ROBERT R. MERHIGE, JR.*

The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence

In late October, 1975, the Judicial Panel on Multi-District Litigation transferred thirteen cases to me for consolidated pre-trial discovery.[1] These were suits brought by a number of electrical utility companies against Westinghouse. Each to a large extent involved an alleged contractual obligation on the part of Westinghouse for the present or future delivery of uranium to fuel nuclear power plants operated by the plaintiff utilities or planned for operation by them in the near future. In general terms, Westinghouse contended that its performance has been made commercially impracticable by the occurrence of certain unforeseen events, including the creation of a cartel among foreign and domestic producers of uranium which dramatically forced the price of uranium upward during the critical period.[2] Damages sought by the plaintiffs aggregate amounts in the billions of dollars.

Footnotes have been prepared by Margaret K. Pfeiffer, Esq. of the New York and District of Columbia Bars.

*United States District Judge, Eastern District of Virginia.

[1] *In re* Westinghouse Elec. Corp. Uranium Contract Litigation, 405 F. Supp. 316, 319 (J.P.M.D.L. 1975). The cases transferred were: Northeast Utils. Serv. Co. v. Westinghouse Elec. Corp., Civ. No. H-75/373 (D. Conn. 1975); Consolidated Edison Co. of N.Y. v. Westinghouse Elec. Corp., Civ. No. 75CV5503-CHT (S.D.N.Y. 1975); Long Island Lighting Co. v. Westinghouse Elec. Corp., Civ. No. 75C1878 (E.D.N.Y. 1975); South Carolina Elec. & Gas Co. v. Westinghouse Elec. Corp., Civ. No. 75-1863 (D.S.C. 1975); Florida Power & Light Co. v. Westinghouse Elec. Corp., Civ. No. 75-2319 (S.D. Fla. 1975); Alabama Power Co. v. Westinghouse Elec. Corp., Civ. No. 75-P1892S (N.D. Ala. 1975); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., Civ. No. 75-0514-R (E.D. Va. 1975); Tennessee Valley Auth. v. Westinghouse Elec. Corp., Civ. No. 3-75-298 (E.D. Tenn. 1975); Texas Utils. Servs., Inc. v. Westinghouse Elec. Corp., Civ. No. 3-75-1241C (N.D. Tex. 1975); Houston Lighting & Power Co. v. Westinghouse Elec. Corp., Civ. No. 75-H-1729 (S.D. Tex. 1975); Union Elec. Co. v. Westinghouse Elec. Corp., Civ. No. 75-893C(3) (E.D. Mo. 1975); Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp., Civ. No. 75-250-C6 (D. Kan. 1975); Wisconsin Elec. Power Co. v. Westinghouse Elec. Corp., Civ. No. 75-C-571 (E.D. Wis. 1975).

[2] *See in re* Westinghouse Elec. Corp. Uranium Contract Litigation, 436 F. Supp. 990, 991 (J.P.M.D.L. 1977).

The population of the areas served by the plaintiff utilities approximates 50 million people. In short, the cases are of an incredible magnitude in terms of national interest and monetary potential.

On October 21, 1976, at the request of Westinghouse, letters rogatory were issued for Canadian, Australian and English courts. Westinghouse sought the right to obtain evidence by way of depositions of certain British subjects who were alleged to be employees associated with Rio Tinto Zinc Corporation, a large British uranium producing company. The right of Westinghouse to proceed in this fashion was challenged by certain of the witnesses named in the letters rogatory.[3] Issues involving first-impression interpretation of the British Evidence (Proceedings In Other Jurisdictions) Act, 1975, Ch. 34[4] were addressed to the British courts. After receiving

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[3]Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., (1978) 1 All E.R. 434, 440, 451 (H.L. 1977) (E).

[4]This Act implements the principles of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 1968, 23 U.S.T. 2555, T.I.A.S. No. 7444, 658 U.N.T.S. 10, to which the United Kingdom is a signatory.

The Act provides, in pertinent part:

1. Where an application is made to the High Court . . . for an order for evidence to be obtained . . . , and the court is satisfied—
   (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ("the requesting court") exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and
   (b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,
   the High Court, . . . , shall have the power conferred on it by the following provisions of this Act.
2. (1) Subject to the provisions of this section, the High Court . . . shall . . . have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence . . . as may appear to the Court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the Court may consider appropriate for that purpose.
   (2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision—
   (a) for the examination of witnesses, either orally or in writing;
   (b) for the produciton of documents;
   (c) for the inspection, photographing, preservation, custody or detention of any property;
   (3) . . . a person should not be compelled . . . to give any evidence which he could not be compelled to give—
   (a) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or
   (b) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.
   (4) An order under this section shall not require a person—
   (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
   (b) to produce any documents other than particular documents specified in the order as appearing to the Court making the order to be, or to be likely to be, in his possession, custody, or power.

adverse rulings at three judicial levels,[5] Rio Tinto Zinc witnesses appealed to the Supreme Court of Judicature, the Court of Appeal. Lord Denning, Master of the Rolls, stated as follows:

> As this is an urgent matter we will give judgment straight away. It arises out of a dispute now going on in the United States of America. In the 1960s the Westinghouse Electric Corporation made contracts with power companies under which Westinghouse were to build nuclear power stations and to supply them with uranium as a fuel. The prices were stated in the contracts. There was an escalation clause to meet increases in the general cost of living, but not to meet changes in the market price of uranium.
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> At the time when Westinghouse agreed to supply this uranium, the price was comparatively low, but in the middle 1970s, especially after the raising of the oil prices, the price of uranium rose very sharply. In February 1973 it was only $6 a pound, but three years later it had risen to $41 a pound. The result was that Westinghouse found themselves in great difficulty, both in getting uranium and in supplying it to the power stations. So much so that they were unable to fulfill their contracts. They sought to excuse themselves on the ground that the performance of them was "commercially impracticable"; a line of defence with which we are familiar in England, and known as "frustration owing to supervening circumstances."
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> Then the power companies brought proceedings against Westinghouse in the States of Virginia and Pennsylvania. In addition there is an antitrust suit in the State of Illinois. The amount in dispute is extremely large, $2,000 million or £1,000 million sterling.
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> At first sight this dispute seems to have nothing to do with England at all or any of us. But it appears that in Australia about a year ago someone surreptitiously got access to the files of an Australian uranium producer and Westinghouse got hold of those files. They disclosed the existence of an international cartel in uranium. This cartel was an association by which the big producers of uranium combined to regulate the output of uranium and the price of it. We are told that Australia, Canada, South Africa, France and the English company of Rio Tinto were parties to this cartel. Its object is said to have been to manipulate the market in uranium, to limit competition and to force prices up to excessively high levels. The files showed that in about 1972 there was formed a policy committee, an operating committee and a secretariat.

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3. (1) A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give—
   (a) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or
   (b) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.
   (2) Subsection (1) (b) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either—
   (a) supported by a statement contained in the request . . . ; or
   (b) conceded by the applicant for the order; and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

[5] *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, M.D.L. Docket No. 232, [1977] 3 W.L.R. 430, 433 (C.A.).

To aid their defence in America, Westinghouse want to prove the existence of this cartel and its dealings. They want to see all the documents which have been passing between the members and the notes of all the meetings. They desire to show the existence of this "conspiracy," as they would call it, to keep up prices. They have tried and failed in Australia, Canada, France and South Africa. We were told that in those countries regulations have been passed so as to forbid the documents of the cartel being disclosed. Now Westinghouse seek to get them from Rio Tinto in England. . . . We have before us a courteous request from the United States District Court for the Eastern District of Virginia, Richmond Division. It has asked us to order the Rio Tinto Zinc Corporation Ltd. and its principal directors, Sir Mark Cunliffe Turner, Lord Shackleton of Burley and others, to produce the documents relating to this cartel, and also to give evidence here in England. The Federal Judge, Judge Robert R. Merhige, Jr. has issued two letters rogatory (which we call letters of request) addressed to us on October 21, 1976. The actual words are worth noting:—

"The people of the United States of America to the High Court of Justice in England. Greetings:

"Whereas, certain actions are pending in our District Court for the Eastern District of Virginia, Richmond Division, in which the corporations listed in Schedule A attached hereto are plaintiffs and Westinghouse Electric Corporation is defendant, and it has been shown to us that justice cannot be done among the said parties without the testimony, which is intended to be given in evidence at the trial of the actions of the following persons residing in your jurisdiction (the directors of Rio Tinto Zinc) nor without the production of certain documents in the possession of [Rio Tinto Zinc] . . . related to the existence and terms of various agreements, arrangements or concerted practices . . . . And whereas the existence and terms of such agreements, arrangements or concerted practices are relevant to the matters in issue in the actions at present in this court.

"We, therefore, request that in the interest of justice, you cause by your proper and usual process [Sir Mark Cunliffe Turner and others] to appear before any consul . . . of the United States at London . . . to be examined orally as witnesses . . . ."

The letter rogatory finished with the assurance: "and we shall be ready and willing to do the same for you in a similar case when required."

A few days ago on May 20, Federal Judge Merhige made a supplement to these letters in which he makes it clear that the letters rogatory are concerned with material that is required not merely for pre-trial procedure (as it is called in the United States of America) but for evidence and documents for actual use at the trial. . . . He desires that all proceedings here be completed at the earliest possible date, so that the plaintiff shall have an adequate opportunity to consider such testimony and documents in connection with the presentation of heir case.

Such is the request made by the United States Federal Court. It is our duty and our pleasure to do all we can to assist that court, just as we would expect the United States court to help us in like circumstances. "Do unto others as you would be done by."[6]

At status conferences counsel for the parties attempted to keep me advised of the proceedings in England and it was my understanding that counsel for the witnesses opposed the taking of testimony under the letters

[6] *Id.* at 434-36.

rogatory on a number of grounds. Among these were the contentions that Westinghouse was not seeking evidence but rather was engaged upon a discovery exercise, an impermissible practice under English law,[7] and that in no event should the witnesses be required to testify because of their rights to privilege under the Fifth Amendment of the United States Constitution and under English law and the rules of the European Economic Community.[8] Lord Denning made these observations in the judgment of the Court of Appeal:

> It only applies to individuals and not to companies—an interesting contrast to Article 85 which only applies to undertakings and not to individuals.
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> So far as procedure is concerned, if privilege is claimed because of the risk of a fine by the European Commission, the procedure is governed by R.S.C., Ord. 39, R. 5. If the witness refuses to answer the question, an application can be made to the court to see whether he can be required to answer; and then the court will rule upon his claim. If privilege is claimed under the Fifth Amendment, the examiner will have to act under the new R.S.C. Ord. 70, R. 6. The examiner will have to take down the evidence, seal it up and send it across to the United States: and then the United States court will rule whether the claim is good or not.[9]

The Court continued through Lord Justice Roskill:

> We are not concerned with assisting or not assisting Westinghouse. We are *concerned with, and only concerned with, assisting the Federal Court* for the District of Richmond in Virginia. It is *that* Court which has enlisted our assistance by letters rogatory and it is that Court which, to use Lord Denning M.R.'s phrase, it is both our duty and our pleasure and our power under the Act of 1975 to assist, so far as we properly can.
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> Accordingly, for those reasons, I agree with what Lord Denning, M.R. has said about privilege. So far as the Fifth Amendment is concerned, I propose to say very little. Mr. Kidwell has said that we should make it a condition of the issue of the order that a master should act in place of the United States Consul or Vice-Consul for the purpose of taking any evidence that may be given under the letters rogatory and that such a master should be appointed by the Judge in Virginia. *The purpose was that a ruling on this privilege on behalf of the Judge might be given instantly so that no problem of delay would arise in connection with any*

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[7] *See, e.g.,* Radio Corp. of America v. Rauland Corp., [1956] 1 Q.B. 618, 649:
"It is an endeavor to get in evidence by examining people who may be able to put the parties in the way of getting evidence. That is what we should call mainly fishing proceedings, which is never allowed in the English courts."
The House of Lords has held that the passage of the 1975 Act has not changed this attitude toward pre-trial discovery. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434, 441-42, 450 (H.L. 1977) (E).

[8] Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434, 444. (H.L. 1977) (E). *See in re* Westinghouse Elec. Corp. Uranium Contract Litigation M.D.L. Docket No. 235, [1977] 3 W.L.R. 430 (C.A.); *In re* Westinghouse Elec. Corp. Uranium Contract Litigation M.D.L. Docket No. 235, [1977] 3 W.L.R. 492 (C.A.).

[9] *In re* Westinghouse Elec. Corp. Uranium Contract Litigation M.D.L. Docket No. 235, [1977] 3 W.L.R.-at 441 (C.A.).

> *witness who invoked the Fifth Amendment.* All I would say is that I think it would be quite wrong for this court to presume to dictate before whom these proceedings should take place. That, it seems to me, must be a matter for the court in Virginia and not for this court. If the proceedings are to be held in the near future in London, it must be a matter for the Judge in Virginia to say by his order who is to sit where: *possibly either he himself or a master appointed on his behalf* on a Consul or Vice-Consul as the present order provides. (Emphasis supplied).[10]

Thereafter the taking of evidence commenced at the American Embassy.

Prior to convening for the taking of depositions, counsel had suggested that it would be appropriate and beneficial to the interest of all parties if I would make arrangements to preside over the depositions. It should be remembered that we were rapidly approaching the day that the case was scheduled to commence. Thinking that necessity for rulings could probably be handled by telephone, I at that time declined to go to England for these purposes.

Nevertheless, novel questions of English and American law were developing and in anticipating the need for a more experienced presiding officer than a vice-consul attached to the Embassy, William B. Spong, Jr., Dean of William and Mary Law School, was appointed as Special Master. It was agreed, however, that he would not go to London unless it should develop that his presence there was needed.

Depositions commenced on schedule in London before a vice-consul and the record which I soon received was replete, not with questions and answers from the witnesses, but colloquy between counsel.

Witnesses were represented by both English and American counsel, and it was apparent that they would resist giving testimony by any means properly available to them under English or American law. Ultimately, a conference telephone call was put through to me with both the English and American counsel requesting in most urgent terms that I personally preside over the proceedings. I acquiesced pursuant to our understanding that the Dean accompany me, the thought being that perhaps once I had made certain rulings I could leave the balance of the proceedings to the Dean.

Testimony was first taken from Mr. Price, Secretary of the Uranium Institute, who testified freely and fully without claiming any privilege. Thereafter certain witnesses were called and each, after giving his name, refused upon advice of counsel to answer any further questions, claiming privilege under the Fifth Amendment of the United States Constitution. After extensive argument, I ruled that although these witnesses were British subjects, subpoenaed to testify on British soil, they had the right to avail themselves of the privilege against self-incrimination under our Constitu-

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[10] *Id.* at 443, 445.

tion.[11] It should be pointed out that at this same time a federal grand jury was sitting in the District of Columbia investigating the possibility of antitrust violations by uranium producers. Immediately after my ruling on the Fifth Amendment, *i.e.*, the following morning, after having flown all night, two members of the Justice Department Antitrust Division appeared and presented to me a letter from the Department stating that it would not prosecute any of the witnesses on the basis of any testimony given in the depositions.[12] It was urged that this letter was sufficient to grant immunity, and thereby remove the previously established rights of the witnesses to claim privilege under the Fifth Amendment. Counsel for Westinghouse and for the United States Department of Justice strenuously argued that this was so. English and American counsel for the witnesses strenuously argued that since the letter did not conform to our immunity statutes, it was not sufficient to waive the Fifth Amendment rights.

While I concluded that the letter would bar the Department of Justice from using any testimony given by these witnesses in any prosecution of them under our antitrust laws, I also concluded that it was not in conformity with the requirements of our immunity statutes and hence the decision to be made was one based upon discretion as distinguished from mandatory requirements of the immunity statutes.[13] My view of the matter was that the overriding consideration was to accord the British witnesses every benefit of the doubt, and every opportunity to protect their legal rights. It was obvious that the English court, should I order the testimony given, would be called upon, in the event that the witnesses continued refusal, to consider sanctions, and I held as follows:

> We deal here with a matter involving both the British and American courts. The efficient and expeditious manner in which the British courts have acted in the spirit of total cooperation and the interest of comity and justice should be a source of pride to the citizens of both countries. I, for one, on a personal basis, am very proud of the fact that they and I are part of a profession whose sole desire and function is to do justice under the law. I'm very impressed with the British judges. When an American court, as in the instant case, asks a British court to require its citizens to attend judicial proceedings of an American court to which, indeed, said British are not litigants, in light of Congress' more recent assertion of its power in matters dealing with countries, it is my view that both countries are better served by the utilization of the statutory scheme. Then, our British friends and the British court if called upon to issue sanctions against their own citizens, would know that any such request was not precipitated by the exercising of one Federal Judge's discretionary power. The statutory scheme removes from this court any discretion, for if it is in proper form, as a judge I

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[11] Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434, 445 (H.L. 1977) (E).

[12] *Id.* at 445-46; 458, 465-66.

[13] 18 U.S.C. §§ 6002-6003 (1970).

would have no recourse but to grant the immunity sought, and I remain available to entertain any such motion.Then all would know that the matter had been given consideration by the highest officer of the executive branch or his designee charged with responsibility for criminal investigations and prosecutions. His approval of the United States Attorney seeking any such order would be premised on authority granted by the Congress of the United States. In short, and as Mr. Justice Jackson implied, in the Steel Seizure Cases,[14] the Government is acting with its fullest authority when the Executive acts pursuant to a Legislative delegation. In my view, the British court and its citizens are entitled to no less an authority.[15]

[14]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[15]Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434, 445-46 (H.L. 1977) (E).