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The Hague Evidence Convention and State Courts after Societe Nationale Industrielle Aerospatiale v. U.S. District Court: Has the Supreme Court Unveiled a Federal Right

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"If we are to be one nation in any respect, it clearly ought to be in respect to other nations."

—The Federalist No. 42 (J. Madison)

I. INTRODUCTION

A clash between judicial and foreign-relation interests[1] occurring in both state and federal courts led in part toward the United States taking the lead in proposing and ratifying the Hague Convention on the Taking of Evidence Abroad (Convention).[2] The Convention was designed "to facilitate the obtaining of evidence abroad"[3] through a system " 'tolerable' in the State of execution and . . . 'utilizable' in the forum of the State of origin where the action is pending."[4] The Convention sets forth procedures whereby a judicial authority in one contracting state may request evidence located in a second state, without offending the sovereignty of the second state.[5]

Most cases involving Convention application were brought in the

1. This clash of interests is exemplified by the facts of Societe Internationale v. Rogers, 357 U.S. 197 (1958), where a Swiss "blocking statute" effectively prevented the foreign petitioner from complying with the district court's discovery order unless the petitioner was willing to suffer criminal penalties in Switzerland. In overturning the district court's dismissal with prejudice of the petitioner's complaint, the United States Supreme Court took into account the need for respecting Swiss sovereignty and showed compassion for the petitioner's lack of "willfulness, bad faith, or . . . fault." *Id.* at 212.

2. The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter Convention].

3. Letter of transmittal from Richard Nixon on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 12 I.L.M. 323 (1973).

4. Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 12 I.L.M. 327 (1973).

5. *See id.* Pre-trial discovery, as practiced in the United States, is virtually unheard of in Europe. In most civil law countries, evidence gathering is exclusively a function of the judge or judicial officer. *See* R. SCHLESINGER, COMPARATIVE LAW 443-48 (5th ed. 1988). Thus, evidence gathering by the adverse parties might be seen by the judicial authorities in a European host nation as an affront.

federal courts.[6] However, both state and federal court systems demonstrated a lack of consistency with regard to when the Convention should apply, and whether its application was mandatory. Certain state and federal courts felt that principles of international comity required a "rule of first resort" to Convention procedures where an attempt was being made to discover evidence abroad.[7] Other courts reasoned that where a foreign litigant was subject to the in personam jurisdiction of an American court, any discoverable evidence was technically not outside of the forum, and thus the forum's discovery rules could not be supplanted by the Convention.[8]

The United States Supreme Court decided to settle the issue in *Societe Nationale Industrielle Aerospatiale v. United States District Court*.[9] The Court held that the Convention provides an optional method of discovery in United States district courts.[10] The district court judge now has discretion to employ this discovery method once he has scrutinized "the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective."[11] The Court rejected both the first resort rule[12] for using the Convention and the jurisdictional rationale for avoiding use of the Convention

6. Most of these cases were product liability suits involving foreign manufacturers with, in some cases, United States based subsidiaries. Thus, in a case where the plaintiff might decide to sue in state court, the defendant could choose to remove based on diversity of citizenship. *See* 28 U.S.C. § 1332(a)(2) (West Supp. 1985) for diversity jurisdiction and 28 U.S.C. § 1441(a)(1) (West 1973) for removal jurisdiction.

7. *See, e.g.*, Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983); Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981). These courts have adopted a rule of first resort, where if the Convention procedures appear applicable, then they should be made use of until their use results in an impasse. The rationale behind this "first resort rule" rests upon the notion of international comity: "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

8. *See, e.g., In re* Ancshuetz & Co., GmbH, 754 F.2d 602 (5th Cir. 1985), and Wilson v. Lufthansa German Airlines, 108 A.D.2d 393, 489 N.Y.S.2d 575 (1985). The jurisdictional rationale relied upon by these courts, that once the foreign party is under the court's personal jurisdiction, the court then has plenary power to order discovery, is well established. *See* Societe Internationale v. Rogers, 357 U.S. 197 (1958). However, as the dissent in Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542 (1987), points out, this rationale ignores the strong policy established by the Convention that a court should forego exercise of its full power to order discovery "for the purpose of furthering United States interests and minimizing international disputes." *Id.* at 2560, n. 4 (Blackmun, J., dissenting).

9. 107 S. Ct. 2542 (1987).

10. *Id.* at 2556.

11. *Id.* at 2556 (footnote omitted).

12. *Id.* at 2555.

altogether.[13]

After first outlining the Court's holding in *Societe Nationale*, this Comment will address issues relevant to the interaction between this newly interpreted federal act and the various state courts presumably charged with its enforcement. The analysis will initially cover ways in which state courts are bound by federal treaties. The focus will then shift to the Court's analysis in *Societe Nationale*, and how it has arguably found within the Convention a federal right akin to procedural due process. Finally, after examining the effect of the Court's holding on the various states which have already dealt with the issue of Convention usage, this Comment will conclude with a proposal for legislation requiring uniform applicaton of the Convention at both state and Federal levels.

II. THE COURT'S DECISION IN *SOCIETE NATIONALE*

The underlying facts of *Societe Nationale* are simple enough. A French-made airplane crashed in Iowa, injuring two, and precipitating lawsuits in federal court for negligence and breach of warranty.[14] The two defendants in that action were corporations, owned by the Republic of France, engaged in the design and manufacture of the suspect aircraft.[15]

After initial discovery was conducted pursuant to the Federal Rules of Civil Procedure without objection, the French defendants responded to the plaintiffs' second set of production of evidence requests by filing a motion for a protective order.[16] The motion pointed out that since the materials sought to be discovered would only be found in France,[17] French penal law prohibited the defendants from responding to such requests that did not comply with the Convention.[18] The Magistrate denied the motion after finding that the interest in protecting United States citizens from harmful foreign products was stronger than France's interest in protecting its citizens from intrusive discovery, and that the former interest was best served by ap-

13. *Id.* at 2554.

14. *Id.* at 2546.

15. *Id.*

16. *Id.*

17. The Court of Appeals for the Eighth Circuit implicitly held that the "location" of the materials was irrelevant so long as they were within the "possession" of a litigant properly before the court. *See In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124 (8th Cir. 1986).

18. Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542, 2546 (1987).

plication of the Federal Rules of Civil Procedure and not the Convention.[19]

The defendants next sought a writ of mandamus from the Court of Appeals for the Eighth Circuit.[20] The court of appeals held that the Convention does not apply when the district court has jurisdiction over a foreign litigant, but noted that the Convention procedures would still be useful for obtaining evidence from nonparties.[21] That court rationalized that the potential overruling of a foreign court's refusal to provide discovery would defeat rather than promote international comity.[22]

Accepting the defendants' petition for certiorari, the United States Supreme Court vacated the judgment of the court of appeals and remanded the case for further proceedings.[23] After a lengthy discussion of the history behind the Convention,[24] the Court acknowledged that "both the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States."[25] In order to decide how and when each set of discovery rules should be applied, the Court framed four possible interactions between them: (1) exclusive use of the Convention is required "whenever evidence located abroad is requested for use in an American court;" (2) the Convention "require[s] first, but not exclusive, use of its procedures;" (3) the Convention merely "establish[es] a supplemental set of discovery procedures . . . to which concerns of [international] comity . . . require first resort by American courts;" and (4) the Convention should be "viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties . . . [and] the interests of the concerned foreign nation."[26]

The Court "reject[ed] the first two possible interpretations as inconsistent with the language and . . . history of the Hague Convention."[27] In rejecting the third alternative, later championed by the

19. *Id.* at 2547.
20. *Id.*
21. *Id.*
22. *Id.* at 2547-48.
23. *Id.* at 2557.
24. *Id.* at 2548-50.
25. *Id.* at 2550.
26. *Id.*
27. *Id.* The Court placed particular emphasis on the lack of mandatory terms in the language of the Convention. For example, the word "may" is often used instead of "must."

dissent, the Court decided that an inflexible rule requiring first resort to the Convention in all applicable cases would be "inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts."[28] The majority noted that Convention procedures, in many instances, would be dilatory and expensive, as well as less functional than direct use of the Federal Rules of Civil Procedure.[29] Thus, the Court declined to hold that comity requires first resort to Convention procedures without a case by case scrutiny of the facts, sovereign interests, and probable efficacy of resorting to those procedures.[30] The Court required a sensitivity to sovereign interests and emphasized that the foreign litigant should be given a full and fair opportunity to demonstrate appropriate reasons for using the optional set of procedures provided by the Convention.[31]

In framing the issue to be resolved in *Societe Nationale*, the Court seemed to limit the effect of its holding: "The question presented in this case concerns the extent to which a *Federal District Court* must employ the procedures set forth in the Convention. . . ."[32] In answering this question the Court noted:

> petitioners correctly assert that both the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States. This observation, however, does not dispose of the question before us; we must analyze the interaction between these two bodies of federal law.[33]

Presumably, since the Court may decide only cases and controversies,[34] and may not issue advisory opinions,[35] the Court avoided any

28. *Id.* at 2555. The dissent reasoned that, in practice, domestic courts would inadequately perform the Court's case-by-case comity analysis because where there is any doubt, national interests will tend to be favored over foreign interests. *Id.* at 2560. The dissent further argued that there was no need for a case-by-case resort to comity principles because "the conflicts they are designed to resolve already have been eliminated by the agreements expressed in the treaty." *Id.* at 2562.

29. *Id.* at 2555.

30. *Id.* at 2556.

31. *Id.* at 2557.

32. *Id.* at 2545-46 (emphasis added).

33. *Id.* at 2550 (citation omitted).

34. U.S. CONST. art. III, § 2 cl. 1. The case or controversy requirement of Article III has, since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), been interpreted as limiting judicial review to a function of deciding disputes between adverse parties before the court, in which it is necessary to examine the constitutional validity of applicable legislation to resolve the dispute at hand. *See* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297 (1979).

35. *See* Flast v. Cohen, 392 U.S. 83, 94-97 (1968). The Court in *Flast* emphasized that the function of federal courts was limited to questions presented in an adversarial context so as

direct holding of the interaction between the Hague Convention and state discovery rules.[36]

Thus, the question naturally arises: to what extent, if any, are state courts bound to follow the procedures outlined by the Court in *Societe Nationale* and, if they are not technically bound, does this present a problem?

III. ANALYSIS

A. The Binding Effect of Treaties

Initially, it is important to note that treaties, like other federal laws, are supreme and binding upon state court judges.[37] Likewise, a state law must yield to the extent that it impairs the policy of a valid treaty.[38] However, a treaty does not automatically supersede inconsistent local laws unless the treaty provisions are self-executing.[39] To determine whether a treaty is self-executing, "courts look to the intent of the signatory parties as manifested by the language of the instrument . . . [and] it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts."[40] The Court in *Societe Nationale* went through this analysis, and the Court's interpretation of the treaty is most definitely binding upon both state and federal courts:[41]

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to assure that the courts would not intrude into areas committed to the legislative or executive branches.

36. The Court makes several vague references to "an American court" and "any other discovery procedures," but it is unclear from the context of these references whether the Court is attempting to broaden the scope of its opinion to extend over state courts or to override state discovery procedures. Even assuming that this is the case, these references would be dicta, and therefore could not be used to directly overturn state court precedent. Thus, trying to resolve this enigma in no way answers the question to which this Comment addresses itself: whether state courts are bound to treat the relationship between the Convention and state discovery rules in the same manner which district courts must now treat the interface between the Convention and the Federal Rules of Civil Procedure.

37. *See* U.S. CONST. art. VI, § 2. *See also* Kolovrat v. Oregon, 366 U.S. 187, 190 (1961); United States v. Pink, 315 U.S. 203 (1942); Missouri v. Holland, 252 U.S. 416, 433 (1920) ("Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States . . . .").

38. *Pink*, 315 U.S. at 231.

39. *See* Foster v. Neilson, 2 Pet. 253, 314 (A treaty is "to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself, without the aid of any legislative provision.") *See also* Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

40. *Sei Fujii*, 38 Cal. 2d at 721-22, 242 P.2d at 620.

41. The issue of what a treaty requires is a federal question subject to Supreme Court review. *See Pink*, 315 U.S. at 203, 217; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, at 242 (1972).

> The Preamble does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices. The text of the Evidence Convention itself does not modify the law of any contracting State, require any contracting State to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting State to change its own evidence-gathering procedures.[42]
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> . . . .
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> . . . The Hague Convention . . . contains no such plain statement of a pre-emptive intent.[43]

It is clear from this interpretation that the treaty was not "intended to prescribe a rule that, standing alone, would be enforceable in the courts."[44] Implicit in the Court's determination that the Convention "was intended to establish optional procedures"[45] is the conclusion that the Convention was not meant to stand alone as an enforceable rule, and therefore state rules are not necessarily superseded via the supremacy clause of the United States Constitution.[46]

B. The Convention's Creation of a Federal Right

However, the Court intimates that the Convention does provide certain rights which transcend local rules. In rejecting the court of appeals' holding that the Convention was inapplicable, the Court noted:

> It must be recalled, however that the Convention's specification of duties in executing States creates corresponding rights in requesting States; holding that the Convention does not apply in this situation would deprive domestic litigants of access to evidence through treaty procedures to which the contracting States have assented. Moreover, such a rule would deny the foreign litigant a full and fair opportunity to demonstrate appropriate reasons for employing Convention procedures in the first instance, for some aspects of the discovery process.[47]

It is not readily apparent whether these guiding principles enunciated

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42. Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542, 2550-51 (1987).

43. *Id.* at 2553.

44. *See supra* text accompanying note 40.

45. *Societe Nationale*, 107 S. Ct. at 2553.

46. *See supra* text accompanying notes 25-26.

47. Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542, 2557 (1987).

by the Court extend beyond a directive to the lower federal courts. Given the Court's appraisal of the treaty as providing merely an option to the Federal Rules, the treaty's lack of expressed pre-emptive intent, and a long tradition of state autonomy over the application of procedural mechanisms in state courts,[48] the Supreme Court seemingly could not set a mandate for the states to follow.[49] Significantly, however, the Court interprets the Convention as creating "corresponding rights in requesting States." By stating that the Convention establishes "optional procedures"[50] which foreign litigants would have "a full and fair opportunity to demonstrate appropriate reasons for employing," the court uses language which suggests that these 'corresponding rights' are essential to fairness.[51] Thus, while the Court states that the Convention was not pre-emptive in terms of replacing local rules, it interprets the Convention as having created a federal right to have the Convention procedures fairly considered, a right seemingly akin to procedural due process and thus guaranteed to all parties, whether in state or federal court.

The Fourteenth Amendment's guarantee of due process provides procedural safeguards for the individual against the arbitrary wielding of state power.[52] The historic origin of these safeguards lies in the notion that personal freedom can be preserved only through some institutional check on arbitrary government action.[53] Early on, the Supreme Court concluded that due process "cannot be so construed as to leave Congress [or the states] free to make any process 'due process of law,' by its mere will."[54] Professor Tribe has recently identified as an "instrumental approach" to due process: "such process as may be required to minimize 'substantially unfair or mistaken depri-

48. For a comprehensive discussion of the rationale behind this deference to state procedural mechanisms, *see* Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982)(O'Connor, J., dissenting).

49. *See, e.g.*, New York Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973) ("It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so."); Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973) ("Congress legislated here in a field which the States have traditionally occupied .... So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

50. *Societe Nationale*, 107 S. Ct. at 2553.

51. *Id.* at 2557.

52. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-7, at 666 (2d ed. 1988).

53. *Id.*

54. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855).

vations' of the entitlements conferred by law . . . [ensuring] that a challenged action accurately reflects the substantive rules applicable to such action; its point is less to assure *participation* than to *use* participation to assure *accuracy*."[55] Tribe's characterization reflects the settled idea that government may not deprive individuals of liberty or property without providing an opportunity to be heard in a meaningful time and manner,[56] in order to assure an accurate and principled basis for decision-making. The Convention was most likely intended to achieve the same sort of assurance.

In *Mathews v. Eldridge*,[57] the Supreme Court identified three factors which generally require consideration in resolving whether the demands of procedural due process have been met in a given situation:[58]

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[59]

The analysis suggested by these three factors is strikingly similar to the "particularized analysis," which the Court requires in *Societe Nationale*, of "the particular facts, sovereign interests, and likelihood that resort to [Convention] procedures will prove effective."[60] The Court touches upon all three of the *Mathews* factors in reaching its conclusion in *Societe Nationale*.

Beginning with the private interest factor, it is important to note that before due process requirements apply, the private interest at stake must be within the Fourteenth Amendment's protection of liberty and property.[61] Property interests are not created by the Constitution, but rather stem from an independent source such as a statute which secures certain benefits and supports a claim of entitlement to

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55. L. TRIBE, *supra* note 52, at 667 (footnotes omitted) (emphasis in original).

56. *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

57. 424 U.S. 319 (1976).

58. The Court in *Mathews* noted that due process is not a fixed set of rules, unrelated to time or place, but rather calls for such protections as the particular set of circumstances require. Matthews v. Eldridge, 424 U.S. 319, 334.

59. *Id.* at 335.

60. Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542, 2555-56 (1987).

61. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

those benefits.[62] By requiring that the foreign litigant be given an opportunity to demonstrate reasons for employing Convention procedures in the first instance,[63] the Court in *Societe Nationale* suggests that a federal law supports a claim of entitlement to the benefits of Convention usage. The private interest at stake here is a property interest in fairly applied discovery procedures. The Court notes that in many instances the operation of United States' discovery rules, coupled with foreign hostility toward their extraterritorial application, could work a deprival of this interest if the Convention were entirely unavailable.[64]

The second factor identified in *Mathews* is the risk of an erroneous deprivation of the private interest. In this vein, the Court in *Societe Nationale* stresses the "special vigilance [required of American courts] to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position."[65] The Court accordingly recognizes that the private interest in fairly applied discovery procedures is subject to a heightened risk of deprivation where the foreign litigant is involved. To balance this danger, the Convention should be available as a safety valve for those cases where the potential for abusive discovery is greatest.

Finally, the Court identifies the Government's interest as encompassed within Rule One of the Federal Rules of Civil Procedure: "the 'just, speedy, and inexpensive determination' of litigation in our courts."[66] Using Rule One as a guide, the Court notes that while "[i]n many situations the [Convention procedures] would be unduly time consuming and expensive,"[67] in other instances "a litigant's first use of the Hague Convention procedures can be expected to yield more evidence abroad more promptly than use of the normal procedures governing pre-trial discovery."[68] As with all of these factors, the Government's interest will have to be weighed on a case-by-case basis.

The Court never mentions outright the possibility of a foreign litigant being denied due process because of non-application of the

62. *Id.* at 577.
63. *Societe Nationale*, 107 S. Ct. at 2557.
64. *Id.* at 2556 n. 29.
65. *Id.* at 2557.
66. *Id.* at 2555.
67. *Id.*
68. *Id.* at n. 26.

Convention. However, the fact that the Court held that the Convention must be fairly considered as an optional set of discovery procedures, suggests that the Convention represents a property right which cannot be deprived by the states without due process of law. If the Court has indeed unveiled a federal right created by the Convention, then to the extent that this creation was a valid exercise of federal power, this federal right cannot be defeated by the forms of local practice.[69] The Convention language supports the proposition that Congress intended to create a right in litigants to have the Convention procedures available when the procedures would facilitate the obtaining of evidence abroad.[70] Also, the Court's rejection in *Societe Nationale* of the court of appeals' hard-line "does not apply" approach indicates such an intent. Therefore, the question remains: Was the creation of this federal right a valid exercise of federal power?

C. Federal Rights and Federalism

In *Federal Energy Regulatory Comm'n v. Mississippi*,[71] the Supreme Court was faced with a situation analogous to *Societe Nationale*. The state of Mississippi and the Mississippi Public Service Commission both sought a declaratory judgement that certain Titles of the Public Utility Regulatory Policies Act of 1978[72] (PURPA) were unconstitutional. Mississippi argued that PURPA was beyond the scope of congressional power under the commerce clause of the Constitution and invaded state sovereignty in violation of the tenth amendment.[73] PURPA was enacted to combat the nationwide energy

69. This "reverse-*Erie*" situation was first revealed in a line of cases dealing with the Federal Employers' Liability Act. *See, e.g.*, Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952); Brown v. W. Ry. of Al., 338 U.S. 294 (1949); Bowman v. Illinois Cent. R.R., 11 Ill. 2d 186, 142 N.E.2d 104 (1957). The interesting point of distinction is that these cases faced the problem of state court enforcement of a "substantive right" created by Congress, and the extent to which state rules of practice and procedure might detract from a substantive right. Here, the federal "substantive right" is wholly concerned with procedure, and is not a right of recovery or a right granting a cause of action as in the aforementioned cases. Thus, the right created by the Convention, if valid, eludes the sort of labeling that animated the typical *Erie* Doctrine situation.

70. *See* Convention, *supra* note 2, at 2555 ("the States signatory . . . [d]esiring to improve mutual judicial cooperation in civil or commercial matters, [h]ave resolved to conclude a convention to this effect . . . ."). *See also* Letter of transmittal from Richard Nixon, *supra* note 3, at 323 [("This convention is a significant step forward in the field of international judicial cooperation. It will permit our courts *and litigants* to avail themselves of a number of improved and simplified procedures for the taking of evidence.")(emphasis added)].

71. 456 U.S. 742 (1982).

72. Pub. L. 95-617, 92 Stat. 3117.

73. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 752 (1982).

crisis by directing "state utility regulatory commissions and nonregulated utilities to 'consider' the adoption and implementation of specific 'rate design' and regulatory standards."[74] In the Court's tenth amendment analysis of PURPA's "Mandatory Consideration of Standards," the majority began by acknowledging "that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty."[75] The Court proceeded, however, to note instances "where the Court has upheld federal statutory structures that in effect directed state decision makers to take or to refrain from taking certain actions,"[76] and where "the Court has recognized that valid federal enactments may have an effect on state policy—and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority."[77]

PURPA is similar to the federal right created by the Convention in that Congress, short of preempting state regulation of a field traditionally within the states' regulatory domain, has "adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards."[78] In upholding this section of PURPA, the Court found appropriate the constitutional analysis found in *Hodel v. Virginia Surface Mining & Reclamation Association*:[79]

> the most that can be said is that the . . . Act establishes a program of cooperative federalism that allows the States, within limits es-

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74. *Id.* at 746.

75. *Id.* at 761 (quoting National League of Cities v. Usery, 426 U.S. 833, 851 (1976)).

76. *Federal Energy Regulatory Comm'n*, 456 U.S. at 762. The Court cites Testa v. Katt, 330 U.S. 386 (1947), for the proposition that the Federal Government has some power to enlist the States' judiciary to further federal ends.

77. *Federal Energy Regulatory Comm'n*, 456 U.S. at 766. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), does not undermine the analysis. Dealing with the limits on Congress' authority to encroach upon purely intrastate activities involving traditional state functions, the *Garcia* Court rejected the long followed test enunciated in National League of Cities v. Usery, 426 U.S. 833 (1976). The *Garcia* Court accepted *National League of Cities*' argument that the states must have *some* inviolable island of sovereignty, but felt that the states would be adequately protected by our representational, federal legislative process. *Garcia*, 469 U.S. at 556. The Court held that it was enough to support the Congressional action by finding that it was not destructive of state sovereignty, and was not violative of any affirmative constitutional limit on Congressional power. *Id.* at 554.

Federal Energy Regulatory Comm'n is consistent with *Garcia* in that the Court is sensitive to the states' sovereign interests while recognizing Congressional power to intrude upon that sovereignty to some extent, limited by the Constitution. The *Federal Energy Regulatory Comm'n* majority avoided reliance upon *National League of Cities*, unlike the lower court which it reversed, and the dissent which it rejected.

78. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 765 (1982).

79. 452 U.S. 264 (1981).

> tablished by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.[80]

Likewise, the Convention establishes a program of cooperative federalism by providing that litigants in both state and federal courts shall have the right to "demonstrate appropriate reasons for employing Convention procedures,"[81] while allowing the state courts to structure their judicial systems as they see fit.

The Convention, like PURPA, establishes an important federal policy. Here, the policy involves improving mutual judicial cooperation with our allies.[82] This policy would prove vulnerable should individual states have the power to ignore the procedures designed to implement it. As Justice Sutherland stated in *United States v. Belmont*,[83] "[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."[84] Thus, state courts would seem bound to adhere to the federal minimum set out in *Societe Nationale* for district courts.

One commentator has analyzed the problem of the enforceability of federal rights in state courts by looking at whether the policy expressed by the federal rule outweighs the significance of the state policy on the same matter.[85] As the Supreme Court recognized in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[86] "countervailing federal interests may override state rules which do not express important state policies even though in some circumstances a difference in outcome will result."[87] This commentator concluded that "[u]nlike the diversity area . . . the extent of the constitutional compulsion in the 'converse *Erie*' situation turns on an interpretation of the statute,"[88] and that "the weighing of the relevant policy considerations will occur, for all practical purposes, only once—when the statute is being

80. *Id.* at 289.

81. *See supra* notes 35-36 and accompanying text.

82. *See supra* note 38.

83. 301 U.S. 324 (1937).

84. *Id.* at 331.

85. Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1559-61 (1961).

86. 356 U.S. 525 (1958).

87. Note, *supra* note 85, at 1560. Although *Byrd* was addressing the converse situation of state procedural rights in federal courts, the principle enunciated seems no less applicable where federal procedural rights are at issue in state courts.

88. *Id.*

construed."[89]

The Supreme Court was forced to weigh relevant federal policies when it interpreted the Convention as providing optional procedures which require consideration in applicable district court cases.[90] Although the Court did not examine state court policies that might conflict with its conclusion, it is hard to imagine an important state policy that would require abstaining from consideration and use of Convention procedures where they would legitimately facilitate the gathering of evidence abroad. Any state policy in this case would have to be based on protecting resident litigants from expensive and ineffective discovery procedures. Dealing with these same convenience and fairness concerns in the federal system, the Supreme Court has decided that they will be adequately abated by discretionary consideration and use of the Convention.

At least one court has concluded that the policy issues in state court adjudications involving foreign litigants turn more upon private rights and less upon international relation issues as determined by decisions of the United States Supreme Court. In *Johnston v. Compagnie Generale Transatlantique*,[91] the New York Court of Appeals explicitly rejected the United States Supreme Court's holding in *Hilton v. Guyot*[92] as binding upon state courts. *Hilton* had decided that judgments acquired in French courts were unenforceable in the United States on the basis of reciprocity; that is, because French courts did not give binding effect to United States court judgments. In ignoring *Hilton*, the *Johnston* court held:

> A right acquired under a foreign judgment may be established in this State without reference to the rules of evidence laid down by the courts of the United States. Comity is not a rule of law, but is a rule of 'practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.' [citation omitted] It therefore rests, not on the basis of reciprocity, but upon the persuasiveness of the foreign judgment.[93]

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89. *Id.* at 1561.

90. *Sees* Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542, 2563 (1987).

91. 242 N.Y. 381, 152 N.E. 121 (1926).

92. 159 U.S. 113 (1895).

93. Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 387, 152 N.E. 121, 123 (1926).

The *Johnston* court, in focusing on the private rights of the parties, seemed to ignore the interplay between private rights and international relations at work behind the *Hilton* decision. The court implicitly found that comity existed directly between the State of New York and the Republic of France, and as such it was for New York to discern its obligations under that "rule of practice, convenience and expediency."[94]

Johnston is distinguishable from the issue presented here, in that no legislative command was involved. However, it is worth noting as representative of one court which concluded that states have an independent basis for relationships with foreign sovereigns; a basis which could not always be usurped by the United States Supreme Court acting alone. Since the decision in *Societe Nationale* was based on a federal treaty, the states' independent relations with foreign sovereigns are necessarily circumscribed by the Court's interpretation of that treaty: here, that a federal right has been created for litigants in American courts which cannot be abridged by state local rules.

IV. Effect on State Courts

In view of these guiding principles, state courts that previously would have followed the reasoning in *In re Anshuetz*,[95] that the Convention has no application to parties subject to the court's in personam jurisdiction, will now be compelled to scrutinize in each case "the particular facts, sovereign interests, and likelihood that resort to [Convention] procedures will prove effective."[96]

As of the date of this writing there have been seven state court decisions which have addressed the issue of the Convention's interaction with state discovery rules.[97] Five out of the seven decisions have followed the approach taken in *Volkswagenwerk* requiring a litigant seeking evidence abroad to first use Convention procedures, while reserving the right to enforce discovery orders under the state rules

94. *Id.*

95. 754 F.2d 602 (5th Cir. 1985).

96. *Id.* at 484.

97. Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981); Morton-Norwich Products v. Rhone-Poulenc, Civil Action No. 6525, slip op. (Del. Ch. 1981); Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982); Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686 (N.J. Super. Ct. App. Div. 1984); Goldschmidt v. Smith, 676 S.W.2d 443 (Tex. Ct. App. 1984); Gebr. Eickhoff Maschinefabrik und Eisengieberei v. Starcher, 328 S.E.2d 492 (W. Va. 1985); Wilson v. Lufthansa German Airlines, 108 A.D.2d 393, 489 N.Y.S.2d 575 (N.Y. App. Div. 1985).

should Convention procedures prove ineffective.[98] The remaining two decisions, *Morton-Norwich Products v. Rhone-Poulenc*[99] and *Wilson v. Lufthansa German Airlines*,[100] express the view enunciated in *In re Anshuetz*[101] that the Convention "has no application whatsoever to the production of evidence in this country by a party subject to [the court's] jurisdiction."[102]

A. Effect on State Courts Refusing to Apply the Convention.

A look at the leading New York state court precedent, *Wilson v. Lufthansa German Airlines*,[103] where the court rejected use of the Convention altogether, shows that while the application of *Societe Nationale* may not have affected the result in that case, the manner in which that result was obtained would be changed. In *Wilson*, the plaintiff alleged that the defendant, a foreign corporation, negligently maintained a DC-10 jet, resulting in a crash, thereby causing him injuries.[104] Among the materials the plaintiff sought to discover were "accident reports, all work and repair orders concerning the jet involved in the accident, and the names and addresses of those individuals working on the subject aircraft."[105] Upon the defendant's failure to respond to the plaintiff's discovery requests, Special Term granted the plaintiff's motion to compel over the defendant's objection that the Convention "requires that discovery requests directed at foreign corporations comply with [C]onvention procedures."[106] In affirming the lower court's order, the appellate court emphasized that "most of the requested documents *appeared* to relate to local matters emanating from the use of Lufthansa's terminal space at the New York airports."[107] The higher court concluded that since the documents sought "are *more likely* to be located in New York, as opposed to the West German, corporate offices of Lufthansa . . . invocation of the

98. *Volkswagenwerk*, 123 Cal. App. 3d at 857-59.

99. No. 6525 (Del. Ch. Nov. 24, 1981).

100. 108 A.D.2d 393, 489 N.Y.S.2d 575 (N.Y. App. Div. 1985).

101. 754 F.2d 602 (5th Cir. 1985).

102. *Wilson*, 108 A.D.2d at 396, 489 N.Y.S.2d at 577.

103. 108 A.D.2d 393, 489 N.Y.S.2d 575 (N.Y. App. Div. 1985).

104. *Id.* at 393-94, 489 N.Y.S.2d at 575.

105. *Id.* at 394, 489 N.Y.S.2d at 576.

106. *Id.* In this case, the Convention would have required the court to execute a letter of request addressed to the competent judicial authority in West Germany. This letter would specify the nature of the evidence requested and might request that a United States diplomatic officer or consular agent participate in taking the evidence to be transmitted back to the New York court.

107. *Id.* at 396, 489 N.Y.S.2d at 577 (emphasis added).

Hague Evidence Convention would unduly complicate the litigation."[108]

Societe Nationale seems to require greater scrutiny by the trial court of why the defendant was unable to comply with the discovery requests. To say that evidence is "more likely" to be located in New York indicates that the location of the documents had not been established. If the documents are located in the United States, and the defendant is properly within the court's jurisdiction, then invoking the aid of the West German judiciary would be completely unnecessary.[109] However, under *Societe Nationale*, the defendant in a case like *Wilson* must be given the opportunity "to demonstrate appropriate reasons for employing Convention procedures,"[110] (e.g. that the evidence is maintained in the West German offices of the parent corporation). In *Wilson* the court rejected use of the Convention before developing enough facts to appropriately scrutinize. Of course, it is possible that the defendant, after being given the opportunity, will fail to convince the court that the evidence sought is located abroad. Under *Societe Nationale*, the court *then* has discretion to reject the use of the Convention, and to compel discovery under the forum's discovery rules. Only by first allowing the foreign defendant to present reasons for Convention usage will the court be exercising that "special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position."[111]

B. Effect on State Courts Using the First Resort Rule.

Most of the other state courts follow the approach taken by the California Court of Appeals in *Volkswagenwerk Aktiengesellschaft v. Superior Court*.[112] In *Volkswagenwerk*, the plaintiff brought suit for injuries sustained while driving a "microbus" manufactured by the

108. *Id.* at 396-97, 489 N.Y.S.2d 577-78 (emphasis added).

109. The defendant in *Wilson* contended that the Convention was applicable to any discovery requested of a foreign national from a signatory country. *Id.* at 394, 489 N.Y.S.2d at 576. This contention is erroneous, as West German judicial authorities have no power to facilitate the taking of evidence in the United States; thus, invoking their assistance for this sort of evidence gathering would be useless, and contrary to the purposes which the Convention was designed to serve.

110. Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542, 2557 (1987).

111. *Id.*

112. 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981).

defendant, a West German corporation.[113] After "protracted discovery proceedings, including several bitterly contested motions for discovery orders and for sanctions," the trial court issued discovery orders "which would require [Volkswagenwerk] to permit inspection of its plant and documentary records, and to give other discovery, in Wolfsburg, West Germany."[114] On appeal, the defendant argued that the orders, "even to the extent they would be valid under the California Discovery Act, encroach impermissibly upon the judicial sovereignty of West Germany."[115] After noting that West Germany is a civil law state, wherein the gathering of evidence is exclusively a judicial function,[116] the court agreed that "because they conform to no West German law, treaty, or practice . . . the discovery orders . . . would violate West German judicial sovereignty."[117]

In dealing with this conflict, the *Volkswagenwerk* court admitted that a foreign corporation subject to the court's jurisdiction "may with technical propriety be ordered to act or to refrain from acting, in matters relevant to the lawsuit, at places outside the state."[118] However, the court recognized a countervailing force in international comity:

> The concept that the courts of one state should not, as a matter of sound international relations, require acts or forbearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that the order is justified. Rulings based in this concept of international comity are dictated not by technical principles of jurisdiction of the parties to or subject-matter of particular lawsuits, but rather by exercise of judicial self-restraint in furtherance of policy considerations which transcend individual lawsuits.[119]

In order to accommodate this important concept, the court conditionally adopted an approach used in certain federal cases, which involves "balancing the interests of the respective sovereignties"[120] after "the responding party has failed to give full discovery and seeks to avoid

113. *Id.*
114. *Id.* at 846, 176 Cal. Rptr. at 878.
115. *Id.* at 851, 176 Cal. Rptr. at 881.
116. *Id.* at 852, 176 Cal. Rptr. at 881.
117. *Id.* at 855, 176 Cal. Rptr. at 883.
118. *Id.* at 856, 176 Cal. Rptr. at 883-84.
119. *Id.* at 857, 176 Cal. Rptr. at 884.
120. *Id.*

sanctions by asserting the conflict of sovereign demands upon it."[121] The qualification added by the court to this approach requires that the "initial discovery order must appear to take into account the ascertainable requirements of the foreign state and to adopt those procedures which are least likely to offend that state's sovereignty."[122] The *Volkswagenwerk* court concluded that Convention procedures should have been followed until use of such procedures resulted in an impasse.[123]

Unlike the approach taken in *Wilson*, the "first-resort" approach adopted in California and other states appears undisturbed by the Supreme Court's ruling in *Societe Nationale*. Although the Court declines "to announce a new rule of law that would require first resort to Convention procedures,"[124] there is nothing in the decision that would directly preclude a state court from adopting such a local rule. Nowhere in the opinion does the Court speak of a litigant's right to *not* have the Convention applied where the court otherwise finds it appropriate.

Furthermore, whereas the *Wilson* approach might be seen as inconsistent with the policy of the Convention and as contravening the foreign relations of the United States, the *Volkswagenwerk* rule enthusiastically supports and furthers the policy embodied in the Convention. Since the "first-resort" rule is not at odds with the purpose or policy of the Convention, and since the Court in *Societe Nationale* merely "decline[s] to hold as a blanket matter that comity requires resort to . . . Convention procedures without prior scrutiny in each case,"[125] state courts are free to adopt a rule of first resort to the Convention procedures, and consequently *Societe Nationale* presents no barrier.

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121. *Id.* at 858, 176 Cal. Rptr. at 884.

122. *Id.*

123. *Id.* at 859, 176 Cal. Rptr. at 885. *See also* Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 244 (1982).

124. Societe Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542, 2555 (1987). At least one court feels that the United States Supreme Court has taken the choice out of the matter. In Sandsend Financial Consultants v. Wood, 743 S.W.2d 364 (Tex. App. 1988), the Texas court felt bound by the high court's rejection of the rule of first-resort, and so overturned its own first-resort precedent enunciated in Goldschmidt A.G. v. Smith, 676 S.W.2d 443 (Tex. App. 1984). In an exceedingly brief opinion, the court felt its decision was mandated by federal supremacy in construing a treaty.

125. Societe Nationale Industrielle v. United States District Court, 107 S. Ct. 2542, 2556 (1987).

V. CONCLUSION

In *Societe Nationale*, the Supreme Court has taken an important step toward bolstering respect for the United States judicial system in the international community by rejecting the rationale behind *Wilson* and *In re Anshuetz*. In line with the opening quote to this Comment, some consistency in applying the Convention is crucial toward maintaining this respect.

If foreign investment in the United States continues to expand, it is more than likely that various state courts around the nation will become increasingly involved in litigation where Convention usage will be at issue. Although arguably the holding in *Societe Nationale* is strictly limited to the federal court system, the language of the opinion, as well as the structured policy of the Convention, suggests otherwise.

Nonetheless, the Supreme Court has at most set a federal minimum, which states like California may choose to exceed. When state courts provide differing procedural mechanisms that could variously affect outcomes, two types of forum shopping result: parties may or may not remove to federal court, and foreign corporations may choose with care where they establish their businesses. Upholding the integrity of the entire judicial system of the United States mandates that individual states not be presented with an option as to how far above this federal minimum they should go when their ultimate decision might have an effect on the amount of foreign investment they attract. The states should be given as much autonomy as possible over governance of their courts, but where United States foreign relations are involved, an overriding federal concern outweighs the need for state autonomy.

Because consistent application of the Convention would further its policies and goals, Congress should pass enabling legislation to establish how this Convention should be used by *all* United States courts. This legislation should set specific guidelines to help the trial judge's use of discretion. Factors for consideration should include: (1) the sensitivity of the information sought; (2) how intrusive the discovery would be on the sovereignty of the foreign nation (considering its particular judicial system); and (3) the consequences to the foreign litigant from a forced application of domestic discovery procedures. The goal of this legislation should center around how the

Convention can best be used to reconcile both United States' judicial and foreign relations interests.

Aaron P. Allan