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On the Exclusivity of the Hague Evidence Convention

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On the Exclusivity of the Hague Evidence Convention

JOHN M. ROGERS†

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I. INTRODUCTION

As the world grows smaller and nations become more interdependent, the likelihood that litigation will involve foreign property, parties, or activities increases tremendously. To prepare and conduct such litigation, the lawyer may need to obtain information "located" in a foreign jurisdiction: a person located abroad may know the information; documents located abroad may contain the information; or the information may describe conditions or property located abroad. The question of when relatively burdensome, internationally-approved methods of obtaining such information must be used thus becomes more and more important.

Consider a product liability suit for damages in the United States arising from a defective automobile made in Europe. The plaintiff's lawyer will want to know how the manufacturer designed the product, whether the manufacturer selected a more dangerous design to save money, the extent of quality control in the manufacturing process, and other material information. Documents and people with this information, however, may only be found in Europe.

The problem of how to obtain such information presents conflicts between the interests of litigants in United States courts and the interests of foreign states in protecting against encroachments on their territorial sovereignty. Resolving these conflicts initially requires examining the alternatives available to a litigant who seeks such information.

First, if a party under the personal jurisdiction of a United States court can obtain and provide the information, an opposing party may employ various discovery techniques. Under the Federal Rules, a party may use interrogatories, requests for admission, oral depositions, and requests for production of documents or inspection of tangible things to obtain information from an opposing party.

Second, a party may obtain information by seeking to depose a nonparty and to have the nonparty produce documents. Federal courts have jurisdiction to subpoena a United States national in a foreign country and require

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2. Id. 36.
3. Id. 30.
4. Id. 34.
5. See id. 30(a), (b)(6), 45(b).
his or her presence before the court, but there may be no basis for requiring
a foreign national to appear before a United States court to testify. Thus,
proceedings in the foreign country may be necessary to obtain information
from a non-United States witness. Further, when obtaining information
requires activity in the foreign jurisdiction other than taking testimony, such
as physically inspecting an automobile plant, a proceeding abroad becomes
necessary.

The traditional method of obtaining information from a nonparty is by a
letter rogatory, or letter of request, from the American court to a court of
the foreign state, requesting the latter to conduct a proceeding. The court
may transmit the letter directly or through the State Department.

The Federal Rules also permit alternative evidence-gathering proceedings
abroad. A party may take depositions before a person authorized to admin-
ister oaths under the foreign state’s law or before consular officers of the
United States. Additionally, the court may commission a person to
administer oaths and take testimony abroad.

II. THE HAGUE EVIDENCE CONVENTION

To facilitate and regularize the conduct of proceedings abroad for taking
evidence, without adversely affecting the sovereignty interests of foreign
states, the United States and seventeen other nations have become parties to
the Hague Convention on the Taking of Evidence Abroad in Civil or Com-
mercial Matters. The states represented at the Eleventh Session of the
Hague Convention on Private International Law negotiated and signed the
Hague Evidence Convention in 1968, following successful negotiation of the
Hague Service Convention at the previous session.

The earlier Service Convention comprehensively regulates the procedures
for effective transnational service among member states. Parties must follow

8. See id. 28(b)(3); 6 M. Whiteman, Digest of International Law 204-25 (1968).
11. Id. 28(b)(2).
No. 231 (entered into force for the United States on October 7, 1972), reprinted in 28 U.S.C.A.
§ 1781 (West 1982) [hereinafter Evidence Convention]. States that have signed, ratified, or
13. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in
9432 (entered into force for the United States on February 10, 1969) [hereinafter Service
Convention]. The Hague Conference, a permanent institution, which came into existence in
1893, meets periodically to discuss and draft conventions of private international law.
775 (1963).
the Service Convention "in all cases in civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad." United States courts have consistently held that litigants wishing to serve process in countries that are parties to the Service Convention must follow the procedures provided by that Convention unless the nation involved permits more liberal procedures.

The Evidence Convention provides methods of conducting evidence-taking proceedings in foreign signatory states in connection with civil or commercial litigation. During the negotiations of the Evidence Convention, the United States identified several difficulties with the traditional letter of request procedure: (1) delays brought about by routing letters of request through diplomatic mail, (2) unnecessary translation requirements, (3) unavailability of verbatim transcripts, and (4) other procedural requirements of the requesting state. Because of the expense and delay involved in using letters of request, the United States sought to improve the letter of request technique and to authorize "less burdensome means" of obtaining testimony from a witness in a foreign state. The Evidence Convention thus improved the then-existing practice for obtaining evidence in a foreign territory by (1) simplifying and expediting the use of letters of request, (2) eliminating restrictions on using diplomatic and consular officers in taking evidence abroad, and (3) introducing the use of commissioners to take evidence abroad. The drafters constantly bore in mind, however, that the act of taking evidence in a foreign country without the participation, or at least the consent, of the local authorities might violate that country's judicial sovereignty.

The concern for judicial sovereignty reflects the fact that in most civil law countries the legal system regards taking evidence as a judicial function.

18. United States Report, supra note 17, at 807.
rather than an act of the parties. One government exercising a governmen-
tal function in the territory of another without the latter state's prior consent
generally violates that state's sovereignty. For instance, an arrest or
seizure by officers of State A in foreign State B without State B's consent
violates State B's sovereignty, just as marching armed forces across foreign
State C without State C's consent violates State C's sovereignty. On the
other hand, when a person—including a lawfully admitted alien—engages in
private activity in a foreign state, there is generally no violation of sover-
eignty. An American in West Germany or France, like the West German or
Frenchman, can eat, drink, sleep, take pictures, ask questions, engage in dis-
cussions, and participate in other activities without violating the sovereignty
of West Germany or France. Of course, if the individual American violates
the law of West Germany or France, then he or she may suffer the local legal
consequences.

Because the government, through the courts, always participates in taking
testimony in civil law systems, while in common law systems parties often
take testimony with minimal or no court participation, different attitudes
prevail on the question whether taking testimony in a foreign territory vi-
lates territorial sovereignty. West Germany or France could regard the tak-
ing of testimony in its territory for purposes of a United States lawsuit as a
violation of its sovereignty, while the United States would not consider
identical procedures by a West German or French court to violate its
sovereignty.

The drafters of the Hague Convention sought to accommodate such judicial
sovereignty concerns:

Under the Common Law system the preparation of the case for
trial and the obtaining of the necessary evidence of the witness is
not a function of the judge or of the judicial machinery. It is the
function of the parties and their lawyers, who do so on a "private"

19. Id. at 806; Edwards, Taking of Evidence Abroad in Civil or Commercial Matters, 18
INT'L & COMP. L.Q. 646, 647 (1969); 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, 762-64 (1983); see also Borel & Boyd, Opportunities for and Obstacles to
Obtaining Evidence in France for Use in Litigation in the United States, 13 INT'L LAW. 35, 36-
37 (1979); 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.

69 (D.C. Cir. 1980) (service of compulsory process); Oxman, supra note 19, at 751.

21. E.g., The Ship Richmond, 13 U.S. (9 Cranch) 102, 103 (1815) (seizure of a vessel in
foreign waters is an offense under international law); I. BROWNLE, PRINCIPLES OF PUBLIC


23. See supra note 19.

SESSION, Hague Conference on Private International Law 55, 56 (1968) [hereinafter Special
Commission Report]; United States Report, supra note 17, at 806.
basis. Under the Civil Law system, the obtaining of the evidence is a function of the judge or of the judicial machinery, in which the parties and their lawyers may be permitted to assist, but on a "public" basis.

Because of this difference, the act of taking evidence in a common law country of a willing person, without compulsion, and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which it does not wish to participate. To the contrary, the same act in a Civil Law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized person. It may violate the "judicial sovereignty" of the host country, unless official permission is obtained.25

Despite this effort, an important issue of recent concern to lawyers, courts, and commentators remains: When must courts and parties resort to Convention-authorized methods to obtain evidence abroad? Courts and parties must rely upon Convention-authorized procedures when (1) an alternative procedure would violate the sovereign rights of the foreign state under international law, independent of the Evidence Convention, or (2) an alternative procedure would violate, or cause a party to violate, the law of the foreign state, and comity would require deference to that foreign state's law. It may be difficult, however, to determine (1) what limits international law places on American court actions or (2) when comity requires deference to a foreign state's law.

Much confusion arises from careless use of the term "exclusive" when referring to the Evidence Convention.26 The question is, what does the Evidence Convention exclude? If certain alternatives to Convention-authorized procedures are illegal, then the Evidence Convention is exclusive of those procedures. To interpret the Evidence Convention as exclusive of illegal alternative procedures, however, is not to conclude that the Evidence Convention excludes all other procedures for obtaining information located abroad.

A. Evidence Convention Procedures to Obtain Evidence

1. Letters of Request

The Evidence Convention simplified, expedited, and improved the reliability of the letter of request procedure. Under this procedure, a court of one state asks the court of another state to secure designated evidence for use in the requesting state.27 Each state must designate a "Central Authority" to receive letters of request.28 The Evidence Convention specifies the contents

26. Because of the inherent ambiguity of the term "exclusive," I will attempt to avoid its use as much as possible.
27. United States Report, supra note 17, at 807.
28. Evidence Convention, supra note 12, art. 2.
of the letter of request and the language in which it must be written. A court may request "a special method or procedure," and the requested court must apply "the appropriate measures of compulsion . . . to the same extent as are provided by its internal law." Thus, unlike before the Evidence Convention, testimony under oath and verbatim recordings are available, and the Evidence Convention assures litigants of compulsory attendance of witnesses from abroad. Most importantly, contracting states undertake an international obligation, subject to limited exceptions, to execute letters of request that comply with the Evidence Convention requirements. While the Evidence Convention improved and simplified the letter of request procedures, they remain cumbersome in comparison with American discovery techniques.

Because the courts of the executing state carry out letters of request, considerations of judicial sovereignty were irrelevant to the Evidence Convention provisions amending the letter of request procedure:

[The task of the Commission was merely to "improve" the existing practice, particularly in the areas of transmission, reduction of formalities, the language and translation problems, the privileges and immunities of witnesses and the form of the execution of the letters. No basic questions of legal philosophy and governmental concepts of sovereignty were presented. The letter of request . . . poses no [judicial sovereignty] question, because it is performed by the judge or his nominee in the State of execution.]

Since the Evidence Convention created an obligation upon contracting states to execute letters of request, there were concerns about the extent of that obligation, and the contracting parties incorporated provisions reflecting those concerns. A letter of request may be used "to obtain evidence, or to perform some other judicial act," but not "to obtain evidence which is not intended for use in judicial proceedings." Privileges available under the law of the state of execution may be asserted in the execution of a letter of

29. Id. arts. 3-5.
30. Id. art. 9.
31. Id. art. 10.
32. United States Report, supra note 17, at 813; Borel & Boyd, supra note 18, at 39; Shemanski, supra note 19, at 473.
34. Evidence Convention, supra note 12, art. 12.
36. Special Commission Report, supra note 24, at 56; see also United States Report, supra note 17, at 807.
39. Evidence Convention, supra note 12, art. 1.
request. Under article 12, a court may refuse execution if it "does not fall within the functions of the judiciary" or if the executing state objects on sovereignty or national security grounds. Article 12, however, also provides: "Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it." Finally, article 23, the most controversial article of the Evidence Convention, permits a contracting state to declare its refusal to execute letters of request "for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." The articles establishing these limits do not prohibit individuals, courts, or states from complying with a letter of request; they merely limit the contracting state's obligation to comply with a letter of request.

2. Taking Evidence by Diplomatic Officers and Consular Agents

The Evidence Convention's second method for taking evidence is by diplomatic officers and consular agents. Unlike the letter of request procedure, this procedure does not involve the courts of the receiving state. The judicial sovereignty issue arises because officers of a foreign state take evidence. Under the Evidence Convention, the receiving state must give permission before a diplomatic officer or consular agent may take evidence. The receiving state may grant permission generally or specifically in each particular case. The Evidence Convention does not require a state to obtain prior permission when it seeks evidence from its own nationals in the receiving state, unless the receiving state has declared otherwise.

3. Taking Evidence by Court-Appointed Commissioners

The third Convention-authorized procedure is evidence taking by commissioners appointed by one state's courts to take evidence in another state's territory. The procedure implicates the judicial sovereignty issue, and the evidence-taking state must first receive permission, unless the receiving state has declared otherwise.

40. Id. art. 11(a).
41. Id. art. 12.
42. Id.
43. Id. art. 23.
44. Id. arts. 15-16.
45. Special Commission Report, supra note 24, at 56; United States Report, supra note 17, at 807, 816.
46. Evidence Convention, supra note 12, art. 16.
47. Id. art. 17.
49. Evidence Convention, supra note 12, art. 17.
Furthermore, the receiving state, in granting permission, "may lay down such conditions as it deems fit." Finally, a state may partially or entirely exclude, at the time of signature, ratification, or accession, those provisions dealing with evidence taking by diplomatic officers, consular agents, or commissioners. These provisions further reflect the drafters' concern with preserving judicial sovereignty.

4. Other Convention-Authorized Methods of Taking Evidence

While the Evidence Convention addresses (1) letters of request, (2) evidence taking by diplomatic officers and consular agents, and (3) evidence taking by commissioners, it also authorizes other forms of evidence taking. The Evidence Convention expressly allows states to permit "by international law or practice, methods of taking evidence other than those provided for" in the Evidence Convention. Moreover, states may agree to supplement the procedures outlined in the Convention. For example, in an exchange of notes in 1955 and 1956, the United States and the Federal Republic of Germany agreed that American consular officers could take voluntary depositions of West German citizens, subject to certain conditions. The two countries agreed in 1980 that the exchange of notes remained in effect, despite the fact that when the Federal Republic became a party to the Evidence Convention in 1979 it made a reservation pursuant to article 33, thereby excluding evidence taking by consular agents when West German nationals are involved. Hence, Convention-authorized proceedings are not limited to those specified in the Evidence Convention.

B. Interpretation Problems

The Evidence Convention meets its drafters' goals of improving then-existing practices and respecting judicial sovereignty. Nonetheless, problems with taking evidence abroad persist. One major problem, beyond the scope of this article, is the extent to which a reservation under article 23 limits a state's obligation to execute letters of request. A different problem, and the

50. Id. art. 19.
51. Id. art. 33.
52. Id. art. 27(c).
53. Id. arts. 28, 32.
54. M. WHITEMAN, supra note 8, at 221-24; Shemanski, supra note 19, at 477.
55. T.I.A.S. No. 9938; see Shemanski, supra note 19, at 477-587.
56. See Brief of the United States as Amicus Curiae, Volkswagenwerk Aktiengesellschaft v. Falzon, S. Ct. No. 82-1888, at 7-9, reprinted in 23 I.L.M. 412, 415-16 [hereinafter Falzon brief].
principal concern of this Article, is the extent to which courts or litigants
must employ Convention-authorized procedures in order to obtain informa-
tion located abroad.

III. WHEN MUST PARTIES USE HAGUE EVIDENCE
CONVENTION PROCEDURES?

A. The Argument That Parties Must Use Convention-Authorized
Procedures in Order to Obtain Information Located Abroad

Some lawyers and commentators argue that, when parties can only obtain
information in the territory of a foreign state, the Evidence Convention itself
requires domestic courts to use only Convention-authorized procedures to
obtain, or permit the obtaining of, information located abroad. The logic
underlying the argument is that the Evidence Convention represents a quid
pro quo: the civil law states permitted better access to information in their
territory in exchange for the common law states’ renunciation of any right to
obtain information by other procedures.

The argument fails to recognize, however, that judicial sovereignty has
little to do with access to information per se. Judicial sovereignty reflects a
state’s desire to prevent usurpation of governmental functions within its terri-
tory. Thus, if a national of a civil law state voluntarily sends trade secrets
to a national of a common law state, the action may violate certain public
policies of the civil law state, but the action would not infringe upon judicial
sovereignty since no one has taken a governmental action in the territory of
the civil law state. Similarly, if a national of a civil law state is unlawfully
compelled to send the trade secrets by private persons in a common law
state, the actions still would not infringe upon judicial sovereignty, although
they might implicate other national policies, such as the protection of
nationals from illegal duress. In contrast, when foreign courts, other gov-
ernmental bodies, or individuals undertake activities which otherwise fall

58. Bishop, Significant Issues in the Construction of the Hague Evidence Convention, 1
INT’L LITIGATION Q. 1 (1985); Heck, U.S. Misinterpretation of the Hague Evidence
Convention, 24 COLUM. J. TRANSNAT’L L. 231 (1986); Comment, The Hague Convention on
the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory
Hague Convention]; see Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 42,
48-50 (D.D.C. 1984); Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) 17,222
note 1 (N.D. Ill. 1983); Cuisinarts, Inc. v. Robot Coupe, S.A., Super. Ct., Stamford/Norwalk,
Conn., No. CV 80 005 0083 S, July 22, 1982; Gebr. Eickhoff Maschinenfabrik u. Eisengieberei
v. Starcher, 328 S.E.2d 492, 497-501 (W. Va. 1985); RISTAU, supra note 57, § 5-40 at 256.1;
Non-resident Parties to American Litigation, 17 INT’L LAW. 61, 78-79 (1983); Oxman, supra
note 19, at 758-61; Report of the American Bar Association Subcommittee on the Hague
Convention on Taking Evidence Abroad in Civil or Commercial Matters 15-23 (Apr. 18, 1985)
[hereinafter ABA Report].

59. Bishop, supra note 58, at 28-29; Oxman, supra note 19, at 760-61; Comment, The
Hague Convention, supra note 58, at 1481-82; ABA Report, supra note 58, at 22-23.
within the exclusive power of the courts in that civil law jurisdiction, they infringe upon judicial sovereignty in a civil law country. For example, parties cannot serve process, hear testimony, or examine private premises in the territory of the civil state without the participation of a civil law court.

One could interpret the Evidence Convention to preclude such actions, if not authorized by the Convention, as violations of judicial sovereignty. This interpretation, however, contributes little to the discussion of the Evidence Convention; whether or not the Evidence Convention itself precludes such actions, United States courts should respect the judicial sovereignty of foreign states if the actions violate the international law obligations of the United States. The quid pro quo argument supports the proposition that the Evidence Convention prohibits individuals or organs of one state from physically exercising judicial authority in another state's territory. Logic does not require extending this prohibition to exercises of judicial authority in the United States that result in private activity abroad. West German courts have the same view of judicial sovereignty:

[T]he courts have not yet seen a problem in requiring a defendant to produce information including that which must be procured in a foreign country. In special circumstances, the German law also can procedurally require a party to provide information. In paternity matters, both fines and imprisonment are possible if a party refuses a blood test. Also, in this context, no differentiation is made if the party in question is a foreigner or lives in a foreign country...

All of this has been accepted traditionally without contradiction in the national practice. Hence, one can conclude that there is no rule in international public law which limits the authority of national courts and agencies to require the cooperation of foreign parties in discovery and to impose sanctions for refusals in so far as this also can be done in a similar situation to a domestic party.

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61. See Nahas, 738 F.2d at 492-93 n.11.

The West German Supreme Court has held that an Italian man living in Italy is bound to give a blood sample when being sued in West German paternity proceedings. The sanction for failure to give the sample was an adverse fact-finding, in the presence of a pre-established likelihood of defendant's paternity. Judgment of Sept. 4, 1986, Bundesgerichtshof, IV. Zivilsenat, W. Ger., [1986] 38 NJW 2371.

The English courts have also recognized that defendants must produce documents located abroad: "If you join the game you must play according to the rules. This applies not only to plaintiffs but also to defendants who give notice of intention to defend. . . . In principle, there is no reason why [a party] should not have to produce all discoverable documents wherever they are." MacKinnon v. Donaldson, Lufkin and Jenrette Corp., [1986] 2 W.L.R. 453, 460 (Ch.D.) (dictum).
In addition to the fact that the quid pro quo argument does not support the conclusion that the Evidence Convention precludes all obtaining of information from the territory of foreign states other than by Convention-authorized procedures, other factors strongly argue against such a broad proposition. The Evidence Convention states no obligation to use the procedures authorized therein. Instead, it only provides for methods of obtaining evidence from abroad and obligates the signatories to execute or permit properly initiated procedures. In contrast, the Service Convention, drafted at the previous session by the same Hague Conference, must be applied "in all cases in civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad."

The history of the Evidence Convention negotiations contains no information to support the finding of an obligation to use Convention-authorized procedures instead of other methods for obtaining information from abroad. Indeed, Mr. Philip Amram, United States representative to and rapporteur of the Hague Conference, assured the United States Senate that the Convention would make "no major changes" in United States procedure, legislation, or rules. The practice of United States courts of ordering parties to supply information located abroad clearly preceded the Evidence Convention. Mr. Amram could hardly have anticipated "no major changes" in United States procedure were the Convention intended to put an end to such orders.

Absurd consequences also would result if courts interpreted the Evidence Convention to preclude a party from obtaining any information located abroad for purposes of presenting it in court. The defendant could assert that even telephoning someone in Europe to answer an interrogatory would violate judicial sovereignty. The obligation would apply irrespective of whether the plaintiff or the defendant made the assertion that information was located abroad, and regardless of whether either party was a foreign national. Since even the voluntary taking of testimony abroad, if not authorized under the Evidence Convention, implicates judicial sovereignty concerns, the Convention would bar the voluntary transfer of information

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63. See Gebr. Eickhoff, 328 S.E.2d at 500-01.
64. Service Convention, supra note 13, art. 1.
67. The preparatory materials for the Evidence Convention show that even procedures voluntarily entered into by the parties in a state's territory may violate the judicial sovereignty that the drafters sought to protect. For example, many civil law countries object to a foreigner
located abroad by one party to another. The potential for abuse would be enormous.

Finally, such a restrictively interpreted Evidence Convention would result in a violation of the public international law obligations of the United States whenever a court ordered or permitted the obtaining of information abroad, even if voluntary, and the party did not follow Convention-authorized procedures. It is inconceivable that any signatory nation intended the Evidence Convention to have such effects.

Judge Getzendanner noted still other extraordinary consequences of a preclusive interpretation of the Evidence Convention:

Treating the Convention procedures as exclusive would make foreign authorities the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court. This cession of jurisdiction not only would apply at the discovery stage, presumably, but also would allow foreign authorities to determine what evidence may be taken from their nationals at trial, or for use at trial. An American plaintiff might not be able to call the president of a foreign defendant corporation as a live adverse witness, and instead might have to settle for introducing a transcript of the execution of a Letter of Request abroad.68

One could argue that the Evidence Convention only precludes the compulsory extraction of information from abroad, but such a limitation is inconsistent with the very theory that the use of Convention-authorized procedures is obligatory. The theory behind the argument is that the Evidence Convention provides methods to obtain information from abroad; therefore, the courts should interpret the Evidence Convention to require exclusive use of those methods.69 But the Evidence Convention provides for voluntary as well as involuntary giving of information. For instance, the Evidence Convention expressly provides for the voluntary giving of testimony to consular officers.70

Moreover, the attempt to limit the preclusive effect of the Evidence Convention to the compulsory giving of information suffers from the lack of a definition of compulsory in the Evidence Convention. We may reasonably assume that an explicit threat of a contempt citation would constitute compulsion. But what about an order that requires disclosure of information but does not state the consequences of a party’s failure to comply, or merely threatens that the court will deem certain facts to be established71 or that

taking evidence even from a willing witness. Special Commission Report, supra note 24, at 56; Oxman, supra note 19, at 764 & n.84.


70. Evidence Convention, supra note 12, art. 15.

71. See, e.g., FED. R. CIV. P. 37 (b)(2)(A).
certain issues will be precluded? What about defendants who merely gather evidence to defend their cases? A United States court order to provide information on pain of sanctions, such as forfeiting the case, would seem indistinguishable from shifting the burden of proof to the defendant once the plaintiff has presented a prima facie case, when the evidence to rebut the prima facie case may only be obtained from abroad. In each situation, the defendant must obtain information from abroad to avoid losing the suit in the United States. Clearly no principled basis exists for distinguishing between a case in which a party must marshal evidence to avoid losing a lawsuit and one in which a party is expressly compelled to produce evidence. Consequently, construing the Evidence Convention to preclude only the compulsory transfer of information does little to limit the extraordinary nature of a preclusive interpretation of the Convention.

Given the difficulties associated with this restrictive view, it is not surprising that United States courts have regularly rejected such an interpretation. Those courts requiring resort to the Evidence Convention have relied upon comity, not on any interpretation of the Convention itself.

In an amicus brief filed at the United States Supreme Court's request, the United States Government adopted the position that the Evidence Convention is not exclusive. In the Government's view, "the Convention cannot be construed as absolutely restricting the authority of United States courts to employ traditional discovery devices specified in federal and state rules," even if those devices require a "party or witness to comply with a discovery request under pain of sanctions," and even "where the party from whom discovery is sought claims that the information necessary to respond to the

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72. See, e.g., id. 37 (b)(2)(B); Shemanski, supra note 19, at 484.

73. Indeed, the French blocking statute, see infra text accompanying notes 115-16, even though purporting to require resort to Convention-authorized procedures when courts or parties seek broad categories of information in France for foreign litigation purposes, "does not have as a purpose the limiting or controlling of the relations of international lawyers and their clients." J. O. Assemblee Nationale—Questions et Responses, January 26, 1981 at 373, translated and quoted in Toms, The French Response to the Extraterritorial Application of United States Antitrust Laws, 15 INT'L LAW. 585, 596, 612, 614 (1981); see infra text accompanying note 115.


77. Id. at 8-9, 23 I.L.M. at 1338.

78. Id. at 6, 23 I.L.M. at 1337.
discovery request is located in a foreign state that is a party to the Hague Evidence Convention."\textsuperscript{79} United States courts, in deference to the Government's views on United States treaty obligations,\textsuperscript{80} will probably interpret the Evidence Convention accordingly.

\textbf{B. The Argument That the Evidence Convention Requires First Resort to Convention-Authorized Procedures}

A second argument is that the Evidence Convention requires first resort to Convention-authorized procedures.\textsuperscript{81} While rejected by some courts,\textsuperscript{82} other courts have adopted this interpretation—but only as a matter of comity.\textsuperscript{83}

The Evidence Convention contains no textual basis for the first resort position. As Judge Getzendanner succinctly explained, it is inconsistent to insist that judicial sovereignty prohibits certain activity in a foreign country at one stage of a lawsuit but does not prohibit the same activity at a later stage: "[T]he greatest insult to the civil law countries' sovereignty would be for American courts to invoke their judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure."\textsuperscript{84} The first resort interpretation of the Evidence Convention lacks any textual, logical, or sound policy basis.

\textbf{C. The Argument That Proceedings to Take Evidence in a Foreign State, Which is a Party to the Convention, Require Resort to Convention-Authorized Procedures}

Finally, one may argue that international law requires Convention-authorized procedures when proceedings are conducted in a foreign signatory state's territory, but not when domestic proceedings merely result in information gathering by a party in the foreign state's territory.\textsuperscript{85} In other words, a United States court may not order an evidence-taking proceeding in the foreign territory without using Convention-authorized procedures, but a United States court can undertake proceedings in the United States which

\textsuperscript{79} Id. at 3, 23 I.L.M. at 1335.
\textsuperscript{80} E.g., Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933).
\textsuperscript{81} Professor Oxman argues that a first resort rule should be "gradually evolv[ed]" in "judge-made federal common law." His policy arguments support his conclusion that "[t]he agreed [Evidence Convention] procedures should be used," but he provides no clear definition of when international law requires its use. Oxman, supra note 19, at 794-95. Hence, the argument is of limited use to a court faced with both the conflicting demands of counsel and the potential for reversal on appeal.
\textsuperscript{82} In re Anschuetz, 754 F.2d 602, 612-13 (5th Cir. 1985); Graco, 101 F.R.D. at 523.
\textsuperscript{83} See, e.g., Gebr. Eickhoff, 328 S.E.2d 492; Graco, 101 F.R.D. at 523; see also Anschuetz, 754 F.2d at 613.
\textsuperscript{84} Graco, 101 F.R.D. at 523; see also Anschuetz, 754 F. 2d at 613.
result in private information-gathering activity abroad. Under this theory, the critical question is the location of the evidence-taking proceeding.\(^6\)

This inquiry satisfies the Evidence Convention's purpose of protecting judicial sovereignty. Parties and courts must have the host state's participation or consent to undertake proceedings in its territory if it so requires. But ordinary activity, such as private information gathering by a party, regardless of its purpose, does not require the host state's participation or consent.

This conclusion is congruent with the text of the Evidence Convention. Nowhere does the Evidence Convention by its terms require its use, and it would be extraordinary to interpret the Evidence Convention to preclude information gathering, pursuant to domestic court orders, by methods previously consistent with international law. On the other hand, to the extent that proceedings without prior consent in the territory of a foreign state would violate that state's sovereignty under international law, one can logically look to the Evidence Convention as providing the only means by which a contracting state will permit another state or party to conduct such proceedings. Thus, the Evidence Convention is exclusive not by its terms, but because it authorizes the only means by which the signatories agree to permit proceedings which otherwise, without consent, would violate international law. Article 27 implies this interpretation by allowing contracting states to permit "methods of taking evidence other than those provided for in this Convention."\(^7\) This provision is consistent with the conclusion that courts need not use Convention-authorized procedures whenever a party seeks evidence from abroad, but only when actually ordering proceedings in a foreign state's territory.

This analysis explains the position of the United States government in Volkswagenwerk Aktiengesellschaft v. Falzon.\(^8\) In a product liability suit brought in a Michigan state court, the court ordered a consular officer to take the depositions of West German nationals, employees of the defendant, in the Federal Republic of Germany.\(^9\) The Michigan Supreme Court denied the defendant's motion for leave to appeal and the defendant sought review in the United States Supreme Court. The Supreme Court requested the views of the United States.\(^10\) The Government's amicus brief stated that the depositions as ordered were "barred" under the Evidence Convention because the Michigan court did not order the depositions pursuant to Convention-authorized procedures, including procedures authorized by an Exchange of Notes between West Germany and the United States.\(^11\)

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\(^6\) Graco, 101 F.R.D. at 521.

\(^7\) Evidence Convention, supra note 12, art. 27. But see Bishop, supra note 58, at 26 (arguing that article 27 of the Evidence Convention precludes all other methods for obtaining evidence abroad); Comment, The Hague Convention, supra note 558, at 1475-78.


\(^9\) Falzon brief, supra note 56, at 2-3, 23 I.L.M. at 413.


\(^11\) Falzon brief, supra note 56, at 11, 23 I.L.M. at 417.
Because a consular officer would conduct the depositions, however, the government would simply prevent consular officers in West Germany from presiding over the ordered depositions. The Government concluded that Supreme Court review was not necessary to avoid violating West German sovereignty. The Supreme Court refused to take the case.

Two sentences in the Government's Falzon brief caused some commentators to attribute to the Government the position that the Evidence Convention supersedes all other methods for obtaining information located in a foreign party state's territory. On its face, each sentence only limits proceedings in the territory of a foreign state party to the Evidence Convention:

The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted. The Convention accordingly must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it.

In light of the factual situation in Falzon, one cannot reasonably conclude from these sentences that the Evidence Convention prohibits all information-gathering not authorized by the Evidence Convention. Rather, one should read them to mean that the Evidence Convention does not permit proceedings conducted abroad and not authorized by the Evidence Convention. Of course, Convention-authorized proceedings include proceedings permitted by a host state, even though not specifically provided for by the Evidence Convention.

The Supreme Court subsequently requested the Government's views in a case involving the gathering of information in France for the purpose of answering interrogatories served in a suit brought in a New York court. The Government declared that the Evidence Convention did not require resort to Convention-authorized procedures. A United States court order requiring a party to answer interrogatories in the United States may compel information gathering in France. Unlike the testimony-taking proceeding on West German soil in Falzon, such an order would not infringe upon French judicial sovereignty. The Government distinguished the two cases, albeit in an unfortunately cryptic fashion:

92. Id. at 11-12, 23 I.L.M. at 417-18.
93. Id.
96. Falzon brief, supra note 56, at 6, 23 I.L.M. at 415.
97. See supra text accompanying note 53.
98. Club Med brief, supra note 76.
The statement in the *Falzon* brief requires clarification to the extent that it could be construed to mean that the Convention is exclusive.

We note that the *[Falzon]* statement was not necessary to our argument that the trial court's order in *Falzon* was unlawful. The trial court in *Falzon* ordered that employees of a foreign corporation be deposed in Germany before an American consular officer. Under established principles of both domestic and international law, however, American courts are precluded from ordering anyone to participate in discovery proceedings in the territory of a foreign state absent that state's consent, wholly independent of the Evidence Convention. . . . Because Germany's consent to such discovery was limited to means authorized by the Convention, the court in *Falzon* could order such proceedings in Germany only if authorized by the Convention.99

Thus, the Government apparently accepted the position that a court may order proceedings *in the territory* of a foreign state party only if authorized by the Evidence Convention, but that Convention-authorized procedures are not the only means by which a court may obtain information located abroad.

One commentator argues that any order requiring the delivery of information located abroad to the United States "necessarily compels certain conduct abroad."100 While that may be true, it does not follow that such conduct is necessarily public in nature—that only a court may so act under the foreign law system. Gathering information for a law suit does not always constitute public activity. As the court reasoned in *Adidas (Canada) Ltd. v. S/S SEATRAIN BENNINGTON*:

> The discovery here sought does not involve any such intrusion on French sovereignty or judicial custom. No adverse party will enter on French soil to gather evidence (or otherwise). No oath need be administered on French soil or by a French judicial authority.

> What is required of Les Toles on French soil is certain acts preparatory to the giving of evidence. It must select appropriate employees to give depositions in the forum state: likewise it must select the relevant documents which it will reveal to its adversaries in the forum state. These acts do not call for French judicial participation. If Les Toles were preparing to bring litigation against United States adversaries in the United States, it would perform the same acts of selecting employee witnesses and evidentiary documents from its files without participation by any French judicial authority. In no way do those acts affront or intrude on French sovereignty.101


100. Bishop, *supra* note 58, at 46.

For example, the simple fact that a United States plaintiff has brought suit may necessarily compel the gathering of evidence to rebut a factual argument made by the plaintiff. It would be absurd to argue that the Evidence Convention therefore requires dismissal of the suit.

Still others criticize this interpretation—that only public evidence gathering in a foreign state requires resort to Convention-authorized procedures—because it permits circumvention of the Evidence Convention. Under this analysis, the Evidence Convention would fall into disuse because courts would inevitably prefer to obtain information from abroad by ordering parties to produce the information in the United States.

These fears are not well founded. Convention-authorized procedures must be used whenever a court or party wishes to question persons located abroad, whenever such questioning becomes necessary (e.g., because a party does not control a witness), and whenever a party or court must inspect documents or premises located abroad. The Evidence Convention also provides a means for courts to avoid jurisdictional conflicts, such as those caused by foreign blocking statutes. Using domestic discovery procedures to obtain information from abroad no more circumvents the Evidence Convention than service of process on an agent of a foreign corporation in the United States circumvents the Service Convention. In neither case is there an infringement upon territorial judicial sovereignty.

Thus, the most logical conclusion is that international law requires using Convention-authorized procedures only when a court or party conducts proceedings in a foreign territory that would otherwise violate that state’s sovereignty. The more difficult question is, if Convention-authorized procedures are not required by international law under certain circumstances, when does comity mandate the use of such procedures?

IV. COMITY AND USE OF EVIDENCE CONVENTION-AUTHORIZED PROCEDURES

While the Evidence Convention may not require resort to its procedures for a court to obtain information from abroad, a foreign state may seek to limit the private activity of its citizens in providing information to foreign courts. For instance, if a statute of a signatory state prohibits the export of certain information, with an exception for compliance with Convention-authorized procedures, such a law in effect requires a court in a foreign country to resort to Convention-authorized procedures to avoid subjecting

102. Bishop, supra note 58, at 46.
103. Comment, The Hague Convention, supra note 58, at 1482-83; Bishop, supra note 58, at 39; ABA Report, supra note 58, at 21-22.
104. Graco, 101 F.R.D. at 520.
106. See infra text accompanying notes 107-71.
the parties before it to conflicting obligations. An American court faced with this situation must decide whether to defer to the foreign statute as a matter of comity.

Comity analysis is not new to American courts. When an American court contemplates an order requiring a party to violate foreign law, the party may oppose the order on the basis of international comity. By definition, comity is not a matter of obligation under international law. Therefore, neither treaty nor customary international law obligates courts to grant comity to foreign legislation. Nonetheless, in order to foster goodwill, avoid unnecessary conflicts, and encourage international harmony, courts attempt to avoid orders requiring persons to violate foreign laws. In particular, a court should strive to avoid ordering a person to supply information when providing such information would violate the law of a foreign state. Courts consider various factors in determining whether comity should apply.

*Club Mediterranee v. Dorin* raised this problem in the context of a French statute requiring exclusive use of Evidence Convention procedures. Plaintiff Dorin brought suit in New York state court against Club Med, a French corporation, for injuries allegedly sustained while he was a guest at a Club Med resort in Haiti from December 1981 to January 1982. Under New York court rules, Dorin’s counsel served interrogatories on Club Med’s counsel in September 1982. The interrogatories, inter alia, requested that Club Med: Indicate whether or not Club Med owned the Club Med facility in Haiti; describe every document in its possession describing such relationship; identify all entities involved in constructing the Club Med facility in...
Haiti; state whether Club Med had an operational manual relating to the operation of the Club Med facility in Haiti; and indicate whether Club Med required employees to take appropriate shots for typhoid fever.\(^\text{114}\)

Club Med moved to strike the interrogatories on the ground that they violated both the Evidence Convention and the provisions of a French statute, commonly referred to as the French blocking statute. The blocking statute is apparently intended to stem the export of economic, financial, and technical information in private hands, rather than to protect French judicial sovereignty.\(^\text{115}\) The statute provides, on pain of fine and imprisonment:

Art. 1 bis. Subject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical [matters] leading to the establishment of proof with a view to foreign or administrative judicial proceedings or as a part of such proceedings.\(^\text{116}\)

The New York court struck four interrogatories on other grounds, but rejected Club Med's Evidence Convention argument because "the Hague Convention proscribes the taking of evidence . . . only in French Territory,"\(^\text{117}\) The Appellate Division affirmed without opinion and denied Club Med leave to appeal to the New York Court of Appeals.\(^\text{118}\)

- \(^\text{114}\) Id.
- \(^\text{115}\) Graco, 101 F.R.D. at 513 n.11.
- The underlying intent of the blocking statute may be to hinder the application by the United States of its laws to French companies with limited United States contacts and, in particular, to impede the enforcement of United States antitrust laws. See Toms, supra note 73, at 586, 596; Note, Compelling Production, supra note 109, at 879.
- The question of the extraterritorial application of United States laws is analytically distinct from the question of judicial sovereignty. See Oxman, supra note 19, at 750. To the extent courts consider extraterritorial applications of United States laws as choice of law questions, the substantive law that courts apply is a different question from the proper procedure. With respect to extraterritorial enforcement jurisdiction, the underlying premise of each case in which the court considers the Evidence Convention is that the party to whom the court addresses an order is subject to the court's jurisdiction. If a court lacks jurisdiction, the question whether the court uses Convention-authorized procedures becomes irrelevant to disposition of the case. But if an order and the parties fall within the court's subject matter and personal jurisdiction, respectively, the question of extraterritorial enforcement of United States laws is necessarily thereby resolved. Where the court exercises its jurisdiction is simply a different issue. Of course, parties objecting unsuccessfully to the exercise of jurisdiction over them may attempt to rely on concepts of judicial sovereignty to impede that exercise of jurisdiction. See infra text accompanying note 172.
- \(^\text{117}\) Club Med brief, supra note 76, at 2-3, 23 I.L.M. at 1335 (emphasis in original).
- \(^\text{118}\) Id. at 3, 23 I.L.M. at 1335.
sought review in the United States Supreme Court, which again requested the views of the United States.\textsuperscript{119}

The Government's \textit{amicus} brief took the position that the Evidence Convention is not "exclusive," and that international law does not require the New York court to limit itself to Convention-authorized procedures for obtaining information from abroad. The Government indicated, however, that compliance by Club Med implicated principles of comity because Club Med's compliance could violate the French blocking statute, while the court's use of Convention-authorized procedures would avoid the problem:\textsuperscript{120}

[In] appropriate cases, United States courts should utilize the procedures established in the Evidence Convention in order to avoid international friction arising from the enforcement of extraterritorial discovery orders. Thus, where a trial court determines that a conflict between a foreign blocking statute and state or federal discovery rules cannot be reconciled in a given case other than through resort to the Evidence Convention, the court, as a part of a proper comity analysis, should consider whether to require the litigants to proceed in conformity with the Convention.\textsuperscript{121}

The \textit{amicus} brief added that if evidence is not forthcoming after resort to Convention-authorized procedures, "the court would retain the authority to order the litigant from whom discovery is sought, upon pain of sanctions, to produce the evidence located abroad."\textsuperscript{122} Under comity analysis, unlike under an interpretation of the Evidence Convention requiring resort to Convention-authorized procedures,\textsuperscript{123} it makes sense to require only first resort to Convention-authorized procedures, thus retaining other options for obtaining information when Convention-authorized procedures prove unsuccessful. Comity analysis seeks to avoid imposing conflicting obligations on a party and not to protect territorial sovereignty. Indeed, an appropriate factor in determining whether comity requires deference to a foreign

\textsuperscript{119} 104 S. Ct. 1268 (1984).
\textsuperscript{120} \textit{Club Med} brief, \textit{supra} note 76, at 12, 23 I.L.M. at 1340.
\textsuperscript{121} \textit{Club Med} brief, \textit{supra} note 76, at 13, 23 I.L.M. at 1340. The courts owe less deference to government suggestions regarding the application of comity principles than to the government's interpretation of treaties. The executive branch negotiates treaties and therefore is especially competent to interpret them. Moreover, the political branches have primary responsibility for insuring United States compliance with its international legal obligations. \textit{See, e.g.}, \textit{O'Reilly DeCamara v. Brooke}, 209 U.S. 45, 52 (1908). These factors do not apply in the context of comity, which does not involve international legal obligations and focuses primarily on avoiding conflicting obligations upon private parties. Some deference to the Government's views is appropriate, however, because comity serves to avoid international tensions, and the conduct of foreign relations is the responsibility of the executive branch.
\textsuperscript{122} \textit{Club Med} brief, \textit{supra} note 76, at 13, 23 I.L.M. at 1340.
\textsuperscript{123} \textit{See supra} text accompanying notes 82-84.
law is the extent to which the domestic court may achieve its goals without violating the law of the foreign state.124

Furthermore, the *amicus* brief suggested that the New York courts failed to balance the pertinent interests, that it would be inappropriate for the United States Supreme Court to balance those interests in the first instance,125 and that the Supreme Court should therefore decline review.126 The Supreme Court refused to take the case.127

*Club Med* is significant because it provides the paradigm for requiring the interest balancing appropriate under a comity analysis. Whether or not such comity analysis would ultimately require deference to the French blocking statute is a distinct question that the government did not address, although comity analysis is extensively treated in the reporters.128

It is not always easy, however, to determine when a comity analysis is necessary in the first place. Is a comity analysis required in the absence of a foreign statute requiring resort to Convention-authorized procedures? Must a foreign state wishing to limit information flow pass a statute similar to the French blocking statute in order to force a United States trial court to apply a comity analysis before ordering a party to provide information from abroad? The facts of *In re Anschuetz & Co.*129 present this question.

The plaintiff brought this admiralty suit in federal district court following a collision on the Mississippi River.130 Defendant Compania Gijonesa de Navegacion S.A. filed a third party claim against Anschuetz, a West German corporation, alleging that the failure of a steering device designed by Anschuetz was a contributing cause of the accident.131 Anschuetz objected on Evidence Convention grounds to discovery orders by the district court requiring Anschuetz to produce, in the United States, documents then located in West Germany. Anschuetz, a party defendant, also objected on the same grounds to Rule 30(b)(6) depositions of its representatives residing in West Germany.132 Anschuetz unsuccessfully sought protective orders from the district court and subsequently petitioned the court of appeals for a

124. *Restatement (Revised)*, *supra* note 57, § 420(1)(c); *Restatement (Second)*, *supra* note 66, § 40(e).
126. *Id.* at 14-15, 23 I.L.M. at 1341.
127. 105 S. Ct. 286 (1984). The lack of an international law question may have influenced the Court's decision. The Supreme Court has a special responsibility to insure compliance with international law by the United States, *cf.* THE FEDERALIST, No. 80, at 536 (A. Hamilton) (J. Cooke ed. 1961), but the Court does not correct every wrong decision with respect to the rights of parties. *See* S. Ct. R. 17.
128. *See supra* note 110.
130. *Anschuetz*, 754 F.2d at 604.
131. *Id.*
132. Joint letter from Counsel for Gijonesa and Anschuetz (May 18, 1984), *quoted in* Brief for the United States as *Amicus Curiae*, *In re Anschuetz*, 5th Cir. No. 84-3286, at 6-7 (1984) [hereinafter Anschuetz brief].
writ of mandamus. The Fifth Circuit requested the views of both West Germany and the United States.\(^{133}\)

The West German Government filed an *amicus* brief arguing that oral depositions in West Germany and production of documents located there would violate West German sovereignty unless the court transmitted the order by the Evidence Convention letter of request method.\(^{134}\)

The United States' *amicus* brief treated the orders regarding the depositions and the production of documents separately. With respect to the depositions on West German soil, the United States, relying on its *Falzon*\(^ {135}\) and *Club Med* briefs,\(^ {136}\) took the position that the courts could not order such depositions without resort to Convention-authorized procedures.\(^ {137}\) As for the order of production of documents, the United States reiterated its position in *Club Med* that the Convention is not exclusive, but suggested that interest balancing under a comity analysis would be appropriate on remand.\(^ {138}\) No West German law or regulation requiring resort to the Evidence Convention, however, existed to trigger a comity analysis. Instead, according to the United States, the West German Government's statement in its *amicus* brief that the document production order violated West German sovereignty was sufficient to require a comity analysis.\(^ {139}\)

The Fifth Circuit thanked both governments for their views\(^ {140}\) and then steered its own course. The court rejected Anschuetz's argument that obtaining information in West Germany required resort to Convention-authorized procedures.\(^ {141}\) Nonetheless, "the exercise of judicial power should be tempered by a healthy respect for the principles of comity."\(^ {142}\) The court noted the absence of a West German blocking statute and referred to the statement in the West German *amicus* brief that the document production order would violate West German sovereignty. In what looks almost like an omission, the court said nothing about whether the West German statement required a balancing of interests under a comity analysis.

As for the taking of depositions, the court apparently took the United States' position: "the Hague Convention is to be employed with the involuntary deposition of a party conducted in a foreign country," but need not be employed in the case of involuntary depositions on United States soil.\(^ {143}\)

\(^{133}\) 754 F.2d at 605.


\(^{135}\) See *supra* text accompanying note 91.

\(^{136}\) See *supra* note 109.

\(^{137}\) *Anschuetz* brief, *supra* note 132, at 9-11.

\(^{138}\) *Id.* at 7-9.

\(^{139}\) *Id.* at 8-9.

\(^{140}\) 754 F.2d at 605 n.5.

\(^{141}\) *Id.* at 606-14; see *supra* text accompanying notes 47-68.

\(^{142}\) 754 F.2d at 614.

\(^{143}\) *Id.* at 615.
Ordering the district court to reconsider its ruling accordingly, the Fifth Circuit refused to issue a writ of mandamus.144

The court's additional suggestion that a court can order voluntary depositions in West Germany as an alternative to involuntary depositions in the United States145 is questionable; a court should refrain from ordering any proceeding, whether voluntary or involuntary, in a foreign country when such action would violate that country's judicial sovereignty. The history of the Evidence Convention negotiations indicates that even voluntary proceedings (e.g., a voluntary deposition before a consular officer) in the territory of a foreign state, without that foreign state's consent, may violate the judicial sovereignty of that state.146 As applied to Evidence Convention parties, such consent extends only to Convention-authorized procedures. While the Evidence Convention may authorize certain procedures only if the parties consent,147 this authorization does not constitute blanket consent by each state party to voluntary proceedings in its territory. Indeed, this authorization implies the opposite conclusion. That is, the provision of specific Convention-authorized procedures for taking evidence “without compulsion” suggests that judicial sovereignty requires the territorial state's consent in at least some cases of voluntary proceedings. Finally, the Fifth Circuit's suggestion suffers from the lack of a satisfactory definition of voluntary. Determining the meaning of voluntary is no less problematic than discovering the definition of compulsory.148

Subsequently, in In re Messerschmitt Bolkow Blohm GmbH,149 the Fifth Circuit upheld an order for production of documents located in West Germany and an order to depose a West German company's employees in the United States. The Messerschmitt court held that because the parties would conduct the depositions on United States soil, “[t]he order therefore does not implicate the comity considerations addressed in Anschuetz.”150 Referring to the amicus briefs filed by West Germany and the United States in Anschuetz, the court conducted a brief comity analysis on the document production order.151 Since the order did “not require any governmental action

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144. Id. at 615-16.
145. Id. at 608 n.13.
146. See supra text accompanying note 25.
147. See, e.g., Evidence Convention, supra note 12, arts. 15, 16.
148. See supra text accompanying notes 71-73. The Fifth Circuit appeared to retreat from its own suggestion that courts or parties could conduct voluntary depositions in West Germany outside of Convention-authorized procedures. In approving depositions in the United States, the court stated: “Were the witnesses to be deposed in Germany, other considerations would be applicable. The Hague Convention provides convenient procedures for taking witnesses' depositions in Germany without unnecessarily offending German sovereignty.” In re Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729, 733 (5th Cir. 1985).
150. 757 F.2d at 733.
151. Id. at 731-32.
in Germany, any appearance in Germany of foreign attorneys, or any pro-
ceedings in Germany,” the order “balance[d] appropriately the considera-
tions involved.”"152 If the absence of a violation of judicial sovereignty,
without more, means that comity does not require resort to the Evidence
Convention, then comity comes into play only when an international obliga-
tion would require Convention-authorized procedures. Thus, assuming
international law never permits outright violations of judicial sovereignty,
the Fifth Circuit effectively made comity irrelevant while purporting to
apply it.

The Fifth Circuit opinions give little guidance on questions of when or
how courts should undertake a comity analysis. The court did reject the
position that comity automatically requires use of Convention-authorized
procedures whenever parties seek information from the territory of a party
to the Convention.153 This analysis makes sense. Comity in theory is a mat-
ter of giving deference to foreign prescriptions in order to avoid conflicts
among states and conflicting obligations upon individuals. As the Fifth Cir-
cuit stated, “comity is largely a function of the relative interests between
overlapping jurisdictions.”154 In the absence of evidence that domestic court
actions will violate judicial sovereignty abroad, a party cannot invoke comity
without demonstrating that it faces conflicting obligations if it complies with
da discovery order.

The West German company in Messerschmitt sought Supreme Court
review,155 and again the Supreme Court sought the views of the United
States.156 The United States took the position that the Fifth Circuit opin-
ions, “while containing some troublesome language, are essentially cor-
cert.”157 The amicus brief filed by the Government restated the view that
the Convention is not the sole avenue for obtaining foreign evidence.158
Noting that the Evidence Convention “nonetheless remains a valuable and
workable mechanism for obtaining evidence abroad,” the Government
argued that principles of comity should guide a court’s decision to employ
the Convention “in any particular situation.”159 The Government failed,
however, to explain when a court must apply comity and thus provided little
guidance on that issue.

The Government found the Fifth Circuit’s comity discussions “rather cur-
sory,” but concluded that the decisions were “ultimately correct.”160 The

152. Id. at 732.
153. 754 F.2d at 608-12.
154. Id. at 608-09; see also ABA Report, supra note 58, at 39.
156. 106 S. Ct. 52 (1985).
157. Brief of the United States as Amicus Curiae, Anschuetz & Co., GmbH v. Mississippi
158. Id. at 8-11, 25 I.L.M. at 809-11.
159. Id. at 11, 25 I.L.M. at 811.
160. Id. at 13, 25 I.L.M. at 812.
Government relied upon the "relatively limited" West German sovereignty interest (there was no discovery on West German territory) and the absence of any blocking statute or possible violation of a "content-based" restriction upon the disclosure of information to foreign sources. On the other hand, the United States had a "substantial interest in affording litigants in its courts adequate opportunities to discover the pertinent facts surrounding their claims." The Government accordingly recommended that the Supreme Court deny review.

While the Supreme Court has not granted the certiorari petitions in Anschuetz and Messerschmitt, it recently granted certiorari to review the Eighth Circuit's decision in In re Societe Nationale Industrielle Aerospatiale. This case involves victims of an Iowa aircraft accident who sued the French designer and manufacturer of the aircraft. A federal magistrate ordered the defendants to comply with the plaintiffs' interrogatories, requests for admissions, and requests for production of documents. The defendants sought a writ of mandamus from the Eighth Circuit. Relying upon the Fifth Circuit opinions in Anschuetz and Messerschmitt, the court of appeals concluded: "[T]he Hague Convention does not apply to the discovery sought in this case 'because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad.'" The court also held that international comity does not require first resort to Convention-authorized procedures.

In response to the defendant's argument that compliance with the magistrate's order would require violation of the French blocking statute, the Eighth Circuit held that the magistrate properly balanced the interests in deciding—at least prior to the imposition of sanctions for noncompliance—to order the defendants to comply with the plaintiffs' discovery requests.

The Supreme Court in Societe Nationale may finally resolve the issue of the exclusivity of the Evidence Convention and provide important comity analysis guidelines. The existence of the French blocking statute in Societe Nationale makes it unlikely, however, that the Court will address the question whether international law requires a comity analysis when a party is not subject to conflicting obligations.

162. Id. at 16, 25 I.L.M. at 813.
163. Id. at 20, 25 I.L.M. at 815.
166. 782 F.2d at 122-23.
167. Id. at 125 (citations omitted).
168. Id. at 125-26.
169. Id. at 126-27.
A party can easily prove conflicting obligations arising from a blocking statute. In the absence of such a statute, a court should require a showing of at least some adverse effect upon a complying party that results from the policies of the government. Thus, a showing that compliance with discovery orders of a United States court would cause a party to pay higher taxes or preclude a party from government contracts would trigger the same comity analysis employed in *Club Med*. Without such a showing, however, it would be difficult to say exactly what a court is deferring to in the exercise of a comity analysis. Requiring a comity analysis without such a showing would encourage obstructive tactics by parties opposing discovery.

In its *amicus* brief at the appellate level in *Anschuetz*, the United States took the position that a statement in the West German Government's *amicus* brief triggered the comity analysis. This position neglects several important factors: (1) foreign governments are often unfamiliar with United States judicial processes, (2) some foreign governments are better equipped than others to monitor lawsuits involving their nationals in the United States, and (3) slow action by distant governments in obtaining local counsel to prepare and present *amicus* papers will result in delays in proceedings or, as in *Anschuetz*, after-the-fact changes in circumstances affecting the validity of a discovery order. These problems militate against requiring a comity analysis simply because a foreign state files an *amicus* brief.

Moreover, a foreign state ministry unhappy with the very exercise of long-arm jurisdiction by a United States court over one of its nationals—or a foreign government motivated by domestic political considerations—may also retain legal counsel in the United States to file a brief and thereby attempt to mitigate the exercise of United States jurisdiction. American lawyers could easily parrot the West German Government’s language in *Anschuetz*, asserting that the foreign government they represent views particular discovery orders as violations of its judicial sovereignty. The assertion of comity in this procedural context is an inappropriate method of countering perceived excesses in the exercise of personal jurisdiction. Even if American long-arm jurisdiction concepts are excessive from the European perspective, the question of permissible procedures is analytically distinct from the question of jurisdiction over the parties in the first place. If more civil law states make extravagant claims of infringement on their judicial sovereignty in order to resist a court's exercise of jurisdiction, American courts will become more inclined to reject such sovereignty considerations.

170. *See Messerschmitt*, 757 F.2d 729 (the court appeared to face the same problem of determining what it was deferring to in comity analysis).

171. *Anschuetz* brief, *supra* note 132, at 8-9. It should be noted that Anschuetz, for instance, contested personal jurisdiction prior to the discovery disputes dealt with by the court of appeals.

172. *See Anschuetz*, 754 F.2d at 604 & n.3.

173. *See supra* note 115.
Even otherwise legitimate sovereignty claims, as in the case of ordering proceedings abroad, may suffer in the process. Undertaking a comity analysis because a foreign government has filed an amicus brief encourages foreign governments to make such claims.

Most recently, in its amicus brief on the merits filed in Societe Nationale, the United States Government has taken the position that a comity analysis is required "whenever a foreign litigant from a signatory nation (where the evidence is located) timely and clearly articulates his country's objections to the use of American discovery methods."\footnote{Brief for the United States as Amicus Curiae, Societe Nationale Industrielle Aerospatiale v. District Court, S. Ct. No. 85-1695, at 19.} In other words, a court must undertake an explicit comity analysis in virtually\footnote{The formulation fails to give domestic litigants the right to demand a comity analysis, for no reason related to judicial sovereignty.} every case in which one is demanded, on pain of reversal. In balancing the interests, the foreign interest that the Government suggests a court must weigh is "judicial sovereignty."\footnote{Societe Nationale brief, supra note 174, at 22-26.} But in discussing how much weight should be given to that interest, the amicus brief reasserts the "established American principle" that a United States court may order a foreign national, properly subject to the court's jurisdiction, to produce evidence located abroad.\footnote{Id. at 23. The Government also advocated caution when a party opposes a discovery order on the basis of a blocking statute. Id. at 24-25.} If so, in many cases there may be nothing left to weigh. What is the point of requiring an empty comity analysis?\footnote{An order requiring that a foreign citizen be deposed on a foreign nation's soil would, according to the Government's latest brief, "work a greater affront to that nation's 'territorial integrity' than [for example] requiring a foreign corporation doing business here to make admissions." Id. at 25. Since such an order would violate a foreign state's sovereignty and thus violate international law, the court should simply not allow it. This principle is weakened by merely treating it as an interest to be weighed in a comity analysis.}

A comity analysis should instead be triggered by a showing that the law or policy of a foreign state will adversely affect a party if that party complies with a discovery request to which it objects. Such a showing provides the court with something concrete to weigh in the balancing of interests necessary to a proper comity analysis. The court can more easily weigh such factors as the extent to which the order actually implicates the interests of the foreign state and the extent and nature of the hardships a discovery order would impose on the individual party.\footnote{See Restatement (Revised), supra note 57, § 420(1)(c).}

V. CONCLUSION

International law as implemented by United States courts requires resort to Evidence Convention-authorized procedures only when a court-ordered action would otherwise violate the judicial sovereignty of a foreign signatory...
state. Generally, a violation of judicial sovereignty occurs when a court orders proceedings in a foreign state's territory without that state's permission. On the other hand, the Evidence Convention does not preclude court actions which do not impinge on judicial sovereignty, such as a court order requiring a party in the United States to take private action abroad to obtain information.

Other foreign governmental interests, however, may limit the ability of parties to undertake such private actions abroad. Exactly when a court should defer to such interests is less clear. If a United States discovery order would subject a party to conflicting obligations, the United States court should undertake a comity analysis and carefully balance the domestic interest in obtaining the information against the foreign interest underlying the conflicting obligation. In the absence of such conflicting obligations, a comity analysis may be unnecessary.