PANEL I:
SERVICE OF PROCESS

MODERATOR

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PANELISTS:

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OUTLINE OF DISCUSSION:
- —Service of U.S. Process in Mexico
- —Service of Mexican Process in the U.S.
- —Notions of Governmental Interests
- —Recommendation: Treaty for Service of Process Recognition
- —Recent Developments

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OUTLINE OF DISCUSSION:
- —Service of Process in Mexico
- —Commercial Law/Administrative Service of Process
- —Treaties in Force in Mexico
- —Letters Rogatory in Mexico
- —Limits to the Use of Letters Rogatory

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OUTLINE OF DISCUSSION
- —Jurisdiction
- —Competence
- —Inter-American Letters Rogatory Convention
- —Requirements for Letters Rogatory: Border Areas

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OUTLINE OF DISCUSSION
—Contrasting Notions of Jurisdiction
—Long-Arm Jurisdiction
—Evidentiary Matters

For papers presented in conjunction with the following discussion, *see*:

Casad, *Service of Process Abroad*, p. 93 of this volume.

Acosta Romero, *Notes on the Service of Foreign Notice and Summons in Mexico*, p. 97 of this volume.

Flores Garcia, *Recognized Methods of Judicial Communication* p. 112 of this volume.

CASAD: Thank you Boris. First I want to express my gratitude and my sense of honor over being asked to participate in this group. I think it is a very good idea. I congratulate the University of Arizona and all of the people who helped bring this conference about. I hope there will be other occasions for meetings of this type in the future to deal with this and other subjects of mutual concern to lawyers in the United States and Mexico.

SERVICE OF PROCESS IN MEXICO

One of the difficulties I have is a lack of experience in matters relating to service of process in Mexico. I had to learn whatever little I know about that subject from what others have written on it, and, it has been pointed out to me, I made a serious mistake in some of the conclusions I included in the brief paper that I submitted for this conference. I am happy to have that corrected. [Ed. The corrections have been incorporated into the version printed in this edition.] Nevertheless, one of the problems, I initially noted about addressing this particular issue was the absence of any treaty arrangement for service of process abroad to which both the United States and Mexico were parties. The United States is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, [signed Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638] as Mr. Ristau has told us, but it is not a signatory to the Inter-American Convention on Letters Rogatory [O.E.A./Ser. A/21 *reprinted at* 14 I.L.M. 339 (1975)]. At the time I prepared this paper, I

thought Mexico was not a signatory to either convention, but it has been pointed out that Mexico has ratified the Letters Rogatory Convention. The fact still remains that, in this subject area, the United States and Mexico are not signatories to the same treaty. So, the law relating to service to process abroad in both countries must be found within the internal law of each country.

This poses another difficulty for North American lawyers faced with prospects of serving process in Mexico—the absence of the availability of direct sources on Mexican law to most United States lawyers. It's very hard to find such sources, even in university law school libraries such as ours. In my own defense, I should say that I sent a research assistant to the library to spend the better part of a day investigating whether Mexico had ratified that treaty: somehow we didn't discover it, even with the resources we have. We don't have the greatest law library in the world, but we should have been able to come up with that rather rudimentary point.

MEXICAN SERVICE OF PROCESS IN THE U.S.

Serving Mexican process in the United States is a problem because of Mexican law and procedure. There are no barriers that I know of in most states in the Union to serving the process of another country. Even if the law of that other country requires a government official to serve process, most sheriffs in most states will serve almost any paper that's given to them. There's no general policy anywhere in the United States that I know of which considers the serving of foreign process in our courts as an affront to our national or state sovereignty. A foreign country that wants to serve its process by mail in the United States is perfectly free to do so. If Mexico's procedure authorized service by mail, that would be a simple solution to the process of serving Mexican process in the United States. But, under the existing circumstances, Mexican law requires official service through letters rogatory, and that means that the procedures prescribed by U.S. law, state or federal, for letters rogatory have to be followed to serve Mexican process in civil actions in the United States. My conclusion, in the brief paper that I prepared, was that the most effective way of accomplishing Mexican service of process in the United States is through the statute referred to by Mr. Ristau, which authorizes United States District Courts to receive letters rogatory and serve process within the territories of the states in which they sit.

Serving United States process in Mexico again requires the use of the letter rogatory, since Mexico does have a policy against direct service in Mexico of foreign countries' process. It is my understanding that it is possible for letters rogatory to be addressed directly to the

court in which the process must be served rather than going through diplomatic channels. It must be directed through the central authority; I assume this is the same central authority set up by the Republic of Mexico in connection with the Letters Rogatory Convention, but I may be wholly mistaken on that. I won't attempt to go through the details of letter rogatory procedure. It's probably better known to most of you than it is to me.

NOTIONS OF GOVERNMENTAL INTERESTS

I'll just close with a few personal observations about this general subject which I hope will help us in keeping the matter in perspective as we discuss the special problems that you will bring up in response to the presentations being made. One of the most fundamental points that I want to make at the outset, and I think this was illustrated in what Professor Kozolchyk said in his introduction, is that we must keep in mind that a civil judgment has a dual aspect. In one sense, of course, the judgment of a court is an act of sovereignty. It's an act of government. But, in another sense, a civil judgment is a resolution of a private dispute. I believe part of the difference between the way we view some of the points that Professor Kozolchyk pointed out and the way the civil law countries tend to view them is that in the common law system we tend to see it more as a dispute resolution, a private arrangement with governmental assistance rather than an act of government on private interests. I think that explains why there is relatively little concern in the United States about serving process of foreign countries within our territory. Our sovereign interests are not deeply involved in the resolution of private disputes, even though they happen to take place through the framework of a sovereign institution like the court. We do have some concern, of course. We have concern about the use of our governmental institutions like courts. We have concern about the overall fairness of the process for resolving these disputes, but do not have that much concern about the effect upon our sovereignty of other nations projecting their courts' processes into our country.

Besides the relatively free attitude toward service of foreign process, we can see this same attitude, I think, in our concept of the discovery process, the taking of evidence process. It's amazing to many civil lawyers how much we allow private litigants to impose compulsory responses upon each other without judicial intervention or the intervention of any governmental agency. Our procedure tends to deemphasize the governmental sovereign act aspect of the litigation process. It seems to me, in connection with serving process abroad, the thing that is of paramount importance is not that this is an act of one

sovereign nation in the territory of another; the thing that is of paramount importance is the litigant, the party to be subjected to judicial order as a result of that process. Has that person been fairly notified and given an opportunity to make whatever defense he chooses to make in the foreign tribunal? Notification, in my way of thinking, is the primary function of service of process. So long as basic fairness is provided in the procedure of the country whose process is to be served, it does not seem to me that there should be much concern over the governmental interests of the country in which the actual process occurs. The governmental interest may become involved in a more substantial way if the judgment resulting from the service of foreign process also has to be enforced in your country.

RECOMMENDATION: Treaty for Service of Process Recognition

The sovereign concerns of the state in which the process is served can be exerted at the judgment recognition level. Service of process is a formality designed to notify. The ideal solution to the problems of service of process of Mexico in the United States and vice versa would be a treaty in which both countries recognized, with a minimum of formality, the process issued by the other country's courts. Service by mail would be adequate, I feel, to satisfy the legitimate interests of both countries. When I say a treaty, I realize that in the past United States participants to inter-American conventions such as that which produced the Bustamante Code on Private International Law [86 L.N.T.S. 111 drafted in 1928] have resisted signing any of them because of the belief, in the United States, that these matters, matters of private international law, are properly handled by state law and not federal law. I believe that the attitude is changing. I believe that it would unquestionably be constitutional if Congress or if the executive, with the consent of Congress, were to enter into a treaty, a private international law treaty relating to service of process, recognition of judgments, and facilitating proof. To me that would be the ideal solution. But, of course, the treaty process is extremely difficult, and the United States hasn't yet even entered into one bilateral treaty relating to execution or recognition of judgments. So, it is perhaps overly optimistic for me to think that that's a workable solution; however, as I say, I believe it is an ideal one.

RECENT DEVELOPMENTS

One other brief point about developments in the United States relating to this question: the American Law Institute is currently studying the newly revised Restatement of Foreign Relations Law of the

United States. In it, there are some extensive provisions relating to the recognition of judgments, as well as other topics of interest to this Symposium. Hopefully, that revised Restatement will soon be promulgated, and we'll have at least some other principles in writing to refer to when talking about questions of this type. Finally, while we're talking about books, I might point out, on the subject of jurisdiction, I have a book on jurisdiction in civil actions which I brought along to show to anybody who might be interested in that subject. Very little of it actually deals with service of process abroad, but there is some mention of it in there. [Casad, *Jurisdiction in Civil Actions* 3406 (1983).]

KOZOLCHYK: (comment): What Professor Casad has touched upon is terribly important in understanding the notions of personal jurisdiction and service of process in the two countries. This is where there is a very fundamental distinction between the two. Under Mexican law, it's possible, even to this day, to establish service of process on the basis of publications and by court action. In the U.S., the idea of notice and due process is terribly important in establishing the *in personam* jurisdiction.

FURNISH: (question): Can you summarize subject matter jurisdiction and *in personam* jurisdiction?

CASAD: This is part of the problem of talking about jurisdiction between common law countries and civil law countries. The civil law conception of competence over the action incorporates two distinct notions we employ in our discussion of jurisdiction in this country. We talk about jurisdiction over persons; conditions for jurisdiction over persons exist when a person has a sufficient connection with the territory of the state and when the proper procedural steps have been taken to connect that person to that state's authority. When those factors coincide, the state courts have what we call personal, or *in personam*, jurisdiction over the individual. The same idea applies to corporations, but with obvious differences. There is the additional requirement, though, that must be present before any court can properly enforce its order against someone: the court must have jurisdiction over the subject matter of the action. That means the action must be of a kind the court has been empowered to hear by the sovereign that it serves.

In the United States, we have federal courts and we have state courts. The federal courts have limited subject matter jurisdiction. Only certain kinds of cases can be heard in federal courts. Federal

courts, too, have to have personal jurisdiction over all parties in the same way state courts do. The requirements are essentially the same in both state and federal courts, but their subject matter jurisdiction is different. In some states, there are particular courts that are empowered to hear certain kinds of cases but not others. The case must be one which is within the subject matter jurisdiction of the court.

In addition, the proper procedural steps must be taken to connect the person of the defendant to the court's authority, giving the court personal, or *in personam*, jurisdiction. I'm talking about service of process. That is a function of the *in personam* jurisdiction of the court and is not related to subject matter jurisdiction. Every court, regardless of the scope of its subject matter jurisdiction, has to have *in personam* jurisdiction over the defendant before it can properly adjudicate a case. *In personam* jurisdiction depends upon the individual having the proper connection with the state and upon the proper procedural steps having been taken.

AUDIENCE: (E. Lozano Rocha, comment): With reference to the service of process, Professor Casad suggested that perhaps Mexico and the United States could establish a bilateral treaty. The possibility of accomplishing service of process through certified mail is very practical, but, in my mind, that method has always brought up the problem of certifying the contents of that certified letter. You send a certified letter by mail, and you get a certificate from the post office stating that a certain piece of mail was delivered on a certain date, at a certain hour. That is evidenced by the signature of the receiver. But who knows what was inside of that certified letter? In my practice, I have not used the certified mail; I have used the method of notifying the defendant through a notary public, either in Mexico or by using the services of the notary public in the United States. That way, I have obtained evidence that the defendant was served personally, because the notary public makes a record of the fact that I appeared before him on a certain date and that I delivered a copy, a certified copy, of the complaint that was received by the defendant. That has been accepted in the United States as well as in Mexico.

Now, to me the most important problem, or half of this problem, is that we have to find out in each case whether the Mexican court is competent. Even if you serve the defendant personally in Mexico with regard to a suit that is being brought in the United States, if the United States court has no jurisdiction because of the subject matter, or because the action involved is a personal action, or the real estate is in Mexico, then the decision of the United States court is not going to be

enforced in Mexico, even if we have a treaty and even if we have complied with all the requirements.

CASAD: I want to respond to Mr. Lozano Rocha's comment. I acknowledge the point you're making; you can't be certain that the process served on someone through mail was, in fact, the process of that court. But lying is always something we have to take the risk of in the judicial system. It seems to me that if a copy of the summons which was sent by mail is filed with the court, and if the person who mailed it gives the proper assurances that it is a true copy of the document served, that is not a problem of great importance. It becomes a problem when it becomes necessary to enforce the resulting judgment, and then close scrutiny should be given; but I'm talking just at the preliminary stage of service of process. I think we don't have to worry about those barriers at the outset of the action. The fewer procedural impediments there are, the better the system will work.

ACOSTA ROMERO (translation by Kozolchyk): Good morning, I would like to start out by thanking the Arizona Journal of International and Comparative Law for inviting me to speak at this much-needed symposium. My presentation today will be restricted to service of process.

SERVICE OF PROCESS IN MEXICO

Mexico does not have the same kind of liberal system of service of process prevailing in the United States. By liberal, I mean a system which empowers the parties to a proceeding to privately appoint someone to serve process. Service of process in Mexico is one the essential requirements of procedure as established by the Mexican Constitution; hence, the service must pass constitutional muster if the judicial process is to be considered valid.

The first point I'd like to make is that Mexico, just like the United States, has a dual system; being a federal republic, it has both a federal and a state legal system, and, as in the United States, there is federal subject matter jurisdiction and there is state subject matter jurisdiction. This is reflected in the rules governing service of process. Depending on the court that has jurisdiction, different rules may apply. For example, commercial matters in Mexico are by definition of Article 73(X) of the Mexican Constitution, a federal matter in Mexico. Thus, they must be handled using federal procedural rules. In contrast, matters involving the civil status of the parties are controlled by the civil code of Mexico; they are left to the states and are subject to state requirements.

COMMERCIAL LAW/ADMINISTRATIVE SERVICE OF PROCESS

Let me digress for one moment and focus on the question, "What is commercial in Mexico?" The answer is not entirely clear. Nevertheless, commercial matters must be identified for the purpose of determining the applicable law. Federal law governs commercial matters even at the private level as a result of a constitutional enactment. The commercial code itself lists a number of so-called commercial acts. Among these one finds sales, commission agencies and negotiable instruments. Unfortunately, the code does not list all commercial instruments, and to further complicate matters, not all the items listed are true commercial instruments. In addition, it is difficult to distinguish commercial jurisdiction from civil jurisdiction because commercial jurisdiction involves a preliminary phase in which certain matters must be resolved administratively. For example, in the area of consumer protection, the agency for consumer protection may be required to take some sort of action before the case actually goes before the commercial court.

In various areas of commercial law, a suit must be commenced through an administrative agency. Hence, the plaintiff must serve process through the agency and not through a court of law. For example, during my last trip to Tucson, when I spoke before the Council on Foreign Relations, I bought a defective camera at the airport in Mexico City. Before I went against the actual merchant, I had to go to the Office of Consumer Protection and make sure that the merchant was summoned through that office. Without such service, I could not have brought the case before the ordinary courts. So, in the relationship between merchants and non-merchants, say, in the commercial area, there is this preliminary service of process at the administrative level that must be accomplished before you can properly go before the courts of law.

This type of administrative service also occurs in the area of insurance. Any action that you're going to be bringing in court based upon an insurance policy must go through an initial administrative procedure of conciliation where preliminary service of process is issued. Also, as of January 1, 1983, because of the nationalization or expropriation of the Mexican banks, it is now necessary to start actions against a bank through an administrative agency. The banking commission may conduct its own procedure before an action is brought against banks themselves.

The result is a sort of two-tiered system for the service of process which differs from that used in the ordinary courts. As is to be expected, there are exceptions to this sort of administrative service. For

instance, in the banking area, there are two banks that are not subject to the banking commission situation: Citibank, a commercial bank, and Workers' Bank. Apparently, you can serve process on these banks in an ordinary procedure through letters rogatory without having to go through the administrative procedure. It is also important to pay close attention to places of residence for purposes of service of process. In very many large Mexican cities, such as Guadalajara and Monterey, there is concurrent jurisdiction on the federal and state level. As a result of the tremendous amount of work that federal judges have in Mexico, they might very easily respond to a letter rogatory saying it will be processed when the court workload decreases, which may be in three or four months. In cases of concurrent jurisdiction, it may be easier to get action by referring it to a state court.

TREATIES IN FORCE IN MEXICO

There are various treaties in force in Mexico in this area. Both the Inter-America Letters Rogatory Convention of January 30th, 1975 and the Additional Protocol of May 8th, 1979 are in force in Mexico. Mexico is both a signatory and ratifying party to these important treaties. Mexico recognizes treaty law as the supreme law of the land. There are also state and federal procedural codes on the matter. In the absence of treaty law, the principle of reciprocity applies. In addition, codes of civil procedure leave the decision of whether to honor a letter rogatory to the judges' discretion, as long as individual guarantees, or due process provisions, are respected. Basically, these are the rules covering the procedures for letters rogatory and service of process in Mexican law. To repeat, there is some treaty law already enacted in Mexico as a result of the final treaty ratification of 1983. Also, there are statutory laws, in the federal and state procedural codes, which give judges discretion to grant foreign requests for the service of process, provided that there be reciprocity and that there be no violation of the individual guarantees espoused in the Mexican Constitution.

LETTERS ROGATORY IN MEXICO

There are two final points for those who are interested in the mechanics of service of process through letters rogatory in Mexico. First, with regards to letters rogatory, the court does not act *ex officio*. Mexico still follows the principle of requested justice. What is meant by that is that the parties either have to appear before the Mexican court, or grant a general power of attorney to someone to appear for them and request that the letter rogatory procedure be handled expeditiously (or in whatever manner the court wishes to handle it). In the absence of such a power of attorney, most states follow the law of the

federal district of Mexico, which requires that the person trying to expedite the handling of the letters rogatory have credentials from the local registry of professions to petition the courts.

AUDIENCE (question): Does the person making the court appearance have to be a Mexican citizen or can he be a foreigner with the proper credentials?

ACOSTA ROMERO (translation by Kozolchyk): If the power of attorney is written broadly enough, the person does not have to be a Mexican citizen to go through the procedures of letters rogatory for service of process.

JUDGE DE ANDA (question): Is Rule 4 of the Arizona Rules of Civil Procedure in conflict with the Mexican procedure? Rule 4 provides that the Arizona state court may appoint someone in the foreign country over age eighteen to serve the American process in the foreign country.

ACOSTA ROMERO (translation by Kozolchyk): In my opinion, the Arizona rule would be in direct conflict with the Mexican rule just stated.

LOW (question): Under the Inter-American Convention on Letters Rogatory. will Mexico recognize procedures for letters rogatory by countries who haven't signed or ratified the treaty?

SIQUEIROS (response): I think that Lucinda Low's question is pertinent and is very important. My own feeling is that any convention in which a treaty is signed and ratified by any of the contracting parties will be only applicable and enforceable vis-a-vis other contracting parties that have acceded to, or ratified, the convention. So, if we assume that up to now the U.S. has not either signed or ratified the Convention, this Inter-American Convention on Letters Rogatory will not be enforceable between the two countries. I have received information through friends at the U.S. Department of State that the U.S. government would apply the Panama Convention on Letters Rogatory only to those countries who have also ratified the Montevideo Protocol. I understand that the United States is planning to ratify both the Convention and the Protocol.

RISTAU (comment): Let us hypothesize that a United States court designates a private party to go to Mexico to serve a United States

document. That would be good service under United States law but not recognized under Mexican law per Dean Acosta Romero's remarks. Would the person trying to enforce the United States judgment be committing an offense under Mexican law?

ACOSTA ROMERO (translation by Kozolchyk): It may be considered an offense, but I would need to do more research on the question before giving a definite answer.

AUDIENCE (V. Penner, question): Would such an act, enforcing the United States judgment by a United States tourist, be contrary to Mexican immigration laws?

ACOSTA ROMERO (translation by Kozolchyk): Yes, this would violate immigration laws. I would also like to comment on a recent interpretation of a clause allowing tourists to perform certain legal acts. In Mexico, various acts are considered legal, using a credit card, for example. Well, tourists are allowed to use a credit card, but they cannot perform other legal acts, like the service of process.

LIMITS TO THE USE OF LETTERS ROGATORY

ACOSTA ROMERO (continuing): In concluding the presentation, there are three areas where service of process through letters rogatory would not be effective in Mexico at all. The first instance involves decedents' estates where there is no executor approved for the administration of the estate. The second instance is that of insolvency, a Chapter 11 [bankruptcy reorganization] situation. The third instance involves a straight bankruptcy in a liquidation situation. The problem arises in a Chapter 11 situation where the debtor in possession is in Mexico, or where the straight bankrupt in a liquidation situation is in Mexico. The fact that there might be a letter rogatory asking that person to appear in a bankruptcy or insolvency proceeding in the United States might even have a "boomerang effect" in Mexico, because the effect of the bankruptcy jurisdiction in Mexico is all-embracing, and, consequently, the Mexican courts will want to proceed to have its own type of adjudication. So, in those three areas, the effect will be negative. Those are the only three areas that a letter rogatory would not be effective: First, in the area of succession where there is no executor appointed; second, in the area of insolvency; and third, in bankruptcy.

AUDIENCE (question): It has been stated that the concept of service of process is notification. In the United States, the complaint that is

served upon the defendant is a description of the facts and what he is asked for, or indeed, what should be done with these facts. Is the concept of service of process in Mexico of a similar type of notification, where the individual is informed of the *facts*, or is he informed more of the *concept* that was mentioned by Professor Kozolchyk?

ACOSTA ROMERO (translation by Kozolchyk): Service of process in Mexico is a much more comprehensive and informative type of a procedure than it is in the United States. Not only do you have the summons to appear and a copy of the complaint, but the complaint is accompanied by all sorts of attached documents which serve to bolster it. The complaint is not merely a statement of facts, as we see it, but of accompanying law, etc. In addition, if the person who accomplishes the service of process is a court employee, he has the duty to make sure that the party who receives it signs the document. The signature indicates that the receiver understands what his rights and duties are. It is a very comprehensive procedure. Service of process by edicts or publication are totally exceptional. Such service of process is done when you do not know what the defendant's domicile is or when you're unaware of where he resides.

SIQUEIROS (comment): I just want to make a brief comment that probably would clarify some misconceptions. The core of the problem is the difference in the procedural systems. Since the Middle Ages, there has been a knowledge and acceptance everywhere in the world that procedural matters are also ruled by the *lex fori*. In other words, anything to do with the procedure, including notifications, service of process, etc., should be ruled by the principles of the court that is taking cognizance of the subject matter. Therefore, any procedure taken into effect by the court of origin should be ruled by the rules of procedure of that court. If the action is started in the United States and notifications, service of process, or any other procedural matter takes places abroad, in Mexico, in accordance with Arizona's rules, such a procedure will be valid in Arizona. When I was younger, I made a lot of notifications in Mexico regarding marriage and divorce. I was sent a copy of the summons by the plaintiffs or their lawyer in Arizona, and I would personally serve the defendant in Mexico. The Mexican party was required to sign the summons. If he would not sign, I would make an attestation establishing that fact and then take the affidavit to the U.S. Embassy in order to have it recorded and authenticated. In other words, I played the role of "sheriff." The core of the problem is whether or not that ultimate judgment to be rendered in Arizona is going to be recognized and enforceable in Mexico. If the

judgment is going to be recognized and enforced in Arizona, or in any other sister state, I don't have any doubts that the procedure was correct. But, there is a problem if that particular type of notification is going to be used later on to enforce that judgment in Mexico.

AUDIENCE (F. Lopez Encinas, comment, translated by Kozolchyk): There are two very practical points in regards to understanding the mechanics of operating within this dual system that we have right now. When you serve process in Mexico through the Mexican system, requiring someone who is a court-appointed employee to serve process and the party is not there, there is a requirement that whoever is the process server must leave a note or an indication that the party should be at the place where service is to be accomplished within 24 hours of the first attempt to serve process. If such notification is not made, the second attempt to serve process will be null and void. From the standpoint of Mexico, the whole thing falls apart as not having a sufficient basis of service of process.

The second point has to do with the documents that must accompany the complaint. As previously stated, in Mexico, the complaint has to be accompanied by essential documents. For example, in a suit for breach of contract, you must include a copy of the contract. If a copy of the contract doesn't accompany the complaint, then the Mexican procedure for service of process has not been complied with. Later, the service can be attacked collaterally even to the point of creating a judgment in default against the plaintiff. For example, the plaintiff may be barred from introducing any of those essential documents later.

KOZOLCHYK: There are still some areas we have not covered, particularly exhorbitant jurisdiction. Exhorbitant jurisdiction is involved in the so-called long-arm statutes in the United States. Professor Fernando Flores Garcia and Judge James De Anda will make the presentations.

FLORES GARCIA (translation by Kozolchyk): The first concept that I will discuss is the nature of jurisdiction under Mexican law. This is in response to the very broad question that was posed earlier this morning in an introduction to the question of exhorbitant jurisdiction.

JURISDICTION

The idea of jurisdiction, as seen in Mexico, has been most clearly stated by an Italian professor, Giuseppe Chiovenda, who established

a very sharp dichotomy between the public and the private order. Originally, jurisdiction was essentially private in nature, because the exercise of self-help was seen as private. Now, it has become public. The time for self-help, according to Chiovenda, in which private parties could determine for themselves what remedies they wanted to apply to their situation, is past. The present trend is toward the public order. This is why the Mexican Constitution talks about the judicial system as providing a public service and, hopefully, a gratuitous service where justice can be obtained cheaply and expeditiously. This can only be attained through the notion of a public order type of jurisdiction. This public order type of jurisdiction, which is tremendously comprehensive and powerful, is distinguished by some authors from the so-called "administrative" type of jurisdiction that is used for purposes of what you call "acts of state" in the United States.

The much broader notion of public order jurisdiction is the one that prevails in Mexico and is incorporated into Articles 14, 16, 17, and 21 of the Constitution. One cannot talk about a mere process; jurisdiction comprehends the whole basis of adjudication in the legal system. This should be distinguished from the notion of competence, which we talk about very broadly in the United States as coinciding with the notion of venue.

COMPETENCE

Competence is a subdivision of jurisdiction. It is that which attributes territory, but it does not attribute territory to a person or to the power of a person, but to an organism—the court. Within this notion, there is also the idea of delegated jurisdiction. It is possible to delegate jurisdiction to people who have been properly authorized to exercise this function under the law that establishes the powers of the courts. As stated by Eduardo Pallares, perhaps our greatest procedural lawyer, this notion of jurisdiction is always in the background of competence. Competence is predicated on the assumption that courts have jurisdiction.

There are various sources for determining competence in Mexican law. One of them is in the Code of Civil Procedure for the Federal District. The Code indicates that there are four bases for establishing competence. The first basis is the level at which the proceeding finds itself, the "instance," as it is called. Second, the subject determines competence. Third, the amount of money involved or the amount in dispute determines competence. Finally, territory can be determinative. As far as the state civil codes, the Model State Civil Code, I suppose, refers to only two factors for determining competence. One is the subject matter and the other one is the territory or the place where the controversy is being brought.

As with the old medieval concept, territory begins in hell and goes all the way to heaven. The concept of sovereignty also comes in; even though the concept of sovereignty is regarded as a nineteenth century concept, once we start talking about the problem of letters rogatory, as well as cooperation with courts from other countries, sovereignty cannot be ignored.

KOZOLCHYK (comment): The best way to understand the manner in which these different means of communication operate within the general concepts of jurisdiction and competence is to look at the situation, first in terms of communications from a judge to a party, and then in terms of communications from a judge to a judge. Within the area of communications from one judge to another, it is also important to look at it in terms of hierarchy. If the communication is from a superior court to a lower court, then the proper term to apply is "mandate;" whereas if it is from a lower court to a higher court, then in Mexican law the communication is regarded as an *"exhorto,"* the roughest translation of which would be a letter rogatory.

INTER-AMERICAN LETTERS ROGATORY CONVENTION

FLORES GARCIA (translation by Kozolchyk): Before I give a short summary of what is involved in the Inter-American Letters Rogatory Convention, let me emphasize that treaties in Mexico are the supreme law of the land. That is like the Supremacy Clause in the United States. This principle is found in Article 133 of the Mexican Constitution—it's the same principle in both constitutions.

The Convention applies to what is described as letters rogatory. The term is not used in the technical sense that I used it in Mexican law, which distinguishes between *"exhortos,"* on the one hand, and the letter rogatory on the other. In the Convention, both terms are used interchangeably.

The Convention is restricted to civil and commercial matters and involves communications from one jurisdictional organ to another. It applies to procedural acts which could be described as mere processing of requests, such as requests for notification of the party's taking of evidence. It doesn't apply to acts of coercive execution. The procedure set up in the Convention is one in which letters rogatory could be used directly by the parties. They could be used by means of the intervention of judicial authorities or consular authorities or by the use of a central authorized agency to effect this type of procedure. In the case of the Latin American republics, the Organization of American States is deemed to be the central authorized agency.

The requirements of the letters rogatory are that it first of all be legalized. This is normally done through consular officials. Second, it has to be translated into the official language of the recipient country. The third requirement involves tribunals of what are called border zones. If you are in a border zone, then you can make requests directly from court to court. Why be so niggardly, so restrictive in our approach? We should be more altruistic. After all, we include all the area along the borders, but why stop there? Why not talk about the neighboring states, not only the United States but also Canada? Why not adopt the language of the procedure in the Convention and also suggest a modification of the language in the Convention so that it would extend to areas of neighboring countries in the northern part of the western hemisphere?

I could end by using some of the very poetic statements that Italian procedural law professors like Professor Carnelutti are known to have made, stating that the law is nothing more than a summation of all interests. There is also the beautiful statement that the effects and the purpose of the law are to effect peace and justice among all mankind, not only among lawyers. I could have said all that, but I prefer a much more modest conclusion. The modest conclusion is that, in my thirty years as a professor of law, I've always believed in the principle that it is a lucky professor who can learn, who can get up one day and learn something from those who listen to him; I must tell you, with all vanity set aside, that I've been a very lucky person this morning already, judging from what I have learned from listening to what's happened on this floor. Thank you very much.

FERNANDEZ DOBLADO (comment, translation by Kozolchyk): I would like to clarify a statement made earlier about treaties being the supreme law of the land in Mexico. Even though what was said concerning these articles of the Mexican Constitution is absolutely correct, this presupposes that the treaties themselves are valid international law. Unless it can be proven that the treaties themselves are valid international law, they will not be binding in Mexico, even though there may have been, as there was in this case, signature and ratification by the Mexican legislative bodies. Courts determine that treaties come into effect as of the time that there was a ratification by another state. From that moment on, the treaties will be deemed binding. That's logical, because without another country adopting that provision, you cannot claim its validity in international law. So, in Mexico, it becomes valid and enforceable as of the time that the second instrument of ratification is deposited, and remains in effect afterwards. Both Mexican law and United States law distinguish be-

tween those treaties that are self-executing and those that require some subsequent legislation. Here, we are not referring to a treaty requiring subsequent legislation, but to a treaty which is self-executing.

DE ANDA: It seems that the various speakers are in agreement on the need of some type of treaty to effect some uniform type of service of process in all cases. At the outset, we are met with a problem: we have some conceptual differences as to the purposes of process in the United States and Mexico.

CONTRASTING NOTIONS OF JURISDICTION

As has been pointed out, in this country, the sole purpose of process really is to give you notice that someone is upset with you and you have been sued. Then, later on, after discovery, you find out why you have been sued. Of course, under the Mexican approach, the process involves much more than just the notification of suit; it entails a detailed description of the nature of the cause of action and its basis, and apparently, it even requires that you be notified of what recourses you have available to you in response to summons. So, viewed in that fashion, considerable adjustments must be made regarding our respective thinking concerning process.

I might also point out to you that, under the United States concept, the courts are somewhat detached from this process, specificially in civil cases, of serving notice. They are trying to remain aloof of it. As a matter of fact, the United States marshals are forbidden to serve process in any civil case, except those involving the government as a party. Under our new rules, we have provided for private process servers; we no longer require process by certified mail; we have service by private individuals. Such procedures would certainly be condemned in Mexico, which takes a more stringent view of process. If we were to discuss and enter into a treaty approach where the validity of a United States judgment is summarily accepted in another country, it might be desirable to comply with the laws of the country in which you want to give your judgment validity. Thus, if you want to enforce the United States judgment in Mexico, serve process upon the defendant according to the Mexican procedural rules.

LONG-ARM JURISDICTION

I don't know how we will ever solve long-arm jurisdictional problems with Mexico, because we can't even solve them with Louisiana, New Mexico and Arizona. In Texas, you have constant battles as to whether a court has jurisdiction; when you're trying to get long-arm jurisdiction, they come up again and again. Of course, the question of

contacts and doing business in the state, the things upon which you rely constitutionally to acquire jurisdiction even over a citizen or corporation of another state, can get rather complex and complicated. But, the courts and litigants, in absence of these treaties that we think are so important, have had to devise their own self-help, to try to resolve some of these problems.

EVIDENTIARY MATTERS

Today, especially in Houston, where we have litigation that is complex and international in scope, many times we try to resolve these things; the parties voluntarily work these matters out, especially in regards to evidentiary matters and depositions. Pre-trial discovery is done, to some extent, voluntarily by the parties. Sometimes, with a little arm-twisting on the part of the court, in cases involving litigants from various countries, where you have a hostage subsidiary or a corporation that is doing business in the United States, you are surely in a better position to get cooperation and discovery, even in countries where ordinarily you could not do it. Since the moment of reprisal will come later on in the case, you are able to achieve a great deal of discovery and accumulate evidence, even in foreign countries, where the parties are properly before the courts, and they have interests in the United States. But, it would be far better if you could resort to some more equitable process than just brute force and threats to try to get the evidence that might be needed in a particular litigation in the United States. These are my comments and observations of some practical aspects on how these problems are being solved now in the absence of a more formal way.