ARTICLE

OBTAINING EVIDENCE ABROAD: A MODEL FOR DEFINING AND RESOLVING THE CHOICE OF LAW BETWEEN THE FEDERAL RULES OF CIVIL PROCEDURE AND THE HAGUE EVIDENCE CONVENTION

PATRICIA J. YOUNGBLOOD*
JOHN J. WELSH**

1. INTRODUCTION

"Few issues have engendered more friction in the international community than the extension of the United States legal system beyond its borders during pretrial discovery."1 This conclusion was reached by the American Law Institute in 1985, thirteen years after the United States ratified an international treaty created to achieve uniformity and predictability in transnational efforts to obtain evidence,2 the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention or Convention).3 In the early 1980s, federal and state courts were required for the first time to define the role of the Hague Evidence Convention in suits brought in the United States.4 Since that time, no court in the United States has accepted the

* Professor of Law, Albany Law School of Union University, LL.M., Harvard Law School, 1980; J.D., Willamette University College of Law, 1978; B.A., Washington State University, 1975.
** J.D.Candidate, Albany Law School of Union University, 1988; B.B.A., University of Notre Dame, 1984.
1 RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437, reporter's note 1 (Tent. Draft No. 6, 1985).
3 Id.
4 "Although the Hague Evidence Convention has been in force in the United States for over a decade, it was not until the early 1980s, 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." Comment, Extraterritorial Discovery Under the Hague Evidence Convention, 31 VILL. L. REV. 253, 255 (1986). France became a party to the Convention in 1974, the United Kingdom in 1978, and the Federal Republic of Germany in 1979. For a list of signatory nations, see infra
argument that the Convention provides the exclusive means of obtaining evidence located in the territory of a foreign signatory, a position consistently adhered to by other signatories to the Convention. Instead, the majority of federal and state courts have held that the Convention's procedures were either optional or inapplicable to the particular discovery sought.

In June 1986, the United States Supreme Court granted certiorari in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, a case calling for an interpretation of the relationship between the Hague Evidence Convention and the Federal Rules of Civil Procedure. Commentators anticipated that the Court would either hold that the Convention provides exclusive procedures for the taking of evidence in the territory of a foreign signatory or provide an articulated legal analysis for choosing between the Convention and the Federal Rules of Civil Procedure.

The Court announced its decision in *Societe Nationale Industrielle Aerospatiale* on June 15, 1987. In one respect, the decision

---

note 67.


9 782 F.2d 120 (8th Cir.), cert. granted, 106 S. Ct. 2888 (1986).


fulfilled the anticipation of observers; the Court held that the Hague Evidence Convention does not provide the exclusive means of discovery for evidence located in the territory of a foreign signatory. In another respect, however, the opinion was disappointing; while the Court spoke in general terms to the choice-of-law analysis that is appropriate in choosing between the Federal Rules of Civil Procedure and the Hague Evidence Convention, it declined to "articulate specific rules to guide this delicate task of adjudication."

This Article offers a useful framework through which practitioners and judges can determine, first, when the need for a choice between the Federal Rules and the Hague Evidence Convention is presented, and, second, how that choice should be approached. We believe that this analytical model will define the role of the Hague Evidence Convention more clearly and will advance the 'overriding interest in the 'just, speedy, and inexpensive determination' of litigation' in federal courts.

2. BACKGROUND

The United States was relatively late both in appreciating the advantages of international judicial assistance and in seeking international agreements to obtain those advantages. Decades before the United States recognized the benefits of cooperating in judicial matters, civil law nations had sought bilateral agreements to promote international assistance in a wide range of judicial functions. Until the late 1950s, the United States rejected both domestic and foreign efforts to establish cooperative agreements.

In the late 1940s and early 1950s, as the post-war domestic and international economy of the United States improved dramatically, both private attorneys and the United States Government discovered the

---

12 Id. at 2553.
13 Id. at 2557.
14 Id. (footnote omitted).
15 Id. at 2555 (quoting Fed. R. Civ. P. 1).
16 Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 YALE L.J. 515 (1953). Jones notes, "[civil law] countries . . . have covered the globe with a network of treaties to assure judicial assistance among 'civilian' courts, a fact which may interest common law practitioners who suppose that the common law system is more interested in fact-finding than is the civilian system." Id. at 516.
17 For an extensive listing of such agreements, see Harvard Draft on Judicial Assistance, 33 AM. J. INT'L L. (Supp. 1939) at 119-28.
18 For an extensive discussion of American involvement in international judicial cooperation both before and after becoming a party to the Hague Evidence Convention, see Bishop, International Litigation in Texas: Obtaining Evidence in Foreign Countries, 19 HOUS. L. REV. 361, 367-69 (1982).
complexities of confronting foreign judicial systems. During this period, the Federal Rules of Civil Procedure provided two broad devices for seeking evidence abroad: depositions and letters rogatory.

Depositions could be taken abroad in three ways: “on notice,” “by commission,” and “by stipulation.” Each of these deposition methods was accomplished without the participation of a foreign court. Letters rogatory, however, required the involvement of a foreign court, asked by a United States court to take evidence from an identified witness. In

---

19 See Jones, supra note 16, at 517-18.
20 FED. R. CIV. P. 28(b). For an excellent discussion of these procedures, see Jones, supra note 16.
21 FED. R. CIV. P. 28(b). This was, and remains, the simplest of the procedures authorized by the Federal Rules of Civil Procedure. One party serves notice on another party that he will orally examine specified witnesses before a United States consular or foreign service official at a specified time and place. Jones, supra note 16, at 519. See also Comment, Obtaining Testimony Outside the United States: Problems for the California Practitioner, 29 HASTINGS L.J. 1237, 1238 (1978) (discussion of taking depositions abroad as a private arrangement between parties).
22 FED. R. CIV. P. 28(b). See Jones, supra note 16, at 519. Describing the commission procedure, Jones states, a party requests the court to authorize a foreign service officer, or any other person designated as commissioner, to take a deposition. Issued only when ‘necessary or convenient,’ the court’s commission will contain such special directions governing the mode of taking the deposition as the circumstances may require. A party upon whom a notice is served to take a deposition orally before a consul, may object and ask that a commission be issued to examine the witness on written interrogatories, if he thinks that the importance of the case or the nature of the expected testimony does not justify the expense and time of oral examination.

Id. See also Comment, supra note 21, at 1238 (a commission is a document issued by the court in the party’s home country, authorizing an individual in a foreign country to depose a witness; the rules and regulations of the country issuing the commission govern the deposition procedure).

23 FED. R. CIV. P. 29. The parties enter into a written stipulation that a deposition will be taken before any person at any time and place suitable to the parties. Jones, supra note 16, at 519.

24 FED. R. CIV. P. 28(b) continues to govern issuance of letters rogatory where evidence is located abroad in the territory of a non-signatory to the Hague Evidence Convention. Letters rogatory normally are executed by the foreign court as a matter of comity. See infra note 182. The process by which letters rogatory are effectuated involves the participation of both the United States court and the foreign court. The party desiring evidence located abroad applies to the federal court for issuance of the letter. At one time, parties were required to describe facts that made recourse to the foreign court “necessary or convenient.” This requirement was eliminated in the 1963 amendments to Rule 28(b). See infra notes 33-35 and accompanying text. In most instances the requesting party is required to include written interrogatories to be propounded by the foreign court. The federal court then forwards the letter to the foreign court through diplomatic channels. The procedure followed in the examination conducted by the foreign court is that defined by the internal law of that nation. Jones, supra note 16, at 530. See also, Comment, supra note 21, at 1239 (noting that a letter rogatory is different from a commission, insofar as it asks a foreign court to take the deposition of the foreign witness; the deposition is then governed by the rules and regulations of that foreign court).
United States, private attorneys, who were left uninolved in the evidence-gathering process, tended to view the letters rogatory process as both slower and less effective. As a result, it proved to be a less desirable method of gathering evidence, and lawyers in the United States used depositions whenever possible. Unfortunately, the Federal Rules of Civil Procedure neither stated nor suggested that the authorized discovery processes for obtaining evidence abroad were available only to the extent that the internal law of the country in which the evidence was sought permitted their use. The assumption by judges and lawyers in the United States that such broad permission existed was "erroneous and occasionally dangerous."

As a result of the ineffectiveness of the methods of seeking evidence abroad under the Federal Rules of Civil Procedure, and in response to the increasing irritation of nations where such methods were regularly employed, the United States Congress in 1958 established the Commission and Advisory Committee on International Rules of Judicial Procedure (The Rules Commission or The Commission). The Commission was charged with making discovery methods in state and federal courts involved in litigation involving a foreign party or witness "more readily ascertainable, efficient, economical and expeditious." In response to The Commission's efforts, the United States Supreme Court amended the Federal Rules of Civil Procedure in 1963 with respect to service of process and taking of evidence abroad. The next year, Congress passed legislation improving federal judicial procedures for service of process and discovery abroad. This legislation also created more liberal methods by which foreign parties and tribunals were

26 For a detailed discussion of the procedural problems encountered in the execution of American letters rogatory in foreign courts, see id. at 530-32.
27 Id. at 519.
29 Note, supra note 28, at 966; see Jones, supra note 16, at 521.
32 Id., § 2, 72 Stat. 1743.
able to obtain evidence located in the United States.\textsuperscript{35}

The United States effort to make international evidence-taking more effective did not lead to reciprocal cooperation by other governments.\textsuperscript{36} Many nations continued to view United States discovery practices in foreign nations with hostility and as a violation of their judicial sovereignty.\textsuperscript{37} Many responded to such practices either indirectly, by refusing to compel persons within their territory to comply with United States discovery requests, or directly, by either prohibiting United States counsel from obtaining evidence within their territory or forbidding persons from complying with United States discovery efforts.\textsuperscript{38} A few nations, concerned with the expanding reach of United States substantive and procedural laws, prohibited persons within their jurisdiction from providing any assistance to foreign litigants seeking to obtain certain types of business documents.\textsuperscript{39}

The problems caused by United States discovery practices arose primarily out of fundamental differences between the roles played by

\*\*\*\*\textsuperscript{35} The United States Department of State is authorized to receive, transmit and return letters rogatory between the United States and foreign courts. 28 U.S.C. § 1781 (1982). Assistance is also given to foreign courts and litigants seeking a wide range of evidence in the United States. 28 U.S.C. § 1782 (1982). Mr. Phillip Amram, the chief delegate to the Hague Conference during the negotiation of the Hague Evidence Convention, described these Congressional efforts as intended to offer to foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States. The amendments . . . authorized the use in the federal courts of evidence taken abroad in civil law countries, even if its form did not comply with the conventional formalities of our normal rules of evidence.


\*\*\*\*\textsuperscript{36} Letter of Submittal by Secretary of State William P. Rogers to the President Regarding The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. A., 92nd Cong., 2d Sess. (1972), reprinted at 12 I.L.M. 324 (1973); see also, Amram, supra note 35, at 655 (author noting that liberal evidence-taking procedures for foreign litigants in the United States have not been reciprocated).


\*\*\*\*\textsuperscript{38} For illustrative examples of the experience of private attorneys confronted with such foreign governmental opposition to discovery practices within their territory, see Bishop, supra note 18, at 361-63; Jones, supra note 16, at 520.

the court in common law and civil law systems. Put simply, many of the routine discovery procedures authorized by the Federal Rules of Civil Procedure, particularly the taking of depositions, would take place exclusively in the courtroom in civil law countries. In contrast to United States practices, civil law countries generally require that the court, and not the parties, gather the evidence for trial. Although most civil law countries allow attorneys to suggest questions to be asked of a witness, the court, rather than counsel, questions the witnesses. Not only is the Anglo-American practice of taking testimony of a private lay person virtually unknown, in many civil law countries it is also considered improper or unlawful for the lawyer to talk to witnesses before the witnesses testify in civil law trials. Furthermore, the witness is normally not under oath while testifying. A verbatim transcript is not kept; the judge summarizes the witness's testimony in a written narrative that the witness is asked to sign. The United States concept of discovery of material that is not admissible at trial but that may lead to admissible material is unknown in civil law systems.

---


41 Jones, supra note 16, at 527.


43 R. SCHLESINGER, COMPARATIVE LAW 407-08 (4th ed. 1980); Bishop, supra note 18, at 363; Jones, supra note 16, at 527-28. See also, Work, 106 F.R.D. at 55 (in Germany, judge determined which witnesses may testify and what questions were to be asked); Philadelphia Gear, 100 F.R.D. at 59 (in civil law countries, the judge questions the witnesses and then summarizes the testimony for the record; the litigants may not question the witnesses, but they may offer suggested questions to the judge).


45 Jones, supra note 16, at 531.

46 Id.

47 Id.

The most significant difference between common law and civil law approaches to evidence-gathering, however, is the fact that in civil law nations litigation is not bifurcated between pretrial procedures and the trial itself; instead, every proceeding after the institution of the suit is part of the trial. The fact that civil law systems viewed depositions and other discovery efforts as an essential part of the trial itself led civil law countries to interpret United States discovery efforts as private trials. Furthermore, these attempts at discovery were viewed as being hostile to judicial sovereignty, because the taking of evidence in civil law countries is essentially a sovereign function. Although it may be delegated by the sovereign, the right to obtain evidence may not be unilaterally arrogated by foreign private attorneys or courts.

Tension generated by American discovery practices was not limited to civil law nations. Similar hostility arose as a result of discovery efforts in the United Kingdom. Although the modern British and United States legal systems share many common features, important differences exist between the two with respect to pretrial discovery.

---

49 R. Schlesinger, supra note 43, at 398; Bishop, supra note 18, at 363; Jones, supra note 16, at 528.

50 Maier, Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention, 19 Vand. J. Transnat'L L. 239 (1986). Professor Maier notes that, in a civil law country, the evidence gathering is characterized as a governmental act, not solely because the judge carries it out in his official capacity but because, in discharging this duty, he effectuates both the public policies of fairness and efficiency embodied in the procedural mechanisms which enable the trial and the societal interests reflected in the relevant substantive legal rules promulgated by the legislature.


51 The term "sovereign function" relates to the inherent power of a government to prescribe laws and regulate activities within its territory. See, e.g., The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812).

52 Jones, supra note 16, at 527. "In countries where the performance of a 'judicial act' is historically a monopoly of the courts, taking of testimony other than by a court pursuant to a letter of request may be treated as an infringement of sovereignty and may even be criminal in nature." Amram, United States Ratification of the Hague Convention On the Taking of Evidence Abroad, 67 Am. J. Int'l L. 104, 107 (1973).

53 Collins, Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States, 13 Int'l Law. 27 (1979) [hereinafter Collins, Obtaining Evidence in England].

54 For an extensive discussion of British discovery practices, see Myrick & Love, Obtaining Evidence Abroad for Use In United States Litigation, 35 Sw. L.J. 585, 597-609; Collins, A Serious Misunderstanding, supra note 48; Collins, Obtaining Evidence in England, supra note 53, at 27. For an extensive discussion of Canadian prac-
Like civil law systems, British and most Commonwealth systems do not permit discovery of inadmissible evidence that may lead to potentially admissible evidence. Instead, discovery is limited to the production of documents. Furthermore, British and most Commonwealth systems do not permit discovery against a person who is not a party to the litigation.

When unilateral actions proved ineffective, the United States took the initiative before the Hague Conference on Private International Law (Hague Conference or Conference) in proposing that a convention on international evidence-taking be considered at the 1968 meeting of the Conference. Twenty-five nations participated in the negotiations and by 1980 the Hague Evidence Convention was opened for signature. When President Nixon sent the Hague Evidence Convention to the Senate for ratification, he stated that it would "permit our courts and litigants to avail themselves of a number of improved and simplified procedures for the taking of evidence." The Senate, without dissent, gave its consent on June 13, 1972.


3.1. Introduction

The Hague Evidence Convention was designed to provide methods of taking evidence that would, in the words of the Convention’s drafters, “be ‘tolerable’ to the authorities of the State where it is taken...
and at the same time ‘utilizable’ in the forum where the action will be tried.\textsuperscript{64} The scope of its application is limited to civil and commercial matters\textsuperscript{65} for pending or contemplated judicial proceedings.\textsuperscript{66} To date, nineteen nations\textsuperscript{67} are signatories to the Convention.

The Hague Evidence Convention establishes three methods by which evidence may be obtained in the territory of a signatory: by a diplomatic officer or consular agent,\textsuperscript{68} by a private commissioner,\textsuperscript{69} and through letters of request.\textsuperscript{70} Because many signatories have restricted the use of the first two methods,\textsuperscript{71} the primary method of obtaining evidence abroad is by the letter of request procedure.

\subsection*{3.2. Letters of Request}

Through a letter of request,\textsuperscript{72} a court of a signatory asks that a
court of another signatory obtain specific evidence for use in judicial proceedings within the former's territory. The request is communicated to a "central authority" in the receiving state.\(^3\) The function of the central authority is to receive the letters of request from foreign authorities and to transmit them to the appropriate tribunals within the executing state.\(^4\) This process is intended to eliminate uncertainty as to the proper recipient of letters of request.\(^5\) If a letter of request is sent to the wrong entity in the executing state, Article 6 of the Convention requires that the letter be forwarded to the correct authority.\(^6\)

Article 3 of the Convention specifies the content of a letter of request. In particular, Article 3 requires that a letter of request identify:\(^7\)

1. the authority issuing the letter and the authority requesting its execution if known;\(^8\)
2. the names and addresses of the parties to the suit and their representatives;\(^9\)
3. the nature of the proceedings;\(^10\)
4. the evidence sought to be obtained or the other judicial act to be performed;\(^11\)
5. the names and addresses of the witnesses;\(^12\)
6. the specific questions to be asked or a statement of the subject matter about which the witness is to be examined;\(^13\)
7. the documents or property to be inspected;\(^14\)
8. a statement that the evidence is to be given under oath or affirmation, if applicable, and any special form of oath or affirmation required;\(^15\) and

---

\(^3\) Convention, supra note 2, arts. 1, 2, 23 U.S.T. at 2557-58, 847 U.N.T.S. at 241. The designated central authority and other competent authorities named by a contracting nation for the receipt of letters of request are normally identified in the nation’s declaration. See 28 U.S.C.A. § 1781 (West Supp. 1987). The Department of Justice has been designated as the central authority for the United States. Id.

\(^4\) Convention, supra note 2, art. 2, 23 U.S.T. at 2560, 847 U.N.T.S. at 242.

\(^5\) Delegation Report, supra note 37, at 809.

\(^6\) Convention, supra note 2, art. 6, 23 U.S.T. at 2560, 847 U.N.T.S. at 242.

\(^7\) The requirements of Article 3 are modeled on the United Kingdom's bilateral treaties of judicial assistance. See Delegation Report, supra note 37, at 809.

\(^8\) Convention, supra note 2, art. 3(a), 23 U.S.T. at 2558, 847 U.N.T.S. at 241.

\(^9\) Id., art. 3(b).

\(^10\) Id., art. 3(c).

\(^11\) Id., art. 3(d), 23 U.S.T. at 2558, 847 U.N.T.S. at 242.

\(^12\) Id., art. 3(e).

\(^13\) Id., art. 3(f).

\(^14\) Id., art. 3(g).

\(^15\) Id., art. 3(h), 23 U.S.T. at 2359, 847 U.N.T.S. at 242.
any special method or procedure to be followed in obtaining the evidence.\textsuperscript{86}

The Convention allows letters of request to be written in either English or French.\textsuperscript{87} A signatory may, however, refuse to accept letters in either language, pursuant to its power of reservation under Article 33.\textsuperscript{88} If a signatory makes an Article 33 declaration, a letter of request sent to its central authority must be either written in, or accompanied by a translation into, an acceptable language specified by the signatory.\textsuperscript{89} A translation is not recognized unless it is certified as correct by a diplomatic officer, a consular agent, a sworn translator, or any other person authorized by either the requesting or receiving state.\textsuperscript{90}

Prior to the actual execution of a letter of request, a requesting state has the right to "be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives may be present."\textsuperscript{91} The executing state may also allow members of the requesting judicial authority to attend the execution of the letter.\textsuperscript{92}

Article 10 of the Convention requires the executing country to use whatever means of compulsion are available under its law for domestic proceedings to obtain the requested evidence.\textsuperscript{93} While the executing signatory will normally employ its own evidence-gathering procedures, the Convention requires that it proceed in accordance with any special method or procedure requested by the requesting signatory,\textsuperscript{94} unless the requested method of procedure is: (1) incompatible with its domestic law,\textsuperscript{95} or (2) impossible due to either practical difficulties or the inter-

\textsuperscript{86} Id., arts. 3(i) & 9, 23 U.S.T. at 2561, 847 U.N.T.S. at 243. For a model letter of request, see 28 U.S.C.A. § 1781 (West Supp. 1987). A similar copy of a model letter of request may be obtained from the Office of Foreign Litigation of the United States Department of Justice.

\textsuperscript{87} Id., art. 4, 23 U.S.T. at 2559, 847 U.N.T.S. at 242.

\textsuperscript{88} Id., art. 33, 23 U.S.T. at 2571, 847 U.N.T.S. at 247.

\textsuperscript{89} Id., art. 4, 23 U.S.T. at 2559, 847 U.N.T.S. at 242.

\textsuperscript{90} Id. American consular officers are not authorized to translate documents or to certify the correctness of translations. 22 C.F.R. § 92.78 (1987).

\textsuperscript{91} Id., art. 9, 23 U.S.T. at 2560-61, 847 U.N.T.S. 242.

\textsuperscript{92} Id., art. 8, 23 U.S.T. at 2561, 847 U.N.T.S. at 243.

\textsuperscript{93} Id., art. 10, 23 U.S.T. at 2561-62, 847 U.N.T.S. at 243.

\textsuperscript{94} This section allows a court in the United States, for example, to request that testimony be taken under oath or that a verbatim transcript be kept. Delegation Report, supra note 37, at 810, 813.

\textsuperscript{95} Id., arts. 9 & 12, 23 U.S.T. at 2561, 2562-63, 847 U.N.T.S. at 243. Amram has commented, "[t]he Report of the Rapporteur of the Convention notes that the word 'incompatible' does not mean 'different' from the domestic law; it means that a constitutional or statutory barrier in the domestic law prevents compliance with the request to apply a foreign procedure." Amram, supra note 52, at 106 n.13.
nal practice or procedure of the executing state. The Convention applies the standard of "impossibility," rather than a standard of "difficulty" or "inconvenience," in order to reduce the possibility of refusal by an executing state.

Under the Convention, a letter of request may be refused if: (1) it was issued for the purpose of obtaining pretrial discovery of documents; (2) it fails to comply with the formal requirements of the Convention; or (3) its execution would prejudice the sovereignty or security of the acting state. Among these grounds, the "pretrial discovery" ground for refusal has been the major source of controversy among the contracting states.

Article 23 of the Hague Evidence Convention provides, "[a] Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." This article was included in the Convention at the insistence of the United Kingdom and was intended to allow the rejection of the kind of "fishing expeditions" permitted by United States discovery rules. All of the Article 23 declarations made prior

---

96 Convention, supra note 2, art. 9, 23 U.S.T. at 2561, 847 U.N.T.S. at 243.
98 Convention, supra note 2, art. 23, 23 U.S.T. at 2362-63, 847 U.N.T.S. 245; see infra notes 102-14 and accompanying text.
102 Convention, supra note 2, art. 23, 23 U.S.T. at 2568, 847 U.N.T.S. at 245.
103 The British attitude toward broad and unspecified pretrial discovery requests is reflected in a case decided a dozen years before the Convention was drafted. In Radio Corp. of Am. v. Rauland Corp., [1956] 1 Q.B. 618 (C.A.), defendants in a patent infringement suit sought evidence from British non-party witnesses. The court denied the request as to disclosure of information that was not directly relevant to the issues to be tried. As to that part of the request, the court said, "[t]hat is mainly what we should call a 'fishing' proceeding, which is never allowed in English courts . . . ." Id. at 649. See also Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. 547 (1977).
104 For an excellent discussion of the legislative history and purpose of Article 23, see Collins, A Serious Misunderstanding, supra note 48, at 775-77.
to 1978, except that of the United Kingdom, were blanket prohibitions against pretrial discovery of documents. In 1978, at the scheduled meeting of the Special Commission on the Operation of the Evidence Convention, the United States sought to clarify an apparent misunderstanding about the scope and function of United States pretrial discovery. As a result, the other signatories agreed to reevaluate their Article 23 declarations.

Presently, four signatories, Barbados, Czechoslovakia, Israel and the United States, have not made declarations under Article 23. France, Italy, Luxembourg, Monaco, Portugal and West Germany have filed declarations precluding all pretrial discovery of documents.

By 1978, every Signatory, except the United States, had made an Article 23 declaration. The Hague Conference appointed the Special Commission on the Operation of the Evidence Convention [hereinafter Special Commission], which is composed of experts on international judicial assistance and representatives of the Signatories, to meet periodically to consider ways in which to make the Convention's procedures more effective. The 1978 meeting was a continuation of the Special Commission's first meeting in 1977. Special Commission Report, supra note 104, at 1425.

Those countries that had made Article 23 declarations apparently believed that the pretrial discovery of documents in common law systems was conducted not just prior to trial, but prior to the initiation of the litigation. U.S. Delegation Report, supra note 101, at 1421. Believing that several of the Signatories that had made blanket declarations under Article 23 had not intended to accomplish so broad a declaration, the Special Commission expressed the desire that the States Parties to the Convention and those which were to become Parties withdraw or never make this reservation, or at least that they restrict by declaration the application of the reservation to Letters of Request which are not sufficiently specific, taking as their example the declaration made by the United Kingdom.


Denmark, Finland, the Netherlands, Norway, Singapore and Sweden have modified what were initially blanket prohibitions in favor of declarations similar to those in the British Article 23 declaration. 28 U.S.C.A. § 1781 (West Supp. 1987); see infra note 112 and accompanying text.


Id. In 1985, the Special Commission held its second meeting. As it had in its first meeting, the Special Commission endorsed the United Kingdom's declaration as an appropriate reservation against "unreasonable or overly burdensome" discovery requests. Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 I.L.M. 1668, 1675-77 (1985).

In commenting on West Germany's Article 23 declaration, which has not been modified, one author has noted, although it was initially believed that the FRG's hostility to this type of evidence-taking was based on a misunderstanding of the concept, it now appears clear that the real reason for concern lies in the procedural differ-
Cyprus, Denmark, Finland, the Netherlands, Norway, Singapore and Sweden have made Article 23 declarations similar to that of the United Kingdom, which is directed at broad and unspecific letters of request 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.

Clearly, this type of request seeks the kind of broad and unspecific discovery that motivated the United Kingdom to insist upon including Article 23 in the Convention. When seeking to obtain evidence in these countries through the Convention's letter of request procedure, a litigant should clearly specify the documents sought; should make the request as narrow and specific as possible; and should ask the United States district court to state that the evidence sought is required "solely for use at the trial and for no other purpose and will, if obtained, be introduced at the trial."

If a letter of request is refused by an executing state, Article 13 requires the executing state to notify the requesting state immediately of the reasons for the refusal. This notification requirement is intended to reduce the likelihood of arbitrary refusal. Article 36 of the Convention creates procedures for diplomatic discussions in the event...
the requesting state believes a letter of request was improperly denied.\textsuperscript{117}

If, however, the executing state accepts the letter of request, it must execute the letter and return the pertinent documents "to the requesting authority by the same channel which was used by the latter."\textsuperscript{118} The executing state has the right to require the requesting state to reimburse it for both fees paid to experts and interpreters, and costs incurred through the use of a special procedure requested by the state of origin under Article 9.\textsuperscript{119} "Costs occasioned by the employment of an examiner appointed by the court can be reclaimed only if the consent for incurring such costs has been obtained from the requesting authority in advance."\textsuperscript{120} No other costs or fees are reimbursable under the Convention.\textsuperscript{121}

3.3. Use of Diplomatic Officers, Consular Agents or Approved Commissioners

The other two Convention procedures for the taking of evidence abroad involve the use of diplomatic officers, consular agents, or appointed commissioners.\textsuperscript{122} These procedures differ from the letter of request procedure in that they do not require the participation of the courts in the foreign signatory. Attendance of witnesses at these proceedings cannot be compelled.\textsuperscript{123} A diplomatic officer or consular agent may take evidence from one of his own nationals in the territory in which he performs his functions.\textsuperscript{124} A signatory may, however, require that prior permission be obtained in each case before allowing the officers or agents to take such testimony.\textsuperscript{125} Diplomatic officers and consular agents may also take testimony from nationals of the host state or a third state.\textsuperscript{126} Prior permission is always required in these instances

\textsuperscript{117} 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." Convention, supra note 2, art. 36, 23 U.S.T. at 2572, 847 U.N.T.S. at 247.
\textsuperscript{118} \textit{Id.}, art. 13, 23 U.S.T. at 2563, 847 U.N.T.S. at 243.
\textsuperscript{119} \textit{Id.}, art. 14, 23 U.S.T. at 2563-64, 847 U.N.T.S. at 243-44.
\textsuperscript{120} Edwards, \textit{supra} note 50, at 649.
\textsuperscript{121} Convention, \textit{supra} note 2, art. 14, 23 U.S.T. at 2563, 847 U.N.T.S. at 243.
\textsuperscript{122} \textit{Id.}, arts. 15-17, 23 U.S.T. at 2564-65, 847 U.N.T.S. at 244.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}, art. 16. American consular officers may take depositions on notice or to execute commissions for the taking of evidence when requested to do so. 22 U.S.C. §§ 4215, 4221 (1982); 22 C.F.R. § 92.55 (1986). However, they are not empowered to do so if foreign law prohibits the action. \textit{Id.} The regulations governing the taking of evidence by consular officials are found at 22 C.F.R. §§ 92.49-71 (1986).
\textsuperscript{125} Convention, \textit{supra} note 2, art. 15, 23 U.S.T. at 2564, 847 U.N.T.S. at 244.
\textsuperscript{126} \textit{Id.}, art. 16, 23 U.S.T. at 2564-65, 847 U.N.T.S. at 244.
unless the executing state has declared otherwise. A grant of permission may impose any conditions the host state considers to be necessary or appropriate. Representatives of the host state have a right to be present at the actual taking of the testimony to insure that their nationals are not subject to undue pressure or influence by the presiding officer. Finally, pursuant to conditions established by the contracting state, authorized commissioners may take voluntary evidence in aid of proceedings commenced in the courts of any contracting state.

3.4. Obtaining Evidence Under the Federal Rules of Civil Procedure

The scope and nature of the procedures for obtaining evidence under the Hague Evidence Convention differ dramatically from the discovery procedures authorized by the Federal Rules of Civil Procedure. The authorized means of discovery of information and documents in litigation before United States courts are found in Federal Rules of Civil Procedure 26 through 37. These methods are identified in Rule 26(a):

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

The scope of information that may be discovered under the Federal Rules of Civil Procedure is extremely broad and includes not only information that is admissible and relevant, but also information that is not admissible but that "appears reasonably calculated to lead to the

---

127 Id. The permission may be given generally or on an individual basis. The United States has given general permission. 28 U.S.C.A. § 1781 (1982).
128 Convention, supra note 2, art. 19, 23 U.S.T. at 2566, 847 U.N.T.S. at 245.
129 Delegation Report, supra note 37, at 816.
130 Convention, supra note 2, art. 17, 23 U.S.T. at 2565, 847 U.N.T.S. at 244.
131 Unlike the case as applied diplomatic officers and consular agents, the nationality of a commissioner does not limit his authority to take evidence. Id.
discovery of admissible evidence.” Generally, the parties conduct discovery without the active participation of the court, but a party may seek the court’s assistance either to compel a response to a discovery request or to protect against discovery. Except where depositions are to be conducted abroad, a situation that is governed by rule

133 Fed. R. Civ. P. 26(b)(1). This rule provides in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.


135 Fed. R. Civ. P. 26(c). This rule provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Id. Amendments to the Federal Rules of Civil Procedure in 1983 were intended to allow greater judicial involvement, when the trial judge finds it appropriate, to avoid “excessive discovery and evasion or resistance to reasonable discovery requests.” Fed. R. Civ. P. 26, advisory committee’s note (1983). According to the Advisory Committee,

...the purpose of discovery is to provide a mechanism for making relevant information to the litigants. ... Thus the spirit of the rules are violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake. ... These practices impose costs on an already overburdened system and impede the fundamental goal of the ‘just, speedy, and inexpensive determination of every action.’

Id.
OBTAINING EVIDENCE ABROAD

28(b), the scope and nature of the Federal Rules of Civil Procedure governing discovery are not altered either by the fact that one of the parties is a foreign national, or by the fact that the information sought to be discovered is located outside the United States.

The Federal Rules of Civil Procedure also provide for the issuance of subpoenas that command the person to whom they are directed to give testimony or to produce designated books, papers, documents or other tangible things. Rule 45(e)(2) provides, however, that "[a] subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in 28 U.S.C. § 1783." Section 1783 is part of the Walsh Act, which empowers a United States court to order the issuance of a subpoena requiring a United States national or resident who is in a foreign country to appear and give testimony or produce documents or things. The subpoena power under § 1783 is not to be used, however, unless the court finds that "it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

Although the United States has consistently taken the position that it has the right under international law to compel its citizens residing abroad both to give testimony in, and to produce documents for, United States litigation, a number of foreign governments believe this exercise of extraterritorial compulsion violates international law. Several foreign nations have enacted laws prohibiting service of subpoenas by United States officials within their territory.

144 See e.g., Blackmer v. United States, 284 U.S. 421, 439 (1932) ("[t]he question of the validity of the provision for actual service of the subpoena in a foreign country is one that arises solely between the Government of the United States and the citizen... [and] is in no sense an invasion of any right of the foreign government."); FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980); United States v. Lansky, 496 F.2d 1063 (5th Cir. 1974). But see infra notes 174-203 and accompanying text. It is clear, however, that a nation does not have the unilateral right under international law to invoke its compulsory process directly against foreign nationals within the territory of the foreign state. Case of the S.S. Lotus (Fr. v. Turk.), 1927 F.C.I.J. (ser. A) No. 9 (Sept. 7); Restatement (Second) of Foreign Relations Law of the United States § 8 comments e & f, § 20 comment b, § 44 (1965).
145 See infra note 144 and accompanying text.
146 See, e.g., Schweizerisches Strafgesetzbuch [StGB] arts. 271-274; Code penal suisse [CP] arts. 271-274, Codice penale svizzero [Cp] arts. 271-274; Note,
4. THE RELATIONSHIP BETWEEN THE FEDERAL RULES OF CIVIL PROCEDURE AND THE HAGUE EVIDENCE CONVENTION

As earlier noted,\(^{146}\) the extension of United States discovery efforts beyond the borders of the United States has engendered much friction in the international community.\(^ {146}\) The friction created by the continued use of Federal Rules of Civil Procedure discovery techniques for obtaining evidence in situations where foreign signatories believe the Hague Evidence Convention provides exclusive mechanisms\(^ {147}\) has been

\[^{146}\text{See supra notes 37-39 and accompanying text.}\]

\[^{147}\text{In response to United States cases, West Germany, France and Switzerland...}\]
exacerbated since 1980 as numerous federal and state courts have been called upon to define the relationship between the two bodies of law.\textsuperscript{148} While a few early cases held that parties must first resort to the Convention procedures and may employ the Federal Rules of Civil Procedure only when Convention procedures proved ineffective,\textsuperscript{149} the majority of courts in the United States have rejected this rule of "first resort."\textsuperscript{150} Instead, they have held that the Convention merely provides an alternative to the Federal Rules of Civil Procedure.\textsuperscript{151}

On June 15, 1987, the United States Supreme Court decided \textit{Societe Nationale Industrielle Aerospatiale v. United States District}

\begin{itemize}
  \item In virtually every case, one party had sought discovery under the Federal Rules of Civil Procedure and the other party had moved for a protective order under Rule 26(e), arguing that the discovery could proceed only if undertaken through Convention procedures.\textsuperscript{149}
  \item See supra note 149 and accompanying text.
\end{itemize}
and held that the Hague Evidence Convention does not provide exclusive or mandatory procedures for obtaining documents and information located in the territory of a foreign signatory. Writing for the majority, Justice Stevens noted that at least four interpretations of the relationship between the Hague Convention and the Federal Rules of Civil Procedure were possible:

First, the Hague Convention might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. Second, the Hague Convention might be interpreted to require first, but not exclusive, use of its procedures. . . . Third, . . . the Convention might be viewed as establishing a supplemental set of discovery procedures, strictly optional under treaty law, to which concerns of comity nevertheless require first resort by American courts in all cases. Fourth, the treaty may be viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the concerned foreign state.

Without expressly stating its choice, the majority implicitly adopted the fourth interpretation. In rejecting the first three interpretations, the majority noted that the language of the Convention does not speak in mandatory terms that purport to exclude all other existing practices. The Convention neither modifies the law of a signatory

107 S. Ct. at 2553. Although the Court’s decision was 5-4, all nine of the Justices agreed on the non-exclusivity of the Convention; the majority and dissent diverged on the appropriate approach to determining under what circumstances resort should be had to Convention procedures in litigation before federal courts.
154 Chief Justice Rehnquist and Justices White, Powell and Scalia joined with Justice Stevens.
155 107 S. Ct. at 2550.
156 Id. at 2550-53. For example, article 1 of the Convention provides that a judicial authority in one contracting State “may” forward a letter of request to the competent authority in another contracting State for the purpose of obtaining evidence. Convention, supra note 2, art. 1, 23 U.S.T. at 2557, 847 U.N.T.S. at 241. Similarly, articles 15, 16, and 17 state that diplomatic officers, consular agents and commissioners, “may . . . [take evidence] without compulsion,” under certain conditions. Id., arts. 15-17, 23 U.S.T. at 2564-65, 847 U.N.T.S. at 244. Article 27 of the Convention expressly authorizes that membership to the Convention does not prevent a signatory nation from using more liberal methods of rendering evidence than those authorized by the Convention. Id., art. 27, 23 U.S.T. at 2569, 847 U.N.T.S. at 246. The majority reasoned, “thus, the text of the Evidence Convention, as well as the history of its proposal and
nation nor requires or compels a signatory to use the procedures outlined in the Convention prior to resorting to the procedures of the signatory's internal law. Instead, the language is permissive and does not "require first resort to Convention procedures whenever discovery is sought from a foreign litigant."

In its analysis of the fourth interpretation, the majority stated that the trial court should resort to Convention procedures "when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the concerned foreign state . . . ." Aside from exercising "special vigilance" in evaluating the intrusiveness and unreasonableness of the discovery request, the trial court is to "demonstrate due respect for any special problem confronted by the foreign litigant . . . and for any sovereign interest expressed by a foreign state." The majority declined however to articulate rules for the trial court "to guide this delicate task of adjudication."

Justice Blackmun, writing for the minority, dissented in part from the majority opinion. Justice Blackmun concurred with those parts of the majority opinion that rejected the two extreme positions regarding the Convention: that it is either exclusive and mandatory or entirely inapplicable. The minority dissented from the majority's case-by-case approach and criticized its failure to provide meaningful guidance to ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures that would facilitate the taking of evidence abroad."}

107 *Aerospatiale* 107 S. Ct. at 2552-53.


18 *Aerospatiale* 107 S. Ct. at 2555.

159 *Id.* at 2550.

160 *Id.* at 2557.

Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the District Court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence.

*Id.*

161 *Id.*

162 *Id.* (footnote omitted).

163 *Id.* at 2557 (Blackmun, J., concurring in part and dissenting in part). Justices Brennan, Marshall and O'Connor joined with Justice Blackmun.

164 *Id.* at 2558 (Blackmun, J., concurring in part and dissenting in part).
the lower courts. Justice Blackmun would not remove judicial discretion entirely from the determination of the proper method of discovery where one of the parties is a national of a foreign signatory. Instead, the minority opinion advocated a general presumption that resort should first be made to Convention procedures. The minority stated that an individual analysis of a particular case would be appropriate only after a court determines that Convention procedures would be futile or unhelpful.

5. Determining the Appropriate Role of The Hague Evidence Convention in Civil Suits Brought in United States District Courts

The remainder of this Article develops a method of analysis for determining, first, when a choice between the Federal Rules of Civil Procedure and the Hague Evidence Convention is presented, and, second, how the choice is to be made. Determining whether a choice between the Convention and the Federal Rules of Civil Procedure exists requires a two-step analysis. The first step asks where the contemplated "evidence-taking proceeding" will occur. If it is to be conducted in the territory of a foreign signatory to the Hague Evidence Convention, the following conclusion is appropriate: the Hague Evidence Convention is the exclusive means through which the proceeding may be conducted; the Federal Rules of Civil Procedure are inapplicable, and no choice-of-law question is presented. If the proceeding is to be conducted in the United States, the party seeking discovery must look to the second step of the proposed analysis.

The second step asks where the evidence is located. Assuming that the evidence-taking proceeding occurs in the United States, and the location of the evidence is in the United States, the following conclusion is appropriate: the Federal Rules of Civil Procedure provide the proper means of discovering that evidence, the Hague Evidence Convention is inapplicable, and no choice-of-law question between the two is presented.

Only when the evidence-taking proceeding is in the United States and the evidence is located in the territory of a foreign signatory, the precise situation at issue in Societe Nationale Industrielle Aerospatiale

---

165 Id.
166 Id.
167 Id.
168 See infra notes 174-203 and accompanying text.
169 Id.
170 See infra notes 204-18 and accompanying text.
v. United States District Court, is a choice of law between the Convention and the Federal Rules of Civil Procedure presented. Resolution of that choice, in accordance with the broad standards articulated in Aérospatiale, may be approached through a three-level analysis. The first level examines whether the sovereign interests of the foreign signatory in whose territory the evidence is located are accommodated through use of the Convention’s procedures.171 If they are not, the court should reject any assertion that the parties be required to resort to those procedures. If the foreign signatory’s interests are accommodated by resorting to the Convention, the second level examines whether substantial sovereign interests of the United States are impaired by deferring to the Hague Evidence Convention.172 If they are, the court should allow discovery to proceed under the Federal Rules of Civil Procedure. The third step is reached only if substantial interests of the United States are not impaired by ordering that discovery proceed through the Convention. In such a case, the court should defer to the Convention, unless the party opposing those procedures can demonstrate that the order will impose upon him a substantial burden that outweighs the burden imposed upon the other party by discovery under the Federal Rules of Civil Procedure.173

5.1. Identifying the Situs of the Evidence-Taking Proceeding

Because identification of the situs of an evidence-taking proceeding may lead to the conclusion that a choice between the Hague Evidence Convention and the Federal Rules of Civil Procedure is not presented,174 it serves as a useful starting point of analysis. Despite the general statement in Aérospatiale that the Hague Evidence Convention does not provide exclusive and mandatory methods of obtaining evidence abroad,175 the weight of case authority continues to support the conclusion that when a proceeding is to be conducted in the territory of a foreign signatory, use of Convention procedures is mandatory and the

171 See infra notes 226-257 and accompanying text.
172 See infra notes 258-67 and accompanying text.
173 See infra notes 268-94 and accompanying text. Although the Hague Evidence Convention does not distinguish between evidence-taking from parties to the litigation and evidence-taking from non-parties, numerous federal courts have distinguished the two in dicta. For this reason, we discuss the model as it applies to evidence-taking from parties in Section 5.1 through 5.3 below. In Section 5.4, we examine evidence-taking from non-parties and conclude that only in limited situations will non-parties be treated differently under the proposed model.
174 See infra notes 202-03 and accompanying text.
Federal Rules are inapplicable. United States courts clearly have dis-

178 This conclusion survives *Aerospatiale* because that case concerned only “the extent to which a Federal District Court must employ the procedures set forth in the Convention when litigants seek answers to interrogatories, the production of documents, and admissions. . . .” 107 S.Ct. at 2546 (emphasis added). The Magistrate’s ruling that any oral depositions to be conducted in France must comply with Convention procedures was not challenged on appeal; therefore, the Supreme Court did not address the issue of whether depositions and on-site inspections to be conducted in the territory of a foreign signatory must be undertaken through the means established by the Convention. *Id* at 2547 n.7.

The role of the Hague Convention is treated differently where evidence abroad is sought through depositions or inspection of premises in the territory of a foreign signatory. The possibility of such divergent treatment became evident in the position taken by the United States Government in amicus curiae briefs to the United States Supreme Court in cases concerning the role of the Convention. The first such brief was filed in *Volkswagenwerk A.G. v. Falzon*, 464 U.S. 811 (1983), *appeal dismissed*, 465 U.S. 1014 (1984). In *Falzon*, the defendant, a national of West Germany, sought Supreme Court review of a Michigan state court order that a United States consular official take depositions of West German nationals who were employees of defendant. The depositions, ordered pursuant to Michigan court rules, were to take place in West Germany. The Government recommended that the Court refuse review of the case on the ground that the Government would not allow United States consular officials to carry out the order of the Michigan court and thus the depositions would not take place. Nevertheless, it articulated an unambiguous position with regard to the impropriety of an American court ordering a deposition to be taken in the territory of a signatory outside of either Convention procedures or procedures otherwise approved by the signatory. The Government asserted:

> the Evidence Convention deals comprehensively with the methods available to United States courts and litigants to obtain proceedings abroad for taking evidence. . . . 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 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,
tungished "information-gathering activities" from "evidence-taking proceedings." Extraterritorial evidence-taking proceedings violate the territorial integrity of the foreign signatory and implicate the same concerns of judicial sovereignty that led to negotiation of the Hague Evidence Convention. Several cases suggest that these concerns are not raised by mere extraterritorial information-gathering activity. Thus, even after Aerospatiale, it appears likely that, if a deposition or an on-site inspection is to be conducted in the territory of a foreign signatory, United States courts will feel themselves obliged to order the parties to use the Hague Evidence Convention.

The location of an on-site inspection is beyond the power of a court to change and, therefore, the court and parties cannot avoid the mandate of the Hague Evidence Convention by simply relocating the evidence-taking proceeding. When the court has in personam jurisdiction over the party on whom a notice of deposition is served, how-

the court in Falzon could order such proceedings in Germany only if authorized by the Convention.

Id. at 1338 n.10. The Supreme Court dismissed the appeal in Club Med, for lack of jurisdiction. Club Med, 469 U.S. 913 (1984). Perhaps because the above-quoted language represented the full extent of the Government's efforts to reconcile its positions in the two cases, some commentators concluded that the Government had changed its position in the interim. See, e.g., Maier, supra note 50, at 249 ("An interagency squabble over the position to be taken in the Club Med brief . . . resulted in a substantial modification of the position taken in the Falzon brief."); Comment, supra note 116, at 281 ("The views expressed in these briefs . . . are inconsistent."); see also infra note 177 (discussing distinction between "information gathering activities" and "evidence-taking proceedings").

This distinction, properly understood, makes entirely consistent the views of the United States Government expressed in Falzon and Club Med. The Club Med defendant was ordered to answer interrogatories that allegedly required the gathering of information that was located in the territory of a foreign signatory and necessary to answer interrogatories served in the United States. Although this information-gathering was to be conducted under the compulsion of a United States court, the activity actually undertaken in the foreign signatory's territory was private. Club Med, 469 U.S. 913. In Falzon, however, the court's order, if effectuated, would have resulted in an actual proceeding, conducted by a United States official, taking place within the territory of a foreign signatory. Falzon, 464 U.S. 811.

See supra notes 49-52 and accompanying text.


Defined as the power which a court has over an individual in contrast to a court's power over an individual's interest in property or over the property itself. BLACK'S LAW DICTIONARY 711 (5th ed. 1979). For an analysis of international jurisdictional principles, see Comment, The Extraterritorial Assertion of Long-Arm Juris-
ever, it has the power to order that the proceeding be conducted outside the territory of a foreign signatory and thus to avoid mandatory use of Convention procedures.\textsuperscript{181} Although that power can be exercised to order that the deposition be conducted in the territory of a non-signatory to the Convention,\textsuperscript{182} the more commonly employed alternative to the taking of a deposition in the territory of a foreign signatory is the taking of a deposition within the United States.\textsuperscript{183}


\textsuperscript{181} The fact that the evidence-taking proceeding is located outside the territory of a foreign signatory does not mean that the Convention is inapplicable. It simply means that it does not provide exclusive jurisdiction. \textit{See infra} section 5.3.

\textsuperscript{182} Where depositions in the territory of non-signatories are ordered, they are governed by Rule 28(b). \textit{See supra} notes 20-27 and accompanying text. The deposing party will normally prefer either the notice or the commission procedure to the letters rogatory procedure. Two factors however may prevent use of the former procedures. First, notice and commission procedures require a willing deponent. \textit{See Fed. R. Civ. P. 28(b)} advisory committee's note (1963). Second, many countries either restrict or forbid the use of notice and commission procedures inside their territory. Among nations that forbid notice and commission procedures of the type authorized by Rule 28(b) are Switzerland and Venezuela. Among those that restrict such procedures are Austria, Korea, Saudi Arabia, Taiwan, the Union of Soviet Socialist Republics and most Central and South American nations. \textit{See}, Note, \textit{Taking Evidence Outside of the United States}, 55 B.U.L. Rev. 368, 374-75 (1975).

Use of letters rogatory may avoid these problems. However, there are still several nations that will not compel a witness to appear and testify in response to letters rogatory. While the majority of nations will compel the presence of a witness at an examination made pursuant to a letter rogatory, a few will not do so unless there is a treaty so requiring. Where a foreign national refuses its coercive power in aid of a letter rogatory, it may be impossible to accomplish the taking of a deposition in that territory. When the deponent is a party, a court in the United States will have recourse to sanctions against that person if the failure to accomplish the taking of a deposition in a non-signatory is entirely due to the recalcitrance of that party. \textit{See discussion infra} at note 266. Furthermore, the procedure can be extremely time-consuming, and will normally require between three and six months to complete. 4 J. Moore, J. Lucas & G. Grottheer, Jr., \textit{Moore's Federal Practice, supra} note 33, ¶ 28.08, at 28-39. It also can be costly. \textit{See Comment, supra} note 21, at 1241, 1242.

Although the letters rogatory procedure is conducted in accordance with the laws of the foreign country, the evidence obtained by this method must be taken in such a manner as to make it admissible in the domestic court. \textit{Fed. R. Civ. P. 28(b)} advisory committee's note (1963) (citing United States v. Paraffin Wax, 23 F.R.D. 289 (E.D.N.Y. 1959)). Both the manner in which the evidence is taken and the manner in which it is reported may be troublesome in this regard. \textit{Fed. R. Civ. P. 28(b)} advisory committee's note (1963). The 1963 amendments to the Federal Rules of Civil Procedure liberalized the standards of admissibility of evidence obtained under Rule 28(b), but district court judges retain discretion with regard to the weight given this evidence. \textit{Id.}

\textsuperscript{183} Illustrative of the use of this alternative is \textit{In re Messerschmitt Bolkow Blohm}, GmbH, 757 F.2d 729 (5th Cir. 1985), \textit{cert. granted} & \textit{judg. vacated sub nom. Messerschmitt Bolkow Blohm, GmbH v. Walker}, 107 S. Ct. 3223 (1987), a case in which
When depositions of parties are to be conducted in the United States, the normal deposition rules under the Federal Rules of Civil Procedure are available, and normally are preferred by the deposing party. Depositions in federal civil litigation are governed by Rules 27, 30, 31 and 32 of the Federal Rules of Civil Procedure. Rule 30(a) provides that depositions may be taken by the plaintiff without leave of court thirty days or more after service of the summons and complaint. The defendant may schedule a deposition at any time after receipt of the summons and complaint. Rule 30(b) provides that the attorney has the right to schedule the time for the deposition. Thus, a litigant desiring to depose a party or a party's expert witnesses may seek to do so unilaterally under the Federal Rules of Civil Procedure. If the party is recalcitrant, the normal sanctions under Federal Rule 37 may be sought. At least one court has suggested that the alternatives available to a court having in personam jurisdiction over

the district court had ordered defendant, a West German national, to produce for depositions in the United States persons defendant intended to call as expert witnesses at trial. Because those persons were German employees residing in Germany, defendant asserted that discovery must be pursued through Convention procedures. The Fifth Circuit disagreed. Id. at 731. In rejecting defendant's assertion and upholding the district court order, the Court of Appeals noted that the order "might concern Germany, but it does not involve alien procedures on German soil, is directed to the party-defendant and not the foreign witnesses, and is enforceable only by procedures and sanctions directed to a party to the litigation in the forum court." Id. at 733.

The court noted that the district court's order could be viewed as a "complement to the measures for trial preparation expressly sanctioned by Federal Rule of Civil Procedure 26(b)(4)." Id. That section provides:

**Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

FED. R. CIV. P. 26(b)(4).

184 See supra notes 133-35 and accompanying text.
185 FED. R. CIV. P. 30(a). Prior to the 30-day period, leave must be given by the court except in limited circumstances, as where the defendant has noticed a deposition or otherwise sought discovery. FED. R. CIV. P. 30(a)(1).
186 FED. R. CIV. P. 30(a).
187 FED. R. CIV. P. 30(b).
188 See supra note 183 and accompanying text.
189 FED. R. CIV. P. 37.
190 Specifically, the option to order that the deposition be taken in a non-signatory
the person to whom the notice of deposition is directed may motivate the deponent to consent to deposition in his own country through authorized procedures under the Convention which do not directly involve the foreign signatory. It may be tempting to believe that the relatively burdensome letter of request procedure can be avoided in favor of the commission or officer procedure if the party indicates a willingness to be deposed. This approach fails, however, to take account of the fact that, under the Convention, the availability of such procedures does not lie solely in the discretion of the deponent.

The Convention gives separate treatment to those deponents who are nationals of the requesting state. For example, where the deposition of a United States national is sought in the course of litigation in the United States, the Convention assumes that signatories will authorize the taking of evidence by United States diplomatic officers, consular agents, or commissioners if the deponent is willing to be deposed. The Convention expressly provides signatories with the right, however; to require prior, individual permission in such cases. Where the deponent is not a national of the forum nation, the Convention recognizes a different assumption. In this more common case, the Convention provides that the permission of the signatory is required, unless it has declared otherwise. Although the United States has made such a declaration, only four of the other eighteen signatories have done so. Thus, the letter of request procedure remains the primary and often sole means of proceeding under the Convention.

The Convention's recognition of a signatory's right to restrict the use of voluntary methods of evidence-taking in its territory strongly suggests that this conclusion applies even where the deponent agrees to be deposed in a foreign signatory's territory through means not authorized by the Convention.

nion or in the United States. See supra notes 180-89 and accompanying text.

191 Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 521 n.24 (N.D. Ill. 1984) ("It may be 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.").

192 Convention, supra note 2, art. 15, 23 U.S.T. at 2564, 847 U.N.T.S. at 244.

193 Id.; see supra notes 123-31 and accompanying text.

194 Convention, supra note 2, art. 16, 23 U.S.T. at 2564-65, 847 U.N.T.S. at 244.


196 Finland and the Netherlands have made express Article 16 declarations. Czechoslovakia and the United Kingdom grant permission if there is reciprocity. See 28 U.S.C.A. § 1781 (West Supp. 1987).

197 See supra notes 72-101 and accompanying text.

198 The situation where a witness volunteers to be deposed in the territory of a signatory might arise where he is not adverse to being deposed but does not wish to travel across national borders. See infra note 192 and accompanying text.
the position that Convention procedures are exclusive as to both voluntary and compulsory depositions conducted within the territory of a foreign signatory.199 Several United States courts have suggested that the Convention provides exclusive procedures only for involuntary depositions.200 To the extent, however, that a rule of exclusivity arises out of concerns regarding judicial sovereignty over proceedings within a sovereign's territory, similar concerns also exist where the deponent voluntarily agrees to provide evidence.201

Analysis of the first step, identification of the situs of evidence-taking proceedings, permits the following conclusions: if it is determined that an evidence-taking proceeding, is to be conducted within the territory of a foreign signatory, no choice-of-law issue is presented between the Federal Rules of Civil Procedure and the Hague Evidence Convention. In this instance, the Convention provides the exclusive means by which the proceeding may be conducted,202 the Federal Rules of Civil Procedure are inapplicable, and no further steps need be considered under this model.203 A determination that an evidence-taking proceeding is not to be conducted in a foreign signatory's territory does not render the Convention inapplicable, but instead requires considera-

---

199 See Brief for the United States as Amicus Curiae Volkswagenwerk A.G. v. Falzon, supra note 176, at 415.
200 See, e.g., In re Anschuetz & Co., GmbH, 754 F.2d 602, 615 (5th Cir. 1985), cert. granted & judg. vacated sub nom. Anschuetz & Co., GmbH v. Mississippi River Bridge Authority, 107 S. Ct. 3223 (1987) ("We hold that the Hague Convention is to be employed with the involuntary deposition of a party conducted in a foreign country.").
201 This conclusion is supported by the language of the Convention itself, which gives signatories considerable control over the availability within their territory of depositions of willing witnesses by foreign officials, the failure of most signatories to grant general authorization for such depositions, and the limitations placed on the commission and notice procedures under Federal Rule of Civil Procedure 28(b) by many non-signatory countries. See supra notes 123-31 & note 182 and accompanying text.
202 This conclusion does not necessarily mandate use of the often time-consuming and expensive letters of request procedure. Article 27 of the Convention provides:

The provisions of the present 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.

Convention, supra note 2, art. 27, 23 U.S.T. at 2569, 847 U.N.T.S. at 246. Therefore, an evidence-taking proceeding in the territory of a non-signatory must be conducted either through Convention procedures or through internal practices of the foreign signatory if the foreign signatory permits use of such practices.
203 The natural consequence of this conclusion is that Federal Rules of Civil Procedure 28(b) and 29 serve absolutely no function as to Signatories to the Hague Evidence Convention.
tion of the second step of the proposed analysis.

5.2. Identifying the Situs of the Evidence

Although there is limited authority to the contrary,204 the weight of case law holds that "the Hague Convention does not apply at all to the discovery of evidence available in the United States."205 The most thorough discussion of the rationale for this conclusion, based on both the language and purpose of the Convention itself, is found in International Society for Krishna Consciousness v. Lee.206 In Krishna Consciousness, one of the defendants, a German national, argued that by virtue of the Convention, "discovery against a party defendant may not proceed under the ordinary federal rules of discovery if the defendant is a foreign national . . . regardless of whether the information sought to be discovered is available in the United States or must be obtained from a foreign country."207 The court rejected this broad interpretation of the Convention's scope,208 and noted that "[n]o authority has been suggested for the notion that letters of request were ever used or required to be used to enable litigants to obtain information within the very country in which they are litigating."209

Thus, where the physical evidence or information sought is present in the United States,210 the party seeking such material should proceed under the Federal Rules of Civil Procedure.211 If the party seeking discovery of such material is unsure of its location, it is nor-

207 Id. at 437.
208 Id. at 444.
209 Id. at 443.
210 This second step presupposes that the evidence-taking proceeding is to be conducted in the United States rather than in the territory of a foreign signatory. See supra notes 174-203 and accompanying text.
211 This kind of physical evidence or information normally is sought through Rule 34, which governs "Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes." FED. R. CIV. P. 34. See also, FED. R. CIV. P. 35 (Physical and Mental Examination of Persons) and FED. R. CIV. P. 36 (Requests for Admissions). In a footnote in Aerospatiale, the Supreme Court mentioned that plaintiffs had made certain requests for the production of documents under rule 34 and for admissions under rule 36. "Apparently the petitioners responded to those requests without objection, at least insofar as they called for material or information that was located in the United States." Aerospatiale, 107 S. Ct. 2542, 2546 n.4 (1987).
mally to his advantage to proceed under the Federal Rules of Civil Procedure and leave to the other party the option of moving for a protective order under rule 26(c). Normally, the burden of showing good cause for such an order lies with the person seeking it. As a result, when a party objects to the use of discovery under the Federal Rules of Civil Procedure on the grounds that the information is located outside the United States, that party will have the burden of establishing its location.

The same conclusions follow where discovery of knowledge or information, as opposed to physical evidence, is sought. Where such evidence is sought through interrogatories, the party on whom the interrogatories are served will have the burden of showing that they cannot be answered without resort to evidence or information available only in the territory of a foreign signatory. The same burden would fall upon a party who was given notice for a deposition to be conducted in the United States.

The following conclusions are appropriate as a result of the second step in the proposed model: where the party opposing discovery fails to show that the evidence or information sought is located in the territory of a Signatory to the Hague Evidence Convention, the Convention is inapplicable and discovery should proceed under the Federal Rules of Civil Procedure. Where a party successfully establishes that the evidence or information is located in the territory of a foreign signatory, however, the court is not compelled to resort to Convention procedures. Instead, the court should analyze whether deferring to Convention procedures is appropriate under the choice-of-law methodology discussed below.

5.3. Defining The Role of the Hague Evidence Convention When Evidence Located in the Territory of a Foreign Signatory is Sought in Connection with an Evidence-Taking Proceeding Located in the United States

Because the Hague Evidence Convention is the exclusive means of conducting an evidence-taking proceeding in the territory of a foreign

---

212 FED. R. CIV. P. 26(c). For the text of this rule, see supra note 135.
215 FED. R. CIV. P. 33 (Interrogatories to Parties).
216 See Krishna Consciousness, 105 F.R.D. at 442.
217 See supra notes 210-12 and accompanying text.
218 See infra section 5.3.
signatory, and is inapplicable where both the evidence-taking proceeding and the evidence are located in the United States, the only context in which United States courts and litigants will be presented with troubling questions regarding the role of the Convention is when evidence located in the territory of a foreign signatory is sought in connection with evidence-taking proceedings located in the United States. The United States Supreme Court has held that the Hague Evidence Convention in this context is neither exclusive nor inapplicable. The Court, however, declining to offer all but the most general guidance as to how a United States court is to determine when resort to Convention procedures is appropriate, stated only that "American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."

A reasoned choice between the Hague Evidence Convention and the Federal Rules of Civil Procedure, which puts in proper perspective the interests of the foreign signatory, the United States and the litigants, is more likely to be made if three basic inquiries are resolved. First, what are the sovereign interests that underlie the foreign signatory’s objection to discovery under the Federal Rules of Civil Procedure and to what extent are those interests accommodated by resort to the Convention? Second, what are the sovereign interests of the United States in allowing discovery through the Federal Rules of Civil Procedure and to what extent are those interests impaired by resort to Convention procedures? Third, will ordering compliance with Convention

219 See supra notes 174-203 and accompanying text.
220 See supra notes 204-17 and accompanying text.
223 Id. at 2557.
224 Id.
procedures impose a substantial burden on the party seeking discovery through the Federal Rules of Civil Procedure, and will that burden be greater than the burden on the other party if discovery is allowed to proceed under the Federal Rules of Civil Procedure?225

5.3.1. Evaluating Whether the Foreign Signatory’s Sovereign Interests Can Be Accommodated by Resort to Convention Procedures

In the context of defining the appropriate role for the Hague Evidence Convention, international comity,226 which is “largely a function of relative interests as between overlapping jurisdictions,”227 requires a “particularized analysis of the respective interests of the foreign nation and

---

225 In many respects the choice-of-law analysis proposed here, and the general guidelines endorsed by the Court in Aerospatiale, parallel the choice-of-law rules articulated by Professor Brainard Currie in the late 1950’s for use in domestic conflicts of law cases. See Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171. Professor Currie, the architect of what is widely known as “interest analysis,” posited that a reasoned choice of law could flow only from an evaluation of the legitimate interests of the states whose laws presented the choice. An “interest” exists when a policy underlying a law will be advanced by the application of that law in a particular case. If only one state has such an interest, a “false conflict” exists and that state’s law should be applied. If both states have an interest, a “true conflict” exists. In what is perhaps the most controversial aspect of Currie’s model, he proposed that a court faced with a true conflict should apply its own law rather than seeking to weigh the two to determine which is the more worthy. Id. at 178. A determination of relative worthiness is a “political function of a very high order . . . [that] should not be committed to courts in a democracy.” Id. at 176. Where neither state has an interest, the case is “unprovided for” and, in Currie’s opinion, the choice normally should be resolved in favor of forum law. Id. at 179.


No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation . . . shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call “the comity of nations . . . .”

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-64, quoted in Aerospatiale, 107 S. Ct. at 2555 n.27. A number of commentators have likened comity to a transnational golden rule. Maier, supra note 50, at 253 (“Employing the comity concept merely calls into play the fundamentally pragmatic principle that nations need to treat each other as they themselves would be treated in the same or similar circumstances.”); Rosenthal & Yale-Loehr, Two Cheers for the ALI Restatement’s Provisions on Foreign Discovery, 16 N.Y.U. J. INT’L L. & POL. 1075, 1100 (1984) (“Do unto other states as you would have them do unto us.”)

the requesting nation . . . .”

The choice-of-law model proposed here initially examines the interests of the foreign signatory and asks whether those interests can be accommodated by resort to Convention procedures in the particular case.

Although lower courts have tended to give a narrow definition to the kinds of foreign sovereign interests implicated by discovery under the Federal Rules of Civil Procedure, the United States Supreme

---


229 Before examining the nature of the sovereign interests potentially possessed by a foreign signatory urging resort to Convention procedures, it is important to note that, while the interests of the forum, here the United States, in having its procedural laws applied is presumed, either the party seeking resort to the Convention procedures, or the foreign signatory in whose territory the evidence is located, must assert the foreign signatory’s interest. See International Soc’y for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 449 (S.D.N.Y. 1984); Murphy, 101 F.R.D. at 361; Sadoff, The Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence, 20 INT’L LAW. 659, 664 (1986) (“of course where both parties to the litigation and the foreign witness all agree to direct discovery, no issue of the use of the Evidence Convention is raised and such discovery will not be barred. This is not because there is no intrusion on the judicial sovereignty of the host country, but rather because no issue will be presented to the court.”). More specifically, this party or signatory must show, initially, that employing the discovery procedures of the Federal Rules of Civil Procedure rather than those of the Convention will result in a violation of either an internal law or an express policy of the signatory. See International Soc’y for Krishna Consciousness v. Lee, 105 F.R.D. at 441 (S.D.N.Y. 1984) (quoting Hague Evidence Convention, art. 9, 23 U.S.T. at 2557, 847 U.N.T.S. at 241); Lasky v. Continental Prod. Corp., 569 F. Supp. 1227, 1228 (E.D. Pa. 1983).

The party or signatory additionally must show that the signatory consistently enforces that law or articulates that policy. Aerospatiale, 107 S. Ct. at 2556 n.29 (“[t]he blocking statute thus is relevant to the court’s particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interest in nondisclosure of specific kinds of material.” (emphasis added)). If the specific interest asserted as promoting the propriety of resort to Convention procedures is one which has not in fact been consistently pursued by the foreign Sovereign, that interest should be dismissed as irrelevant to the issue, and absent a compelling reason grounded in some other interest to order otherwise, discovery should proceed pursuant to the Federal Rules of Civil Procedure.

The focus here is on the actions of the signatory, not on the actions of the party who asserts the signatory’s interest. It is clear that the failure of a party to raise the issue cannot waive the signatory’s interest in having discovery proceed under the Convention. “The failure of one litigant . . . to demand compliance with the [C]onvention cannot divest the foreign nation of its sovereign judicial rights under the [C]onvention. The [C]onvention may be waived only by the nation whose judicial sovereignty would thereby be infringed upon.” Pierburg, GmbH & Co. KG v. Superior Court, 137 Cal. App.3d 238, 244-45, 186 Cal. Rptr. 876, 881 (1982).

We do not suggest here that the failure of a signatory consistently to enforce its law operates to waive any right it may have to urge Convention procedures upon American courts. Rather, we suggest that the failure undermines the sovereign interest that might otherwise lend weight to the signatory’s position.

230 A number of courts appear to have taken the position that so long as evidence-taking proceedings, which by their nature implicate the territorial integrity of the signatory in which they are to take place, are not involved, any claim by a foreign state
Court has adopted an expansive interpretation of relevant sovereign interests in this context. The Court has directed lower courts to demonstrate due respect for "any sovereign interest expressed by a foreign state." Noting in its amicus brief in *Aerospatiale* that the "precise nature of the foreign interests at stake in discovery controversies has not been well articulated by the courts or by foreign litigants in the past,” the United States Government identified three broad interests that either individually or collectively might support an assertion that a foreign signatory's judicial sovereignty would be violated by a failure to employ Convention procedures. First, the assertion may "incorporate legitimate notions of territorial integrity — a reluctance to permit foreign litigants to invade one's borders, literally or figuratively, for the purpose of seizing evidence." Second, the assertion may reflect the

---

231 *Aerospatiale*, 107 S. Ct. at 2557. This language should not be read to require a communication by the signatory to the court. The Supreme Court has made clear that, while the policy or law must be one which the signatory itself has consistently enforced or advanced, the existence of that law or policy may be communicated to the United States court by the party seeking resort to Convention procedures. *Id.* at 2556 ("The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.") (emphasis added)).


233 The United States Supreme Court, having cited the Government's brief on another point, noted that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Aerospatiale*, 107 S. Ct. at 2551 n.19 (quoting Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982)). *See also*, O'Connor v. United States, 107 S. Ct. 347 (1986).

objection of the civil law nations, "[where] evidence-gathering is usually conducted by judicial officers rather than by private parties." Finally, the assertion "may simply illustrate a foreign nation's desire to protect its nationals from liability, or reflect a preference for its own mode of dispute resolution instead of ours."

The first objection to intrusion on judicial sovereignty, which addresses an anticipated violation of territorial integrity, is clearly the most compelling. This conclusion is evidenced by the fact that the right to conduct discovery proceedings — specifically, depositions and on-site inspections — in the territory of a foreign signatory cannot be arrogated by the United States through the enactment of the Federal Rules of Civil Procedure. Such sovereign interests clearly are accommodated by resort to the Hague Evidence Convention because its procedures place the evidence-taking proceeding either in the hands of the signatory in whose territory the proceeding is to take place, or within the control of a private commissioner or an official of the requesting State with the express or implied consent of the signatory.

The second category of sovereign interests, those which arise from the civil law nations' view of evidence-gathering as a public function, should also be recognized in deciding whether resort should be made to Convention procedures. When a party or foreign signatory asserts that, as a matter of law or policy, evidence within its borders must be gathered through its public institutions, a United States court must recognize that interest in a comity analysis.

---

235 Id.
236 Id.
237 See supra notes 174-204 and accompanying text.
238 Convention, supra note 2, art. 1, 23 U.S.T. at 2557, 847 U.N.T.S. at 241. The Special Commission created to draft the Convention noted, [t]he task of the Commission was merely to 'improve' the existing practice, particularly in the areas of transmission, reduction of formalities, the language and translation problems, the privileges and immunities of witnesses and the form of the execution of the letters. No basic questions of legal philosophy and governmental concepts of sovereignty were presented . . . . The letter of request . . . poses no [judicial sovereignty] question, because it is performed by the judge or his nominee in the State of execution.

Rogers, supra note 10, at 447 (quoting Report of the Special Commission, IV Conférence de la Haye de Droit international privé, ACTES ET DOCUMENTS DE LA ONZIÈME SESSION, 56 (1978)).
239 Convention, supra note 2, arts. 15-17, 23 U.S.T. at 2564-65, 847 U.N.T.S. at 244. See supra notes 122-27 and accompanying text.
240 See supra note 229.
241 The minority in Aerospatiale clearly rejected any suggestion that judicial sovereignty of this nature was less worthy than judicial sovereignty involving territorial integrity. Justice Blackmun, speaking for the minority, said,
signatories to the Convention, as well as Switzerland, a non-signatory, have clearly articulated to the United States their position that private evidence-gathering in their territory violates judicial sovereignty. The United Kingdom has urged the United States to recognize such sovereign interests in a comity analysis. Resorting to the procedures under the Convention clearly accommodates these interests inasmuch as use of its procedures, as opposed to those under the Federal Rules of Civil Procedure, normally will place evidence-gathering in public hands.

The third category of objection, one based on a foreign nation's desire either to protect its nationals or to favor use of its own law, is far more troublesome. Clearly, the United States Government includes within this category assertions based upon non-disclosure or "blocking" laws enacted by the foreign signatory out of "hostility to American law." These objections, in the Government's view, "should be approached with some skepticism in any proper comity analysis."

Much of the confusion surrounding the relevance of a foreign blocking statute in deciding whether resort to the Convention is proper flows from a failure to distinguish between the sovereign interest un-

I am at a loss to understand why gathering documents or information in a foreign country, even if for ultimate production in the United States, is any less an imposition on sovereignty than the taking of a deposition when gathering documents also is regarded as a judicial function in a civil-law nation.


246 See supra notes 72-74, 134-35 and accompanying text.

247 "The use of the nomenclature 'blocking statute' to describe foreign laws which purport to qualify, interdict or control disclosure in United States litigation has obtained wide acceptance in recent years and is routinely utilized in the relevant cases." Batista, supra note 146, at 62 n.1. See generally Societe Nationale Industrielle Aerospatiale v. United States Dist Ct., 107 S. Ct. 2542, 2546 n.6 (1987) (translation of French blocking statute).


249 Id.
derlying the statute, and the extent to which that interest is accommodated by Convention procedures. A blocking statute that is consistently enforced by a foreign signatory clearly reflects a sovereign interest in preventing disclosure of information under certain circumstances. If that interest is not advanced by ordering resort to the Convention, however, it should be given no recognition in a comity analysis. Thus, if the foreign blocking law absolutely prohibits the disclosure of particular records, documents or other information for use in foreign litigation, and that prohibition is not withdrawn when such evidence is sought through Convention procedures, the choice of which method to use in obtaining the evidence is meaningless. By contrast, a blocking statute that is not violated by discovery through Convention procedures but that is violated by discovery under the Federal Rules of Civil Procedure is entitled to recognition in a comity analysis.

More troublesome are blocking statutes that are generally subject to the signatory’s obligations under the Hague Convention, but which “block” discovery of precisely the kind of information to which a signatory’s obligation under the Convention does not extend. Illustrative is a provision of the French law, prohibiting the communication of documents or information which may adversely affect the sovereignty, security or essential economic interests of France. This provision is ex-

---

250 See generally, Convention, supra note 2, art. 1, 23 U.S.T. at 2557, 847 U.N.T.S. at 241 ("[a] Letter [of Request for Evidence] shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.").

251 The conclusion that the existence of such a blocking statute is not entitled to weight in a comity analysis influencing the choice between the Convention and the Federal Rules does not mean that the existence of such a statute is irrelevant to a comity analysis undertaken for other purposes. See infra note 266.


253 Under French law,

Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial, or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.


254 Law No. 80-538, 1980 J.O. 1799, art. 2(I) amending Law No. 68-678, 1968
pressly made subject to France's international treaties and agreements, which include the Hague Evidence Convention. Under the Convention, however, France is not obligated to execute a letter of request if it "considers that its sovereignty or security would be prejudiced thereby." As a result, information sought through discovery under the Federal Rules of Civil Procedure may also be unavailable under the Convention if disclosure violates a blocking statute. Where a party or signatory points to such a statute in urging resort to procedures under the Convention, it should be required to show that the sovereign interest reflected in the statute is accommodated through use of the Convention.

If it is determined that the sovereign interest threatened by discovery under the Federal Rules of Civil Procedure will not be accommodated by resort to the Hague Evidence Convention, then resort to Convention procedures should not be ordered. Even if it is determined that a signatory possesses an articulated and consistently asserted interest that can be accommodated by compliance with Convention procedures, discovery under the Federal Rules of Civil Procedure is not necessarily improper. The sovereign interests of the United States do not simply disappear in the face of foreign sovereign interests.257

J.O. 7267, art 1st. This article was at issue in Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16 (S.D.N.Y. 1984).

255 Convention, supra note 2, art. 12(b), 23 U.S.T. at 2562, 847 U.N.T.S. at 243.


257 Some courts have suggested that decisions reached in earlier Hague Evidence Convention cases, in seeking to accommodate foreign sovereign interests, gave insufficient consideration to the interests of the United States.

The solicitude for the judicial sovereignty of civil law countries shown in Schroeder, Philadelphia Gear, and Pierburg apparently is unmatched by any recognition that they are suggesting a startling limitation on the sovereign powers of this country, as expressed through its courts. Treating the Convention procedures as exclusive 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.

5.3.2. Determining Whether Substantial Sovereign Interests of the United States Will Be Impaired by Resort to the Hague Evidence Convention

If the interests of the foreign signatory can be accommodated through resort to Convention procedures, the next level of inquiry focuses on the extent to which substantial interests of the United States would be impaired if the court were to order compliance with those procedures. As the United States Government noted in its amicus brief filed in *Aerospatiale*,

[...] the central domestic interest is generally the same in any international discovery dispute. The United States has a fundamental obligation to assure that domestic litigants are afforded adequate opportunities to adjudicate their claims . . . . [I]t is well settled that a United States litigant is generally entitled to adjudicate his claim in accordance with the laws of the local forum . . . .

American jurisprudence provides that an important element of the litigant’s right to judicial access is the opportunity to discover the pertinent facts surrounding his claim. That element finds explicit recognition in the discovery provisions of the Federal Rules of Civil Procedure. Those provisions are central to the conduct of federal judicial proceedings.258

Because the Federal Rules of Civil Procedure were drafted, in part, to ensure that “civil trials in the federal courts no longer need be carried on in the dark,”259 any civil trial initiated in a United States district court implicates the interest of the United States in the application of the Federal Rules of Civil Procedure.

The question of whether this interest of the United States is sufficiently substantial and seriously impaired by resort to the Hague Evidence Convention is more troublesome. Certainly, to the extent that Convention procedures are not as likely to produce “just, speedy and


inexpensive\textsuperscript{260} determinations in litigation before federal courts, an interest of the United States is affected. This fact alone, in our opinion, is not sufficient to show that substantial United States interests are impaired. Rather, this second level of inquiry should focus on broader interests of the United States than those that are present in every suit filed in federal court. For example, in \textit{International Society for Krishna Consciousness v. Lee},\textsuperscript{261} the court found significant the fact that plaintiff's claims arose out of the First Amendment. "Whatever may be the ultimate merits of their claims, the paramount importance of those rights militates against imposing any greater limitations on discovery than are found in the Federal Rules of Civil Procedure themselves."\textsuperscript{262} A similar conclusion was reached in \textit{Graco, Inc. v. Kremlin, Inc.}.\textsuperscript{263}

The present conflict implicates United States interests of a Constitutional magnitude. Graco alleges infringement of a patent held under the United States patent laws, enacted by Congress under U.S. Const. Art. I, § 8, cl. 8. . . . The United States patent laws rely heavily for their enforcement on private infringement actions by patent holders, and pre-trial discovery, under the Federal Rules of Civil Procedure, is an important part of the system of private enforcement. This does not mean, of course, that every discovery dispute in a patent case is a Constitutional matter; still, inadequate discovery frustrates the purposes of the patent laws and the Constitution.\textsuperscript{264}

Where the substantive claim at issue implicates a strong policy of the United States, which is grounded either in the Constitution or in comprehensive statutory regulation,\textsuperscript{265} and resort to Hague Convention procedures will significantly narrow the scope and nature of discovery, the court should allow discovery to proceed under the Federal Rules of Civil Procedure.\textsuperscript{266} Where such interests are not impaired,\textsuperscript{267} resort

\textsuperscript{260} FED. R. CIV. P. 1.  
\textsuperscript{261} 105 F.R.D. 435 (S.D.N.Y. 1984).  
\textsuperscript{262} \textit{Id.} at 450.  
\textsuperscript{263} 101 F.R.D. 503 (N.D. Ill. 1984).  
\textsuperscript{264} \textit{Id.} at 512-13.  
\textsuperscript{265} \textit{See In re} Uranium Antitrust Litigation, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979).  
\textsuperscript{266} The focus of this Article is on the choice of law presented between the Federal Rules of Civil Procedure and the Hague Evidence Convention. In suggesting that, when United States interests are impaired by resort to the Hague Evidence Convention, discovery should be allowed to proceed under the Federal Rules, we do not suggest that principles of comity are not further relevant to the decision of whether to sanction a
should be made to the Convention unless the party urging application


The extent to which one nation’s policies will be impaired by application of another nation’s laws is one of five factors set forth in § 437(1)(c) of the Revised Restatement of the Foreign Relations Law of the United States. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437(1)(c) (Tent. Draft No. 7, 1986). In a footnote in Aerospatiale, the Supreme Court mentioned this section as suggesting “[t]he nature of the concerns that guide [any] comity analysis . . . .” Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 107 S. Ct. 2542, 2555 n.28 (1987). The factors listed in § 437(1)(c) are:

1. the importance to the litigation of the documents or other information requested;
2. the degree of specificity of the request;
3. whether the information originated in the United States;
4. the availability of alternative means of securing the information; and
5. the extent to which non-compliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.


These factors may be useful in a comity analysis that seeks to inform the choice between the internal law of one country and the internal law of another country. They can be, and have been, of use in determining the choice between a rule of the United States that would allow discovery of particular information and a blocking statute of another nation that makes criminal the disclosure of that particular information. See supra note 266. Such factors are of much less value in the kind of comity analysis that is the focus here. The choice between the Hague Evidence Convention and the Federal Rules of Civil Procedure is not a pure choice between competing internal laws of two nations, but rather is a choice between a law of one nation and a law shared by that nation and other nations. The discussion below identifies the limited circumstances in which those factors provide useful guidance in the choice between the Convention and the Federal Rules of Civil Procedure, and indicates that when they do, the three-level model proposed incorporates such factors.

The relevance of the first factor, the importance to the litigation of the document or information sought, in the context of the choice between the Federal Rules of Civil Procedure and the Convention, depends on an initial conclusion that the document or information sought is important. See infra note 287. If the conclusion is reached that the document is not important to the litigation, the argument of either the party urging the Federal Rules of Civil Procedure or the party urging the Convention is hardly advanced. Instead, the conclusion that a document is not important suggests that a court should grant a motion under Rule 26(c) to exclude altogether the discovery of evidence located abroad where such discovery is insulting to the foreign signatory and unimportant to the litigation. See infra notes 291-92 and accompanying text. When the information is deemed to be important and complete discovery of the information is shown to be more likely under the Federal Rules than under the Convention, however, this fact is relevant to the burden on the party seeking discovery through the Federal Rules, a concern reflected in the third level of inquiry proposed by the model developed in this article. See discussion infra note 289.

The relevance of the second factor, the degree of specificity of the request, is dependent on the same kind of analysis. Attempted discovery of broadly or generally defined information is likely to be unavailing under the Hague Evidence Convention.
of the Federal Rules of Civil Procedure can demonstrate that compliance with the Convention will impose a substantial burden on that party which is greater than the burden imposed on the other party if discovery is allowed to proceed under the Federal Rules.

5.3.3. Evaluating the Burden on the Party Opposing Resort to the Hague Evidence Convention and Balancing that Burden against the Burden on the Party Opposing Federal Rules Discovery

The third level of analysis is reached only after it is determined both that the foreign signatory’s sovereign interests are accommodated, and that substantial interests of the United States are not impaired by resort to the Convention’s procedures. The court in this instance should order that Convention procedures be used unless the party seeking discovery satisfies the court that such an order would impose a substantial burden outweighing the one that would be imposed on the other party if discovery is allowed to proceed under the Federal Rules of Civil Procedure.

Convention, supra note 2, art. 23, 25 U.S.T. at 2562-63, 847 U.N.T.S. at 245. See infra notes 284-88 and accompanying text. The same type of discovery under the Federal Rules will infringe upon the sovereignty of the foreign signatory in whose territory the discovery “net” is being cast. The proper response by a court is not to struggle with the choice between the Federal Rules and the Convention, but instead to refuse to order compliance with non-specific discovery requests aimed at evidence located abroad.

The third factor, the relevance of the origin of the information in the United States, is linked to the rule that the Federal Rules of Civil Procedure provide the exclusive procedural rules regarding discovery of evidence located in the United States. This factor recognizes that the sovereign interests of the United States should not be substantially impaired by the simple expedient of removing information originating in the United States and locating it in the territory of the foreign signatory. Thus, where the Hague Evidence Convention will not allow as complete access to that information as the Federal Rules would, the fact that the information originated in the United States increases the impairment of the United States interest if compliance with Convention procedures is ordered.

While perhaps useful in other contexts in which a comity analysis is undertaken, the fourth factor, the unavailability of alternative means of securing the information, is not particularly useful here. Since the availability of the Hague Evidence Convention as an alternative means of securing the evidence has been established at an earlier stage of this analysis, and it is precisely the use of that alternative that one of the parties is urging, this factor ought, in our opinion, to be ignored in this particular context.

The fifth factor might, analogizing to domestic choice-of-law theories, be labeled a “comparative impairment” inquiry. See Bernhard v. Harrah’s Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976); Weintraub, Commentary on Conflict of Laws § 6.24 (3d ed. 1986). The focus of the second level of the choice-of-law model proposed here is upon the extent to which United States’ sovereign interests are impaired by choice of Convention procedures. The first level of analysis requires a demonstration not only that the foreign Sovereign’s interests would be impaired by application of the Federal Rules but also that the foreign Sovereign’s interests would be accommodated by resort to the Hague Evidence Convention. See supra notes 226-57 and accompanying text.
Lower federal courts and the Supreme Court have identified three factors that might impose a burden on the party seeking discovery if resort to Convention procedures is ordered: time, expense and evidentiary disadvantage.\textsuperscript{268} Time may create a burden on the party seeking discovery under the Federal Rules of Civil Procedure if the effect of the lengthy nature of the Convention procedures is exacerbated by the amount of time already spent in the discovery process.\textsuperscript{269} An example is \textit{Murphy v. Reifenhauser KG Maschinenfabrik.}\textsuperscript{270} In this case, the parties were already approaching the third year of discovery. Noting that "[a]t least one previous letter of request executed in Germany required many months of effort involving translation of materials, transmittal through local counsel, review by the German Ministry of Justice and then by German courts,"\textsuperscript{271} the District Court of Vermont refused to require plaintiff to employ Convention procedures at "this relatively late stage of discovery . . . ."\textsuperscript{272} Defendant's delay in arguing for resort to the Convention was not interpreted as an intentional act of bad faith. In the court's opinion, however, the interests of both the parties and sound judicial administration suggested that "this case should not be further prolonged for many months in order to accommodate a somewhat hypothetical conflict between ordinary American discovery and German sovereignty."\textsuperscript{273} Similarly, in \textit{International Society For Krishna Consciousness v. Lee,}\textsuperscript{274} the District Court of the Southern District of New York noted that the consequences of the slow pace of Convention procedures "is enhanced by the pendency of this litigation for nine years, a delay that led the United States Court of Appeals to issue an explicit directive . . . to expedite the resolution of the case."\textsuperscript{275} The mere passage of time should not be viewed as a waiver of the right to seek resort to Convention procedures.\textsuperscript{276} Delay is relevant, however, to measuring the burden it imposes on the party opposing such resort.

The second factor, expense, recognizes that the costs associated with compliance with Convention procedures—fees for translators, foreign legal fees, and transportation expenses—can be "exceedingly

\textsuperscript{268} See infra notes 270-89 and accompanying text.
\textsuperscript{269} See infra notes 270-94 and accompanying text.
\textsuperscript{270} 101 F.R.D. 360 (D. Vt. 1984).
\textsuperscript{271} Id. at 361.
\textsuperscript{272} Id. at 363.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 363.
\textsuperscript{275} Id.
\textsuperscript{276} 105 F.R.D. 435 (S.D.N.Y. 1984).
\textsuperscript{277} Id. at 450.
\textsuperscript{278} Cf. Slauenwhite v. Bekum Maschinenfabriken, GmbH, 104 F.R.D. 616, 619 (D. Mass. 1985) ("requiring resort to the procedures of the Convention . . . would be [unwise because it would be] tantamount to an order denying the plaintiff the discovery he seeks.")
Although numerous federal cases, including *Aerospatiale,* have mentioned this factor, the mere increase in costs is not relevant in choosing between the Convention and the Federal Rules of Civil Procedure because significant costs will be present in every case in which resort to the Convention is at issue. Instead, the burden of the increased cost must be balanced against the benefits gained by resorting to those procedures; only a burden that substantially outweighs the benefit is relevant to this level of inquiry. Such a burden might arise where a party sought information located in the territory of a foreign signatory. If the seeking party is required to follow the procedures under the Convention to discover this information, the significant increase in cost to that party might present a sufficiently substantial burden; in that case, resort to the Convention should not be ordered. Significantly, in such a case, the specificity of the request may reduce the extent to which a foreign signatory's interest in public evidence-gathering is impaired.

In the majority of cases in which the role of the Hague Evidence Convention will be raised, one party, usually the plaintiff, will be a United States national and the other party will be a national of a foreign signatory. The third factor used to assess the burden imposed upon the party forced to resort to Convention procedures compares the rela-

---

278 In *In Re Anschuetz & Co.,* GmbH 754 F.2d 602 (5th Cir. 1985), cert. granted & judg. vacated sub nom. Anschuetz & Co., GmbH v. Mississippi River Bridge Auth. 107 S. Ct. 3223 (1987), the United States Court of Appeals declared that, "[r]equiring that such discovery be processed through foreign authorities would work a drastic and very costly change in the handling of this type of litigation." *Id.* at 612. *See also* International Soc'y of Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 450 (S.D.N.Y. 1984) (stating that "[t]he Hague Convention machinery is quite slow and costly even when the foreign government agrees to cooperate"); *cf.* Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 363 (D. Vt. 1984) (suggesting that plaintiff would be burdened by late resort to the Convention because of additional expenses which would be incurred).  
280 *Cf.* *Id.* at 2556 ("[t]he exact line between reasonableness and unreasonableness [of resorting to Convention procedures] in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.")  
281 *See supra* note 267. The specificity of the request would not reduce the impairment of a foreign signatory's interest reflected in the kind of blocking statute relevant to the choice of law between the Convention and the Federal Rules of Civil Procedure. *See supra* note 253 and accompanying text. Where such a statute exists, the burden on the party that will be forced to violate it in order to comply with the Federal Rules of Civil Procedure discovery may well be greater than the burden of additional cost imposed on the other party by resort to procedures under the Convention. *See infra* notes 293-94 and accompanying text.
tive access to information available to the party forced to follow the Convention to that available to the other party who is free to seek discovery under the Federal Rules of Civil Procedure. The United States Supreme Court recognized this "asymmetry" as a reason to reject adoption of a "first resort" rule.

Within any lawsuit between a national of the United States and a national of another contracting Party, the foreign party could obtain discovery under the Federal Rules of Civil Procedure, while the domestic party would be required to resort first to the procedures of the Hague Convention. This imbalance would run counter to the fundamental maxim of discovery that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."

The "unfair evidentiary advantage" of the party having full resort to discovery under the Federal Rules of Civil Procedure may lead to the result that the other party, who is subject to the far more limited procedures under the Convention, will be "unable to prepare its case against a fully-prepared foreign party." Such a situation is most likely to occur when evidence is located in the territory of a signatory that has exercised its right under Article 23 of the Convention not to execute letters of request "issued for the purpose of obtaining pretrial discovery of documents . . . ." This burden is exacerbated when resort to the Convention is likely to be futile in light of an Article 23 declaration or other limitation on discovery through Convention

[Id. at n.25, (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).]
[Id. (emphasis added).]
[Convention, supra note 2, art. 23, 23 U.S.T. at 2568, 847 U.N.T.S. at 245. See supra notes 102-14 and accompanying text.

A number of federal cases have refused to order resort to the Convention on this ground. For example, in Lasky v. Continental Products Corporation, the court in refusing to order plaintiff to use Convention procedures, concluded that "imposing the blanket restriction sought by [defendant] would severely restrict the plaintiff's scope of discovery [in light of West Germany's Article 23 declaration]." 569 F. Supp. 1227, 1229 (E.D. Pa. 1983). In Murphy v. Reifenhauser KG Maschinenfabrik, the court concluded that "particularly where it appears that a request for production of documents under the Convention would be futile" in light of West Germany's article 23 declaration, comity did not require the plaintiff, a United States citizen, to proceed first under the Convention. 101 F.R.D. 360, 363 (D. Vt. 1984). Similarly, in International Soc's for Krishna Consciousness v. Lee, one of three compelling reasons cited as support for the decision to permit the plaintiffs, United States citizens, to pursue their discovery against Lufthansa German Airlines under the Federal Rules was that, with
OBTAINING EVIDENCE ABROAD

OBTAINING EVIDENCE ABROAD

Unless the burden on the person who seeks to avoid Convention procedures is substantial, the court should order that party to resort to those procedures. A showing of "substantiality" in this context requires that the information sought be important and material to the resolution of a key issue in the litigation. Since progress to this level of the choice-of-law analysis presupposes the existence of a foreign Sover-

288 A number of comity tests mention the importance of the information sought to the party seeking it as a relevant factor. See, e.g., Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986); Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-205 (1958); In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979). In In re Uranium Antitrust Litigation, the court, applying the standards set forth in Societe Internationale v. Rogers, noted, "the normal discovery standard of whether a document is relevant or is calculated to lead to the discovery of admissible evidence does not apply, and should be replaced by the higher standard of whether the requested documents are crucial to the resolution of a key issue in the litigation." 480 F. Supp. at 1146. Other cases appear to have set a somewhat lower standard of "importance." United States v. Vetco, Inc., 691 F.2d 1281, 1290 (9th Cir.) ("courts have refused to require production where the documents sought are largely cumulative of records already produced."); cert. denied, 454 U.S. 1098 (1981); Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972). As the court noted in Graco, Inc. v. Kremlin, Inc., "[t]hese cases do not suggest . . . that the discovery requests must meet some exceptionally high standard of relevance; these cases merely indicate that the importance of the documents is a factor to be considered by the court." Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 515 (N.D. Ill. 1984).

Comment a to § 437 of the Restatement (Revised) briefly discusses the content of the "importance" factor:

Given the degree of difficulty in obtaining compliance, and the amount of resistance that has developed in foreign states to discovery demands originating in the United States, it is ordinarily reasonable to limit foreign discovery to information necessary to the action (typically, evidence not otherwise readily obtainable) and directly relevant and material.

Restatement of Foreign Relations of the United States (Revised), § 437 comment a, at 30 (Tent. Draft No. 7, 1986). Reporters' Note No. 2 to this section states:

[w]hile the proponent of discovery may not know at the beginning of the discovery process whether a given item of information will turn out to be directly relevant or material, subsection 1 [of § 437] requires him to persuade the court of the likelihood that the request meets a higher standard than applies in routine domestic cases; if the proponent of discovery cannot do so at the outset, the discovery request may be renewed at a later stage in the action.

Id. at 37-38. This language has "proven controversial." U.S. Amici Brief Societe Nationale Industrielle Aerospatiale, supra note 232, at 1514 n.20.
eign's interest that is accommodated by use of Convention procedures, an insubstantial burden on one of the litigants should not obviate resort to the Convention in light of the presence of sovereign interests.

Even if the interests of that litigant are substantial, however, the interest of the party seeking discovery under the Convention may be equally compelling. In evaluating this party's burden, it is important to distinguish between burdens imposed by discovery generally, and burdens imposed by the choice to pursue discovery through the Federal Rules of Civil Procedure. In *Aerospatiale*, the United States Supreme Court noted:

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the District Court must supervise pretrial proceedings particularly closely to prevent discovery abuses.291

These concerns are relevant to the scope of discovery without reference to the Convention. Unreasonable or intrusive discovery requests should not be enforced by federal courts through either the Federal Rules of Civil Procedure or the Hague Evidence Convention.292

The burden relevant to the comity analysis at this level is the burden that will be imposed on the party opposing discovery under the Federal Rules of Civil Procedure if Convention procedures are not im-

---

290 *See supra* notes 226-57 and accompanying text.


292 Fed. R. Civ. P. 26(b)(1). This rule states in pertinent part:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

*Id.*
Only the burden created by a blocking statute prohibiting the disclosure of information through any process other than the Hague Evidence Convention is relevant here. When a party can show both that discovery under the Federal Rules of Civil Procedure will force a violation of a foreign nation’s blocking statute, which is likely to be enforced against it, and that disclosure through Convention procedures will not create similar burdens, the other party must demonstrate that its burden in being required to follow the Convention outweighs the burden imposed upon the party seeking to avoid discovery under the Federal Rules of Civil Procedure.

5.4. Taking Evidence from Non-Party Witnesses

In their argument before the Supreme Court in Aérospatiale, the appellees asserted that it was “appropriate to construe the Convention as applying only in the area in which improvement was badly needed,” or, in other words, “to obtain evidence from non-party witnesses abroad.” In rejecting this argument, the Court noted that “the text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves.” Despite the absence of any literal distinction in the Convention, however, several lower federal courts have appeared to draw this distinction in dicta. While the distinction between parties and non-parties may be relevant in deciding whether a choice between the Federal Rules of Civil Procedure and the Convention is presented, it is irrelevant, except in one instance, in deciding the choice of law between the two when it is presented.

As is true when evidence is sought from parties, an evidence-tak-
ing proceeding directed at a non-party witness that is to be conducted in the territory of a foreign signatory must be conducted through Convention procedures.\textsuperscript{300} In the case of non-party witnesses who are not United States nationals or residents, there is no basis of power in either domestic or international law to compel their presence at proceedings located elsewhere.\textsuperscript{301} As a result, the mandatory application of the Convention cannot be avoided by the simple expedient of conducting the proceeding outside the foreign signatory, unless the witness consents to travel to the alternate site. If the non-party witness located in the foreign signatory is a United States national or resident, the United States can assert its power to subpoena that witness.\textsuperscript{302} The language of the

\textsuperscript{300} See supra notes 175-203 and accompanying text.

\textsuperscript{301} See supra note 142.

\textsuperscript{302} "A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783." \textit{Fed. R. Civ. P. 45(e)(2).} In Blackmer v. United States, 284 U.S. 421 (1932), the United States Supreme Court rejected a constitutional challenge to the statute forming the basis for § 1783, see Act of July 3, 1926, ch. 762, 44 Stat. 835 §§ 1-3 (repealed 1948) (providing for service of letters rogatory on United States citizens abroad by United States consuls), and stated that the "mere giving of such a notice [of subpoena] . . . to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government." \textit{Blackmer,} at 439. Professor Smit's criticism of this conclusion, authored before negotiation of the Hague Evidence Convention, is even more appropriate in light of the Convention.

The correctness of these statements is clearly subject to serious doubt . . . [T]here seems to be no question that the freedom of the United States consul to make personal service within the territory of a foreign state is entirely dependent on the foreign sovereign's willingness to allow such service. Not only does the prohibition imposed on United States consuls from making service abroad except in a number of narrowly circumscribed cases bear telling witness of official recognition of this fact, but it is undeniable that a number of foreign sovereigns specifically forbid service by United States consuls within their territory. Accordingly, reconsideration of the provision of sections 1783 and 1784 for personal service abroad by United States consuls would seem appropriate, notwithstanding the Supreme Court's rather lighthearted assumptions.


The mere service of a subpoena in a foreign signatory may violate that signatory's internal law. See supra note 144. Since many of the signatories to the Hague Evidence Convention are also signatories to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter Hague Service Convention], service of a subpoena, even on a United States national, may have to be accomplished through means defined by the Hague Service Convention. To date, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom and the United States are Signatories to both Conventions. \textit{TREATIES AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISOR, U.S. DEPT OF STATE, TREATIES IN FORCE, JANUARY 1, 1987} (1987); see also, \textit{Office of Public Communication, Bureau of Public Affairs, U.S. DEPT OF STATE, Treaties: Current Affairs,}
United States law authorizing issuance of the subpoena, however, appears to require a showing that the information could not otherwise be obtained through use of the Convention. Where such a showing is made, the court is empowered to establish the place for the appearance of the witness or the production of the document. As long as that place is outside the territory of a foreign signatory, mandatory application of the Hague Evidence Convention can be avoided.

When the evidence-taking proceeding is to be conducted in the United States, the Federal Rules of Civil Procedure provide the exclusive means of discovery if the evidence is also located in the United States. As is true when discovery is sought of parties, the only circumstance in which a choice of law between the Federal Rules of Civil Procedure and the Convention will be presented is when an evidence-taking proceeding is to be conducted in the United States and the evidence is located in the territory of a foreign signatory. In this latter case, exactly the same choice-of-law analysis should be undertaken as is described in Section 5.3. Both the interests of the foreign signatory and the extent to which those interests will be accommodated by resort to the Convention are likely to be the same as where evidence is sought from a party. Since discovery from a non-party witness under the Federal Rules of Civil Procedure requires some basis of jurisdictional

\[\text{Ref: Dep't of State Bulletin 67 (Oct. 1987) (for information on Spain's adoption of the Hague Service Convention).}\]

\[\text{28 U.S.C. § 1783 provides in pertinent part:}\]

\[\text{(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and . . . if the court finds, in addition, that it is not possible . . . to obtain the production of the document or other thing in any other manner.}\]

\[\text{Id. (emphasis added).}\]

\[\text{It should be noted, however, that the discovery devices available under the Federal Rules of Civil Procedure are substantially more limited when discovery is sought of non-parties than when discovery is sought of parties. While the Federal Rules of Civil Procedure governing deposition, Fed. R. Civ. P. 27-32, apply to both parties and non-parties, Fed. R. Civ. P. 30(a), 31(a), the rules governing interrogatories, requests for production of documents, and requests for admissions, extend only to parties. Fed. R. Civ. P. 33, 34, 36. Rule 35, governing physical and mental examinations of persons, permits such examinations of a party or "a person in the custody or under the legal control of a party. . . ." Fed. R. Civ. P. 35. The subpoena power under rule 45 may be used to compel a person within the court's jurisdictional reach to give testimony or produce documents.}\]

\[\text{See supra Section 5.3.}\]

\[\text{See supra notes 226-57 and accompanying text.}\]
power over the witness, the sovereign interests of the United States are likely to be impaired under similar circumstances as would arise with parties.\textsuperscript{507} Similarly, the burden on the party seeking discovery through the Federal Rules of Civil Procedure is likely to parallel the burden that would exist if the same information were sought from the other party.\textsuperscript{508} The burden on a non-party witness who would be required to violate a non-disclosure law if ordered to produce evidence under the Federal Rules of Civil Procedure, but who would not violate that law through Convention procedures, should be given even greater weight in the balance proposed\textsuperscript{509} than the burden similarly imposed on a party to the litigation.\textsuperscript{310}

6. CONCLUSION

In his dissenting opinion in \textit{Societe Nationale Industrielle Aerospatiale},\textsuperscript{511} Justice Blackmun expressed concern that the majority's failure to provide guidance to lower federal courts would result in a "pro-forum bias [creeping] into the supposedly neutral balancing process and courts not surprisingly often will turn to the more familiar procedures established by their local rules."\textsuperscript{512}

Experience to date indicates that there is a large risk that the case-by-case comity analysis now to be permitted by the Court will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently. I fear the Court's decision means that courts will resort unnecessarily to issuing discovery orders under the Federal Rules of Civil Procedure in a raw exercise of their jurisdictional power to the detriment of the United

---

\textsuperscript{507} See \textit{supra} notes 258-67 and accompanying text.

The force of a subpoena for production of documentary evidence generally reaches all documents under the \textit{control} of the person or corporation ordered to produce, saving questions of privilege and unreasonableness. It makes no difference that a particular document is kept at a place beyond the territorial jurisdiction of the court that issues the subpoena. The test is one of \textit{control}, not of location.

5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 45.05[2], at 45-29 (2d ed. 1987) (footnotes omitted).

\textsuperscript{508} See \textit{supra} note 268 and accompanying text.

\textsuperscript{509} See \textit{supra} note 294 and accompanying text.

\textsuperscript{510} For discussion of the significance of this burden in an international discovery context not involving the Hague Evidence Convention, see Minpeco, S.A. v. Conticommodity Serv., Inc., 116 F.R.D. 517, 525-27 (S.D.N.Y. 1987).


\textsuperscript{512} Id. at 2560.
States’ national and international interests.\textsuperscript{313}

In order to avoid such a result, Justice Blackmun would have lower courts evaluate not only the internal or domestic sovereign interests of the foreign signatory and the United States but also “the mutual interests of all nations in a smoothly functioning legal regime”\textsuperscript{314} in making a choice-of-law decision regarding the Hague Evidence Convention.

The model we propose does not make such “mutual interests” a discrete choice-of-law inquiry, in part because “[u]se of Hague Convention procedures in lieu of the Federal Rules when discovery is sought in a civil law country . . . will in nearly every instance promote ‘the development of an ordered international system.’”\textsuperscript{315} We believe that the analytic approach proposed in this Article places both the sovereign interests of the foreign signatory and the mutual international interests in proper perspective. Where the interests of the foreign Sovereign are accommodated by resort to the procedures established in the Convention, federal courts are to order resort to those procedures unless substantial interests of the United States or of the litigant seeking discovery through the Federal Rules of Civil Procedure would be impaired.\textsuperscript{316} This choice-of-law method addresses the concern of the majority in \textit{Aerospatiale} that courts in the United States “take care to demonstrate due respect for any special problem confronted by the foreign litigant . . . and for any sovereign interest expressed by a foreign state.”\textsuperscript{317} It also addresses the concern expressed by Justice Blackmun by both providing a functional model for solving transnational disputes and “[avoiding] foreign perceptions of unfairness that result when United States courts show insensitivity to the interests safeguarded by foreign legal regimes.”\textsuperscript{318}

\textsuperscript{313} Id. at 2558.

\textsuperscript{314} Id. at 2562.

\textsuperscript{315} Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 40 (N.D.N.Y. 1987) (quoting 107 S. Ct. at 2567 (Blackmun, J. concurring in part and dissenting in part)).

\textsuperscript{316} See supra notes 256-67 and accompanying text.

\textsuperscript{317} Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 107 S. Ct. 2542, 2557.

\textsuperscript{318} Id. at 2568. To date, only one post-\textit{Aerospatiale} case, involving the appropriate role of the Hague Convention, has been decided. In Hudson v. Hermann Pfauter, GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987), plaintiff sued in negligence and strict liability for injuries she suffered while operating a machine allegedly manufactured by defendant, a West German corporation. At issue was a set of interrogatories served by plaintiff upon defendant, seeking detailed information about the design of the machine and the conduct of defendant’s business affairs in the United States. Defendant demanded that such information be sought through Convention procedures rather than through the Federal Rules. The court so ordered.

Noting that a primary difference between the majority and minority opinions in
Aerospatiale is the weight to be given the individual interests of the parties, the court determined that the de-emphasis on those interests in Justice Blackmun's minority opinion was preferred and consequently applied Justice Blackmun's proposed analytic framework. Id. at 37. The court began by examining the foreign interests implicated by plaintiff's discovery request. It found the request "offensive to the sovereign interests" of West Germany. Id.

The diplomatic problems created by the use of discovery provisions of the Federal Rules within the borders of West Germany which constitute nothing less than a violation of West Germany's internal laws by outsiders with the approval and support of United States courts are largely diminished when the procedures of the Hague Convention are utilized. Though the Convention contemplates the taking of evidence within West German borders by individuals who are not judicial officers of West Germany, that nation's consent to the use of Convention procedures reduces the danger of offending West Germany's sovereign interests . . . [and] weighs heavily in favor of the use of those procedures in the first instance. Id. at 38.

The court acknowledged that the United States had interests as well, particularly in assuring fair and equal treatment of litigants before United States courts. It noted, however, that the greatest obstacle to effective use of Convention procedures to accomplish that result lay in lack of familiarity of American courts with those procedures. Consequently, use of Convention procedures will, at least initially, result in greater expenditures of time and money for attorneys pursuing causes of action against foreign parties on behalf of their clients and could require an increased commitment of judicial resources. Nonetheless, these inconveniences alone do not outweigh the important purposes served by the Hague Convention. Further, as judges and lawyers become more familiar with the discovery rules of the Convention, it is quite possible that its procedures will prove just as effective and cost-efficient as those of the Federal Rules. To assume that the "American" rules are superior to those procedures agreed upon by the signatories of the Hague Convention, would reflect the same parochial biases that the Convention was designed to overcome. Id. at 38-39.

Additionally, the court noted that if Convention procedures proved unavailing, it had "extensive discretionary powers to control discovery" that would allow it to compel discovery through the Federal Rules of Civil Procedure as a method of second resort. Id. at 39. Finally, the court found that an order that the parties proceed through the Hague Convention would further the mutual interests of the community of nations in promoting effective international judicial cooperation. Id. at 39-40.

Although the framework applied by the court in Hudson differs from the analytical model proposed here, the result reached by application of the two models is the same. Since the sovereign interests of West Germany clearly are accommodated by ordering resort to Hague Evidence Convention procedures, those procedures should be chosen under our model unless the substantial interests of either the United States or one of the parties are sufficiently impaired to justify application of the Federal Rules of Civil Procedure (despite the existence of West Germany's interests). Since Hudson is a state-created tort action, neither a constitutional nor an extensive statutory policy of the United States is at issue. As a result, the interests of the United States in applying the Federal Rules of Civil Procedure would not be sufficiently substantial to overcome West Germany's interest in applying the Convention. Although the model chosen by the Hudson court did not compel it to examine the interests of the parties, there is nothing in the court's opinion suggesting that the burden on the plaintiff, in being forced to pursue discovery through the Convention, would be substantial. In fact, the scope of the discovery sought, involving a minimum of ninety-two interrogatories, would suggest that any additional cost to the plaintiff could be justified by the scope of the information potentially obtained.