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The Hague Evidence Convention: Its Impact on American Civil Procedure

JAMES S. McLEAN*

I. INTRODUCTORY STATEMENT

At a time when the world is experiencing increased international travel and commerce,¹ international litigation² is understandably becoming a common occurrence in the United States courts.³ Whether one looks to recent product liability litigation,⁴ current antitrust litigation,⁵ or criminal investigations conducted by federal agencies,⁶ foreign evidence is sought by United States litigants with more frequency from all corners of the globe.

A problem that has frequently confronted the American Bar in the discovery of evidence abroad is the hostile opposition of foreign litigants and their countries to American methods of pre-trial discov-

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1. See Statistical Abstract of the United States 880, Table No. 1545 (1982-83). Between 1975 and 1981, world imports increased 123%, world exports increased 125%, United States imports increased 163%, and United States exports increased 116%. *Id.*; Statistical Abstract of the United States 909, Table No. 1523 (1977). See also *Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981). At the end of 1983 the volume of United States investment abroad totaled \$226 billion. U. S. Department of Commerce, Survey of Current Business, August 1984, at 29. Direct foreign investment in the United States amounted to \$135 billion. *Id.* at 27.

2. The statement in this paper "international litigation" refers to civil litigation with a foreign party.

3. See *United States v. Strong*, 608 F. Supp. 188, 193 (D.C. Pa. 1985), where the judge commented that "there has been an explosion of civil litigation involving foreign entities in recent years."; see also RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES 385 (Rev. Tent. Draft. No. 6, 1985) [hereinafter RESTATEMENT].

4. See, e.g., *Volkswagenwerk v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982); *Pierburg GMBH and Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

5. See, e.g., *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585 (9th Cir. 1983); In re Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980).

6. See, e.g., *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 119 (1983). *United States v. Marc Rich*, 707 F.2d 663 (2nd Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983).

ery.⁷ This opposition is not limited to civil law countries,⁸ but apparently has reached almost unanimous opposition in other developed democracies.⁹

It is against this backdrop that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial matters was conceived and negotiated.¹⁰ Even though the Convention was intended to facilitate international discovery by United States litigants, it has received a cool reception from American courts,¹¹ especially at the federal level.¹² This chilly reception by the federal bench, together with the decision of the United States Supreme Court to stay on the sidelines,¹³ has precipitated substantial disarray in the current judicial treatment of the Hague Evidence Convention by United States courts.¹⁴

7. United States litigants' attempts to discover documents abroad have been the subject of the most opposition and controversy:

No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with the investigation and litigation in the United States. Some 15 states as of 1984 have adopted legislation expressly designed to counter U.S. efforts to secure production of documents situated outside the United States; other states, such as Switzerland, have had bank and business secrecy laws in effect for longer periods and not directed specifically against the United States.

RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 437 reporters note no. 1 at 333 (Rev. Tent. Draft No. 7, 1986).

8. It is evident that the United States discovery process is unique in the world regardless of the characterization of a country's legal system:

On top of this, foreign rules of discovery tend to be considerably more restrictive than their American counterparts. For example, foreign jurisdictions generally allow discovery only of matters that would be admissible at trial; the American practice of allowing the discovery of facts which may in turn lead to the discovery of admissible evidence is condemned as authorizing "fishing expeditions." Also, in contrast to the American practice, a foreign court is not likely to require a local parent to produce the records of its foreign subsidiaries. As a general matter, the trial judge will strictly supervise all aspects of the discovery process, applying the "blue pencil" to requests that wander from narrow bounds.

2 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 1510 at 227 (2d ed. 1981).

9. See generally Rosenthal & Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery*, 16 N.Y.U.J. INT'L L. & POL. 1075 (1984).

10. 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 Hague Evidence Convention or Convention].

11. See *infra* text accompanying notes 113-151.

12. See, e.g., *In re Anschuetz & Co. GMBH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (1985).

13. See, e.g., *Club Mediterranee, S.A. v. Dorin*, 469 U.S. 913 (1984). *But see infra* note 134 and accompanying text.

14. See 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) § 5-40, at 256.1 (1984).

This paper will attempt to bring some order to this disorder by applying accepted principles of international law to the application and interpretation of the Hague Evidence Convention.¹⁵ Given the variety of legal systems in the world, and recognizing that other systems do not recognize pre-trial discovery as we practice it, the inevitable conclusion is that the Hague Evidence Convention was intended to provide the exclusive procedures in the discovery of evidence located in signatory nations.

II. THE PROBLEM OF THE DISCOVERY OF EVIDENCE LOCATED ABROAD

A. Comparative Legal Systems

Procedures for conducting pre-trial discovery of evidence in foreign countries varies from country to country and is dependent upon the type of legal system found in each respective country. Whether a country characterizes its legal system as civil law, common law, socialist, or Muslim, the different procedures for pre-trial discovery vary greatly.¹⁶ For example, civil law countries use the inquisitorial method to obtain oral evidence, unlike the adversarial system used in the United States.¹⁷ Thus, the questioning of witnesses is undertaken by the judge.

In Germany, the judge is given expansive powers to obtain evidence.¹⁸ "It is the judge who determines which witnesses are to be heard, [and] which documents . . . are to be produced . . ."¹⁹ Indeed, after a suit is instituted, all proceedings that follow are in effect parts of the trial, which are conducted as a series of evidentiary hearings.²⁰ The trial is not viewed as a separate proceeding distinct from the rest of the suit.

In civil law nations, witnesses are not necessarily placed under oath before they testify and cross-examination is typically unknown.

15. See *infra* text accompanying notes 185-232.

16. SEIDEL, EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION, PRACTICING LAW INSTITUTE 22-23 (1984); O'Kane, *Taking Depositions Abroad: The Problems Still Remain*, 31 FED. INS. CONS. 343, 345 (1981).

17. Note, *Taking Evidence Outside of the United States*, 55 B.U.L. REV. 368, 373 n.37 (1975).

18. Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465, 466 (1983).

19. *Id.*

20. R. SCHLESINGER, *COMPARATIVE LAW* 398 (4th ed. 1980).

Evidence taken by the judge automatically becomes part of the record and expert testimony is done through court appointed experts which results in testimony of very high regard.²¹ Pre-trial discovery as known in common law countries, especially the procedures utilized in the United States, is virtually unheard of. Even in common law countries no system of evidence gathering resembles that of the United States:

In most common law countries, even England, one must often look hard to find the resemblances between pre-trial discovery there and pre-trial discovery in the U.S. In England, for example, although document discovery is available, depositions do not exist, interrogatories have strictly limited use, and discovery of third parties is not generally allowed.²²

The differences between discovery in the United States and other countries are numerous; to paraphrase one commentator's analysis:

1. Many countries have no pre-trial discovery as known in the United States;
2. Certain discovery devices such as depositions may not be allowed at all;
3. The scope of pre-trial discovery in other countries may be very narrow and much more limited than that allowed in the United States;
4. Document demands may be strictly confined to specific requests; and
5. Rules of procedure while conducting discovery may vary enormously. For example, depositions may not be transcribed verbatim.²³

Thus, it is these different methods of discovery utilized by various legal systems that create the conflict between the system of discovery in the United States and legal systems in the rest of the world. If United States litigants choose to ignore foreign methods of evidence gathering and seek to superimpose their system upon foreign litigants and foreign legal systems, this conflict is exacerbated. The conflict is especially acute in civil law nations where all judicial acts, including the taking of testimony and the inspection of documents, are viewed as public acts to be performed by the courts.²⁴ Since only a sovereign can perform public acts, it is considered an infringement upon a na-

21. *Id.* at 413.

22. Seidel, *supra* note 16, at 24.

23. *Id.* at 25-27.

24. Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures*, 13 INT'L LAW. 5, 6-7 (1979).

tion's "Judicial Sovereignty" for a private party to engage in acts such as evidence gathering.²⁵ All countries want their sovereignty to be respected and their legal system viewed as civilized. As one commentator put it, for United States litigants and United States courts to disregard the sovereignty of another nation in the area of evidence gathering is acute naivete:

U.S. Courts are not so naive as to think only the results of the U.S. system of justice are fair and the others are barbaric and must be ignored. Rather, the United States recognized the validity of other countries' systems of justice in many ways by, for example, enforcing certain foreign judgments and foreign arbitration awards here; giving certain *res judicata* effect here to foreign litigation; enforcing certain forum selection clauses requiring litigation in other countries; and dismissing litigation here on the basis that, under principles of *forum non conveniens*, a case should be tried in another country. On the other hand, the U.S. favors its system of discovery, sometimes unduly.²⁶

It was the recognition of this conflict that caused the United States to join the Hague Conference on Private International Law in 1964. At that time, the United States apparently recognized the need to reconcile, on the international plane, this conflict between United States litigants and foreign parties. The involvement of the United States with the Hague Conference resulted in its becoming a signatory to several multilateral judicial assistance Conventions.

B. *The History of American Participation in International Judicial Assistance*

The premise that each nation has exclusive rights over its own territory is an accepted principle of international law that cannot be seriously rebutted.²⁷ Thus, international judicial cooperation developed as a necessary component of the natural ordering of legal relationships within the civilized global community. Indeed, almost a century ago, the Oregon Supreme Court observed that the rendition of judicial assistance:

appertains to the administration of justice in its best sense, and its exercise is now common and unquestioned among civilized nations. It is true that the duty may not be imposed by positive local

25. *Id.* at 7.

26. Seidel, *supra* note 16, at 28.

27. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 Comment b (1965).

law, but it rests on national comity, creating a duty that no state could refuse to fulfill without forfeiting its standing among the civilized states of the world.²⁸

As far back as 1855, Congress enacted a statute authorizing federal courts to assist foreign tribunals.²⁹ The early federal international judicial assistance legislation was primarily designed to facilitate the transmission of letters rogatory with certain liberalizations in the legislation occurring in the 1948 amendments.³⁰

In 1964 Congress comprehensively revised the federal judicial assistance statutes. That same year the United States joined the Hague Conference which enabled the United States delegation to participate as a full member in the Conference's tenth session in October of 1964.³¹

The Hague Conference resulted in the 1965 drafting of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.³² The United States became a party to the Convention in 1969. The United States later became a party to the Hague Evidence Convention which came into force in 1972. Both the Hague Service and Evidence Conventions represent revisions of Chapters I and II of the 1954 Hague Convention on Civil Procedure which, in turn, was a modification of the 1905 Hague Convention.³³

The United States delegation further participated in negotiating the Inter-American Convention of Letters Rogatory in 1975.³⁴ In that same year they were a party to the negotiation of the Inter-American Convention on Taking Evidence Abroad.³⁵ In 1979, an additional Protocol to the Inter-American Convention on Letters Rogatory was negotiated and, in 1980, that Protocol and the Inter-American Convention on Letters Rogatory were signed by the United States.³⁶

28. *Oregon v. Bourne*, 21 Or. 218, 228, 27 P. 1048 (1891).

29. Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630.

30. Act of June 25, 1948, ch. 117, 62 Stat. 949; Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103.

31. B. RISTAU, *supra* note 14, at 6.

32. 20 U.S.C. 361; T.I.A.S. No. 6638; 658 U.N.T.S. 163, done at the Hague November 15, 1965. [hereinafter Hague Service Convention].

33. Amram, *U.S. Ratification of the Hague Convention on Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104 (1973).

34. 14 INT'L LEGAL MATERIALS 339 (1975).

35. *Id.* at 328.

36. 20 INT'L LEGAL MATERIALS 312 (1981).

In December of 1980, the United States acceded to the Hague Convention abolishing the requirement of legalization for foreign public documents.³⁷ In addition, the advice and consent of the Senate was received in 1979 for the Hague Public Documents Convention which was entered into force and effect for the United States in 1981.³⁸

Consequently, it is evident that the United States became extremely active in the negotiation and signing of various multilateral international judicial assistance conventions since 1964. A more detailed history of the formation of the Hague Evidence Convention and the involvement of the United States in its formation follows.

III. NEGOTIATING HISTORY AND PURPOSE OF THE CONVENTION

The purpose and intent of the Hague Evidence Convention, as articulated by Phillip W. Amram, the United States representative to the special commission and rapporteur of the special commission which drafted the Evidence Convention, is as follows:

In broad outline, the Convention seeks to:

- (1) improve the existing system of Letters of Request;
- (2) enlarge the devices for the taking of evidence by increasing the powers of consuls and by introducing in the civil law world, on a limited basis, the concept of the commissions; and
- (3) preserve all the more favorable and less restrictive practices arising from internal law, internal rules of procedure, and bilateral or multilateral conventions.³⁹

Although the United States was a member of the Hague Conference on Private International Law in 1964, which produced the International Convention on the Service of Documents Abroad, the United States was more active in its participation and drafting of the Hague Evidence Convention.⁴⁰

Pre-Convention discovery by United States litigants of foreign evidence had always been difficult⁴¹ and often times unsuccessful.⁴²

37. 527 U.S.T. 189, *opened for signature*, October 5, 1961.

38. 20 INT'L LEGAL MATERIALS 790 (1981).

39. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651, 652 (1969); Report of U.S. Delegation to Hague Conference, 8 INT'L LEGAL MATERIALS 785, 805 (1969).

40. See Amram, *supra* note 39.

41. See, e.g., Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation*, 14 VA. J. INT'L L. 747 (1974); and Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law Situs*, 64 NW. U.L. REV. 487 (1969).

42. See, e.g., *Societe Internationale Pour Participations Industrielles et Commerciales*,

The Convention as explained by Mr. Amram to American lawyers, was touted as a great step forward in international judicial assistance:

The Convention deserves the warm support of the American Bar Association and early ratification by the Senate. Like the Documents Convention, it carries out the Association's long struggle for improvement in international judicial cooperation. It makes no major changes in the United States' procedure and requires no major changes in the United States' legislation or rules. On the other front, it will give the United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants.⁴³

The Convention was intended by the negotiators to be a compromise in resolution of the conflict arising from the interface of United States and foreign, particularly civil, legal systems.⁴⁴ It was recognized in the President's letter to the Senate for advice and consent in ratifying the Convention, that the Hague Evidence Convention was consistent with the United States' policy for international judicial assistance but would require many other countries, particularly civil law countries, to make "important changes in their judicial assistance practice."⁴⁵ Even though it was recognized that foreign countries would have to make certain adjustments consistent with the Hague Evidence Convention, the concepts of state sovereignty and internal public policy were preserved:

The Chairman [of the commission] succinctly stated the basic principle which animated all the discussion. Any system of obtaining evidence or securing the performance of other judicial acts internationally must be "tolerable" in the state of execution and must also be "utilizable" in the forum of the state of origin where the action is pending.⁴⁶

Given that liberal judicial assistance to foreign litigants was already

S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087 (1958); see also Note, *Foreign Nondisclosure Laws*, 88 YALE L.J. 612 (1979).

43. See Amram, *supra* note 39, at 655.

44. *Id.*; see also letter of transmittal from Richard Nixon on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 12 INT'L LEGAL MATERIALS 323 (1973).

45. *Id.*

46. Explanatory report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 8 INT'L LEGAL MATERIALS 37 (1969). [hereinafter Explanatory Report].

mandated by federal law,⁴⁷ it appeared the United States had all to gain from the Convention and nothing to lose.⁴⁸ The Convention attempted to accommodate discovery "American style" to a limited extent,⁴⁹ and at the same time preserve civil law judicial sovereignty and evidence gathering.⁵⁰ Respect for signatory countries' internal law and procedures was afforded by preserving the right of a signatory nation to make specific declarations limiting their obligations to provide judicial assistance.⁵¹ Specifically, a Contracting State may declare under Article 23 of the Convention that it "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries."⁵² It is this declaration which has caused the most aggravation for United States litigants in their quest for foreign evidence in international litigation.⁵³ A more detailed analysis of this declaration and of the Convention's procedures follows.

IV. CONVENTION PROCEDURES

A. *Parties to the Convention*

The Convention provides that the States which were represented at the Eleventh Session at the Hague Conference on Private International Law are entitled to become parties to the Convention.⁵⁴ After the Convention has entered into force, any other state may accede to the Convention if it is a member of the Hague Convention, a member of the United Nations or one of its agencies, or if it is a party to the Statute of the International Court of Justice.⁵⁵

It should be noted that a later accession is not automatic and becomes effective only if other States file a "declaration" accepting the accession. Consequently, the accession is ineffective as to those states which file no declaration.⁵⁶

47. See 28 U.S.C. § 1782.

48. See generally Amram, *supra* note 39.

49. See Hague Evidence Convention, *supra* note 10, at arts. 15, 21.

50. *Id.* at art. 9.

51. See, e.g., *id.*, at art. 23.

52. *Id.*

53. See *infra* text accompanying notes 94-112.

54. Hague Evidence Convention, *supra* note 10, at art. 37.

55. *Id.* at art. 39(1).

56. *Id.*

B. Structure of the Convention

The Convention is divided into three parts or chapters. Chapter One deals with Letters of Request, regulating their form, content, methods of transmission, language, method of execution, compulsion, privileges, grounds for refusal to execute the letter and the question of costs.⁵⁷

Chapter Two involves the use of consuls or court appointed commissioners to take evidence. This chapter specifically deals with the circumstances under which a consul or a commissioner may take evidence. It further explains the approvals necessary in the State of execution and other procedures concerning the use of consuls or commissioners including the limits of their power.⁵⁸

Chapter Three contains the general provisions and clauses of the Convention. This chapter sets forth the specifics with respect to the central authority. It further regulates the relationship between the present Convention and the Civil Procedure Conventions of 1905 and 1954. Reservations, declarations, accessions, dispute resolution, and denunciations are all covered in that chapter.

It should be emphasized that Chapter Three contains Article 23 which, as explained above, allows contradicting States not to execute Letters of Request seeking pre-trial discovery of documents. To date, all States that have ratified the Convention, with the exception of Czechoslovakia, Israel, and the United States, have issued declarations under Article 23 stating that they will not honor requests "for the purpose of obtaining pre-trial discovery of documents as known in common law countries."⁵⁹

C. Scope of the Convention

Article 1 of the Convention provides that judicial assistance is to be rendered only in "civil or commercial matters." The Convention does not define civil or commercial. The use of the phrase "civil or commercial matters" is derived from the 1905 and 1954 Civil Procedure Conventions which employed the same term.⁶⁰ Previous use of the phrase made it apparent that a definition would be necessary.

The failure to define the phrase creates an ambiguity for American courts because it is not clear whether administrative proceedings

57. *Id.* at arts. 1-14.

58. *Id.* at arts. 15-22.

59. *Id.* at art. 23.

60. B. RISTAU, *supra* note 14, at 180.

would be covered. The leading treatise explains the problems this way:

In sum, the characterization of a suit in the requesting state as "civil" or "commercial," or the designation of a court as "civil court" or "commercial court," does not establish conclusively that a matter is "civil" or "commercial;" the underlying cause of action and the nature of the relief sought must be considered in determining whether a request falls within the scope of the Convention. Based on this analysis, American practitioners can expect to encounter some difficulties abroad, at least in some Convention states, with Letters of Request issued by the Court of International Trade, the Tax Court, and the Claims Court.⁶¹

Further limitations on the scope of the Convention can be derived from Article 1 which limits the issuance of a Letter of Request to "judicial" authorities of the State of origin. Thus, the Hague Evidence Convention is clear that a Letter of Request must originate from a court or tribunal relating to a controversy in litigation or before a court.

D. *The Central Authority*

Pursuant to Article 2, it is incumbent upon each Contracting State to establish a "Central Authority" for the receipt of Requests from other Contracting States.⁶² The idea of a Central Authority arose in connection with the Hague Service Convention. The function of the Central Authority is to receive Requests and transmit them to an executing authority. In the United States, the Department of Justice acts as the Central Authority for receiving Letters of Request.⁶³ Although it is not required, States that have ratified the Hague Service Convention and Hague Evidence Convention have designated the same authority as its Central Authority for both Conventions. The Hague Evidence Convention further allows designations of other authorities in addition to its Central Authority and federal States are "free to designate more than one Central Authority."⁶⁴ In addition, provisions are made for Contracting States with more than one legal system.⁶⁵

61. *Id.* at 183.

62. Hague Evidence Convention, *supra* note 10, at art. 2.

63. 28 C.F.R. § 0.49 (1983).

64. Hague Evidence Convention, *supra* note 10, at art. 24.

65. *Id.* at art. 25.

E. Letters of Request

Article 3 of the Convention prescribes the content of a Letter of Request. Article 4 regulates the appropriate language to be utilized. Both articles are crucial in that a Central Authority is empowered to reject a letter for failing to comply with the provisions of the Convention.⁶⁶

Article 3 is specific as to what items of information are required to be contained in the Letter of Request. For example, the authority requesting execution and the authority requested to execute it are to be included. Further, the nature of the proceedings and the evidence to be obtained relating to the scope of the Convention are required.⁶⁷ In addition, if live testimony of witnesses is required, then specific additional information must also be given.⁶⁸

At the meeting of the special commission at the Hague in June of 1978, the need for a model form for use in the transmission of international Letters of Request was pointed out.⁶⁹ A drafting committee was appointed and a recommended form was developed. Delegates of the Contracting States took it upon themselves to publicize the recommended form in their respective countries.⁷⁰

Since the Hague Evidence Convention is multilateral, the problem of language translation arises. Article 4 lays down the basic general rule that every Letter of Request must be written in the language of the State of execution or be accompanied by a translation into that language. That same Article creates a general exception requiring acceptance of a Letter either in English or French or a translation into one of these respective languages unless a contracting party had filed a reservation as authorized by Article 33.⁷¹

Nine Contracting States do not have French or English as an official language. Of those countries, Czechoslovakia, Israel, and Sweden have declared that they will accept Requests in English or French.⁷² Denmark, Finland, and Norway have declared that they will accept Requests in English.⁷³ The United States has declared

66. *Id.* at art. 5.

67. *Id.* at art. 1.

68. *Id.* at art. 3.

69. B. RISTAU, *supra* note 14, at 194.

70. *Id.* at 195.

71. Hague Evidence Convention, *supra* note 10, at art. 4.

72. B. RISTAU, *supra* note 14, at 207.

73. *Id.*

that it will accept Letters of Request in French.⁷⁴ Article 4 further requires that in the event that an incorrect language is used in a Letter without justifiable excuse, the costs of such translation into the required language shall be borne by the State of origin.⁷⁵

Article 9 provides that the execution of a Letter of Request shall be pursuant to the "methods and procedures" of the executing authority. This Article further provides that a special method or procedure may be requested by the requesting authority which is to be followed unless such procedure would be "incompatible with the internal law of the State of execution" or impossible or impracticable.⁷⁶

The general rule followed in the Convention is that costs incurred for or in the execution of Letters of Request "shall not give rise to any reimbursement." Articles 14 and 26 regulate the costs and fees for special procedures and service of process.⁷⁷ Article 28(f) does permit bilateral agreements concerning arrangements between Contracting States on such issues.⁷⁸

F. Declarations Under Article 23 of the Hague Evidence Convention

Article 23 of the Convention permits a State to declare that it will not execute a Letter of Request issued "for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."⁷⁹ All Contracting States to the Convention, with the exception of Czechoslovakia, Israel, and the United States, have made declarations under Article 23, essentially declining to execute Letters of Request seeking pre-trial discovery of documents.⁸⁰

It should be emphasized that Article 23 restricts declarations to "obtaining pre-trial discovery of documents."⁸¹ Consequently, a Contracting State may not decline to execute a Letter of Request seeking testimony of witnesses on the ground that such request constitutes pre-trial discovery of evidence. Regardless of the wording of Article 23 and the declarations, the existence of Article 23, together with the civil law mentality, mandates that the American lawyer patiently ex-

74. *Id.*

75. Hague Evidence Convention, *supra* note 10, at art. 4.

76. *Id.* at art. 9.

77. *Id.* at arts. 14, 26.

78. *Id.* at art. 28(f).

79. *Id.* at art. 23.

80. B. RISTAU, *supra* note 14, at app. C.

81. *Id.* at 233.

plain to the executing authorities the American litigation process. The necessity of this educational process is emphasized by Bruno Ristau in his treatise:

What lawyers and authorities in civil law jurisdictions find difficult to accept is: *first*, that American procedural law obligates the parties and their lawyers to gather all relevant and material evidence prior to the actual trial of the cause; *second*, that it is not the function of American judges to participate directly in the evidence-gathering process; and *third*, that (except for proceedings in some specialized courts, such as the Claims Court, the Court of International Trade, or the Tax Court) civil suits in this country are not tried "in installments." Lawyers trained only in continental procedural law find it difficult to accept that litigating parties in this country must have all the evidence on which they intend to rely on hand at the start of trial and that—especially where the case is tried before a jury—an American court will not order the trial stopped or suspended to enable a party to search for additional evidence abroad. Yet, some continental writers and courts contend that only a request issued *after the actual trial has started* shows conclusively that the evidence sought is intended for use at trial; requests for evidence at any earlier stage of the proceeding will always be suspected as constituting an impermissible "fishing expedition," designed to search out evidence on the basis of which to build a case.⁸²

Ristau goes on to suggest that for an American attorney to be successful in Letters of Request, it is incumbent upon him to identify the issues in some formal proceeding in order to substantiate to the foreign party or court that the evidence he is seeking pertains to such issues.⁸³ In the alternative, a party could have the trial court make a finding in the Letter of Request that the evidence sought is "for use at trial."⁸⁴

G. Taking of Evidence by Diplomatic Officers, Consular Agents, and Commissioners

Chapter Two of the Convention provides for the taking of evidence by "diplomatic officers and consular agents and court appointed commissioners."⁸⁵ For the purposes of this discussion,

82. *Id.* at 233-34.

83. *Id.* at 235.

84. *Id.*

85. Hague Evidence Convention, *supra* note 10, at ch. II.

diplomatic officers and consular agents will be referred to as consuls. Article 15 specifies the circumstances under which the consuls can take evidence:

In civil or commercial matters, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take evidence without compulsion of nationals of the State which he represents in aid of proceedings commenced in the courts of a State which he represents.⁸⁶

Although Article 15 limits the powers of the consul to take evidence from his own nationals, Article 16 extends his powers to take evidence from nationals of the host State. The underlying condition under both Articles 15 and 16 is that such testimony or evidence cannot be obtained under compulsion.⁸⁷ In the case of Article 16, appropriate permission must be obtained generally or specifically from the host State.⁸⁸

Article 17 authorizes a person duly appointed as a commissioner to take evidence in the territory of the Contracting State "in aid of proceedings commenced in the courts of another Contracting State."⁸⁹ Permission is also required in the State where the evidence is to be taken; consequently, evidence can be taken from all types of witnesses, domestic or foreign, to the State of execution. Article 17 provides that the requirement of permission may be waived by declaration. To date, only Finland and the United States have given unrestricted permission to court appointed commissioners to take evidence in their States. The United Kingdom has granted such permission on the condition of reciprocity, and Denmark and Portugal have filed declarations that they will not permit commissioners to take testimony in their States. All other States would require permission pursuant to Article 17.⁹⁰

Finally, Article 18 of the Convention allows a Contracting State to declare that a consul or commissioner may seek compulsory assistance against the witness from the host State. If a State chooses to file such a declaration, upon granting of an appropriate application to a designated authority, compulsory measures against the witness can be applied "which are appropriate and are prescribed by its law for use

86. *Id.* at art. 15.

87. *Id.* at arts. 15-16.

88. *Id.* at art. 16.

89. *Id.* at art. 17.

90. *Id.*

in internal proceedings."⁹¹ To date, only the United States has filed an unqualified declaration making available to foreign counsels unqualified court compulsion.⁹² Czechoslovakia and the United Kingdom have declared that compulsory measures will be applied only on the basis of reciprocity.⁹³

This concludes a brief analysis of the substantive provisions and detailed procedures provided for in the Convention. Even with the availability of such detailed procedures, which are reputed to be an improvement in international judicial assistance to United States litigants, there remains dissatisfaction on both sides of the Atlantic concerning the application and use of the Convention by United States litigants seeking the discovery of evidence abroad.

V. CURRENT PROBLEMS IN THE UTILIZATION OF THE CONVENTION BY UNITED STATES LITIGANTS

The United States litigants were dissatisfied with the numerous declarations filed by Contracting Parties and the declarations concerning Article 23 which allows parties to refuse to honor Requests to obtain pre-trial discovery of documents.⁹⁴ This dissatisfaction with Article 23 and other problems associated with the operation of the Convention resulted in a meeting of the Special Commission in June 1978.⁹⁵ The United States delegate to the Commission, Mr. Bruno Ristau, attempted to deal with the declarations of Contracting Parties under Article 23 of the Convention.⁹⁶ What surfaced, for presumably the first time, was the gross misunderstanding expressed by other members of the Commission concerning their translation of "pre-trial discovery:"

It became apparent to this commentator, who served as the United States delegate to the Commission, that there was not only consid-

91. *Id.* at art. 18.

92. 28 U.S.C. 1782(A); B. RISTAU, *supra* note 14, at 262.

93. B. RISTAU, *supra* note 14, at app. C.

94. *See id.* for declarations of contracting parties: France, Germany, Italy, Luxembourg, Netherlands, Norway, Portugal, Singapore, Sweden, United Kingdom, all of which have made declarations under Article 23.

95. Report on the Work of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *reprinted in* 17 INT'L LEGAL MATERIALS 1417, 1425 (1978) [hereinafter Special Commission]; *see also* Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 24 INT'L LEGAL MATERIALS 1668 (1985).

96. Special Commission, *supra* note 95, at 1421.

erable apprehension about the sweeping pre-trial discovery practice permitted under United States law, but that the delegates from a number of civil law countries displayed an appalling misunderstanding of the institution of "pre-trial discovery." To them, the term "pre-trial" was synonymous with "prior to the institution of the suit." Almost all civil law delegates were conversant with the English expression "fishing expedition." It therefore followed that their States had to decline lending judicial aid to such searches for potential evidence by prospective plaintiffs.⁹⁷

This misunderstanding of an essential term, coupled with the Contracting Parties' general hostility to United States discovery methods⁹⁸ and American notions of *in personam* jurisdiction,⁹⁹ has exacerbated the problem of United States litigants actually using the Hague Evidence Convention.¹⁰⁰

Although these problems appear to persist,¹⁰¹ they have not proven insurmountable for United States parties seeking foreign discovery. The House of Lords in *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*,¹⁰² required the execution of Letters of Request for documents even in the face of the United Kingdom's declaration under Article 23.¹⁰³

A recent German decision also liberalized the scope of discovery under the Hague Evidence Convention when the Court finally realized the meaning of "pre-trial discovery:"

Finally, petitioners contend[ed] that the request should not have been approved because it was issued at the "pre-trial discovery" stage of the proceeding and, therefore, the evidence was "not intended for use in judicial proceeding commenced or contemplated," as required by Paragraph 2, Article 1, of the Convention. The decision of this panel of 31 October 1980 (9 VA 3/80) establishes, and the legal literature there cited teaches, that the "pre-trial discovery" stage not only presuppose[d] a pending judicial proceeding before an American Court, but that it is an essential

97. B. RISTAU, *supra* note 14, at 229.

98. See generally Rosenthal & Yale-Loehr, *supra* note 9.

99. See generally Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 758-765 (1983).

100. *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 2 W.L.R. 81, 1 All E.R. 434 (1978), reprinted in 17 INT'L LEGAL MATERIALS 38 (1977).

101. See *infra* notes 119-36 and accompanying text.

102. *Id.*

103. B. RISTAU, *supra* note 14, at 250.

part of the securing of evidence to be introduced at "trial."¹⁰⁴

Furthermore, under Germany's Article 23, declaration prohibiting the pre-trial discovery of documents, the German court expressly permitted testimony as to such documents which the United States litigants had sought:

Nor in the opinion of this panel does such a holding amount to a disregard of the [German] declaration under Article 23 of the Convention. German law permits the examination of third persons as witnesses concerning the contents of documents, which documents themselves need not be surrendered or produced.¹⁰⁵

Given the reasoning of the above decisions, which represent civil law as well as common law Contracting Parties, such decisions will certainly have an impact on the further liberalization of the execution of United States Requests abroad.¹⁰⁶ Indeed, the Scandinavian countries have recently narrowed their Article 23 declaration's scope substantially. The following quotation from the Finland declaration illustrates this point:

Additional Declaration of December 11, 1980

...

The declaration made by the Republic of Finland in accordance with Article 23 concerning "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" shall apply only to Letters of Request which require a person:

(A) To state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

(B) To produce any documents other than particular documents specified in the Letter of Request, which are likely to be in

104. Appeal of Siemans/Siecor and the Individual Corporate Officers (Opinion and Judgment of November 27, 1980, Docket No. 9 VA 4/80) reprinted in 20 INT'L LEGAL MATERIALS 1025, 1039 (1980).

105. *Id.* at 1037-38.

106. See generally Vienna Convention on the Law of Treaties, reprinted in 8 INT'L LEGAL MATERIALS 679, 692 (1969) [hereinafter Vienna Convention]. Section 3, Article 31 speaks to subsequent practice in the application of the treaty, which provides as follows:

3. There shall be taken into account, together with the context:

(A) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(B) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(C) Any relevant rules of international law applicable in the relations between the parties.

his possession, custody or power.¹⁰⁷

It is unfortunate that, during a period of increased awareness of the Convention both here and abroad, together with the apparent liberalization in its use by Contracting Parties,¹⁰⁸ utilization of the Convention in the United States should be met with opposition by both United States litigants and courts.¹⁰⁹ A review of the negotiating history¹¹⁰ indicates that the Convention is an improvement, and foreign judicial treatment indicates the desire to accommodate United States forms of discovery.¹¹¹ Indeed, it should be emphasized that Article 23 only includes the discovery of documents in the possible declarations and not pre-trial discovery of testimony which is permitted.¹¹²

What follows is an analysis of the judicial treatment of the Hague Evidence Convention by American courts. Although the case authority interpreting the Convention and applying it has not yet fully developed, trends are starting to appear in holdings that, in this author's opinion, are contrary to the intention of the drafters and the understanding of other Contracting Parties.

VI. THE CURRENT INTERPRETATION AND APPLICATION OF THE HAGUE EVIDENCE CONVENTION BY THE UNITED STATES COURTS

A. *Introductory Statement*

At the outset of this discussion, it is important to note that the decision of the United States Court of Appeals for the Fifth Circuit in *In re Anschuetz and Co.*,¹¹³ has had by far the greatest impact of any decision on state and federal courts in their treatment of the Hague Evidence Convention. That decision, which will be discussed in detail below, had such a major effect on state and federal courts that the discussion which follows will analyze cases in the pre- and post-*Anschuetz* eras of the judicial treatment of the Hague Evidence Convention.

107. B. RISTAU, *supra* note 14, at app. C. Additional Scandinavian countries that modified Article 23 Declarations are Norway and Sweden.

108. *Id.*

109. *See, e.g.*, *In re Anschuetz & Co. GMBH*, 754 F.2d 602 (5th Cir. 1985).

110. *See* Amram, *supra* note 39.

111. *See supra* notes 101-05 and accompanying text.

112. Hague Evidence Convention, *supra* note 10, at art. 23; B. RISTAU, *supra* note 14, at § 5-36.

113. 754 F.2d 602 (5th Cir. 1985).

B. State Courts

Although some commentators have pointed out that certain unreported state court decisions have decreed the exclusive application of the Hague Evidence Convention in all cases involving foreign evidence gathering,¹¹⁴ a search of reported decisions discloses no such similar holdings. The four state cases that have addressed the issue prior to the *Anschuetz* decision have uniformly held that the principle of international comity and other considerations compel resorting first to the provisions of the Hague Evidence Convention prior to the utilization of state Rules of Civil Procedure.¹¹⁵ Two state court decisions have been reported subsequent to the *Anschuetz* decision. The earlier of the two followed the majority of state courts in holding that comity considerations mandate the resort to the Convention in the first instance.¹¹⁶ The more recent New York decision held that the Convention is not applicable when evidence is sought from a foreign party subject to the *in personam* jurisdiction of the court.¹¹⁷ The latter decision expressly followed the holding of the *Anschuetz* panel, borrowing from that court the jurisdiction-based analysis governing the application of the Convention.¹¹⁸

C. Federal Court Decisions

1. Federal District Court Decisions

Federal court decisions prior to the *Anschuetz* case were almost evenly divided between those courts instructing that resort to the Convention should be in the interest of comity in the first instance,¹¹⁹ and other decisions holding that resort to the Convention was discretionary.¹²⁰ The latter line of cases justified their holdings on a jurisdiction-based analysis that was later adopted by the *Anschuetz*

114. See 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. 1461, 1473 n.61 (1984); B. RISTAU, *supra* note 14, § 5-40 at 256.1.

115. *Pierburg*, 137 Cal. App. 3d at 238; *Volkswagenwerk*, 123 Cal. App. 3d at 840; *Vincent v. Ateliers de la Motobecane*, 193 N.J. Super. 716, 721-24, 475 A.2d 686, 689-91 (1984); *Goldschmidt v. Smith*, 676 S.W. 2d 443 (Tex. Ct. App. 1984).

116. *Gebr. Eickhoff Maschinefabrik v. Starcher*, 328 S.E.2d 492, 504-05 (W. Va. 1985).

117. *Wilson v. Lufthansa German Airlines*, 489 N.Y.S.2d 575 (1985).

118. *Id.* at 577.

119. See, e.g., *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 48-49 (D.D.C. 1984); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D.Pa. 1983); and *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Philips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984).

120. See, e.g., *Graco, Inc. v. Kremlin Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Lasky v.*

panel.¹²¹

United States District Court decisions subsequent to the *Anschuetz* decision have uniformly followed its lead.¹²² First, in *Work v. Bier*,¹²³ a magistrate in the District of Columbia Circuit held that an order directing the deposition in the United States of a foreign national who lived abroad was not subject to the Hague Evidence Convention. Secondly, the most recent decision from the United States District Court for the Eastern District of Tennessee held that documents ordered to be produced from a party defendant are not subject to the procedures of the Convention even if the documents are located abroad.¹²⁴

2. United States Court of Appeals Decisions

To date, the leading United States Court of Appeals decision analyzing in detail the necessity of resorting to the Hague Evidence Convention procedures is the case of *In re Anschuetz*.¹²⁵ In that case the appellate panel was asked to overturn a ruling of a United States magistrate ordering depositions in Germany of some of *Anschuetz*' employees.¹²⁶ The Court of Appeals denied mandamus, thus essentially affirming the magistrate's order in the face of *Anschuetz*' and the German government's contention that the discovery order would be a "violation of German sovereignty unless the order is transmitted according to a Letter of Request as specified in the Hague Convention."¹²⁷ The *Anschuetz* panel incorporated into its reasoning the jurisdiction-based analysis of recent federal court decisions which chose not to apply the Convention:

We agree with the court's conclusion in *Graco* that "the Convention was [not] intended to protect foreign parties, over whom an American court properly has jurisdiction, from the normal range of pre-trial discovery available under the Federal Rules of Civil

Continental Products Corp., 569 F. Supp. 1225 (E.D. Pa. 1983); Intern. Soc. for Krishna Consciousness v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984).

121. *Graco v. Kremlin Inc.*, 101 F.R.D. at 519-21.

122. *Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985); *Lowrance v. Weing*, 107 F.R.D. 386 (W.D. Tenn. 1985).

123. 106 F.R.D. at 45.

124. *Lowrance*, 107 F.R.D. at 388-89.

125. 754 F.2d 602 (5th Cir. 1985).

126. *Id.* at 605.

127. *Id.*; The court's decision also recognized the Department of Justice amicus brief which took the position that a court order to conduct depositions on foreign soil would violate the international law obligations of the United States. *Id.*

Procedure.” We find particularly apt the court’s observation that the Convention does not require deference to a foreign country’s judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States. As *Graco* held, “Discovery does not, take place within [a state’s] borders, merely because documents to be produced somewhere else are located. Similarly, discovery should be considered as taking place here, not in another country, when interrogatories are served here, even if the necessary information is located in the other country.”¹²⁸

Although the *Anschuetz* court did note that the exercise of a court’s power “should be tempered by a healthy respect for the principles of comity,”¹²⁹ it left such comity analysis for the lower courts. A reading of the decision exhibits such a “pro American” discovery bias that any lower court comity analysis would be distorted in favor of the United States litigant’s paramount interest of full discovery.¹³⁰

Anschuetz’ interpretation of the treaty, taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States courts. Insofar as *Anschuetz* seeks discovery it would be permitted the full range of free discovery provided by the federal rules. But when a United States adversary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention. Further, we believe that requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a result directly antithetical to the express goals of the federal rules and the Hague Convention which aim to encourage the flow of information among adversaries.¹³¹

It is interesting to note that two other decisions out of the Fifth Circuit¹³² have mentioned the Hague Evidence Convention subsequent to the *Anschuetz* decision. Only one of those decisions involved the application of the Convention.¹³³ Subsequent decisions from the

128. *Id.* at 611.

129. *Id.* at 614.

130. *Id.* at 610.

131. *Id.* at 606.

132. *In re Messerschmitt Bolkow Blohm GMBH*, 757 F.2d 729 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (1985); *Tenneco Resins Inc. v. Davy Intern., AG*, 770 F.2d 416 (5th Cir. 1985).

133. *See In re Messerschmitt*, 757 F.2d at 729.

Eighth and Ninth Circuits have followed the *Anschuetz* reasoning.¹³⁴ Other appellate circuits, including the noted international forums of New York and Washington, D.C., have not had the opportunity to rule on the application of the Hague Evidence Convention, although the Court of Appeals for the District of Columbia Circuit, in dictum, has suggested that the Convention procedures are the only available means of obtaining certain evidence.¹³⁵ It is also reasonable to assume that the District of Columbia Circuit will be asked to review this question in the very near future.¹³⁶

3. United States Supreme Court Decisions

Although the United States Supreme Court has previously chosen to stay on the sidelines concerning the Hague Evidence Convention controversy,¹³⁷ the Court has recently granted certiorari to consider the matter.¹³⁸ Pre-Hague Evidence Convention decisions from the United States Supreme Court are worth analyzing as an indication of the Court's possible contemporary approach to the interpretation of the Convention. In the case of *Societe Internationale v. Rogers*,¹³⁹ the United States Supreme Court exhibited a profound sensitivity and respect for the sovereignty of Switzerland in refusing to sanction the plaintiff's inability to produce documents due to foreign law:

In view of the findings in this case, the position in which petitioner stands in the litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pre-trial production order when it has been established that failure to comply has been due to inability, and not willfulness, bad-faith, or any fault of petitioner.¹⁴⁰

134. *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986), *cert. granted*, ___ U.S. ___, 90 L. Ed. 2d 976 (1986) (No. 85-1695, 1985 Term). Amicus briefs have been filed by the Federal Republic of Germany, Switzerland, the United Kingdom, Italy, and France urging reversal of the *Anschuetz* line of cases. *National Industrial v. Superior Ct.*, 788 F.2d 1408 (9th Cir. 1986); *see also Boreri v. Fiat S.P.A.*, 763 F.2d 17 (1st Cir. 1985).

135. *Pain v. United Technologies Corp.*, 637 F.2d 775, 788 (D.C. Cir. 1980).

136. *See, e.g., Work*, 106 F.R.D. at 56-57; Notice can be taken that the District of Columbia is one of the world centers for international litigation and arbitration.

137. 83 L. Ed.2d 223.

138. *See supra* note 134. A petition for certiorari has also been filed in *Anschuetz*, and in *In re Messerschmitt Bolkow*, 754 F.2d at 602.

139. 357 U.S. 197 (1958).

140. *Id.* at 212. The Supreme Court's decision recognized that the petitioner was an

Furthermore, dicta from past United States Supreme Court decisions favor the application of the Hague Evidence Convention and its procedures if such rules conflict with national law.¹⁴¹ More recently, the U.S. Supreme Court has indicated that the U.S. judiciaries deference to U.S. law and courts must be balanced against the overriding interest of U.S. involvement in international economic relations:

The expansion of American business and industry will hardly be encouraged if, notwithstanding sole contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the court of appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon-Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealing by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, *and resolved in our courts*.¹⁴²

D. Summary and Analysis

To summarize the current judicial treatment of the Hague Evidence Convention, courts have chosen to follow the *Anschuetz* reasoning with regard to depositions and the production of documents from foreign nationals or foreign parties subject to the *in personam* jurisdiction of the forum court. Concerning depositions, the court merely orders the foreign party, usually a corporation, to provide its employees or officers for deposition in the United States.¹⁴³ It then allows the deposition to be taken in the foreign country if it would be more convenient for the deponent.¹⁴⁴ With regard to the production of documents, the court merely holds that a document request served in this country is outside the Convention since such a request involves evi-

American plaintiff subject to criminal sanctions in Switzerland because the production of such documents pursuant to court order would violate Swiss laws. *Id.* at 211.

141. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (the court noted, "[t]his doctrine of construction is in accord with the long-headed admonition of Mr. Chief Justice Marshall that 'an act of congress (sic) ought never to be construed to violate the law of nations if any other possible construction remains'"). *Id.*

142. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (emphasis added).

143. *Work v. Bier*, 106 F.R.D. 45, 57-58 (D.D.C. 1985).

144. *Id.*

dence obtained in this country and not abroad.¹⁴⁵

Other judicial justifications for avoiding the Convention involve an analysis of the negotiating history in support of the argument that the Convention did not effectively repeal the Federal Rules in foreign evidence situations.¹⁴⁶ Another avoidance justification centers on the purpose of the Convention to improve the situation and not frustrate it.¹⁴⁷ The latter assumes that discovery was much broader prior to the Convention.¹⁴⁸ Other courts have cited the practical difficulties associated with the procedures¹⁴⁹ and the time and cost involved to justify disregarding the Convention.¹⁵⁰ Still other courts have looked to the declarations of the other Contracting Parties under Article 23 of the Convention in refusing to comply with requests for pre-trial discovery of documents as a justification for avoiding the Convention on the basis of futility. Indeed, courts have even resorted to pulling words and phrases out of the Hague Evidence Convention to support the argument that it was not intended to be exclusive. This has been done in a comparative analysis with the Hague Service Convention, which the courts contend *was* intended to be exclusive.¹⁵¹

Clearly, the above summary and analysis raises many interesting questions of international law and procedure which have only recently been addressed by various commentators in the field. Since the judicial treatment of the Hague Evidence Convention is literally changing by the day, it is difficult for commentators to provide the courts with current articles. The most recent articles on the subject are surely to impact the continued treatment of the Hague Evidence Convention and consequently their analysis follows.

VII. THE COMMENTATORS AND THE HAGUE EVIDENCE CONVENTION

Until recently, most articles on the Hague Evidence Convention were primarily explanatory with regard to the procedures as opposed

145. *Lowrance v. Weinig*, 107 F.R.D. 386, 389 (W.D. Tenn. 1985).

146. *Compagnie Francaise D'Assurance Pour Le Commerce Exterior v. Phillips Petroleum Co.*, 105 F.R.D. 16, 28 (S.D.N.Y. 1984).

147. *Laker Airways Ltd.*, 103 F.R.D. at 49.

148. *See contra* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE Civil § 2083.

149. *Pain v. United Technologies Corp.*, 637 F.2d 775, 778-90 (D.C. Cir. 1980); *Fabrik*, 101 F.R.D. 360, 361 (1984).

150. *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 48 (D.C. Dist. 1984).

151. *Gebr. Eickhoff Maschinenfabrik v. Starcher*, 328 S.E.2d 492, 500-01 (W. Va. 1985).

to an analysis of its interpretation and application.¹⁵² Current articles and texts are either critical of American extraterritorial discovery in general¹⁵³ or critical of attempts by the judiciary to avoid the Convention in particular.¹⁵⁴ Since the American bar and judiciary appear to be understandably ignorant of foreign law and procedures,¹⁵⁵ law review articles and commentaries play an important role in international litigation.

A. Domestic Commentators

United States commentators have recently instructed that while our courts view extraterritorial discovery as proper, other countries view it as a violation of international law.¹⁵⁶ Indeed, Professor Oxman, the commentator most frequently cited by the courts on either side of the issue, describes the apparent detachment of American courts concerning *in personam* jurisdiction and the assertion of the right to extraterritorial discovery:

The circumstances in which *in personam* jurisdiction becomes confounded with the power to compel discovery are all too familiar. Committed to the value of the convenience of the plaintiff (particularly in tort actions) not to mention that of the local bar, courts assert *in personam* jurisdiction on the basis of "minimum contacts," regardless of whether the defendant is from Rome, Italy, or from Rome, Georgia. The court then orders depositions of the defendants' employees in Geneva, Switzerland as if they were in Geneva, New York, and the inspection or production of documents or equipment located in Hanover, West Germany as if they were in Hanover, New Hampshire. The court normally faces the implications of what it is doing only when it comes up against a foreign criminal statute, and even then asserts the power to override foreign laws by ordering parties "before the courts" to attempt in good faith to persuade foreign governments not to enforce their

152. See, e.g., Bishop, *International Litigation in Texas: Obtaining Evidence in Foreign Countries*, 19 Hous. L. Rev. 361 (1982).

153. See, e.g., Rosenthal & Yale-Loehr, *supra* note 9; Von Mehren, *Discovery Abroad: The Perspective of the U.S. Private Practitioner*, 16 N.Y.U.J. INT'L L. & POL. 985 (1984); B. RISTAU, *supra* note 14, at 256.1.

154. Radvan, *The Hague Evidence Convention on Taking of Evidence Abroad In Civil or Commercial Matters: Notes*, 16 N.Y.U.J. INT'L L. & POL. 1031 (1984); Mahler & Esser, *U.S. Discovery Orders and the Hague Evidence Convention: The Controversy Continues*, 12-13 [unpublished manuscript written by German lawyers].

155. *Anschuetz*, 754 F.2d at 611.

156. Rosenthal & Yale-Loehr, *supra* note 9, at 1089.

laws that interfere with United States discovery practices.¹⁵⁷

Oxman concludes that resort to the Hague Evidence Convention and other internationally agreed procedures is the preferable alternative to confrontational discovery, because the latter threatens to further impinge on international relations and possibly result in a breach of the Convention in general.¹⁵⁸

Indeed, even the tentative draft of the Revised Restatement of Foreign Relations Law, which meticulously tries to maintain a neutral position even to the extent of instructing that the Hague Service Convention may not be mandatory,¹⁵⁹ instructs that alternative means of obtaining evidence should be considered prior to resorting to the type of confrontational discovery methods which have recently been ordered.¹⁶⁰

The greatest volume of current commentaries on the Hague Evidence Convention and the topic of international discovery in general can be derived from a 1983 symposium that was held at New York University Law School.¹⁶¹ At that symposium, many commentators were vehement in their condemnation of United States extraterritorial discovery in general, especially when alternative means were available:

We start with the brute fact that United States extraterritorial discovery is viewed by most foreign international law experts as a violation of international law. Applying a principle of reasonableness

157. Oxman, *supra* note 99, at 741-42.

158. *Id.* at 736.

159. RESTATEMENT, *supra* note 3, introductory note to § 471 at 388.

160. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 437(1)(c) (Rev. Tent. Draft No. 7, 1986). The pertinent proposed restatement section provides as follows:

§ 437[420]. Requests for disclosure and foreign government compulsion: Law of the United States (1)(a) where authorized by statute or rule of court, a court in the United States may order a person subject to its jurisdiction to produce documents, objects, or other information directly relevant, necessary, and material to an action or an investigation, even if the information or the person in possession of the information is outside the United States.

.....
(c) In issuing an order directing production of information located abroad, a court in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information . . . (emphasis added).

Id.

161. 16 N.Y.U.J. INT'L L. & POL. (1984).

to that fact should, at least, lead to the following inquiry before foreign discovery is authorized:

(1) Have substantial, good faith efforts to obtain information within the territory of the United States been undertaken and found wanting?

(2) What is the likelihood that information exists abroad that can be expected to be important evidence in an investigation or litigation, justified by some probative information already obtained?

(3) Can it be shown that jurisdiction is likely to be established over the one with whom the information is sought and over the subject matter or the investigation or litigation?

(4) Are there any reasonable alternative means of securing the foreign information available, such as a bilateral agreement or issuance of Letters of Rogatory, which will not be viewed by foreign governments as a breach of their sovereignty and a violation of international law?¹⁶²

By far the most detailed analysis of the Hague Evidence Convention and its procedures is found in the treatise on international judicial assistance prepared by Bruno Ristau.¹⁶³ He takes the position that the exclusivity of the application of the Convention is controlled by the declarations filed by the Contracting Parties.¹⁶⁴ A reading of these declarations together with a country's policy, legislative and judicial pronouncements, is clearly indicative of a country's position.¹⁶⁵ As a consequence, it would be Ristau's position that the current judicial and commentators' analyses miss the mark. But Mr. Ristau has no problem in taking the position that the Convention was to have a binding effect on American litigants, impliedly amending or repealing certain former procedural rights inherent in domestic litigations.¹⁶⁶

162. Rosenthal & Yale-Loehr, *supra* note 9, at 1089-90.

163. B. RISTAU, *supra* note 14.

164. *Id.* at 255.

165. *Id.* at App. C.

166. *Id.* at 254-55. Mr. Ristau is clear in the mandatory nature of the Evidence Convention:

Where a state signifies that testimony can be secured in its territory for use in foreign proceedings *only* pursuant to the Evidence Convention, United States courts are bound by that declaration as a matter of federal treaty obligation, and the Convention is therefore "mandatory" with respect to testimony sought by American litigants *in the territory of such state*. With respect to the taking of evidence in the territory of such state, United States federal and procedural laws—as the laws of the requesting state—have obviously been affected by these stipulations of the Convention.

Id. at 255. In a note following the above quoted provision, Mr. Ristau further comments as follows:

It is as if Rule 28 (b), F.R. Civ. P., had been amended by adding a proviso at the end of the first sentence which reads: "*provided that* no deposition shall be taken in the

B. Foreign Commentators

Foreign commentators, like their American counterparts, appear to be uniformly critical of the exercise of extraterritorial jurisdiction over foreign parties for the purposes of litigation and discovery. Indeed, the countries which we find ourselves in acute disagreement with concerning questions of international jurisdiction and discovery happen to be our allies and closest trading partners, such as, the United Kingdom and Germany. Although foreign commentaries in English concerning American extraterritorial discovery appear to be somewhat scarce, the few that are available are consistently critical of United States notions of jurisdiction and the tendency of our courts to disregard the Hague Evidence Convention. Concerning extraterritorial *in personam* jurisdiction, a commentator from the United Kingdom makes this observation:

This disagreement is now of increasing worry to us. I am bound to tell you, in a voice of friendliness, and not hostility, that we are disturbed for you, for us, and for international trade. We are disturbed that agencies of the United States government, over an ever widening field of international commerce, are persistently making more and more attempts to impose domestic laws on persons and corporations who are not U.S. nationals and who are acting outside the territory of the U.S. I do not think it is an unfair question to ask how you would respond if other nations attempted to do the same to you. Without putting it tritely, the U.S. was founded by those who took exception to little matters of taxation being imposed extraterritorially.¹⁶⁷

Foreign commentators on transnational litigation in general appear to accept as a given that they control, as an incident to their sovereignty, the taking of evidence in their territory.¹⁶⁸ One Japanese commentator recently emphasized that judicial assistance provided by the Japanese courts to foreign courts is extremely conditional and contingent upon reciprocity. In addition to the guarantee of reciproc-

territory of a state that is a member of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters except in conformity with the provisions of the Convention and the declaration of the state of execution."

Id.

167. Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 *NW. J. INT'L L. & BUS.* 773 (1979); Heck, *Symposium Transnational Litigation Part II: Prospectus from the U.S. and Abroad*, 18 *INT'L LAW.* 793 (1984).

168. Koroyasu, *Symposium Transnational Litigation Part II: Perspectives from the U.S. and Abroad*, 18 *INT'L LAW.* 785, 787 (1984); Frei, *Symposium Transnational Litigation Part II: Perspective from the U.S. and Abroad*, 18 *INT'L LAW.* 789 (1984).

ity, Japanese courts require that requests go through diplomatic channels, that there be a reimbursement of expenses, and appropriate translations provided.¹⁶⁹ Frei, a Swiss commentator, instructs that assistance given foreign courts in Switzerland is based on comity and reciprocity. Frei also emphasizes that Switzerland will, in all probability, soon sign both the Hague Evidence Convention and the Hague Service Convention.¹⁷⁰ He makes it clear that in Switzerland, in the absence of such Conventions, Swiss law controls the processing of requests for evidence which as in Japan, must be processed through diplomatic channels.

Turning to the commentators on the use of the Hague Evidence Convention, a German lawyer recently observed that the Convention "constitutes a remarkable concession by civil law countries, such as Germany, to the desire of the United States to have U.S. style discovery executed and enforced abroad."¹⁷¹ Thus, it is not surprising that civil law lawyers are understandably confused and surprised at the difficulty United States courts have in interpreting the Hague Evidence Convention to be mandatory, taking precedence over our domestic rules of civil procedure, both state and federal. That same German commentator emphasizes that Germany has no problem in finding that the Hague Evidence Convention is preemptive of local law:

In contrast to the rather confusing situation in the United States, there is no question that, under German treaty law the Hague Evidence Convention takes precedence over any conflicting rules of German civil procedure

* * *

The majority of the (lower) courts in the United States that to date had an opportunity to address the issue of the Hague Evidence Convention, however, have taken the position that the Convention is not preemptive, but rather only the primary vehicle that must be used when discovery is to be had abroad; thus, American law on the subject of discovery abroad is left fully intact

* * *

Another confusing element that can be found in these cases is that although they acknowledge the treaty status of the Convention, they still apply principles of comity. In a treaty context, however, there is no need to resort to such principles; they have been ab-

169. Koroyasu, *supra* note 168, at 787.

170. Frei, *supra* note 168, at 792.

171. Heck, *supra* note 167, at 795.

sorbed by the treaty, which constitutes a binding contract between and among sovereign nations.

Finally, it is interesting to note that as regards the Hague Convention on Service of Process abroad, which has a treaty structure that, *mutatis mutandis*, is identical with that of the Evidence Convention, there is a plethora of American cases that unequivocally acknowledge its treaty and therefore, preemptive status. The fact that the Hague Evidence Convention, in effect, might limit the power American courts might otherwise have, particularly when they have personal jurisdiction, surely does not justify breaching a treaty and thereby violating the supremacy clause of the U.S. Constitution.¹⁷²

Consequently, the above quote and foreign commentators in general raise many interesting questions concerning the law of treaties, international law, comity, international jurisdiction, and the judicial treatment of the Hague Service Convention by American courts. A detailed treatment of these and other issues follows, but first a comparative analysis between the Hague Evidence and Service Conventions.

VIII. COMPARATIVE ANALYSIS: THE HAGUE SERVICE CONVENTION

The Hague Service Convention was developed at the Tenth Session of the Hague Conference on Private International Law in October of 1964. The Service Convention like its counterpart, the Evidence Convention, was designed to revise and modernize Chapter One of the Hague Conventions on Civil Procedure of 1905 and 1954.¹⁷³

The Service Convention was designed to perform three broad functions:

- (A) To establish a system that, to the extent possible, brings actual notice of the document to be served to the recipient in sufficient time to enable him to defend himself;
- (B) To simplify that method of service of judicial documents issued by the courts of the state of origin in the state of execution; and
- (C) To facilitate proof that service has been affected abroad.¹⁷⁴

172. *Id.* at 796-97.

173. B. RISTAU, *supra* note 14, at 118.

174. *Id.* at 118-19.

Like the Evidence Convention, the Service Convention requires the establishment of a "Central Authority" for the receipt of requests from other Contracting States. The Central Authority must perform the functions required in receiving documents and it may perform the functions of sending documents. The Service Convention does not require that service abroad be channeled through the Central Authority.¹⁷⁵

Aside from the substantive aspects of the Service Convention dealing with the service of documents, the Convention itself is organized similarly to the Evidence Convention. The Service Convention deals with language requirements, methods of transmittal through diplomatic channels, and costs.¹⁷⁶ Like the Evidence Convention provisions, the Service Convention allows Contracting States to deviate from certain provisions of the Convention by way of declaration.¹⁷⁷ For example, a party may object to transmission of documents by mail pursuant to Articles 8 and 10 at the time of ratification or accession.¹⁷⁸

It is evident that the Conventions are quite similar and closely related. Indeed, the fact that they both evolve from Chapter One of the Hague Conventions on Civil Procedure of 1905 and 1954 presents the possibility that the two Conventions could have easily been merged into one. However, individuality has presented problems for the American courts. Problems have arisen concerning the questions of scope and mandatory use of the Convention procedures.

A comparison of the first paragraph of Article 1 of each Convention which defines the scope of each treaty, suggests that each Convention was intended to be mandatory. To quote first from the Hague Service Convention: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extra-judicial document for service abroad."¹⁷⁹ Now to quote from the Evidence Convention:

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that state, request the competent authority of another Contracting State by means of a Letter of Request, to obtain evidence, or to

175. Hague Service Convention, *supra* note 32, art. 2, par. 1.

176. *Id.* at arts. 2-16.

177. *Id.* at art. 21.

178. *Id.*

179. *Id.* at art. 1.

perform some other judicial act.¹⁸⁰

First of all, it should be noted that American courts have uniformly held that the Hague Service Convention is mandatory and its provisions for service of process abroad must be followed by United States litigants.¹⁸¹ Thus, the paradox is why American courts have seen fit to hold that the Hague Evidence Convention is optional.¹⁸²

American courts, aside from using their jurisdiction-based analysis to preclude the use of the Convention procedures, have distinguished that language used in the two Conventions to emphatically assert the the Service Convention is mandatory while the Evidence Convention is not. The cases appear to emphasize the language in Article 1. In that Article, the Service Convention uses the term "shall" and the Evidence Convention uses "may."¹⁸³ It is this author's position that the use of the term "may" in the Hague Evidence Convention in no way signified an intention of the drafters to create an international agreement designed to be permissive or optional. That would constitute an exercise in futility. The use of the word "may" in the Evidence Convention is merely an appropriate use of the English language. A close reading of the Conventions discloses that the Scope Article, Article 1 of the Service Convention, precedes the first chapter, while in the Evidence Convention, Article 1 is *in* the first chapter, which is the chapter dealing with Letters of Request. Consequently, to say that the parties "may" use Chapter One is consistent with the structure of the Convention which allows for two other permitted alternatives. Furthermore, the use of the term "may" is merely consistent with a general principle of international law, recognized by the Revised Restatement of Foreign Relations, which requires that service and evidence gathering abroad be done in accordance with the other State's consent.¹⁸⁴ Thus, the Evidence Convention is merely a grant of *permission* to the Contracting Parties to utilize the Letter of Request procedure. Other procedures may be utilized if permitted by the state of execution.

180. Hague Service Convention, *supra* note 10, at art. 1.

181. *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280, 286-90 (3rd Cir.), *cert. denied*, 454 U.S. 1085 (1981) (dictum); *Low v. Bayerische Motoren Werke, A. G.*, 88 A.D.2d 504, 449 N.Y.S.2d 733 (1982); *Dr. Ing. H.C.F. Porche v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981); *Cintron v. W & D Machinery Co., Inc.*, 182 N.J. Super. 126, 440 A.2d 76 (1981); *Kadota v. Hogsai*, 125 Ariz. 131, 608 P.2d 68 (Ariz. App. 1980).

182. See *supra* notes 113-36 and accompanying text.

183. See, e.g., *In re Anschuetz & Co. GMBH*, 754 F.2d 602 (5th Cir. 1985).

184. RESTATEMENT, *supra* note 3, Chapter 7 introductory note at 385.

In conclusion, there appears to be no rational basis for differentiating between the two Conventions by reason of the terminology used in the opening articles. For American courts to pull such words and phrases out of the Hague Evidence Convention in order to distinguish it from the Service Convention is clearly contrary to the negotiation history and the intent of the parties. Although United States courts have interpreted the Evidence Convention to be nonexclusive, a review of the judicial treatment of the Convention as set forth above discloses that it is not international law considerations but domestic notions of *in personam* jurisdiction that play the most important role in such determinations. What follows is an analysis of the international law considerations which supports the conclusion that the agreed procedures must be utilized by United States litigants seeking evidence abroad regardless of whether the witness is subject to the *in personam* jurisdiction of a United States court.

IX. INTERNATIONAL LAW CONSIDERATIONS IN THE APPLICATION OF THE HAGUE EVIDENCE CONVENTION

A. Introduction

To summarize the evolution of the judicial treatment of the Hague Evidence Convention by American courts, it is evident from the foregoing discussion that current decisions have transcended the initial level of treaty analysis, that is, whether the Convention procedures apply to the discovery of evidence abroad. The *Anschuetz* decision and the cases that have followed it clearly answered that question in the affirmative, but created various jurisdiction-based exceptions to the taking of depositions and the production of documents:

We hold that the Hague Convention is to be employed with the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's *in personam* jurisdiction. The Hague Convention has no application at all to the production of evidence in this country from a party subject to the jurisdiction of a district court pursuant to the Federal Rules. . . .¹⁸⁵

This form of limited judicial analysis ignores international law considerations in the interpretation and application of the Hague Evidence Convention. Accepted rules of treaty interpretation, statutory con-

185. *Anschuetz*, 754 F.2d at 615.

struction, international jurisdiction and comity analysis not only contribute to our understanding of the Convention, but should be applied to round out a complete judicial analysis of any international agreement. Indeed, the present jurisdiction-based analysis of our domestic courts is void of a discussion of territorial limitations which we afford our own domestic litigants.¹⁸⁶

B. Rules of Treaty Interpretation

The United States Supreme Court has recently affirmed the rule that the intent or expectation of the signatories to a treaty is the overriding consideration in the interpretation and application of that treaty.¹⁸⁷ Indeed, the intent or purpose of the treaty would even override its language.¹⁸⁸ It could be strongly argued that since jurisdictional considerations were not covered in the treaty, the Hague Evidence Convention was intended to be primarily concerned with the territorial or geographical location of the evidence sought to be obtained. In other words, regardless of whether or not a Contracting State has jurisdiction, *in personam* or otherwise, over a party, it is the location of the evidence that controls.¹⁸⁹ There is nothing in the treaty language or negotiating history that could contradict such an assertion. This is especially true in light of the extensive negotiating history that is available in English which emphasized the accommodation made by the civil law Contracting Parties to United States methods of discovery in the treaty as emphasized in the explanatory report,¹⁹⁰ and the language in the history of the treaty that emphasizes that methods of discovery must be "tolerable" to requested parties.¹⁹¹ This position is further supported by the commentary of Mr. Phillip Amram where he emphasized that one of the overriding pur-

186. See, e.g., *Birmingham Fire Ins. Co. v. KOA Fire & Marine Ins.*, 572 F. Supp. 962 (S.D.N.Y. 1983) (agent not subject to personal jurisdiction in state where corporate principal does business); *Ryder Truck Rental v. Action Food Servs. Corp.*, 554 F. Supp. 277 (C.D. Cal. 1984) (action of subsidiary does not automatically subject parent to personal jurisdiction); for U.S. Supreme Court cases recognizing territorial limitations of jurisdiction, see *Kulko v. Superior Court of Cal.*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

187. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

188. *Id.* at 180.

189. The Convention's purpose and scope was defined as the taking of evidence "abroad." No party or jurisdictional exception was included in the text at the Convention. 23 U.S.T. 2555.

190. See *supra* notes 39-53 and accompanying text.

191. See Explanatory Report, *supra* note 46.

poses of the Convention was to protect against any "infringement of sovereignty" of a Contracting Party:

In countries where the performance of a "judicial act" is historically a monopoly of the courts, taking of testimony other than by court pursuant to a Letter of Request may be treated as an infringement of sovereignty and may be even criminal in nature. It was therefore necessary to include in the Convention provisions to permit a state at the time of signature or ratification to file a reservation with respect to the power of consuls, commissioners, and private parties to take testimony on its territory. The Convention, in this aspect, is skillfully drawn. If a signatory initially files a reservation and if its public policy later changes, it can withdraw the reservation, without the need of any amendment or change in the Convention and without the need to call another international conference. The Convention represents a substantial breakthrough in common law and civil law relationships and its operation will be watched with the greatest interest by all persons interested in the development in international private law.¹⁹²

Another accepted rule of treaty interpretation is that courts are to give great weight to interpretations of the treaty given by agencies of government charged with the negotiation and enforcement of the treaty.¹⁹³ Recent briefs filed by the Solicitor General offer evidence that both the Departments of State and Justice favor the utilization of the Hague Evidence Convention procedures in obtaining foreign evidence from the United States forum.¹⁹⁴ Current judicial analysis appears to view these briefs as a source of secondary authority as opposed to the view of the executive branch.¹⁹⁵

In addition, it is appropriate to look to the rules of treaty interpretation found in the Vienna Convention on the Law of Treaties which, although not ratified by the United States, is viewed by commentators as stating¹⁹⁶ or largely restating,¹⁹⁷ customary international

192. Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 107 (1973).

193. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. at 184-85.

194. See briefs submitted by the U.S. Solicitor General in *Club Mediterranée Dorin*, No. 83-461, reprinted in 23 INT'L LEGAL MATERIALS 1332 (1984), and *Volkswagenwerk Aktiengesellschaft v. Falzon*, 464 U.S. 811 (1983), reprinted in 23 INT'L LEGAL MATERIALS 412 (1984) [hereinafter *Falzon*].

195. *Anschuetz*, 754 F.2d at 605.

196. See Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71, 95 (1982); see also *Weinberger v. Rossi*, 102 S. Ct. 1510 (1982).

197. I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 6 (2d ed. 1984).

law in the world. The Vienna Convention instructs that treaties are to be construed in light of their purpose.¹⁹⁸ That treaties are considered binding¹⁹⁹ and to be performed in good faith.²⁰⁰ Any ambiguities as to the interpretation of the Convention are to be resolved by looking to the practice of the Contracting Parties.²⁰¹ Concerning the latter rule, it appears that the French, German, Swiss, U.K., and Italian governments view the Hague Evidence Convention to be exclusive.²⁰²

C. *Rules of Statutory Construction*

Contrary to the German view of international law, which considers it to be paramount and supercede national law,²⁰³ the United States Federal Courts view international law to be on equal footing with federal statutory law.²⁰⁴ But the domestic rule is clear that, in the event of a conflict between a statute and a treaty, or in this case the Hague Evidence Convention and the Federal Rules of Civil Procedure, the latter in time shall prevail.²⁰⁵ Also, there is a rule of statutory construction that a special law controls a general one, the Hague Evidence Convention being the special one and the Federal Rules being general.²⁰⁶ Lastly, the supremacy clause of the United States Constitution dictates that a treaty supercedes any conflicting state law,²⁰⁷ which raises the potential problem of inconsistency if the Convention were to apply at the state level and not at the federal.

D. *Comity Considerations*

A proper comity analysis in decisions interpreting the Hague Evidence Convention is either lacking from existing court decisions or insufficient.²⁰⁸ Any expressed comity analysis by courts in their con-

198. *Id.*, art. 31, at 691-92.

199. *Id.*, art. 26, at 690.

200. *Id.*

201. *Id.*, art. 31(3)(b), at 692.

202. See *supra* note 134; see also Current Developments, *The 1980 French Law on Documents and Information*, 75 AM. J. INT'L L. 382 (1981); see also Falzon, *supra* note 186, at 419-20 (letter from West German Embassy in Washington to the Department of State).

203. See Frei, *supra* note 168, at 796.

204. RESTATEMENT, *supra* note 3, § 135, reporters note no. 1, at 81.

205. *Id.*

206. See Anschuetz, *The Hierarchy of the Sources of International Law*, XLVII BRIT. Y.B. INT'L L. 273, 273 (1974-75).

207. *United States v. Pink*, 315 U.S. 203, 230-31 (1941).

208. See, e.g., *In re Anschuetz & Co. GMBH*, 754 F.2d 602, 605 (5th Cir. 1985); *Work v. Bier*, 106 F.R.D. 45, 45 (D.D.C. 1985). Principles of comity do not apply within the context of the interpretation and application of a treaty, in that such principles have been absorbed

sideration of the Hague Evidence Convention appears to place most weight on the interest of United States litigants which results in a distortion of the doctrine.²⁰⁹ Indeed, there are *three interests* involved in a proper comity analysis. The three areas of interest include "the interest of the forum state, the interest of the foreign state, and the interest of international relations in general."²¹⁰ It is the final interest which is central to a proper comity analysis:²¹¹

[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced—the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of laws is also encouraged, which benefits all nations.²¹²

It is this type of comity analysis with the emphasis on improving and protecting international relations which is lacking in most Hague Evidence Convention cases. In this author's view, a proper comity analysis in the interest of international cooperation should replace the current jurisdiction-based analysis which currently impedes the application of the Hague Evidence Convention.

E. Jurisdictional Considerations

Courts tend to justify the avoidance of Hague Evidence Convention procedures when a foreign natural person subject to their *in personam* jurisdiction is a party to the litigation.²¹³ However, most cases involve the assertion of *in personam* jurisdiction over a foreign artificial person in the form of a corporation or corporate subsidiary.²¹⁴ In order to avoid the Hague Evidence procedures it is incumbent upon

into the treaty which constitutes a binding contract between the states signatory thereto. See Heck, *supra* note 159, at 797. Most American courts still appear to include a comity analysis in Hague Evidence Convention cases and as a consequence a consideration of such principles is included in this paper.

209. See *supra* notes 128-30 and accompanying text.

210. Gebr. Eickhoff Maschinenfabrikund Eisengieberei v. Starcher, 328 S.E.2d 492 at 505 (1985).

211. *Id.*

212. Laker Airways Ltd. v. Sabena, Belgium World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

213. See, e.g., *Work*, 106 F.R.D. at 45.

214. See, e.g., *In re Messerschmitt*, 757 F.2d 729 (1985).

the court to order depositions of employees and the production of documents located abroad. Whether this is jurisdictionally appropriate on the international plane has been called into question:

It may be argued that the domestication of a foreign corporation for global discovery purposes is justified because only its United States assets are thereby put at risk and because the risk is a condition of doing business here. This argument does not resolve the underlying question of how that power to order global discovery is to be exercised to maintain a rational ordering of the international systems of separate territorial sovereignties in the context of increasing transnational commercial activities. The existence of jurisdiction is relative rather than absolute. The notion that jurisdiction to command appearance before the court "domesticates" the witness of a party for all purposes relative to the litigation is fallacious. The court should not ignore the foreign nationality or locus of the witness or evidence.²¹⁵

Thus, the question is not whether the United States court has the power to do what it appears to be doing, but whether it should exercise such power. This again raises questions of international comity in the interest of international relations and judicial cooperation,²¹⁶ together with a need for a broader jurisdictional analysis of the assertion of such prescriptive power on the part of United States courts.

1. Theoretical bases of international jurisdiction: the Restatement

The current source of the theoretical bases for international jurisdiction as applied by United States courts is found in the proposed Restatement of Foreign Relations Law.²¹⁷ This newly revised Restatement attempts to restate the law of international jurisdiction as a blend of United States law and international law.²¹⁸ Under international law, a state is subject to limitations on its authority in the exercise of its jurisdiction to prescribe, adjudicate and enforce.²¹⁹ Whether or not a United States court can subject a foreign national to the Federal Rules of Civil Procedure involves the application of the power of the court to prescribe such rules of discovery with respect to that individual.²²⁰ The proposed Restatement recognizes as a rule of

215. Oxman, *supra* note 99, at 741.

216. *Laker Airways*, 731 F.2d at 937.

217. RESTATEMENT, *supra* note 3, at Part 4.

218. *Id.* at § 181.

219. *Id.* at § 401.

220. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 com-

customary international law that the power of a United States court to prescribe is limited by a rule of reasonableness.²²¹ Whether or not prescriptive jurisdiction is reasonable is dependent upon various factors as set forth in the Restatement.²²² Other sections speak to this rule of reasonableness and require both interest balancing and a consideration of the possibility of alternative means.²²³

2. Recent cases and proposed legislation

Recent federal case authority involving the subject of prescriptive jurisdiction on the international plane is currently in conflict. One line of cases, led by *Mannington Mills, Inc. v. Congoleum Corp.*²²⁴ and *Timberline Lumber Co. v. Bank of America*²²⁵ support the concept of interest balancing. This is also the proposed restatement's position.²²⁶ The *Laker Airways v. Sabena Belgium Airlines* decision contrarily rejected interest balancing.²²⁷ The various considerations and factors to be considered as set forth in the *Mannington Mills* case are as follows:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;

ment H (Rev. Tent. Draft No. 7, 1986); see also *id.* at reporter's note 1; *id.* at § 437 comments and reporters notes.

221. *Id.* at § 403.

222. *Id.*

223. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, comment (h) (Rev. Tent. Draft No. 7, 1986).

224. *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979).

225. *Timberline Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613-15 (9th Cir. 1976).

226. Commentators have recently criticized interest-balancing within the jurisdictional context as being an improper function for the courts. See, e.g., Rosenthal, *Jurisdictional Conflicts Between Foreign Nations*, 19 INT'L LAW. 487 (1985); Sennett & Gavil, *Antitrust Jurisdiction, Extraterritorial Conduct, and Interest-Balancing*, 19 INT'L LAW. 1185 (1985).

These commentaries are supportive of diplomatic or political solutions to what appears to be an extraterritorial jurisdictional crisis. Such analysis clearly favors the mandatory utilization of the Hague Evidence Convention in the discovery of evidence abroad. The Convention represents an express diplomatic solution to the problems identified in international evidence gathering. It is difficult to escape from a natural skepticism concerning the ability of a federal magistrate to properly balance national interests in cases involving foreign corporate defendants, especially in cases where such corporations are owned by foreign sovereigns. See, e.g., *In re Société Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986).

227. 731 F.2d 909 (D.C. Cir. 1984).

6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. *Whether a treaty with the affected nations has addressed the issue.*²²⁸

The above factors support using the Hague Evidence Convention to limit the power of United States courts to enforce discovery orders involving foreign witnesses and evidence when the alternative procedures of a judicial assistance treaty are available. Additionally, this interest balancing approach, recognized in some federal circuits and in the proposed Restatement, is found in proposed legislation by Senator Deconcini entitled: The Foreign Trade Antitrust Improvements Act of 1985.²²⁹ The Act proposes a jurisdictional rule of reason mandating certain considerations which are borrowed from federal case authority and the Restatement. The Act mandates consideration of the following:

- (1) The relative significance, to the alleged violation, of conduct within the United States compared to conduct abroad;
- (2) The nationality of the person involved or affected by the conduct [and the principal place of business of corporations];
- (3) The presence or absence of a purpose to affect U.S. consumers or competitors;
- (4) The relative significance and foreseeability of the effects of the conduct on the United States compared to effects abroad;
- (5) The existence of reasonable expectations potentially furthered or defeated by the actions;
- (6) The degree of conflict with foreign law or economic policy;
- (7) The effect of the exercise of jurisdiction on international commerce.²³⁰

Comparing the various interest balancing considerations set forth above emphasizes the important role of law and international agree-

228. *Mannington Mills Inc.*, 595 F.2d at 1297-98 (emphasis added).

229. S. REP. NO. 397, 99th Cong., 1st Sess., (1985) as amended by amend. no. 1324, 131 Cong. Rec. § 17,105 (daily ed. Dec. 6, 1985).

230. *Id.*; see also the Reagan Administration Antitrust Reform Package entitled the "Foreign Trade Antitrust Improvements Act of 1986" which incorporates these factors with the exception of Number (7). 3 INT'L TRADE REP. 292 (BNA) (1986).

ments in the rational ordering of our global economy. Because of the increased importance of international trade to the United States, the assertion of international jurisdiction by United States courts and its effect on international commerce are increasingly the predominate considerations. These considerations emphasized the necessity of international agreements providing judicial assistance in an agreed and orderly fashion.

F. *Constitutional and Foreign Relations Considerations*

Mutual judicial assistance treaties, especially regarding evidence gathering, involve sensitive areas of foreign sovereignty. The courts must pay close attention to the sensitive nature of the processes involved because the parties to the Hague Evidence Convention are some of our closest allies. For example, in the recent uranium anti-trust litigation²³¹ the United States Court of Appeals for the Seventh Circuit was informed by the Departments of State and Justice of the serious embarrassment caused to the United States Government resulting from some of the language in a recent decision.²³² This raises a question whether our domestic courts are interfering with the role of the Executive Branch to conduct foreign affairs. Clearly, an appropriate interest balancing will resolve such controversy.

G. *Summary of International Law Considerations*

The overriding consideration in the interpretation and application of the Hague Evidence Convention is its purpose and the intent of the Contracting Parties. Thus, the question arises why the United States agreed to a treaty restricting its right to seek extraterritorial discovery from parties over which they assert *in personam* jurisdiction. The answer to this question is found in the cases and early articles which recognized that extraterritorial discovery had been accepted by the United States judiciary for some time, but was viewed as a violation of international law by our trading partners. Consequently, regardless of our policy and rules, our courts and litigants have met substantial resistance on foreign soil to United States discovery orders. Thus, just as a body of water seeks the path of least resistance, the United States ratified the Hague Evidence Convention which was to aid its citizens in the discovery of foreign evidence.

231. *Westinghouse Electric Corp. v. Rio Algom Ltd.*, 617 F.2d 1248 (7th Cir. 1980).

232. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 657, 665-67 (1980).

It is also important to ask how other Signing Parties benefit if United States courts refuse to follow the Convention's procedures. Consequently, they agreed to liberalize their judicial assistance to foreign parties without the intended *quid pro quo* on the part of United States courts. Indeed, viewing the Hague Evidence Convention from a global perspective, it appears to take on a bilateral complexion; the United States versus the rest of the world.

X. SUGGESTED POLICY CONSIDERATIONS AND SOLUTIONS

A. *Policy Considerations*

The current trend in Hague Evidence Convention decisions in the United States indicates certain potential serious problems. The expansion of *in personam* jurisdiction over witnesses for global discovery purposes could tip the scales in favor of a foreign forum because of the doctrine of *forum non conveniens*.²³³ This would cause great aggravation to the segment of the bar that appears to be seeking exemption from the Hague Evidence Convention. Secondly, failing to abide by the Hague Evidence Convention procedures, if viewed as exclusive by other Contracting Parties, could result in a breach of the treaty and a declaration by other parties that they will not abide by it. This would result in a loss of the procedures for United States litigants. Thirdly, current judicial treatment by United States courts will deter other trading partners, i.e., Japan, Canada, and the People's Republic of China, from acceding to the Hague Evidence Convention. Lastly, United States courts should question the potential impact of their failure to use the Hague Evidence Convention procedures on the validity of their judgments at home and in foreign countries. This would be especially true in the event that sanctions in the form of a default judgment are entered.²³⁴

B. *Policy Solutions*

The problem besetting the United States judiciary today concerns the application of the Hague Evidence Convention to foreign parties. This could be solved by the promulgation of new judicial assistance legislation or by amending the Federal Rules. Additionally, the Revised Restatement's timid approach to the problem neutralizes its impact on the judiciary. The Restatement should take a position that

233. See, e.g., *Pain v. United Techs. Corp.*, 637 F.2d 775 (D.C. Cir. 1980).

234. See, e.g., *Feliciano v. Reliant Tooling Co.*, 691 F.2d 653 (3d Cir. 1982).

leads the courts in the right direction before a developing body of law inflicts irreparable injury upon the Hague Evidence Convention. Lastly, the Departments of State and Justice should take a more active role in these decisions by providing letters and briefs stating the government's position at both the trial and appellate levels.

XI. PRACTICE CONSIDERATIONS AND RECOMMENDATIONS

A. *Practice Considerations Before Ignoring the Hague Evidence Convention Procedures*

First of all, consider the possibility of a lengthy hearing and appellate process by the foreign party who feels that the Hague Evidence Convention Procedures are exclusive.²³⁵ Another consideration is that an appellate court may reverse the granting of the trial court's discovery order for foreign input concerning comity considerations.²³⁶ Additionally, sanctions in the form of a default judgment would impair the enforceability of the judgment in this country or abroad.²³⁷ The possibility of criminal sanctions in the foreign state if one seeks evidence contrary to certain statutes is another factor to be considered.²³⁸ Finally, the consequences of the invocation of the doctrine of *forum non conveniens* must be looked at.²³⁹

B. *Practice Recommendations*

In the use of the Hague Evidence Convention, the practitioner must be specific in the Request to avoid being charged by a foreign court of going on a "fishing expedition."²⁴⁰ Also, the practitioner should declare the purpose of the Request, which is that the evidence is to be used at trial.²⁴¹ Additionally, he should follow the procedures of the Hague Evidence Convention to avoid rejection.²⁴² At the outset of the litigation, he should identify all foreign witnesses and documents that may require the utilization of the Hague Evidence Convention procedures for deposition or production.²⁴³ If represent-

235. See, e.g., *In re Anschuetz & Co. GMBH*, 754 F.2d 602 (5th Cir. 1985).

236. See, e.g., *In re Messerschmitt Bolkow Blohm GMBH*, 757 F.2d 729 (5th Cir. 1985).

237. See, e.g., *Feliciano v. Reliant Tooling Co.*, 691 F.2d 653 (3d Cir. 1982).

238. B. RISTAU, *Overview of International Judicial Assistance*, 18 INT'L LAW. 525, 531 (1984).

239. See, e.g., *Pain v. United Techs. Corp.* 637 F.2d 775 (D.C. Cir. 1980).

240. B. RISTAU, *supra* note 14, at 234-35.

241. *Id.* at 235.

242. *Id.* at 221.

243. *Id.* at 213.

ing a foreign party, the practitioner should assert the application of the Hague Evidence Convention at the outset of the proceeding to avoid waiver.²⁴⁴ Finally, the practitioner should consider the retention of foreign counsel to assist the Request or to appear in the foreign forum.

XII. CONCLUSION

In conclusion, that the Hague Evidence Convention was intended to apply to foreign parties subject to a court's *in personam* jurisdiction is evident from the negotiating history and language of the Convention. However, this issue is moot today in light of the overriding considerations of foreign and international economic relations and the possible negative ramifications from the failure to abide by the Convention's procedures.²⁴⁵

As was recently recognized by the Honorable Kenneth W. Dam, former Deputy Secretary of State, the extraterritorial application of our laws transcends the international law debate:

Controversies over the extraterritorial application of United States law have taken on increasing importance in our foreign policy. Recall the dispute in 1982 over United States sanctions against the Soviet natural gas pipeline. That problem was resolved, but the extraterritorial issue has arisen in other contexts. We have had diplomatic and courtroom clashes with Switzerland, for example, over foreign evidence production in the *Marc Rich* case, and with

244. See, e.g., *Cooper Indus., Inc. v. British Aerospace*, 102 F.R.D. 918 (S.D.N.Y. 1984); *Murphy v. Reifenhauer KG Maschinenfabrik* 101 F.R.D. 360 (D. Vt. 1984).

245. Reflecting the concern of other contracting parties, who are also our closest trading partners, are these quotes taken from amicus briefs filed in *In re Société Nationale Industrielle Aérospatiale*, ___ U.S. ___, 90 L. Ed. 2d 976 (1986) (No. 85-1695, 1985 Term):

As the economies of nations have become more interdependent, effective mechanisms for cooperation between their different legal systems have become increasingly important. These mechanisms for cooperation (including treaties, statutes, and administrative arrangements), facilitate international business by enhancing the predictability and enforceability of rules governing transactions across international boundaries.

Transnational enforcement of legal rules can most effectively be achieved when the sovereignty of all nations is respected. Such respect requires that conflicts between the legal requirements of nations be avoided or minimized whenever possible.

Brief of the government of Switzerland as amicus curiae;

The governments of the United States, the Republic of France, the United Kingdom, and all other trading nations with developed legal systems have a common interest in the promotion of international trade and in the orderly and mutually supportive resolution of legal disputes which arise in international commerce. Reducing international jurisdictional conflicts is a vital national interest of the United States no less than other nations.

Brief of the United Kingdom as amicus curiae.

Canada and a number of Caribbean jurisdictions in the *Bank of Nova Scotia* cases. We have had disputes with other countries over application of our re-export controls to goods within their jurisdictions. The private *Laker* antitrust case and the Grand Jury investigation into alleged North Atlantic aviation price-fixing has seized the attention of the highest levels of the United States and British governments. Britain has invoked its Protection of Trading Interests Act to forbid the production in *Laker* of any documents held in that country.

As a result of these and other experiences, the United States government and a number of other governments have dedicated themselves to a systematic effort to manage the extraterritorial application of their law more effectively. The problem naturally arises most acutely among friends and close trading partners; we therefore share a powerful interest in not letting the issue do harm to vital political relationships.²⁴⁶

In sum, the extraterritorial application of United States antitrust laws and export controls may remain undecided. In the discovery of documents and evidence from a foreign witness, whether or not a party is subject to *in personam* jurisdiction of the court, the Executive and Legislative Branches have clearly spoken. The interests and the considerations have been weighed in favor of the negotiation and the ratification of a valid and binding international agreement intended to represent the exclusive and preferable alternative to continued expensive and protracted discovery litigation in transnational disputes. For federal courts to perpetuate this developing controversy not only does violence to United States and foreign notions of international law, but also inflicts possibly irreparable harm to United States international trading relationships.²⁴⁷ Certainly, the trend in federal appellate decisions led by *Anschuetz* must be reversed.

246. Dam, *Economic and Political Aspects of Extraterritoriality*, 19 INT'L LAW. 887, 887-88 (1985).

247. *Id.* at 890.