deny that they are within his possession, control or custody. Finally, it provides that a State ratifying the Protocol may declare that it will execute letters rogatory falling under this Article only if "they identify the relationship between the evidence or information requested and the pending proceeding."

This provision represents a balanced solution to the problem created by the need of U.S. litigants to obtain documents located in foreign countries and those countries' legitimate desire to avoid fishing expeditions on their soil.

[46]There are language changes throughout the draft, as well as several new articles (Articles 14, 17, and 19) dealing with reservations, expansion of the scope of the Convention by declaration to include criminal or other matters, and interpretation of the Protocol to complement the Convention.

[47]*See supra* note 6.