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The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention

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The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention

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I. INTRODUCTION

When a party to a civil action in an American state or federal court seeks to obtain testimony of witnesses or other evidence located outside the United States and beyond the asserted jurisdiction of the court, it is widely understood that the acquiescence or active cooperation of the government or courts of the country in which the witness or evidence is located will be necessary.

This article deals with a slightly different situation. It assumes

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that an American court has asserted, or might assert, jurisdiction over the witness or person in control of the evidence outside the United States. That person may even be a party to the action. The question examined is whether an American court should require use of methods for obtaining evidence that are accepted by the state where the evidence is located¹ in preference to other discovery procedures available under American state or federal law.

Since counsel for the party seeking discovery may prefer to use "direct" methods for obtaining depositions, documents, or other evidence, which do not involve a foreign government or foreign courts,² this article explores the nature and relative importance of the moderating values that may interpose themselves to override that preference. A party's desire to avoid the use of foreign courts may be grounded in a serious calculation of the relative costs and inconvenience to the parties, the witnesses, and the court in a particular case,³ but the courts should also consider that "[n]o

1. The most important multilateral agreement dealing with this question is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

2. [T]he taking of evidence abroad in the face of determined opposition can be a long, expensive and difficult process, and both counsel and his client should carefully weigh the benefits and alternatives before proceeding. If, for example, the desired witness is a party or would be subject to subpoena in the United States, or would appear voluntarily anywhere, it would, in most instances, be preferable to proceed with discovery in the normal course under the Federal Rules of Civil Procedure before invoking the Convention.

Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 INT'L. LAW. 575, 576 (1982).

3. For a discussion of the factors influencing the initial choice of discovery methods by the attorney, see Note, *Taking Evidence Outside of the United States*, 55 B.U.L. REV. 368 (1975). Travel, shipping, duplication, and translation expenses, as well as foreign expert and legal fees, may arise under either alternative, although the precise amount and distribution of costs may vary. The court may be able to control the distribution of costs.

Costly delays are not endemic to foreign courts alone; indeed, it is likely that courts would give priority to foreign requests for judicial assistance. The elimination of the requirement for communication of requests for judicial assistance through diplomatic channels breaks one major roadblock. See Hague Evidence Convention, opened for signature Mar. 18, 1970, art. 2, 23 U.S.T. 2555, 2558, T.I.A.S. No. 7444, at 4, 847 U.N.T.S. 231, 241. Nevertheless, lack of familiarity of American attorneys and foreign judges with both the procedures of the Hague Evidence Convention and the judicial processes of the other country may be significant factors resulting in delay.

The use of foreign judicial assistance may also reduce the need for costly foreign travel by the trial judge. Nevertheless, in some instances foreign travel by the trial judge may still be desirable—for example, to deal with complex problems of privilege under United States law. See Platto, *supra* note 2, at 581. The availability of a computer terminal in the United States capable of receiving data stored abroad may eliminate the cost of examining the data overseas, but should not be used to avoid the procedures of the state where the data is

aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.”⁴ The underlying question is whether, and under what circumstances, witnesses and custodians of property within the territory of a foreign state should be compelled to give evidence in a manner contrary to the laws and public policies of that state.

Since the type of situation being considered is that in which a court has asserted or might assert jurisdiction over the foreign witness or party in control of the evidence, this article will address first the relationship between the decision to assert jurisdiction over a person and the decision to require that person to produce evidence located abroad. The author will attempt to show that the conclusion that the court has jurisdiction over the party does not in itself resolve the separate question whether to order the production of evidence located abroad.

The article will proceed to address the reasons why a decision to order the production of evidence located outside the United States requires greater caution than such a decision with respect to a sister state within the United States. In this connection the author will examine the principles of public international law governing relations between the United States government and its courts and the governments and courts of foreign states.

The article will then focus on the internationally agreed cooperative methods of securing evidence abroad. The first, and by far the most important for many common law nations, is express or implied consent for foreigners to engage in “voluntary” collection of evidence, either directly or through their national consulate, for use in proceedings abroad. This highlights two basic problems. First, what of those “civil law” countries of Europe, Asia, and Latin America where express or implied consent, even with respect to willing witnesses within their borders, does not exist? Second, is

stored. A foreign court could be requested to authorize or require transmission of the data to the United States if such transmission is consistent with the foreign state's laws.

A California court summarized its reaction to the cost issue rather succinctly. It stated, “The consequence that compliance with the Hague Evidence Convention might entail additional cost to plaintiffs is not disparate treatment. California law imposes different obligations upon proponents of discovery depending upon the status and location of the deponent.” *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 246, 186 Cal. Rptr. 876, 882 (2d Dist. 1982) (footnote omitted).

4. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 420 reporters' note 1 (Tent. Draft No. 3, 1982).

"cooperation" by a witness under threat of sanction "voluntary"?

The body of the article deals with the Hague Evidence Convention,⁵ the most significant multilateral treaty dealing with the problems of securing evidence located abroad, particularly in Europe. The article discusses in detail the express exceptions to the duty to cooperate with a foreign court's request for judicial assistance or other efforts to obtain evidence. These exceptions illustrate the points of sensitivity that describe the boundaries of tolerance in this area. These points of sensitivity are relevant in determining not only whether use of the convention is likely to be productive, but also whether an attempt directly to secure testimony or other evidence in foreign territory is likely to offend important interests of the foreign state.

The analysis concludes with some observations on balancing the interests of the forum with the interests of the country where the evidence is located, and on some special questions posed by the division and separation of powers in the United States. The author concludes that these considerations indicate the desirability of requiring more frequent use of the Hague Evidence Convention and other internationally agreed procedures whenever it is probable that direct discovery with respect to witnesses or evidence located abroad will offend a foreign state.

II. DEFINING THE ISSUE

Congress frequently enacts legislation requiring the federal courts to apply United States domestic law to acts, property, or persons outside the United States. The statutes often involve basic national policies that may conflict with those of foreign nations. Such statutes may apply specifically or by implication to activities that occur outside the United States and may permit the United States government to prosecute all parties who act in violation of the United States law. Antitrust,⁶ trading with the enemy,⁷ export

5. *Opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

6. *See In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. Watchmakers of Switz. Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955); *British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd.*, [1953] 1 Ch. 19 (1952). *See generally* J. Atwood & K. Brewster, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1981); W. Fugate, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (2d ed. 1973); *PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS* (J. Griffin ed. 1979); Samie, *The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws*, 14 *LAW. AM.* 23 (1982).

7. *See Societe Internationale pour Participations Industrielles et Commerciales, S.A. v.*

control,⁸ and securities regulation⁹ cases are all of this sort. American courts have little choice but to yield to such policy determinations, even if this results in a dispute with a foreign government.¹⁰ To put it bluntly, when the political organs of government have

Rogers, 357 U.S. 197 (1958); Corcoran, *The Trading with the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174 (1968).

8. See *infra* note 10; Note, *Extraterritorial Application of the Export Administration Amendments of 1977*, 8 GA. J. INT'L & COMP. L. 741 (1978).

9. See R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 1296-307 (5th ed. 1981); Note, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17 HARV. INT'L L.J. 315 (1976); Special Committee on Commodities Regulation, *The Extraterritorial Implications of the Commodity Exchange Act*, 32 REC. A.B. CITY N.Y. 492 (1977).

10. See *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 1978 A.C. 547 (H.L.); Merhige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1979).

The British Parliament created a cause of action against successful American plaintiffs for the return of noncompensatory damage awards resulting from the extraterritorial application of United States antitrust laws. See *Protection of Trading Interests Act*, 1980, ch. 11; Rosen, *The Protection of Trading Interests Act*, 15 INT'L LAW. 213 (1981); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 1980, 75 AM. J. INT'L L. 257 (1981).

Though American courts try to avoid stating the fact, the Canadian government has attempted to frustrate the extraterritorial enforcement of United States antitrust laws. See *United Nuclear Co. v. General Atomic Co.*, 95 N.M. 155, 181-90, 629 P.2d 231, 257-66 (1980). An Ontario court, rejecting letters of request in connection with private litigation, concluded,

It is inappropriate . . . to invoke the doctrine of comity of nations in an effort to search out testimony and documents designed to permit a foreign tribunal to determine whether actions taken by or on behalf of the Government of Canada were contrary or inconsistent with the laws of a foreign country. It should not be necessary to add that Canada is a fully sovereign nation and not accountable to the tribunals of a foreign State.

Re Westinghouse Elec. Corp. and Duquesne Light Co., 78 D.L.R.3d 3, 21-22 (Ont. 1977).

A French affiliate of a United States corporation was placed into temporary receivership by a Paris court in order to execute a contract that the corporation's American directors were prohibited by United States law from performing. See Judgment of May 22, 1965, Cour d'appel, Paris, 1968 Recueil Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 147.

Recently the Western alliance was shaken by attempts to control the resale of American technology by foreign corporations to the Soviet Union for use in the construction of a gas pipeline to Western Europe. See *Export Administration Act of 1979*, 50 U.S.C. § 2401 (Supp. V 1981); Statement on Extension of U.S. Sanctions, 18 WEEKLY COMP. PRES. DOC. 820 (June 18, 1982); Statement on U.S. Measures Taken Against the Soviet Union Concerning Its Involvement in Poland, 1981 PUB. PAPERS 1209 (Dec. 29, 1981); *infra* note 45. For a series of September 1982 orders of the International Trade Administration temporarily denying export privileges to Dresser S.A. (France), Nuovo Pignone S.p.A. Industrie Meccaniche E Fonderia (Italy), John Brown Engineering Ltd. (U.K.), Creusot-Loire S.A. (France), AEG-Kanis Turbinenfabrik GmbH (West Germany), and Mannesmann Anlagenbau Aktiengesellschaft (West Germany), see 47 Fed. Reg. 39,708, 39,709, 40,205, 42,392, 44,603, 44,604 (1982).

decided to risk international controversy, courts are properly reluctant to question those policy decisions.¹¹ In the field of foreign affairs, authoritative congressional or presidential pronouncements normally prevail over the courts' own perceptions of international law or comity.¹²

Although there may be no stated policy of the federal government on the subject, the issue of deference to foreign sovereigns may also arise in private civil actions of a type common to most legal systems. A products liability action is one good example. Choice of forum or choice of law could indeed alter the outcome, but the courts of different jurisdictions do not in principle lack either the competence or the inclination to hear the case.

"Ordinary" cases may, for several reasons, provide a better setting for analysis than cases arising under special federal statutes. First, the international legal implications of such ordinary lawsuits may be serious. Second, ordinary cases arise more frequently than do politically controversial cases involving explicit foreign relations issues. Third, ordinary cases, which usually do not involve a highly charged international political dispute, provide a good environment for dispassionate analysis of the foreign discovery issue by national courts. Finally, and perhaps most importantly, courts have the greatest flexibility and opportunity to develop a "common law" of foreign discovery in cases where no clear position on the subject has been taken by the political branches of the federal government. To the extent that United States constitutional law and international law govern the subject,¹³ the latter

11. The draft Restatement recognizes that the interests of the nation as a whole, including its foreign relations interests, are more likely to be reflected in a case to which the United States is a party:

When the U.S. Department of Justice convokes a grand jury, issues a civil investigative demand, or brings a lawsuit, a decision has already been made that the matter is important to the national interest, whether it concerns allegation of an antitrust violation, securities fraud, or tax evasion. In many instances, before such action is undertaken, it is subject to interagency review, sometimes also involving international consultation. Private litigants cannot be expected to have comparable concern for the long-term national, as contrasted with their own short-term interests, or to abide by international understandings that they had no part in making.

RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 420 reporters' note 8 (Tent. Draft No. 3, 1982).

12. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 221-22, 460 n.61 (1972).

13. See *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. 2591, 2598 (1983) ("[T]he principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies.").

presumably having the domestic status of "federal common law,"¹⁴ state courts are required to apply that law notwithstanding any state law to the contrary.¹⁵ State courts thus may participate in the development of this federal common law.

Products liability actions arise in a context in which the reasons both for and against deference to the foreign sovereign seem less extreme than in cases governed by internationally controversial federal statutes. The basic policies underlying the substantive cause of action are common to the legal systems involved. For this reason, one may argue that the exercise of jurisdiction by the forum over evidence in foreign territory does not violate any substantive policy of the foreign state, but rather furthers the substantive policies of both states. On the other hand, one may argue that since both countries' underlying substantive policies are similar, there is no reason *not* to defer to the foreign state's procedures for obtaining evidence in its own territory.

Not only do these arguments tend to cancel each other out, but to an important degree they are beside the point. "Private law" and "public law" issues arise on both national and international levels in private litigation involving evidence abroad. The question is not where a consumer may choose to sue a manufacturer, but whether and under what circumstances compulsory process under threat of sanction should issue with respect to persons and evidence within the territory of a foreign state. Since compulsory process is an awesome use of a nation's coercive power—one that most Western democracies severely restrict and frequently deny even their own executive officials except under judicial supervision—the public law aspect of the problem cannot be ignored.

III. THE POWER TO COMPEL DISCOVERY AS A JURISDICTIONAL ISSUE

The fact that the witness, documents, or person in control of documents or other evidence located abroad is subject to the jurisdiction of the court does not necessarily mean that the American

14. See *id.*; Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939), cited with approval in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964); L. HENKIN, *supra* note 12, at 223; *United States v. Belmont*, 301 U.S. 324, 331 (1937); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); see also *Volkswagenwerk A.G. v. Falzon*, 103 S. Ct. 1810 (O'Connor, Circuit Justice 1983). See generally Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

15. See U.S. CONST. art. VI.

court should apply the ordinary discovery practices of the forum.

The decision to assert in personam jurisdiction over a foreign defendant in a civil action does not, and should not, involve a detailed inquiry as to the reasonableness of subjecting that person's property, employees, and affiliates throughout the world to the compulsory power of the court.¹⁶ To assume that all the property, employees, and affiliates of a company are subject worldwide to the compulsory discovery orders of all the courts before which the company might be ordered to appear as a defendant in a civil action is, in the end, to require that the rationality of such a course of action be weighed in each case as part of the decision whether to exercise jurisdiction over the defendant at all. The eventual effect well could be to reduce the number of forums open to the plaintiff in the first instance.

The most cursory reading of *International Shoe Co. v. Washington*¹⁷ and its progeny should suggest the supremacy of context over rigid preconceived jurisdictional conclusions. *Shaffer v. Heitner*,¹⁸ which requires that the standards for establishing in personam jurisdiction apply even where the defendant's property is located within the forum state, is stood on its head by the proposition that in personam jurisdiction places all property wherever located under the control of a court that once purported to assert jurisdiction only over that property located within the state.¹⁹

The existence of the power to order a thing done does not resolve the question of the propriety of exercising that power, particularly in the international context. For analytical purposes, it matters little whether we regard the issue of the proper exercise of power as jurisdictional or discretionary.²⁰ The existence of rational

16. This holds true even (or especially) if jurisdiction is based on the fiction of prior consent to in personam jurisdiction, e.g., as a condition of doing business in the forum. Moreover, whenever offense to a foreign sovereign rather than fairness to a party is the concern, it should be noted that a private party may not waive the rights of a foreign state.

17. 326 U.S. 310 (1945).

18. 433 U.S. 186 (1977).

19. This is not literally so, of course. *Shaffer* dealt with the threshold question of asserting jurisdiction, not with the question of limitations on the exercise of that jurisdiction once established. In a more profound sense, however, *Shaffer* could be understood as standing for the premise that the mere existence of territorial power (in that case, power over property) is no substitute for consideration of whether its exercise is rational under the circumstances.

20. Categorical analysis is not an adequate substitute for an examination of the proper balance of the competing values involved in this field. The possible procedural consequences of characterizing the issue as jurisdictional or discretionary, such as the availability and scope of appellate review, need not limit the analysis of the underlying issues. A California appellate court, noting that a foreign government had specifically informed the trial court

and preferable alternatives should inform the decision in any case.²¹

It may be argued that the domestication of a foreign corporation for global discovery purposes is justified because only its United States assets are thereby put at risk²² and because that risk is a condition of doing business here.²³ This argument does not resolve the underlying question of how that power to order global discovery is to be exercised to maintain a rational ordering of the international system of separate territorial sovereignties in the context of increasing transnational commercial activity.

The existence of jurisdiction is relative rather than absolute. The notion that jurisdiction to command appearance before the court "domesticates" the witness or party for all purposes relevant to the litigation is fallacious. The court should not ignore the foreign nationality or locus of the witness or evidence.

The circumstances in which in personam jurisdiction becomes confounded with the power to compel discovery are all too familiar. Committed to the value of the convenience of the plaintiff (particularly in tort actions), not to mention that of the local bar, a court asserts in personam jurisdiction on the basis of "minimum

that letters rogatory were the appropriate vehicle for discovery in the case, stated, "Whether the superior court's election to ignore these declarations represented an abuse of discretion or an excess of jurisdiction, it will be annulled by mandate." *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App. 3d 503, 508, 109 Cal. Rptr. 219, 222 (3d Dist. 1973). The court dealt separately with the procedural issue, stating, "Although resort to prerogative writs to review discovery orders is relatively limited, a writ is available to review discovery questions of first impression and general importance." *Id.*

21. For example, the United States Supreme Court considered the availability of an alternative procedure under the Uniform Reciprocal Enforcement of Support Act in reaching its decision that the assertion of jurisdiction over the out-of-state parent in a child support action was unconstitutional. See *Kulko v. Superior Court*, 439 U.S. 84, 99 (1978).

The draft Restatement takes the position that, "[I]n issuing an order directing production of documents or other information located abroad, a court in the United States must take into account . . . the possibility of alternative means of securing the information." *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 420(1)(c)* (Tent. Draft No. 3, 1982).

22. The argument that only United States assets are at risk assumes that a United States court's in personam money judgment would not be enforced in any other country where the corporation has assets. That assumption may be neither accurate nor desirable.

23. This argument raises the question whether it is constitutional for a state to impose such a condition for doing business in the United States upon a foreign corporation. By virtue of the full faith and credit clause, all of the corporation's United States assets, not just those in the forum state, would be exposed to an adverse judgment. This is a harsh remedy for enforcing discovery. That in turn raises the question whether courts in general and state courts in particular should interpret a general discovery statute as imposing such a condition on foreign commerce in the United States, absent an authoritative political decision. See *infra* text accompanying notes 163-65.

contacts,"²⁴ regardless of whether the defendant is from Rome, Italy or from Rome, Georgia. The court then orders depositions of the defendant's employees in Geneva, Switzerland as if they were in Geneva, New York, and the inspection or production of documents or equipment located in Hanover, West Germany as if they were in Hanover, New Hampshire. The court normally faces the implications of what it is doing only when it comes up against a foreign criminal statute,²⁵ and even then asserts the power to override foreign laws by ordering parties "before the court" to attempt in good faith to persuade foreign governments not to enforce their laws that interfere with United States discovery practices.²⁶

American courts seem shocked by the inevitable result: the enactment by foreign governments of rigid penal statutes designed to convince American courts to restrain themselves from ordering discovery abroad and to frustrate execution of such orders as the American courts issue;²⁷ or the intervention of a foreign govern-

24. An illuminating discussion of the minimum contacts test first enunciated in *International Shoe* and the domestic allocation of sovereign powers among the states is contained in Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

25. See *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958) (Swiss penal statute precluded production of documents); cf. *United States v. First Nat'l Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (civil liability under German law held insufficient to preclude discovery).

26. See *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 205 (1958); *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 156 (D.C. Cir. 1961); *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 229-30, 629 P.2d 231, 305-06 (1980), cert. denied, 451 U.S. 901 (1981).

27. Early statutes enacted in response to antitrust investigations were the Business Records Protection Act, 1947 ONT. REV. STAT. c.44 and the Wet Economische Mededinging 1956 (Economic Competition Act of 1956), *Staatsblad voor het Koninkrijk der Nederlanden* [Stb.] 413 (Neth.).

Several foreign statutes were enacted in response to the Federal Maritime Commission's investigation of anticompetitive practices of international shipping conferences. See *The Shipping Contracts and Commercial Documents Act*, 1964, ch. 87; *Federal Maritime Shipping Act* of May 24, 1965, art. 11, 1965 *Bundesgesetzblatt* [BGBl] II 833, 835 (W. Ger.); *Loi No. 68-678 du 26 juillet 1968*, *Journal Officiel de la République Française* [J.O.] 7267, 1968 *Dalloz-Sirey, Legislation* [D.S.L.] 248; *NORGES LOVER 1685-1975*, Law No. 3 of June 16, 1967, at 2189 (1976) (Norway). See generally Note, *Anglo-American Conflict of International Jurisdiction*, 13 INT'L & COMP. L.Q. 1460 (1964) (discussing English statute enacted in response to United States law).

Some countries enacted statutes in response to private discovery and governmental investigation into the international uranium cartel. See *Foreign Proceedings (Prohibition of Certain Evidence) Act*, No. 121, 1976 Austl. Acts 1125, amended by *Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act*, No. 202, 1976, Austl. Acts 1743; *Uranium Information Security Regulations*, CAN. STAT. O. & REGS. 644 (1976), replaced by CAN. STAT. O. & REGS. 836 (1977) (implementing the Atomic Energy Control Act, CAN. REV. STAT. ch. A-19, § 9 (1970)); *Loi No. 80-538 du 16 juillet 1980*, 1980 J.O. 1799, 1980 D.S.L. 285;

ment (and at its request, perhaps the United States government) in the litigation, thus politicizing what began as a neutral and dispassionate judicial proceeding between private parties.

An analysis of the questions left unanswered by a jurisdictional approach to foreign discovery reveals the underlying problem that would exist if every country where a large corporation has assets could hold the corporation hostage on the basis of the country's right to inspect all information controlled by the corporation anywhere in the world. Moreover, if ownership of a local subsidiary may subject the parent corporation to the in personam jurisdiction of the forum, even the formal barrier of corporate entity may fall before a veil-piercing assertion of power to order discovery of data from the foreign parent corporation.²⁸

Protection of Trading Interests Act, 1980, ch. 11, §§ 1-4; Second General Law Amendment Act, No. 94 of 1974, § 2, *repealed by* Protection of Businesses Act, No. 99 of 1978, § 3, 26 STAT. S. AFRICA 681; *see In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1143 (N.D. Ill. 1979); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 420 reporters' note 3 (Tent. Draft No. 3, 1982); 54 INT'L L. ASS'N CONF. REP. 151, 178-80 (1970); *Extracts From Some Published Material on Official Protests, Directives, Prohibitions, Comments, Etc.*, 51 *id.* at 565 (1964) [hereinafter cited as *Extracts on Official Protests*]; Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation*, 17 INT'L LAW. 61, 63-72 (1983); Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Re-evaluation of the American Position*, 50 FORDHAM. L. REV. 877, 877 n.1 (1982).

28. *See Graco, Inc. v. Kremlin, Inc.*, 7 U.S. IMPORT W. (BNA) (Int'l Trade Rep.) (N.D. Ill. Sept. 23, 1982); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1145 (N.D. Ill. 1979). The more tantalizing question is what do we mean by foreign nationality? The "genuine link" rule of nationality of the *Nottebohm Case* (Liechtenstein v. Guat.), 1955 I.C.J. 4, 20-24 (Judgment of Apr. 6), applies to ships and presumably other juridical persons that have nationality under international law. *See Convention on the High Seas, done Apr. 29, 1958*, art. 5, 13 U.S.T. 2312, 2315, T.I.A.S. No. 5200, at 2, 450 U.N.T.S. 82, 84-86; *Convention on the Law of the Sea, opened for signature Dec. 10, 1982*, art. 91, U.N. Doc. A/CONF.62/122 (1982); *see also id.* ann. III, art. 4(2); *id.* ann. III, art. 4(3). At the same time, courts may regard a corporate subsidiary organized under United States law, but wholly owned by a foreign corporation, as a United States national. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982). Although it is open to doubt whether the "genuine link" requirement for recognition of foreign nationality under international law is a comparative study, the operating hypothesis for purposes of this inquiry is that the links of a corporation (or corporate group to which it belongs) to the foreign "state of nationality" are considerably more substantial than are its links to the United States.

The reluctance of the International Court of Justice in the *Barcelona Traction Case* (Belg. v. Spain), 1970 I.C.J. 3 (Judgment of Feb. 5), to pierce the corporate veil with respect to the right of diplomatic representation where the alleged injury to the state was the uncompensated wrong to its national stockholders is not inconsistent with the court's decision in *Nottebohm*—that a state with purely formal contacts with its alleged "national" does not enjoy a right of diplomatic representation, at least as against a state with longstanding and substantial contacts. Even if everyone *must* have, i.e., will be regarded post hoc as having, a domicile for jurisdictional or choice of law purposes, there is no requirement that even a natural person have a nationality for purposes of diplomatic representation. The harshness

It is at least arguable that a national court that assumes it has potential universal jurisdiction (that is, the power to "domesticate" anyone anywhere if the need arises), but that limits the exercise of its power in rational deference to the existence of foreign sovereignties, would arrive at more sensible results than would a court that recognizes ordinary territorial limitations on its powers, but then automatically acts to the limit of its jurisdiction. The issue is how to harmonize multiple concurrent jurisdictions, not simply how to limit the power of a particular court. The goal is to introduce a rational ordering of governmental relationships into a non-rational (not necessarily irrational) division of the planet into some 170 territorial sovereignties.

IV. THE IMPACT OF PUBLIC INTERNATIONAL LAW

An assumption that the national courts of the world are essentially fungible trustees of coercive powers in civil cases has little to commend it. We would not wish to apply that assumption automatically to the courts of many non-Western countries. It is an assumption belied by the concept of federal diversity of citizenship jurisdiction in our own country.²⁹ It is an assumption whose foundation disappears if the court is not reasonably neutral not only as between the parties, but also as between the policies of the various states affected. The limits of neutrality as to policy are evident: a court must apply its own law, including its own choice of law rules. But where, as in a typical pretrial discovery matter, the court has substantial latitude in fashioning and applying that law, its decision as to the means to be employed should proceed from an analysis of the relevant policies of international law, in particular a rational ordering of relationships among nations.

The United States and other nations affected by a case may be friendly allies, but they remain separate states in the international sense of the term. They have not yielded sovereignty to one central government, pledged full faith and credit to each other's acts and

of such a result is perhaps justified if the person voluntarily created the problem, and may be reduced to some degree by the gradual incorporation of human rights standards into public international law and treaties.

29. Even proposals to abolish diversity jurisdiction between citizens of different states would retain diversity jurisdiction in cases involving aliens or foreign states. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 149-50 (1973); AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 108 (1969); Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966-68, 1008 (1979).

judicial proceedings, or accepted direct compulsory review by a single supreme court that may, among other things, resolve their competing jurisdictional claims and ensure, pursuant to common standards, that justice is done their citizens in their respective courts.

The "constitutional" law that orders relations among separate nations is customary international law, as well as treaties and other agreements to which the nations are parties. The basic treaty provisions requiring respect for a foreign state as a sovereign equal, and protection of the rights and interests of its nationals and companies, are set forth in the Charter of the United Nations and in various bilateral treaties of establishment or of friendship, commerce and navigation.

The first principle of the United Nations Charter is the "sovereign equality" of all member nations.³⁰ The United Nations General Assembly has declared, without dissent, that the principle of sovereign equality of states includes the following elements: "(a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable"³¹

The Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany, for example, provides, "Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests."³² The treaty expressly recognizes that the "offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party," and their contents, are subject to "[o]fficial search and examinations . . . only accord-

30. U.N. CHARTER art. 2, para. 1.

31. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970). These elements are essentially the same as those reported during the drafting of the Charter in San Francisco in 1945. See Doc. 739, 6 U.N.C.I.O. Docs. 483 (1945). Achievement of consensus on the Declaration took six years of work in the Legal Committee of the United Nations General Assembly. It has been described as "the most important single statement representing what the Members of the United Nations agree to be the law of the Charter on these seven principles" addressed therein. Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 714 (1971).

32. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-West Germany, art. I, § 1, 7 U.S.T. 1839, 1841, T.I.A.S. No. 3593, at 3.

ing to law."³³ The relevant law is presumably that of the place where such premises are located.

Some may regard modern international law's emphasis on territorial sovereignty as anachronistic, artificial, inefficient, regrettable, unfair, unworkable, or even stupid. It is, however, the framework of formal government-to-government behavior.

When the United States Supreme Court rejects or limits territorially based principles of jurisdiction or choice of law as among the states of this nation, it is acting in the context of the prior political decision to "form a more perfect union" and to superimpose a centrally enforced law of individual liberty on the states. However earnestly desired by liberal politicians or conservative economists, no such political decisions have been made on the global level. None appears imminent.

Thus, while the United States Supreme Court may vacillate on the question whether rational ordering of relations among the states is an element of the calculus of domestic jurisdiction,³⁴ no

33. *Id.* art. V, § 2, 7 U.S.T. at 1844, T.I.A.S. No. 3593, at 6. This provision illustrates the legal context, but does not provide a solution to the problem of foreign evidence-gathering in civil cases. The underlying attitude toward "official search and examinations," however, is important.

34. Compare *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *Insurance Corp. of Ir. v. Compagnie de Bauxites de Guinee*, 102 S. Ct. 2099, 2104 & n.10 (1982), with *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980). Justice Powell, in his concurrence in *Insurance Corp. of Ir.*, pointed out that the issue of rejection of sovereignty factors as a limitation on the judicial jurisdiction of the states was "neither argued nor briefed by the parties." 102 S. Ct. at 2110. Neither the opinion of the Court nor the concurring opinion discussed the fact that most of the defendants were not United States nationals. The Court treated the question of asserting in personam jurisdiction over a defendant who refuses to cooperate in discovery on the jurisdictional issue as "a fairly straight-forward matter," *id.* at 2101, based on "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered," *id.* at 2106 (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909)), and the fact that "[b]y submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that courts [sic] determination on the issue of jurisdiction." 102 S. Ct. at 2106.

In proposing the elimination of sovereignty factors in deciding domestic jurisdiction cases, Professor Martin Redish distinguished domestic from international cases, arguing, "[I]t no longer seems appropriate—if it ever was—to view the relations among the states as analogous to the relations among foreign nations." Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. Rev. 1112, 1136 (1981) (footnote omitted).

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Supreme Court went out of its way to avoid treating the states of the union as territorial sovereigns in the international sense. Ruling that California need not accord sovereign immunity to the state of Nevada in a California tort action, the Court discussed no developments in the international law of the subject since its decision in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812),

such luxury exists on the international plane where the "law" is rooted in the perceptions of the community of national governments. That community regards national courts as organs of national governments. The question of the jurisdiction of those courts evokes the prior question of the jurisdiction of states.³⁵

Problems of extraterritorial discovery among the states of the United States are far less serious in their implications than are similar problems on the international level. For example, if a Florida court orders actions that infringe the governmental rights of Georgia, the prospect of ultimate resolution of the issue by the United States Supreme Court (or the Congress) and the states' limited potential for retaliation reduce the danger of court-generated political conflict between the two states. On the international level, every intrusion by a court of one nation into the sovereign domain of a foreign nation has the potential for creating a political problem between the nations concerned.

Any government is, of course, free to disagree with another and to act firmly on its own convictions. That is a political, not a judicial, decision. Absent a reasonably clear command by the competent political authorities, it is not the ordinary province of courts to initiate international conflict by the exercise of jurisdiction in the territory of a foreign state.³⁶

Two principles of self-restraint emerge from these considera-

except for a passing reference in a footnote. See 440 U.S. at 415-17 & n.13. The Court did not even cite the then relatively new Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1605(a)(5) (1982), which contains a specific exception for tort actions, but noted that "ours is not a union of 50 wholly independent sovereigns." 440 U.S. at 425. The Court disagreed with Nevada's contention that there was a "federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine [with respect to each other] as it prevailed when the Constitution was adopted," noting, "[U]nless such a federal rule exists, we of course have no power to disturb the judgment of the California courts." *Id.* at 418.

35. Since Americans are potentially defendants abroad as well as plaintiffs at home, it is questionable whether United States courts should promote fairness to the parties as the sole criterion for the exercise of jurisdiction on the international plane. Though universalist in their philosophical basis, concepts of fairness are inevitably rooted in local cultural perceptions. Precisely because perceptions of fairness or unfairness depend on context, they contain an element of subjectivity that may be perceived as bias or that may, in fact, result in bias. Even if fairness to the parties is the issue, good relations among states may be better served by reducing the instances in which states are compelled to accuse each other of unfairness. Resort to abstraction rooted in accepted principles, in this case a rational ordering of territorial sovereignties, may involve complicating elements of nationalism, but avoids implications of insult and a potentially frustrating search for a generally accepted law of individual liberty. See Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 595-97 (1983).

36. See text accompanying notes 132-72.

tions. First, courts must be particularly diligent in respecting the restraints of international law³⁷ and treaties,³⁸ since their decisions are not normally subject to review by an international tribunal. Indeed, the absence of outside judicial control necessitates a policy of self-restraint. In the pretrial stages of United States civil litigation, this responsibility for judicial restraint rests primarily with state and federal trial courts, particularly in light of limitations on appellate review of interlocutory orders. Second, because courts may not perform the negotiating and political functions necessary to resolve a conflict with a foreign state if one arises, and because the federal government may be unable or reluctant to intervene in private litigation on behalf of a foreign state,³⁹ the courts must be particularly careful to avoid creating international conflict in the first place. No state can be expected to accept a judgment of a foreign court as dispositive of its sovereign powers.⁴⁰

37. "International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); see *supra* notes 13-14.

38. "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, para. 2.

39. In a note of June 11, 1980 to the Turkish Embassy, the Department of State reiterated "the firm policy of this Department not to take positions concerning or to participate in litigation between private parties in the courts of the United States, except to the extent that applicable laws may so require, or to the extent that the interests of the United States may be affected by the litigation." It remarked, "This practice must be followed in order to avoid prejudice to the rights of private parties, and to avoid inappropriate interference with the independence and integrity of the judicial process." Nash, *Contemporary Practice of the United States Relating to International Law*, 75 AM. J. INT'L L. 363, 367 (1981).

On August 17, 1978, the Department of State circulated a note to the foreign legations in Washington stating that the Department "will no longer transmit diplomatic notes submitted to it by foreign governments with respect to cases pending in the Supreme Court of the United States or in the United States Courts of Appeal." M. NASH, 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 560 (1980). It recommended that the foreign governments present their views through the filing of amicus curiae briefs. This decision was the result of the transmittal of diplomatic notes by the Department of State through the Solicitor General to the Supreme Court in the case of *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978). In a letter to the Solicitor General, the Clerk of the Supreme Court objected to the transmittal, noting that such a procedure was not authorized by the Court's rules. *Id.*

In a letter of June 15, 1979, the Deputy Legal Adviser of the Department of State stated that the "Department of State did not, in general, expect to transmit diplomatic notes from foreign governments to federal trial courts and state courts, but had not foreclosed the possibility of so doing (in the absence of indications to the contrary from the courts)." Nash, *Contemporary Practice of the United States Relating to International Law*, 73 AM. J. INT'L L. 669, 678 (1979).

40. The presentation of amicus briefs by foreign governments does not solve the prob-

V. THE NEED FOR CONSENT

A. Territoriality

It is a basic principle of international law that each state has sovereignty over all activities taking place within its territory.⁴¹ No state may perform an act in the territory of a foreign state without the latter state's consent.⁴² This principle holds true whether a government purports to act through its political or judicial branches, or through its central government or political subdivisions.⁴³

Consent may be express or implied. It may also flow from the right of another state under international law, such as the right of each state to regulate the activities of its own nationals wherever they are.⁴⁴ The attempt to balance the two competing jurisdictional principles of territoriality and nationality may on occasion lead to serious international conflict.⁴⁵

The dilemma exists on two levels: first, fairness to the individual litigants, and second, rational ordering of relations between

lem. In *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980), the court remarked, "[S]hockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction." *Id.* at 1256. The countries involved in that case were Australia, Canada, South Africa, and the United Kingdom. Not surprisingly, the Legal Adviser of the Department of State transmitted a letter to the court through the Department of Justice stating in part, "For reasons that may not have been apparent to the Court, this language has caused serious embarrassment to the United States in its relations with some of our closest allies." Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 657, 665 (1980).

41. Chief Justice Marshall authored the classic American formulation of the principle of territorial sovereignty in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812): "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . ." *Id.* at 136; accord *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

42. "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

43. "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power." *Id.*; see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 169-170 (1965).

44. See *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

45. A contemporary example is the political friction that arose between the United States and its Western European allies over the United States embargo on supplies for the Soviet gas pipeline. The President, for reasons of national security, extended the restrictions on American corporations to include the activities of their foreign subsidiaries and licensees. See *supra* note 10. The nations of the European Common Market called on the United States to withdraw the measures, arguing that they were contrary to international law. N.Y. Times, Aug. 13, 1982, at A4, col. 3. Those measures were withdrawn some months later.

states. On the level of fairness, the individuals involved may face sanctions under the law of one country if they obey the law of the other.⁴⁶ On the level of rational ordering of relations between states, conflict must inevitably yield to some principles of self-restraint, perhaps voluntary at the start, but sooner or later ripening into law.⁴⁷

The typical foreign discovery problem does not usually present a clash between territoriality and nationality as such. Evidence is sought from a national of a foreign state in the territory either of that state or of a third state. In theory, the sovereignty exercised by the forum state might be based on either territoriality or nationality, the former on the ground that the conduct of trials is an exercise of territorial sovereignty, the latter on the ground that persons subject to the jurisdiction of the court owe it "temporary allegiance" with respect to the litigation in question. In either case, the interest of the forum state *as such* is in the proper conduct of the litigation. That interest is distinguishable from the "substantive" interests of a state in controlling all events within its territory or in controlling the global conduct of its nationals. The subject matter of the litigation may indeed involve the latter "substantive" interests of the forum, and those interests are relevant to the existence of jurisdiction, but they are not strictly relevant to the collection of evidence, i.e., the search for truth, in a civil case.⁴⁸

46. This dilemma is particularly acute for corporations that may have subsidiaries, affiliates, or licensees in a large number of countries. An attempt by one country to use its power over a corporation or the corporation's employees and property located in its territory to compel acts to be done in the territory of a foreign state that are illegal under the latter's laws places the corporation or its officers or employees in a situation in which they cannot avoid committing a crime in one of the countries. Assertions that each country has jurisdiction to apply its laws in that situation are beside the point. In Western tradition and, increasingly, under general international law an individual is entitled to elementary fairness—in our terms, "due process"—in a government's exercise of jurisdiction over him. That demands mutual restraint and accommodation by the governments asserting concurrent jurisdiction. The fairness question thus implicates the sovereignty question.

47. "A person may not ordinarily be required by authority of the United States . . . to do an act prohibited by the law of the state where the act is to be done or, if he is an alien, by the law of the state of which he is a national." RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 419(1)(a) (Tent. Draft No. 3, 1982). This rule is qualified in the case of orders to do acts in the United States prohibited by the state of nationality. The "territorial preference" is clear: "[P]rohibitions by the state in whose territory the act is to be carried out ordinarily prevail over orders of other states." *Id.* § 419 comment b.

48. It may be argued that this analysis is too neat, since the choice of forum may affect the outcome in several ways, including cost, differences in the substantive rules establishing the rights of the parties, differences in the applicable choice of law rules, and differences in the procedural rules regarding burdens of proof. Inability to obtain evidence for use in a

It is established that a state may not directly invoke its compulsory process against foreign nationals in the territory of a foreign state without the latter state's consent.⁴⁹ There is thus no question of a United States court dispatching a marshal to seize a person or property in a foreign country. It is not merely that a policeman of one state has no privilege to use force in a foreign state; he may not purport to act there as a policeman, particularly with respect to a foreign national on foreign soil. Even if a court may coerce a foreign national to "consent" in advance to the discovery of evidence controlled by him in his home country, the court may not dispatch a policeman to collect the evidence in the territory of the foreign state without the consent of that state.⁵⁰ Thus, one issue posed is whether counsel for a private litigant

particular forum may therefore result in a party's having no remedy at all. Nonetheless, the presence of these factors does not contradict the analysis. Rather it underscores the fact that the "substantive" territorial or nationality interests of a forum state may be substantial in a given case.

49. See *The S.S. "Lotus" (Fr. v. Turk.)*, 1927 P.C.I.J., ser. A, No. 10 (Judgment of Sept. 7); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 8 comments e & f, § 20 comment b, § 44 (1962); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 comment d (1969); G. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 100 (3d ed. 1963); Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 128, 138 (1964).

In *The S.S. Lotus*, the Permanent Court of International Justice drew a clear distinction between the power to legislate and adjudicate and the power to take evidence in foreign territory. In upholding the power of Turkey to arrest in Turkish territory, and to try an officer of a French ship that collided with a Turkish ship on the high seas, the court analogized ships on the high seas to national territory, finding that the alleged involuntary homicide on board the Turkish ship occurred within Turkish territory for jurisdictional purposes. The court based its conclusion on Turkey's power to exercise its jurisdiction in its own territory, stating, "[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State." 1927 P.C.I.J., ser. A, No. 10, at 18. Elaborating on this point, the court stated, "Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law." *Id.* at 25. In this connection, the court noted that "by virtue of the principle of the freedom of the high seas, a ship is placed in the same position as national territory." *Id.* Despite its restrictive view of jurisdiction to take evidence, the court's expansive view of Turkey's jurisdiction to try the case was narrowed if not completely rejected with respect to collision cases by subsequent treaty. See *Convention on the High Seas*, Apr. 29, 1958, art. 11, 13 U.S.T. 2312, 2316, T.I.A.S. No. 5200, at 3, 450 U.N.T.S. 82, 88; *accord* *Convention on the Law of the Sea*, art. 97, U.N. Doc. A/CONF.62/122 (1982).

50. The United States government sought the express consent of the government of the Federal Republic of Germany and the government of Iraq for its own consular officials to take depositions in the territories of those states, without compulsion, even on the premises of United States embassies and consulates in those countries. 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 221-25 (1968).

seeking evidence is a private citizen or an agent of a foreign governmental entity—in effect, a policeman. Does the arrival in a country of counsel for a private litigant armed with a foreign state's authorization to take a deposition or examine records or other property (which necessarily involves the possibility of sanctions for failure to comply) amount to an unlawful attempt at direct execution of foreign process in that country? Another issue posed is whether “indirect” execution, namely, ordering a party or witness already before a United States court to transport employees or documents from a foreign country to the United States or a third state for examination, entirely avoids the difficulty.

B. *Implied Consent*

Governments routinely permit foreign nationals in their territories to engage in activities that may further a foreign government's policies. Express consent to the presence of diplomatic officers, consular agents, and visitors of high rank implies consent for them to engage in their official activities. In other situations, patterns of tolerance may give rise to implied consent to do certain acts.

In principle, friendly countries may have no interest in frustrating the processes by which their respective courts endeavor to ascertain truth in civil cases, at least where jurisdiction over the parties is uncontested. Surely, strict territorialization of evidence-gathering could complicate or frustrate the administration of justice in many cases. Absent indications to the contrary, a court may be justified in reaching the conclusion that there is implied consent for obtaining documents or testimony abroad from a “willing” witness. The parties may then proceed to take depositions, using the notice or commissioner procedures provided in rule 28(b)⁵¹ of the Federal Rules of Civil Procedure, or to submit interrogatories to parties under rule 33.⁵² Rule 29 permits the parties to stipulate to any manner of discovery that they find mutually convenient.⁵³

51. Rule 28(b) provides:

In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court

FED. R. CIV. P. 28(b).

52. FED. R. CIV. P. 33.

53. Rule 29 provides:

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place,

This adds flexibility in obtaining evidence from cooperative witnesses.

In the United States and to some degree in other common law countries, patterns of tolerance have arisen with respect to the taking of evidence from willing witnesses in foreign civil litigation. The federal statute on the subject⁵⁴ reflects that underlying tolerance in its unilateral grant of express consent. That tolerance does not, however, exist to the same degree, if at all, in many countries, particularly civil law countries. The tendency of some American lawyers to proceed as though the liberal American policy were universal is not founded on fact.

C. *Express Consent*

By domestic legislation, bilateral treaty, or multilateral treaty, a state may consent to the taking of evidence within its territory for use in foreign litigation. United States legislation gives broad consent to foreign courts or parties wishing to take evidence in the United States in connection with foreign litigation.⁵⁵ The statute was intended to enhance the United States bargaining leverage in international negotiations on judicial assistance,⁵⁶ but it contains no requirement of reciprocity.

The United States is a party to many bilateral agreements in which foreign governments expressly consent, under specified conditions, to the examination of willing witnesses by a United States consular official⁵⁷ or to specific types of governmental investi-

upon any notice, and in any manner and when so taken may be used like other depositions, and (2) may modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

FED. R. CIV. P. 29.

54. 28 U.S.C. § 1782 (1982); see Sklaver, *Obtaining Evidence in International Litigation*, 7 CUM. L. REV. 233, 234-42 (1976); Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1035-36 (1965).

55. See authorities cited *supra* note 54.

56. See Letter from the Secretary of State submitting the Hague Evidence Convention to the President of the United States, 12 I.L.M. 324 (1973).

57. See *Agreements on Judicial Assistance: Taking of Evidence*, Feb. 11, 1955-Oct. 8, 1956, Oct. 17, 1979-Feb. 1, 1980, United States-West Germany, T.I.A.S. No. 9938; Consular Convention, Mar. 22, 1963, United States-Japan, 15 U.S.T. 769, T.I.A.S. No. 5602. The German Federal Minister of Justice noted that the procedure for taking evidence by United States consular officials as agreed in the notes prohibits the use of direct or indirect compulsion. Letter from the German Federal Minister of Justice to Hans-Viggo von Hülse (Jan. 7, 1981) (on file at University of Miami Law Review office).

gations.⁵⁸

VI. THE HAGUE EVIDENCE CONVENTION

The most significant multilateral treaty on the subject is the Hague Evidence Convention.⁵⁹ That convention is now in force for Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxemburg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom (including certain British dependencies), and the United States.

A. *The Agreed Procedures*

The Hague Evidence Convention establishes three procedures for the courts of one country to obtain evidence in the territory of another country in "civil or commercial matters."⁶⁰ The first proce-

58. See Agreement on Criminal Investigations, Jan. 20-22, 1979, United States-Japan, 30 U.S.T. 3473, T.I.A.S. No. 9400; Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-West Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291; Agreement on Criminal Investigations, Mar. 23, 1976, United States-Japan, 27 U.S.T. 946, T.I.A.S. No. 8233; Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302.

59. *Opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

60. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 1, 23 U.S.T. 2555, 2557, T.I.A.S. No. 7444, at 3, 847 U.N.T.S. 231, 241. The reference to "civil or commercial matters" in article 1 of the convention excludes penal and possibly other matters. This raises several questions: whether characterization of the case is determined by the law of the requesting or of the requested state, or by some international standard; whether a simultaneous criminal proceeding or investigation dealing with the same matter affects the characterization; and whether administrative proceedings are characterized as "civil" matters for purposes of the convention. These questions were addressed at a meeting at the Hague in 1978 of experts "drawn from the governmental bureaux which had responsibility for applying the Convention." See Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 17 I.L.M. 1425 (1978) (partial text) [hereinafter cited as Commission Report]. On the question of characterization, the Special Commission noted,

Certain experts indicated that in practice their courts accepted the characterization as civil or commercial which was given by the requesting authorities under their own law, but a greater number of experts indicated, to the contrary, that this determination should be made according to the views of the State addressed.

Id. at 1426. See *Huntington v. Attrill*, 146 U.S. 657 (1892), and *Huntington v. Attrill*, 1893 A.C. 150 (P.C.), for the view that the question whether the action sued upon is penal is a question of private international law to be decided by the court being asked to enforce the judgment.

With respect to the effect of separate criminal proceedings,

[t]he experts were of the opinion that the mere possibility that the proof obtained abroad in a civil or commercial proceeding might lead to a penal or tax

dure is a "letter of request" from the trial court to the competent

proceeding in the requesting country should not prevent the Convention from being applied. On the other hand, if the evidence sought in a foreign country in connection with a civil or commercial matter could be directly linked to a penal proceeding underway in the requesting State, the State addressed might refuse to carry out the Letter of Request, as was done in the [Westinghouse] case . . .

Commission Report, *supra*, at 1427.

In *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 1978 A.C. 547 (H.L.), the House of Lords declined a request by a Virginia federal district court for evidence in a civil action on the ground, among others, that the action was directly linked to a criminal proceeding. The Department of Justice had granted immunity to the British witnesses from whom evidence was being sought by the district court in order to overcome their previous successful invocation of the privilege against self-incrimination. The express grounds for granting immunity were that the testimony sought "may well be indispensable to the work of the grand jury" in Washington, D.C. that was investigating the international uranium industry. *Id.* at 614-15 (Lord Wilberforce); *see id.* at 631 (Viscount Dilhorne), 640 (Lord Diplock), 651 (Lord Fraser of Tullybelton), 654 (Lord Keith of Kinkel). On the other hand, in considering whether to refuse the request by the Virginia district court because it might produce evidence relevant to Westinghouse's arguably "penal" treble-damage antitrust action in an Illinois district court, Lord Wilberforce concluded that he need not decide the character of the Illinois proceedings:

Unless a case of bad faith is made against Westinghouse (which is expressly disclaimed) it is impossible to deny that the letters rogatory were issued for the purposes of obtaining evidence in the Richmond proceedings. The fact, if it be so, that evidence so obtained may be used in other proceedings is no reason for refusing to allow it to be requested: all evidence, once brought out in court, is in the public domain, and to accept the argument would largely stultify the letters rogatory procedure.

Id. at 611. In the *Westinghouse* case, two Lords characterized a treble-damage antitrust suit as a civil proceeding. *See id.* at 620 (Viscount Dilhorne), 651 (Lord Fraser of Tullybelton). This characterization is possibly relevant to simultaneous claims for compensatory and punitive damages in a single civil action. Whatever the arguments for regarding a statutory antitrust award for treble damages as "penal," the same reasoning is not necessarily applicable to punitive damages awarded in tort cases involving particularly outrageous conduct. Punitive damages in the United States are not fines payable to the state and do not require adherence to the rules of criminal procedure. They are not designed to encourage private enforcement of statutory proscriptions. The government is not a party to the action, except perhaps in its "private" capacity. Judge Cardozo expressly declined to characterize as penal a Massachusetts wrongful death statute that measured damages on the basis of the degree of culpability of the defendant. *See Loucks v. Standard Oil Co.*, 224 N.Y. 99, 103, 120 N.E. 198, 199 (1918).

Disapproval of the law of damages of the requesting state is not a permissible basis for refusing to execute a letter of request. The issue in executing a letter of request is not whether the requested court would apply the law of the requesting state were it trying the case. Even if the requested court characterized an action for punitive damages as penal, the court at most might be justified in refusing to execute a request for a particular item of evidence only if that item were clearly not relevant to any claim for compensatory damages but only to the claim for punitive damages. Even the merger of civil and criminal proceedings, as in France, may not render the convention inapplicable to civil actions.

As to administrative proceedings,

The discussions of the Special Commission made it manifest that civil law jurisdictions do not consider administrative matters—though civil in nature—to be within the purview of the term "civil or commercial." Delegates and observers

authority of the foreign country, requesting the foreign courts "to obtain evidence, or to perform some other judicial act."⁶¹ Under the second procedure, a diplomatic officer or consular agent of the requesting country takes the evidence in the foreign country.⁶² The third procedure permits the trial court, with the consent of the appropriate foreign authorities, or a court of the foreign state to appoint a commissioner to take evidence.⁶³

from those jurisdictions stressed that under their legal systems administrative matters have traditionally been the province of special administrative tribunals, applying a special body of substantive law, and that to a civil lawyer's mind there could be no question that "civil and commercial" cases were exclusive of "administrative" cases.

Report of the United States Delegation to the Special Commission on the Operation of the Hague Evidence Convention, 17 I.L.M. 1417, 1418 (1978) [hereinafter cited as United States Delegation Report]. The United States delegation pointed out that the Department of Justice interprets "civil or commercial" as referring to any foreign proceeding that is not criminal. Although no American court has passed on this construction, existing practice would allow United States courts to honor requests under the convention for evidence to be used in foreign administrative proceedings. The United Kingdom delegate agreed with this interpretation. French and German representatives stated that their governments would be flexible in executing requests for evidence for use in administrative proceedings. Thus, while France or West Germany might refuse a request from the United States Tax Court on behalf of the government on the grounds that they would thereby be assisting in the enforcement of American revenue laws, those countries might honor such a request on behalf of a taxpayer. *Id.* at 1418-19.

An agreement between the United States and other countries regarding mutual assistance in governmental or criminal investigations could reduce the reluctance of a foreign court to cooperate in obtaining evidence in a private civil action that is also of direct or indirect relevance to such investigations. See authorities cited *supra* note 58.

61. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, arts. 1-14, 23 U.S.T. 2555, 2557-64, T.I.A.S. No. 7444, at 3-10, 847 U.N.T.S. 231, 241-44. "Letters of request" replaces "letters rogatory" as the English equivalent of the French term *commissions rogatoires*.

62. *Id.* arts. 15, 16, 18-22, 23 U.S.T. at 2564-65, 2566-68, T.I.A.S. No. 7444, at 10-11, 12-14, 847 U.N.T.S. at 244, 245. United States consuls will generally perform these functions in any country that permits the use of this procedure.

63. *Id.* arts. 17-22, 23 U.S.T. at 2565-68, T.I.A.S. No. 7444, at 11-14, 847 U.N.T.S. at 244-45. The commissioner usually will be a local resident of the foreign state, but this is not required by the convention. For example, the language of article 17 would encompass the United States practice of appointing foreign judges as commissioners of United States courts, thus permitting witnesses to be examined in their own language and under their own procedures. Amram, *Rapport Explicatif*, 4 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ: ACTES ET DOCUMENTS DE LA ONZIÈME SESSION 202, 212-13 (1970).

The so-called "notice" procedure, under which a willing witness appears before a local notary or other person authorized to administer oaths and is questioned by a representative of the parties, is available under the laws of some countries but is not expressly included in the Hague Evidence Convention. However, any of the three procedures mentioned in the convention may, if consistent with local law, be applied in a manner similar to the notice procedure.

Rule 28(b) of the Federal Rules of Civil Procedure and section 3.01 of the UNIF. INTER-STATE AND INT'L PROC. ACT, 13 U.L.A. 487 (1980), permit both the notice and commissioner

European civil law countries prefer the letter of request procedure. This preference is revealed by the contingent nature of the convention's other two alternatives.⁶⁴ The efficacy of the consular and commissioner procedures depends largely on the optional declarations filed by the state where the evidence is located.⁶⁵ These optional declarations run the gamut from a provision that no prior consent is needed⁶⁶ to a requirement of consent in each case,⁶⁷ and may include other specific conditions.⁶⁸ The consular and commissioner procedures contemplate a willing witness unless the local government declares that it is prepared to assist in obtaining evidence by compulsion.⁶⁹

The convention is not merely hortatory. The Justice Department views the convention as "a great step forward in the area of international judicial assistance in civil and commercial matters."⁷⁰ Subject to certain exceptions, the receiving state must comply with the first procedure: it must execute a letter of request even if the letter is based on a cause of action not recognized by, or includes a request to use a procedure unknown to, the internal law of that state.⁷¹ The authors of the convention presumably were concerned

procedures.

64. France even requires that the request for permission to use one of the alternative procedures specify the reasons for choosing that method in preference to the letter of request. 7 MARTINDALE-HUBBELL LAW DIRECTORY *Selected International Conventions*, at 15 n.2a (1984) (declarations of France). Nevertheless, it is reported that France has not denied any requests for permission to use these alternative procedures. Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 42 (1979).

65. These declarations can be found at 7 MARTINDALE-HUBBELL LAW DIRECTORY *Selected International Conventions*, at 14-20 (1984).

66. See *id.* at 18 n.3d (declarations of the United Kingdom).

67. See *id.* at 15 n.2a, 16 n.2b (declarations of France and West Germany).

68. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 19, 23 U.S.T. 2555, 2566, T.I.A.S. No. 7444, at 12, 847 U.N.T.S. 231, 245.

69. *Id.* art. 18, 23 U.S.T. at 2566, T.I.A.S. No. 7444, at 12, 847 U.N.T.S. at 245. The United Kingdom has made such a declaration on condition of reciprocity. 7 MARTINDALE-HUBBELL LAW DIRECTORY *Selected International Conventions*, at 18 n.3d (1984) (declarations of the United Kingdom). United States courts are authorized to afford such assistance. 28 U.S.C. § 1782(a) (1982). France, on the other hand, requires that the witness be notified in writing that failure to appear will not give rise to criminal proceedings in the state of origin. 7 MARTINDALE-HUBBELL LAW DIRECTORY *Selected International Conventions*, at 15 n.2a (1984) (declarations of France).

70. Boyd, *Contemporary Practice of the United States Relating to International Law*, 72 AM. J. INT'L L. 119, 133-34 (1978) (quoting a Department of Justice memorandum).

71. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, arts. 9, 12, 23 U.S.T. 2555, 2561, 2562-63, T.I.A.S. No. 7444, at 7, 8-9, 847 U.N.T.S. 231, 243. Some authors, nevertheless, continue to link the duty to execute letters of request with foreign attitudes toward various United States procedures, causes of action, and damage rules. See

mainly with testimony from witnesses located beyond the jurisdictional reach of a court, but they wisely did not so limit the convention's scope, since the parties to the convention have divergent views about jurisdiction.⁷² The civil law countries conceded a broad application of the duty to execute a letter of request in exchange for the agreement of the common law countries to permit the state where evidence is located to limit the use of the consular and commissioner procedures, which do not require the participation of that state's courts.

Because some civil law countries limit the use of the consular and commissioner procedures, and because there are exceptions to the obligation to execute a letter of request, the question arises whether an American court must use only the convention procedures to obtain evidence located in a state that is a party to the convention.

B. *Must the Convention be Used?*

The convention does not state that it is the exclusive means of obtaining evidence located abroad. By contrast, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Docu-

Stiefel, "Discovery"—*Probleme und Erfahrungen im Deutsch-Amerikanischen Rechtshilfeverkehr*, 25 RECHT DER INTERNATIONALEN WIRTSCHAFT 509 (1979).

72. Article 1 of the draft convention prepared by the Special Commission referred to "the taking of statements of witnesses, parties or experts and the production or examination of documents or other objects or property." *Draft Convention Relating to the Taking of Evidence Abroad Drafted by the Special Commission on June the 22nd, 1968*, CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ: ACTES ET DOCUMENTS DE LA ONZIÈME SESSION 48, 48 (1970) (emphasis added). This "was excluded as unnecessary" from article 1 of the final convention text, which uses the general term "obtain evidence," in part because article 3 contains language that "is more explicit and even broader than the proposed phrase in the draft Convention." Amram, *supra* note 63, at 203. Article 3 provides in part,

A letter of Request shall specify—

....

(d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected

Hague Evidence Convention, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 2558, T.I.A.S. No. 7444, at 4, 847 U.N.T.S. 231, 241-42.

Moreover, while article 11 of the 1954 Hague Convention on Civil Procedure, *done* Mar. 1, 1954, 286 U.N.T.S. 265, 273, contained an exception to the obligation to employ compulsion in the execution of a letter of request if the witness was a party to the case, the new Hague Evidence Convention contains no such exception.

ments in Civil or Commercial Matters,⁷³ which inspired the Hague Evidence Convention, expressly provides that it is exclusive.⁷⁴

Article 27 of the Hague Evidence Convention states:

The provisions of the present Convention shall not prevent a Contracting State from—

a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

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.

Article 27 has been cited in the course of a disagreement between two courts about whether the Hague Evidence Convention is the exclusive means of obtaining foreign discovery among the states party. Answering this question in the negative and concluding that the convention established “not a fixed rule but rather a minimum measure of international cooperation,” a California court remarked that its “reading of Article 27 of the Convention encourages us to conclude that this is, indeed, what the ratifying states intend.”⁷⁵ Taking a contrary view, a Connecticut court concluded that the California court’s holding reflected “an erroneous evaluation of The Hague Evidence Convention. . . . Article 27 of the Convention is not . . . evidence that the treaty is neither mandatory or exclusive.”⁷⁶

The issue is not whether the state in which the evidence is located may afford other states more liberal procedures than the convention requires. Article 27 makes clear that it may. The issue also is not whether a party, in seeking to secure evidence abroad by a method state in the convention, must comply with the procedures and restrictions set forth in the convention. Clearly it must. If, for example, a private American attorney seeking depositions or other evidence abroad pursuant to the discovery rules of a United States court is properly regarded as a “commissioner” of that court

73. *Done* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163.

74. *Id.* art. 1, 20 U.S.T. at 362, T.I.A.S. No. 6638, at 2, 658 U.N.T.S. at 165.

75. *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874, 886 (1st Dist. 1981); see Batista, *supra* note 27, at 79 (relying on article 27 as preserving forum state discovery).

76. See *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. DN-CV-80-0050083-S (Conn. Super. Ct. July 22, 1982).

within the meaning of the convention, then the provisions and restrictions of the convention regarding the use of commissioners must be respected.

The issue is whether a state party must use only those procedures set forth in the convention and the internal law of the state where the evidence is located. Article 27 does not appear relevant to this issue. In the context of subparagraphs (a) and (b), the word "State" in the chapeau of article 27 appears to refer to the state where the evidence is located, and not to the state seeking the evidence. This interpretation of the word "State" is reinforced by subparagraph (c), which allows a state to permit methods of taking evidence that are not provided in the convention. If article 27(c) expressly allows the state seeking the evidence a completely free hand in determining "by internal law or practice" the methods of taking evidence in another state, then there is no need for the convention. Thus, this interpretation of the word "State" in the chapeau is reinforced.

The argument that a state is not limited to the convention's procedures for securing evidence located abroad rests on two principal points. First, there is no express provision for exclusivity, whereas there is such an express provision in the Hague Service Convention. Its omission from the Hague Evidence Convention is therefore evidence of a contrary intent. While some parties to the convention may assert that customary international law prohibits the taking of evidence in their territory except as expressly agreed in the convention, this does not mean the convention itself contains such a prohibition. Second, extraterritorial discovery has been a standard practice of American courts for some time. The author knows of no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit this practice entirely.

The two points are interrelated. Absent an express provision in the treaty that a longstanding practice valued by at least some members of the American bar was being abolished—a factor that could indeed have affected the United States decision to ratify the convention—it is unreasonable to conclude that the convention implies such a prohibition.

On the other hand, one may argue that if the convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful quid pro quo for their concessions to the United States under the convention. While there is no requirement of "consideration" in international treaty

law, unilateral concession is not the most probable explanation for the behavior of governments in international negotiations. The liberal American policy regarding collection by foreigners of evidence in the United States was unlikely to change as a result of the treaty negotiations, since it was not conditioned on reciprocity. The civil law nations agreed under the convention to make the co-operative procedures for securing evidence in their territory more effective—even to the point of requiring their courts to use some common law practices alien to them. That agreement most probably was based on an expectation that the convention procedures would be used and that their territorial sensitivities would be respected.

It is possible to synthesize these opposing points of view. Even if the treaty does not foreclose all other options for the state seeking evidence abroad, it may require a state to consider in good faith the use of the Convention's procedures before resorting to procedures that are not permitted by the internal law or policy of the state where the evidence is located.⁷⁷ When a court must decide whether or not to compel a witness or party to produce evidence located abroad, the significance of the convention is that it provides an alternative to the use of procedures that may offend the foreign state. Insofar as orderly international relations are concerned, the use of agreed procedures is clearly preferable. The common law applied by American courts is and must be informed by the need for a rational ordering of sovereignties under public international law. Accordingly, the convention should be the primary means of securing evidence located in the territories of other states party—if not by its terms, then by a proper understanding of its intent and customary international law.

C. *Judicial Sovereignty*

In the United States, evidence-gathering in civil litigation is primarily a function of the parties, not of the court.⁷⁸ A party seek-

77. Authority for such a synthesis could be found in the liberal rule that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31, U.N. Doc. A/CONF. 39/-27 (1969), *reprinted in* 63 AM. J. INT'L L. 875, 885 (1969). Although the Vienna Convention is not in force for the United States, it is generally regarded by American authorities as codifying the customary international law of treaties. See *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)*, pt. III, intro. note 1, at 71-72 (Tent. Draft No. 1, 1980).

78. See *infra* notes 106-14, 131-32 and accompanying text.

ing evidence here for use in a civil action abroad does not usurp the authority of any United States court, so long as no compulsion is involved. In many civil law countries,⁷⁹ however, the gathering of evidence is an exercise of "judicial sovereignty" entrusted exclusively to the courts.⁸⁰ Stated simplistically, this is the counterpart in civil procedure of the distinction drawn in criminal procedure between the "adversarial" system of the common law and the "inquisitorial" system of the civil law.

The Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law states in this regard,

In drafting the Convention, the doctrine of "judicial sovereignty" had to be constantly borne in mind. Unlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities.

The act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the "judicial sovereignty" of the host country, unless its authorities participate or give their consent. This civil law approach has a direct bearing upon choice among the three general methods of taking evidence abroad.

First—the letter of request or "commission rogatoire." This is a truly "judicial" act. The court of one State through appropriate channels, asks the court of another State to secure designated evidence for use at a trial in the requesting State. Here no "sovereignty" problem exists because the evidence is taken through the judicial process of the requested State.

Second—taking evidence by a diplomatic or consular officer of the requesting State. Diplomatic officers are infrequently employed for this purpose, but the use of consuls is well recognized within certain limits. Here there may be a "sovereignty" ques-

79. For a summary of procedure in civil law countries, see J. MERRYMAN, *THE CIVIL LAW TRADITION* 120-31 (1969).

80. See R. SCHLESINGER, *COMPARATIVE LAW* 387-89 (4th ed. 1980).

tion, as the State where the consul acts may object to his entering into "judicial" activities on its territory in the absence of a consular convention authorizing him to do so.

Third—the use of "commissioners" nominated by the court of the State where the action is pending. Here the "sovereignty" question is even more sharply raised. A commissioner acts as the extended arm of the court of the State which appoints him. In a State which follows the "judicial sovereignty" concept, the activities of a foreign commissioner constitute an obvious intrusion by an agent of a foreign judicial "sovereign."⁸¹

It is apparent that in many countries the taking of evidence in civil cases is exclusively a function of the state or, more precisely, of the national courts. In these countries, a foreign attorney attempting to secure a deposition or examine property might inadvertently violate a penal-law proscription against unauthorized persons carrying out or impairing state functions.

Thirty years ago, one writer warned the unwary lawyer about this when he reported that Swiss authorities had arrested Dutch attorneys attempting to interview a Dutch citizen in Switzerland concerning a case in the Netherlands; the attorneys were released only after the government of the Netherlands apologized to the Swiss government and promised to discipline the attorneys.⁸² Two experienced lawyers have issued a similar warning regarding French law.⁸³ For those judges and attorneys who emphasize the

81. 8 I.L.M. 785, 806-07 (1969); see Edwards, *Taking Evidence Abroad in Civil or Commercial Matters*, 18 INT'L & COMP. L.Q. 646, 647 (1969).

82. The incident is discussed in Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 520 (1953). The Swiss government referred to the penal sanctions in its response to the 1967 questionnaire on the taking of evidence abroad, which preceded the drafting of the Hague Evidence Convention. *Réponses des Gouvernements au Questionnaire sur la Réception des Dépositions à l'Étranger*, 4 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ: ACTES ET DOCUMENTS DE LA ONZIÈME SESSION 21, 44 (1970). See generally Dorman, *California's Statutory Contributions in the Field of International Assistance*, 39 L.A. BAR BULL. 7, 30-32 (1963).

83. The danger of foreign criminal sanctions results from American lawyers' disregard of foreign procedures:

Instead of using the Convention procedures, American attorneys apparently continue to engage in legal tourism for the purpose of conducting informal fishing expeditions. They send draft statements directly to persons from whom they wish to obtain evidence with a request that such statements be executed in the form of an affidavit sworn to before an American consular officer. . . .

. . . The French Minister of Justice could decide that the lawyers involved, deemed to be without any lawful authority to engage in such acts, would be subject to criminal proceedings in France. Such a proceeding might be brought under Article 258 of the Penal Code which imposes punishment of two to five years imprisonment for anyone who, without lawful authority, interferes with

effect of foreign criminal law on the propriety of extraterritorial discovery, this should give ample cause for reflection.

The term "judicial sovereignty" implies respect for the exclusivity of governmental organs within their own territories—the monopoly of governmental power that lies at the heart of territorial sovereignty. Many civil law countries object to a foreigner's taking evidence even from a willing witness. Such countries naturally share the aversion felt even by the more liberal common law countries to the exercise of compulsion by foreigners within their territories.⁸⁴ Thus, for example, the government of the Federal Republic

public, civil or military functions. To date, no prosecution of this type has ever been undertaken.

Borel & Boyd, *supra* note 64, at 45.

84. A 1967 questionnaire circulated to participating governments prior to the Hague Conference on Private International Law contained the question, "Is there in your State any legal provision or any official practice, based on concepts of sovereignty or public policy, preventing the taking of voluntary testimony for use in a foreign court without passing through the courts of your State?" *Questionnaire on the Taking of Evidence Abroad*, 4 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ: ACTES ET DOCUMENTS DE LA ONZIÈME SESSION 9, 10 (1970). Of the 20 replies, nine governments stated that, except for foreign consuls authorized to take evidence, usually voluntarily and only from their own nationals, they did have objections to such unauthorized evidence-gathering: Egypt, France, West Germany, Italy, Luxemburg, Norway, Switzerland, and Turkey. To these, one may add Japan as a probable "yes." See *Réponses des Gouvernements au Questionnaire sur la Réception des Dépôts à l'Étranger*, *supra* note 82.

The French, German and Norwegian comments give a general idea of the points made. The French government responded, "The French conception of sovereignty and 'ordre public' implies that, on French territory, the collection of evidence may not be undertaken by an agency other than a [French] court or a magistrate appointed by that court." *Id.* at 33 (author's translation). West Germany similarly answered, "Any examination of a witness by an unauthorized person, particularly a foreign agent or individual in Germany, would constitute an inadmissible exercise of sovereign rights on German territory." *Id.* at 22 (author's translation). Norway stated, "It is in principle held that even a voluntary testimony for use in a foreign court must be taken by a Norwegian court unless there is a treaty between Norway and the State concerned which permits the testimony to be taken in another way." *Id.* at 38.

Three of the negative replies were significantly qualified as to the use of compulsion: those of Finland, the Netherlands, and the United Kingdom. *Id.* at 32, 39, 41-42. The United Kingdom's answer, while stating that the British government had "no legal objection" to the taking of voluntary testimony in its territory for use in foreign proceedings, specified that "no compulsory process may be used." *Id.* at 41. Even the United States negative response specified that its liberal policy applied to "voluntary" testimony. In response to another question, however, it noted that "a person seeking testimony for use in a proceeding pending before a foreign tribunal is not permitted to use direct compulsion against an unwilling witness." *Id.* at 29. No other response drew a distinction between direct and indirect compulsion. The comment of the Netherlands, in fact, seemed to reject the distinction. While the Netherlands did not in principle object to the voluntary taking of testimony in its territory for use in foreign proceedings, its comment emphasized, "[T]his attitude is limited to truly voluntary testimony and . . . it is essential that any constraint, however subtly applied, as well as any false appearance of a legal obligation, often created by the use

lic of Germany has, in individual cases, repeatedly expressed its opposition to the orders of American courts directing acts to be performed in its territory.⁸⁵ Chief Justice Burger and Justice O'Connor recently ordered a stay of a Michigan court's order to take depositions in West Germany.⁸⁶ One state court that had received no diplomatic communication on the matter stated that it was "satisfied that West Germany would, were the matter brought to its attention, deem the discovery orders a violation of its judicial sovereignty. We perceive no need to wait for an aide memoire."⁸⁷

In summary, there would usually be insufficient grounds to conclude that states that adhere to the concept of judicial sovereignty impliedly consent to the execution of foreign courts' discovery orders, even where the witness is willing to comply. The legal bases of this conclusion are the Hague Evidence Convention and customary international law. If the states concerned are parties to the Hague Evidence Convention, the state where the evidence is located has the right under the convention to insist that a commissioner of the foreign court obtain the consent of the host state to take evidence in its territory.⁸⁸ In the opinion of a foreign government, an American lawyer armed with the discovery order of an American court may be acting as a commissioner, and the lawyer, therefore, should seek the permission of the local authorities before attempting to obtain evidence abroad. Moreover, under customary international law, a state that adheres to the concept of judicial sovereignty may regard an American court's discovery orders as a challenge to its exclusive right to perform governmental acts in its territory, and thus as a violation of its territorial sovereignty.

D. *Qualifications to the Duty to Execute a Letter of Request*

The duty to execute a letter of request under the Hague Evi-

of solemn formalities, be avoided." *Id.* at 39.

85. See Memorandum from the Embassy of the Federal Republic of Germany to the Department of State of the United States (Sept. 21, 1972); Notes from the Embassy of the Federal Republic of Germany to the Department of State of the United States (Oct. 10, 1974 and Dec. 12, 1974); Letter from the Ambassador of the Federal Republic of Germany to the Supreme Court of Michigan (June 25, 1982) (all on file at the University of Miami Law Review office); see also *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App. 3d 503, 505, 109 Cal. Rptr. 219, 220 (3d Dist. 1973).

86. See *Volkswagenwerk A.G. v. Falzon*, 103 S. Ct. 1810 (O'Connor, Circuit Justice 1983).

87. *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874, 885 (1st Dist. 1981).

88. Hague Evidence Convention, opened for signature Mar. 18, 1970, art. 17, 23 U.S.T. 2555, 2565, T.I.A.S. No. 7444, at 11, 847 U.N.T.S. 231, 244.

dence Convention is not unqualified. For purposes of the present inquiry, an examination of the qualifications is of obvious utility in ascertaining whether use of the convention procedures is likely to be of practical value in a given case. More importantly, the qualifications represent points of sensitivity that are agreed to be overriding considerations even when the local courts are in control of the procedures and even if the convention were the only means for obtaining the evidence sought. An examination of these points of sensitivity is therefore relevant to any decision by a United States court to order done what the territorial sovereign expressly cannot be compelled to do under the convention. They are in effect authoritative benchmarks relevant to ascertaining the limits to which a state may reasonably be expected to tolerate interference with its territorial sovereignty for purposes of accommodating the interests of another state in securing evidence in a civil case.

1. PROCEDURES

Local law governs the methods and procedures for executing letters of request.⁸⁹ The court addressed must, however, grant a request to use a "special method or procedure" unless it is "incompatible" with local law or "impossible of performance" due to internal practice or procedure or practical difficulties.⁹⁰ The "special method or procedure" provision would apply, for example, to a request from a common law court to a civil law court to administer oaths, produce verbatim transcripts, or permit examination of witnesses by attorneys for both parties where the latter court customarily questions witnesses itself and prepares only a written summary of the evidence.⁹¹

89. *Id.* art. 9, 23 U.S.T. at 2561, T.I.A.S. No. 7444, at 7, 847 U.N.T.S. at 243.

90. *Id.* The explanatory report points out,

To be "incompatible" with the internal law of the State of execution does not mean "different" from the internal law. It means that there must be some constitutional inhibition or some absolute statutory prohibition.

... There is a clear difference between "impracticable" and "impossible of performance." The latter is a much heavier burden to assume. This was deliberate. . . . It is not sufficient for the foreign practice to be "difficult" to administer or "inconvenient"; compliance must be truly "impossible."

Amram, *supra* note 63, at 208.

91. For example, the New Code of Civil Procedure of France, in implementing the Hague Evidence Convention, permits a French judge to be designated as a commissioner by a foreign court, NOUVEAU CODE DE PROCEDURE CIVILE [Nouv. C. Pr. Civ.] arts. 736-738 (70e ed. Petits Codes Dalloz 1976), permits examination and cross-examination of witnesses by the parties and their attorneys, *id.* art. 740, and permits the foreign judge to attend the

2. SOVEREIGNTY OR SECURITY

A party to the Hague Evidence Convention may refuse to execute a letter of request only if its execution "does not fall within the functions of the judiciary" or if "the State addressed considers that its sovereignty or security would be prejudiced thereby."⁹² It is evident, not only from the word "considers," but from the nature of the issue, that each state must decide for itself whether its security would be prejudiced by permitting certain information to be divulged. The prospect of relying on the discretion of foreign judges to screen and protect state secrets is unlikely to appeal to any government. This is an example of a situation in which the problem of supervision is particularly relevant to the decision whether to defer to agreed cooperative procedures for obtaining evidence abroad, particularly the letter of request procedure, or to use "direct" discovery methods.

3. PRIVILEGE

Unlike the Second Restatement of Conflict of Laws, which (with some exceptions) recognizes a privilege to refuse to give evidence only if the privilege is recognized by the laws of both the forum and the state with the most significant relationship with the communication,⁹³ the convention recognizes "a privilege or duty to refuse to give the evidence" under the law of either the state of execution or the state of origin, or possibly even a third state.⁹⁴

proceedings, *id.* art. 741. It also permits the preparation of a verbatim transcript of the questions and answers at the expense of the requesting authority. *Id.* arts. 739, 748.

Article 739 provides, "The letter of request shall be executed in accordance with French law provided that the foreign jurisdiction has not requested that a special method or procedure be followed. If a request to this effect is made in the letter, questions and answers shall be recorded or transcribed verbatim." (author's translation).

Article 740 provides, "The parties and their representatives, even if they are foreigners, may, upon authorization by the judge, ask questions; these questions must be formulated in, or translated into, the French language; the same applies to the answers given." (author's translation).

92. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 12, 23 U.S.T. 2555, 2562, T.I.A.S. No. 7444, at 8, 847 U.N.T.S. 231, 243.

93. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1969). However, this section does not specifically address the question of privileges where evidence is being taken in one jurisdiction for use before the courts of another. *Cf.* Application of Cepeda, 223 F. Supp. 465 (S.D.N.Y. 1964) (whether law of requesting forum, or law of place of deposition controls question of privilege).

94. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 11, 23 U.S.T. 2555, 2562, T.I.A.S. No. 7444, at 8, 847 U.N.T.S. 231, 243. As a procedural matter, a privilege under the law of the requesting state must be recognized only if the privilege is specified in the letter of request or, at the instance of the requested authority, has been con-

This provision applies to the consular and commissioner procedures as well as to letters of request.⁹⁵

The difference in approach between the Restatement and the convention may be ascribed to the relative cultural homogeneity of the United States, broad similarities in state laws on the subject,⁹⁶ and perhaps most importantly, the fact that the basic liberties of all Americans are protected by supervening federal constitutional and statutory law applicable in all the states.⁹⁷ On the international level, a state has a major interest in setting the conditions under which its citizens may be compelled to reveal information inside its territory, and in supervising attempts to exercise such compulsion in its territory. The question is not merely who may exercise governmental authority within the territory of a state, but also when, where, under what conditions, and subject to what privileges and immunities a person may be subject to compulsion. These requirements differ from culture to culture and from nation to nation.⁹⁸ They are of such importance that a nation may insist that its courts, and only its courts, have the power to coerce compliance with discovery within its borders.

The problems of security and liberty are related. Major corporations of many countries today are subject to the jurisdiction of numerous foreign courts. It is inevitable that the many different countries where these corporations do business will wish to restrict the dissemination of corporate information that may affect an individual's privacy or the nation's economic and military security. To enforce this, a state may refuse to allow a foreign judge access to the information, even for the purpose of determining whether it lawfully may be withheld or placed under a protective order limiting dissemination.

firmed by the requesting court. *Id.*

95. *Id.* art. 21(e), 23 U.S.T. at 2567, T.I.A.S. No. 7444, at 13, 847 U.N.T.S. at 245.

96. See UNIF. R. EVID., 13 U.L.A. 209 (1980 & Supp. 1983). Significant differences nevertheless persist among the states.

97. As a practical matter, the state of execution of a letter of request will often be the state with the most significant relationship with the communication, and therefore presumably would apply its own privileges even under the Restatement test. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 comment 6 (1969).

98. For example, in Japan a witness may refuse to testify on matters calculated to bring disgrace upon his employer. MINJI SOSHŌ HŌ (Code of Civil Procedure) art. 280. Even one with only a passing familiarity with Japanese society can sense the relationship between that privilege and the very basis of the Japanese social and economic order. The abuse of strict rules of economic privacy—such as bank secrecy laws—should not obscure the fact that many privileges have a close connection with basic concepts of individual freedom and social relationships peculiar to a particular society.

The protection of sensitive information acquired a new dimension with the advent of modern computers and data processing. Governments now face more complex problems of protecting privacy and preventing fraud and espionage. The United States government is increasingly concerned about protecting sensitive technology for both economic and military reasons.⁹⁹ American courts should, therefore, take great care in establishing precedents that could allow foreign courts to "request" American corporations, under threat of sanctions, to open wide their records and computers in the United States under the sole supervision of the foreign court.¹⁰⁰ To date, American courts have been the most aggressive in the use of discovery abroad, while the governments and courts of other nations have resisted as best they could. There is no guarantee that this imbalance will continue.

4. COERCION

The convention authorizes only the courts and authorities of the place where the evidence is located to compel the production of evidence.¹⁰¹ Even the liberal United States statute reserves the issuance of compulsory process within United States territory to American courts.¹⁰² The convention requires local courts in executing letters of request, however, to compel the production of evidence to the same extent as they would in local cases.¹⁰³

The convention's limitations on the use of coercion may be read as referring only to the direct exercise of coercive power within the territory of a foreign state. Under this analysis, the convention would not forbid indirect coercion—threatening to punish

99. These concerns were clearly stated by Congress in the Export Administration Act of 1979, § 2, 50 U.S.C. app. § 2401 (Supp. V 1981).

100. An extreme example may put the matter in bold relief. Though the Pepsi Cola Company may be subject to in personam jurisdiction in a products liability action in the U.S.S.R., absent express agreement to the contrary the United States government is not bound under international law to allow a Soviet plaintiff or court to search Pepsico's American plants or records, to interview its American employees, or to compel any person, thing, or information to leave United States territory for evidentiary purposes. Pepsico would also prefer to remain free from criminal or civil responsibility in the U.S.S.R. for failing to persuade the United States to consent. The rest of us would prefer to minimize the pressure the U.S.S.R. could bring to bear upon the United States by virtue of the U.S.S.R.'s jurisdiction over Pepsico.

101. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, arts. 10, 18, 23 U.S.T. 2555, 2561-62, 2566, T.I.A.S. No. 7444, at 7-8, 12, 847 U.N.T.S. 231, 243, 245.

102. See 28 U.S.C. § 1782 (1976); see UNIF. INTERSTATE AND INT'L PROC. ACT § 3.02, 13 U.L.A. 492 (1980).

103. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 10, 23 U.S.T. 2555, 2561-62, T.I.A.S. No. 7444, at 7-8, 847 U.N.T.S. 231, 243.

a person who is in New York unless he testifies or procures testimony or other evidence in London or brings a witness or other evidence to New York.

While courts may wish to avail themselves of coercive power to overcome foreign interests in certain circumstances, it is improbable that they are entirely satisfied with this direct-indirect rationale.¹⁰⁴ In the case of a corporation, the fiction of the corporate entity may obscure the effects of indirect coercion. A corporation cannot speak or give evidence. When a foreign corporation is ordered by an American court to respond to questioning, it may speak through foreign employees located abroad who have no United States contacts, but who doubtlessly perceive that they may lose their jobs or other benefits if they do not cooperate. Precisely how "indirect" is that coercion?¹⁰⁵

Global electronic access to computerized data of multinational corporations further complicates the application of the direct-indirect distinction. The new technology emphasizes the fact that information is intangible and potentially ubiquitous. This fact should not, however, obscure the need to accord information a locus to effect a rational accommodation of the laws of separate territorial sovereigns. This should be done for many of the same reasons that other intangibles are deemed to have a situs or, in the case of corporations, even domicile and nationality.

The distinction between direct and indirect coercion is at best a formal accommodation of the state's interest in exercising exclusive governmental authority within its territory. The distinction does not, however, address the underlying substantive interests of the state in protecting its secrets, the liberty of its citizens, and the solidarity of privileged social relationships from foreign coercion. These interests go to the heart of the division of the planet into separate independent states. With respect to matters such as security, liberty, and social solidarity, foreign courts cannot substitute themselves for local courts with ease, if at all. Thus, the issue of privileged information may be as relevant to the choice of forum for the collection of certain evidence as it is to the more general question of choice of law. The state from which the evidence is to

104. See *supra* note 84 for comments of several governments.

105. One court concluded that "plaintiffs cannot avoid the clear applicability of the Convention by arguing that the [corporate defendant's] officers responsible for providing answers to the discovery could leave West Germany to perform the physical act of giving answers [in the United States]." *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 245, 186 Cal. Rptr. 876, 881 (2d Dist. 1982).

be taken may well have, and choose to assert, a supervening interest in setting and administering the conditions for the compulsory production of certain types of evidence. Indirect coercion is as offensive to these interests of the foreign state as direct coercion.

5. THE DISCOVERY OF DOCUMENTS EXCEPTION

Parties to the Hague Evidence Convention have the right to declare that they "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."¹⁰⁶ This particular provision is the handiwork of the British delegation.¹⁰⁷ All parties to the convention except Barbados, Cyprus, Czechoslovakia, Israel, and the United States have exercised this right.¹⁰⁸

a. Meaning and Purpose

The scope of this exception remains to be determined. The exception should be narrowly construed. It derogates from the objectives both of the United States delegation, which sought maximum flexibility in securing evidence abroad, and of the civil law delegations of continental Europe, which sought to encourage the use of the letter of request and to discourage methods of collecting evidence that circumvent their courts. A construction of the words "pre-trial" and "documents," among other things, is required.

The reasons for the inclusion of the discovery of documents exception relate primarily to divergences in existing American and British discovery practices.¹⁰⁹ This suggests that longstanding British irritation with the exercise of extraterritorial jurisdiction by the United States to enforce its antitrust laws and anti-Communist trade policies played some role in this position.

106. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 23, 23 U.S.T. 2555, 2568, T.I.A.S. No. 7444, at 14, 847 U.N.T.S. 231, 245.

107. Amram, *supra* note 63, at 204.

108. 7 MARTINDALE-HUBBELL LAW DIRECTORY *Selected International Conventions*, at 14-20 (1984).

109. One commentator has pointed out the magnitude of this perceived divergence: The present-day American discovery procedures, which had their origins in English Chancery, have developed and diverged so much from the way discovery has developed in England that English lawyers familiar with American litigation have become concerned, if not appalled, at the consequences of the developments in the United States, especially in major international litigation.

Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States*, 13 INT'L LAW. 27, 27 (1979); see Edwards, *supra* note 81, at 650.

The term "pre-trial" has engendered a great deal of confusion.¹¹⁰ In American practice, discovery in a civil case does not begin until after the action is commenced. Discovery is in principle subject to the supervision of the court, although the degree of judicial involvement may vary. The American lawyer uses the word "trial" to refer to the formal presentation of evidence collected during the discovery stage. The "trial" in an American civil case, especially where a jury is used, is ordinarily too brief to permit any significant use of international judicial assistance during that period.

In many civil law countries the court itself, presumably after concluding that the evidence sought is relevant to the disposition of the case, collects evidence over a substantial period of time after an action is brought. Civil law judges would certainly expect American courts to honor letters of request for documentary evidence during this period, because it is the only period during which foreign judicial assistance would be of practical use. The same is true of the discovery stage in American practice, and for the same reasons.¹¹¹ If "pre-trial" means all attempts at common law discovery of documents, then the convention does not contain reciprocal obligations between common law and civil law systems, as only the latter can, in practice, require execution of letters of request for

110. The fact that the French official text of article 23 merely uses the English term "pre-trial discovery of documents" is perhaps the most interesting intrinsic evidence of the lack of careful analysis of the British proposal, its rationale, and its scope. See Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 23, 23 U.S.T. 2555, 2568, T.I.A.S. No. 7444, at 14, 847 U.N.T.S. 231, 237. A learned French commentator on the convention explained the "pre-trial discovery" exception as a reinforcement of the rule in article 1 that a letter of request "shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated," noting that the discovery exception refers to the collection of evidence in advance of the formal institution of suit. The purpose of the article 1 rule was, in his opinion, to allay fears of possible malicious use of a letter of request. Gouguenheim, *Convention sur l'Obtention des Preuves a l'Etranger en Matiere Civile et Commerciale*, 96 JOURNAL DU DROIT INTERNATIONAL 315, 319 (1969). This apparent misapprehension of the American meaning of "pre-trial discovery" is clearer if one examines the French text of the same provision in article 1, which translated more literally, prohibits a request for judicial assistance "that enables parties to obtain evidentiary material that is not destined for use in commenced or future proceedings." See Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 1, 23 U.S.T. 2555, 2557, T.I.A.S. No. 7444, at 3, 847 U.N.T.S. 231, 232 (author's translation) (emphasis added). The comment nevertheless reveals a sensitivity to the problems of relevancy, specificity, and judicial supervision, and to the possibility of "fishing expeditions," that lies at the heart of the discovery of documents exception. The same concerns are central to the ongoing debate about discovery practice in the United States.

111. The relationship between discovery in the "discontinuous" civil law trial and pre-trial discovery in the "concentrated" common law trial is discussed in A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 203-08 (2d ed. 1977).

documentary evidence.

The pretrial discovery exception was intended to prevent pre-trial discovery of a "fishing nature" or that sought "the production of documents not *directly* required by a foreign court."¹¹² Lord Devlin has noted that discovery practice "has been carried very much further" in the United States than in England: United States procedure "allows interrogation not merely of the parties to the suit but also of persons who may be witnesses in the suit," which questioning "would not necessarily be restricted to matters which were *relevant* in the suit, nor would the production be necessarily restricted to admissible evidence."¹¹³ In light of this history, the word "pre-trial," as used in the discovery of documents exception could be understood as referring to discovery requests that are neither specific nor judge-supervised, at least as to probable relevance. This interpretation would accommodate both the British criticisms and the preference of civil law countries for dealing with the evidentiary needs of courts rather than those of private litigants.¹¹⁴

b. Review of the Exception

At the meeting of the Special Commission on the Operation of the Evidence Convention held at the Hague in June 1978, "the most spirited discussion" centered on pretrial discovery.¹¹⁵ According to the United States delegates' report, their colleagues from the civil law countries revealed a "gross misunderstanding" of the meaning of "pre-trial discovery," thinking that it was something used before the institution of a suit to search for evidence that

112. Edwards, *supra* note 81, at 650-51 (emphasis added).

113. *Radio Corp. of America v. Rauland Corp.*, [1956] 1 Q.B. 618, 643-44 (emphasis added). The problem of admissibility, aside from relevance and privilege, would presumably be of little concern to civil law judges who may well have no familiarity with or sympathy for elaborate common law rules that exclude relevant unprivileged evidence.

114. Note in this regard the British complaint that, because in civil law countries the judge, rather than the parties, controls the collection and presentation of evidence, the "majority of delegates of civil law countries . . . failed to appreciate, despite efforts by the United Kingdom to explain the dangers, that it is essential that countries should be able to refuse a request for pre-trial discovery." Edwards, *supra* note 81, at 650. The effect of the British campaign was substantial. For example, as of 1974, West German courts did not in principle refuse to execute letters rogatory issued in the framework of pretrial discovery, even though they were not obliged to do so. Von Hülsen, *Vorlage von Dokumenten und Zeugenvernehmungen für US-Zivilprozesse* (Pre Trial Discovery), 1974 AUSSWIERDSCHAFTSDIENST DES BETRIEBS-BERATERS 315, 316. When Germany ratified the Hague Evidence Convention, it exercised its right to exclude requests for pretrial discovery, thereby possibly restricting an arguably more liberal policy of its courts. See *infra* notes 127, 136.

115. United States Delegation Report, *supra* note 60, at 1421.

would lead to litigation.¹¹⁶

The United Kingdom delegates did not share that misunderstanding, but reaffirmed their objection to the "almost abusive discovery permitted by American law."¹¹⁷ The United States delegation offered an explanation in defense of American pretrial discovery procedure¹¹⁸ and concluded its report by stating,

The delegates from the civil law jurisdictions agreed to urge their governments to reconsider their declarations under Art. 23 of the Convention.

In sum, it is readily apparent that an American Letter of Request for the discovery of documents, couched in sweeping and indefinite terms, will not be honored in the Contracting States, but will be returned unexecuted for failure to comply with Art. 3 of the Convention.¹¹⁹

c. Declarations and Interpretations by the Parties

The United Kingdom's 1976 declaration exercising its right to apply the discovery exception stated,

Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as *including* any Letter of Request which requires 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.¹²⁰

116. *Id.*; see *supra* note 110.

117. United States Delegation Report, *supra* note 60, at 1422 (citing *Radio Corp. of America v. Rauland Corp.*, [1956] 1 Q.B. 618; *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 1978 A.C. 547 (H.L.)).

118. *Id.* at 1423-24.

119. *Id.* at 1424. Article 3 of the Hague Evidence Convention provides that a letter of request must specify the evidence sought and the documents or property to be inspected. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 3(d), (g), 23 U.S.T. 2555, 2558, T.I.A.S. No. 7444, at 4, 847 U.N.T.S. 231, 242.

120. 7 MARTINDALE-HUBBELL LAW DIRECTORY *Selected International Conventions*, at 18 n.3d (1984) (declarations of the United Kingdom) (emphasis added).

During the 1978 review of the operation of the Hague Evidence Convention, there were signs that the parties read the British statement as a basis for restricting the scope of the discovery exception. The report of the 1978 meeting interpreted the British statement as a restrictive, rather than broadening, clarification, despite the ambiguity of the word "including."¹²¹

After the 1978 meeting, Singapore filed a declaration identical to the British statement,¹²² and Sweden modified its original declaration in terms substantially identical to the British statement.¹²³ Going farther, the Netherlands 1981 declaration expressly defines excepted discovery of documents in terms of categories (a) and (b) exclusively.¹²⁴ Similarly, the additional declarations of Finland and

121. See Commission Report, *supra* note 60, at 1428; Droz & Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW. J. INT'L L. & Bus. 155, 166 (1981).

A restrictive interpretation of the British declaration is supported by subsection 2(4) of the Evidence (Proceedings in Other Jurisdictions) Act, 1975, ch. 34, which does not contain a general exception for pretrial discovery of documents, but rather provides that an order executing a letter of request may not require a person to reveal what documents relevant to the proceedings are in his possession, or to produce documents not deemed by the British court to be likely to be in the person's possession. According to Viscount Dilhorne, "This subsection states in statutory form the reservation made by Her Majesty's Government on the signing of the convention." *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 1978 A.C. 547, 625 (H.L.). This statutory interpretation is particularly important because treaties have no direct effect as internal law in Great Britain.

Lord Wilberforce considered that subsection 2(3) of the Act, which provides that an order executing a letter of request "shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order," was also related to the problem of implementing broad United States discovery requests in Great Britain. *Id.* at 608-09. This does not necessarily mean that subsections (a) and (b) of the British declaration must be read as an inclusive, rather than exclusive, description of the scope of the article 23 exception. Subsection 2(3) of the Act may instead be regarded as an implementation of article 9 of the convention (methods or procedures to be used in implementing a letter of request) or of article 10 (measures of compulsion applied in the same instances and to the same extent as provided by internal law of the executing state) rather than of the discovery exception in article 23.

122. See 7 MARTINDALE-HUBBELL LAW DIRECTORY *Selected International Conventions*, at 18 n.3b (1984) (declaration of Singapore).

123. The Swedish government's declaration now provides:

The Swedish Government understand "Letters of Request issued for the purpose of pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires 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, which are likely to be in his possession, custody or power.

Id. at 18 n.3c (declarations of Sweden).

124. The Dutch government's declaration provides:

For the purposes of Article 23 of the Convention, "Letters of Request issued for

Norway provide that the exception "shall apply only" to categories (a) and (b).¹²⁵ The text of Denmark's additional declaration falls between the United Kingdom's and Norway's language, specifying that the exclusion "shall apply" to categories (a) and (b).¹²⁶ On the

the purpose of obtaining pre-trial discovery of documents as known in Common Law Countries," which the Netherlands will not execute, are defined by the Government of the Kingdom of the Netherlands as being any Letters of Request which require a person:

a. to state which of the documents which are of relevance to the proceedings to which the Letter of Request relates have been in his possession, custody or power; or

b. to produce any document other than particular documents specified in the Letter of Request as being documents which the court which is conducting the proceedings believes to be in his possession, custody or power.

Id. at 17 n.2f (declarations of the Netherlands).

125. The Finnish government's additional declaration provides:

The declaration made by the Republic of Finland in accordance with Article 23 concerning "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" shall apply only to Letters of Request which 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, which are likely to be in his possession, custody or power.

Id. at 15 n.2 (declarations of Finland).

The Norwegian government's additional declaration provides:

The declaration made by the Kingdom of Norway in accordance with article 23 concerning "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" shall apply only to Letters of Request which 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, other than particular documents specified in the Letter of Request; or

b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession.

Id. at 17 n.3 (declarations of Norway).

126. The Danish government's additional declaration provides:

The declaration made by the Kingdom of Denmark in accordance with article 23 concerning "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" shall apply to any Letter of Request which requires 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, other than particular documents specified in the Letter of Request; or

b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession.

Id. at 15 n.1b (declarations of Denmark).

The Danish and Swedish additional declarations supplemented their original unqualified declarations, and were submitted about the same time as the Finnish and Norwegian additional declarations. *See id.* at 15 n.1b (declarations of Denmark), 17 n.3 (declarations of Norway). This supports the view that they were intended to be limiting. *See Droz & Dyer, supra* note 121, at 167.

other hand, France and Portugal have not modified their declarations, and since 1978 both Italy and West Germany have become parties to the convention with unqualified declarations on the discovery exception.¹²⁷

It is therefore difficult at this stage to regard the British declaration as an agreed restrictive interpretation of the pretrial discovery exception. Nevertheless, support may be growing for the view that the exception applies only to requests that lack sufficient specificity or that have not been reviewed for relevancy by the requesting court. That interpretation rests on the apparent understanding of the exception's author and principal proponent, the United Kingdom. It is supported by the numerous other declarations modeled on that of the United Kingdom and the underlying need for a coherent interpretation of the exception that is compatible with the reciprocal nature of the convention.

d. Role of Counsel and the Courts

Letters of request from American courts for pretrial discovery will probably be executed if drafted with sufficient specificity and sensitivity to the attitudes of foreign courts.¹²⁸ In light of the different understanding of "pre-trial" procedures in civil law and common law countries, it is more likely that foreign courts would honor requests that reflect an American court's decision that each item of evidence sought is probably relevant and necessary for the just and proper disposition of a precise issue or plausible claim. Thus, judicially scrutinized discovery requests would seem to satisfy British concerns as well as the civil law attitude that discovery

127. The West German Implementing Act § 14, 1977 BGBl I 3106, which brought the Hague Evidence Convention into force, specifically contemplates the possibility that future regulations may be promulgated permitting some requests for pretrial discovery to be executed despite Germany's declaration that it is not bound to execute them. In refusing a request for discovery of documents from the United States District Court for the Western District of Virginia, a German state court noted that no such regulations had yet been issued. Order of the 9th Civil Division, Oberlandesgericht, Munich, issued Oct. 31, 1980, certified Nov. 3, 1980. "One hopes that the West German authorities will soon issue regulations which limit the scope of the reservation made by the Federal Republic under Article 23 along the same line as the British and Scandinavian declarations." Droz & Dyer, *supra* note 121, at 170. The possible scope of such regulations is discussed in Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of The Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465, 483-84 (1983). See *supra* note 114.

128. See Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures*, 13 INT'L LAW. 5, 13-17 (1979). The model letter drafted by the Special Commission is a useful point of departure. See Commission Report, *supra* note 60, annex I, at 1436-39.

should be based on a considered need of the court rather than a desire of the parties.

This requires much closer scrutiny by the American court of the evidence requested from a foreign court than has been normal in United States discovery practice. However, the demands of courtesy to the foreign court as well as the need to avoid application of the discovery exception indicate the desirability of this scrutiny.¹²⁹ Moreover, recent suggestions for curbing abuse of United States discovery procedures even in wholly domestic cases anticipate a more active role for the trial judge in scrutinizing discovery requests.¹³⁰

129. A California court has suggested that the convention contemplates that a foreign court will "seek in good faith to implement any legitimate discovery procedure." That court proposed that the reach of the pretrial discovery exception be tested by a "specific request" for documents couched in terms of "the manifest need for full disclosure of evidence in the pending California action" and "drafted to employ the discovery means least likely to antagonize the foreign government." *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 173 Cal. App. 3d 840, 858, 176 Cal. Rptr. 874, 885 (1st Dist. 1981).

130. "Contrary to the philosophy expressed by the Advisory Committee at the time of the 1970 amendments that, 'the mechanics of discovery are designed to encourage extrajudicial discovery with a minimum of court intervention,' the new amendments authorize and encourage early and continuing control and monitoring of discovery by judges." *Sherman & Kinnard, Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 269 (1983) (footnote omitted); see FED. R. CIV. P. 26(f) & advisory committee note.

A recent amendment to rule 26(b) specifically authorizes the court to limit the extent of discovery on its own initiative:

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. 26(b) (effective Aug. 1, 1983). The amendment "contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." *Id.* advisory committee note.

The new rule 26(g) permits the court to impose "an appropriate sanction" upon an attorney who, by signing the discovery request, improperly certifies that the request is "not interposed for any improper purpose." *Id.* 26(g). Vigorous implementation of this power should encourage attorneys seeking discovery to consider prior consultation with opposing counsel, witnesses, and the court regarding their discovery plans.

The draft Restatement "requires an order to produce documents or information located abroad to be issued by a court, not merely by a private party or by a U.S. government agency" and "requires that a request for production of documents or information located abroad meet a more stringent test of direct relevancy, necessity and materiality than is required for comparable requests for documents or information located in the United States." *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 420 comment a*

In a case in which a United States court has asserted or may assert jurisdiction to order a foreign national to produce the evidence located abroad, both the American and the European courts must choose between mutual restraint and prolonged controversy on the discovery issue. The American court either may fashion specific and moderate discovery requests under the convention or may exercise its jurisdiction over the witness or party to compel production.¹³¹ The European court either may interpret the discovery exclusion narrowly and endeavor to respond or may refuse to cooperate with the American court's request.

If the European courts demonstrate that the convention is a real and useful alternative to direct discovery under United States procedures, it will be easier for litigants to persuade American courts to use the convention as the preferred means of discovery. If, on the other hand, the European courts respond with a doctrinaire refusal to execute requests for pretrial discovery of documents, they will have won a skirmish in the discovery battle at the expense of deepening the conflict over the exercise of jurisdiction to compel acts abroad. The discovery of documents exception, unless narrowly construed, will thus subvert both American and European goals.

VII. BALANCING THE FACTORS

International law does not absolutely prohibit a court from ordering acts to be done abroad. But that is not to say that international law permits a court to order an act done in the territory of a foreign state in contravention of the foreign state's laws and policies. The question is whether the restrictions of the foreign sovereign are so obnoxious to the orderly administration of justice in the forum, or so clearly designed to frustrate the forum's policies, that a discovery order contrary to the laws and policies of the territorial sovereign nevertheless should issue. If so, the internationally recog-

(Tent. Draft No. 3, 1982). "In imposing judicial control on discovery, Subsection 1(a) is consistent with the proposed amendments to Rule 26(b)" *Id.* § 420 reporters' note 2. While the draft Restatement's approach may help reduce problems with direct discovery in common law jurisdictions like the United Kingdom, which in principle have no objection to taking voluntary evidence in their territories for use abroad, it will not solve the problem in countries that assert exclusive judicial sovereignty, and does not solve the problem of compulsion. It is nevertheless a useful guide in framing letters of request.

131. The draft Restatement encourages judicial intervention and more stringent standards of specificity and relevancy for the preparation of a direct discovery order for evidence located abroad. In this respect, at least, using the letter of request procedure would not impose substantial additional burdens on the court or the parties.

nized interest of the forum may override the foreign state's laws in order to achieve a rational ordering of the international system.

In the classic parlance of conflict of laws or "private international law," the taking of evidence is "procedural," and procedure is governed by the law of the forum. Such formal characterization in choice of law has given way to an analysis of the interests of the governments with respect to the particular issues. Evidence-gathering involves major nonprocedural interests of the state where the evidence is located.¹³² How should these interests influence the decision of a United States court to exercise its power to order production of evidence located abroad? Two questions might be asked. First, is there a treaty or statutory arrangement in effect between the two countries providing a discovery procedure with which the state where the evidence is located must or probably will comply? Second, is there anything in the case to justify the forum's assertion of a superior right, under a rational ordering of international relations, to act without the express or implied consent of the foreign state?

If the first question is answered in the affirmative, the agreed procedures provide a means for avoiding the complex and delicate international issues posed by the second question, including the international friction that the exercise of extraterritorial discovery powers may arouse. The existence of an agreed procedure reduces whatever justification might otherwise exist for a court to resort to a unilateral discovery order. The letter of request procedure, in particular, is specifically tailored to accommodate both governments' interests: the forum shapes the request in the light of its own needs and procedures, and the territorial sovereign executes the request subject to the fundamental rights of its citizens, its national security, and its social organization.

Even if an agreed procedure is available, the question is then whether there are countervailing values, including the convenience of the court and the parties, that counsel against its use. These other values are relevant both to the initial decision whether to employ the agreed procedures and to a subsequent decision whether to seek more evidence through direct discovery if inadequate evidence was obtained through the agreed procedures.

It should be recalled that the problem arises only if the state where the evidence is located has not expressly or impliedly consented to the use of direct discovery procedures or a "commis-

132. See *supra* text accompanying notes 89-100.

sioner," or consular, procedure that achieves much the same result. If, as the author advocates, a fairly liberal approach is taken to the finding of implied consent,¹³³ the problem arises only with respect to states, especially those in Europe, Asia, and Latin America, that adhere strictly to the civil law concept of judicial sovereignty.

That raises the question whether a United States court is expected to take notice of such restrictive policies of a foreign state if they are not brought to its attention by the parties or the foreign government. An argument could perhaps be made for an affirmative reply if the question is treated as "jurisdictional," but the more realistic view would appear to be that the issue arises only if raised before the court. Thus, one exception to use of internationally agreed procedures will frequently occur when the party seeking the evidence, the opposing party and, if different, the witness from whom the evidence is sought prefer direct discovery. This is so not because a private party may waive the rights of the state where evidence is located, but because the court is not presented with the issue.¹³⁴

While it might be rare that the party seeking evidence would prefer to use the convention while the opponent prefers direct discovery, if the situation should arise (for example, where attempted discovery may involve violation of foreign criminal laws), a court would not normally refuse to use means that are both preferred by the party seeking evidence and agreed to by the state where the evidence is located.

The most difficult problem arises where the opposing party, or the witness from whom evidence is sought, opposes direct discovery on the grounds that the convention, or some other agreement with or statute of the state where the witness or evidence is located, contains the proper procedure for securing the evidence. Should this occur, it is difficult to conceive of circumstances where those procedures should not be tried.¹³⁵ This being said, account

133. See *supra* text accompanying notes 51-54.

134. As one California appellate court has noted, "The Convention 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, 245, 186 Cal. Rptr. 876, 881 (2d Dist. 1982). For that reason, even if all the parties are in agreement, the court may find it prudent in some cases to request a memorandum from counsel on the lawfulness of the proposed discovery in the foreign state concerned.

135. The California courts have themselves required the convention to be used in preference to other discovery methods:

The two reported California cases that have addressed the applicability of the Hague Evidence Convention where California civil litigants sought discovery of West German national defendants within West Germany have established

would nevertheless be taken of other principles that moderate any general rule: the matter might be de minimis; the difference in total cost to the parties and the courts might be large (this issue should be distinguished from allocation of costs between the parties, which the trial court has some discretion to administer in any event); or it might be a case of extreme urgency.

In general, it would seem inappropriate for the court to speculate on whether the requested state might exercise some right to refuse cooperation (for example, on grounds of security or the discovery of documents exception). However, should it be clear that cooperation will be refused, there would be no point in going forward with the internationally agreed procedures. A reluctant party should not be required to use those procedures if they will prove futile.¹³⁶ This does not mean, however, that direct discovery is necessarily appropriate. For example, if the court concludes that the foreign state will not execute a letter of request because the information sought is a military secret, that reason would be a powerful argument against permitting direct discovery. This illustrates the desirability of using the agreed cooperative procedures, if only to elicit a response from the foreign government or court regarding the extent to which it is unable to cooperate and the reasons for refusing cooperation. Foreign authorities would then be able to determine the conditions under which some potentially secret infor-

that California courts must compel the litigants to first attempt such discovery in conformity with the Convention. This rule applies even though the courts have jurisdictional power to compel the party to comply with discovery outside the Convention.

Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 241, 186 Cal. Rptr. 876, 878 (2d Dist. 1982). The two cases referred to are Volkswagenwerk Aktiengesellschaft v. Superior Court, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (3d Dist. 1973), and Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1st Dist. 1981). The court decided the first *Volkswagenwerk* case before the Hague Evidence Convention became effective between the United States and West Germany, whose government suggested directly that letters of request were the proper procedure. See 33 Cal. App. 3d at 505-06, 108 Cal. Rptr. at 220; Note, *Obtaining Testimony Outside the United States: Problem for the California Practitioner*, 29 HASTINGS L.J. 1237 (1978).

136. This is a problem the West German government, for example, would have to ponder if neither regulations nor moderating interpretations of the discovery exception are forthcoming. See *supra* note 126. Arguing against exercise of the article 23 exception, Dr. von Hülsen noted the problem this would pose for U.S. judges. See Von Hülsen, *supra* note 114, at 317. On the other hand, in urging a characterization of American punitive damage claims as penal or social welfare actions, Professor Stiefel seemingly ignored the significance of rendering the convention useless in products liability cases, since American judges might then face a stark choice between using direct discovery procedures authorized by United States law and being unable to obtain the necessary evidence. See Stiefel, *supra* note 71, at 512; *supra* note 60.

mation may in fact be revealed consistently with their laws. Orders of the local foreign courts to reveal the information would also provide protection for parties and witnesses who oppose discovery on grounds of potential violation of foreign law.

It may nevertheless be argued that, in litigation between an American and a foreigner, it is unjust to permit the foreigner to use American discovery to the fullest while denying the American the same privilege. This argument tends to minimize the fact that the locus of the evidence, not the nationality of the parties, is the critical territorial factor. A foreign plaintiff trying to secure evidence from a foreign branch of an American defendant might well be required by a court to use the convention procedures rather than direct discovery under United States law. In other words, any litigant may be restricted in his use of United States discovery procedures if the evidence is located abroad. In this sense there is strict mutuality.¹³⁷

137. In the case of *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (2d Dist. 1982), a products liability action against the manufacturers of a foreign automobile and its component parts, the trial court ordered the plaintiffs to use the convention procedures in lieu of direct interrogatories on condition that "defendant Pierburg . . . comply with the Hague Evidence Convention when propounding discovery to plaintiffs, if applicable." *Id.* at 240, 186 Cal. Rptr. at 877-78. Pierburg thereafter attempted to "comply" with the Hague Evidence Convention in inspecting the plaintiffs' automobile in California. The federal district court ruled, and the Justice Department stated in a letter, that "the Convention did not apply to physical inspections to be conducted within the territorial jurisdiction of the state court compelling the discovery." *Id.* at 240, 186 Cal. Rptr. at 878. The trial court then vacated its earlier order and directed Pierburg to respond to plaintiffs' written interrogatories.

The state court of appeal was squarely faced with the problem of mutuality. The plaintiffs contended "that requiring them to propound interrogatories in accordance with the Hague Evidence Convention denie[d] them equal protection of California discovery law, as guaranteed under the Fourteenth Amendment, because defendant Pierburg need not observe that same Convention to obtain discovery of plaintiffs." *Id.* at 246, 186 Cal. Rptr. at 881. The court rejected the contention for two reasons. First, it stated, "California's interest in avoiding violations of international treaties is clearly a rational basis for requiring California litigants to comply with the Hague Evidence Convention." *Id.* at 246, 186 Cal. Rptr. at 882. The court did not state whether the treaty itself, the supremacy clause of the United States Constitution, or considerations of comity required application of the convention. The court cited an earlier California case, *Dr. Ing H.C.F. Porsche A.G. v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (3d Dist. 1981), that denied discovery in preference to letters rogatory. That earlier case, however, was decided before the convention entered into force in the foreign state concerned. *Pierburg*, 137 Cal. App. 3d at 246, 186 Cal. Rptr. at 881-82. Therefore, the *Pierburg* court's reference to "violations of international treaties" should perhaps be read more broadly as a reference to violations of international law or foreign territorial sovereignty.

Second, the court went on to note,

[E]qual protection arguments apply only where persons who are similarly situated receive disparate treatment. Here, plaintiffs and defendant are not so situ-

A more sensitive problem is posed if a letter of request (or other request for cooperation) is returned wholly or partially unexecuted. The requesting court should first examine the reasons given for the failure to execute the request. It might then consider whether a new request could be fashioned to overcome the objections in whole or in part.¹³⁸ This would be the case, for example, if the foreign court stated that a discovery request lacked sufficient specificity.¹³⁹

If it cannot fashion a new, acceptable request, the court would have to decide whether the need for discovery is sufficiently great that it will order done (or impose sanctions for failure to do) something that a foreign court has refused to do. There should be a compelling need for the evidence before such action is taken. The circumstances will determine the extent to which the need is sufficiently compelling.

The reasons proffered by the foreign authorities for their failure to execute the request play a part in this determination. A refusal based on the need to protect state secrets or a privileged relationship deeply rooted in the political or social structure of the foreign state should carry great weight. A refusal based on a technical inhibition in the jurisdiction of foreign courts might reasona-

ated. . . . Should defendant seek answers to written interrogatories from its co-defendants, who are also West German nationals, and those codefendants assert the applicability of the Hague Evidence Convention, then Pierburg would be treated in the identical manner as plaintiffs must now be treated. This state may not, and does not, treat two parties seeking the same discovery differently.

Id. at 246, 186 Cal. Rptr. at 882.

Still, it may be argued that in a products liability action it is the foreign defendant, not the United States plaintiff, who is likely to "benefit" from restraints on discovery in a way that United States defendants could not. That is not necessarily true, however, with respect to United States defendants with multinational operations. More importantly, if cooperative means of securing evidence actually work, and if the American trial court fairly allocates the costs, how substantial is the benefit to the defendants? Even if there is some benefit, the disparity may be acceptable. It must be recalled that the reason for using cooperative methods for securing evidence is to accommodate the interests of a foreign state in a rational and ordered system of territorial sovereignties, not to promote the convenience of the litigants.

138. Fashioning requests that bridge the gap between dissimilar legal systems can be a challenging exercise that taxes the ingenuity of the most accomplished expert in comparative law. Few attorneys are proficient in both the languages and laws of several countries. In difficult cases, the parties and the court might be well advised to consider consulting an individual familiar with procedural requirements under both United States law and the relevant foreign law for guidance in drafting an acceptable request.

139. One might note the care with which Lord Denning edited and qualified the United States district court's discovery request in the Westinghouse litigation; this stands as an example of sophisticated dialogue between the courts concerned. See *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 1978 A.C. 547, 558-66. Much more of this type of cooperation is needed. See *FED. R. Civ. P.* 37.

bly be accorded less weight, assuming the technical inhibition does not itself reflect some important principle regarding exercise of political authority in the foreign state. It is also reasonable to inquire whether the nature of the foreign legal inhibition is primarily internal, e.g., the strict doctor-patient privilege in France, or extra-territorial, e.g., banking secrecy laws designed to promote a country's international business position. Since an important underlying objective of international law is to ensure a rational ordering of relations among equal and independent territorial sovereigns, foreign laws regarding privilege and secrecy whose object is primarily internal should be given greater deference than those designed to operate in the international marketplace. To put it differently, the forum and the territorial state have roughly comparable interests in deciding whether transactions affecting several states can be shielded by the banking laws of any one state. They do not have comparable interests in regulating the relationship between doctors and patients in the territorial state.

If the parties' need for the evidence and the foreign authorities' reasons for failing to produce the evidence are both substantial, the forum has several options: it may compel discovery;¹⁴⁰ it may proceed without the evidence; it may dismiss the action without prejudice.

The suitability of dismissal without prejudice may depend on whether an alternative forum is available in which the plaintiff could get a fair hearing.¹⁴¹ While the United States Supreme Court has stated, "The possibility of a change in substantive law should

140. Absent independent evidence supporting a presumption against a party from whom evidence is sought, the sanction of a prejudicial decision on the merits of the issue or the case amounts in effect, if not in form, to the first option—coercive enforcement of United States discovery laws. See *Insurance Corp. of Ir. v. Campagnie de Bauxites de Guinee*, 456 U.S. 694 (1982); *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* § 420 & comment e (Tent. Draft No. 3, 1982).

141. In effect, the courts must apply the principles of *forum non conveniens* after pre-trial discovery has begun. Nevertheless, the criteria outlined by Justice Jackson in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947), and *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947), remain apposite. Although the foreign nationality and domicile of a plaintiff or real party in interest may suggest that the United States forum is not necessarily convenient, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981), the hardship to an American plaintiff required to sue in a foreign country is no reason for a court to hesitate if this course of action is otherwise reasonable. *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 154-56 (2d Cir. 1980) (en banc), cert. denied, 449 U.S. 890 (1980); see *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972). The court may attach substantial conditions to the order of dismissal without prejudice to ensure that the party seeking dismissal does not gain an unfair advantage. See *Pain v. United Technologies Corp.*, 637 F.2d 775, 785 (D.C. Cir. 1980).

ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry," the availability of discovery might influence the decision to dismiss without prejudice.¹⁴²

At the same time, a court ought to hesitate before exercising its option to order discovery in violation of the foreign nation's laws or policy. It is a decision affecting foreign policy, which is properly the concern of the nation as a whole and of the central organs of the federal government.¹⁴³

Because of the political, military, and economic importance of the United States, many countries will be reluctant to oppose discovery orders of United States courts. These countries are faced with a choice between acquiescing in what they perceive to be a violation of their sovereignty and complicating their relations with the major Western power. Predictably, many countries friendly to the United States frequently acquiesce, with or without verbal protest. Resentment accumulates, however, and those countries may retaliate by withholding cooperation in other matters. Thus, the decision to rely on the inherent political, military, and economic power of the United States to induce acquiescence is not without potential long-term political cost and embarrassment. American courts must be circumspect in deciding to rely on that power to obtain discovery. Demonstrations of national strength are quintessentially political and federal, not judicial or local.

The extraterritorial application of the antitrust laws is instructive in this regard. There, the cases frequently have been brought by the United States government itself,¹⁴⁴ and involve federal stat-

142. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247, 255-59 & nn.22, 25 (1981). The relevant state and federal standards for dismissal on grounds of *forum non conveniens* have been presumed to be the same in the cases the Supreme Court has decided to date. The Court, therefore, has yet to address the question whether the standard in a diversity action in a federal court is determined by federal or state law. *Id.* at 248 n.13.

143. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Zschernig v. Miller*, 389 U.S. 429 (1968). See generally L. HENKIN, *supra* note 12.

144. Judge Robert H. Bork, the former Solicitor General of the United States, has described the significance of this fact as follows:

Th[e] situation [posed by foreign violations of United States antitrust laws] contains an obvious possibility of conflict between antitrust principles and American foreign policy concerns. Under present policy, the federal government explicitly considers this trade-off. As Assistant Attorney General William Baxter has stated, the Antitrust Division will fully consider effects on competition in American markets. "But we also take foreign government interests into account. We routinely seek to balance our enforcement interests with the interests other nations may have with respect to the conduct in question." To that end, the Department of Justice "regularly consult[s] with the State Department and with

utes that expressly refer to "trade or commerce . . . with foreign nations."¹⁴⁵ These statutes form the "cornerstones of this nation's economic policies."¹⁴⁶ Federal courts have nevertheless exhibited considerable hesitation in requiring parties to violate foreign law in order to facilitate the application of federal statutes.¹⁴⁷ Extraterritorial enforcement has nevertheless provoked the enactment of retaliatory statutes in some foreign countries,¹⁴⁸ and has become a source of continuing irritation between the United States and other Western countries.¹⁴⁹

With respect to ordinary common law civil actions, neither an existing federal policy nor direct involvement by the Department of Justice in the litigation is available as a political basis for a decision that could offend a foreign state. Under the United States Constitution, American state and federal courts must respect the Hague Evidence Convention.¹⁵⁰ An argument can be made that the

foreign government officials." The effort to reconcile American and foreign interests affects decisions regarding "what cases to bring, who [sic] to name as defendants, and what relief to seek," as well as what approach to take for the discovery of documents and information located abroad.

This process can produce a tolerable balance between the sometimes competing values of economic efficiency and satisfactory relations with other nations. But no such process occurs when a private suit goes forward. The balancing process which Mr. Baxter describes must be performed initially by a district court, if indeed it is performed at all.

The district court is then placed in a very peculiar position. Unless the judge adopts an extreme position—either that the interests of foreign governments are no concern of his or that any such interest is reason to dismiss the complaint—he is forced into a largely political and managerial role that is usually, and ideally, played by the executive or the legislative branch and eschewed by the judiciary.

Bork, International Antitrust—Introduction, 18 STAN. J. INT'L L., 241, 241-43 (1982) (footnotes omitted); see *supra* note 11.

145. Sherman Antitrust Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1982).

146. *United States v. First Nat'l City Bank*, 396 F.2d 897, 903 (2d Cir. 1968).

147. See *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977); *In re Uranium Contracts Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979); *Federal Maritime Comm'n v. DeSmedt*, 268 F. Supp. 972 (S.D.N.Y. 1967); *United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953); *United States v. Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

148. See *supra* note 27.

149. See Jones, *Extraterritoriality in U.S. Antitrust: An International "Hot Potato,"* 11 INT'L LAW. 415 (1977); Rosen, *The Protection of Trading Interests Act*, 15 *id.* at 213 (1981); Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, *id.* at 585; *Extracts on Official Protests*, *supra* note 27.

150. See U.S. CONST. art. VI. In its landmark decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Supreme Court stated,

convention preempts alternative state procedures.¹⁵¹ In any event,

The appropriate application of that part of the [supremacy] clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

Id. at 211; see also *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Missouri v. Holland*, 252 U.S. 416 (1920); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

No further legislation is necessary to give effect to the Hague Evidence Convention in the United States. Letter from the President of the United States transmitting the Hague Evidence Convention to the Senate, 12 I.L.M. 323 (1973), 28 U.S.C. § 1782 (1982).

151. In its review of the preemption doctrine in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 102 S. Ct. 3014 (1982), the Supreme Court stated,

The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L.Ed. 2d 604 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility[.]" *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed. 2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See also *Jones v. Rath Packing Co.*, 430 U.S. at 526, 97 S.Ct. at 1310; *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767, 773, 67 S.Ct. 1026, 1029, 91 L.Ed. 1234 (1947).

Fidelity Fed. Sav. & Loan Ass'n, 102 S. Ct. at 3022.

In *Hines v. Davidowitz*, 312 U.S. 52 (1941), the Court said,

When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute . . .

Id. at 62-63. The Court went on to state,

Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's [alien registration] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in enacting a subsequent federal alien registration law]. And in that deter-

absent an authoritative policy determination to the contrary by a

mination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits

Id. at 67-68 (footnote omitted). With respect to the Hague Evidence Convention, the President pointed out,

[T]he convention is designed to facilitate the obtaining of evidence abroad in a form admissible in municipal courts Ratification of the convention will require many other countries, particularly civil law countries, to make important changes in their judicial assistance practice. . . . It will permit our courts and litigants to avail themselves of a number of improved and simplified procedures for the taking of evidence.

Letter from the President of the United States transmitting the Hague Evidence Convention to the Senate, 12 I.L.M. 323 (1973). The Secretary of State noted,

The willingness of the Conference to proceed promptly with work on the evidence convention is perhaps attributable in large measure to the difficulties encountered by courts and lawyers in obtaining evidence abroad from countries with markedly different legal systems The substantial increase in litigation with foreign aspects arising, in part, from the unparalleled [sic] expansion of international trade and travel in recent decades had intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.

Id. The Secretary General of the Hague Conference on Private International Law agreed that the treaty "establishes a bridge between the civil law and common law systems." Droz, *La Conférence de la Haye et l'Entraide Judiciaire Internationale*, 168 RECEUIL DES COURS 159, 175 (1980) (author's translation). An authoritative French commentator has asserted that, in addition to modernization, the main purpose of the convention was to achieve an accommodation between the procedures of common law and civil law countries. Gouguenheim, *supra* note 110, at 317.

If the convention is designed to bridge differences between the United States and civil law countries, and if this will require civil law countries "to make important changes in their judicial assistance practice," then the application of discovery procedures to collect evidence in a civil law country in a manner contrary to the laws and policies of that country, in preference to the procedures of the Convention, would certainly appear to be "an obstacle to the accomplishment and execution of the full purposes and objectives" of the convention, to wit, "the method of taking the evidence must 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." United States Delegation Report, *supra* note 60, at 806.

An interesting issue that arises in this connection is whether the convention is exclusive and mandatory as a matter of international treaty law. If it were, then failure to apply its procedures would then constitute a breach of a treaty by the United States. See *supra* notes 74-76 and accompanying text. A conclusion that the convention is not exclusive and mandatory does not, however, dispose of the matter, either with respect to state law or with respect to the issue of the convention's impact on the Federal Rules of Civil Procedure. The United States government may, as a matter of policy or strategy, enter into a treaty establishing procedures that help to minimize disputes with foreign states over extraterritorial jurisdiction without yielding all legal rights to use other procedures found offensive to foreign governments. Such a treaty may be construed domestically to establish a national policy of voluntary self-restraint and minimization of disputes that would be binding on both federal and state courts. This policy would not impose an inflexible rule on the courts, but

competent organ of the federal government, a court should be reluctant to apply state discovery statutes or the Federal Rules of Civil Procedure, or to exercise its discretionary powers, without regard for the convention or the territorial sovereignty of a foreign state.

A trilogy of California state court cases illustrates the process of harmonization. In the first of the three cases,¹⁵² decided before the Hague Evidence Convention had entered into force between the United States and the foreign state concerned (West Germany), the California Third District Court of Appeal noted several alternative theories: "Whatever the generous provisions of the California discovery statutes, courts ordering discovery abroad must conform to the channels and procedures established by the host nation. The limitation may rest on any one of several theories—comity, curtailed discretion or implied statutory

would introduce a mandatory element to be considered in decisionmaking by the courts. Federal courts are obliged to harmonize the discovery provisions of the Federal Rules of Civil Procedure with policies implicit in the convention; state courts are obliged to do the same with respect to state discovery practice. The issue is less one of preemption than of the concurrent application of two separate bodies of law—the convention and state or federal discovery rules.

The California courts have demonstrated this application of the convention in opinions that deny any legal obligation to apply the convention but require its application as a matter of policy. The first California decision under the convention concluded that the court was not bound to apply the convention under the supremacy clause, but stated that it would do so "as an exercise of judicial self-restraint designed to serve what we regard as important international goals." *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874, 885 (1st Dist. 1981). The next year, another California appellate court relied on the supremacy clause and the state's "interest in avoiding violations of international treaties" as the "rational basis" for requiring California litigants to comply with the convention. *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 246, 186 Cal. Rptr. 876, 882 (2d Dist. 1982).

The territorial sovereignty and political sensitivities of the foreign states where the evidence is located are the heart of the problem of extraterritorial discovery. These problems are not limited to the parties to the convention, but raise general difficulties under customary international law and the foreign relations law of the United States. Accordingly, even if the convention procedures are not exclusive under international treaty law, and are not preemptive of inconsistent state laws or practices, rules of federal common law that are rooted in both customary international law and the doctrine of separation of powers, may dictate the use of the convention procedures for obtaining discovery abroad, at least in the absence of authoritative guidance to the contrary from the political branches of the federal government.

Consequently, were it called upon to do so, the United States Supreme Court should have little difficulty in finding an appropriate basis for requiring self-restraint by the state courts or lower federal courts in such cases.

152. *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (3d Dist. 1973).

qualification.”¹⁵³

In the second of the three cases,¹⁵⁴ decided after the convention entered into force between the United States and West Germany, the California First District Court of Appeal interpreted the holding in the first case that “the courts of the forum . . . have no jurisdiction over persons or property outside their territory” as “far too broad.”¹⁵⁵ The First District Court of Appeal affirmed long-arm jurisdiction over out-of-state corporations, concluding, “Once a foreign corporation is properly subject to a court’s jurisdiction, it (like any other party validly joined in a local lawsuit) may with technical propriety be ordered to act or refrain from acting, in matters relevant to the lawsuit, at places outside the state.”¹⁵⁶ Nevertheless, “requirements of international comity” led the court to set aside a discovery order that did not use the Hague Evidence Convention, “a channel more apt to elicit the cooperation of the foreign government,” when it was “plainly available.” The court observed, “Here the Hague Convention provides an obvious and preferable alternative means of obtaining evidence from within West Germany.”¹⁵⁷

In the third case,¹⁵⁸ the Second District Court of Appeal quoted the previous two cases at length, emphasizing the statement in the second case that “[r]ulings based in this concept of international comity are dictated not by technical principles of jurisdiction of the parties to or subject-matter of particular lawsuits, but rather by exercise of judicial self-restraint in furtherance of policy considerations which transcend individual lawsuits.”¹⁵⁹

Judicial restraint in such cases, though perhaps rooted in considerations of federalism as well as of separation of powers, ought not to be posed as a question of constitutional limits on the power of the courts. Ordinary civil litigation based on common law causes of action is the usual business of the courts. The need for deference by the courts to the political organs of the federal government is not grounded in distinctions between political and justiciable is-

153. *Id.* at 508, 109 Cal. Rptr. at 221.

154. *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1st Dist. 1981).

155. *Id.* at 856, 176 Cal. Rptr. 883.

156. *Id.* at 856, 176 Cal. Rptr. at 883-84.

157. *Id.* at 858, 176 Cal. Rptr. at 885.

158. *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (2d Dist. 1982).

159. *Id.* at 244, 186 Cal. Rptr. at 880 (quoting *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d at 840, 857, 176 Cal. Rptr. 874, 884 (1st Dist. 1981)).

sues per se. If there is emerging a more general distinction in the field of sovereign immunity¹⁶⁰ or act of state¹⁶¹ between commercial and political disputes, this "ordinary" litigation would seem to fall on the commercial side.¹⁶² Also, the collection of evidence in civil cases is a matter with respect to which the courts are normally afforded great discretion.

The relevant search is for a principle that will justify a judicial decision to risk offense to a foreign sovereign. John Marshall¹⁶³ and Learned Hand¹⁶⁴ wrote that we cannot lightly infer a command to take such risks from the general language of statutes and rules. John Harlan¹⁶⁵ counseled the Court to consider the relative certainty of the principles of international law under which it purported to act. These considerations point strongly in the direction of restraint with respect to discovery abroad.

Exposure to suit in foreign courts, along with foreign regula-

160. See 28 U.S.C. §§ 2671-2680 (1982).

161. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

162. The extent to which the restraint is nevertheless rooted in considerations of federalism as opposed to separation of powers is itself a matter of some interest.

Exposure to global discovery as a condition of doing business in the United States clearly may entail some coercive restraint on the realization of the underlying policies of the United States relative to foreign commerce. The several states of the United States are restricted in their capacity to coerce each other within the context of the constitutional domestic common market. More stringent restrictions should apply to coercion in the context of international commerce—both because of the monopoly of federal power over international politics and because the restrictions may run counter to the federal government's exercise of its monopoly power to determine policy with respect to foreign commerce. See *Zachernig v. Miller*, 389 U.S. 429 (1968). Where state courts are involved, an absence of restraint can be rectified only by the elaboration of an overriding rule of federal law by Congress or the Supreme Court (preferably as federal common law rather than as constitutional interpretation), each invading a field traditionally occupied by the states. Where federal courts are involved, even in diversity cases, the matter could be treated as one of interpreting federal procedural law, a system more easily administered by the United States Supreme Court and courts of appeal.

While no effort at empirical analysis is made here, one is struck by the number of cases with foreign defendants that are being litigated in state courts. This would suggest that even the federal courts should be cautious about extraterritorial discovery in diversity cases because federalism problems are involved. The Supreme Court would have difficulty in articulating a doctrine of restraint to be applied only in state courts.

It may make more sense to think of the issue in terms of the administration of the separation of powers, regarding the state courts for this purpose as divisions of a single national court system integrated by virtue of the supremacy and full faith and credit clauses of the Constitution. For example, it would seem to make little sense to analyze this problem differently under the Federal Rules of Civil Procedure and under state discovery statutes, absent evidence of congressional intent to accord greater discretion to federal than to state courts with respect to discovery abroad.

163. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 146 (1912).

164. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945).

165. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

tion and taxation, is, of course, a consequence of doing business abroad. The use of elaborate corporate entities to limit companies' exposure to liability abroad is evidence of the fact that this exposure is a real restraint on the free flow of international commerce, notwithstanding that such restraints are normal, ubiquitous, and doubtlessly justified in principle. On the other hand, from the perspective of the international community, American discovery practice is almost unique and to some degree unjustified in principle. This is true even from the British perspective, as evidenced by Britain's successful effort to write into the Hague Evidence Convention a "common law" discovery exception to the duty to render judicial assistance.¹⁶⁶ Most nations that have ratified the convention have invoked the discovery of documents exception. Thus, many countries apparently view exposure to global discovery in a United States civil action as an unusual restraint on international commerce.

This does not in itself make the restraint a violation of international law. Free trade has long been an underlying, if qualified, international policy of the United States. However, unlike the several states under the federal Constitution or the members of the European Economic Community under the Treaty of Rome, the United States belongs to no "common market" in which the principle of free trade must prevail over local interests in local litigation.

The underlying tension therefore may be seen as one between the exercise of powers normally left to the courts (state and federal)—such as broad discretion to decide when coercion to obtain evidence is justified in principle in a civil action in order to ascertain truth or to realize established policies of the relevant governmental unit (state or nation)—and powers normally left to the centralized political branches—such as broad discretion to decide when to risk offense to a foreign sovereign or restrain foreign commerce.

It might be argued that the federal political branches are in the best position to balance domestic needs against foreign policy considerations, particularly since they are in a position to negotiate with foreign governments on the matter. Two alternative conclusions may flow from this premise. It may be argued, on the one hand, that if the federal political branches want to authorize any discovery abroad, they should state how much discovery is permit-

166. See J. LEVINE, *DISCOVERY:—A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS* (1982).

ted. This position would put pressure on the federal government to seek cooperation from foreign countries regarding the collection of evidence. On the other hand, it may be argued that if the political branches want to restrict discovery abroad, they should set the limits of permissible discovery. This position would put pressure on foreign countries to agree to cooperate as an alternative to direct discovery.

There are difficulties with this line of argument for two reasons: first, it is open to at least some doubt that the federal political branches are in a better position than the courts to strike a balance in this matter; second, it is a dubious practice for the courts to get into the business of pressuring or aiding the federal government in international negotiations. If the political branches need the help of the courts in this respect, they are certainly able to enact legislation requiring or encouraging it.¹⁶⁷

It is submitted that judicial policies of deferring to the political branches either in all cases, or in no cases until they speak clearly, are too extreme to solve such a problem of concurrent powers. They invite too rigid a solution.

A flexible policy of selective restraint, gradually evolving into a judge-made federal common law of the subject, and guided on occasion by the federal Supreme Court, is preferable if it can work.¹⁶⁸

167. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), a Cuban expropriation decree created rights that the Cuban government sought to enforce in a United States court. The defendants argued that the Cuban decree was invalid. The court refused to inquire into the validity of the foreign government's action, stating,

The possible adverse consequences of a conclusion to the contrary . . . is [sic] highlighted by contrasting the practices of the political branch with the limitations of the judicial process in matters of this kind. . . . Judicial determinations of invalidity of title can . . . have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country. Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached.

Id. at 431-32. It is instructive that Congress proceeded expressly to invite such judicial action in limited expropriation cases and subject to executive veto. See Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (1964) (codified as amended at 22 U.S.C. § 2370(e)(2) (1976)).

168. Cf. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046-52 (1977). One might imagine a process of "dialectical federalism," where the Supreme Court establishes only "vague limits," allowing an "open-ended dialogue" to emerge between state and federal courts that "may lead to the elaboration of legal

In this regard, it must be recognized that such a policy cannot work if commitments to values with which trial courts are more familiar—such as those underlying the particular cause of action involved (for example, facilitating recovery of damages by injured plaintiffs)¹⁶⁹—deflect them from the difficult task of giving appropriate weight to the need to ensure a rational ordering of relations on the international plane.

VIII. CONCLUSION

As a matter of the orderly administration of justice, when trial courts have reasonable alternatives available under the Hague Evidence Convention or other agreed procedures, it is undesirable to press either the international law or constitutional law issues surrounding discovery abroad to definitive resolution, to expose the courts to unseemly controversy and ridicule, or even to escalate the controversy. The agreed procedures should be used. If the response of a foreign court to a letter of request is satisfactory, or foreign permission is granted to a United States consul or court-appointed commissioner to take evidence, the problems are avoided. If all or part of a letter of request is not executed, the trial court will be “informed immediately” and “advised of the reasons.”¹⁷⁰ It could then, in light of its knowledge of the case and the communications received, weigh the various factors that have been discussed.

doctrine, as courts vie for prestige or influence with an eye to the other system's developments.” *Id.* at 1047-48. The analogy between the elaboration of constitutional rights in habeas corpus cases and civil cases involving international law elements is arguably inapposite. But, since the issue is the content of “federal common law,” the analogy to the competitive dialogue between federal and state courts before *Erie* is nevertheless valid here. *See id.* at 1048 n.66 (citing M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 220-26 (1977)).

169. The question of whether it is plaintiff or defendant who is seeking discovery may influence the ultimate choice in a given case, but this factor is not per se dispositive. *See supra* note 141. The inability to obtain certain evidence may be regarded as unfair either to plaintiff or to defendant. The court should consider (1) whether there are ways to ameliorate this unfairness without compelling discovery; (2) if not, whether its duty to be fair to the parties overrides its duty to respect the sovereign interests of the foreign state concerned; and (3) if not, whether it is reasonable to proceed with the case under such circumstances.

170. Hague Evidence Convention, *opened for signature* Mar. 18, 1970, art. 13, 23 U.S.T. 2555, 2563, T.I.A.S. No. 7444, at 9, 847 U.N.T.S. 231, 243.