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Letters Rogatory: Current Problems Facing International Judicial Assistance

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Letters Rogatory: Current Problems Facing International Judicial Assistance

The litigant whose cause of action involves persons or events in another country often must produce in his nation's courts either testimony of a non-resident witness or documentary evidence located abroad, serve judicial documents on nonresidents or obtain information on foreign law.[1] The cooperation and aid of another nation's legal system in these situations can be invaluable and even essential. This aid rendered by one nation to judicial or quasi-judicial proceedings in another country's tribunals is called international judicial assistance.[2] Largely because of the dramatic differences between the procedural norms and theoretical bases on which the legal systems of different nations operate,[3] requests for aid and cooperation are not always honored. What might be called "judicial ethnocentrism," *i.e.*, the reluctance of judges to aid legal systems not resembling their own,[4] and concerns of national sovereignty[5] have motivated judges to frustrate international judicial assistance. In some cases, the decision as to the granting of assistance can significantly affect the economic positions and even certain foreign and domestic policies of the respective nations. While it can simply involve a mechancal application of previously agreed upon procedures, international judicial assistance must often resolve greater issues.

In the past thirty years great strides have been made in the use of international judicial assistance. This note will examine three recent cases in order to analyze the current state of one specific area of international judicial assistance, letters rogatory. An American case, *In re Letters Rogatory From Tokyo District, Tokyo, Japan*,[6] follows the general trend to-

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[1] Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 516 (1953).

[2] *Id.* at 517.

[3] Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1072 (1965).

[4] Recent Development, 12 TEX. INT'L L.J. 106, 109 (1977).

[5] The cult [of national sovereignty] has become mankind's major religion. The intensity of worship of the idol of the national state is, of course, no evidence that national sovereignty provides a satisfactory basis for the political organization of mankind . . . . The truth is the very opposite . . . . It seems fairly safe to forecast that, if the human race survives, it will have abandoned the ideal and practice of national sovereignty.

Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 LAW & POL'Y IN INT'L BUS. 1 (1971) (quoting A. Toynbee, THE RELUCTANT DEATH OF SOVEREIGNTY).

[6] 539 F.2d 1216 (9th Cir. 1976).

ward liberalizing the letters rogatory procedures in favor of objectivity and international order. *Re Westinghouse Electric Corporation Uranium Contracts Litigation*, a British case,[7] and *Re Westinghouse Electric Corporation and Duquesne Light Company, et al.*,[8] a Canadian case, illustrate the difficulties encountered even by today's liberalized procedures for letters rogatory when economic and national policy issues are emphasized. Before discussing the approaches taken in those cases a brief analysis of the function and evolution of letters rogatory is in order.

The basic problem which letters rogatory are designed to remedy has been described as follows:

> Since a majority of the states and foreign countries follow the territorial concept of sovereignty as the principal basis for furnishing jurisdiction over a person, problems frequently arise involving the testimony of absent or non-resident witnesses. Often, the forum does not require the witness' physical presence, but only his testimony. This power to procure testimony from an absent or non-resident witness is fundamentally a judicial power of any sovereign and is restricted by a sovereign's territorial boundaries. In the absence of a treaty, convention, statute, or judicial authorization, a state may not send a representative outside of the state and into another state or country and there permit him to exercise his power to compel the absent or non-resident witness to testify. This would clearly interfere with the sovereignty of the sister state or foreign country.[9]

What techniques then exist to assist persons in obtaining evidence in a foreign country needed for the vindication of their rights in the courts of their home country? In U.S. law there are a number of such techniques, including direct subpoena of the evidence by the domestic courts (F.R.C.P. 26),[10] desposition on notice and deposition on commission, as provided by F.R.C.P. 28(b).[11] The most expensive, time-consuming and useful procedure, however, is the use of letters rogatory.[12]

Letters rogatory are,

> the medium, in effect, whereby one country, . . . acting through its own courts and by methods of court procedures peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made and usually granted, by reason of the comity existing between nations in ordinary peaceful times.[13]

When letters rogatory are used, the rules of procedure of the foreign tribunal to which the request for assistance was made control, for a court cannot execute its own laws in a foreign jurisdiction.[14] Moreover, this

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[7] [1978] 1 All. E.R. 434 [hereinafter cited as *Re Westinghouse Electric Corporation Uranium Contracts Litigation*].

[8] 78 D.L.R.3d 3.

[9] Rafalko, *Depositions, Commissions and Letters Rogatory in a Conflicts of Law Case*, 4 DUQ. U.L. REV. 115 (1965).

[10] FED. R. CIV. P. 26.

[11] *Id.* 28(b). For a fuller discussion, *see* Gangel, *The Witness Abroad: Unobtainable Evidence*, 22 N.Y. INTRA. L.R. 288 (1967); Note, 55 B.U.L. REV. 368 (1975).

[12] Note, 46 IOWA L. REV. 619, 630 (1961).

[13] Tiedeman v. The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941).

[14] Note, 23 IOWA L. REV. 92, 93 (1937).

foreign tribunal is under no obligation or compulsion to execute the letters rogatory, the decision ultimately resting upon the tribunal's own discretion whether to enforce them or not.[15] However, comity, as well as the promise of reciprocity[16] contained in each letters rogatory,[17] usually suffices for its execution,[18] provided that such execution neither exceeds the jurisdiction or power of the requested state's judiciary nor interferes with the requested state's sovereignty nor becomes an oppressive burden on the resident of the requested state from whom the evidence is sought.[19]

When given the choice, U.S. courts generally favor depositions over letters rogatory, since under the former the U.S. court procedure is followed and thus the acquired evidence is likely to meet the U.S. court's requirements for admissability.[20] However, in some civil law countries the taking of evidence is regarded as an exclusive function of the sovereign[21] and must be performed according to local procedures. Thus, the fact that depositions can be taken according to a foreign legal system's procedure constitutes both the reason why the U.S. courts favor depositions and why most civil law countries prohibit their use.[22] Consequently letters rogatory are virtually the only effective procedure for foreigners to secure the testimony of witnesses in most of continental Europe.[23] In addition, if the witness abroad is unwilling to testify voluntarily, letters rogatory again become the sole means even in common law countries, since the power to compel testimony often belongs to the sovereign alone.[24]

These unique attributes of letters rogatory became increasingly important as the volume of litigation involving international aspects surged after World War II.[25] The United States in particular, long famous for its "juridical isolationism,"[26] became active in efforts to improve all as-

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[15] *Id.* at 94.

[16] A letters rogatory is properly issued by a court of such general jurisdiction that it could reciprocate the favor granted by the foreign court. Jones, *supra* note 1, at 532.

[17] Revised FED. R. CIV. P. 28(b) adopted the singular term "letter rogatory" contrary to most literature in the field which uses "letters rogatory" for both singular and plural. Professor James Moore said, "Of letters rogatory and mooses—let us hope those learned draftsmen never deal with the subject of moose, for by their logic two moose must surely be two mooses." 4 MOORE'S FEDERAL PRACTICE ¶ 28.05, at 1929 (2d ed. 1976).

[18] Jones, *supra* note 1, at 532.

[19] Note, *Judicial Cooperation in the Taking of Evidence Abroad—The Canada and Ontario Evidence Acts*, 8 TEX. INT'L L.J. 57, 75 (1973).

[20] *See* Gangel, *supra* note 11, at 294.

[21] *Id.* at 295.

[22] "It is the 'inquisitorial' nature of the civil law trial—in sharp contrast to the common law 'adversary' proceeding—which most severely restricts the usefulness of a letter rogatory addressed to a civilian court: under civil law, witnesses are examined by the judge, not by counsel." Jones, *supra* note 1, at 531.

[23] Gangel, *supra* note 11, at 293.

[24] Sklaver, *Obtaining Evidence in International Litigation*, 7 CUM. L. REV. 233, 235 (1976).

[25] *See* Note, 55 B.U.L. REV. 368, n.1 (1975); Jones, *supra* note 1, at 516.

[26] Jones, *supra* note 1, at 517.

pects of international judicial assistance.[27] In 1958, Congress established the Committee of International Rules of Judicial Procedure to study the system of international judicial assistance and to recommend improvements.[28] These efforts resulted in twofold action by the United States: entry into multilateral negotiations and treaties regarding international judicial assistance, and unilateral reform of the domestic procedures for rendering and requesting judicial aid, in the hope that by maximizing the flexibility of the U.S. system other states would be encouraged to reciprocate.[29]

One product of the multilateral negotiations was The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.[30] This convention represents a major advance for letters rogatory procedures. Basically the Convention's procedures attempt to,

> bridge the gap between common-law practice, which places upon the parties to the litigation the duty of privately securing the evidence and presenting it at trial, and the civil law concept of judicial sovereignty under which the obtaining of evidence is a matter primarily for the court with the parties in the subordinate position of assisting the judicial authorities.[31]

Under the Convention, letters rogatory are termed "letters of request" and the principal method of securing international judicial assistance.[32] Each contracting nation is required to designate a central authority to receive these letters of request from foreign courts and to deliver them to the appropriate court within the executing state. The Convention also limits the permissible grounds on which a state may refuse to execute letters unless it took specific exception at the time of signing. Otherwise, the receiving nation may refuse to execute the letters only if its form fails to comply with the Convention requirements, if the execution would require acts beyond the functions of that state's judiciary, or if the execution would be prejudicial to the state's security or sovereignty. Thus, differing legal systems can interact pursuant to one uniform procedural mechanism and need no longer rely on "the vague and uncertain duties imposed by international comity."[33]

These recent improvements in international judicial assistance have been hindered by the strain on international relations caused by the rise of the multinational corporation.[34] Because of a multinational's pres-

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[27] For a discussion of these efforts *see* Jones, *supra* note 1, at 556-62.

[28] Recent Development, *supra* note 4, at 108.

[29] Miller, *supra* note 3, at 1072. One such unilateral reform, the 1964 amendment to 28 U.S.C. § 1782, will be discussed below in reference to the *Lockheed* case.

[30] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

[31] Sklaver, *supra* note 24, at 242.

[32] Note, 55 B.U.L. REV. 368, 381 (1975).

[33] *Id.* at 380.

[34] "[M]ost (75%) of the world's trade and industrial production will by the 1980's be in the hands of 300, or so, global corporations." Vagts, *The Global Corporation and International Law*, 7 J. INT'L L. & ECON. 247, 249 (1972) (citing Angelo, *Multinational Corporate Enterprises*, 125 RECUEIL DE COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 443, 575 (1968)).

ence in more than one nation, international conflict can result from assertions of overlapping jurisdictions.[35] For instance, a host nation, feeling threatened by this new form of foreign investment, "is likely to believe that the maintenance of national independence and sovereignty and its capacity to carry out national policy . . . leave it no other choice . . . than to regard resident foreign subsidiaries as falling within its jurisdiction."[36] But when the multinational corporation involved has significant operations in a number of countries, regulation of the multinational instigated by one host nation is likely to have some extraterritorial effect. Indeed, domestic courts may also use the foreign subsidiary to reach the operations of the foreign parent.[37] Unilateral action by one nation against a multinational corporation is therefore often the source of international friction and can be particularly damaging to the advancement of international judicial cooperation.[38] Not coincidentally, each of the three cases to be discussed deals with the regulation of a multinational.

The 1976 U.S. case, *In Re Letters Rogatory from the Tokyo District, Tokyo, Japan*,[39] adopted a liberal approach with regard to letters rogatory in the regulation of multinationals, the result clearly being influenced by the egregious nature of Lockheed's activities. In that case, on May 28, 1976 letters rogatory issued by a Japanese district court judge, requesting immediate assistance in taking in camera depositions, were presented to the U.S. district court for the Central District of California where the deponent resided. The letters rogatory were issued pursuant to a request by the Tokyo District Public Prosecutor's Office in aid of an investigation of alleged improper payments of money by officers and agents of Lockheed, a U.S. corporation, to Japanese citizens.[40] The U.S. witnesses whose depositions were sought by the letters rogatory were not the subjects of the investigation.

On June 15, 1976, the U.S. district court issued a stay to block the taking of the depositions, and the U.S. district attorney, appointed by the district court to preside over the depositions, filed a motion to terminate the stay. This motion was granted by the U.S. Court of Appeals for the Ninth Circuit, which resolved the issue of whether the letters rogatory in this case were issued to obtain testimony for use in a foreign "tribunal" as

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35 Hollmann, *Problems of Obtaining Evidence in Antitrust Litigation: Comparative Approaches to the Multinational Corporation*, 11 TEX. INT'L L.J. 461, 462 (1976). Some writers have expressed the problems in fundamental terms: "Reduced to its simplest terms there is an inherent conflict between the objectives of the international corporation and the nation-state." Goldberg & Kindleberger, *Toward a GATT for Investment: A Proposal for Supervision of the International Corporation*, 2 LAW & POL'Y INT'L BUS. 295, 296 (1970).

36 J. BEHRMAN, NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE 9 (1970).

37 Hollmann, *supra* note 35, at 463.

38 Note, *supra* note 19, at 57.

39 539 F.2d 1216.

40 Japan and the United States had entered a mutual assistance agreement entitled: 'Procedures for Mutual Assistance in Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter," and a copy accompanied the letters rogatory. *Id.* at 1217.

that term is used in 28 U.S.C. § 1782.[41] Prior judicial interpretations of section 1782 had indicated that the requesting foreign "tribunal" must be acting as an adjudicatory body capable of resolving controversies for the request to be granted.[42] A third circuit case cited by the *Tokyo* court, *In re Letters Request to Examine Witnesses From the Court of the Queens Bench for Manitoba, Canada*,[43] affirmed a district court ruling that "section 1782 was not intended to and does not authorize the United States courts to compel testimony on behalf of foreign government bodies whose purpose is to conduct investigations unrelated to judicial or quasi-judicial controversies."[44]

The *Tokyo* court noted, however, that the previous language of section 1782, replaced by the 1964 amendment, had been more limiting. The words "any judicial proceeding pending in any court in a foreign country" were replaced with "a proceeding in a foreign or international tribunal."[45] The *Tokyo* court reasoned that Congress intended to broaden the prior law and permit extension of international judicial assistance to bodies of quasi-judicial or administrative nature.[46] Therefore, since the Tokyo public prosecutor was empowered to make the final decision to prosecute, his investigation was sufficiently related to "judicial or quasi-judicial controversies." *Manitoba* was distinguished on the ground that the investigatory entity requesting assistance in that case was empowered only to make recommendations to a non-judicial body.[47] By de-emphasizing the character of the foreign body seeking assistance, this decision clearly accommodated the congressional intent to broaden the scope of international judicial assistance through unilateral procedural reform.[48]

The British and Canadian cases, on the other hand, do not reflect the liberality exhibited in the *Tokyo* case. Significantly, those countries face two factors not before the U.S. courts with respect to letters rogatory: (1) the United States' unique method for determining the extent of its own jurisdiction, and, (2) the United States' unusual rules of discov-

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[41] Section 1782(a) reads as follows:

> The distict court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . .

28 U.S.C. § 1782 (1966).

[42] In re Letters Rogatory Issued by the Director of Inspections of the Government of India, 385 F.2d 1017 (2d Cir. 1967).

[43] 488 F.2d. 511 (9th Cir.), *aff'g* 59 F.R.D. 625 (N.D. Cal. 1973).

[44] 59 F.R.D. 625, 627 (N.D. Cal. 1973).

[45] 539 F.2d at 1218.

[46] The Tokyo court cited the House Reports: "The word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts." *Id.* (quoting H.R. REP. NO. 1052, 88th Cong., 1st Sess. 9, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3782, 3788).

[47] 539 F.2d at 1219.

[48] Recent Development, *supra* note 4, at 109.

ery. For purposes of determining jurisdiction, many nations apply the objective test of territoriality.[49] However, U.S. courts adhere to the "effects doctrine" as first stated in *United States v. Aluminum Co. of America (Alcoa)*.[50] This doctrine permits a state to "impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[51] It is often contended that this assertion of jurisdiction beyond national boundaries violates the sovereignties of other nations and contravenes international law.[52] The dilemma for U.S. courts is whether to enforce their own laws effectively through the use of the effects doctrine, or to follow a policy of judicial non-interference in areas that have significant impact on U.S. foreign relations, on the theory that the conduct of foreign relations is reserved for the executive and legislative branches.[53] The latter approach requires the courts to respect the laws of other sovereign states "even though they may differ in economic and legal philosophy from our own."[54] United States courts have demonstrated little hesitancy in resolving this dilemma. As one writer has observed:

> No other nation [aside from the United States] has expanded the geographic scope of its domestic legislation, especially in antitrust and shipping, to the point of exercising some degree of regulatory control over the economic activities of other countries within those countries. No other nation has been able to assert successfully the right to enforce its legal process outside its own territory.[55]

England, and especially Canada, have been major victims of the extra-

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[49] Maechling, *Uncle Sam's Long Arm*, 63 A.B.A.J. 373 (1977).

[50] 148 F.2d 416 (2d Cir. 1945).

[51] *Id.* at 443.

[52] As one Canadian official declared:

> What we are concerned about is the possible effect of the decree asked for in the United States so far as it may require directors of Canadian companies to take certain actions with respect to the operation of those companies in Canada, which actions would not be dictated by the requirements of Canadian law, or be in accord with Canadian business or commercial policy, but would be dictated by requirements of United States law and be in accord with United States policy.

H.C. DEB. (Can.), 1959, Vol. I, at 618, *as quoted in* Note, *supra* note 19, at 66.

[53] Backer, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977).

[54] Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747, 752 (1974), (*citing Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); for one solution, *see* Comment, *"Be No Longer A Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 NW. U.L. REV. 733 (1977).

[55] Maechling, *supra* note 49, at 373. Of course, the EEC has asserted the application of its antitrust provisions beyond its boundaries. Maechling adds:

> A jurisdictional dispute in a particular case theoretically is supposed to be settled according to the principle of comity, whereby the parties make an objective judgment as to which state has the paramount interest and then defer to it. But comity is effective as an arbiter only if all parties concerned, especially governments, show respect for the reserved domain of other states and exercise judicial restraint. These qualities have been notably deficient in American courts and regulatory agencies for the last few decades.

Id.

territorial application of U.S. law.[56]

While other countries object to this extraterritorial extension of substantive U.S. law, they also object to the extraterritorial extension of U.S. procedural law in the form of broad discovery.[57] Foreign nations argue that national sovereignty requires that persons residing in a state not be forced to submit to a broader form of inquiry with regard to an action pending in a foreign court than they would be forced to undergo if the litigation were being conducted in the state, regardless of considerations of international cooperation and comity, the importance of the evidence, and the burden on the witness.[58] Illustrative of this point of view was the case of *Radio Corporation of America v. Rauland*,[59] a 1956 British case which was also adopted as binding in Canada.[60] In this case, the British court refused to execute letters rogatory issued by a U.S. court that requested, in keeping with the Federal Rules of Civil Procedure, evidence that though itself inadmissable at trial might have led to other evidence that would have been admissable. Speaking for the court, Lord Goddard termed such a procedure a "fishing proceeding, which is never allowed in English courts."[61]

The British and Canadian cases exemplify the jurisdiction and discovery objections examined above. Both cases had their origins in the Westinghouse Electric Corporation uranium contracts litigation begun in 1975 by sixteen U.S. public utility companies.[62] Briefly stated, Westinghouse entered into contracts to supply uranium to these companies for specified periods at essentially a fixed base price subject only to an escalation clause to meet increases in the general cost of living. But after 1973, the price of uranium increased from six to forty-one dollars per pound.

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[56] Note, *supra* note 19, at 60-67.

[57] Foreign countries also object when U.S. courts, after finding jurisdiction over foreign corporations or individuals through use of the various "long-arm" statutes, issue discovery orders directly to the foreign party. To combat this alleged invasion of their sovereignty, many countries have passed laws with criminal penalties which prohibit the removal or disclosure of certain documents. In *Societé International pour Participations Industrielle et Commerciales, S.A. v. Rogers* (357 U.S. 197 [1958]) the U.S. Supreme Court responded by holding that foreign illegality is not necessarily a valid excuse for non-production of court-ordered documents. On these developments one writer has said:

> The non-disclosure statutes are objectionable. They are not designed as norms of conduct for intrinsically condemnable conduct, but are used instead to thwart the foreign administration of justice and as levers in commercial competition between nations. Coercing the waiver of these laws by applying the *Societé* rule is also objectionable, since it puts the United States courts in the position of selecting which foreign laws they will ignore, or more precisely, which United States policies have primacy over which foreign values.

Note, *supra* note 54, at 770; *see also* Onkelinx, *Conflict of International Jurisdiction: Ordering Production of Documents in Violation of Law of Situs*, 74 NW. U.L. REV. 487 (1969).

[58] Note, *supra* note 19, at 68.

[59] [1956] 1 Q.B. 618.

[60] Re Radio Corp. of America v. Rauland Corp. et al., 5 D.L.R.(2d) 424 (1956); *see* Note, *supra* note 19, at 63.

[61] [1956] 1 Q.B. 649.

[62] For a discussion and analysis of the case, *see* Joskow, *Commercial Impossibility, The Uranium Market and The Westinghouse Case*, 6 J. LEGAL STUDIES 119 (1977).

Westinghouse notified the utility companies with which it had contracted to supply uranium that, in its view, because of this unforeseen contingency the contracts had become "commercially impracticable" and thus unenforceable under section 2-615 of the Uniform Commercial Code.[63] The utility companies charged Westinghouse with breach of contract and claimed equitable relief as well as sizable damages. Westinghouse contended that ordinary competitive price fluctuation and normal inflationary factors were not primarily responsible for the great leap in uranium prices. Rather it maintained that the price of uranium had been manipulated by the concerted actions of certain foreign governments and producers acting as a cartel to increase the price level artificially. This alleged international uranium cartel included uranium producers in Australia, South Africa, France, Canada, and Great Britain. Acquiring evidence from these foreign non-resident producers was therefore crucial to Westinghouse in the development of its defense of commercial impracticability. Such acquisition, however, proved to be tremendously difficult.[64]

On Westinghouse's application in early 1977, the U.S. District Court for the Eastern District of Virginia in Richmond issued letters rogatory to the appropriate courts in Canada and the United Kingdom. In the June 1977 Canadian decision, *Re Westinghouse Electric Corporation and Duquesne Light Company, et al.*,[65] the court refused to enforce the letters rogatory. Judge Robins recognized the conventional argument most often invoked to oppose letters rogatory issued by a foreign court, *i.e.*, that the letters should be executed only if "it is clear that what is intended is the taking of evidence for the purpose of trial" and not for the broader purposes of American discovery.[66] The judge quoted *Radio Corporation* in stating that, "[t]estimony, if it can be called 'testimony,' which consists of mere answers to questions on the discovery proceeding designed to lead to a train of questions, is not permissible."[67] To determine precisely which sort of "testimony" the foreign court was seeking, Judge Robins asserted that he was entitled to go beyond the letters rogatory themselves and examine extrinsic evidence. Unfortunately for Westinghouse, the extrinsic evidence used was a transcript of the Federal Court proceeding in Richmond in which the presiding judge, Judge Merhige, stated: "I don't know how relevant the evidence is going to be, but be that as it may, I have good lawyers here. It may lead to something."[68] Consequently, Judge Robins sensed a fishing expedition.

A strict application of the *Radio Corporation* decision would have been fatal to Westinghouse from the start, but the Canadian judge re-

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63 U.C.C. § 2-615 (1978).
64 *See* Note, *supra* note 19, at 119-21.
65 16 Ont. 2d 273 (H.C. 1977).
66 78 D.L.R.(3d) at 15.
67 *Id.*
68 *Id.* at 17.

jected that approach by recognizing that "there is often, if not always, an element of discovery in examinations conducted pursuant to letters rogatory from a United States Court and their enforcement ought not to be viewed in too narrow or technical a way."[69] However, Judge Robins went on to specify a second overriding reason for refusing to execute the letters rogatory. Quoting liberally from affidavits and public statements, Judge Robins indicated that as a matter of public policy, the Canadian government did specifically request and approve of the participation of Canadian uranium producers in an informal marketing arrangement, and that in the public interest the court must prohibit the production or discovery of the documents relating to the marketing of uranium. He maintained as fundamental that the basis for execution of letters rogatory between the United States and Canada, *i.e.* comity, should not be applied when to do so would violate the public policy of the requested state. Furthermore it is not appropriate for a foreign tribunal to determine whether actions taken by or on behalf of the Canadian government violated the laws of that foreign tribunal.[70]

Of utmost importance to Judge Robins were two further developments. First, on the same day the letters rogatory had been issued, Westinghouse had also launched an action in the U.S. District Court for the Northern District of Illinois against twenty-nine uranium producers, including several that were Canadian, alleging violations of the Sherman Act and claiming treble damages as relief. Second, the United States Department of Justice, pursuant to its investigation of possible antitrust violations by Canadian producers, had empanelled a grand jury in the District of Columbia which had subpoenaed Westinghouse requiring production of any documents and testimony obtained during discovery, notwithstanding the protective orders issued by the federal court in Richmond. Judge Robins explained, "I am not satisfied that the testimony and documents in this case are really for the purpose of trial or necessary for the purpose of justice . . . . I have become convinced that the principal reason the evidence and productions is being pursued is not for the Richmond hearing."[71]

The case of *Re Westinghouse Electric Corporation Uranium Contract Litigation*[72] came before the British House of Lords at a time when the letters rogatory issued by the federal district court had already been denied by Australia, Canada, France and South Africa. Evidently, in those countries "regulations had been passed so as to forbid the documents of the cartel being disclosed."[73] The case appeared as though it might be the last chance for Westinghouse to obtain the information it needed for its commercial impracticability defense.

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[69] *Id.* at 19.
[70] *Id.* at 21-22.
[71] *Id.* at 19.
[72] [1977] 3 All E.R. 703.
[73] *Id.* at 707.

The letters rogatory in this instance requested documents and testimony from the Rio Tinto Zinc Company, an English company, and its principal directors. The Court of Appeal decision[74] followed a strictly formal, literal analysis of the letters rogatory without reference to extraterritorial application of foreign laws or national sovereignty. The British Court of Appeal avoided application of the *Radio Corporation* test on two grounds. First, Judge Merhige of the federal district court, possibly in response to his experience with the Ontario Court, had in this case supplemented the letters rogatory with a clear statement that the documents were needed, not for pre-trial discovery, but for use at the trial itself. Lords Denning, Roskill and Shaw of the Court of Appeal felt no need to look for more extrinsic evidence that the information sought was for use at trial. Second, the Court of Appeal noted that the Foreign Tribunals Evidence Act of 1856, upon which the *Radio Corporation* case was based, had been replaced by the Evidence Proceedings in Other Jurisdictions Act of 1975, and that the 1975 Act had been passed so as to give effect to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters and its stated purpose of "facilitating the transmission and execution of letters of request and to further the accommodation of the different methods that nations use for this purpose." The United States had also ratified this Convention; thus the Convention's terms were applicable to this transaction. The Court of Appeal looked to the liberal spirit of the Hague Convention for its interpretation, rather than referring back to "a line of judicial decisions, albeit of high authority, under a statute in different terms passed in different circumstances about 125 years ago."[75]

However, one premise upon which the British Court of Appeal based its analysis was clearly erroneous. Article 23 of the Hague Convention permits a contracting state, at time of ratification, to declare that it will not execute letters of request issued for the purpose of obtaining pretrial discovery. Although the United Kingdom had made such a declaration at the time of ratification, the Court of Appeal specifically based its findings on the assumption that the United Kingdom had not taken advantage of Article 23.[76]

The Court of Appeal opinion also discussed the argument for "privilege" made by counsel for the individual witnesses, although such discussion was only a preliminary view requested by the parties—no official claim of privilege had been made. British law does allow a person to refuse to answer any question in a legal proceeding if in so doing he would be exposed to criminal proceedings or be subject to penalties provided by law. This would have presented no difficulty under the old law

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[74] *Id.*

[75] *Id.* at 713. Lord Roskill added, "We move in 1975 in a very different world from that of 1856."

[76] *Id.* at 709.

of England, which provided for no relevant penalties. But as Lord Denning stated, "[since] 1972 everything is different. We are now in the European Economic Community. The EEC Treaty and all its provisions are now a part of the law of England . . . ."[77] And the witnesses, if forced to testify, could well be found to have breached Article 85 of the Treaty of Rome and thus be subject to the penalties imposed by General Regulation 17 of February 6, 1972.[78] The Court of Appeal recognized as a preliminary view that if a privilege were actually claimed it could well defeat enforcement of the letters rogatory.[79]

Both parties appealed the decision to the House of Lords to discover if the *Radio Corporation* case would be effectively repudiated and, if so, what obstacles to letters rogatory would remain. Lord Wilberforce, writing for the Lords, stated that:

> the Court of Appeal, while correctly stating that the 1975 Act was a new Act, may have been led to treat it as dealing more liberally than its predecessor with pre-trial discovery. I do not so regard the Act; on the contrary, it appears to me that it takes a stricter line.[80]

The *Radio Corporation* case was still effective precedent. Wilberforce also refused to accept at face value Judge Merhige's contention in the letter that the evidence was sought solely for trial, recognizing that the letter was drafted after "consultation with eminent counsel from England" with the *Radio Corporation* case in mind. Lords Fraser, Keith and Viscount Dilhorne all supported Lord Wilberforce on these points. Lord Diplock, however, disagreed with his colleagues in a well-reasoned opinion:

> I would not be inclined to place any narrow interpretation on the phrase in the Evidence Act of 1975 'evidence . . . to be obtained for the purposes of civil proceedings . . . .' The English court cannot be expected to know the systems of civil procedure of all countries from which requests for an order under the 1975 Act may come. It has to be satisfied that the evidence is required for the purposes of civil proceedings in the requesting court but, in the ordinary way in the absence of evidence to the contrary, it should, in my view, be prepared to accept the statement by the requesting court that such is the purpose for which evidence is required.[81]

However, it was clear to the lords that the Court of Appeal had erred with regard to the United Kingdom's obligations under the Hague Convention. The House of Lords could have reversed the Court of Appeal decision on this basis and accordingly denied the American request for evidence without further explanation. But each lord chose instead to devote a large part of his opinion to a discussion of the acts and motives of the United States Government in regard to this proceeding.

Lord Wilberforce noted three considerations regarding how the sov-

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[77] *Id.* at 711.
[78] *Id.* at 712.
[79] *Id.* at 713.
[80] [1978] 1 All. E.R. at 442.
[81] *Id.* at 461-62.

ereignty of the United Kingdom might be prejudiced if the letters rogatory were executed in this instance:

> (a) Her Majesty's Government considers that the wide investigatory procedures under the United States anti-trust legislation against persons outside the United States who are not United States citizens constitutes an infringement of the proper jurisdiction and sovereignty of the United Kingdom.
>
> (b) That the American grand jury in the District of Columbia have issued a subpoena to Westinghouse requiring that company to produce to the grand jury documents and testimony obtained in discovery in the Virginia proceedings. Therefore evidence given in pursuance of the letters rogatory will be available to the United States Government for use against a United Kingdom company and United Kingdom nationals in relation to activities occurring outside the United States territory in anti-trust proceedings of a penal character.
>
> (c) That the intervention of the United States Government followed by the grant of the order of immunity of 18 July 1977 shows that the execution of the letters rogatory is being sought for the purposes of the exercise by United States courts of extra-territorial jurisdiction in penal matters which in the view of Her Majesty's Government is prejudicial to the sovereignty of the United Kingdom.[82]

This last paragraph refers to the fact that, despite the stated policy of the U.S. Department of Justice that immunity would not be granted to a witness in private litigation, the Department did grant immunity to the Rio Tinto witnesses, causing Judge Merhige to withdraw his previous ruling that these witnesses were protected from testifying by the fifth amendment to the United States Constitution. In a formal communication delivered to the State Department, British officials voiced their concern over this attempt by the Department of Justice to obtain evidence for a criminal antitrust investigation by intervening in a civil suit. The British stressed the importance of settled procedures as protection for the rights of individuals and expressed the "strong hope that the Department of Justice will desist from its attempts to undermine these procedures and discontinue its intervention. . . ."[83]

Lord Wilberforce believed that such action by the Department of Justice resulted from extraordinary circumstances relating to the public interest and policy of the United States, rather than directly from the civil proceedings in Richmond. He concluded that:

> [I]f public interest enters into this matter on one side, so it must be taken account of on the other; and as the views of the executive in the United States of America impel the making of the order, so must the views of the executive in the United Kingdom be considered when it is a question of implementing orders here. It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack.[84]

The letters rogatory requested by Westinghouse in this litigation were thus never consummated because of their prejudicial effect on the

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[82] *Id.* at 448.
[83] *Id.* at 458.
[84] *Id.* at 448.

sovereignty of the United Kingdom, as well as for their technical insufficiency under prevailing British standards.

Taken together these three cases illustrate the various hurdles in the path of both the procedure for letters rogatory in particular and international judicial assistance in general. When the larger national policy issues involving questions of jurisdiction and conflicts of law are answered, as in the *Lockheed* case, most nations favor the less restrictive procedural requirements for letters rogatory. Indeed it is significant that the *Lockheed* case can be considered representative of this general trend, for as late as 1965 the United States was still regarded as "somewhat behind the other countries in rendering judicial assistance honoring letters rogatory."[85] The great increase in international transactions which has occurred and is still occurring will supply the impetus to continue this trend.

The Canadian and British cases on the other hand illustrate the use of judicial roadblocks thwarting the execution of letters rogatory in order to avoid the extraterritorial application of another nation's laws. As was shown in these cases, when the courts of a foreign nation are relied upon to respond to unilateral attempts at regulation of multinational corporations, the results are often "undignified international altercations between nations professing adherence to a system of law and mutual respect for each other's laws and legal institutions."[86] The legal fictions and frictions that develop when a nation's judiciary takes responsibility for decisions directly affecting the nation's foreign policy in this way seriously impede international judicial assistance and such innovations as the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Clearly the ultimate solution is for the executive or legislative branches of all countries to join together and resolve jurisdictional conflicts of law problems, instead of beginning with collateral issues like letters rogatory.[87] However, the bilateral and multilateral agreements envisioned here which would regulate multinationals in place of unilateral regulation are probably not a viable alternative in the near future. At least for now, only the courts offer hope of "curbing the anarchical extension of jurisdictional claims. Only the courts provide a means for giving proper weight on the scales of justice to principles of international order."[88]

—THOMAS LAND FOWLER

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[85] Rafalko, *supra* note 9, at 121.

[86] Feltham, *The Extraterritorial Application of Domestic Law II Antritrust Law: the Canadian Radio Patents Case and the Peat Moss Case*, 1 U.B.C.L. REV. 340, 352 (1960).

[87] Note, *supra* note 9, at 82; Note *supra* note 54, at 770.

[88] Maechling, *supra* note 49, at 380.