

EXPLANATORY REPORT ON THE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

by Ph.W. Amram

I. Introduction

1. The three-week Eleventh Session of the Hague Conference on Private International Law produced the final text of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, contained in the Final Act of the Session completed and signed on the 26th of October 1968 by all the delegations present at the Session. This Convention was prepared by Commission III, of which Dr Arnold was Chairman and Judge Balbaa Vice-Chairman. The writer of this Report was the Rapporteur.

A. *General purposes of the Convention*

2. The fundamental purpose of the Convention is to continue the revision and modernization of the Hague Conventions on Civil Procedure of 1905 and 1954.

3. Chapter I of those Conventions, dealing with the service abroad of documents, was revised at the Tenth Session of the Conference in 1964, in the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which came into force on February the 10th, 1969.

4. Chapter II of those Conventions, entitled 'Letters of Request (commissions rogatoires)' dealing with the obtaining of evidence abroad, is the subject-matter of the present Convention.

5. The Chairman succinctly stated the basic principle which animated all the discussion. Any system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending.

6. In broad outline, the Convention seeks to:

- a) improve the existing system of Letters of Request; and
- b) enlarge the devices for the taking of evidence by increasing the powers of consuls and by introducing, on a limited basis, the concept of the commissioner; and at the same time
- c) preserve all existing more favourable and less restrictive practices resulting from internal law, internal rules of procedure and bilateral or multilateral conventions.

7. Among the significant novelties in the Convention are new rules on a language, the introduction of the Central Authority as a receiving agent, provision for the privileges and immunities of witnesses, a differentiation in the powers of a consul dependent upon the nationality of the witness, and the recognition of the use of commissioners as a technique for obtaining evidence on an optional basis.

B. *Relationship between the present Convention and the Conventions of 1905 and 1954*

8. The present Convention will replace articles 8-16 of the Conventions of 1905 and 1954 as between States which have signed one or both of these earlier Conventions and also become Parties to the present Convention (article 29). Supplementary Agreements executed under the Conventions of 1905 and 1954 will remain effective as between States which also become Parties to the present Conventions, unless the States concerned agree otherwise (article 31).

9. The present Convention has no effect on article 23 of the Convention of 1905 or article 24 of the Convention of 1954 (article 30). These deal with free judicial assistance, a topic excluded from the coverage of the present Convention.

C. Parties to the Convention

10. The Convention is not a 'closed' convention. The initial States entitled to become Parties are those States which were represented at the Eleventh Session of the Conference (article 37). After it has entered into force (article 38), any other State may accede to the Convention if (1) it is a Member of the Conference, or (2) it is a Member of the United Nations or of one of its specialized agencies, or (3) it is a Party to the Statute of the International Court of Justice [article 39(1)].

11. However, the accession is not automatic. It will be effective only as between the acceding State and those other States which affirmatively file a 'declaration' accepting the accession. As to States which file no such declaration, the accession will have no effect [article 39(4)].

D. Structure of the Convention

12. Chapter I deals with Letters of Request (commissions rogatoires). It includes articles 1-14, and regulates the form of the Letter, the scope of its content, the methods of transmission, the language to be used, the method and technique of execution, the compulsion to be exercised against a witness, the privileges and immunities of the witness, the permissible grounds for refusal to execute the Letter, and the question of costs and expenses.

13. Chapter II deals with the use of consuls or commissioners to take evidence. It includes articles 15-22, and regulates the situation under which a consul¹ or commissioner may act, the extent to which approval and consent of the State of execution may be required, the extent to which compulsion against the witness may be available, the privileges and immunities of the witness, the limits of the power of the consul or commissioner, and the privilege of obtaining evidence through other channels in the event of the failure to obtain the evidence through the consul or commissioner.

14. Chapter III contains the general clauses. It includes articles 23-42, and regulates the relationship between the present Convention and the Conventions of 1905 and 1954, the limits of the power of reservation by a signatory, the declarations to be filed and the authorities to be designated under certain articles, the States which may be signatories or which may accede to the Convention, the use of diplomatic channels to resolve disputes, the application of the Convention to the territories of a signatory, the time when the Convention will enter into force, the time the Convention will remain in force, the power of denunciation and the provision for administration by the Ministry of Foreign Affairs of the Netherlands.

15. Chapter III also contains individual clauses further limiting the scope of Letters of Request, providing details respecting the Central Authority, authorizing States with more than one legal system to designate one of them to execute Letters of Request, further regulating certain costs and expenses, and listing the matters as to which States may, by agreement, derogate from the provisions of the Convention.

16. Finally, Chapter III contains, in article 27, the all-important provision that if any State, by internal law or practice, permits any act provided for in the Convention to be performed on a more liberal and less restrictive basis than the Convention provides, such internal law or practice will be unaffected by the Convention and will continue to govern.

E. Scope of this Report

17. A lengthy and exhaustive Report² accompanied the draft Convention prepared by the Special Commission. In the light of the fact that much of the basis of the draft Convention was accepted without change, or with only stylistic or detailed improvements, it would be an unjustified repetition to restate in full, in this Report, the commentary already appearing in the Report to the draft Convention.

¹ Throughout this Report, the word 'consul' will be used as a shorthand substitute for the lengthy phrase 'diplomatic officer or consular agent'. It should be so read wherever it appears.

² By the same Rapporteur.

18. For this reason, the comments in this Report will relate primarily to those provisions of the Convention which vary from the provisions of the draft Convention. Where the draft Convention and the Convention are substantially identical, reference will be made to the relevant parts of the discussion in the Report to the draft Convention without repetition.

II. Article by article analysis

A. Articles 1 and 23 – Scope of Letters of Request

19. Article 1(1) is closely identical to article 1 of the draft Convention. The issuance of Letters is limited to the 'judicial' authorities of the State of origin. 'Judicial' is not defined.

20. There is no definition of 'civil or commercial matters'.

21. There is no definition of 'obtain evidence' or of the French equivalent «faire tout acte d'instruction».

22. These matters are fully discussed in the Report to the draft Convention. As pointed out in that Report, any potential disagreement on the meaning of these words is to be settled through diplomatic channels (see article 36). No further discussion is needed, except to point out that article 3 sub-sections (e), (f) and (g) furnish some guide to the meaning of 'obtain evidence'. These three sub-sections show that the Letter may be used to 'examine' persons and to put 'questions' to them, or to secure the 'inspection' of 'documents or other property, real or personal'. This is more explicit and even broader than the proposed phrase in the draft Convention:

'the taking of statements of witnesses, parties or experts and the production or examination of documents or other objects or property.'

which was excluded as unnecessary.

23. The principal changes made in the draft Convention were the inclusion of two new paragraphs in article 1 and a new article 23.

24. Article 1(2) is self-explanatory and may represent an excess of caution. No court in a foreign country should be asked to undertake the obtaining of evidence unless it is to be used in judicial proceedings in the requesting tribunal. It is not easy to contemplate that a judicial tribunal in State A would ever, issue a Letter of Request to a court in State B, where no litigation was pending or contemplated in State A, and the evidence was sought merely to satisfy the curiosity or commercial desire of a national of State A. But if such a situation should exist, the court in State B should be permitted to reject the Letter.

25. Sub-divisions (b) and (c) of article 3 are relevant here, since the Letter must contain the names of the parties to the 'proceedings' and 'all necessary information' respecting those proceedings.

26. Article 1(2) refers to 'proceedings, commenced or contemplated'. This formulation was used to make it clear that there need not necessarily be an action actually in progress in the State of origin when the Letter is issued. It is designated to authorize the use of a Letter for the purpose of 'perpetuation of testimony' of an aged, dying or going witness under the Common Law procedure, or for the purpose of «l'enquête *ad futurum*» or «la procédure valétudinaire» or 'Beweissicherungsverfahren' under the Civil Law procedure.

27. Article 1(3) was added after an extended discussion of the content of the phrase 'other judicial act' and the illustrations given in the Report to the draft Convention. Additional illustrations discussed were (1) securing a copy of a birth certificate, (2) obtaining extracts of public records, (3) securing the appointment of a temporary receiver for property, and (4) requiring a defendant to put up security to protect a possible future judgment in favour of the plaintiff.

28. There was unanimous agreement that the broad and all inclusive term 'other judicial act' must be restricted.

29. Service of documents should be excluded, since this is the subject of the separate Convention prepared by the Tenth Session. Enforcement of judgments should be excluded since this is the subject of the separate Convention on the Recognition and Enforcement

of Foreign Judgments and the Supplementary Protocol which were considered at the Eleventh Session (see Part B (II) of the Final Act). Provisional and protective measures should be excluded, such as injunction, restraining orders, forced sales, receiverships or *mandamus*, since these involve the discretion of the court having jurisdiction over the persons and the property and are subject to domestic statutes and procedures. They are not subject to the mandatory order of a foreign judge (who in these cases cannot compel action merely by issuing a Letter of Request).

30. Further, the act in question must be 'judicial'. Here article 12(a) is applicable. If, under the domestic law and practice of the State of execution, it is not within the function of the judiciary, for example, to secure copies of birth certificates or public records, or to advertise the existence of a legal proceeding pending in another State, or to conduct conciliation proceedings between a husband and wife, article 12(a) authorizes the State of execution to reject the Letter.

31. For this reason, if the content of the Letter of Request falls within the ambit of 'other judicial act', it will be wise for the moving party or the requesting authority in the State of origin to verify in advance that the particular act requested will fall within the functions of the judiciary in the State of execution. This information should be easily obtainable by a direct inquiry addressed to the Central Authority of the State of execution.

32. Finally, article 23, adopted at the request of the United Kingdom delegation, permits a State to declare that it will not execute a Letter of Request if it has been issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. This refers to a procedure by which one of the Parties to an action may obtain access, before trial, to documents in the possession of his adversary, to aid him in the preparation of his pleadings or in preparation for trial. The procedure varies widely among the various States and is not even uniform in all Common Law jurisdictions. Accordingly, some States may be quite prepared to accept Letters for this purpose while other States may refuse them. Article 23 provides the machinery for the exercise of this option.

B. Articles 2, 6, 13, 24, 27(a), 28(a), 28(e), 32 – Transmission of Letters. The Central Authority

33. This group of articles in combination regulates the problem of the transmission of the Letters from the State of origin to the State of execution and their return following their execution or rejection.

34. Article 2(1) is identical with article 2(1) of the draft Convention, except for minor stylistic improvement. It provides the Central Authority concept invented in the Convention on the Service of Documents.

35. Article 2(2) is modelled upon the first sentence of article 2(2) of the draft Convention. It is designed to emphasize the position elaborated in the Report to the draft Convention that no intervening authority of the State of execution is to handle the Letter of Request on its way to the Central Authority.

36. To the contrary, the Convention does not regulate what is to happen within the State of origin, and which of its authorities are to handle the Letter on its way to the Central Authority of the State of execution. There is no limit to the rules which may be imposed by the internal law of the State of origin with respect to this transmission.

37. For example, the State of origin may permit the issuing authority to send the Letter directly to the Central Authority of the State of execution. Or, the State of origin may require that the issuing authority send the Letter in every case to *its own* Central Authority for check and supervision before it is sent on to the Central Authority of the State of execution. Or, the State of origin may require every Letter to be sent by the issuing authority to the Ministry of Justice or the Ministry of Foreign Affairs or the Ministry of the Interior or to some other supervisory authority who will determine whether the Letter should be permitted to go abroad. Or, the State of origin may require that every Letter go through its Embassy or Legation or consular office in the State of execution, and that this office will arrange to deliver the Letter to the Central Authority of the State of execution.

38. None of these regulations are the business of the State of execution. It cannot refuse to receive or execute the Letter because it disapproves of the internal arrangements within the State of origin. Article 2(2) only forbids the intervention of some authority of the State of execution other than its Central Authority.

39. Article 6 contains nothing contradictory to the principles just stated. It regulates the internal administration of the Letter within the State of execution. It is modelled on article 10 of the draft Convention.

40. Article 2(1) provides that the Central Authority of the State of execution is to transmit the Letter 'to the authority competent to execute' it. The Central Authority may err and may send the Letter to some tribunal which is not competent to execute it. Such an error will not frustrate the execution of the Letter. To the contrary, article 6 requires that the Letter be 'sent forthwith' to a competent authority of the State of execution.

41. Article 6 does not provide the mechanics for such a retransmission. The first tribunal could transmit the Letter directly to the correct tribunal, since it should know its own law and procedure. Or the Letter could be returned promptly to the Central Authority of the State of execution with a request for proper re-transmission.

42. Article 13(1) follows article 11(1) of the draft Convention, it states the obvious rule that the executed Letter shall be returned by the State of execution to the issuing authority in the State of origin by the same channel of transmission as was used originally to transmit the Letter to the State of execution.

43. Article 24 follows article 18 of the Convention on Service of Documents and article 21 of the draft Convention. It authorizes any Contracting State to designate other authorities than the Central Authority and to fix their competence. If this is done, then the issuing authority will have optional methods of transmission available.

44. Article 24 specifically provides that, if such additional authorities are designated, Letters may 'in all cases' still be sent to the Central Authority. Accordingly, the Letters may be sent to the Central Authority of the State of execution or to the additional authorities which that State may designate as competent to receive them.

45. For example, the United Kingdom may elect to provide a subsidiary authority for Scotland. In that event, the State of origin would have the choice of sending the Letter to the Central Authority in London or to the subsidiary authority in Scotland. Either would be correct and the choice would lie entirely with the issuing authority.

46. Article 24 further provides, in paragraph 2, that Federal States shall be free to designate more than one Central Authority. This follows article 18(3) of the Convention on Service of Documents and article 21(3) of the draft Convention.

47. This provision was inserted in the Convention on Service of Documents at the request of the delegation of the Federal Republic of Germany because of constitutional problems with respect to the division of powers between the Federal Government and the 'Länder'.

48. If any Federal State should exercise this privilege, any practical difficulty which might arise will be easily resolved. If the State has eight or ten different Central Authorities, with territorial limitations, it is easily possible for the issuing authority in the State of origin to choose the wrong Central Authority. In that case, article 6 provides the remedy. The Central Authority which receives the Letter will immediately perceive the error, and, knowing its own law, will know exactly which of the other Central Authorities in its country will be the proper authority to administer the request. It will then 'forthwith' send the Letter to the proper Central Authority and the error of the issuing authority abroad will be automatically cured.

49. There was extended discussion, in the debates in Commission III, with respect to the use of consular or diplomatic channels of transmission of Letters. This phrase means the transmission of the Letter of Request by the issuing authority to the consul or diplomatic representative of the State of origin in the State of execution. On receipt of the Letter, the consul or diplomatic representative himself will present it to the executing tribunal, bypassing the Central Authority and all other agencies of the State of execution.

50. It was agreed to make no mention of the consular or diplomatic channel in article 2. If the consular or diplomatic channel is available, either through declaration under article 27(a), or through separate agreement under article 28(a), or through other conventions under article 32, or through the internal law and practice of the State of execution under article 27(b), or through applicable rules of public international law, it may be used as an alternative to the Central Authority route. However, a proposal to make it specifically available under this Convention, as an alternative conventional channel, was rejected.

51. Further, articles 27(a), 27(b), 28(a) and 32 may permit the issuing authority to send Letters direct 'from court to court', or through a party to the action direct to the executing tribunal, by-passing the Central Authority of the State of execution. This is not permissible, under the Convention, in the absence of some such special authorization, since the normal rule under article 2 requires transmission through the Central Authority of the State of execution. Again, if an error is made in choosing the wrong court, article 6 provides for automatic correction.

52. Finally, on the question of transmission, article 28(a) and (e) permit separate bilateral or multilateral agreements between two or more States, setting up, as between themselves, other and different rules for the transmission and return of Letters of Request. Also article 32 (which is a verbatim copy of article 25 of the Convention on the Service of Documents) recognizes the effectiveness of the provisions of other conventions to which States are, or shall become, Parties.

53. However, the execution of such agreements or conventions cannot modify the obligation under article 2 to maintain the Central Authorities system in full operation, for the benefit of Contracting States which are not Parties to the outside agreements and conventions.

54. The difference between the effect of a declaration under article 27(a) and an agreement or convention under articles 28(a), 28(e) and 32, is obvious. If a declaration is filed, it creates a universal rule which, for example, would permit 'court to court' transmission with respect to every other State Party to this Convention. On the other hand, a side agreement or convention under articles 28 and 32 is a limited agreement, effective only as to States Parties thereto and not effective for any other State.

55. The scheme of the Convention is to set up the Central Authority system as the norm and the minimum obligation. Any two or more States can, as between themselves, set up other and different schemes and techniques for transmission of the Letters, if they please. But this will never relieve them of the obligation to provide the Central Authority system for those States who do not enter into any such side agreements.

56. Further, there is no inflexible requirement that the Letter, after execution, must in every case be returned to the issuing authority by the exact channel through which it was sent. This is, of course, the normal and conventional rule, under the express provision of article 13(1). But, like other provisions of this Convention, it is subject to modification, as between any two States, by side agreements and conventions and by internal law and practice. To illustrate, assume that the Letter is sent through the Central Authority of the State of execution. If the requisite foundation exists, the executing authority might be permitted to return the executed Letter directly to the issuing tribunal, without routing it through the Central Authority by which it arrived in the State of execution. This is entirely a matter between the two States involved in the particular Letter. No other State has any interest in it.

C. Article 3 – Content of the Letter of Request

57. Article 3, with minor modifications, follows article 3 of the draft Convention, stylistically rearranged.

58. The only changes other than style are (1) the obvious limitation that the name of the authority in the State of execution which is to execute the Letter will be included only if known to the issuing authority; (2) the inclusion of a more definite statement of the evidence to be obtained or other judicial act to be performed; (3) a more exact specification of the documents or other property, real or personal, to be examined; and (4) a clarification

that it is optional for the issuing authority to include information respecting the law of the State of origin with respect to the privileges and immunities of the witness (see discussion of article 11, *infra*).

59. The discussion in the Report to the draft Convention is applicable here.

60. If the issuing authority wishes the evidence to be taken under oath, this must be specified in the Letter. Further, if any specific form of oath is required, this must also be stated. Otherwise, the executing authority will administer the oath in conformity with its domestic procedure.

61. Article 3 requires that all items mentioned are to be in the Letter of Request. There is a sound practical reason. If some of the items were in the Letter itself and other items were contained in a Letter of transmission, there is the risk that the letter of transmission may become separated from the Letter itself, and the Central Authority might forward to the executing authority only a part of the instructions of the issuing authority. If everything is in a single document, this risk will be avoided.

D. Articles 4, 27(b), 28 (b), 32, 33(1) – The language problem

62. The scheme of articles 4, 5, 6 and 7 of the draft Convention for the handling of the difficult problem of the language of the Letter of Request, was reconsidered at length in Commission III and an entirely different scheme was adopted. The questions posed in the Report to the draft Convention still remain, but are answered in a very different fashion.

63. Article 4(1) starts with a fixed, definite, conventional rule. Every Letter of Request must be written in the language of the State of execution or accompanied by a translation into that language. This is the general principle of the United Kingdom bilateral conventions and article 10 of the 1954 Convention.

64. Then follows a series of modifications and loosening of this rigid rule.

65. The first modification is in article 4(2). This provides that every Contracting State will automatically accept a Letter in either English or French, or translated into one of those languages, unless it makes a reservation under article 33(1). This reservation *must* be made at the time of signature, ratification or accession, and may not be made at any time thereafter.³

66. To revert to the example of a Japanese request to a Turkish court, discussed in the Report to the draft Convention, this modification would be very helpful, if both States accept it without reservation. Whereas it may be very difficult to find Turkish translators in Japan or Japanese translators in Turkey, there should be little, if any, difficulty in finding skilled translators of English or French in both countries. If therefore the Letters in the hypothetical Japanese maritime cases are sent to Turkey in English or French, the Central Authority in Turkey should have no difficulty in retranslating the documents into Turkish, if necessary, for the use of the Turkish judge who will execute the Letter.

67. The real value of article 4(2) will become clear if and when ratifications or accessions are executed, without reservation, by States which do not have French or English as official languages.

68. Article 4(3) regulates the problem of the State with more than one official language and which requires a different language in different parts of its territory. Switzerland was the conspicuous trilingual example. Here the State may file a declaration specifying which language must be used for designated parts of its territory. An unjustified failure to follow the instructions in the declaration will warrant the imposition, upon the State of origin, of the cost of the necessary extra translation by the Central Authority or other authority of the State of execution.

69. The duty to pay for the translation will be imposed if the wrong language is used 'without justifiable excuse'. An illustration of justifiable excuse, presented during the debate was the case of a witness whose last known address was in Zurich. The moving party therefore arranged for the issuing tribunal to prepare the Letter with a German

³ This provision was, of course, adopted with all the francophone and anglophone countries abstaining.

translation. However, the witness had in fact moved from Zurich to Geneva with no notice to, or knowledge of, the moving party abroad. The burden of making a new translation into French would not be placed upon the State of origin.

70. If a State, such as Switzerland, does not file a reservation under article 33(1), the English or French rule of article 4(2), discussed above, would still remain effective, in spite of the declaration under article 4(3). This would mean that the Letter must be written in the designated language stated in the declaration under article 4(3) *or* in English *or* in French. Of course, if a reservation is filed, then only the language specified in the declaration could be used.

71. The next modification, in article 4(4) permits a State, by filing a simple declaration, to list additional languages in which Letters may be sent to its Central Authority. Illustrations are The Netherlands, which will accept Letters in German or English, and Israel, which will accept Letters in Hebrew, Arabic, English or French⁴.

72. The same result flows from article 27(b), which permits any act to be performed upon less restrictive conditions than the Convention provides, if the internal law or practice permits. Under this article, if the internal law or practice of a State accepts Letters with more liberal and less restrictive language conditions than are contained in the various paragraphs of article 4, this law and practice would continue to govern after that State had ratified the Convention. The difficulty, of course, is the presence or absence of knowledge of this internal law or practice by other States. The more liberal provisions could hardly be used by those who were ignorant of them, and the Convention contains no express provision for making this information generally available. The easy answer, of course, is that the Central Authority of the State of execution should be fully informed of its own law and practice and can be consulted by the State of origin for information on any special language rules.

73. Article 28(b) provides explicitly for side agreements, bilateral or multilateral, between two or more States setting up special language rules as between them.

74. Article 32 similarly provides for conventions to this effect. These of course are effective only as between the parties to these agreements or conventions and the rules of article 4 will apply as to all other States.

75. Article 4(5) follows the second sentence of article 5 of the draft Convention. It provides that any translation accompanying a Letter must be certified by a diplomatic officer or a consular agent of either State, by a sworn translator of either State, or 'by any other person so authorized in either State'. This final broad provision is designed to cover situations in States which do not have functionaries known as 'sworn translators' but who have competent and qualified translators whose work is recognized and accepted by the authorities and courts of the State in litigious and non-litigious matters.

76. Nothing is said in article 4 or in article 13(1) about the language in which the Letters are to be executed and returned.

77. Two alternatives seem rather obvious. First, if the State of execution insists on the Letter being written in, or translated into, its own language under article 4(1), the State of origin will normally anticipate that the Letter will come back executed in that same language. Any other expectation would seem unreasonable. Second, if the State of execution accepts article 4(2) without reservation or if it designates specific acceptable languages under article 4(4), this could be construed as a representation to the State of origin that any 4(2) or 4(4) language so designated may be considered as the 'language of the Letter'. If so, the State of origin may reasonably anticipate that the Letter will be returned executed in the same language in which it was accepted. It would seem strained to postulate the deliberate acceptance of a Letter in one language and a return of that Letter executed in a wholly different language.

⁴ It must be emphasized that the acceptance by a State of English or French under article 4(2) or of specific languages under article 4(4) is for the purposes of this Convention only. No such act will make those languages 'official' languages of the States for any purpose, nor do those languages become acceptable for any purpose other than the purposes of this Convention.

E. Article 5 – Objections to the Letter

78. Article 5 is new; it did not appear in the draft Convention.

79. It applies where the Letter is sent to the Central Authority of the State of execution.

80. Article 5 provides that the Central Authority may enter 'objections' to the Letter because it does not 'comply with the provisions of the present Convention'. Notice is to be given promptly to the authority of the State of origin which transmitted the Letter to the Central Authority.

81. Some of the errors or defects which would justify such 'objections' are:

- a) that the matter in dispute is not a 'civil or commercial' matter (article 1);
- b) that the Letter did not emanate from a 'judicial' authority (article 1);
- c) that the Letter did not relate to judicial proceedings (article 1);
- d) that the Letter relates to an 'other judicial act' which falls outside the definition (article 1);
- e) that the Letter does not contain the information required under article 3;
- f) that the Letter does not comply with the language requirements of article 4;
- g) that the execution of the Letter does not fall within the function of the judiciary in the State of execution (article 12);
- h) that the execution of the Letter would prejudice the sovereignty or security of the State of execution (article 12);
- i) that the Letter seeks pre-trial discovery of documents, and a declaration has been filed under article 23;
- j) that the Letter does not conform to an agreement or convention between the State of origin and the State of execution [articles 28(b), 32].

82. Obviously, the Central Authority will hold up the transmission of the Letter to the appropriate tribunal for execution until the matter of these objections has been resolved.

83. Article 12 states only two grounds on which the execution of a Letter may be 'refused', namely, outside the function of the judiciary and sovereignty or security. Yet article 5 actually provides additional reasons for a 'refusal' to execute the Letter. There is no inconsistency; the articles must be read together.

84. Article 12 refers to a 'refusal' to execute a 'Letter of Request'. But this necessarily means a Letter of Request which *conforms to, and does not violate, the provisions of the Convention*. Any other reading of article 12 would reach the absurd result that the State of execution would be required to execute every Letter of Request which violated every provision of articles 1 to 4, 23, 28(b) and 32 if it was within the power of the judiciary and did not violate sovereignty or security.

85. To avoid this absurdity, article 12 must be read to open:

The execution of a Letter of Request (which complies with the provisions of the present Convention) may be refused only to the extent that...

With such a reading, it is obvious that, if there is a transmission of the Letter under articles 27, 28 or 32 by a channel other than the Central Authority, article 5 should be applied by analogy by the appropriate authority of the State of execution if the Letter is not in conformity with the formal requirements of the Convention or of a side agreement or convention under articles 28 and 32. The authority which receives the Letter should promptly notify the court of origin of the formal errors or defects in the Letter, to permit correction and amendment if possible.

F. Articles 7, 8, 9, 25, 27(b), 28(c), 32 – Execution of the Letter

86. Article 8 is new; it did not appear in the draft Convention. Article 9 is a modification of article 12 of the draft Convention, which is analyzed at length in the Report to the draft Convention.

87. Article 7 is article 8(2) of the draft Convention, with stylistic changes. It provides self-explanatory rules for notice to the requesting authority of the time and place where the Letter will be executed. This is designed to permit the parties concerned, or their representatives, to be present. The notice is not automatic; it need be given only if the requesting authority asks for it. This could be included in the Letter itself or in a covering document accompanying the Letter or sent separately. Further, the requesting authority, to avoid loss of time in multiple transmissions, may request that the information be sent directly to the parties or their representatives.

88. If such a request is made, the time fixed for execution of the Letter must be sufficiently late to permit the notices to be given and to give the parties and their representatives ample time to arrange to be present or to be represented.

89. Article 7 does not say who is to give the notice. It could be given by the Central Authority (after the Central Authority is informed of the proposed date by the executing tribunal) or it could be given directly by the executing tribunal to avoid multiple communications. As a practical matter, we can predict that the Central Authority in the average case will send the Letter on to the executing tribunal, making special reference to the request for the article 7 notice and asking the executing tribunal to comply directly.

90. Since the notice is not automatic, it will be the duty of counsel for the moving party in the State of origin to see to it that the issuing authority includes a request under article 7 in the Letter.

91. Article 8 states a conventional rule that the judges of the State of origin cannot assert a right to be present at the execution of the Letter. This will be permissible only if the State of execution files a declaration permitting the judges to be present. Further, the declaration may require a special application for permission to be present, and an *ad hoc* approval of the application.

92. This leaves the question under the total control of the State of execution. By doing nothing, the foreign judges will not be permitted to attend. By filing a declaration, attendance may be permitted as narrowly or as broadly as the State of execution may elect.

93. In addition, article 28(c) specifically authorizes side agreements between States making the system of article 8 even more liberal, *e.g.* by permitting presence of foreign judges without preliminary conditions. Article 32 similarly permits conventions to that effect.

94. Finally, the presence of foreign judges may be permitted under the provisions of article 27(b), if the internal law or practice of a State permits the judges to be present on less restrictive conditions than article 8 provides. This will, for example, permit the United States to continue to allow German and Italian judges themselves to execute the Letters in the United States by examining the witnesses in their own language and in conformity with their own procedures, as reported in the analysis of Chapter V of the Report to the draft Convention.

95. Article 9 is a modification of article 12 of the draft Convention. It deals with the difficult problem of the extent to which the State of execution will execute Letters in the foreign form of the State of origin, necessarily different from the form used in its own domestic litigation.

96. Article 9(1) states the conventional rule that the State of execution will execute the Letter in conformity with its own internal procedures, just as though it were domestic litigation. This is the easy route for the judge in the State of execution; he ignores the fact that he is dealing with litigation in another State. But suppose the result is useless in the forum where the action is pending, because of the form in which it was taken? All the time, effort and expense in securing the evidence will have been wasted.

97. The dilemma thus created is discussed in detail in the Report to the draft Convention, article 12.

98. Article 14 of the 1954 Convention resolved the dilemma by providing that the State of execution should comply with a request for a special procedure in the execution of the Letter unless the procedure requested was 'contrary to the legislation' of the State of execution. The Special Commission found this formula unsatisfactory and proposed, in article 12 of the draft Convention, compliance with the request unless the special procedure is 'incompatible with' the law of the State of execution, or 'impracticable on account of the practice and procedure of its courts'.

99. The Report to the draft Convention discusses the basis for these changes and gives numerous practical illustrations of the problems involved.

100. Commission III debated this matter at great length. There was no disagreement with the general principles stated in the draft Convention or with the discussion in the Report to the draft Convention. The debate was semantic, in an effort to find phrases which would more accurately reflect the exact intention of the Convention.

101. The phrase 'incompatible with' the internal law of the State of execution, in article 12 of the draft Convention, was retained unchanged.

102. To be 'incompatible' with the internal law of the State of execution does not mean 'different' from the internal law. It means that there must be some constitutional inhibition or some absolute statutory prohibition. No Civil Law delegation suggested that his country had constitutional or statutory provisions which would prevent the examination of witnesses and the preparation of the transcript of the testimony 'Common Law style'. Nor did any Common Law delegation suggest that his country had constitutional or statutory provisions which would prevent a judge or an official designated by him from interrogating a witness and preparing a summary in 'Civil Law style'. It is not anticipated that this clause in article 9(2) will prevent the maximum furnishing of judicial cooperation.

103. However, the phrase 'impracticable on account of the practice and procedure of its courts' was considered too wide an escape clause. The language was tightened and the scope of the exception narrowed by agreement on the substitute language:

'impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties'.

There is a clear difference between 'impracticable' and 'impossible of performance'. The latter is a much heavier burden to assume. This was deliberate. The basic intent is to maximize international cooperation and to minimize the possibilities of refusal to cooperate. It is not sufficient for the foreign practice to be 'difficult' to administer or 'inconvenient'; compliance must be truly 'impossible'.

104. Article 25 provides that if a State has more than one legal system, it may designate the authorities of one of the systems to have exclusive competence to execute Letters under the present Convention. For example, the United States, which has a Federal judicial system and separate State judicial systems, could utilize this article and direct that all Letters of Request from foreign States should be directed to the courts of the Federal system. This would give the Federal courts exclusive competence to execute Letters.

105. It is interesting that, during the extended debate on article 9(2), no hypothetical examples were presented, other than those discussed in the Report to the draft Convention. Many delegations stressed the problem of a request to a Civil Law State from a Common Law State to take evidence by cross-examination, where neither the judge nor the local lawyers had any experience or competence in this procedure. This was suggested as a clear illustration of a foreign procedure which would be 'impossible' to perform for the simple reason that no one in the State of execution knew how to do it, nor would the Civil Law presiding judge have the requisite skill or experience to control the scope and extent of the questioning.

106. The Convention does not regulate how the questions of 'impracticability' or 'impossibility' are to be adjudicated. Obviously this is primarily for the State of execution to determine. The State of origin cannot decide it. It is clear, however, that in adjudicating

the question, the State of execution should remain within the limits of an internationally acceptable standard of discretion. Within the State of execution, the local practice would determine who would make the decision. It might be made by the Central Authority or it might be solely within the competence of the executing tribunal to determine the question.

107. In any event, of course, article 13(2) will require the State of execution to furnish a full explanation to the State of origin of its non-execution of the Letter on either of these grounds. If the State of origin believes the decision of the State of execution to be unjustified, the disagreement should be settled under article 36.

108. Article 9(3) provides that a Letter of Request shall be executed 'expeditiously'. Some delegations proposed that the Letter should be executed with priority status.

109. This was rejected, since it would be unacceptable to require local litigants, who had been waiting for extended periods to be reached for hearing, to step aside in every instance and permit a request from abroad for the taking of evidence to take priority, irrespective of relative urgency.

110. Assume that a court, like the courts in the City of New York, is several years behind in its current trial list. Assume that a foreign court sends a Letter of Request, seeking the evidence of certain witnesses, and asks that the evidence be taken 'Civil Law style' by the judge himself. How is this to be done 'expeditiously'? If the judge puts the request at the foot of his current list, it may be two years before it is reached, and the requesting court will be properly aggrieved at the delay. If the judge puts the request at the head of his list, he will be giving priority to the foreign request over local litigants who have been waiting several years to be reached. It would seem that the judge might try to assess the urgency and act accordingly. It would not seem improper, in such a situation, for the judge to delegate the execution of the Letter to a lawyer-commissioner or other competent court official so as to permit it to be executed promptly but without prejudice to the local parties awaiting trial of their cases.

G. Article 10 – Compulsion against a witness

111. Article 10 is adapted from article 8(1) of the draft Convention, and provides for the application of compulsion against an unwilling witness who will not appear or who appears but will not give evidence.

112. The application of compulsion is not discretionary with the executing authority. Article 10 uses the mandatory 'shall'. The only limitations are (1) the compulsion shall be 'appropriate', and (2) it shall correspond to the compulsion which would be granted under the same circumstances in a domestic proceeding.

113. The appropriateness of the compulsion is self-explanatory. To illustrate, it may require the witness to answer a particular question; or it may require him to produce certain documents or tangible objects for inspection; or it may require him to permit entry on real property for inspection.

114. Whether compulsion will be granted in a particular situation will be determined by reference to the internal law of the State of execution. If, under the circumstances facing the executing tribunal, it would grant compulsion in a domestic proceeding pending before it, either on the request of a party to the proceeding or on order of the tribunal itself, compulsion will be applied in the execution of the Letter of Request.

115. If the grant of compulsion in a domestic proceeding would be discretionary with the tribunal, it will be equally discretionary with respect to the execution of the Letter. If the grant of compulsion would be limited or partial in the domestic proceeding, it will be equally limited or partial with respect to the execution of the Letter.

116. The requesting authority cannot ask the executing authority to grant compulsion in the execution of the Letter to any extent greater than the compulsion which would be applied, under the same circumstances, in a domestic proceeding in the State of execution.

117. Article 8(1) of the draft Convention contained a final sentence which excluded mandatory compulsion of the parties to the action. This was included to take care of the French practice, under which a party to an action cannot compel testimony from his adversary.

118. This sentence was ultimately deleted from article 10 as tautological. Since the compulsion is, by definition, limited to the local practice of the State of execution, compulsion in France is necessarily limited by the French domestic rule; and if that rule excludes compulsion against a party in domestic actions, it will automatically exclude compulsion against parties in the execution of a Letter of Request.

H. Articles 11, 27(b), 28(d) – Privileges and duties of witnesses

119. Article 9(1)(a) of the draft Convention proposed to recognize any privilege of a witness not to testify conferred by either the State of origin or the State of execution.

120. Article 9(1)(b) also sought to recognize the very difficult questions of 'third State' privileges, exemplified by the illustrations of the Swiss banker and the French doctor contained in the Report to the draft Convention.

121. Article 11 modified the first of these principles as to the privileges of the State of origin, and modified the second from a definite recognition to an optional recognition by declaration.

122. Article 11(1)(a) specifically recognizes any privilege or duty of the witness not to testify given under the law of the State of execution. This conforms the execution of the Letter to a domestic proceeding.

123. Article 11(1)(b) specifically recognizes any privilege or duty given by the law of the State of origin, but only if the issuing authority takes an affirmative step to have it recognized. There are two ways in which the issuing authority can do this.

First – it may include a statement of the privilege or duty in the Letter itself. There would be no purpose in including this in the Letter except the purpose of having the State of execution recognize it.

Second – if the issuing authority says nothing about the privilege in the Letter, the executing authority will not be informed about the 'foreign law' of privilege. However, the witness may, during the proceedings, make a claim of 'foreign' privilege under the law of the State of origin. At this point the executing tribunal has the option of ignoring the claim of privilege or of seeking help from the issuing authority. If the executing authority requests advice from the issuing authority, and if the issuing authority responds and specifies the privilege or duty, then the executing authority will recognize it to the extent specified by the issuing authority.

124. The witness can therefore be deprived of his privilege under the law of the State of origin if:

(1) the Letter of Request does not specify it and the executing authority refuses to recognize it; or if

(2) the executing authority asks the issuing authority for a specification of the privilege and the issuing authority declines to reply.

125. This is admittedly a difficult position for the witness. The moving party in the State of origin naturally wishes the maximum of testimony from the witness and he will not go out of his way to have the issuing authority include any restrictive privileges which would reduce the scope of the witness's evidence. In many instances, the opposing party in the State of origin may be interested in minimizing the testimony of the witness and may ask that the Letters include the specification of the privilege. But in many other instances, both parties to the litigation in the State of origin may be equally interested in maximum testimony from the witness and neither will mention the privilege question to the issuing authority. In these cases, the witness has no one to represent his interests in the State of origin. He is confined to seeking help from the executing authority, by claiming his privilege and asking the executing authority to seek a certification from the State of origin.

126. The problem which faced Commission III was the problem of the 'foreign law' aspects and the risk that the execution of the Letters could be frustrated by claims of 'foreign' privileges unknown in the State of execution. This would lead to endless arguments over the 'foreign law' with which the executing authority would be unfamiliar. This risk was minimized by passing the problem back to the State of origin and confining the 'foreign' privilege within such limits as the issuing authority might choose to certify.

127. It was not possible to find any solution which would fully protect the witness and completely avoid 'foreign law' frustrations at the same time.

128. Article 11(2) deals with the 'third State' privileges. Here again a compromise was reached between the full protection of the witness under foreign law and the frustration of the execution of the Letters because of claims under foreign law.

129. Commission III acted on the principle that when a witness left his home State and travelled abroad, he left behind him the protection of the privileges granted by his own law. He could not demand that a foreign State recognize them obligatorily.

130. There is no mandatory requirement in article 11 to recognize any third State privilege. It is entirely optional with each State dependent upon the filing of a declaration by the State. If it files a declaration, it will thereby agree to respect third State privileges to the extent specified in the declaration.

131. All of article 11, including the provisions for the recognition of third State privileges, is subject to the effect of articles 27(b), 28(a) and 32. Side agreements may be made between States, or conventions may be concluded between them, or internal law or practice may govern the whole field of privileges and duties of witnesses.

132. The agreements and conventions are, of course, effective only as between the Parties thereto, whereas the internal law and practice will normally be universal in its effect.

I. Articles 12, 13 – Refusal to execute the Letter

133. In the discussion of article 5, *supra*, non-execution of the Letter, because of non-compliance with the provisions of the Convention, has been considered. Article 12 deals with the corollary problem of justification for non-exercise of a Letter which complies fully with the provisions of the Convention.

134. Article 11(3) of the 1954 Convention and article 8(3) of the draft Convention mentioned three reasons for non-execution. The first, that the Letter is not authentic, is really part of the article 5 concept of non-compliance with the provisions of the Convention. It was therefore deleted from article 12 as unnecessary.

135. The sole reasons remaining are identical with the 1954 Convention and the draft Convention.

136. The discussion of article 1, *supra*, recognizes that 'other judicial acts' may include acts which, under the domestic law of the State of execution, are outside the judicial function and are for example, within the functions of some administrative agency. This necessitates the first exception to execution in article 12(1)(a).

137. The second exception of 'sovereignty or security' is taken directly from the 1954 Convention. It also appears in article 13(1) of the Convention on Service of Documents. There have been no instances where this provision has been the basis of a disagreement between any two States in all the years that the Civil Procedure Convention has been operative; nor has it ever been invoked improperly as an excuse to avoid complying with the Convention. If any State should improperly invoke the clause as a device to avoid its international obligations under the Convention, the matter would be appropriate for diplomatic discussions under article 36.

138. Article 12(3) is copied from article 13(2) of the Convention on the Service of Documents and article 8(4) of the draft Convention. It raises no special problems and was accepted without discussion.

139. Article 13(2) contains the necessary provision that, if the execution of the Letter is refused, in whole or in part, because of the application of article 12(1), the issuing authority

shall be informed immediately of the fact and of the reasons therefore. The notice will be transmitted through the same channel through which the Letter was initially transmitted by the issuing authority.

J. Articles 14, 26, 28(f), 32 – Costs and expenses of executing the Letter

140. Article 14 makes a radical break with the provisions of the 1954 Convention. Article 16(2) of that Convention permitted the State of execution to demand reimbursement of (1) fees paid to witnesses and experts; (2) fees paid to official personnel to compel appearance of witnesses and (3) costs occasioned by a request for some 'special procedure'.

141. The discussion in Commission III developed strong pressure to accept a proposal of the German delegation to reduce the scope of these reimbursements and to place on the State of execution the burden of furnishing additional services at its own costs and expense.

142. Article 14(1) is identical with article 16(1) of the 1954 Convention in providing generally that no claim may be made by the State of execution for 'taxes or costs of any nature', e.g. the costs of the services of the Central Authority or the personnel of the courts or other government agencies which may be involved in the execution of Letters.

143. However, article 14(2) eliminates from article 16(2) of the 1954 Convention the reimbursement of fees paid to witnesses and fees paid to official personnel to compel appearance of witnesses. All that remains subject to reimbursement are the fees paid to 'experts and interpreters' and costs occasioned by a demand by the issuing authority for a 'special procedure' under article 9(2).

144. 'Interpreters' as used in article 14(2) means only those who are used to interpret for the witness at the taking of the evidence; it does not include translators of Letters or documents under article 4.

145. In the debate over this change in the 1954 Convention, it was suggested that the fees for witnesses and the fees for compelling the appearance of the witnesses were of minor importance. There was no disagreement respecting the fees for witnesses. However, it was pointed out that in States of large area, the cost of the service of process to compel the appearance of an unwilling witness could be substantial, if the witness was several hundred miles from the tribunal and the serving officer would have to travel double that distance to serve the document and return to his office.

146. In addition, the United Kingdom delegation explained that under the United Kingdom practice, judges could not examine the witnesses themselves but were required to appoint 'examiners' to conduct the examination. If a public official was available to do this, there would be no charge, but if no public official was available and a lawyer had to be appointed, there would be a fee to be paid, which should not be the responsibility of the State of execution. The United States and Canadian delegations indicated a similar problem to some degree.

147. Further the delegations of Canada, Ireland, the United Kingdom and the United States jointly proposed to permit a reservation with respect to the fees of witnesses, the cost of service of process necessary to compel appearance of a witness and the cost of any transcript of the evidence where the evidence is taken 'Common Law style'. The United States delegation explained the constitutional problems involved in the appropriation of funds for these expenses and the problems inherent in a Federal system.

148. Finally, it was pointed out that article 14(2) imposed the duty of reimbursement upon the *State* of origin unconditionally, irrespective of whether the parties in question furnished the funds. This also could raise constitutional questions as to the power of a judge of a court to impose an international fiscal obligation upon his Government, simply by issuing a Letter of Request.

149. These three questions were resolved as follows. A new article 14(3) was inserted to deal with the appointment of the 'examiners'. It provides that the executing authority, in such a case, will advise the issuing authority of the need for the 'examiner' and the approximate costs which will follow. If the issuing authority consents, the 'examiner' may

then be appointed and the issuing authority will reimburse the costs. If the issuing authority does not consent, it will not be liable for the costs, but an 'impasse' may follow.

150. Article 14(3) does not permit the executing authority to appoint the 'examiner' unless the issuing authority consents. It reads:

The requested authority... may, after having obtained the consent of the requesting authority, appoint a suitable person...

This apparently means that, absent such consent, there is no power to make the appointment. But, by definition, the law of the State of execution does not permit the requested authority to execute the Letter. If the United Kingdom judge, under United Kingdom law, cannot execute the Letter himself and if he cannot appoint anyone else to do so, the result apparently will be that the request cannot be complied with.

151. A new article 26 was drafted to meet the problems of constitutional law raised by the United States delegation. If reimbursement of witness fees, costs of compelling attendance of witnesses and the costs of a transcript of the evidence are 'required' because of constitutional limitations, the State of execution may request their reimbursement by the State of origin. If such a request should be made by a State of execution, any other Contracting State may request that State to reimburse similar fees and costs arising from Letters of Request received from that State.

152. Article 26 does not oblige the State of origin to meet the request. Nor does it specifically require the State of execution to take action which is not permissible under its constitution. It is silent on the effect of a rejection of the request. Here again, there may be an 'impasse'. If the State of origin will not agree to pay the costs and if the State of execution is subject to constitutional limitations that preclude it from executing the Letter without such an agreement, it may be impossible to execute the Letter. In such a situation, the problem could be solved if the interested party in the litigation would be willing himself to reimburse the State of execution either directly or through the State of origin.

153. The Chairman of Commission III, with the approval of several other delegations, expressed the hope that no State would ever feel it necessary to invoke article 26. He hoped that ways might be found in all cases to resolve the problem. A purely financial detail ought not to bar international co-operation.

154. There are a number of possible ways to resolve the problem, raised in article 26, as between a Civil Law State of origin and a Common Law State of execution.

First – the Civil Law State of origin may request, under article 9(2), that the Letter be executed 'Civil Law style'. It is assumed that the Civil Law tribunal would always prefer to have the evidence taken under its own procedures rather than by the Common Law method of examination and cross-examination by lawyers and a *verbatim* transcript of the testimony. This will be a 'special procedure' in the Common Law State of execution and the State of origin will automatically be responsible for the minimal costs involved, under article 14(2). All expense of a *verbatim* transcript will be eliminated.

Second – it is likely that the legislature of the Common Law State of execution will appropriate the necessary funds to pay the article 26 costs, or will approve special legislation delegating the execution of Letters to special tribunals which will have appropriated funds to pay the costs of execution.

Third – if the State of origin elects to secure the evidence through the use of consuls or commissioners, this will avoid articles 14 and 26 entirely, since no Letter of Request will be involved.

155. As between two Common Law States, the article 26 problem should be minimal. It will arise when Letters of Request are used and these are not the customary practice between two Common Law States. Instead, evidence is usually taken on notice, by stipulation or through a consul or commissioner.

156. As drawn, the Convention deliberately places the duty to reimburse the costs in article 14(2), not upon the parties to the action, but upon the State of origin itself. This means that any tribunal in the State of origin, which issues a Letter of Request, may

indirectly impose an international fiscal obligation upon his Government to reimburse certain costs. This provision may create constitutional questions in States where a judge has no such power, without the consent of the fiscal authorities of his Government.

157. In any such State, the problem can be resolved if the judge is required to secure an advance deposit from the moving party before he issues the Letter of Request. This advance deposit will avoid any embarrassment or constitutional question if a demand is later made upon the Government of the State of origin for reimbursement of costs.

158. It should be added here that the Convention excludes any power of the State of execution to demand an advance deposit of costs as a condition precedent to the execution of the Letter. Since the Government of the State of origin will be responsible for the reimbursement of the costs, the State of execution will have ample security for the reimbursement of the costs. Finally, article 28(f) provides expressly for side agreements, bilateral or multilateral, in which States may set up other and different rules for fees and costs. Article 32 similarly provides for conventions to this effect.

K. Articles 15, 27(b), 28(g), 32, 33(1) – Power of a consul to take evidence of his own nationals

159. It is well to emphasize again that the entirety of Chapter II is subject to optional clauses and the right of reservation. The policy differences existing between those States which apply a stringent doctrine of 'judicial sovereignty' and those States which apply it to a limited extent, or not at all, were so extensive as to prevent the drafting of any rules which could be of universal application.

160. An effort was made to set minimum standards which might hopefully be agreed to by all signatories, but even these had to be made subject to a right of reservation.

161. It should also be emphasized that Chapter II grants no power to a consul to take evidence, it merely gives him a privilege. The law of the consul's State will determine whether he has the power to take evidence as part of his functions. It is conceivable that the domestic law of a certain State might not authorize its consuls to take evidence in the State where they will exercise their functions. In such a situation, nothing in Chapter II will grant the consul a power which his own Government denies him. All that Chapter II can provide is that, if his own Government gives him the power to take evidence, the State of execution will permit him to exercise this power, upon the terms and conditions set forth in Chapter II.

162. It must also be noted that there is no provision dealing with the question of costs and expenses when evidence is taken by a consul or commissioner. This follows because no functionary of the State of execution is used. The consul or commissioner will be designated by the tribunal where the action is pending in the State of origin and the payment of the costs and expenses will be determined by the law of that State. The State of execution will have no participation, except to the extent that it chooses to have an official representative present under article 19. There should be no cost for this.

163. There is one situation where costs and expenses may be a problem. Assume that the witness declines to appear and the consul or commissioner seeks and receives compulsion assistance from the competent authority of the State of execution under article 18. Here there will be some expense involved. But article 18 provides that the compulsion may be granted subject to whatever terms and conditions the declaring State may impose. It can be expected that one of these conditions will be that the consul or commissioner pay the costs and expenses attendant upon the compulsion.

164. For these reasons, the Convention contains no provision for costs and expenses in Chapter II.

165. Article 15(1) is a redraft of article 13 of the draft Convention. It states a conventional rule setting forth the power of the consul ('diplomatic officer or consular agent') to take the evidence of nationals of the State or States which he represents in the State of execution. All the conditions of the rule are self-explanatory:

- a) the consul may act only in the area in which he exercises his consular functions;
- b) the consul may take evidence only without compulsion, i.e. of willing witnesses;
- c) the consul may take the evidence only of nationals of a State or States which he represents in the State of execution;
- d) the consul may take the evidence only with respect to proceedings which are pending in the courts of a State which he represents in the State of execution.

166. Article 15(1), and in fact all of Chapter II, deals *only* with the power to 'take evidence'. The power to 'perform some other judicial act', given in article 1(1), is *not* given to consuls or commissioners. They will have no such power, except to the extent that the State of execution may grant such power to foreign consuls by an agreement under article 28(g), by a convention under article 32 or by internal law or practice under article 27(b).

167. This omission was deliberate. The taking of evidence by consuls is a well-recognized function. It appears in all the United Kingdom bilateral conventions and in many other bilateral conventions; it appears in many consular conventions and it was specifically authorized in article 15 of the 1954 Convention. On the other hand, the 'other judicial acts' tend to be matters which are part of the exclusively judicial function, and which should be performed by judges or by lawyers designated by the judges for the purpose.

168. Article 15(1) differs in an important aspect from article 1(2). The latter permits evidence to be taken under a Letter of Request in connection with a 'contemplated' action, i.e. 'perpetuation of testimony' and its Civil Law equivalents. But a consul, under article 15(1) can take evidence only with respect to 'proceedings commenced'. Accordingly, the consul cannot be used for purposes of 'perpetuation of testimony' unless a provision to this effect can be found in agreements, or conventions or internal law or practice under articles 27(b), 28(g) or 32.

169. This is the conventional rule, but it is subject to a multitude of exceptions.

First – article 15(2) permits a State, by declaration, to make the consul's powers under article 15(1) permissive only. It may require the consul, in every case, to make an application to an authority designated by the declaring State for permission to take the evidence and article 19 provides that the permission may be made subject to any conditions which that authority may impose (see discussion of article 19, *infra*).

Second – article 28(g) permits side agreements and article 32 permits side conventions which may set up such other or different rules, *inter se*, as the participating States may desire.

Third – article 33(1) permits a Contracting State, at the time of signature, ratification or accession to exclude, by reservation, all or any part of article 15.

Fourth – article 27(b) permits any State, by unilateral action through internal law or practice, to permit a consul to take evidence on conditions even less restrictive than are provided in article 15.

170. It is obvious that this collection of rules can create a morass of non-uniformity. However in order to create a structure into which all Members of the Conference may enter, without first changing their basic internal policy with respect to the power of consuls to take evidence, maximum flexibility was essential.

171. It is also obvious that it was the hope of Commission III that all States would, to the maximum extent, initially approach the minimum standard set forth in article 15(1); and that those States which could not do so initially would do so as soon as possible. It was the hope that no State would find it necessary to file a reservation to article 15(1) and that no State would find it necessary to file a declaration under article 15(2).

L. Articles 16, 27(b), 28(g), 32, 33(1) – Power of a consul to take evidence of other nationals

172. In articles 13 and 14 of the draft Convention a distinction was drawn between the power of the consul to take evidence from his own nationals (for whom he has primary responsibilities and duties) and nationals of the State of execution (for whom the State of execution has primary responsibilities and duties).

173. This distinction led to a decision that the normal rule for the taking of evidence of nationals of the State of execution should be the permission of that State. Thereby that State could protect its nationals against possible abuse or pressure on the part of the foreign consul.

174. The third group, nationals of third States, falls into a different category. However, the formulation in article 14 of the draft Convention of a separate rule for this group was not approved. Article 16 states a single rule for all witnesses who do not fall under article 15 (see the extended discussion in the Report to the draft Convention, articles 13 and 14).

175. Article 16(1) contains the same three conditions stated as (a), (b) and (d) in the discussion of article 15(1). It further provides that the consul can take no testimony without the express permission of the designated authority of the State of execution.

176. The permission may be granted generally, which will relieve the consul of the need to make separate applications in each case where he wishes to act. Or a separate application may be required for each case. The State of execution has full choice.

177. Further, article 19 gives complete freedom to the State of execution to fix the terms and conditions on which the consul may act; and article 16(1)(b) imposes on the consul the duty to comply with those terms and conditions as a condition precedent to his right to take the evidence.

178. Article 16(2) permits the State of execution to waive the permission clauses of article 16(1) by declaration to that effect. The permission could also be waived in a side agreement under article 28(g) or in a side convention under article 32 or by the internal law or practice of the State of execution under article 27(b).

179. Finally, any State may file a reservation against all of article 16 under article 33(1) and forbid absolutely the taking of the evidence of witnesses who are not nationals of the State or States which the consul represents. Articles 15 and 16 are therefore identical insofar as they are subject to the variant provisions of article 27(b), 28(g), 32 and 33(1). However, they differ fundamentally in their approach to the basic power of the consul. As to the nationals of the States which the consul represents, the rule of article 15 is *power* to take the evidence without advance permission, but with the right of the State of execution, by declaration, to require advance permission. As to all other nationals, the rule of article 16 is no *power* to take the evidence without advance permission, but with the right in the State of execution, by declaration, to waive the need for advance permission.

M. Articles 17, 27(b), 28(g), 32, 33(1) – Power of a commissioner to take evidence

180. Article 17 regulates the power of a commissioner to take evidence. It is based on article 18 of the draft Convention. It follows closely the rule of article 16:

- a) the commissioner may take evidence only without compulsion;
- b) the commissioner may take the evidence only with respect to proceedings which are pending in the courts of another Contracting State;
- c) permission from the State of execution and compliance with the conditions of that permission is the rule, subject to waiver of the need of permission by declaration;
- d) articles 27(b), 28(g), 32 and 33(1) apply with respect to side agreements, side conventions, internal law or practice, and reservation.

181. The result is to put the commissioner in a position almost identical with that of the consul, if the consul seeks the evidence of witnesses who are not of his own nationality. The rule stated in article 17, as affected by articles 27(b), 28(g), 32 and 33(1), permits every gradation from unlimited freedom to absolute prohibition, and gives unlimited

opportunity to any Contracting State to modify its position from time to time by declaration, by executing side agreements, by executing side conventions or by changing its internal law or practice.

182. In general, a commissioner may be appointed either by the judicial authority of the State of origin or the judicial authority of the State of execution. Commission III agreed that a commissioner may not be appointed by a private authority or by a non-judicial authority, for example, by a consul.

183. Article 17 is drawn in broad enough language to permit the continuance of the practice in the United States whereby foreign judges are appointed as 'commissioners' by the United States court and are thereby permitted to examine the witnesses directly in their own language and under their own procedure.

184. The commissioner, under article 17, is subject to the same limitation as the consul under article 15(1). He can take evidence only with respect to 'proceedings commenced'. He cannot be used for 'perpetuation of testimony' or its Civil Law equivalents, unless authorization can be found under articles 27(b), 28(g) or 32.

185. The Report to the draft Convention, Chapter V and article 18, contains a detailed discussion of commissioner practice, which is applicable to article 17 of the present Convention and which will not be repeated.

N. Articles 18, 27(b), 28(g), 32, 33(1) – Compelling a witness to testify

186. With respect to compulsion against a witness, to require him to appear before a consul or a commissioner, article 18 states a single rule applicable to both. This combines articles 16 and 19 of the draft Convention, which treated the consul and the commissioner in separate Chapters.

187. The rule is simple and unambiguous. If a consul or commissioner is authorized to take the evidence of a particular witness, under article 15, 16 or 17, he *may* be allowed to ask the appropriate authority of the State of execution for assistance to compel the witness to appear and give the evidence.

188. The word 'may' is emphasized in the preceding paragraph because a State may decline to permit the consul or commissioner even to apply for compulsion. As article 18(1) is phrased, the State of execution must have filed a declaration giving the consul or commissioner permission to apply for compulsion against the witness. The State of execution must also designate the authority to whom the application is to be directed.

189. Of course, the permission to apply may be contained in a side agreement under article 28(g) or in a side convention under article 32 or in the internal law or practice of the State of execution under article 27(b).

190. The essence of the rule is that the permission to apply for compulsion must be found somewhere. Further, the State of execution, in its declaration granting permission to apply, may impose any conditions which it deems fit to the permission to apply. In addition, article 19 provides that, if the consul's or commissioner's application is granted, the approval may be subject to any conditions which may be imposed.

191. In effect, article 18(1) grants nothing. It simply makes it easy for States to be more liberal if they so desire (see the discussion on the draft Convention articles 16 and 19). It merely recognizes the possibility that the consul or commissioner may be allowed, under certain circumstances, to apply to the appropriate tribunal in the State of execution for compulsion against an unwilling witness. It does not guarantee that he may be allowed to apply.

192. Nor does it guarantee that the application will be granted, in whole or in part, conditionally or unconditionally. The State of execution has unlimited power and control over the grant of compulsion in favour of a consul or commissioner, and nothing in article 18(1) is intended to modify that unlimited power and control.

193. Article 18(2) follows the final sentence of article 16 of the draft Convention. It provides that *if* the application for compulsion is granted, the measures of compulsion to be applied shall be 'appropriate'. This has a double meaning. In the first place, the

compulsion must be 'appropriate' to the nature of the evidentiary enquiry, *i.e.* appear on a certain day, or answer certain questions, or produce a certain document, or furnish access to certain real estate, etc. In the second place, it must be 'appropriate' to the terms and conditions which are an inherent part of the grant of compulsion, and which have been authorized either in the declaration filed under article 18(1), or in the grant itself under article 19, or in an outstanding side agreement or convention, or under the law or practice of the State of execution. The extent of the compulsion could hardly be 'appropriate' if it violated these principles.

194. Further, article 18(2) provides that the compulsion must conform to the domestic law of the State of execution for use in internal proceedings. This is self-explanatory; no court would grant a type of compulsion in favour of a foreign consul or commissioner which it would not grant to a party in a domestic action pending before it.

195. Finally, article 18 is subject to reservation under article 33(1) and all compulsion may thereby be excluded.

O. Article 19 – Permissible conditions to the grant of permission or the grant of compulsion

196. In the discussion of articles 15 to 18, reference has been made to article 19, as the basis for the imposition of terms and conditions to (1) the grant of permission to a consul or to a commissioner to take evidence and (2) the grant of the privilege to seek assistance to compel a witness to appear and give evidence.

197. Article 19 is phrased in broad and general terms, applicable equally to articles 15 to 18.

198. Except as to certain matters specified in the Convention, [*e.g.* articles 20, 21(b), 21(c), 21(d), 21(e)] which are discussed at the close of this Section, there are practically no limits to the terms and conditions which the appropriate authority of the State of execution may impose if it chooses to grant permission to a consul or commissioner to take evidence or to grant compulsion against a witness. Article 19 refers only to 'such conditions as it deems fit'. This leaves the nature of the conditions to the *ad hoc* decision of the State of execution, dependent upon the facts of each particular case.

199. Under articles 15 to 18, each State is given the privilege of imposing some control over the consul or commissioner or of waiving control, in whole or in part, as it may determine as a matter of policy. It may impose control simply by filing a declaration under article 15(2), by refusing to file a declaration under articles 16(2), 17(2) or 18(1), or by filing a reservation under article 33(1). In any of these events, it is in the position of forbidding, if it wishes, any taking of evidence by a consul or commissioner, or any request for compulsion against a witness. Since the taking of evidence or the grant of compulsion may be totally forbidden by the State of execution, neither the parties to the litigation nor the tribunal of the State of origin, nor the consul or commissioner can object if the State of execution elects to grant only some limited permission, subject to permissible terms and conditions.

200. These principles are an inherent part of all of Chapter II of the Convention.

201. Article 19 contains a few illustrative terms and conditions which may be imposed by the authorizing authority of the State of execution. These include the right to fix the time and place where the evidence may be taken, the right to receive advance notice of the time and place, if it has not itself fixed them, and the right to have its representative present.

202. If a representative of the State of execution is present at the examination, he may be there for any one of a number of purposes, *e.g.* to protect against examination which might infringe sovereignty or security, to protect the witness against improper questioning, or to protect the privileges of the witness.

203. Illustrations of other conditions, not specified in article 19, which might be anticipated would be: (1) limiting and defining the scope and subject-matter of the examination; (2) defining and limiting the documents or other objects to be produced for inspection; (3) defining and limiting the scope of the entry and inspection of real property; and (4)

specifying the persons who may be permitted to be present at the taking of the evidence, other than the parties, the witnesses and their legal representatives.

204. As has been suggested above, there are a certain number of conditions which may *not* be imposed, because they would be contrary to the provisions of other articles of Chapter II.

205. For example, it would be improper to direct, under article 19, that the evidence may be taken only on condition that the persons concerned may *not* be legally represented at the taking of the evidence. This would be directly contrary to the unconditional provision of article 20.

206. It would be equally improper to provide a language directive for the notice to the witness which contravened article 21(b) and to direct that the notice may *not* contain the information required under article 21(c).

207. It would be equally improper to provide that the evidence may not be taken in the manner provided by the law of the forum where the action is pending, if there is nothing in the law of the State of execution which forbids this. This would be directly contrary to the unconditional provision of article 21(d).

208. Finally, it would be equally improper to provide that the witness may not invoke the privileges and duties contained in article 11. This would be directly contrary to the unconditional provision of article 21(e).

209. It is the hope of the Rapporteur, shared by many of the Delegates who participated in Commission III, that the broad powers given in article 19 will be sparingly used and that consuls and commissioners will be permitted to operate with the maximum of freedom and with the minimum of control and supervision. It is further hoped that they will be given generous assistance in compelling recalcitrant witnesses to appear and give their evidence. This is particularly true with respect to routine private litigation in contract or in tort, where no questions of national sovereignty or national security can be involved.

210. Many States have had long experience in the use of consuls and commissioners to obtain evidence. They have found them so much more efficient, so much speedier and so much more effective than Letters of Request, that the use of Letters by those States has become the rare exception, used only where absolutely necessary.

P. Article 20 – Representation by counsel

211. Article 20 gives an unconditional right to the 'persons concerned' to be legally represented in the taking of the evidence. This is to be separated from article 19. It seems clear that the competent authority in the State of execution, in fixing the 'conditions' for the taking of the evidence under article 19, could *not* specify as a condition that the persons concerned could *not* be represented by counsel. If the taking of evidence is authorized, the right to counsel cannot be denied.

212. Who are the 'persons concerned'? The article deliberately contains no definition. Certainly the parties to the lawsuit in the State of origin are 'persons concerned'. Certainly the witness himself is a 'person concerned'. Can there be others? The question remains open for answer on an *ad hoc* basis in each case. The employer of the witness or an insurance company, indemnitor or surety might, under certain circumstances be considered a 'person concerned'.

Q. Article 21 – Administrative rules for the taking of the evidence

213. The five sub-divisions of article 21 lay down the administrative rules which will apply if a consul or a commissioner is authorized to take evidence under articles 15, 16 or 17. The rules are self-explanatory, and closely follow article 17 of the draft Convention. The discussion of article 17 in the Report to the draft Convention is relevant.

214. Sub-division (a) permits him to take all kinds of evidence which are 'not incompatible' with the law of the State of execution and which are not contrary to any permission granted. These provisions are self-explanatory.

215. Sub-division (a) further permits him to administer an oath or to take an affirmation within these same limits. It is conceivable that the law of the State of execution may provide expressly that only judges and «notaires» may administer an oath. Under these circumstances, the consul or commissioner would have to call in a «notaire» to administer the oath to the witness in conformity with local law.

216. Sub-division (b) recognizes that the witness must somehow be notified that his evidence is needed and that he should appear at a given time and place. The notice must be written in, or translated into, the language of the State of execution, unless the witness is a national of the State of origin. In that case it will, of course, be written in the language of that State.

217. The request, under sub-division (c), must also inform the witness that he may be legally represented (article 20). Further, under sub-division (c), if the State of execution has not filed a declaration under article 18, respecting the right to apply for compulsion against the witness, the notice must also inform him that he is not compelled to appear or to give evidence.

218. There is one minor problem under sub-division (c). Suppose the State of execution has filed no declaration under article 18, respecting compulsion, because the right to ask for compulsion already exists under internal law and practice, protected by article 27(b), or under a side agreement under article 28(g) or a convention under article 32. The declaration is unnecessary and would be redundant. If, by reason of the absence of any declaration, the consul would notify the witness that he cannot be compelled to appear and to give evidence, the statement of the consul would be false. The witness can be compelled to appear and testify under internal law and practice, or under the side agreement or convention, regardless of article 18.

219. To avoid any such improper result, sub-division (c) must be read as though it said:

... and, in any State that has not filed a declaration under article 18, and whose internal law and practice does not provide for compulsion against the witness, shall also inform him that he is not compelled to appear or to give evidence.

The phrase 'internal law' will, of course, include any applicable side agreement or convention on compulsion to which the State of execution is a Party, and which will be applicable under articles 28(g) and 32.

220. Sub-division (d) is a *verbatim* copy of sub-division (c) of article 17 of the draft Convention. The discussion in the Report to the draft Convention need not be repeated.

221. Sub-division (e) permits the witness to invoke, before the consul or commissioner, the same privileges and duties to refuse to give evidence as are applicable under article 11 when he is called before an executing authority under a Letter of Request. This will require the 'commission' or other document appointing the consul or commissioner to take the evidence to contain the necessary information on the extent of the privilege or duty [see articles 3(4) and 11(1)(b)], or will require the issuing authority to 'confirm' the extent of the privilege or duty, if requested to do so by the consul or commissioner.

222. In the draft Convention, article 17 also incorporated the 'sovereignty or security' clause. This was omitted by Commission III as unnecessary. Sub-division (a) of article 21 forbids the consul or commissioner to take any evidence which is 'incompatible with the law of the State' of execution. The disclosure of information which violated the 'sovereignty or security' of the State of execution would clearly be 'incompatible' with its law.

R. Article 22 – Effect of failure to secure evidence through a consul or commissioner

223. Article 22 provides that the failure to obtain the needed evidence through the consular or commissioner route does not exhaust the rights of the moving party and does not prevent him from going back to the State of origin and securing a Letter of Request to obtain the failed evidence.

224. This had been agreed to in principle in the Special Commission but, because of the absence of a quorum, could not be included in the draft Convention.

225. The article is actually unnecessary, but is included out of an excess of caution. Let us suppose that a proceeding through a consul or commissioner fails for any reason, *e.g.* refusal of the State of execution to give a required permission, or inability of the consul or commissioner to comply with a condition laid down in the permission, or refusal of the witness to appear and testify and a refusal to grant compulsion against him. Let us further suppose that the moving party in the State of origin then abandons the abortive attempt and seeks and secures a Letter of Request from the forum where the action is pending.

226. When this Letter of Request arrives at the Central Authority of the State of execution or at the executing tribunal, can the execution of the Letter be refused because the moving party unsuccessfully sought the evidence through the consul or commissioner? We need only look at article 12 for the answer. Does it contain a clause making these facts a ground for refusing to execute a Letter? Clearly not; The prior abortive proceedings are irrelevant to the execution of the Letter of Request.

227. Article 22 does no harm. But, in the light of article 12, it is unnecessary and adds nothing to the Convention.

S. *General clauses*

228. The most important general clauses have already been fully considered in the preceding discussion and will not be re-discussed here.

229. Article 23 is covered in the discussion of articles 1 and 5.

230. Articles 24 and 25 are covered in the discussion of articles 2, 7, 8 and 9.

231. Article 26 is covered in the discussion of article 14.

232. Article 27 has been discussed in connection with almost every one of articles 1 to 22.

233. This is a most important article, designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants.

234. It permits in sub-division (a) a declaration authorizing the use of channels of transmission other than the Central Authority, *e.g.* consular or diplomatic channels or transmission direct 'from court to court', or by the parties.

235. It provides, in sub-division (b) that *any act* provided for in the Convention may be performed upon less restrictive conditions than the Convention provides, if the internal law or practice of the State of execution so permits. This will be particularly applicable to Chapter II, with respect to those States which presently give consuls and commissioner substantially unlimited freedom to take the evidence of willing witnesses.

236. It provides, in sub-division (c), for methods of taking evidence other than those provided in the Convention, to the extent that internal law and practice will permit. This means taking evidence without either a Letter of Request or the use of a consul or commissioner.

237. For example, counsel for the parties may travel to the home of a willing witness, call in a local official to administer an oath, and then question the witness, making a record by stenographer or tape recorder. Or to save travel expense, competent local counsel in the State of execution could be briefed to examine the witness. The only conditions are that the State of execution will permit this, and that the resulting record will be admissible at the trial of the action. If these conditions are met, the result is just as satisfactory as if a Letter of Request had been executed or a consul or commissioner had been appointed to act.

238. Another example would be for the parties or counsel, with an engineer, to inspect, examine, photograph, measure or test certain machinery in a factory, or the inside of a mine, with the consent of the owner, to obtain evidence for use at the trial of the action. Again, if the State of execution will permit this, the result may be completely satisfactory.

239. A final example is the illustration given in the Report to the draft Convention, where the courts in New York and Chicago appointed foreign German and Italian judges as

'commissioners' and granted compulsion against the witnesses, so that the foreign judges might examine the witnesses in New York and Chicago in their own language, and under their own procedure, without interference or participation by the local courts. If the internal law and practice of a particular State offers these broad privileges to foreign courts and litigants, which go beyond anything provided for in the Convention, that State may safely sign and ratify the Convention without thereby affecting its right to continue to offer these extra benefits to foreign courts and litigants.

240. Article 28 has been discussed in connection with articles 2, 4, 5, 8, 11, 13, 14 and 15 to 22.

241. Articles 29, 30 and 31 have been discussed in Section (b) of the Introduction.

242. Article 32 has been discussed in connection with articles 2, 4, 5, 7, 8, 9, 11, 14 and 15 to 22.

243. Article 33, which provides for reservations, has been discussed in connection with article 4 and articles 1522. The reservation may be made only at the time of signature, ratification or accession and not thereafter. The reservation may be withdrawn at any time. If a State makes a reservation, any other State affected thereby may reciprocally apply the same rule against the reserving State.

244. Article 34 gives full freedom to a State to withdraw or modify a declaration which it may have made.

245. Article 36 provides for the use of diplomatic channels to settle any difficulties which may arise under the Convention.

246. Articles 35 and 37 to 42 are conventional clauses dealing with the administration of the Convention by the Ministry of Foreign Affairs of the Netherlands, signature, ratification, date of entry into force, accession by other States, extension to territories and termination of the Convention by denunciation. They present no problems which require special additional comment.

III. Matters excluded from the Convention

247. In the Report to the draft Convention, mention was made of a number of problems which had been reserved from the discussion and from the draft Convention. These were reserved for consideration and decision by Commission III.

248. *Free legal aid* – This topic is treated separately in Chapter IV of the 1954 Convention. In view of the very large differences in the policy of the various Members of the Conference on the question of free legal aid, it was agreed to confine the present Convention to the revision of Chapter II of the 1954 Convention. The present Convention does not deal with free legal aid.

249. *Immunity of a witness from arrest or service of process* – Commission III concluded that the question of the immunity of a witness, in attendance at the taking of the evidence, and while going to and returning from the hearing, is a matter primarily for the domestic law of the State of execution. Further, it would be a most extraordinary situation if a witness would come across the border from a foreign State to testify in the State of execution pursuant to the Letter of Request. The matter was not regulated in the 1954 Convention and is not regulated in this Convention.

250. *Effect of the refusal of a witness to appear* – A proposal to regulate the effect of the refusal of a witness to appear and testify before a consul or commissioner was not approved. This is a matter for the domestic law of the forum where the action is to be tried. The judge in charge of the trial may decide what inferences may be drawn from the failure of a party, or of a witness not a party, to give evidence.

251. *The problem of dual nationality* – Articles 15 and 16 provide separate rules for the taking of evidence by a consul, dependent on the nationality of the witness. Suppose the witness, under the law of the State of origin, is a national of that State and, under the law of the State of execution, is a national of that State. Which article will apply?

252. Commission III agreed that this matter need not be regulated in the Convention. Under article 16, the State of execution has the right to decide the rules for the taking of the evidence of its own nationals. It must have the right to decide who are its own nationals for this purpose, under its own law. The State of origin should not have the power to decide that a particular individual is not a national of the State of execution.

253. *Proceedings before administrative tribunals* – It was pointed out in the discussion of article 1 that the term ‘judicial authority’ is not defined. To what extent will this include ‘administrative tribunals’?

254. Commission III decided that all courts of arbitration were excluded from the definition of ‘judicial’ authority. As to administrative tribunals generally, no decision was or could be reached. There is an enormous variation in powers and functions of administrative tribunals in various legal systems. Some of them have every attribute of courts, except in name. Others have no resemblance to judicial tribunals. Exact definition is not possible, and each case must be examined on its own facts.

255. An interesting illustration is the decision of the Second Circuit Court of Appeals of the United States in New York City, in a case entitled *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F. (2d) 1017 (1967).⁵ The court decided after a careful analysis of the duties and powers of a tax-assessment agency in India that it was not a ‘tribunal’ entitled to the execution in New York of a Letter of Request.

256. *Penal provisions* – Commission III considered the penal problems inherent in the taking of testimony abroad. These include the failure or refusal of a witness to obey an order of the executing authority, and the giving of false testimony by a witness.

257. Commission III agreed with the Special Commission that these raise questions of internal penal law of the affected States and questions of the division of penal jurisdiction. These are not matters appropriate for regulation in this Convention.

⁵ Reproduced in 62 *American Journal of International Law* (1968), p. 776.