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## Application of the Hague Convention to American Litigants: Incorporating the Subsequent Interpretations of Signatory States into the Analysis of the U.S. Judiciary

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## NOTE

### APPLICATION OF THE HAGUE CONVENTION TO AMERICAN LITIGANTS: INCORPORATING THE SUBSEQUENT INTERPRETATIONS OF SIGNATORY STATES INTO THE ANALYSIS OF THE U.S. JUDICIARY

International agreements, such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention" or "Convention"),<sup>1</sup> manifest the desire of sovereign states to reach specific understandings on common concerns.<sup>2</sup> Signatory states entrusted with their interpretation must therefore consider a variety of interests when interpreting international accords. Because the goal of interpretation is to accurately ascertain an agreement's meaning, signatories should take into account foreign interests in addition to domestic interests. When interpreting treaties, the United States judiciary utilizes traditional principles of interpretation shared, in large part, by other civil and common law countries. More importantly, American courts place substantial reliance upon subsequent interpretations by sister signatories of international accords.<sup>3</sup>

Recently, the United States Supreme Court deviated from this "Principle of Subsequent Conduct"<sup>4</sup> when it relegated the provisions of the Hague Convention to optional status for litigants in American courts seeking evidence abroad.<sup>5</sup> The Court gave only passing notice to the positions of signatory governments.<sup>6</sup> Instead, the Court advanced those interests unique to the United States, clearly the signatory with the most

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1. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, reprinted in 28 U.S.C.A. § 1781 (West Supp. 1988).

2. J. SWEENEY, C. OLIVER AND N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 952 (2d ed. 1981).

3. See *infra* notes 41-44 and accompanying text.

4. The phrase "Principle of Subsequent Conduct" was coined in M. McDOUGAL, H. LASSWELL & C. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 56, 58 (1967). See *infra* note 36 for further discussion.

5. *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 107 S. Ct. 2542 (1987) [hereinafter *Societe Nationale*]. See *infra* notes 48-79 and accompanying text for discussion of this case.

6. Although four states submitted amicus briefs—France, Federal Republic of Germany, Switzerland, and Great Britain and Northern Ireland—the Supreme Court declined to respond to

liberal discovery provisions.<sup>7</sup> This Note posits that the Supreme Court deviated from the established Principle of Subsequent Conduct and, as a result, curtailed significantly the use of the mutually beneficial provisions provided by the Convention.

This Note will first examine the history of the Hague Convention, the purposes advanced by its drafters, and the Convention's basic provisions. Second, it will survey traditional principles of treaty interpretation, focusing on the usage of the above principle. Next, the discussion will analyze American courts' interpretations of the Hague Convention.<sup>8</sup> Finally, this Note will consider the subsequent interpretations offered by signatories to the Convention, including legislative responses, judicial interpretations, and positions of signatory governments officially transmitted to the United States. The author concludes that if United States courts would focus on subsequent interpretations of signatory states, the courts would realize a more accurate interpretation of international agreements such as the Convention.

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any concerns set forth in the briefs, except to recognize France's position in a footnote. *Id.* at 2548 n.11.

7. *Id.* at 2553-54 n.25. The United Kingdom, a common law country like the U.S., has recognized the extensive use of discovery by American courts. In *Radio Corporation of America v. Rauland Corporation*, [1956] 1 Q.B. 618, the House of Lords reaffirmed England's dismay with the techniques employed by U.S. courts. The court stated, "it is plain that the principle has been carried much further in the United States of America than it has been carried in this country." *Id.* at 643-44.

*See* FED. RULE CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .").

In civil law countries, discovery is typically assigned to judges rather than to the parties. This procedure results in more streamlined, less intrusive methods for discovery. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985). *See also infra* note 14, for further discussion on differences between civil and common law countries' discovery methods. For a summary of civil law procedure, *see* J. MERRYMAN, *THE CIVIL LAW TRADITION* 120-31 (1969).

8. Both the courts and the executive branch have roles in interpreting treaties, but the judiciary is traditionally considered subordinate to the executive branch in resolving disputes between foreign states. For example, in 1952 the acting legal advisor for the Department of State informed the Judicial Department that grants of sovereign immunity would be curtailed under a newly announced policy of the United States. This announcement, embodied in the *Tate Letter*, named after the acting legal advisor, was an attempt by the executive branch to dictate the theory of sovereign immunity to be followed by the United States. Although this policy eventually eroded and the State Department once again became active in deciding such matters on a case by case basis, the judiciary never questioned the authority of the executive to dictate such policy. *See* J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 302 (2d ed. 1981) (discussion of the *Tate Letter* and cases in which the executive intervened to determine outcomes).

I. THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE  
ABROAD IN CIVIL OR COMMERCIAL MATTERS

A. *Historical Foundations*

In 1968 the Hague Conference on Private International Law adopted the Hague Convention,<sup>9</sup> the fundamental purpose of which was to “improve mutual judicial co-operation in civil or commercial matters.”<sup>10</sup> The United States became a party to the agreement in 1972,<sup>11</sup> and to date twenty states, including the U.S., have deposited instruments of accession or ratification with the Conference.<sup>12</sup>

The drafters operated under the assumption that any system of international discovery must be “tolerable” in the state of execution.<sup>13</sup> To accomplish this goal, they sought, among other things, to bridge the fundamental differences between discovery techniques used in civil and common law countries.<sup>14</sup> Accordingly, the procedures adopted incorporate

9. *Supra* note 1.

10. *Id.*

11. 8 MARTINDALE-HUBBELL LAW DIRECTORY (pt VII) 15 (1987). Other signatory states include Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Great Britain, Ireland, Israel, Italy, Japan, Luxemburg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Spain, Turkey, the United Arab Republic, Observers of Indonesia, and Yugoslavia. See *infra* note 12 for a list of states that have ratified or acceded to the Convention.

12. Ratifying and acceding countries include Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Monaco, the Netherlands, Norway, Portugal, Sweden, Singapore, the United Kingdom and the United States. 8 MARTINDALE-HUBBELL LAW DIRECTORY (pt. VII) 15 (1987); 27 I.L.M. 277-79 (1988). Article 39 of the Hague Convention specifically provides that:

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention. . . .

Hague Convention, *supra* note 1, art. 39.

The Convention's provisions replaced Articles 8-16 of the Hague Conventions on Civil Procedure of 1905 and 1954 as between signatory states who were parties to the earlier agreements.

13. Amram, *Explanatory Report on the Convention, reprinted in PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF (18 MARCH 1970) ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS 20 (1984) [hereinafter PRACTICAL HANDBOOK]* (statement of Dr. Arnold, Chairman of the Hague Evidence Convention).

14. Most civil law countries do not permit the taking of evidence by persons other than judicial officers. In Germany, for example, judges are granted power to order evidence only if it is probative of some issue of fact. This requires lawyers to provide sufficient evidentiary foundations to the judge prior to requesting a discovery order. Shemanski, *Obtaining Evidence in the Federal Republic of*

and improve upon the existing technique of letters rogatory.<sup>15</sup> The drafters sought to enlarge the means of obtaining evidence abroad and to preserve more lenient techniques developed prior to the Convention through cooperation among individual states.<sup>16</sup>

William Rogers, Secretary of State during the Nixon administration, transmitted his recommendation on the Hague Convention to the Presi-

*Germany: The Impact of The Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465, 466 (1983).

Additionally, under German law witnesses are examined by the judge and are typically required to testify only once. Following the examination, the judge summarizes the testimony for the record; rarely is a verbatim transcript of the evidence used. Langbein, *supra* note 7, at 828.

In France, another civil law country, evidence gathering by litigants is also severely restricted, both by custom and under the French Code of Civil Procedure. Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 36 (1976). Judges have the sole power to order factual investigations, appoint experts, summon parties to give testimony, and summarize the testimony of witnesses. *Id.*

Both German and French rules of discovery are highly restrictive in comparison to discovery in the U.S. under the Federal Rules of Civil Procedure. The drafters of the Hague Convention recognized these differences and sought to find ways in which common law courts could gain access to essential information without offending the sovereignty of the state receiving the request. At the same time, no country was expected to give up its local practice and procedure but to permit, when necessary, access to information. This would be accomplished by asking those states requesting information to adhere, as closely as possible, to traditional methods of discovery in the forum state. *Report of United States Delegation to the Eleventh Session of the Hague Convention on Private International Law*, reprinted in 8 I.L.M. 804, 806 (1969).

See also Letter of Submittal to President of U.S. from William P. Rogers of Nov. 9, 1971, reprinted in 12 I.L.M. 324 (1973) (increased trading and litigation prompts "need for effective international agreement to set up a model system to bridge differences between common law and civil law approaches"). For additional information on differences between civil law and common law discovery techniques, see Martens, *German Civil Procedure and the Implementation of the Hague Evidence Convention*, 1985 INT'L LIT. Q. 115.

15. *Report of the United States Delegation to the Eleventh Session of the Hague Convention on Private International Law*, reprinted in, 8 I.L.M. 804, 807 (1969).

16. PRACTICAL HANDBOOK, *supra* note 13, at 20, and Convention, *supra* note 7, art. 27.

Philip W. Amram, the Rapporteur of the Convention, enunciated the three goals of the Convention as follows:

- a) Improve the existing system of Letters of Request; and
- b) enlarge the devices for the taking of evidence by increasing the powers of consuls and by introducing, on a limited basis, the concept of the commissioner; and at the same time
- c) preserve all existing and more favorable and less restrictive practices resulting from internal law, internal rules of procedure and bilateral or multilateral conventions.

PRACTICAL HANDBOOK, *supra* note 13, at 20. Amram also stated the fundamental purpose of the Convention was the "revision and modernization of [the] Hague Convention on Civil Procedure of 1905 and 1954." *Id.*

Several subjects were not addressed at the Convention because the drafters felt they were sufficiently addressed in previous Conventions or were properly left to each state's domestic laws. These include free legal aid, immunity of a witness from arrest or service of process, effects of the refusal of a witness to appear, the problem of dual nationality and the powers of arbitration courts. *Id.* at 34.

dent in 1971.<sup>17</sup> The letter endorsed the Convention's procedures.<sup>18</sup> President Nixon agreed with Rogers and urged approval of the accord by the Senate.<sup>19</sup> The Senate later approved the Convention and its procedures came into force for American litigants on October 7, 1972.<sup>20</sup>

### B. Basic Convention Provisions

The Hague Convention provides two procedures by which a signatory (or contracting) state may obtain evidence abroad. Chapter I allows a contracting state to send a Letter of Request to a signatory state seeking evidence for its own judicial proceedings. The recipient state may refuse to comply with this section if the state feels its sovereignty or security would be threatened.<sup>21</sup> Chapter II gives a contracting state the power to take evidence from another state's national through diplomatic officers, consular agents, and commissioners. These procedures are not mutually exclusive and may be used in combination. For instance, a recipient may require the presence of a judicial officer from the recipient state during the execution of a letter<sup>22</sup> or require permission from the requesting state's officials prior to discovery under Chapter II.<sup>23</sup>

Chapter III of the Convention contains two provisions that greatly limit application of its procedures to foreign states. First, under Article 23 a contracting state may declare that it will not execute Letters of Request designed to obtain pre-trial discovery of documents.<sup>24</sup> As of 1988, thirteen of the twenty contracting states had made such declarations.<sup>25</sup>

Conversely, Article 27 states that the agreement shall not prevent a signatory state from utilizing alternative methods, or procedures less restrictive than those provided in the Convention. American courts have

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17. Letter of Submittal of Nov. 9, 1971, *reprinted in* 12 *I.L.M.* 324 (1973).

18. *Id.* Rogers was particularly swayed by the prompt ratification of the treaty by "five important states": the Federal Republic of Germany, Norway, Portugal, and the United Kingdom and Northern Ireland. *Id.* at 324, 326. Rogers believed that because these five states acceded to the agreement, the agreement was significant. *Id.* at 327.

19. Message From the President Transmitting to the Senate the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 12 *I.L.M.* 323 (1973).

20. Hague Convention, *supra* note 1.

21. Hague Convention, *supra* note 1, at art. 12(b).

22. *Id.*, art. 8.

23. *Id.*, art. 15.

24. Civil law countries, unlike common law countries, do not typically engage in pre-trial discovery but instead seek only those documents relevant for use at trial. See *supra* note 14 for a discussion of the differences between civil and common law discovery methods.

25. 8 *MARTINDALE-HUBBEL LAW DIRECTORY* (pt. VII) 15-19 (1987).

cited this provision in support of the proposition that procedures provided in the agreement are optional,<sup>26</sup> however, some commentators claim that Article 27 merely indicates that the convention's procedures reflect the minimum procedures required of each signatory.<sup>27</sup>

## II. TRADITIONAL PRINCIPLES OF TREATY INTERPRETATION

The United States judiciary considers several different categories of information when charged with the interpretation of international agreements. This is especially true when the meaning agreed upon by signatories is not clearly evident from the text of the agreement.<sup>28</sup> Preparatory works, diplomatic correspondence, the overall purposes of the convention,<sup>29</sup> and drafting negotiations may be consulted.<sup>30</sup> Courts also attribute meaning to domestic sources that influenced the formation of the agreement.<sup>31</sup> In addition, great weight is usually given to the views of the Department of State and Justice Department,<sup>32</sup> enforcers of trea-

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26. For the latest case making this claim, see *Societe Nationale*, 107 S. Ct. 2542 (1987). See also *Lasky v. Continental Prod. Corp.*, 569 F. Supp. 1127, 1129 (E.D. Pa. 1985).

27. See, e.g., Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery*, 132 U. PA. L. REV. 1461, 1468-470 (1984).

28. Generally, courts consult the text of the treaty as the first step towards its interpretation. *Maximov v. United States*, 373 U.S. 49, 53-54 (1983) (consulting the text of the treaty and the context in which the words are used). See also *Air France v. Saks*, 470 U.S. 392 (1985) (interpreting the word "accident" as used in the Warsaw Convention and the Montreal Agreement by first making reference to the context in which the word was used); *Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 31 (1)*, reprinted in, 8 I.L.M. 679-735 (1969) (requiring interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose").

29. *Reed v. Wisner*, 555 F.2d 1079, 1088 (2d Cir. 1977). See also *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); *Factor v. Laubheimer*, 290 U.S. 276, 293-94 (1933); *United States v. A.L. Burbank & Co.*, 525 F.2d 9, 12-14 (2d Cir. 1975); *Board of County Commissioners v. Aerolineas Peruanasa, S.A.*, 307 F.2d 802, 806-07 (5th Cir. 1962).

30. *Arizona v. California*, 292 U.S. 341, 359-60 (1933); *Factor v. Laubheimer*, 290 U.S. 276, 294-95 (1933); *Cook v. United States*, 288 U.S. 102, 112 (1932); *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW* §§ 147 (1)(b), (c) (1965). But see *CHANG, THE INTERPRETATION OF TREATIES* 59 (1950) (discounting oral statements made by parties not embodied in writing and not communicated to the negotiator of the agreement).

31. When the agreement is being interpreted to determine its effect as domestic law, sources may include committee reports, debates, and meanings attributed to the agreement by the legislative branch. *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW* §§ 151, 152 (1965).

32. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW* §§ 151, 152 (1965).

In *Kolovrat* an Oregon resident died leaving property to Yugoslavian relatives. Interpreting an Oregon statute providing that Yugoslavs could not inherit property and an 1881 treaty between the U.S. and Serbia, the Supreme Court stated "[w]hile courts interpret treaties for themselves, the

ties to which the U.S. is a party. Comity—the recognition one state gives to another state's interests—is also considered during the interpretative process.<sup>33</sup>

The Principle of Subsequent Conduct has long been regarded as a prime canon of treaty construction.<sup>34</sup> The U.S. Supreme Court and lower federal courts have attributed great weight to this principle,<sup>35</sup> as have several scholars<sup>36</sup> and commentators.<sup>37</sup> The premise underlying the

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meaning given them by the departments of government particularly charged with their negotiation and enforcement is given much weight." See also *Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303 (O'Connor, C.J.).

33. U.S. courts have maintained, since 1797, that comity is a factor to be weighed whenever the resolution of disputes affects other sovereign states. *Societe Nationale*, 107 S. Ct. 2542, 2555 n.27 (1987), citing *Emory v. Grenough*, 3 U.S. (3 Dall.) 369 (1797); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

The factors that a court should consider when engaging in comity analysis vary; no single set has been found dispositive. In *Hilton*, the Court said comity analysis should give "due regard both to international duty and convenience, and to the rights of its own [state's] citizens or of other persons" under the state's protection. 159 U.S. at 163-64.

The RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437 (1)(C) (Tent. Draft No. 7, 1986) (approved May 14, 1986) suggests that several relevant factors ought to be considered when a court must decide whether to compel a foreign citizen to produce information. These factors include the importance of the information sought, the specificity of the request, where the information originated, alternative means of obtaining the same information, and whether an order would hurt the interests of either the United States or the foreign state. *Id.*

The majority opinion in *Societe Nationale*, see *infra* note 48 and accompanying text, examined both these statements of factors and concluded that comity analysis required a case by case determination of the relevant factors by the American courts. The majority declined to provide explicit guidelines for this analysis. *Societe Nationale*, 107 S. Ct. 2542, 2554-556 (1987).

Justice Blackmun, on the other hand, established a tripartite test for courts to apply when determining whether comity requires first resort to the Hague Convention procedures. *Id.* at 2561-562 (Blackmun, J., concurring in part and dissenting in part). The test requires a balance between the foreign state's interest, interests of the United States, and the interest in a "well-functioning international order." *Id.* See *infra* note 78 and accompanying text for Blackmun's balancing of the interests in *Societe Nationale*. See also *infra* note 82 for a balance struck by a federal court following Blackmun's opinion.

34. *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (per curiam).

35. See *infra* notes 41-44 and accompanying text.

36. See, e.g., M. McDUGAL, H. LASSWELL AND J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 56, 58 (1967). There, the authors set forth a comprehensive set of principles designed to help clarify the goals and strategies of treaty interpretation. They stress the importance of considering the entire range of events surrounding an agreement to accurately interpret an agreement. *Id.* at 47. In a discussion of principles to be applied when interpreting international agreements consistent with overriding goals, the "Principle of Subsequent Conduct" is explained as one that

[t]ake[s] into account the whole sequence of acts of communication and collaboration that have occurred since the outcome phase [of the agreement]. Action by the parties in reliance upon asserted or implicit interpretations during the course of performing an agreement



principle is the belief that action taken by parties following an agreement is an accurate indicator of shared expectations.<sup>38</sup> Because the sources mentioned in the foregoing paragraph—preparatory works, diplomatic correspondence, negotiations, and convention purposes—may reflect only one country's understanding of the agreement, equal weight should be given to those same sources as viewed by other countries.<sup>39</sup> A treaty represents, after all, the combined consent of sovereign states, each of which is entitled to equal respect in the international community.<sup>40</sup>

The United States Supreme Court has endorsed and relied upon inter-

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is appropriately regarded as reliable evidence of shared subjectivities and may be given priority over contradictory evidence even from the outcome phase.

*Id.* at 58-59 (emphasis added).

See also, C. HYDE, *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1471 (2d rev. ed. 1945) (proposing that "whatever be its form, evidence of the signification attached by the parties to the terms of their compact should not be excluded from the consideration of a tribunal charged with the duty of interpretation, citing *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39 (1913)); S. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 383 (2d ed. 1916) (practical construction by the parties through proper means after a treaty's conclusion is quite conclusive as to their meaning); *Harvard Draft Convention on The Law of Treaties*, Art. 19(a), reprinted in 29 *Am. J. Int'l L.* 661 (Supp. Oct. 1935) (the subsequent conduct of the parties in applying the treaty's provisions are to be considered).

37. See, e.g., Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1459, 1480 (1984).

38. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert denied*, 429 U.S. 890 (1976) (citing *Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963)). See also *Air France v. Saks*, 470 U.S. 392 (1986), *Reed v. Wisner*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). Both Courts claimed that interpreting courts should give specific words of a treaty meanings consistent with the shared expectations of the contracting parties.

39. The author does not suggest that the United States judiciary should not advance, as its primary concern, the specific interests of the United States government when interpreting the scope of a treaty. Presumably, however, American negotiators who partake in the drafting of such agreements advance these precise interests and attempt to incorporate them into the text or meaning of the agreement. When the negotiators fail to achieve this incorporation or decide that the best interests of the United States are not reflected in a compromise with other negotiating states, then one should expect the United States not to enter into the agreement. Consequently, if American courts desire to promote the interests of its government, all they should need to do is interpret the agreement according to those principles that promote accurate interpretation, not those that inject additional interests of the United States. United States interests are already represented in the agreement.

40. Fundamental principles of international law provide that an essential characteristic of a "state" is sovereignty, i.e., the "supreme authority, which is independent of any other earthly authority." L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 30-33, 170-72 (1905). Moreover, sovereignty dictates that every state respect the right of every other state to exercise complete control over its territory. Every state also has the right "to demand that other States abstain themselves, and prevent their organs and subjects, from committing any act which contains a violation of its independence and its territorial as well as personal supremacy." *Id.* at 171. From these well established

pretations given international agreements by other signatories for nearly 100 years.<sup>41</sup> Most recently, a unanimous Court, in *Air France v. Saks*,<sup>42</sup> reaffirmed the importance of this principle when it interpreted provisions of the Warsaw Convention and Montreal Agreement. The Court examined and found persuasive French case law and European legal scholarship in determining the meaning of a pivotal term in those agreements.<sup>43</sup> Justice O'Connor believed that subsequent conduct of convention parties aided the Court in its decision and found "the opinions of our sister signatories to be entitled to considerable weight."<sup>44</sup>

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canons follows the conclusion that each state enjoys the same authority to manage its affairs in the international community according to its discretion, especially when concluding treaties. *Id.*

Abstract principles governing international relations among equals are incorporated into many international agreements, providing a second source supporting the proposition that because states are equals it follows naturally that their interpretation of agreements as a signatory deserves equal weight. Article 2 (1) of the United Nations Charter states, for example, that, "[t]he Organization is based on the principle of the sovereign equality of all its Members." All the signatories to the Hague Convention are also parties to the U.N. Charter, implying their adherence to the principle of equality.

41. In *Ross v. McIntyre*, 140 U.S. 467 (1891), the Supreme Court interpreted the interaction of several different treaties between Japan and the United States respecting the authority of American consuls in Japanese territory. The Court regarded the practical construction given the treaty by both the United States and Japan to be of importance in their interpretation. *Id.* at 466-67. The Supreme Court again relied on this interpretive tool in *Nielsen v. Johnson*, 279 U.S. 47 (1929) (interpreting the Treaty of April 26, 1826 between the United States and Denmark). Five years later in *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934), the Supreme Court found the relevant clause of the Webster-Ashburton Treaty ambiguous at best and therefore stated that "it is appropriate that we should look to the practical construction which has been placed on it" by both parties to the Convention. *Id.* at 153.

Other federal courts have also found the principle of referring to subsequent actions taken by sister signatories to be an important factor when evaluating the meaning of an international agreement. In *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), the Second Circuit examined a United Kingdom statute implementing the Warsaw Convention and determined that evidence of how other convention signatories interpreted the Convention to be "compelling." *Id.* at 918-19. Specifically, the court looked to both a statute enacted in the United Kingdom designed to implement the convention and Canadian law. *Id.* See also *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975) (conduct of parties subsequent to ratification relevant to construe treaty); *Husserl v. Swiss Air Transport Company, Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (*per curiam*).

42. 470 U.S. 392 (1985).

43. *Id.* at 399-400, 404.

44. *Id.* at 404. (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)).

### III. AMERICAN JUDICIAL INTERPRETATION OF THE HAGUE EVIDENCE CONVENTION

Until 1987, interpretation of the Hague Convention by state and federal courts reflected conflicting views on whether the Convention's procedures provided the exclusive,<sup>45</sup> preferential,<sup>46</sup> or optional<sup>47</sup> method for obtaining evidence abroad. Although foreign countries expressed displeasure with the confused interpretations, it was not until *Societe Nationale*,<sup>48</sup> that the Supreme Court clarified the Convention and sanctioned optional use of its procedures.

In *Societe Nationale*, the plaintiffs<sup>49</sup> brought suit in federal court against two French corporations<sup>50</sup> following an airplane crash in Iowa.<sup>51</sup> The District Court exercised in personam jurisdiction over the foreign corporations.<sup>52</sup> Initial discovery requests were answered by the French corporations pursuant to the Federal Rules of Civil Procedure,<sup>53</sup> not the Hague Convention. When plaintiffs made a second request for documents under the Federal Rules the corporations sought a protective order, claiming that the Hague Convention dictated exclusive use of its provisions and that defendants could not comply with the request under

45. *E.g.*, *Worthington v. Polymer Machinery Corp.*, No. 83-2131 (E.D. Pa. Jan. 12, 1984); *Gilbert v. Josef Timmer Mfg. Co.*, No. CV 81-2340 (Ala. Cir. Ct. July 5, 1983); *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Augusta, S.P.S.*, No. 81-3984 (E.D. Pa. May 17, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80-L-2275 (Cir. Ct. Cook Co. July 21, 1983).

46. *E.g.*, *General Electric Co. v. North Star Int'l Inc.*, No. 83-C-0830 (N.D. Ill. Feb. 21, 1984); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Vincent v. Ateliers de la Motobecane*, 193 N.J. Super. 716, 475 A.2d 686 (1984); *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

47. *E.g.*, *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, No. 80 Civ. 1922-PNL (S.D.N.Y. May 29, 1984); *McKenna v. Fiat Societa per Azioni*, No. 81-2676 (Pa. Ct. C.P. July 20, 1983).

48. 107 S. Ct. 2542 (1987).

49. Three separate suits were brought in the United States District Court for the Southern District of Iowa against the same manufacturer. The three cases were consolidated pursuant to 28 U.S.C. § 636(c)(1) (1982). *Societe Nationale*, 107 S. Ct. at 2546.

50. Plaintiffs sued two French corporations, *Societe Nationale Industrielle Aerospatiale*, a corporation owned by the French government, and *Societe de Construction d'Avions de Tourism*, a wholly owned subsidiary of the former corporation. *Societe Nationale*, 107 S. Ct. at 2546 n.2.

51. *Id.* at 2546.

52. Apparently, the French corporation did not question the District Court's exercise of jurisdiction over them. *Id.*

53. *Id.* Plaintiffs requested documents from the French corporation under Rule 34(b) and admissions under Rule 36. The corporation subsequently availed itself of the Federal Rules and requested production by plaintiffs under Rules 26, 33 and 34. *Id.* at 2546 n.4.

French law.<sup>54</sup>

The Magistrate denied the corporations' motion for the protective order.<sup>55</sup> In response to petitioners' concerns with violating French law, the Magistrate balanced the United States' interest in protecting its citizens from defective products against France's interest in protecting its country from overly intrusive discovery techniques.<sup>56</sup> The Magistrate found American interests compelling.<sup>57</sup> Subsequently, petitioners sought a writ of mandamus from the Eighth Circuit.<sup>58</sup> The Court of Appeals denied the petition<sup>59</sup> and held that when a court exercises in personam jurisdiction over a foreign litigant, the Hague Convention's procedures do not apply.<sup>60</sup>

On appeal, Justice Stevens, writing for a 5-4 majority, vacated and remanded the court of appeals' judgment, holding that the procedures in

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54. *Id.* at 2547. Defendants cited French Penal Code Law No. 80-538, reprinted in 75 AM. J. INT'L LAW 382 (1981). See *infra* note 95 and accompanying text for the history, text, and scope of the statute. Such foreign statutes prohibiting one of its nationals from complying with requests for information from abroad are frequently termed "blocking statutes." Most often, these statutes make it a criminal offense to comply with such requests when the information sought is believed by the foreign government to be important to its security or sovereignty or if disclosure would be against public policy. United States litigants confront these statutes most frequently in antitrust litigation. See generally, Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation*, 17 INT. LAW. 61 (1983); Pettit and Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982).

Courts tend to distinguish between their ability to compel a foreign litigant to comply with a discovery request otherwise illegal under the foreign government's laws and their discretion to impose penalties on foreign litigants who cannot or do not comply with the order. Most courts do not deny their power to compel parties to American litigation to produce information; however, if the faulting party pleads with his government in good faith to secure release of the information he will not be penalized for failing to comply. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A., v. Rogers*, 357 U.S. 197, 211 (1958). See generally Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 COLUM. L. REV. 1441, 1458 n.159 (1963).

55. 107 S. Ct. 2546.

56. *Id.* at 2547-548. The Magistrate noted that the French penal law did not appear to be strictly enforced by the French government and questioned its applicability to the discovery requests in question. *Id.* at 2547.

57. American interests were stronger, reasoned the Magistrate, because compliance with the discovery requests did not involve recovering documents located in France. *Id.*

58. The corporations argued that the Hague Convention would be rendered meaningless if the Magistrate's decision was upheld or the agreement's provisions were not resorted to in the first instance. *Id.*

59. The court of appeals denied the writ of mandamus on grounds that the French corporations had not yet failed to comply with the discovery order, thereby incurring liability for sanctions. *Id.* at 2548 & n.10.

60. *Id.* at 2547.

the Convention are optional.<sup>61</sup> The Court advanced four possible interpretations of the treaty<sup>62</sup> and applied traditional principles of interpretation<sup>63</sup> to reject all but one alternative. The Court examined the negotiating history<sup>64</sup> and text of the treaty. It found that, because the language used was permissive and made no indication that the parties meant the treaty to be mandatory, the procedures were “unambiguously” optional.<sup>65</sup> The Court reasoned that if the terms were to be read as mandatory, the result would be to impair the jurisdiction of American courts and place American parties at a disadvantage vis-à-vis foreign parties.<sup>66</sup>

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61. *Id.* at 2551 & n.20. Although the precise holding is unclear, the Court enunciated four possible interpretations of the agreement and eliminated the first three. Such action implies that the fourth holds. *See infra* note 62. Justice Stevens stated: “We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.” *Id.* at 2555-556.

62. The four interpretations cover the possible relationships between the Federal Rules of Civil Procedure and the Hague Convention: (1) The treaty’s procedures are the exclusive means of requesting evidence located abroad; (2) the treaty dictates resort to its procedures in the first instance, but is not the exclusive means; (3) the treaty’s provisions supplement federal discovery rules, although comity requires resort to those provisions in the first instance; and (4) the treaty’s provisions are optional, but should be used when trial courts deem it appropriate after examining the particular circumstances and interests of the foreign state. *Id.* at 2550.

63. The majority looked to the history of the treaty, its negotiations, and practical construction of the text and stated that the “practical construction adopted by the parties” may also be relevant. *Id.* (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1943)). However, the Court did not adequately consider the interpretations of other countries revealed in their subsequent action. *See infra* note 73.

64. The Court found particularly persuasive the President’s letter of transmittal to the Senate supporting ratification. 107 S. Ct. at 2549. *See supra* note 18 and accompanying text for text of the letter and a discussion of the circumstances surrounding its transmittal.

65. 107 S. Ct. at 2553. Article 1 of the agreement states that a contracting state *may* issue letters of request to signatory states. Hague Convention, *supra* note 1, art. 1. The majority found this particularly persuasive, especially in light of the mandatory language in Article 1 of the Hague Service Convention. 20 U.S.T. 361, T.I.A.S. No. 6638 (signatory states *shall* apply in all cases). 107 S. Ct. at 2550 n.15.

66. The majority feared that every time an American court exercised jurisdiction over a foreign citizen or needed access to foreign documents, it would become subject to the internal laws of a foreign country. *Id.* at 2553. Justice Stevens, quoting *In re Anschuetz & Co.*, 754 F.2d 602, 612 (1985), believed that courts should not attribute mandatory meaning to the Hague Convention absent an explicit statement of intent on the face of the document. 107 S. Ct. at 2553. Moreover, a mandatory construction would have three unacceptable effects on American litigants: (1) in litigation between American nationals and foreign nationals, the former would be relegated to the procedures in the Hague Convention, while the latter would enjoy liberal discovery under the Federal Rules; (2) foreign companies would therefore have an unfair competitive advantage over domestic companies; and (3) foreign nationals of a contracting state would be unfairly pitted against nationals of any other state. *Id.* at 2553-554 n.25.

The Court also rejected petitioners' alternative argument that litigants should utilize the Convention procedures in the first instance. This rule, Stevens observed, would be inconsistent with the interest of "just, speedy, and inexpensive determination" of disputes.<sup>67</sup> In addition, the Court found no textual support for a "first resort" rule.<sup>68</sup> The Court concluded that the interests of comity dictate that a case by case analysis be used to accurately balance the interests of two sovereign states.<sup>69</sup> Thus, the majority espoused a rule of case-by-case scrutiny of the conflicting interests, with the "exact line between reasonableness and unreasonableness" to be drawn by the trial court.<sup>70</sup> However, the Court failed to provide specific rules to guide the lower courts.<sup>71</sup> Finally, the majority indicated that the burden of persuasion falls on the party seeking to invoke the provisions of the Hague Convention.<sup>72</sup>

In reaching its conclusions, the Court made only passing mention of the interpretations of other signatory states as revealed by their subsequent actions.<sup>73</sup>

In a separate opinion, concurring in part and dissenting in part, Justice Blackmun criticized the majority's analysis and advocated resort to the Convention in the first instance.<sup>74</sup> Blackmun believed that the majority ignored the importance of the Convention and "failed to provide lower

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67. *Id.* at 2555, quoting FED. R. CIV. P. 1.

68. 107 S. Ct. at 2555.

69. *Id.* at 2555-557.

70. *Id.* at 2556.

71. *Id.* at 2557.

72. *Id.* at 2557 n.30 ("The District Court may therefore require. . . that [the] party [urging resort to the treaty] bear the burden. . ."). See *infra*, notes 85, 88-89 for post-*Societe Nationale* cases supporting this interpretation of the Court's opinion.

73. The majority did acknowledge in footnote 11 the position taken by the Republic of France in its *amicus curiae* brief. The opinion does not take into consideration action taken by other signatories other than the existence of blocking statutes such as the French Penal Code Law No. 80-538 which was the subject of this litigation. The majority's failure to apply the Principle of Subsequent Conduct could imply any one of several possible conclusions. The Court may simply have reasoned it unnecessary to address the concerns advanced by signatory states in their briefs, or the Court may have felt such an analysis would be duplicative of analysis already performed by the executive branch and congressmen when signing the treaty. If the former conclusion is correct, then the Court essentially disregarded any foreign signatory's interest in the outcome of a decision having a direct impact on their internal law. If the latter conclusion is correct, then the majority weighed American interests twice, once in the negotiation process and once in the case, whereas foreign interests are considered only at the treaty negotiation stage. Such an interpretation tips the scales in favor of the United States. Either way, the majority's conclusion inevitably results in a skewed interpretation.

74. 107 S. Ct. at 2558. Blackmun's opinion, unlike the majority's, accounts for subsequent action by signatory countries, albeit as a consideration of comity rather than as an independent factor. See *supra* note 73.

courts with any meaningful guidance for carrying out” a case by case inquiry.<sup>75</sup> Furthermore, by sanctioning an ad hoc approach, the majority mandated a re-balancing of competing national interests by the district courts. These interests already had been balanced by the various drafters of the Convention.<sup>76</sup>

Blackmun also set forth definitive guidelines for the lower courts to follow in determining whether first resort to the Hague Convention is appropriate.<sup>77</sup> First, a court should determine whether a conflict does in fact exist between domestic and foreign law. If this threshold question is answered in the affirmative, then the court should engage in a tripartite analysis designed to reconcile the disparate national concerns.<sup>78</sup> The analysis requires consideration of American interests, foreign interests, and the “mutual interests of all nations in a smoothly functioning international legal regime.”<sup>79</sup>

In the wake of *Societe Nationale*, courts remain divided on the proper application of the case-by-case analysis mandated by the Supreme Court.

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75. *Id.* Blackmun’s concern with the methodology suggested by the Court focused on the “risk that . . . case-by-case comity analysis . . . [would] be performed inadequately” and that courts will not use the Hague Convention because of their unfamiliarity with its procedures. *Id.* Moreover, the interests of the United States are furthered by promoting use of the Convention’s procedures in the first instance: the civil law countries had everything to lose and the U.S. had everything to gain during the drafting of the agreement. *Id.* at 2559. Consequently, “[u]nless they had expected the Convention to provide the normal channels for discovery, other parties to the Convention would have had no incentive to agree to its terms.” *Id.*

Blackmun agreed with the majority, however, in rejecting the two extreme positions regarding use of the Convention’s procedures. The Hague Convention applies to third parties in addition to the litigants and it cannot be considered the exclusive means for obtaining evidence abroad. *Id.* at 2558.

76. This double balancing would result, continued Blackmun, in second guessing the executive branch’s balance of competing national interests—a purely political determination. *Id.* at 2560. Blackmun observed that “diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association.” *Id.* (citing *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 235 F.2d 909, 955 (D.C. Cir. 1984)). Judges, on the other hand, lack the experience necessary to make such policy choices and may exhibit a pro-forum bias. *Id.* at 2560.

77. Blackmun declared, “[c]omity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather, it is a principle under which judicial decisions reflect the systematic value of reciprocal tolerance and goodwill.” *Id.* at 2561.

78. *Id.* at 2561-562.

79. *Id.* Blackmun compared this analysis to that performed in choice of law decisions. *Id.* at 2562 n.11. Interests of the United States, under Blackmun’s analysis, include providing litigants with effective procedures to acquire evidence abroad, fair and equal treatment of litigants, and assuring mutually advantageous procedures between foreign and domestic litigants. *Id.* at 2564-567. When examining the interests of foreign states, emphasis should be placed on state sovereignty. Sovereignty includes the power to control the exercise of foreign authority in the state and protection of the substantive rights of a state’s citizenry. *Id.* at 2562-563.

In *Hudson v. Hermann Pfauter GmbH & Co.*,<sup>80</sup> the Northern District of Illinois granted a foreign corporation's motion for a protective order requiring plaintiffs to serve discovery requests pursuant to the Hague Convention.<sup>81</sup> The court acknowledged the majority's holding in *Societe Nationale*, but incorporated Blackmun's tripartite analysis to conclude that principles of comity dictated resort to the Convention's procedures in the first instance.<sup>82</sup> The court determined that "the burden of proof is placed on the party opposing the use of Convention procedures to demonstrate that those procedures would frustrate [American] interests."<sup>83</sup> Moreover, inconveniences due to unfamiliarity with the Convention will not satisfy the burden of proof.<sup>84</sup>

In contrast to *Hudson*, several other courts view the *Societe Nationale* decision as requiring the party seeking utilization of the Hague Convention to demonstrate why resort to its procedures would be effective. In *Benton Graphics v. Uddeholm Corp.*,<sup>85</sup> the court ordered the defendant, a

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80. 117 F.R.D. 33 (N.D. Ill. 1987). In *Hudson*, the plaintiff sued the manufacturer of an allegedly defective machine under negligence and strict liability theories. The manufacturer, a corporation formed under West German law, objected to interrogatories served upon it pursuant to Rule 33 of the Federal Rules of Civil Procedure. The manufacturer refused to comply with the request unless made under Hague Convention procedures. Plaintiffs refused to comply with the opposing party's request. Subsequently, the defendant moved for a protective order. *Id.* at 34-35.

81. *Id.* at 40.

82. *Id.* The court's decision is strikingly similar to Justice Blackmun's *Societe Nationale* concurrence. The tripartite comity analysis, as applied by the district court, considered generalized interests potentially applicable to any factual situation. If the tripartite analysis lends itself to balancing generalized interests, as opposed to individualized interests, then it is difficult to conceive of situations in which the balance would not tip in favor of using Convention procedures.

The *Hudson* court noted the Supreme Court's failure to provide guidance for determining when a court should require compliance with the Convention. *Id.* at 36. The court first examined factors determined by scholars and justices to be relevant when weighing competing interests: factors promulgated in the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) as well as those set forth by Blackmun in his *Societe Nationale* opinion. *Id.* at 36. The Restatement's approach, according to the court, emphasized interests of the individual litigants whereas Blackmun's approach focused less on individual interests "except to the extent they are subsumed by the interests of the sovereigns involved." *Id.* at 37. The court found Blackmun's tripartite analysis to be the preferred framework. *Id.*

83. *Id.* at 38. The court cited no authority for placing this burden on the requesting party. The statement seems to indicate that the court supports Blackmun's ultimate conclusion that resort should be made to the Convention in the first instance. Blackmun did acknowledge, however, that circumstances might arise when United State litigants would be put at an unfair disadvantage against foreign litigants if forced to make use of the Convention's procedures. *Societe Nationale*, 107 S. Ct. 2542, 2567-568 (1987).

84. *Hudson*, 117 F.R.D. at 38. The court reasoned that as judges become more familiarized with the Convention, its procedures may become as effective as American procedure. *Id.*

85. 118 F.R.D. 386 (D.N.J. 1987).



foreign corporation, to respond to discovery requests made pursuant to the Federal Rules of Civil Procedure.<sup>86</sup> The court expressly disagreed with the *Hudson* court's analysis<sup>87</sup> and required the foreign litigants to prove that the sovereign interests implicated in the dispute required adherence to the Convention. Likewise, the court in *Haynes v. Kleinweifers*<sup>88</sup> limited the *Hudson* decision to its facts and required the defendant to show "cognent reasons" why the Convention should be employed.<sup>89</sup>

These decisions, if indicative of how other courts will interpret *Societe Nationale*, accentuate the uncertainty created by the opinion. Depending upon the court, foreign litigants may or may not be able to rely upon Convention procedures and American litigants may or may not be forced to adhere to the Convention procedures. This result is particularly ironic in light of the signatories' intent to provide for a uniform rule of gathering evidence.

#### IV. SUBSEQUENT CONDUCT BY SIGNATORIES TO THE HAGUE CONVENTION AS EVIDENCE OF EXCLUSIVITY: LEGISLATIVE, JUDICIAL AND EXECUTIVE INTERPRETATIONS

Response by signatory states to the Hague Convention was slow because, although the treaty opened for signature in 1970, few states deposited their instruments of ratification prior to 1980.<sup>90</sup> As a result, few opportunities for interpretation occurred prior to 1980.<sup>91</sup>

The United States' discovery rules are considered the most lenient of those countries which are parties to the Convention.<sup>92</sup> Two consequences follow from this well accepted premise. First, most disputes in foreign countries involve an American litigant attempting to obtain pre-

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86. *Id.* at 392.

87. The court believed that the *Hudson* decision placed too much emphasis on Blackmun's concurring opinion and improperly disregarded the majority's opinion. *Id.* at 384.

88. 119 F.R.D. 335 (E.D.N.Y. 1988).

89. *See also* *In Re Anschuetz & Co., GmbH*, 838 F.2d 1362 (5th Cir. 1988) (declining to give district court guidance in its determination of the applicability of the Convention) (on remand from the Supreme Court for a decision in light of *Societe Nationale*).

90. Those states that deposited instruments of ratification prior to 1980 included Czechoslovakia, the United States, Luxemburg, Singapore, and Great Britain and Northern Ireland. Hague Convention, *supra* note 1.

91. In the United States, however, litigation over the use of Convention procedures began shortly after ratification in 1972.

92. *See supra* note 1.

trial discovery of foreign nationals. Second, several countries have enacted legislation to curb overly intrusive "fishing expeditions"<sup>93</sup> conducted by American litigants.

### A. Foreign "Blocking" Legislation

Signatories to the Hague Evidence Convention deposit with the Netherlands instruments of ratification as well as any declarations and reservations made under the Convention.<sup>94</sup> Several states who are parties to the treaty have enacted "blocking" legislation. Two frequently litigated examples will be examined below.

#### 1. France

In 1980, France, a civil law country, enacted the penal law relating to the communication of economic, commercial, industrial, financial, or technical documents or information to foreign natural or legal persons ("Law").<sup>95</sup> The impetus for passage in the French Senate included evidence that American litigants were, in large part, disregarding the procedures in the Hague Convention<sup>96</sup> and specific instances of American courts seeking discovery of pre-trial documents.<sup>97</sup> The French Assembly also hoped the Law would hinder enforcement of American antitrust laws sufficiently to force referral of disputes to government negotiators.<sup>98</sup> However, the Assembly report noted that it was uncertain whether an American court would recognize a claim under the Law as grounds for non-compliance with a discovery order.<sup>99</sup>

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93. The term "fishing expedition" refers to discovery requests made by American courts for "material which might lead to the obtaining of evidence." *Rio Tinto Zinc v. Westinghouse Elec.*, [1978] 1 All E.R. 434, 453 (Viscount Dilhorne). Perhaps the most cited example of a fishing expedition conducted in England is the request made by an American court in *Radio Corp. of America v. Rauland Corp.*, [1956] 1 Q.B. 618. There, the request for production included any documents which are "relevant and material to the issues pending in the suit." *Id.* at 626.

The French have also made clear their disdain of the overly broad requests for discovery made by American courts. See Toms, *The French Response to Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW 585, 596 n.41. (1981).

94. Hague Convention, *supra* note 7, arts. 39-42.

95. French Penal Code Law No. 80-538, reprinted in 75 AM. J. INT'L L. 382 (1981). The Supreme Court examined this law in *Societe Nationale*, 107 S. Ct. 2542, 2546 n.6, 2556 n.2, (1987). For an excellent legislative history of the statute see Toms, *supra* note 93, at 588-90.

96. Current Developments, *The 1980 French Law on Documents and Information*, 75 AM. J. INT'L L. 382, 382 (1981).

97. *Id.*

98. Toms, *supra* note 93, at 590.

99. *Id.*

Article 1 of the Law prohibits transmission of economic, commercial, or financial information to foreign authorities when transmission would threaten French interests, unless it is required by an international agreement.<sup>100</sup> Conversely, Article 1 *bis* prohibits any person from requesting such information for use in a foreign judicial proceeding unless an international agreement provides otherwise.<sup>101</sup> Other sections of the Law require persons who are asked to supply such information to notify the relevant ministry<sup>102</sup> and impose penalties for violators of Articles 1 and 1 *bis*.<sup>103</sup>

As one commentator observed, stricter standards apply to information sought for the purpose of foreign judicial or administrative proceedings (Article 1 *bis*) than information sought by foreign public authorities without a view to judicial proceedings (Article 1).<sup>104</sup> Article 1 only prohibits discovery of information that threatens sovereignty interests, whereas Article 1 *bis* contains a blanket exclusion of all information sought for judicial and administrative procedures. Additionally, the Law will result in a greater reluctance on the part of French nationals to cooperate with foreign states, even when a foreign state may exercise effective jurisdiction over the individuals and the information sought. Such resistance will impair further the already limited procedures for taking evidence abroad.

Clearly, the purposes of the French Assembly include a desire to command greater respect for and use of the traditional means for taking evidence in France.<sup>105</sup> At the same time, the Law requires compliance with the otherwise prohibited requests if the foreign party seeks the information pursuant to the Convention.<sup>106</sup> This indicates France's satisfaction with the treaty procedures specifically agreed to by its negotiators. Therefore, ratification of the Hague Convention by France indicates that

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100. French Penal Law No. 80-538, art. 1, *reprinted in* 75 AM. J. INT'L L. 382 (1981).

101. *Id.*, art. 1 *bis*.

102. *Id.*, art. 2.

103. *Id.*, art. 3. Penalties range from two to six months imprisonment to 10,000 to 120,000 francs in fines, or both. *Id.*

104. Current Developments, *The 1980 French Law on Documents and Information*, 75 AM. J. INT'L L. 382 (1981).

105. See generally Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35 (1979).

106. See Current Developments, *supra* note 104, at 385 (purposes of Article 1 *bis* include prohibiting foreign lawyers from engaging in "legal tourism," preventing the collection of valuable French information in foreign states, and the renegotiation of the Hague Convention).

procedures other than those traditionally utilized in France or those in the Convention will not be acceptable to the French Assembly.

## 2. *United Kingdom*

England, a common law country,<sup>107</sup> enacted two pieces of legislation designed to implement the Hague Convention. These include The Evidence (Proceedings in Other Jurisdictions) Act of 1975 and the Protection of Trading Interests Act of 1980.<sup>108</sup> Both limit the extent to which foreign states may request and obtain information located in the United Kingdom.

The Evidence Act of 1975 sets out a comprehensive code for courts in the United Kingdom taking evidence on behalf of other courts.<sup>109</sup> The Preliminary Note to the Act explicitly states that some provisions are enacted to enable ratification of the Hague Convention.<sup>110</sup> The relevant provisions of the Act provide that when a foreign state requests evidence from an English court, the court shall have the power to order compliance with the request, provided the request is made on behalf of a foreign court and is sought for the purpose of a civil proceeding.<sup>111</sup> In addition to these conditions precedent, English courts use their discretion when drafting orders in response to foreign discovery requests.<sup>112</sup> The courts will not grant an order for pre-trial discovery,<sup>113</sup> grant general discovery requests,<sup>114</sup> or require persons to give evidence that would prejudice the security of the United Kingdom.<sup>115</sup>

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107. As in the United States, England's judicial process is adversarial and the parties to the litigation gather the evidence for use at trial. See *supra* note 14 for a discussion of the pertinent differences between discovery conducted in civil and common law states.

108. See Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697, 699-704 (1982) for an in-depth look at the legislative history of both acts.

109. Evidence (Proceedings in Other Jurisdictions) Act 1975, Preliminary Note (1975 ch. 34).

110. *Id.*

111. Evidence (Proceedings in Other Jurisdictions) Act of 1975, § 1 (1975 ch. 34).

112. *Id.* § 2 (I).

113. The United Kingdom, pursuant to Article 23 of the Hague Convention, declared that it will not execute Letters of Request seeking discovery of pre-trial evidence. 8 MARTINDALE HUBBEL LAW DIRECTORY, SELECTED INTERNATIONAL CONVENTIONS (pt. VII) 23 (1987).

114. Section 2(4) of the Evidence Act of 1975 states that an order from a court shall not require a person to disclose what documents may be in his possession which are relevant to the proceedings, or to produce documents other than those specifically requested in the letter of request that are in his possession.

115. The Secretary of State has discretionary power to issue a certificate stating that evidence given pursuant to the Act would be prejudicial. This certificate constitutes conclusive evidence of that fact. Evidence (Proceedings in Other Jurisdictions) Act of 1975, § 3(1)(3) (1975 ch. 34).

Five years after passage of the 1975 Evidence Act, Parliament enacted the Protection of Trading Interests Act of 1980.<sup>116</sup> The Trading Act effects a further narrowing of discovery procedures allowed by the English government.<sup>117</sup> This narrowing was designed to thwart efforts by American litigants to obtain, via long-arm statutes, information pertaining to English commerce.<sup>118</sup>

The Trading Act provides the Secretary of State with increased, indeed almost complete, discretionary authority over information requests made by foreign states. Section 2 of the Act provides that if the Secretary of State discovers that a foreign tribunal has required a citizen of the United Kingdom to produce commercial information to a court, or may have to produce such information, the Secretary may prohibit compliance.<sup>119</sup> The Secretary may only prohibit compliance, however, if it infringes on the United Kingdom's sovereignty or threatens the United Kingdom's security or foreign relations.<sup>120</sup>

Taken together, these two statutes effectively prevent the United States from utilizing any method of discovery other than those provided for in the Hague Convention. Moreover, the two statutes prevent certain information from leaving the country when the Secretary of State finds it either infringes on the United Kingdom's jurisdiction or is prejudicial to its interests. The Convention, on the other hand, permits non-compliance with a discovery request only when the recipient state considers the request prejudicial to its security or sovereignty.<sup>121</sup> Hence, the extent to which the English may refuse to execute a discovery request under its own laws exceeds its power to refuse a request issued pursuant to the Convention.<sup>122</sup>

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116. Protection of Trading Interests Act of 1980, 1980 Chapter 11, reprinted in B.A. RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL)* 1-7 (1986 Supp. & rev., 1980 Supp., no. 1).

117. According to Pettit & Styles, this legislation marks the "high water mark of English jurisdictional protectionism." Pettit & Styles, *supra* note 108, at 701.

118. *Id.*

119. Protection of Trading Interests Act of 1980, *supra* note 116, § 1.

120. *Id.* § 2.

121. Hague Convention, *supra* note 1, art. 12(b).

122. For additional background on the 1975 and 1980 English Acts, see generally Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation*, 17 *INT'L LAW.* 61 (1983); Huntley, *Some Jurisdictional Aspects of Enforcement of Antitrust Laws*, 30 *INT'L & COMP. L.Q.* 213 (1981); Lowe, *Blocking Extraterritorial Jurisdiction*, 75 *AM. J. INT'L L.* 257 (1981); Comment, *Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform*, 135 *U. PA. L. REV.* 1003 (1987).

The English legislative response indicates a belief on the part of the government that the procedures provided by the Hague Convention should be followed. Traditionally, the United Kingdom has allowed broad discovery requests within its territory by virtue of its common law principles. As demonstrated by the limited nature of its implementing statutes, the United Kingdom interprets the Convention to provide the preferred methods for seeking information located within its territories.

### *B. Foreign Judicial Interpretation of the Convention*

No other signatory has litigated the Hague Convention's applicability to discovery requests as frequently as the United States. Significant case law does exist, however, in the United Kingdom and the Federal Republic of Germany, two of the first countries to ratify the Convention.

#### *1. United Kingdom*

In *Rio Tinto Zinc v. Westinghouse Electric Corp.*,<sup>123</sup> the House of Lords reviewed two letters of request issued by the Eastern District of Virginia pursuant to the Convention. The letters, by request of defendant Westinghouse, sought examination of former directors and employees of a British corporation and production of documents located in England.<sup>124</sup> The British nationals appealed from an English Court of Appeals order executing the letters of request, claiming such discovery exceeded the permissible scope of the 1975 Evidence Act.<sup>125</sup>

The court held that, in the spirit of the 1975 Evidence Act, the letters should be executed to the greatest extent possible. Although Lord Wilberforce recognized the range of documents requested "undoubtedly extend into areas, access to which is forbidden by English law,"<sup>126</sup> the request included some specific documents that conformed to the 1975 Act.<sup>127</sup> Consequently, the letter of request for production of documents was upheld, but only to the extent permitted under the English imple-

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123. [1978] 1 All E.R. 434.

124. *Id.* at 440.

125. *See supra* notes 109-15 and accompanying text.

126. 1 All E.R. at 443.

127. *Id.* Lord Wilberforce examined the practice of "blue penciling," a technique used by the court of appeals to narrow the scope of the initial request as is permitted under § 2 of the 1975 Act. The Lord stated he would "have applied the blue pencil still more vigorously so as to leave in the schedule only 'particular documents specified' together with replies to letters where replies must be sent." *Id.*

menting statute.<sup>128</sup>

In *In re Norway's Application*,<sup>129</sup> the English Court of Appeals examined a letter of request issued by a Norwegian court to an English high court, requesting oral examination of two witnesses residing in the United Kingdom.<sup>130</sup> A duly appointed master granted the application.<sup>131</sup> On appeal, the witnesses claimed that the English court lacked jurisdiction to comply with the request<sup>132</sup> and, alternatively, that the court should use its discretion and deny the request.<sup>133</sup>

The Court of Appeals found that the legal proceeding in Norway constituted a civil matter under either state's laws.<sup>134</sup> Therefore, the high court had proper jurisdiction under the 1975 Evidence Act to comply with the letter of request.<sup>135</sup> In addition, the court recognized, as a matter of public policy, that English courts would not ordinarily assist in the enforcement of foreign revenue laws.<sup>136</sup> However, compliance with the request would not offend either public policy or comity where the request was supported by both parties to the Norwegian litigation.<sup>137</sup> The court affirmed the grant of application for the above reasons.

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128. Five separate opinions were written for this decision, including two dissenting opinions expressing the view that the request for documents should not be executed. Viscount Dilhorne, relying on the United Kingdom's declaration that it would not execute letters issued for the purpose of pre-trial discovery, concluded that the documents requested were of a "fishing character." *Id.* at 454. After so characterizing the request, Dilhorne refused to look at the types of documents requested, but rather looked only to the purposes for which they were sought. Lord Fraser of Tullybelton also expressed the view that the order should be reversed. *Id.* at 471. Fraser believed the documents sought were not evidence and therefore outside the parameters for discovery under the 1975 Act. *Id.*

129. [1986] 3 W.L.R. 452.

130. *Id.* at 452. Both Norway and the United Kingdom are signatories to the Hague Convention. The letters of request issued by Norway complied with Convention procedures. *Id.*

131. Under § 1 of the Evidence (Proceedings in Other Jurisdictions) Act of 1975, the state, upon receipt of a letter of request, refers the application to a master who makes the initial decision to grant or deny the request. In this case, the master granted the request, but on review the high court modified the master's order, narrowing the scope of questions to be asked of the witnesses. *Id.* at 457.

132. The witnesses argued that, because the proceeding taking place in Norway involved estate taxes, the legal process was not technically a civil or commercial matter within the meaning of §§ 1 and 9(1) of the 1975 Evidence Act. *Id.* at 457.

133. *Id.* at 456-57.

134. *Id.* at 465.

135. *Id.* at 472.

136. *Id.* at 480.

137. *Id.* at 481. The court suggested that if one party to the foreign litigation opposed a request for tax information, then the English courts would be obliged to refuse the request on grounds of public policy. *Id.*

In *J. Barber & Sons v. Lloyds*,<sup>138</sup> a United States court sought, through a letter of request executed pursuant to Hague Convention procedures, evidence from defendants residing in England. Furthermore, the United States court wanted the evidence recorded on videotape.<sup>139</sup> The Queen's Bench stated that videotaping of evidence is not traditionally allowed in English courts. However, the court should normally employ the requested method unless it is excessively inconsistent with established procedures. In that case a court, in its discretion, should disallow the request.<sup>140</sup> Finally, the court noted that England's 1975 Evidence Act and the Hague Convention "make it clear that the underlying principle is that the English court should be sympathetic to the request of the foreign court."<sup>141</sup>

Finally, in *MacKinnon v. Donaldson, Lufkin & Jenrette Securities Corp.*,<sup>142</sup> two parties to an English case obtained an ex parte order and subpoena to compel a non-party American bank to produce information located in New York.<sup>143</sup> The English court discharged both the order and subpoena against the bank, finding them to be an infringement of the sovereignty and banking laws of the United States.<sup>144</sup> The court noted that "the first and more orthodox route would be to apply to a master . . . for the issue of letters of request to the courts of New York," or to comply with American procedure through a New York court.<sup>145</sup>

Thus the English courts have interpreted the Hague Convention and their own implementing legislation as providing the preferred procedures for taking evidence within their territory, as well as for use by English

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138. [1987] 1 Q.B. 103. A Queen's Bench proceeding is a trial in the first instance, akin to an American trial court.

139. An attempt to secure the evidence willingly from the defendants proved unsuccessful due to the defendants' belief that the taping of evidence was not a permissible method of recordation under English procedure. *Id.* at 103.

140. The court recognized that the demeanor of the witnesses had become important and, although videotaping is generally prohibited by English procedure, videotape had been utilized in certain instances and, consequently, the procedure was not excessively inconsistent with established principles. *Id.*

141. *Id.* at 104.

142. [1986] 1 Ch. 482.

143. *Id.* at 490.

144. *Id.* at 493-94. The court found ironic that the principle espoused—used here to protect an American national—was the direct result of excessive American discovery practices against British nationals.

145. The court also praised the United States District Court's decision in *Laker Airways, Ltd. v. Pan American World Airways*, 607 F. Supp. 324 (S.D.N.Y. 1985), which held that the provisions of the Hague Convention should be resorted to in the first instance. [1986] 1 Ch. at 496.



nationals abroad. The House of Lords and the lower trial and appellate courts all mandate that foreign courts use the procedures outlined in the Evidence Act of 1975. Although the courts promote the purpose of facilitating the taking of evidence, they are not hesitant to find that requests deviating from the settled procedures are unenforceable.

## 2. *The Federal Republic of Germany*

To date, only one case has arisen in the West German courts regarding a request for judicial assistance under the Hague Convention. In *Corning Glass Works v. International Telephone & Telegraph Corp.*,<sup>146</sup> the District Court for Western District of Virginia issued a letter of request, in accordance with Convention procedures, to a West German Ministry requesting examination of witnesses and production of documents.<sup>147</sup> The Ministry complied with the request for oral examination, but denied the document production request.<sup>148</sup>

Both the grant of oral examination and denial of document production were appealed to the Oberlandesgericht<sup>149</sup> by the affected parties. The court affirmed the examination order, finding that the letter could be executed even though the procedure for transmitting the request was defective.<sup>150</sup> Had the request for evidence been issued through means other than the Convention, the court indicated the request might not be executed because the requested procedures are otherwise unwarranted under German law.<sup>151</sup>

In making its decision, the court stated that the "guiding principle mandating this result is the desire of . . . Germany to place judicial assist-

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146. No. 9 VA 4/80 (Munich Ct. App. Nov. 27, 1980) (petition for review of an administrative ruling under §§ 23 *et seq.*, E66VF, judgment of June 2, 1980 issued in File No. 9341-E-Ia-403/80), reprinted in 20 I.L.M. 1025 (1981).

147. *Id.* at 1027. The text of the letter is reprinted in the opinion. *Id.* at 1040.

148. *Id.* at 1028. The Ministry denied the request for documents because the American court sought discovery of pre-trial documents which the Federal Republic of Germany declared it would not honor pursuant to Article 23 of the Hague Convention. *Id.*

149. The Oberlandesgericht is West Germany's Higher Regional Court. The court treated each appeal in a separate opinion.

150. *Id.* at 1032-35. Petitioners urged the court to overturn the order granting depositions on grounds of procedural impropriety. They urged the following violations: (1) the letter was not transmitted directly to the Bavarian Ministry, (2) the witnesses' addresses were missing from the letter of request, and (3) the questions to be asked of the witnesses were not furnished. 20 I.L.M. at 1032-35. The court rejected these defects because the first two were inconsequential and the third could be remedied by allowing examination of the witnesses only with regard to the documents specifically included in the request. *Id.*

151. *Id.* at 1037.

ance with the United States on a solid treaty basis, as was done in the Convention, and thereby take due account of the procedural device of pre-trial discovery," otherwise unknown in Germany.<sup>152</sup> The court rejected the contention that the information sought was not intended for use in any prospective legal proceeding as required by Article 1(2) of the Hague Convention. Pre-trial discovery in America, the court correctly observed, presupposes a prospective legal proceeding and is intended to disclose evidence for use at trial.<sup>153</sup>

In a separate opinion, the court also affirmed the Ministry's decision refusing discovery of documents.<sup>154</sup> The documents were requested for the purpose of pre-trial discovery. Not only had Germany declared it would refuse to honor requests for such documents, but the administrative regulations authorized by the German implementing statute, which might permit such production under certain conditions, had not yet been promulgated.<sup>155</sup>

The *Corning* decision indicates that the German courts interpret the Hague Convention as more than an advisory treaty.<sup>156</sup> The court clearly reads the treaty as providing the procedural minima for foreign courts requesting evidence in West Germany and therefore permitting nothing else or less until specifically recognized in its implementing legislation.

### C. Official Government Positions of Signatory States

Traditionally, foreign governments communicate with one another through their State Departments or the equivalent thereof. As a consequence, the United States Supreme Court, when confronted with interna-

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152. *Id.* at 1036.

153. *Id.* at 1039.

154. No. 9 VA 3/80 (Munich Ct. App. Oct. 31, 1980) (petition for review of an administrative ruling under §§ 23 *et seq.*, E66VG, judgement of June 2, 1980 issued in File No. 9341 E-Ia-403/80), reprinted in 20 I.L.M. 1049 (1981).

155. *Id.* at 1053. The court carefully circumscribed the question of when discovery of pre-trial documents might be allowed. The court declared:

It need not be decided in the present case whether execution of an American request for judicial assistance seeking not only documents but also other evidence at the discovery stage might be denied, irrespective of the [German] declaration under Article 23 of the Convention, because it constitutes a fishing expedition which is inadmissible under German procedural law, or else because it violates a substantive or procedural tenet of German *ordre public*. . . .

*Id.* at 1055.

156. See also *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 107 S. Ct. 2543, 2550 (1987) (Blackmun, J., concurring in part and dissenting in part) ("[the Convention] cannot be viewed as merely advisory").

tional conflicts, typically defers to the United States State Department.<sup>157</sup> The State Department altered the system slightly in 1978 by declaring that it would no longer transmit diplomatic notes from foreign states to the Supreme Court.<sup>158</sup> Rather, foreign governments are now encouraged to make their interests in American litigation known through the filing of an *amicus curiae* brief.<sup>159</sup>

These briefs, because they are now the favored means by which a foreign state officially expresses its position on international matters subject to judicial resolution, should be viewed by the Court as accurate indicators of a foreign state's interpretation of the Convention. Thus, a discussion of the positions so expressed by signatory states is in order.<sup>160</sup>

### 1. *England and Northern Ireland*

Writing in support of the petitioners in *Societe Nationale*, the government of the United Kingdom expressed its view that, although the Hague Convention is not the exclusive means of gathering evidence abroad, courts should respect a signatory state's requirement that Convention

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157. Although this practice occurs when courts interpret international agreements, it prevails most frequently in conflicts involving sovereign immunity of states. For an example of the State Department's influence, see *supra* note 8.

158. Dept. of State File No. P76 0101-2129, *reprinted in* 73 AM. J. INT'L L. 124 (1979).

159. This new method was believed to be a more effective means for a foreign state to express its views. *Id.* at 125.

Evidently, at first, the change in procedure did not go over well with the courts. In *In re Uranium Anti-Trust Litigation*, *Westinghouse Electric Corp. v. Rio Algom Ltd.*, 617 F.2d 1248 (7th Cir. 1980), the Seventh Circuit expressed shock that the defendants' governments submitted *amicus* briefs. Subsequently, the Department of State wrote to the Associate Attorney General, requesting that he clarify the Department's position for the court. Letter to Associate Attorney General, March 17, 1980, *reprinted in* 74 AM. J. INT'L L. 665, 666 (1980). Finally, on May 6, 1980, Associate Attorney General Shenefield made a formal statement of interest on behalf of the United States to the Seventh Circuit. Commenting on the numerous concerns of foreign countries regarding the exercise of United States jurisdictional authority outside the United States territories, Shenefield declared: "The views and representations advanced by these foreign governments are entitled to appropriate deference and weight in resolving legal questions that turn, at the least in part, on considerations of international comity." Dept. of State File No. P80-0108-2005, *reprinted in* 74 AM. J. INT'L L. 928, 929 (1980).

160. Several *amicus* briefs were filed with the Supreme Court in *Societe Nationale* prior to oral argument. The only states submitting briefs who are signatories to the Convention were France, Germany, and the United Kingdom. Other briefs were filed by Switzerland, the Italy-America Chamber of Commerce, the Motor Vehicle Manufacturers Association of the United States, the United States and the Securities and Exchange Commission, and Compania Gijonesa de Navigacion, S.A. All the briefs were submitted in support of petitioners except the brief by Gijonesa de Navigacion.

procedures be regarded as the mandatory method.<sup>161</sup> The United Kingdom argued that sovereignty dictates once a procedure has been established by a signatory state as a means of implementing an international agreement, due regard be given to the procedure. Therefore, resort to Convention procedures in the first instance is required.<sup>162</sup>

Furthermore, the United Kingdom argued that judicial practice in the United States embodies mutual self-restraint between signatories. As a result, when a state advances a sovereign interest through, for example, foreign blocking legislation, that exercise of sovereignty must be respected by the requesting state.<sup>163</sup> Although the United States identified several substantial interests in obtaining information located in France,<sup>164</sup> the French blocking statute does not threaten that interest, but merely mandates that designated procedures be followed in consideration of France's sovereignty.<sup>165</sup>

Finally, the brief promoted the underlying interest of a stable and dependable international system. The application of one state's laws in such a way that requires violations of foreign laws should be avoided whenever possible in the interest of fairness to the parties.<sup>166</sup>

## 2. *Federal Republic of Germany*

In its amicus brief, the government of West Germany examined discovery procedures prior to the Convention and characterized them as inadequate and chaotic.<sup>167</sup> The negotiations leading up to the treaty in-

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161. Amicus Brief of The Government of The United Kingdom of Great Britain and Northern Ireland 4-8, *Societe Nationale*, 107 S. Ct. 2542 (1987). The United Kingdom agreed with the lower court's opinion in *Societe Naitonale* and relied upon the permissive language found in Article 1 of the Convention, which states that "a Contracting State may . . . request the competent authority. . . ." *Id.* at 5 n.4 (emphasis added).

162. The brief also noted that if a request for evidence failed to be executed, then the courts are always free to compel production of the information pursuant to domestic laws. *Id.* at 8.

163. *Id.* at 14. "United States courts should not lightly reject such expressions of sovereign authority."

164. The interest of the United States identified in the brief was the protection of Americans from harmful effects of defective products manufactured abroad. *Id.* at 14-15.

165. According to the United Kingdom, to determine if a blocking statute threatens an identified interest, the court should look to the possible alternatives to compelling a foreign national to break a foreign law. *Id.* at 15 n.20. The French law presents no threat, claimed the United Kingdom, because the information can be obtained through use of Convention procedures. *Id.* at 15. Moreover, assuming an identifiable interest, the United Kingdom suggested that the benefit to be derived from a demonstration of respect for a foreign law would outweigh the interest. *Id.*

166. *Id.* at 19.

167. Amicus Brief for the Federal Republic of Germany 3, *Societe Nationale*, 107 S. Ct. 2542

icated a desire on behalf of all countries to bridge the gap between common law and civil law discovery methods. As a result, Germany insisted that the Convention's procedures were applicable in *Societe Nationale*.<sup>168</sup>

In support of this argument, the brief pointed to Germany's willingness to aid American courts in obtaining evidence located within its territories.<sup>169</sup> Additionally, the conflict seen by the lower court in *Societe Nationale* between the Convention's procedures and the Federal Rules of Civil Procedure is ephemeral, according to Germany, because the Federal Rules were not designed for application to extraterritorial discovery.<sup>170</sup> Germany enunciated the belief that difficulties concerning the Convention and its applicability must be resolved by diplomatic means, not by the courts, as explicitly provided in the Convention.<sup>171</sup>

Finally, the brief declared that any attempt by the United States to circumvent the Convention would constitute a violation of the principle that treaties are to be interpreted in good faith.<sup>172</sup> Germany concluded with a warning that should the United States attempt to take evidence in Germany without using the Convention's procedures, such an attempt would be considered interference with the sovereignty of the German judiciary.<sup>173</sup>

### 3. France

The Government of France expressed its dissatisfaction with American attempts at securing documents located within France, particularly

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(1987). Prior to the Convention, asserted Germany, the only method by which an American court could obtain access to information located in Germany was under American domestic law. *Id.* Germany recognized that, traditionally, discovery requests from foreign courts were granted in American courts, whereas the reciprocal requests of American courts were of little value in civil law courts. *Id.* at 4.

168. *Id.* at 4-5.

169. German courts expressed this willingness in *Corning Glass Works v. Int'l Tel. & Tel. Corp.*, *supra* notes 146, 154. Germany pointed out that in *Corning* the Oberlandesgericht allowed discovery even though the requests did not comply with Convention standards. Amicus Brief *supra* note 167, at 7.

170. Amicus Brief, *supra* note 167, at 11 (citing Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 236 (1986)).

171. Amicus Brief, *supra* note 167, at 12-13. Article 36 of the Convention states: "Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels." Hague Convention, *supra* note 1, art. 36.

172. Amicus Brief, *supra* note 167, at 14. This requirement is found in the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 138 (1965).

173. Amicus Brief, *supra* note 167, at 14-15.

in the *Societe Nationale* litigation.<sup>174</sup> Supporting petitioners' appeal, the brief looked to the negotiating history and language of the Convention to reach the conclusion that the procedures adopted provide the exclusive means of discovery unless France determines otherwise.

The French government claimed that, given the desire of all parties to the Convention to facilitate the taking of evidence abroad by resolving differences in discovery techniques,<sup>175</sup> the civil law signatories would have had little incentive to agree to the American innovations unless the Convention limited the procedures by which Americans could seek discovery abroad.<sup>176</sup> France also stated its belief that the discovery order at issue infringed upon French sovereignty and violated French law. France claimed that "the Evidence Convention protects the judicial sovereignty of the country in which the evidence is taken, not the interest of the parties to the suit."<sup>177</sup>

The brief also declared that reasonable opportunities exist for foreign litigants to collect evidence abroad.<sup>178</sup> The French Code of Civil Procedure provides for compulsory discovery pursuant to the Hague Evidence Convention.<sup>179</sup> Thus, when foreign litigants comply with the procedures embodied in the treaty, the French government will comply with the request in good faith to the greatest extent possible under French laws and Convention provisions.<sup>180</sup>

All three briefs by signatory states enunciate a common belief about the applicability of the Convention's procedures. The commonality is an understanding, by civil and common law states alike, that resort must be made to Convention provisions when alternative methods would interfere with a foreign state's sovereignty. This understanding is clearly con-

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174. Amicus Brief of The Republic of France In Support of Petitioners 1, *Societe Nationale*, 107 S. Ct. 2542 (1987). In France's statement of interest the government declared that it had an evident interest in regulating activities within its territory, especially because the discovery requests were directed to French corporations. *Id.*

175. *Id.* at 8-9. France, like Germany, pointed to differences between French and American discovery methods prior to the Convention. France claimed the Convention represented an attempt to facilitate discovery, but did not completely alter France's system of procedure. *Id.*

176. *Id.* at 11. "The Convention should not be interpreted as if it merely gave the United States new and unilateral privileges without imposing upon it any concomitant obligation of restraint." *Id.* at 12.

177. *Id.* at 15. This statement was made in response to the lower court's opinion that the Convention procedures do not apply when an American court exercises personal jurisdiction over a foreigner. *Id.*

178. *Id.* at 18-21.

179. *Id.*

180. *Id.*

sistent with the Convention's language. Moreover, it furthers both the fundamental principle of state sovereignty and the common desire of all states to facilitate discovery within the international community.

## V. CONCLUSION

The United States judiciary fails to engage in thorough interpretive analysis of international agreements, like the Hague Convention, when it ignores the subsequent interpretations of signatory states. Fundamental principles of treaty interpretation,<sup>181</sup> prior judicial decisions, and current policy statements by the United States<sup>182</sup> sanction use of this principle.

Should courts ultimately engage in this more complete decision-making analysis, they would come face to face with sharply different interpretations of the Convention. These signatory states have expressed their understanding of the Convention's applicability in their legislation, judicial opinions, and amicus briefs. Without exception<sup>183</sup> the signatory states regard Convention procedures as mandatory in the first instance.<sup>184</sup> The United States judiciary should not abandon the Principle of Subsequent Conduct but should continue to acknowledge the positions of sovereign states when interpreting international agreements.<sup>185</sup> Such a practice for the Hague Convention or other agreements would result in a more accurate interpretation of agreements and promote international cooperation between states.

*Diane M. Peters*

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181. *See supra* notes 29-34 and accompanying text.

182. *See supra* note 158 and accompanying text.

183. The author is unaware of signatory states who interpret the use of Convention procedures as a purely discretionary decision by the requesting state.

184. This statement is qualified when resort is made to the traditional domestic procedures for obtaining information in the forum state.

185. The author believes that this view does not mandate total abandonment by the courts of United States interests. *See supra* note 39.