Extraterritorial Discovery under the Hague Evidence Convention

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Comment

EXTRATERRITORIAL DISCOVERY UNDER THE HAGUE EVIDENCE CONVENTION

INTRODUCTION

Few issues have engendered more friction in the international legal community than the extension of the United States legal system beyond its borders during pretrial discovery.1 By ordering parties to produce evidence located abroad, United States courts extend their powers beyond national boundaries and come into conflict with the sovereignty of other states. As the number of international commercial transactions has risen, transnational litigation has increased, and the conflict over foreign discovery has intensified.2

Many foreign States are hostile toward United States practice permitting American courts to order pretrial discovery within their territory.3 There are many reasons cited for the hostility, not the least of which is that most States view unilateral extraterritorial discovery as a violation of international law.4 In addition, the liberal pretrial discovery procedures used in the United States are alien to civil law countries.5 Adding to the conflict, there are other fundamental differences between civil law and common law legal systems regarding the function of the court in the gathering of evidence.6 Thus, in what they perceive as a

1. Restatement of Foreign Relations Law of the United States (Revised) § 437 reporter’s note 1 (Tent. Draft No. 6 1985) [hereinafter cited as Restatement (Revised)].


5. Practicing Law Institute, Extraterritorial Discovery in International Litigation 23 (1984) [hereinafter cited as Extraterritorial Discovery]. For a comparison of the common law and civil law approaches to discovery, see infra notes 74-78 and accompanying text.


(253)
necessary step to protect their sovereign interests, some of these States have adopted legislation designed to block efforts of United States litigants to obtain evidence within their territory.

The Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Evidence Convention) is a multilateral treaty designed to resolve the jurisdictional conflict inherent in foreign discovery by establishing "minimum standards" for "judicial assist-

exist between the two countries. Discovery has been most ardently opposed when the litigation involved the application of United States antitrust laws. See, e.g., In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1947) (case resulting in passage of Canadian blocking statute); In re Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952).

7. Beckett, United Kingdom, Transnational Litigation—Part II: Perspectives From the U.S. and Abroad, 18 INT'L LAW. 773, 776 (1984) (commentator from United Kingdom stating, "We see our legislation as a legitimate and pragmatic response to a situation which has been developing over many years and which has recently become more acute.").

One author notes that United States courts order depositions of persons "in Geneva, Switzerland as if they were in Geneva, New York, and the inspection and production of documents . . . located in Hanover, West Germany as if they were in Hanover, New Hampshire." Oxman, The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention, 37 U. MIAMI L. REV. 733, 742 (1983).

8. As of 1982, 15 States had adopted "blocking statutes" imposing civil or criminal penalties for the removal of evidence from the country. Some of these statutes prohibit disclosure in connection with specific subject matters. See, e.g., Uranium Information Security Regulations, CAN. STAT. O. & REGIS. 544 (1976) (cited in Batista, Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation, 17 INT'L LAW. 61, 62 n.1 (1983) (Canada enacted statute in response to United States federal grand jury investigation of alleged uranium cartel)). Other blocking statutes prohibit disclosure that is not in compliance with local procedures or international treaties. See, e.g., Batista, supra, at 62 (citing French, Australian, and United Kingdom blocking statutes); Carter, Existing Rules and Procedures, 13 INT'L LAW. 5, 7 n.2 (1979) (citing blocking statutes of the Netherlands and Province of Ontario).


that are "tolerable" to the State where the evidence is taken, and that produce evidence that is "utilizable" in the forum State. The Hague Evidence Convention codifies the minimum procedural and substantive aspects of judicial assistance, and preserves any more liberal procedures in the internal law of signatory States. Certain provisions are subject to restrictions by the State executing the request for judicial assistance, but a State may refuse a proper request only in certain narrow circumstances. In 1972, after receiving the advice and consent of the United States Senate, the United States became one of the first States to ratify the Convention. The Hague Evidence Convention is currently in force between the United States and sixteen other countries.

Although the Hague Evidence Convention has been in force in the United States for over a decade, it was not until the early 1980's, at which point a significant number of other States had ratified the Convention, that it became a major factor in transnational litigation brought in United States courts. Since that time, there has been a dramatic a discussion of the procedure used to gather evidence under the Hague Evidence Convention, see infra notes 86-116 and accompanying text.

11. International judicial assistance has been defined as "aid rendered by one nation to another in support of judicial or quasi-judicial proceedings in the recipient country's tribunals," Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 515 (1953).

Except for incidental provisions concerning the service of documents contained in consular treaties, no treaty provision for judicial assistance appeared until well into the 19th century; and the United States was not a party to any judicial assistance treaty until well into the 20th century. Harvard Research in International Law, *Draft Convention on Judicial Assistance*, 33 AM. J. INT'L L. 1, 26-29 (Supp. 1939).


13. For a discussion of the procedural and substantive aspects of the Hague Evidence Convention with respect to judicial assistance, see infra notes 79-116 and accompanying text.

14. For a discussion of the ways in which the Hague Evidence Convention acts to preserve more liberal procedures of contracting States, see infra notes 112-16 and accompanying text.

15. For a discussion of the circumstances in which a State may refuse a proper request for judicial assistance, see infra notes 103-07 and accompanying text.

16. S Res. 205, 92d Cong., 2d Sess., 118 CONG. REC. 520,623 (1972). The Senate's advice and consent to the treaty was given without dissent. *Id.*


19. *See Comment*, supra note 9, at 1470.
increase in the number of cases in which litigants have asserted that the discovery of evidence located in a foreign contracting State must proceed in accordance with the Hague Evidence Convention.  

The issue presented to the courts is whether the Evidence Convention or the Federal Rules of Civil Procedure govern the discovery of evidence located within the territory of a contracting State. Uncertain of the proper scope of the Evidence Convention, United States federal and state courts have taken divergent positions on this issue.

Some courts have required exclusive use of Evidence Convention procedures while others have held that use of these procedures is optional even for physical inspections and depositions within the territory of a signatory State. A third view, which is perhaps the most prevalent, is that as a matter of comity courts must require the party seeking discovery to utilize the procedures of the Hague Evidence Convention before resorting to discovery under the Federal Rules. In 1984, this issue was appealed to the United States Supreme Court in two cases: Volkswagenwerk Aktiengesellschaft v. Falzon and Club Mediterranee, S.A.

20. See Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit at 7-8, In re Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985) (stating that this discovery issue was raised in nine reported cases in 1983, in at least 12 cases in 1984, and in at least six cases in early 1985). The number of reported cases does not accurately reflect the frequency with which this issue arises because appeals of discovery orders often are not reported or are settled out of court. See Note, Gathering Evidence Abroad: The Hague Evidence Convention Revisited, 16 Law & Pol. Int'l Bus. 963, 964 (1984).


22. For a discussion of the decisions of United States courts analyzing the scope of the Hague Evidence Convention, see infra notes 117-211 and accompanying text.

23. See, e.g., Cuisinarts, Inc. v. Robot-Coupe, S.A., No. CV-80-00500083 (Conn. Super. Ct. July 22, 1982). The Cuisinarts court held that under article VI, clause 2, of the Constitution the Hague Evidence Convention "represents the sole avenue open to an American party wishing to obtain evidence in one of the contracting states." Id. slip op. at 5.

24. See, e.g., In re Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985). For a discussion of In re Anschuetz, see infra notes 187-200 and accompanying text.

25. Comity has been defined as "[t]he concept that the courts of one sovereign state should not, as a matter of sound international relations, require acts or forbearances within the territory, and inconsistent with the internal laws, of another sovereign state unless careful weighing of competing interests and alternative means makes clear that the order is justified." Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 857, 176 Cal. Rptr. 874, 880 (1981). For a discussion of Volkswagenwerk, see infra notes 145-53 and accompanying text.


Dorin.\textsuperscript{28} Although the Court did not reach the merits of either case, the Department of Justice filed briefs amicus curiae expressing the views of the United States in both cases.\textsuperscript{29} Unfortunately, the Department of Justice expressed inconsistent views in the two cases, leading to greater confusion and uncertainty in the area of foreign discovery. Two certiorari petitions recently have been filed requesting review of Fifth Circuit decisions holding that parties seeking evidence located within a signatory State are not required to use the Hague Evidence Convention procedures.\textsuperscript{30}

Commentators have analyzed the Evidence Convention under principles of treaty interpretation and constitutional law, concluding that as a treaty obligation of the United States, the Convention is binding on United States courts.\textsuperscript{31} The remaining issue to be resolved is the proper scope of the Convention. This comment analyzes the Convention in the context of the jurisdictional conflicts it is designed to resolve. Part I discusses international legal principles governing the jurisdiction of States. Part II discusses the purpose of the Hague Evidence Convention and describes its key provisions. The decisions of United States courts that have analyzed the role of the Convention in United States litigation are discussed in Part III. Following an analysis under international principles of jurisdiction, the comment asserts that the scope of the obligations under the Convention will vary based on the restrictions placed by each contracting State on discovery activity within their territory. The comment further concludes that an interpretation that the Hague Evidence Convention exclusively controls extraterritorial discovery is in the best interest of the United States, and thus urges the United States Supreme Court to reaffirm the obligations of the United States under the Convention.

I. CONFLICTS OF JURISDICTION

The power of a court to order the production of evidence located abroad pursuant to the rules of the forum depends initially on the juris-


\textsuperscript{31} See, e.g., Comment, supra note 9, at 1483-85; Note, supra note 20.
dictional power of the forum State. A sovereign State may exercise jurisdiction to prescribe laws and jurisdiction to enforce those laws. International law imposes different restrictions on the jurisdiction of a State according to whether it is exercising its prescriptive or its enforcement jurisdiction. Jurisdictional conflicts arise when the same conduct is subject to jurisdictional assertions by more than one State. Foreign discovery is subject to the jurisdiction of both the forum State and the State in which the evidence is located. In resolving this jurisdictional conflict "[t]he issue is how to harmonize multiple concurrent jurisdictions, not simply how to limit the power of a particular court." 

A. Prescriptive Jurisdiction

Prescriptive jurisdiction refers to a State's jurisdiction to prescribe rules governing "the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." The promulgation of rules governing the taking of evidence is an exercise of prescriptive jurisdiction.

Historically, the international law of prescriptive jurisdiction was based on formal criteria derived from principles of territorial sovereignty and equality of States. A State's authority to exercise prescriptive jurisdiction to govern activity was considered absolute and plenary within its territorial borders, and "susceptible of no limitation not im-

32. Chief Justice Marshall wrote, "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power." Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 133 (1812).

33. RESTATEMENT (REVISED), supra note 1, §§ 402, 431. For a discussion of prescriptive jurisdiction, see infra notes 37-49 and accompanying text. For a discussion of enforcement jurisdiction, see infra notes 50-68 and accompanying text.

34. RESTATEMENT (REVISED No. 6), supra note 1, § 401 comment a; Onkelinx, supra note 3, at 489.

35. See Gerber, Beyond Balancing: International Law Restraints on the Reach of National Laws, 10 YALE J. INT'L L. 185 (1985). Several States may have the power to prescribe and enforce rules relating to the same persons, property, and events. See also RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 37 (1965). Thus subject to certain limitations, a State is not precluded by international law from exercising its jurisdiction merely because this would subject a person to the inconsistent demands of two sovereigns. Id. But cf. infra notes 46-49 (conflicts of jurisdiction are governed by principle of reasonableness).

36. Oxman, supra note 7, at 744. Professor Oxman states that in jurisdictional conflicts the goal is the "rational ordering of government relationships." Id. Oxman's analysis formed the basis for the United States' interpretation of the Evidence Convention in the amicus brief filed in Club Med. See Club Med Brief, supra note 29, at 7-9. For a discussion of Club Med, see infra notes 227-43 and accompanying text.

37. RESTATEMENT (REVISED), supra note 1, § 401.

posed by itself” (territorial principle). Additionally, a State had absolute authority to govern its nationals wherever they were found (nationality principle).

However, the strict doctrine of territoriality was gradually diluted, as States began to assert authority to exercise jurisdiction extraterritorially. The Lotus case represents one of the earliest departures from the strict doctrine of territoriality. In Lotus, the Permanent Court of International Justice stated that there is no general prohibition in international law “to the effect that states may not extend application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory. In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction.”

Although territoriality and nationality remain the primary bases of prescriptive jurisdiction, modern technological, economic, and political developments have resulted in an evolution of international legal principles of jurisdiction. States now assert the right to regulate conduct which has or is intended to have a substantial effect within their territory (effects doctrine).

39. Restatement (Revised), supra note 1, § 402(1). See also Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 133 (1812). In Schooner Exchange, Chief Justice Marshall stated, “Any restriction upon [a State’s territorial jurisdiction], deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of the sovereignty to the same extent in that power which could impose such a restriction.” Id. A fortiori, one State could not exercise its prescriptive jurisdiction in the territory of another, i.e., a State’s laws could not have extraterritorial effect.

40. Restatement (Revised), supra note 1, § 402(2). See also Blackmer v. United States, 284 U.S. 421, 438 (1932) (“The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them.”).

41. Onkelinx, supra note 3, at 490.

42. Case of the S.S. “Lotus,” 1927 P.C.I.J., ser. A., No. 10, reprinted in 2 J. Hudson, World Court Reports 20 (1935) [hereinafter cited as Lotus, 2 J. Hudson]. The Lotus case involved a collision on the high seas between a French vessel (the Lotus) and a Turkish vessel. The Turkish vessel sank and eight Turkish nationals were killed. When the Lotus arrived in a Turkish port, Turkish authorities arrested a French officer and initiated criminal proceedings against him. The case was submitted to the International Court of Justice. The sole issue addressed by the court was whether Turkey had the right to prosecute the French officer or whether such prosecution would be a violation of international law. A small majority of the Court held that Turkey had not violated any rule of international law. See Lotus, 2 J. Hudson, supra, at 28-29.

43. Lotus, J. Hudson, supra note 42, at 35.

44. Restatement (Revised), supra note 1, § 402(1)(c). See also United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (interpreting effects doctrine broadly with result of extraterritorial application of United States antitrust laws to foreign conduct by foreign entities). For a discussion of the effects doctrine and antitrust law, see D. Rosenthal & W. Knighton, Na-
international legal principles to govern their resolution. Precisely what these principles should be remains the subject of controversy. At the very least, however, conflicts of jurisdiction are governed by a principle of reasonableness.

The United States uses a balancing of interests approach to determine whether an exercise of prescriptive jurisdiction is reasonable. In this balancing test, if the exercise of jurisdiction would require a person to violate the law of another State, the exercise of jurisdiction may be unreasonable. Thus, United States discovery rules that permit or require a party to violate the internal law of evidence taking in a foreign State may be considered an unreasonable exercise of prescriptive jurisdiction.

Gerber, supra note 35, at 185. Gerber suggests that the principle of non-interference is a central element of any legal framework replacing the doctrine of territoriality. Id. at 212. Based on the principle of non-interference, a State may not exercise its prescriptive jurisdiction with respect to conduct in a foreign State if to do so “affects essential state interest in such foreign state.” Id. at 213.

See Restatement (Revised), supra note 1, § 403(1). The Restatement provides: “Even when one of the bases for [prescriptive] jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to the activities, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.” Id.

The Restatement delineates the following eight factors which are to be balanced to determine whether an exercise of jurisdiction is reasonable:

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by by the regulation in question;

(e) the importance of regulation to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by other states.

Id. § 403(2).

See id. § 403(3).

Id. § 473(1). This section of the Restatement provides, “under international law, a state may determine the conditions for taking evidence in its territory in aid of litigation in another state . . . .” Id.
B. Enforcement Jurisdiction

Enforcement jurisdiction is a State's power "to induce or compel compliance or punish non-compliance with its laws or regulations, whether through the courts or by use of . . . non-judicial action." 50 Thus, when a court in one State orders a party to produce evidence that is located in another State, under the threat of sanctions for noncompliance, it exercises enforcement jurisdiction. 51 In ordering the production of evidence, although the forum State exercises enforcement jurisdiction within its own territory, compliance involves doing an act in the territory of another State. In so extending its enforcement jurisdiction, the forum State comes into conflict with the sovereignty of the other State.

Since courts cannot accomplish that which the legislature could not, enforcement jurisdiction exists only to the extent that a State has prescriptive jurisdiction. 52 A valid basis for prescriptive jurisdiction, therefore, is a prerequisite for enforcement jurisdiction. 53 Enforcement jurisdiction, however, is not coextensive with prescriptive jurisdiction. Under international law, although prescriptive jurisdiction may exist extraterritorially, enforcement jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." 54 Thus, a State may not exercise enforcement jurisdiction in the territory of another State without the latter's consent. 55 The United States recognizes this limitation on enforcement jurisdiction as a general matter, 56 but asserts the unilat-

50. Id. § 401(3).
51. Id. § 431 comment b.
52. Id. § 431 comment a. See also Onkelinx, supra note 3, at 496.
53. Onkelinx, supra note 3, at 496. The following are two examples of the relationship between prescriptive and enforcement jurisdiction in the context of foreign discovery. (1) Assume that a United States court orders either a national or an alien to produce documents in the United States that are located abroad but relate to their business activity in the United States, or orders a national to produce documents located abroad that relate to its business abroad. Since a State has the authority to regulate business within its territory and the conduct of its nationals anywhere, there is a valid basis of prescriptive jurisdiction. (2) Assume that a court orders an alien to produce documents located abroad and related to its business abroad. The "effects doctrine" is the only valid basis of prescriptive jurisdiction. However, in the pre-trial stage it has not yet been established whether an alien's business activities abroad can under any circumstances be deemed to have an effect within the United States, i.e., whether prescriptive jurisdiction exists. Absent prescriptive jurisdiction, the court cannot have jurisdiction to order the discovery abroad.
54. Lotus, 2 J. HUDSON, supra note 42, at 35.
55. See, e.g., Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 133 (1812). The Supreme Court in Schooner Exchange stated that "[a]ll exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the national itself. They can flow from no other legitimate source." Id.
56. RESTATEMENT (REVISED), supra note 1, § 436.
eral right to order discovery of information located abroad regardless of the laws of the foreign state.\textsuperscript{57}

United States courts have held that a court may order a party to produce evidence located abroad provided that the court has jurisdiction over the party and the party has control over the evidence.\textsuperscript{58} In this regard United States courts have failed to recognize that it is not the power of the court over the party controlling the evidence that is dispositive under rules of international law, but rather the limits of the forum State’s enforcement jurisdiction.\textsuperscript{59} “The problems of enforcement jurisdiction, therefore, [must] be considered exclusively from the point of view of the international rights of that State in which the enforcement takes place or is intended to take place.”\textsuperscript{60} Because the right to control enforcement jurisdiction asserted by foreign courts is a State right and not an individual right,\textsuperscript{61} these rights cannot be the subject of waiver by individuals subject to the jurisdiction of foreign courts.\textsuperscript{62} Implied or express consent to foreign discovery activity must come from the State in which discovery is to take place.\textsuperscript{63}

A State’s consent to activity within its territory by other States may be implied. For example, consent to discovery from willing witnesses may be implied from “patterns of tolerance” that are present in the United States and to some extent in other common law countries,\textsuperscript{64} but to a lesser extent in civil law countries.\textsuperscript{65} A foreign State may not, how-

\textsuperscript{57} Id. § 437.

\textsuperscript{58} See, e.g., United States v. First National City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968). Even if one accepts that enforcement jurisdiction can exist extraterritorially, a United States court lacks jurisdictional authority to order foreign discovery if there is no valid basis of prescriptive jurisdiction, regardless of the existence of personal jurisdiction. \textit{See} \textsc{Restatement (Revised)}, supra note 1, § 431 comment a.

\textsuperscript{59} See Oxman, supra note 7, at 741. Professor Oxman suggests that the notion that jurisdiction over the person “domesticates” the party for all purposes relevant to the litigation is fallacious. \textit{Id.} He further suggests that if parties before a court are subject worldwide to discovery orders, this would have to be weighed in each case as part of the decision to exercise jurisdiction over the party. \textit{Id.}

\textsuperscript{60} Mann, \textit{The Doctrine of Jurisdiction in International Law}, 1 \textsc{Rec. des Cours} 1, 147 (1964) (cited in Onkelinx, supra note 3, at 497 n.52).

\textsuperscript{61} See Falzon Brief, supra note 29, at 7 n.3.

\textsuperscript{62} See Pierburg GmbH & Co. v. Superior Court, 137 Cal. App. 3d 238, 244-45, 186 Cal. Rptr. 876, 881 (1982).

\textsuperscript{63} See Oxman, supra note 7, at 751 ("It is established that a state may not directly invoke its compulsory process against foreign nationals in the territory of a foreign state without the latter state’s consent.") (citing \textit{Lotus, 2 J. Hudson, supra note 42; Restatement (Second) of Foreign Relations Law of the United States} § 8 comments e, f (1965); id. § 20 comment b; id. § 44; \textit{Restatement (Second) of Conflict of Laws} § 53 comment d (1969); G. Stumberg, \textit{Principles of Conflict of Laws} 100 (3d ed. 1963); Mann, \textit{The Doctrine of Jurisdictions in International Law}, 111 \textsc{Rec. des Cours} 1, 128, 138 (1964)).

\textsuperscript{64} Oxman, supra note 7, at 749.

\textsuperscript{65} \textit{Id.} at 758. Presumably this is the result of differences between civil law
ever, enforce its discovery rules within a State that has an express prohibition in its internal law against such discovery activity.66

A State may expressly consent to activity within its territory through its domestic legislation,67 bilateral treaties,68 or multilateral treaties. The Hague Evidence Convention, the most significant multilateral treaty on foreign discovery, expresses the consent of the signatory States to discovery within their territories pursuant to the procedures established by the Convention.

II. The Hague Evidence Convention

A request for judicial assistance involves the domestic law of both the requesting State and the State of execution. Absent an international agreement, the domestic law of the requesting State determines the circumstances under which a litigant may take procedural steps abroad or seek judicial assistance.69 The domestic law of the State of execution governs what evidence gathering activities are permissible, the procedures under which the State will receive requests, and the types of assistance that will be rendered.70 The Hague Evidence Convention replaces the principles of comity71 with a legal framework to ensure adequate cooperation in the area of judicial assistance between nations with different legal policies and procedural laws.72 In particular, this legal frame-

and common law countries with respect to the gathering of evidence. See infra notes 74-85 and accompanying text.

66. Oxman, supra note 7, at 750. Absent prohibitions, a party may proceed with foreign discovery under the Federal Rules of Civil Procedure. Id. For example, a party may take depositions under rule 28(b), which provides: "In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court . . . ." Fed. R. Civ. P. 28(b). The parties may also submit interrogatories pursuant to rule 33, or may stipulate, pursuant to rule 29, to any manner of discovery that they find mutually convenient. Fed. R. Civ. P. 29, 33.


68. See Oxman, supra note 7, at 53-54. The United States is a party to bilateral agreements in which foreign governments consent, under certain conditions, to examination of willing witnesses by a United States consular officer, or to specific types of governmental investigations. Id. For a list of these bilateral agreements, see id. at 753-54 n.57 & 58.


70. Id.

71. For a definition of comity, see supra note 25.


In 1938, the American Bar Association adopted a resolution urging "the
work is designed to provide "a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad." 73

Common law and civil law evidence gathering practices have significant differences, both substantive and procedural. The common law practice of pretrial discovery, particularly the liberal pretrial procedures permitted by United States courts, 74 is alien to civil law countries. 75 Moreover, in civil law countries the courts do not merely supervise the gathering of evidence, but perform the primary role in gathering and presenting evidence. 76 A private party gathering evidence in a civil law jurisdiction, therefore, may be improperly performing a "public judicial" function and offending the country's "judicial sovereignty." 77 Thus, "[i]n drafting the Convention, the doctrine of 'judicial sovereignty' had to be constantly borne in mind." 78

Because of these differences in evidence gathering practices and the lack of established standards for international judicial assistance, courts and litigants frequently encountered obstacles to obtaining evidence lo-

73. Letter of the U.S. Department of State submitting the Hague Evidence Convention to the President of the United States, reprinted in 12 INT'L LEGAL MATERIALS 324, 324 (1972) [hereinafter cited as Letter of Submittal].

74. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides a clear example of liberal United States pretrial discovery practice. The rule permits discovery of any evidence that "appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1).

75. See Extraterritorial Discovery, supra note 5, at 13. See also Carter, supra note 8, at 5. Civil law countries frequently express suspicion and hostility toward United States discovery practices. Id. "Blocking statutes" are a manifestation of this attitude. Id. at 7. For a discussion of blocking statutes, see supra notes 7-8 and accompanying text.

76. See Carter, supra note 8, at 6-7; Report of the U.S. Delegation, supra note 10, at 806.

77. Such activity may subject the party to criminal penalties. For example, article 258 of the French Penal Code imposes a punishment of two to five years imprisonment for interfering with public, civil, or military functions without lawful authority. Borel & Boyd, Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States, 13 INT'L LAW. 35, 45 (1983). Similarly, article 271 of the Swiss Penal Code provides that anyone who gathers evidence without authorization commits an offense that is punishable by fine or imprisonment. Frei, Switzerland, Transnational Litigation—Part II: Perspectives from the U.S. and Abroad, 18 INT'L LAW. 789 (1984).

78. Report of the U.S. Delegation, supra note 10, at 806. By obtaining judicial assistance through the Hague Evidence Convention procedures, United States courts defer to the judicial sovereignty of the civil law countries. It is suggested that it is this deference that provided the quid pro quo for the concessions made by the civil law countries in the Convention. But see infra notes 244-51 and accompanying text (discussing the United States' contrary position).
uated abroad.\textsuperscript{79} That evidence which was obtained was often of little, if any, practical value.\textsuperscript{80} The Hague Evidence Convention, therefore, was designed to facilitate the gathering of "utilizable" evidence\textsuperscript{81} in a manner that protects the judicial sovereignty of the State in which the evidence is taken.\textsuperscript{82} It mandates certain minimum procedural and substantive aspects of judicial assistance requests,\textsuperscript{83} permits member States to provide more liberal assistance procedures,\textsuperscript{84} and makes certain provisions subject to restrictions by the State of execution.\textsuperscript{85}

The Hague Evidence Convention bridges the gap between common law and civil law legal systems by codifying three procedures\textsuperscript{86} for obtaining evidence: letters of request,\textsuperscript{87} use of consular officials,\textsuperscript{88} and use of private commissioners.\textsuperscript{89}

Letters of request are the primary method of obtaining evidence under the Convention. Unlike the procedures for the use of consular officials and commissioners, the procedures for letters of request are mandatory and not subject to reservations by signatory States.\textsuperscript{90} In addition, the State executing a letter of request is obligated to use the methods of compulsion set forth under the Convention to the extent provided by the internal law of the executing State.\textsuperscript{91} Letters of request, however, may be used only to obtain evidence which is intended for use in "judicial proceedings, commenced or contemplated."\textsuperscript{92} Article 23 of

\textsuperscript{79} See Jones, supra note 11, at 516; Letter of Submittal, supra note 73, at 324.
\textsuperscript{80} Borel & Boyd, supra note 77, at 37 (noting that evidence obtained abroad often was not in form that was admissible in United States courts).
\textsuperscript{81} Under the Hague Evidence Convention, the State of execution is obligated to use any special procedure requested unless it is totally "incompatible" with local procedures or "impossible of performance." Hague Evidence Convention, supra note 9, art. 9.
\textsuperscript{82} For a discussion of the circumstances under which a State may refuse to execute a request for judicial assistance, see infra notes 103-07 and accompanying text.
\textsuperscript{83} Hague Evidence Convention, supra note 9, ch. 1. The provisions of chapter I dealing with letters of request are mandatory. See id. art. 12. Consequently, letters of request are the primary means of obtaining evidence under the Hague Evidence Convention. This reflects the preference of civil law countries for this procedure.
\textsuperscript{84} Id. art. 27. For a discussion of article 27, see infra notes 112-16 and accompanying text.
\textsuperscript{85} Hague Evidence Convention, supra note 9, art. 33.
\textsuperscript{86} These procedures are also set forth in the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 28(b).
\textsuperscript{87} Hague Evidence Convention, supra note 9, arts. 1-14.
\textsuperscript{88} Id. arts. 15-16, 18-22.
\textsuperscript{89} Id. arts. 17-22.
\textsuperscript{90} Id. art. 33. Chapter I of the Hague Evidence Convention, which contains the procedures for letters of request, uses the imperative "shall", while chapter II, which pertains to the use of consuls and commissioners, uses the permissive "may." Compare, e.g., id. art. 9 with id. art. 15.
\textsuperscript{91} Id. art. 10.
\textsuperscript{92} Id. art. 1.
the Convention permits a State to "declare that it will not execute Letters of Request for the purpose of obtaining pretrial discovery of documents as known in Common Law countries." Because several countries initially misunderstood the term "pretrial discovery" to mean a proceeding permitted prior to commencement of judicial proceedings, many signatory States made declarations pursuant to article 23 prohibiting such discovery.

All of the article 23 declarations, with the exception of the United Kingdom's, were blanket prohibitions against pretrial discovery of documents. The United Kingdom's declaration merely refused to execute letters of request that lacked specificity. At a 1978 meeting of the Special Commission on the Operation of the Evidence Convention, the United Kingdom declared that it would not execute letters of request issued for the purpose of obtaining pretrial discovery of documents that require a person:

(a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
(b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

The United Kingdom requested the adoption of article 23. Its request was the result of objections to "fishing expeditions." For a discussion of States' objections to pretrial discovery, see notes 1-8 and accompanying text.

The Hague Evidence Convention expressly requires a degree of specificity in letters of request. Under the Convention, a letter of request must contain:

a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
b) the names and addresses of the parties to the proceedings and their representatives, if any;
c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
d) the evidence to be obtained, or the other judicial act to be performed.

e) Where appropriate, the Letter shall specify, inter alia—the names and addresses of persons to be examined;
f) the questions to be put to the persons to be examined, or a statement of the subject matter about which they are to be examined;
g) the documents or other property, real or personal, to be inspected;
American delegate clarified the nature and purpose of pretrial discovery. In light of this explanation, the delegates from nations that had issued blanket prohibitions against pretrial discovery agreed to urge their governments to reconsider their article 23 declarations. As a result, Singapore, Sweden, the Netherlands, Finland, Norway, and Denmark modified their declarations to conform to the United Kingdom’s. Italy, Luxemburg, France, Portugal, and West Germany retain blanket prohibitions.

Absent an article 23 restriction, a State may only refuse to execute a letter of request that fails to comply with the formal requirements of the Convention, or when execution of the letter “does not fall within the function of the judiciary,” or if the State of execution “considers that its sovereignty or security would be prejudiced” by executing the request. Refusals to execute letters of request under the Convention have, in fact, been very infrequent. When a request is refused, article 13 requires the State of execution to notify the requesting State of the reasons for refusal. The notification requirement protects the requesting State against an arbitrary refusal. If a letter of request is improperly refused, this would be an appropriate matter for diplomatic discussions pursuant to article 36.

h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

i) any special method or procedure to be followed under Article 9.

Hague Evidence Convention, supra note 9, art. 3. Article 3 is modeled after the United Kingdom bilateral conventions. Report of the U.S. Delegation, supra note 10, at 809.


100. Id. at 1424.


102. There is some indication that Germany would permit requests which are within reasonable limits. See Heck, Federal Republic of Germany and the EEC, 18 INT’L LAW. 793, 798 (1984).

103. Hague Evidence Convention, supra note 9, art. 5.

104. Id. art. 12. The sovereignty and security exception is taken from article 11 of the 1954 Civil Procedure Convention; it also appears in the Hague Service Convention. Hague Service Convention, supra note 9, art. 15(1). During the period that the 1954 Convention was in force, this exception was never improperly invoked as an excuse to avoid compliance with the Convention and it was never the basis of a dispute between signatory States. Explanatory Report, supra note 12, at 335.

105. Report of the Special Commission Delegation, supra note 94, at 1431. See also Borel & Boyd, supra note 77, at 45. The procedures of the Hague Evidence Convention are generally unfamiliar to United States attorneys. For example, as of mid-1978, less than 25 letters of request had been received by the French Central Authority. Id.

106. Hague Evidence Convention, supra note 9, art. 13.

107. Id. art. 36. Article 36 provides that “[a]ny difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.” Id.
The provisions of the Hague Evidence Convention dealing with the use of consular officers and commissioners to take evidence are of limited applicability because of major reservations by the signatory States. These provisions permit a diplomatic or consular officer to "take evidence . . . without compulsion" from nationals of his or her own country, or from other persons if "the State in which he exercises his functions has given its permission." In addition, a commissioner "may, without compulsion, take evidence . . . if the State where the evidence is to be taken has given its permission." Application of measures of compulsion are within the discretion of the State of execution.

The Hague Evidence Convention also preserves those more liberal procedures for taking evidence that may exist in the internal law of a given signatory State. Article 27 of the Convention states:

The provisions of [this] Convention shall not prevent a Contracting State from . . .
(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

In explaining the purpose of article 27, Phillip Amram, the official Rapporteur of the Evidence Convention and co-chair of the drafting committee, stated that article 27 preserves "for each signatory party all provisions of its internal law that are more favorable to, and grant more generous assistance to foreign courts and litigants than the methods prescribed in the Convention."

108. Augustine, supra note 72, at 131. Article 33 states that "[a] State may . . . exclude, in whole or in part, the application of the provisions . . . of Chapter II." Hague Evidence Convention, supra note 9, art. 33.
109. Hague Evidence Convention, supra note 9, art. 16.
110. Id. art. 17.
111. Id. art. 18.
112. Id. art. 27.
113. In his capacity as a United States delegate to the Convention, Amram's comments are particularly significant because "when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning." Arizona v. California, 292 U.S. 341, 359-60 (1934). See also Restatement (Second) of Foreign Relations Law of the United States § 147(c)(1), (d) (1965); Vienna Convention on the Law of Treaties, May 23, 1969, art. 32, reprinted in 8 INT'L LEGAL MATERIALS 679 (1969). For an application of principles of treaty interpretation to the Hague Evidence Convention, see Comment, supra note 9, at 1475-83.
Because article 27 preserves more liberal procedures for obtaining evidence located abroad, the Hague Evidence Convention made "no major changes in U.S. procedures" and required "no changes in U.S. legislation or rules." Thus, the liberal procedures for judicial assistance provided under United States law remain available to litigants seeking to obtain evidence that is located in the United States.

III. UNITED STATES INTERPRETATION OF THE HAGUE EVIDENCE CONVENTION

A. Judicial Interpretation

The confusion in United States courts over the proper scope of the Hague Evidence Convention is dramatically illustrated by three recent decisions by the United States District Court for the Eastern District of Pennsylvania.

In *Lasky v. Continental Products Corp.*, a products liability action, plaintiffs served the German defendant with interrogatories and a request for the production of documents located in West Germany. The defendant sought an order requiring the plaintiffs to proceed with all discovery in accordance with the procedures of Hague Evidence Convention. The defendant argued that, as a foreign national not located within the United States, it was subject only to the provisions of the Hague Evidence Convention, and was not subject to the Federal Rules of Civil Procedure. The court acknowledged the general proposition that the Hague Evidence Convention "supersedes any inconsistent provisions of the Federal Rules of Civil Procedure." Nevertheless, the court denied the German defendant's request for a protective order on the grounds that discovery pursuant to the Federal Rules of Civil Procedure was not inconsistent with the Hague Evidence Convention. The

115. Id. at 105.
118. Id. at 1228.
119. Id. (emphasis added).
120. Id. It appears that the defendant was arguing that discovery must proceed under the Hague Evidence Convention regardless of where the evidence was located. Id. at 1228 n.1.
121. Id. This principle of supersession is sometimes referred to as the "last in time" rule. Under this rule, where a treaty and a federal statute conflict, the later-enacted will control. Cook v. United States, 288 U.S. 102 (1933); Whitney v. Robertson, 124 U.S. 190 (1888). See also RESTATEMENT (REVISED), supra note 1, § 135; Comment, supra note 9, at 1484. The Federal Rules of Civil Procedure have not been amended to expressly modify the Hague Evidence Convention since its ratification in 1972, and therefore, the Convention controls under the principle of supersession. Id. at 1483-84.
122. 569 F. Supp. at 1228-29.
court arrived at this conclusion by interpreting article 27 of the Convention as permitting the use of methods of taking evidence other than those provided in the Convention, and as preserving the less restrictive procedures of the Federal Rules of Civil Procedure for use by United States litigants to obtain evidence located in another contracting State. Thus, under the Lasky court's interpretation, a United States litigant has the option to use either the Hague Evidence Convention or the Federal Rules of Civil Procedure.

In contrast, the court in Philadelphia Gear Corp. v. American Pfauter Corp., interpreted article 27 as permitting "only the country in which the evidence is being sought to supplement unilaterally the convention procedures with its internal rules." In Philadelphia Gear the plaintiff moved to compel the German defendant to answer interrogatories and produce documents. Each of the plaintiff's discovery requests required the production of evidence located in Germany. The defendant objected to the motion on the ground that the plaintiff failed to comply with the provisions of the Hague Evidence Convention. In holding for defendant, the court disagreed with the Lasky interpretation of article 27, under which a United States court can use either the Federal Rules of Civil Procedure or Hague Evidence Convention. The court reasoned that to permit the forum court to replace the Hague Evidence Convention with its own procedures would allow "one sovereign to foist its legal procedures upon another whose internal rules are dissimilar." Such a result would defeat what the court recognized as a central purpose of the Convention to reconcile markedly different discovery procedures between member States.

Nevertheless, the Philadelphia Gear court rejected an exclusive interpretation of the Convention and held that it was only "the avenue of first

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123. Id. The court stated that "[s]ince letters of request are the only method of compelling the production of evidence under the Hague Convention, imposing the blanket restriction sought by [the German defendant] would severely restrict the plaintiff's scope of discovery." Id. at 1229.

124. Id. at 1228-29.


126. Id. at 60.

127. Id. at 59.

128. Id. Philadelphia Gear can be distinguished from Lasky. Whereas, in Philadelphia Gear, the defendant objected because the plaintiff did not proceed in compliance with the Convention; in Lasky, the defendant sought an order requiring that all discovery take place exclusively under the terms of the Convention. See supra note 119 and accompanying text.

129. 100 F.R.D. at 59.

130. Id. at 60 n.3 (citing Lasky, 569 F. Supp. 1227).

131. Id. at 60. More important, a court order compelling discovery could be an improper exercise of enforcement jurisdiction. For a discussion of the limits on a State's enforcement jurisdiction, see supra notes 50-68 and accompanying text.

132. 100 F.R.D. at 59.
In the court's view, if use of the Convention proved futile, the defendant remained subject to any discovery orders the court might issue. The court held that initial use of the Convention was required, not as a treaty obligation, but because principles of comity necessitated the exercise of judicial restraint when ordering the production of evidence located in a foreign State.

In *McLaughlin v. Fellows Gear Shaper Co.*, yet a third position was expressed by the Eastern District. The West German corporate defendant objected to plaintiffs' interrogatories and requests for production of documents on the ground that plaintiff failed to proceed in accordance with the Hague Evidence Convention. The *McLaughlin* court reasoned that because the Convention deals with discovery procedures carried out in a foreign country, its applicability depends on 1) whether the information requested may be characterized as "evidence," and 2) whether the "evidence" is found in a foreign territory. The court stated that the Convention clearly applies to discovery activity in the foreign country and that "[a]rguably at least, [it] has no application at all to the production, in this country, by a party within the jurisdiction of this court, of evidence pursuant to the Federal Rules of Civil Procedure."

The court then observed that United States discovery rules can result in the production of either evidence or information, and found that the plaintiffs' second set of interrogatories sought only information. The court held that the defendant should be required to answer the second set of interrogatories, but declined to require compliance with the first set of interrogatories and the request for production of documents at that time. The court reasoned that those requests might require activity by persons in Germany "which would be substantially equivalent to producing evidence in that country." The court added that the defendant could be required to comply with other discovery requests under the Federal Rules, unless it could establish that the Hague Evidence Convention was applicable. The court also observed that

133. *Id.* at 61.
134. *Id.*
135. *Id.* at 60. The court noted that failing to proceed under the Hague Evidence Convention might be a violation of West Germany's judicial sovereignty, in which case the order sought "would run afoul of the interests of sound international relations and comity." *Id.*
137. *Id.* at 958. The defendant relied on *Philadelphia Gear* and the plaintiffs relied on *Lasky.* *Id.* (citing *Philadelphia Gear*, 100 F.R.D. 58; *Lasky*, 569 F. Supp. 1227).
138. *Id.*
139. *Id.*
140. *Id.* In the second set of interrogatories the plaintiff sought the identity and expert witnesses' qualifications. *Id.*
141. *Id.* at 959.
142. *Id.*
143. *Id.* Regarding defendants' use of the Convention, the court stated that
while the Hague Evidence Convention governed the gathering of evidence in West Germany, the Convention was not applicable to the conduct of the United States trial; thus, the defendant could be “precluded from presenting at trial any evidence not adequately disclosed before trial, and any witness opposing counsel has not had a reasonable opportunity to depose.”  

The division of opinion in the United States District Court for the Eastern District of Pennsylvania is representative of the divergent views expressed by courts across the country. The view that principles of comity require use of the Hague Evidence Convention before resorting to the Federal Rules of Civil Procedure was first expressed in an early state court decision, *Volkswagenwerk Aktiengesellschaft v. Superior Court.* In *Volkswagenwerk,* a West German corporate defendant sought to vacate orders of the trial court requiring the defendant to permit inspection of its German plant, to produce records located in Germany, and to allow depositions of officers and employees at the plant. Noting that the trial court and the claimants failed to proceed under either the Hague Evidence Convention or other procedures “which West Germany had historically tolerated,” the court concluded that the discovery orders would violate West German judicial sovereignty. The court stated that, based on either principles of “comity, curtailed discretion, or implied statutory qualification,” foreign discovery “must conform to the channels and procedures established by the host nation.” Nevertheless, the court preferred not to interpret the Hague Evidence Convention “as a presumptive and exclusive rule,” but rather as “a minimum the defendant would have to comply with future discovery requests under the Federal Rules, unless it could establish that plaintiffs sought evidence located in Germany, that its production would amount to production of evidence in that country, and that such evidence will not be offered into evidence or relied upon by defendant in the course of the proceedings. *Id.*  

144. *Id.* at 958.  
146. *Id.* at 848, 176 Cal. Rptr. at 877.  
147. *Id.* at 853, 176 Cal. Rptr. at 882. For a discussion of “patterns of tolerance” constituting implied consent to foreign discovery procedures, see *supra* notes 64-66 and accompanying text.  
148. 123 Cal. App. 3d at 855, 176 Cal. Rptr. at 883. Prior to adoption of the Hague Evidence Convention, an almost identical case arose in California, in *Volkswagenwerk Aktiengesellschaft v. Superior Court,* 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973). The same result was reached in that case, but the court stated that “[a] foreign corporation’s amenability to local suit does not signal automatic subjection of its internal affairs to the courts of the forum, because the latter have not jurisdiction over persons or property outside their territory.” *Id.* at 507, 109 Cal. Rptr. at 221. In the 1981 case, the court disagreed with the 1973 decision in this respect, stating that “[o]nce a foreign corporation is properly subject to a court’s jurisdiction, it . . . may with technical propriety be ordered to act or refrain from acting, in matters relevant to the lawsuit, at places outside the state.” 123 Cal. App. 3d at 856, 176 Cal. Rptr. at 883-84.  
149. 123 Cal. App. 3d at 855, 176 Cal. Rptr. at 883.
measure of international cooperation."

Thus, the court held that the initial discovery order must comply with "the ascertainable requirements of the foreign state." In this case the court found that the Hague Evidence Convention provided an "obvious and preferable" means for obtaining evidence from within West Germany. The court emphasized, however, that it was not questioning the initial jurisdiction of the trial court in the case, but rather was holding that the trial court, as a matter of judicial restraint based on international comity, should have proceeded under the Hague Evidence Convention.

The rule enunciated in Volkswagenwerk was applied in Pierburg & Co. v. Superior Court to vacate orders requiring a West German defendant to answer written interrogatories. The plaintiffs argued that the evidence sought, i.e., answers to interrogatories, was located in the United States. Rejecting this argument, the court stated that the "clear applicability of the Convention" could not be avoided by arguing that the persons responsible for answering the interrogatories could leave West Germany and perform the physical act of giving answers in the United States. In addition, the West German defendant had counsel and expert witnesses located in the United States, prompting plaintiffs to assert that these persons could answer interrogatories in the United States. In also rejecting this argument, the court reasoned that plaintiffs' suggestion would defeat the effectiveness of the Convention in all discovery matters other than those involving physical inspection of property owned by a foreign national in the foreign state.

The argument rejected by the Pierburg court was embraced by another court in Graco, Inc. v. Kremlin, Inc. Graco was a patent infringement action against a French corporation and its wholly owned United

150. Id. at 859, 176 Cal. Rptr. at 886.
151. Id. at 858, 176 Cal. Rptr. at 884-85.
152. Id. at 858, 176 Cal. Rptr. at 885.
153. Id. at 859, 176 Cal. Rptr. at 885-86.
155. Id. at 247-48, 186 Cal. Rptr. at 883.
156. Id. at 245, 186 Cal. Rptr. at 881. The plaintiffs' principal argument was that the defendant had waived the applicability of the Hague Evidence Convention because it had answered an earlier set of interrogatories. Id. at 240-45, 186 Cal. Rptr. at 877-81. The court rejected this argument, stating that the Convention protects the interests of sovereign States, not individual litigants, and therefore "may be waived only by the nation whose judicial sovereignty would thereby be infringed upon." Id. at 244-45, 186 Cal. Rptr. at 881. See also supra notes 61-63 and accompanying text.
157. 137 Cal. App. 3d at 245, 186 Cal. Rptr. at 881.
158. Id.
159. Id. This same argument was raised in Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) 17,222 (N.D. Ill. 1983) (mem.). In Schroeder, a negligence action, the court adopted the view of the Pierburg court and granted a protective order, stating that the plaintiff must serve interrogatories to the defendant in accordance with the Hague Evidence Convention. Id. at 17,224.
States subsidiary. The plaintiff brought motions to compel answers to interrogatories and the production of documents, and for the issuance of a commission under rule 28(b) of the Federal Rules of Civil Procedure. The defendant objected on several grounds, including an assertion that the plaintiff must proceed in accordance with the Hague Evidence Convention.

The Graco court acknowledged that an order compelling discovery in France by means other than the Hague Evidence Convention "might well violate the Convention." Moreover, the court noted that "[i]t is fair to assume that the availability of the Convention procedures was intended to discourage, and possibly to preempt" foreign discovery.

161. Id. at 506-07. Rule 28(b) of the Federal Rules of Civil Procedure provides that depositions may be taken in a foreign country before a person commissioned by the court, and "a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony . . . ." FED. R. CIV. P. 28(b). Rule 28(b) further provides that a court shall issue a commission on notice and application under terms that are just and appropriate.

162. Id. at 517-24. Another crucial objection relied on by the defendant was that the plaintiffs' discovery requests would subject the defendants to liability for violating a French blocking statute. Id. at 509. The French blocking statute was enacted specifically because the provisions of the Hague Evidence Convention were being disregarded by United States litigants. Id. at 508. The defendants relied on article 1-bis of the French blocking statute, which the court quoted:

Subject to treaties of international agreements and laws and regulations in force, it is forbidden to all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.

Id. at 509 (citing translation attached as exhibit A to Soletanche & Radio, Inc. v. Brown and Lambrecht Earth Movers, Inc., 99 F.R.D. 269, 273 (N.D. Ill. 1983) (footnote omitted)). The court held that although parts of plaintiffs' discovery requests might cause defendants to violate this provision of the French blocking statute, the defendant was obligated to establish a good faith effort to comply with plaintiff's discovery requests as fully as possible without violating the statute. Graco, 101 F.R.D. at 525-27. In reaching this conclusion, the court relied on a "balancing of interests" comity analysis. Id. at 509-16. The court, however, made two critical assumptions in reaching this conclusion. First, it assumed that, based on the French blocking statute, a letter of request made pursuant to the Hague Evidence Convention would not be adequate to allow the plaintiff the discovery to which it was entitled. Id. at 511. Second, because "[d]ocuments and interrogatory answers [could] be turned over [to the plaintiff] outside of France," the court assumed it was not "regulating activity occurring primarily in France." Id. at 513.

The French blocking statute has been considered among the most extreme of such information disclosure statutes, as it imposes an absolute prohibition on disclosure of a broad range of information relating to French national interests. See generally April, Blocking Statutes as a Response to Extra-Territorial Application of Law, in EXTRA-TERRITORIAL APPLICATIONS OF LAWS AND RESPONSES THERETO 223, 226 (C. Olmstead ed. 1984) (describing French blocking statute involved in Graco).

163. 101 F.R.D. at 517.
without local judicial assistance or approval.\textsuperscript{164} In the \textit{Graco} court's view, however, discovery does not take place within a State's borders merely because information to be produced somewhere else is located there.\textsuperscript{165} The court explained that, for example, a foreign State's judicial sovereignty is not threatened if interrogatories are served in the United States even if the needed information is located in the foreign State.\textsuperscript{166} Similarly, the court noted that if a person residing in a foreign State is subject to jurisdiction in the United States, then a court may order that he attend a deposition,\textsuperscript{167} because the foreign state's judicial sovereignty is not affronted where the person is summoned to give the deposition outside the foreign State.\textsuperscript{168} The court noted that the discovery sought in \textit{Graco} could take place largely within the United States and therefore held that the plaintiff was not required to proceed solely in accordance with the Hague Evidence Convention; however, the court emphasized that it was "not ordering any proceeding [to] be conducted within France."\textsuperscript{169}

In \textit{Adidas (Canada) Ltd. v. S.S. Seatrain Bennington},\textsuperscript{170} another French litigant sought a protective order against depositions of French employees and requests for production of documents on the ground that discovery was limited to procedures set forth in the Hague Evidence Convention.\textsuperscript{171} The Court noted that the Convention had been interpreted as the exclusive means of obtaining discovery within a signatory State.\textsuperscript{172} The court held, however, that the Convention was inapplicable in \textit{Adidas} because discovery was to take place within the United

\begin{footnotes}
\item[164.] \textit{Id.} at 520. The court emphasized, however, that the Convention does not contain an explicit prohibition against other means of taking evidence. \textit{Id.}
\item[166.] \textit{Id.}
\item[167.] \textit{Id.}
\item[168.] \textit{Id.} The court noted that its order did not compel the taking of any depositions, but suggested that "a person to be deposed could avoid the inconvenience of travel to another country by electing voluntarily to appear before a commissioner or diplomatic or consular official under Chapter II of the Convention." \textit{Id.} at 521 n.24.
\item[169.] \textit{Id.} at 524. The court rejected the idea of first resort to the Convention, stating that "the greatest insult to the civil law countries' sovereignty would be for American courts to invoke their judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure." \textit{Id.} at 523. Notably, this argument appears to support the position that the signatory States intended the procedures of the Evidence Convention to be the exclusive means of obtaining foreign discovery.
\item[170.] 1984 A.M.C. [American Maritime Cases] 2629 (S.D.N.Y. 1984). \textit{Adidas} arose out of consolidated actions involving the loss of a shipment of Adidas equipment aboard the S.S. Seatrain Bennington. \textit{Id.}
\item[171.] \textit{Id.} at 2629.
\item[172.] \textit{Id.} at 2630 (citing Brief for United States as Amicus Curiae, Volkswagenwerk v. Falzon, 465 U.S. 1014 (1984)). For a discussion of \textit{Falzon}, see infra notes 215-26 and accompanying text.
\end{footnotes}
States. The court characterized the acts to be performed on French soil as "preparatory to the giving of evidence." Because no adverse party could enter French territory for discovery, and because no oath would be administered on French soil, the court concluded that judicial assistance was not required. The court also rejected the argument that it should not order the French litigant to comply with the discovery orders on the ground that compliance would require it to violate the French blocking statute, stating that "[the French litigant's] predicament is apparent rather than real."

The plaintiff in *Cooper Industries, Inc. v. British Aerospace, Inc.*, a product liability action, sought the production of documents in the possession of the defendant's British affiliate. The defendant failed to respond to the discovery requests relating to the British affiliate, but initially refrained from seeking a protective order. The defendant defied the court order to produce the documents, and at the second pretrial conference sought a protective order based on the Hague Evidence Convention.

The court held that the defendant had waived any right to claim protection under the Convention. Moreover, the court stated that the

173. 1984 A.M.C. at 2631-32. The French defendant had argued that the Hague Evidence Convention is applicable to all discovery of a national of a signatory State, regardless of where the evidence is located. *Id.* at 2632.

The court concluded that it would be unfair to apply the Hague Evidence Convention in *Adidas* because to do so would allow the French litigant to obtain discovery under the Federal Rules, while restricting the United States litigant to Convention procedures. *Id.*

174. *Id.* The court stated that the selection of French employees to give depositions in the forum State and the selection of documents to produce in the forum State did not require French judicial participation. *Id.*

175. *Id.*

176. *Id.* at 2633. The court stated that the French blocking statute was not "to be taken at face value as a blanket criminal prohibition against exporting evidence for use in foreign tribunals." *Id.* It concluded that because "French nationals doing business abroad would be . . . unable to redress breaches and frauds committed against them by suit in foreign courts since they would be barred from supporting their claims with their documents . . . . exemptions from the statute's prohibitions [must be] liberally available upon request." *Id.* For the text of the blocking statute, see *supra* note 162.

177. 1984 A.M.C. at 2634. The court reached this conclusion by examining the legislative history of the statute and finding that it was not intended to be enforced against French nationals, but rather "to provide them with tactical weapons and bargaining chips in foreign courts." *Id.* at 2633.


179. *Id.* at 918-19. The court ordered the defendant to produce the documents if they were in its possession or in the possession of its British affiliate. *Id.* at 919. The court further ordered that if the documents were not found, defendant was to submit a detailed affidavit to the court explaining the steps taken to locate the documents and why they could not be found. *Id.*

180. *Id.* at 918-19. The *Cooper* court relied in part on *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984). The *Murphy* court, however, did not hold that the defendant had waived its right to raise the
discovery of documents within the defendant's custody and control was not barred by the fact that the documents were situated in a foreign country. Reasoning that the requested discovery would not infringe on British sovereignty because it entailed only the production of documents, not a personal appearance, the court held that the Federal Rules of Civil Procedure allowing such production were an appropriate mechanism for discovery.

In *In re Anschuetz & Co.* and *In re Messerschmitt Bolkow Blohm GmbH*, the United States Court of Appeals for the Fifth Circuit recently considered the scope of the Hague Evidence Convention. Certiorari petitions are pending before the United States Supreme Court in both of those cases.

*Anschuetz* is a third-party product liability suit against Anschuetz, a German corporation. Anschuetz moved for a protective order re-

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181. 102 F.R.D. at 919. Because the documents sought by plaintiff all related to planes the defendant worked with every day, the court stated that "it is inconceivable that defendant would not have access to these documents and the ability to obtain them for its usual business." *Id.* at 919-20. For a discussion of the position of United States courts on their power to order a party subject to their jurisdiction to produce documents abroad that are in the party's possession or control, see supra notes 58-63 and accompanying text.

182. 102 F.R.D. at 920 (citing Marc Rich & Co. v. United States, 707 F.2d 663, 667 (2d Cir.), cert. denied, 465 U.S. 1215 (1983); United States v. First National City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968)). Although *Marc Rich* and *First National City Bank* involved grand jury investigations rather than civil proceedings, the *Cooper* court found them applicable, reasoning that the criminal nature of a proceeding is merely one factor a court may consider in determining whether, within the principles of comity, to allow discovery under the Federal Rules. *Id.* (citing *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360, 363 (D. Vt. 1984)).

183. *Id.* The court stated that "[d]efendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad." *Id.*


187. 754 F.2d at 604.
Regarding interrogatories, requests for production of documents, and requests for notices of depositions of witnesses located in Germany.\(^\text{188}\) However, Anschuetz did not rely on the Hague Evidence Convention.\(^\text{189}\) The United States Magistrate ordered Anschuetz to comply with the discovery requests, and pursuant to that order, several witnesses were examined in Germany.\(^\text{190}\) Subsequently, Anschuetz moved for a protective order based on the Hague Evidence Convention to stop further depositions that were scheduled to take place, which motion was denied.\(^\text{191}\) Anschuetz petitioned the court of appeals for a writ of mandamus ordering the district judge to vacate or stay its orders compelling compliance by Anschuetz with certain of plaintiff's discovery requests on the ground that the orders violated the Convention.\(^\text{192}\)

Following a review of the relevant case law, the Fifth Circuit stated that an exclusive interpretation of the Convention "would be exceptionally adverse to United States' interests" since it would allow foreign States to determine the extent of discovery in United States courts.\(^\text{193}\) The court rejected the reasoning relied upon by Anschuetz,\(^\text{194}\) and adopted the views expressed in the *Graco*,\(^\text{195}\) *Adidas*,\(^\text{196}\) and *Cooper*\(^\text{197}\) cases, holding that

the Hague Convention is to be employed with the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from

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188. *Id.* at 605.
189. *Id.*. Anschuetz argued that the requests were overbroad and that the third-party plaintiff in the case already had been afforded an opportunity to take depositions in Spain of the Anschuetz personnel. *Id.*
190. *Id.*
191. *Id.* The district judge upheld the magistrate's denial of Anschuetz's motion, and the court of appeals stayed the magistrate's order pending resolution of "the alleged conflict between the Hague Convention and the Federal Rules of Civil Procedure." *Id.*
192. *Id.* at 604.
193. *Id.* at 614. The court added that "[i]t does not require a Prometheus to foresee that United States litigants would soon find it impossible to obtain necessary discovery from foreign based parties." *Id.*
196. 754 F.2d at 611 (citing *Adidas*, 1984 A.M.C. at 2632). For a discussion of *Adidas*, see *supra* notes 170-77 and accompanying text.
197. 754 F.2d at 608 (citing *Cooper*, 102 F.R.D. 918). For a discussion of Cooper, see *supra* notes 178-86 and accompanying text.
persons or entities in the foreign country who are not subject to the court’s in personam jurisdiction. The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules.\footnote{198. 754 F.2d at 615. The court further stated that “[s]o long as discovery is sought for the identity and qualifications of witnesses there is not basis to suggest that supplying this information amounts to obtaining evidence in Germany.” Id. This same distinction between evidence and information was recognized by the McLaughlin court. See 102 F.R.D. at 958. For a discussion of the McLaughlin case, see supra notes 136-44 and accompanying text.}

The court acknowledged that in ordering international discovery principles of comity require the exercise of judicial restraint; however, the comity analysis was left to the district court on remand.\footnote{199. 754 F.2d at 614-15. The court stated that if the discovery sought in Germany became particularly intrusive or was contemplated for persons not subject to the court’s jurisdiction, then the court could order the parties to proceed with the discovery under the Convention. Id. at 615.} The court stated that Anschuetz could make documents and witnesses available in Germany if this would be more convenient. However, if Anschuetz did not voluntarily produce the evidence in Germany, the district court could order “the production of documents and the examination of witnesses in the United States to avoid any infringement upon German sovereignty.”\footnote{200. Id. The court further stated that the full range of sanctions available under the Federal Rules of Civil Procedure remain applicable to anyone within the court’s jurisdiction. Id.}

\textit{In re Messerschmitt Bolkow Blohm GmbH} involved a wrongful death action against a German helicopter manufacturer and its wholly owned United States subsidiary, Messerschmitt.\footnote{201. 757 F.2d at 730.} The district court ordered Messerschmitt (a) to produce in the United States documents in its possession and control which were physically located in Germany, and (b) to produce for depositions in the United States the persons that Messerschmitt intended to call as expert witnesses.\footnote{202. Id. The expert witnesses were German employees of Messerschmitt residing in Germany. Id.} Messerschmitt sought a writ of mandamus ordering the district court to revoke the discovery orders and to require that discovery proceed in accordance with the Hague Evidence Convention.\footnote{203. Id.}

Relying on its decision in \textit{Anschuetz}, the Fifth Circuit held that “the Convention does not apply to the discovery sought here because the proceedings are in a United States court, involve only parties subject to that court’s jurisdiction, and ultimately concern only matters that are to occur in the court’s jurisdiction, not aboard.”\footnote{204. Id.} In \textit{Messerschmitt}, the
court chose to perform the comity analysis. The court noted that United States pretrial discovery procedures are alien to civil law legal systems and acknowledged Germany's interest in the disclosure of documents within its territory and owned by its nationals. The court weighed Germany's interest against the interest of United States litigants "in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court."  

Regarding the production of documents, the court noted that the order in *Messerschmitt* required a party within the court’s jurisdiction to produce documents in the United States and did not require any governmental action in Germany, any appearance of foreign attorneys in Germany, or any proceedings in Germany. Thus, the court held that the order appropriately balanced the competing interests. With respect to the depositions of expert witnesses, the court held that the depositions were not governed by the Hague Evidence Convention because they would be taken in the United States. The court acknowledged that the order requiring the production of German nationals for depositions in the United States "might concern Germany." However, the court held that the order, which did not involve procedures on German soil, was directed to the party-defendant, and could only be enforced by procedures and sanctions directed to a party to the litigation, did not implicate considerations of comity.  

B. Executive Interpretation

In interpreting an international agreement to determine its effect as domestic law, "a court in the United States gives great weight to an interpretation by the executive branch." In some cases, the Department of Justice presents the government’s views in a brief amicus curiae. In both *Falzon* and *Club Med*, the Department of Justice filed briefs amicus curiae before the United States Supreme Court to express the Government’s view on the issue of whether discovery of evidence located in the territory of a party to the Hague Evidence Convention must proceed

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205. *Id.* at 732. For a discussion of the civil law approach to the gathering of evidence, see *supra* notes 74-78 and accompanying text.

206. 757 F.2d at 732.

207. *Id.*

208. *Id.*

209. *Id.* The court noted that the plaintiffs only sought to depose in the United States the employees that Messerschmitt intended to call as expert witnesses at trial. *Id.*

210. *Id.* at 733.

211. *Id.* The court characterized the orders as a "complement to the measures for trial preparation expressly sanctioned" by rule 26(b)(4) of the Federal Rules of Civil Procedure relating to the discovery of facts known and opinions held by experts. *Id.*

212. *Reformation (Revised), supra* note 1, § 326(2).

213. *Id.* § 326 comment c.
exclusively under the provisions of the Convention. The views expressed in these briefs, however, are inconsistent.

In *Volkswagenwerk Aktiengesellschaft v. Falzon*, a products liability action against Volkswagen of Germany and its American subsidiary, a Michigan trial court ordered that depositions be taken of employees at Volkswagen's plant in Germany; Volkswagen moved to quash the depositions on the grounds, *inter alia*, that the procedures violated the Hague Evidence Convention. Although the trial court certified its order for interlocutory appeal, the Michigan Court of Appeals denied the application "for failure to persuade the Court of the need for immediate appellate review.” Subsequently, the trial court ordered Volkswagen to produce the employees specified in the earlier order for depositions in Wolfsburg, Germany. The second order provided that failure to comply would subject Volkswagen to appropriate sanctions. The Michigan Supreme Court denied Volkswagen's application for leave to appeal. On Volkswagen's appeal, the United States Supreme Court invited the Solicitor General to express the views of the United States.

In the Solicitor General’s brief (*Falzon Brief*), the United States noted that, in order to accommodate the differences between civil law and common law countries, the Hague Evidence Convention “deals comprehensively with the methods available to United States courts and litigants” for obtaining evidence abroad. The Government added:

The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted. The Convention accordingly must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it.

The Government concluded, therefore, that “[t]he orders of the Michigan trial court conflict with the obligations of the United States under the Evidence Convention.” The United States took the position,

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214. See *Falzon Brief*, *supra* note 29; *Club Med Brief*, *supra* note 29.
216. See *Falzon Brief*, *supra* note 29, at 2.
217. *Id.* at 3.
218. *Id.*
219. *Id.*
220. *Id.*
222. *Falzon Brief*, *supra* note 29, at 5.
223. *Id.* at 6.
224. *Id.* at 3. The Government also argued that treaty limits on the taking of evidence were not rendered inapplicable merely because the Michigan trial
however, that "[b]ecause the State Department [would] instruct United States consular officers in [Germany] not to conduct the ordered depositions . . . no international law violation [would] result. 225 The Supreme Court dismissed the appeal. 226

In *Club Mediterranee, S.A. v. Dorin*, 227 a personal injury action, a New York trial court ordered Club Mediterranee (Club Med) to answer interrogatories served on its United States counsel. 228 Club Med moved to strike the interrogatories on the grounds, *inter alia*, that they violated the Evidence Convention since the information necessary to answer them was available only in France, 229 and that answering the interrogatories would violate a French penal law. Viewing the United States as the situs of discovery, the trial court denied Club Med's motion on the ground that "the Hague Convention proscribes the taking of evidence . . . only in French Territory." 230 On appeal to the United States Supreme Court, the United States again filed an amicus brief.

The Solicitor General's brief for the United States (*Club Med Brief*) concluded that "the Evidence Convention is not exclusive and that therefore the order of the New York trial court does not conflict with any treaty obligations of the United States under the Convention." 231 Moreover, the United States suggested that "whether the Evidence Convention's procedures should be employed in the first instance depends

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225. *Falzon Brief*, supra note 29, at 3, 11. The Government noted that the depositions were also not authorized under an exchange of notes that had occurred between the United States and Germany in 1955-1956. *Id. at 7-11*. It further suggested that the imposition of sanctions as a result of the failure of the depositions to take place might also result in a violation of the Hague Evidence Convention. *Id. at 12*.


228. See *Club Med Brief*, supra note 29, at 1. The *Club Med Brief* draws much of its analysis from an article by Professor Oxman. See supra note 7.


230. *Id. at 3* (emphasis in original).

231. *Id.* Under the case by case approach, according to the Government's position, the determination of whether the Hague Evidence Convention should be employed is to be made by a balancing of interests. *Id. at 10-14*. The Government stated, "Thus, where a trial court determines that a conflict between a foreign blocking statute and state or federal discovery rules cannot be reconciled in a given case other than through resort to the Evidence Convention, the court, as part of a proper comity analysis, should consider whether to require the litigants to proceed in conformity with the Convention." *Id. at 13* (citing Oxman, *supra* note 7, at 779-83).
on the facts and circumstances of each case." Because the trial court had not performed the balancing of interests necessary in a comity analysis, the United States took the position that the case did not provide the Court with an adequate record on which to decide the issue. The Supreme Court dismissed the appeal and denied certiorari.

In rejecting an exclusive interpretation, the United States relied primarily on the argument that the Evidence Convention contains no express provision for exclusivity and that absent such a provision it is unreasonable to conclude that it prohibits "a longstanding practice valued by at least some members of the American bar . . . a factor that could indeed have affected the United States decision to ratify the convention." The United States also argued that an exclusive interpretation "would give foreign signatory states the final say in determining the extent of extraterritorial discovery," especially in light of the availability and use of article 23 declarations to prohibit pretrial discovery.

Apparently aware of the inconsistency with its Falzon Brief, the United States attempted to clarify its statement made in that case which "could be construed to mean that the Convention is exclusive":

We note that [our statement in Falzon] was not necessary to our argument that the trial court's order in Falzon was unlawful. The trial court in Falzon ordered that employees of a foreign corporation be deposed in Germany before an American consular officer. Under established principles of both domestic and international law, however, American courts are precluded from ordering anyone to participate in discovery proceedings in the territory of a foreign state absent that state's consent, wholly independent of the Evidence Convention. Because Germany's consent to such discovery was limited to means authorized by the Convention, the court in Falzon could order such proceedings in Germany only if authorized by the Convention.

The United States did conclude that to the extent the ordered dis-

232. Id. at 14-15.
233. Id.
236. Id. at 8. The concern over the article 23 prohibitions against pretrial discovery of documents may no longer be valid in view of the trend to amend those declarations. See supra notes 100-02 and accompanying text.
237. In Falzon, the Government took the position that the contracting parties intended that proceedings not authorized by the Convention would not be permitted. See Falzon Brief, supra note 29, at 3. For a discussion of Falzon, see supra notes 213-222 and accompanying text.
238. Club Med Brief, supra note 29, at 9 n.10.
239. Id. (citation omitted).
covery conflicted with the French blocking statute.\textsuperscript{240} use of the Hague Evidence Convention was required.\textsuperscript{241} This conclusion, however, was not based on a treaty obligation as in \textit{Falzon};\textsuperscript{242} rather, it was based on principles of comity.\textsuperscript{243}

IV. Analysis

The positions expressed by United States courts that the procedures outlined under the Hague Evidence Convention are “optional,”\textsuperscript{244} or that comity requires their use before resort to the Federal Rules of Civil Procedure\textsuperscript{245} are contrary to the views of virtually every other contracting State.\textsuperscript{246} United States courts analyze the impact of the Convention on their power to control the conduct of litigation, but perform little, if any, analysis based on principles of treaty interpretation and constitutional law. The court decisions reflect a resistance to what is perceived to be both a threat to their jurisdictional power,\textsuperscript{247} and contrary to the interests of United States litigants.\textsuperscript{248} The status of the Hague Evidence Convention as a binding treaty has been compromised by analyses seeking to justify restriction of its scope and impact.

Applying principles of treaty interpretation and constitutional law, commentators have concluded that the parties to the Convention intended to preclude evidence taking activities that are neither authorized by the Convention nor otherwise permitted by the foreign State.\textsuperscript{249} As a

\begin{itemize}
\item \textsuperscript{240} For a discussion of the French blocking statute, see \textit{supra} note 162.
\item \textsuperscript{241} \textit{Club Med.} Brief, \textit{supra} note 29, at 12.
\item \textsuperscript{242} For a discussion of the Government’s position in \textit{Falzon}, see \textit{supra} notes 222-26 and accompanying text.
\item \textsuperscript{243} \textit{Club Med.} Brief, \textit{supra} note 29, at 12-13.
\item \textsuperscript{244} The \textit{Lasky} court held that the procedures of the Hague Evidence Convention are optional. For a discussion of \textit{Lasky}, see \textit{supra} notes 117-24 and accompanying text.
\item \textsuperscript{245} This is the position taken by the court in \textit{Philadelphia Gear}. For a discussion of \textit{Philadelphia Gear}, see \textit{supra} notes 125-32 and accompanying text.
\item \textsuperscript{246} See, \textit{e.g.}, Letter from the Ambassador of the Republic of Germany to Judge Coleman, reprinted in \textit{Extraterritorial Discovery}, \textit{supra} note 5, at 131-33. The Ambassador stated:
\begin{quote}
The Convention, together with the provisions of ratification by the Federal Republic of Germany, establishes the legal framework and procedures for the taking of evidence in Germany for use in civil matters pending in the United States. The Convention sets forth the only procedures sanctioned by the German government for the taking of such evidence.
\end{quote}
\textit{Id.} at 131-32.
\item \textsuperscript{247} See, \textit{e.g.}, \textit{Graco}, 101 F.R.D. at 521-22 (exclusive interpretation of Hague Evidence Convention could result in “very serious interference with the jurisdiction of the court”).
\item \textsuperscript{248} See, \textit{e.g.}, \textit{Anschuetz}, 754 F.2d at 606 (exclusive interpretation of Hague Evidence Convention “would give foreign litigants an extraordinary advantage in United States courts”).
\item \textsuperscript{249} See, \textit{e.g.}, Comment, \textit{supra} note 9, at 1483-85.
\end{itemize}
treaty binding on the United States, ratified subsequent to the Federal Rules of Civil Procedure, the Convention supersedes the Federal Rules under the Supremacy Clause. This was the position expressed by the United States in its amicus brief in *Falzon.*

In *Club Med,* however, the United States took the inconsistent position that use of Convention procedures is only required when principles of comity dictate exhaustion of these procedures before resort to the Federal Rules. The Government reasoned that absent an express provision for exclusivity, it is unreasonable to conclude that the negotiators intended to abolish foreign discovery under the Federal Rules. However, “unilateral concessions is not the most probable explanation” for governments to engage in international treaty negotiations. Thus, it would also be unreasonable to conclude that the other contracting States agreed to provide greater judicial assistance to United States courts without requiring in return the restrictions they sought on United States foreign discovery practices.

The issue is not whether, as a treaty, the Hague Evidence Convention creates obligations binding upon United States courts. It clearly does; therefore, resort to principles of comity is unnecessary and inappropriate. Properly framed, the issue is what extraterritorial evidence gathering activity is governed by the Convention. With respect to activity within its scope, the procedures of the Hague Evidence Convention are the exclusive mechanism for obtaining foreign discovery. This comment suggests that the scope of the Hague Evidence Convention should be interpreted in accordance with international principles of

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250. For a discussion of the “last in time rule,” see *supra* note 121 and accompanying text.


252. For a discussion of *Club Med,* see *supra* notes 227-43 and accompanying text.

253. The United States’ attempt to reconcile its positions in *Falzon* and *Club Med* was feeble at best. In *Falzon,* the United States clearly took the position that the Convention procedures and any more liberal procedures permitted by the host country were the exclusive means for obtaining discovery in a contracting State. See *supra* notes 215-26 and accompanying text. In *Club Med,* the United States disregarded the clear statement in *Falzon* regarding the Convention’s exclusivity on the ground that it was unnecessary to the *Falzon* argument. See *supra* text accompanying note 239.

254. *See supra* note 230 and accompanying text.


256. For a discussion of the difficulties United States litigants faced obtaining foreign discovery prior to the Convention, see generally Jones, *supra* note 11.

257. For a discussion of the hostility of civil law countries toward United States foreign discovery practices, see *supra* notes 3-8 and accompanying text.

258. For a discussion of the binding nature of the Convention on United States courts, see *supra* note 31 and accompanying text.
Ordering the production of evidence under the threat of sanctions for noncompliance is an exercise of enforcement jurisdiction. The court's power to order discovery depends on its authority to exercise its enforcement jurisdiction, not its personal jurisdiction over the party possessing or controlling the evidence. If a court lacks the authority to order the taking of evidence in a foreign State, judicial assistance from that State is required.

Under traditional principles of international law, a State cannot exercise its enforcement jurisdiction in a foreign State absent that State's consent. A contracting State's consent to a foreign court ordering certain evidence gathering activity within its territory can be express or implied. The contracting States have expressly consented to the taking of evidence in their territory under the Convention procedures and under any more liberal procedures permitted by their internal law. If a more liberal procedure is permitted, use of the Convention is not required. Thus the scope of the Convention varies depending upon the restrictions each contracting State has placed on evidence gathering activity within its territory. For example, Germany has stated that depositions and physical inspections in Germany cannot take place except through the procedures of the Hague Evidence Convention. France prohibits the taking of any evidence located in its territory except as provided for in treaties or international agreements or other valid French law. Evidence located in France, therefore, may only be obtained

259. For a discussion of international legal principles governing the jurisdiction of States, see supra notes 32-68 and accompanying text.

260. For a definition of enforcement jurisdiction, see supra note 50 and accompanying text.

261. For a discussion of international legal principles governing a State's authority to exercise enforcement jurisdiction, see supra notes 50-68 and accompanying text.

262. See supra note 55 and accompanying text.

263. For a discussion of consent to extraterritorial exercise of enforcement jurisdiction, see supra notes 64-68 and accompanying text.

264. The more liberal procedures are preserved under article 27 of the Hague Evidence Convention. For a discussion of article 27, see supra notes 112-14 and accompanying text.


266. A German commentator has noted, however, that judicial assistance vis-a-vis a party subject to the foreign court's jurisdiction is not normally required. "Only the inspection of property located in Germany must be arranged by means of requests for judicial assistance, since the ordering of such inspections [in the forum state] . . . would violate German sovereignty." Stuernert, Judicial Assistance to Common-Law Countries Under the Hague Evidence Convention, in JURISTENZEITUNG 521 (1981) (translated by B. Ristau for ABA Committee on Private International Law).

267. For a discussion of the French blocking statute, see supra note 162.
through use of the Convention procedures.

In the absence of a contracting State's express consent to or prohibition against a more liberal evidence gathering practice, this comment suggests that a United States court should determine whether it is reasonable to infer that the foreign State has consented to the practice. Whether a court may reasonably imply consent depends on the nature of the discovery activity.

Since discovery procedures that involve substantial activity on foreign soil are more likely to offend the judicial sovereignty of a contracting State, courts should not infer consent to such activity. Courts should require that depositions, the production of documents, and physical inspections within the territory of the foreign State take place under the Convention procedures. On the other hand, some longstanding United States foreign discovery practices involve only minimal activity on foreign soil (e.g., serving interrogatories). It may be reasonable to find that a contracting State has impliedly consented to such activity.

When a contracting State prohibits more liberal evidence gathering activities within its territory, the power of courts to order foreign discovery is limited to the procedures of the Hague Evidence Convention. This limitation on the power of courts is necessary to harmonize the concurrent jurisdictions of the signatory States.

United States courts express the fear that an exclusive interpretation of the Hague Evidence Convention would result in a serious interference with the jurisdiction of United States courts. This fear is unjustified. First, United States courts overstate their authority to order foreign discovery. The court's authority is not coextensive with its

268. For example, in Anschuetz, the German government objected to the court ordering the taking of depositions in Kiel, Germany, as a violation of Germany's judicial sovereignty. Anschuetz, 754 F.2d at 605. For a discussion of Anschuetz, see supra notes 187-200 and accompanying text.

269. This is an alternative to the approach taken by Professor Oxman. See Oxman, supra note 7. Oxman concluded that United States negotiators did not intend to prohibit longstanding United States foreign discovery practices. Id. at 760. He further concluded that requiring a comity analysis before resorting to discovery under the Federal Rules of Civil Procedure would furnish the quid pro quo for the concessions made by the civil law countries. Id. at 761. The approach suggested by this comment affirms the treaty obligations of the United States under the Convention, but preserves traditional United States foreign discovery practices where appropriate under international principles governing the jurisdiction of States.

270. See, e.g., Graco, 101 F.R.D. at 521-22. The Graco court stated that an exclusive interpretation of the Convention "would amount to a major regulation of the overall conduct of litigation between nationals of different signatory states . . . [and, further, that such an interpretation] would make foreign authorities the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court." Id.

271. For a discussion of the United States courts' position on their author-
personal jurisdiction over the party.\textsuperscript{272} In the absence of the authority
to order discovery, the court must obtain judicial assistance. Under the
Hague Evidence Convention, foreign States must provide greater judi-
cial assistance than was previously available to United States courts.\textsuperscript{273}

Some courts suggest that the obligations of the Convention can be
avoided by ordering the production of the evidence outside the signa-
tory State.\textsuperscript{274} It is submitted that there is no substantive difference be-
tween a court ordering an official to seize evidence located in foreign
State and a court ordering a party over whom it has jurisdiction to pro-
duce such evidence.\textsuperscript{275} Because the court lacks the authority to do one,
it lacks the authority to do the other. Certainly, for a United States court
to order the removal of evidence from a foreign State is potentially as
offensive to that State's sovereignty as ordering seizure of evidence
within its territory.

Second, requiring the use of Convention procedures does not de-
prive a court of control over the conduct of the proceedings. If a re-
quest for judicial assistance is denied, the court can impose appropriate
procedural sanctions in the interest of fairness to the parties (e.g., make
findings of fact adverse to the party who has failed to produce evidence,
or exclude a witness that was not produced for deposition prior to
trial).\textsuperscript{276}

United States courts also conclude that regarding the Hague Evi-
dence Convention as the exclusive procedural construct for foreign dis-
covery would be contrary to the interests of United States litigants.
Generally, this conclusion is based on the assumption that such litigants
often would be unable to obtain discovery under the Convention.\textsuperscript{277}
The courts often ignore the fact that the contracting States have as-
sumed a good faith obligation to implement any valid discovery re-

\textsuperscript{272} For a discussion of the limits of a State's enforcement jurisdiction, see \textit{supra} notes 52-55 and accompanying text.

\textsuperscript{273} For example, the State executing the request must use appropriate
measures of compulsion. Hague Evidence Convention, \textit{supra} note 9, art. 10. Article
10 states that "the requested authority shall apply the appropriate measures
of compulsion in the instances and to the same extent as are provided by its
internal law for the execution of orders issued by the authorities of its own coun-
ctry or of requests made by parties in internal proceedings." \textit{Id.}

\textsuperscript{274} See, e.g., \textit{Graco}, 101 F.R.D. at 519-20.

\textsuperscript{275} Ordering an official to seize evidence in a foreign State would be con-
trary to international law. \textit{Onkelinx, supra} note 3, at 497 (citing \textit{Rousseau,
L'Independence de l'Etat dans l'Ordre International}, 2 \textsc{Rec. des Cour} 171, 224
(1948)).

\textsuperscript{276} \textit{McLaughlin}, 102 F.R.D. at 958; \textit{Restatement (Revised) supra} note 1,
§ 497(2)(b).

\textsuperscript{277} See, e.g., \textit{Graco}, 101 F.R.D. at 511 ("a Letter of Request would not be
adequate to allow Graco the discovery to which it is entitled").
COMMENT

They focus instead on such restrictions as the article 23 declarations prohibiting pretrial discovery of documents. However, only five contracting States have blanket article 23 declarations. The remaining States only prohibit document requests that lack specificity. Moreover, those declarations apply only to documentary evidence, not interrogatories, depositions, or the inspection of property.

Anschuetz and Messerschmitt, the two Fifth Circuit cases now pending before the Supreme Court, are ripe for review and present the Court with an opportunity to establish order out of the current chaos surrounding the proper role of the Hague Evidence Convention. Moreover, the cases present the issue in the form most commonly encountered in United States litigation, i.e., orders to produce in the United States documents and witnesses located abroad.

CONCLUSION

The Supreme Court has the opportunity to reaffirm that the Hague Evidence Convention is a treaty obligation of the United States binding upon its courts. It is suggested that it is in the best interest of the United States to uphold this obligation, and not to derogate from it through resort to principles of comity. The Hague Evidence Convention is part of an ongoing effort to improve international judicial cooperation and codify private international law. It is in the best interest of the United States to support this effort, since the alternative is a return to the pre-Convention days when foreign judicial assistance was even more difficult to obtain. The Hague Evidence Convention is not flawless; it is the product of compromises made in the spirit of international coop-

278. Hague Evidence Convention, supra note 9, art. 9. Article 9 states that a request must be executed unless it “is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.” Id.

279. For a discussion of the article 23 declarations by various contracting states, see supra notes 93-102 and accompanying text.

280. The majority of the less restrictive article 23 declarations were modeled after that of the United Kingdom. For a discussion of the United Kingdom’s declaration, see supra notes 97-98.

281. For a discussion of Anschuetz, see supra notes 187-200 and accompanying text.

282. For a discussion of Messerschmitt, see supra notes 201-11 and accompanying text.

283. It is suggested that no intervention by the Government in Anschuetz or Messerschmitt will render this issue moot. Moreover, the records are fully developed; and include an expression of Germany’s objection to the discovery ordered. In contrast the United States, in Falzon, ordered its consular official not to conduct the requested depositions in Germany, thus rendering the issue moot. Falzon Brief, supra note 29, at 3. Also in Club Med, the lower court did not perform a comity analysis; therefore, the United States concluded that review by the Court would be inappropriate. Club Med Brief, supra note 29, at 14.

284. For a discussion of the obstacles to obtaining discovery before the Hague Evidence Convention, see supra notes 79-80 and accompanying text.
eration. Compromise and accommodation are essential in a society where transnational activity is commonplace. As the Supreme Court stated, "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."\(^{285}\)

Continued application of principles of comity to circumvent the Convention will undoubtedly result in more frequent unilateral action, over foreign States' objections, by United States courts. Such action, inconsistent with the United States' obligations under the Hague Evidence Convention, can only serve to increase the level of friction and hostility between the United States and other States signatory to the treaty. It is precisely that kind of friction and hostility, and the concomitant failure of international judicial cooperation, that the Hague Evidence Convention was designed to prevent.

Recognition that the Hague Evidence Convention is the exclusive means by which to obtain discovery abroad, on the other hand, would further the treaty's goals by increasing the level of cooperation between United States and foreign courts. Increased international cooperation, in itself a widely accepted policy objective,\(^{286}\) can produce greater mutual understanding by courts and officials of the differences and commonalities among various legal systems. Only with increased understanding of these systems will they develop a resolution of the problems that still remain in the area of extraterritorial discovery.

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\(^{286}\) See, e.g., Furth, Discovery in Aid of Litigation Pending in a Foreign Court, in \textit{EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO} 179 (C. Olmstead ed. 1984) (Furth, U.S. Deputy Assistant Attorney General for Antitrust, acknowledging that "no one is likely to question the general proposition that there is a need for international cooperation in the gathering of evidence for use in international proceedings").

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