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Overview of International Judicial Assistance

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I. Defining International Judicial Assistance

"International judicial assistance and cooperation" connotes a great many things to a great many people. It refers to a broad array of subjects in both civil and criminal law. In the civil area, we deal with such diverse subjects as the taking of evidence abroad, the service of process abroad, enforcement of foreign judgments, and finally, legal aid which may be granted by courts to foreign litigants (attorneys' fees and other aid to indigents, and provisions for security for costs). With respect to a number of these subjects, the United States has thus far done little. However, in the past two decades, we have made considerable progress in the areas of taking of evidence and service of process in transnational litigation. During this period, the United States ratified two multilateral conventions on these subjects. There is also the related area of administrative law where considerable progress has been made in cooperation with foreign authorities in tax investigations, customs matters, and security regulations.

In the criminal area, the United States has been active from the earliest days in the field of extradition—the only area of criminal judicial assistance in which we engaged. There are, however, other areas in the criminal field—in which the United States has done little: for example, assistance and cooperation in criminal investigations and enforcement of criminal judgments. I suspect that to the average American attorney the idea that we would enforce a foreign criminal judgment sounds extraordinary. In fact, we now do this under certain circumstances.

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II. U.S. Practice

A. Federal Courts

Turning briefly to United States practice, it is worth noting that in the mid-nineteenth century Congress passed a short Act authorizing federal courts to extend aid to foreign courts in obtaining testimony in this country, provided the proceedings which gave rise to the request were for the recovery of money or property, and provided further that a foreign government was a party to those proceedings.[1] This statute remained virtually unchanged until 1948 when the requirement that a foreign state be a party to the foreign proceedings was dropped. In addition, assistance was no longer limited to suits for the recovery of money or property, but was extended to "any civil action."[2] The following year, the term "civil action" was substituted with "judicial proceeding,"[3] thus enabling our courts to render aid to foreign criminal tribunals.

In 1964, Congress comprehensively revised and modernized all federal statutes dealing with international judicial assistance, and conferred broad discretionary power on federal courts to render assistance to foreign tribunals in civil as well as criminal and administrative matters.[4]

B. International Agreements

Until 20 years ago, however, the United States had—with one exception—no treaties on international judicial assistance. In 1935 we entered into an agreement, consumated by an exchange of diplomatic notes, with the Soviet Union on execution of letters rogatory. Essentially, the agreement provided that if Soviet courts required judicial assistance in this country, they could transmit the requests through diplomatic channels to our State Department. The Department undertook to pass the request on to the appropriate state authorities for such assistance as they might be able to render.[5] Until 1964, this was the only international agreement that we had with any foreign country. Of course, the obligation which we assumed was literally next to nothing. Yet, it was symptomatic of the Federal Government's cautious attitude towards international judicial assistance; the then prevailing view was that the Federal Government had no responsibility in that area, and that under our system of federalism, international judicial assistance was a matter left to the States. At best, at the Federal level, we

[1]Act of March 3, 1863, ch. 95, 12 Stat. 769-70.
[2]Act of June 25, 1948, ch. 646, 62 Stat. 949.
[3]Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103.
[4]Act of October 3, 1964, Pub. L. No. 88-619, 78 Stat. 997.
[5]Agreement relating to the procedure to be followed in the execution of letters rogatory. Exchange of notes at Moscow, November 22, 1935; 49 Stat. 3840, E.A.S. 83.

were prepared to play post office: to transmit requests coming from abroad—as stipulated in the Soviet agreement—to the appropriate State authorities for such aid as they might be willing or able to render. Apparently, no one considered judicial assistance a part of this country's conduct of foreign relations.

C. Development of Judicial Role

As early as the 1930s, the legal profession recognized that this was an unsatisfactory state of affairs. Numerous bar associations, the National Association of Attorneys General and other learned groups urged the Federal Government to become engaged in the area of international judicial assistance.[6] Litigation touching foreign jurisdiction was increasing; consequently, there was greater need to invoke the aid of foreign authorities and more frequent occasion to take procedural steps on foreign soil in support of litigation in this country. Those dealing with transnational litigation recognized that our then existing laws and international arrangements were woefully deficient. The only notable development during that period was the Harvard Law School's 1939 draft convention on judicial assistance.[7] Unfortunately, World War II broke out and nothing came of this endeavor.

1. *Commission on International Rules*

Efforts to modernize our law and practice regulating judicial assistance were revived in the early 1950's. There was an article that appeared in the 1953 *Yale Law Journal*, written by Harry Leroy Jones, entitled "International Judicial Assistance: Procedural Chaos and a Program for Reform."[8] I believe that article may well have had a greater impact on judicial assistance reforms in the United States than any other publication of the last 30 years. Efforts continued throughout the 1950's to try to get the Federal Government to focus on the area of foreign judicial assistance. In 1958, Congress established an *ad hoc* commission, the Commission on International Rules of Judicial Procedure,[9] which was charged with the task of reviewing all federal laws and all procedural rules dealing with transnational judicial cooperation, and recommending to Congress any necessary revisions. Unfortunately, the Commission was funded for only two years, and halfway through its work Congress declined to appropriate any further money. Fortunately for Congress, the Commission and for our profession, the

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[6]*See* H.R. Rep. No. 1283, 85th Cong., 2d Sess. (1952), entitled "Establishing a Commission and Advisory Committee on International Rules of Judicial Procedure."

[7]Harvard Law School, *Research in International Law, Draft Convention on Judicial Assistance*, 33 Am.J.Int'l L. 11 (Supp. 1939).

[8]62 Yale L.J. 515 (1953).

[9]72 Stat. 1743.

Columbia Law School jumped into the breach; Columbia's "Project on International Procedure" joined forces with the Commission and finished the task in the early 1960's.

2. *Comprehensive Revision of U.S. Law*

In 1964, the Commission's recommendations led to a comprehensive revision of Federal laws and rules of procedures bearing on transnational litigation. Specifically, Section 1782 of the Judicial Code, dealing with the competence of Federal courts to render assistance to foreign tribunals, was substantially revised and amended.[10] In a new Section 1781, Congress expressly acknowledged the Federal Government's role in judicial assistance. Section 1781 made it clear that the Department of State was expressly authorized to receive requests for judicial assistance from abroad and to receive and transmit to foreign courts requests for judicial assistance from our domestic courts. A new Section 1696 specifically authorized Federal courts to order service of foreign process on persons in this country. Along with these amendments and revisions, the Advisory Committee on Federal Rules recommended to the Judicial Conference far-reaching changes in the Federal Rules of Civil Procedure—especially Rule 28 dealing with taking of the depositions abroad and Rule 4(i) dealing with the service of process abroad. The recommended amendments were promptly promulgated.

3. *Hague Conference*

At about the time that this legislation was enacted, the United States also became a member of The Hague Conference on Private International Law. That organization has existed since the turn of the century and has done some outstanding work on the progressive codification of rules of private international law.[11]

When we joined, the Hague Conference was just in the process of modernizing an earlier convention on the service abroad of legal documents. The United States delegation took an active role in the project, and the Conference's work ultimately led to the adoption of the 1965 Hague Convention on the Service Abroad of Judicial Documents in Civil or Commercial Matters.[12] The United States was among the first three states to ratify the Convention in 1969, and currently it is in force between our country and twenty-two other countries.

Four years later, the United States participated in the drafting of The Hague Convention on the Taking of Evidence Abroad;[13] again, in 1972, we

[10]Act of October 3, 1964, Pub. L. No. 88–619, 78 Stat. 997.

[11]Droz and Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 N.W.J. INT'L L. & BUS. 155 (1981).

[12]20 U.S.T. 361 T.I.A.S. 6638; *reprinted* in 28 U.S.C.A., Rule 4, note.

[13]23 U.S.T. 2555, T.I.A.S. 744; *reprinted* in 28 U.S.C.A. 1781, note.

were among the first three states to ratify that Convention. It is now in force between the United States and some fifteen other states, principally in Western Europe.

4. *Latin America*

Let me now turn to Latin America. Three Latin American states are members of The Hague Conference on Private International Law: Argentina, Venezuela and, of late, Surinam. Those of us who were in government at the time the two Hague Conventions were adopted hoped that we could get agreement with other states on a single treaty regime; one that included not only our European trading partners but our Latin American neighbors as well. However, there appears to be considerable reluctance on the part of our Latin American neighbors to join any treaty regime developed in Europe, or developed between the United States and other non-Latin American states. I believe there is a strong feeling in Latin America that in this hemisphere we ought to do "our own thing." I am under the impression that our Latin neighbors are not going to join any treaty arrangement developed outside of this hemisphere.

To be sure, our sister republics in the Americas have been engaged in the process of codifying judicial assistance rules and practices for almost a century. A Congress was held in Montevideo as early as 1889. At that Congress, a number of Latin American countries agreed on a convention codifying certain rules of civil procedure.[14] After World War I, in the late 1920's, another Congress was held, this time at Havana. The majority of Latin American states attended, as did a delegation from the United States, headed by no lesser personality than Chief Justice Hughes. At the Havana Conference, the Latin American countries agreed on a code which was widely adopted by most Latin American states—the well-known Bustamante Code.[15] The United States delegation advised the delegates from Latin America that this was an attractive Code and that the delegation would study it closely on its return home; but because of constitutional restrictions, the United States was unlikely to adopt the Code. The explanation given was that matters of procedure were largely left to the States, and the Federal Government could not dictate to the States the manner in which they should regulate procedural matters, including international judicial assistance. That the federal judiciary, as an arm of the Federal Government, could play an important role in international judicial assistance does not appear to have been considered.

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[14]Convention on Civil Procedure signed at Montevideo, January 11, 1889, *reprinted* in 33 AM.J.INT'L L. 147 (Supp. 1939).

[15]Bustamante Code, February 20, 1928, *reprinted* in part in 33 AM.J.INT'L L. 152 (Supp. 1939).

In the last eighteen years, under the auspices of the Organization of American States, the Latin American states embarked upon a new attempt to regulate international judicial assistance by multilateral convention. In 1975, a conference was convened in Panama, attended by the United States, at which a number of conventions dealing with subjects of private international law were drafted and adopted. Several of these conventions have since been ratified in Central and Latin America. Two of them were of particular interest to the United States: the so-called "Inter-American Letters Rogatory Convention," which I essentially regard as a service of documents convention, and the "Inter-American Convention on the Taking of Evidence Abroad."[16] The United States ultimately signed the service convention together with an additional protocol proposed by the United States which, in some respect, modified a number of the basic provisions. It is the United States' position that the service convention will become effective only with respect to those Latin American states that also ratify the protocol.[17] According to the latest count, eleven Latin American states have now ratified the basic service convention, and two have already ratified the additional protocol. Despite the fact that we have prevailed upon our Latin American neighbors to accept our protocol, the United States has not yet submitted the convention with the additional protocol to Congress.

Adoption of the Inter-American Evidence Convention is proceeding on the same lines. Here, too, the United States has proposed an additional protocol, but the protocol has not yet been accepted by the Latin American states. The draft protocol was taken up at the Third Inter-American Specialized Conference on Private International Law at La Paz, Bolivia in the Spring of 1984.

In sum, we presently have no treaty arrangements with our Latin American neighbors regarding judicial assistance; this may well change in the next few years.

III. Dissimilarity of Procedural Laws

My experience in transnational litigation has taught me that there is a surprising similarity—if not identity—in the substantive laws of common law countries and so-called civil law countries. I know, for instance, nothing about the law of Belgium, and I have never participated in a case in Belgium. However, I suspect that I, and probably all of us here, would feel quite at home in the substantive law of Belgium—Belgian property law, tort law or

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[16]Both Conventions are reprinted in 14 I.L.M. 328, 339 (1975).

[17]Trooboff, *The Second Inter-American Specialized Conference on Private International Law*, 73 AM.J.INT'L L. 704 (1979).

contract law. Such is not the case with adjective law. When it comes to procedural matters you should not assume that the procedural rules and practices of foreign states are similar to our procedural rules. It is in matters of procedure that we part company; on occasion, we even part company with our own sister common law jurisdictions in Canada and in the United Kingdom. Therefore, when you encounter a procedural problem in transnational litigation—where there is a need either to obtain evidence abroad or to take other procedural steps on foreign soil—do not assume that the rules abroad are the same as ours. Quite to the contrary, you should assume that they will probably be quite different. With this in mind, you will wish to seek counsel from someone familiar with the foreign procedural rules; by doing so, you can save yourself and your client a lot of unnecessary expense and unnecessary work; indeed, you may even save yourself from the embarrassing situation of unwittingly violating a foreign criminal statute.

I had an experience just three weeks ago with one of our distinguished judges in the district court here in the District of Columbia. I am involved in a lawsuit in which I needed to take the deposition of a party residing in France. I happen to know that The Hague Evidence Convention is presently in force between France and the U.S.; it provides a ready mechanism for the taking of my opponent's testimony in France. I also happen to know that France passed a penal statute in 1980 prohibiting the taking of depositions in France by foreign attorneys in disregard of the Hague Convention. I therefore prepared an appropriate request and submitted it to the court. I served my opponent; we had a hearing, and my opponent strongly objected to the use of the Convention machinery. The judge leaned over and said, "Now, look, you are going through this involved procedure, turning to a French court to summon the defendant and to have him examined under French law, through an interpreter, and you may not even be able to get a verbatim transcript of the testimony. I understand that you may only get a summary of it. What am I going to do with that? Why don't you fellows just agree to go over there; to invite the witness to come to your hotel room; take his deposition; have it transcribed; come back; and let's be done with it." I said, "I wish I could accept your Honor's suggestion, but I cannot; the reason is that I do not want to wind up in a French jail; I happen to know better; I cannot even plead ignorance of French law. I know that as a result of recent legislation, the French government strongly objects to that." The judge turned to me and said: "Now, isn't that silly?" (Laughter.) Trying to stay in his good graces, I said, "Yes, your Honor, from our standpoint it is silly, but I still don't want to spend time in a French jail; I therefore respectfully urge that you sign the treaty request." He said, "I will take it under advisement." That was three weeks ago. I still do not have the signed request.

With the highest respect to our brethren on the Bench, we should find some means by which we can give the next judge who expresses skepticism

about our existing treaty arrangements a more satisfactory answer, acquaint him with the procedural differences which all of us—courts and lawyers—encounter abroad, and effectively use the machinery which has now been developed to minimize conflicts and faster cooperation in transnational litigation.