U.S. Obligations Under the Hague Evidence Convention: More Than Mere Good Will?

In Société Nationale Industrielle Aerospatiale v. United States District Court\(^1\) the U.S. Supreme Court voted unanimously to vacate and remand an Eighth Circuit decision,\(^2\) which held that the Hague Evidence Convention\(^3\) does not apply to the discovery of documentary evidence and information located abroad from a foreign national over whom a U.S. court has personal jurisdiction. On the extent of the lower courts’ obligation to make use of Convention procedures, however, the Court divided five to four. Although all members of the Court acknowledged the need for special vigilance to protect foreign litigants from unnecessary or unduly burdensome discovery, the majority declined to give the lower courts any specific guidance.\(^4\) Indeed, the Court did not even decide whether to require use of the Convention on the facts of the case before it. In contrast, the four-vote minority opinion concluded that U.S. ratification of the Convention created a general presumption that courts would employ Convention procedures in the first instance before considering resorting to domestic discovery rules.\(^5\)

The division of the Court on this important question reflects, to some extent, disagreement on the intent of the treaty’s draftsmen, but it also reflects disagreement on a more fundamental question. The majority and minority opinions diverge in their understanding of comity and how this principle operates in U.S. jurisprudence. Indeed, in the case before the

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\*Partner, Lillick, McHose & Charles, San Francisco. J.D., University of California, Berkeley, 1977; B.A., Yale College, 1971. Mr. Minch appeared before the Supreme Court on behalf of petitioners in the case discussed in this note.

2. In re Société Nationale Industrielle Aerospatiale, 782 F.2d 120 (8th Cir. 1986).
4. 55 U.S.L.W. at 4849.
5. Id.
Court, divination of the parties' intent and application of the comity principle were intertwined, because several foreign signators (including the Republic of France, whose nationals were petitioners) told the Court that they understood the Convention to be the exclusive means available for gathering the evidence in question. Yet, the Court remanded the case for a "particularized comity analysis" of whether to make use of Convention procedures while, at the same time, apparently instructing the lower courts that the stated interests of the foreign sovereign in question deserve little or no weight. Thus, Justice Blackmun is well-founded in his fear that the majority opinion may be regarded as an affront to the Convention's other signators. It will prove to be so unless the lower courts exercise more self-restraint than many have shown to date in deciding whether to exercise jurisdictional power to its full extent. The challenge has been sent back to the lower courts to find the middle ground between "absolute obligation" on the one hand and "mere courtesy and good will" on the other. This note suggests that the lower courts will find that middle ground in most instances by focusing their inquiry on whether the Convention's procedures provide an effective means of obtaining the particular kind of evidence sought from the foreign nation in question. If so, there can be little justification for insisting on the use of domestic procedures without any attempt to adhere to the treaty.

I. Background Concerning the Convention

To understand the import of the Court's decision requires some background on how the Convention operates and its relationship to pre-Convention means for obtaining evidence abroad. While the Convention


7. See 55 U.S.L.W. at 4848–49.

8. Id. at 4849.

9. In Hilton v. Guyot, 159 U.S. 113, 163–64 (1895), the Court articulated what has become the traditional formulation of the comity principle in our jurisprudence beginning with the observation that: "'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other."


Mutual judicial assistance has been a major focus of the Hague Conference since its inception. At the Second Conference, held in 1894, the first multilateral convention on civil procedure was drafted. It included detailed rules regarding the execution of requests for judicial assistance. This first convention was superseded by the 1905 Civil Procedure Con-
contains some significant innovations designed to facilitate U.S.-style discovery abroad, it also contains safeguards to protect foreign sovereignty. This tension, which lies at the heart of the Convention, means that its procedures are not simply a substitute for U.S. discovery rules. Although both provide effective methods for obtaining useful evidence, the scope of evidence gathering permissible may not be identical. Whether this is so will depend on the type and scope of discovery sought and the particular foreign signatory involved.

The Convention is a multilateral treaty that provides methods for litigants in civil and commercial disputes to obtain evidence from abroad. It is intended to help lessen the procedural obstacles encountered when litigants seek evidence located in a foreign country with a legal system different from their own and, in particular, to bridge the significant differences between the common law and civil law approaches to the gathering of evidence.11 There are, at present, seventeen parties to the Convention, including the United States and France.12 Twenty-five nations participated in the Convention's drafting. The great majority of these participants, and of the current parties, are civil law nations.


12. Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, United Kingdom, and the United States. VII MARTINDALE-HUBBELL LAW DIRECTORY 14–15 (1986) [hereinafter MARTINDALE-HUBBELL].

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In civil law nations, including France, fact gathering is a judicially controlled process in which the ability of litigants to fish for potentially relevant information is much more carefully circumscribed than in U.S. courts. The court, rather than the parties' lawyers, takes the main responsibility for gathering and sifting evidence. In the civil procedure of these nations, trial is not a single discrete event distinct from pretrial discovery. Instead, the court gathers and evaluates evidence over a series of hearings. Because evidence gathering in civil law nations is a judicial function, these nations generally regard the nonjudicial taking of evidence located in their territory as an affront to their sovereignty. When an American attorney attempts to obtain evidence located in a civil law nation without passing through that nation's courts, the judicial sovereignty of the civil law nation is violated, even if the evidence is offered voluntarily.

The United States was instrumental in the drafting of the Hague Evidence Convention and was its main proponent, seeking to minimize the difficulties U.S. litigants encountered in obtaining evidence located in civil law nations. To accomplish this goal, the United States urged the Hague Conference to undertake revision of part II of the 1954 Convention Relating to Civil Procedure (which concerns the taking of evidence) in order "to explore the availability of other techniques of obtaining testimony abroad, which overcome some or all of the disadvantages of letters rogatory." Prior to the Hague Evidence Convention, letters rogatory were the principal means recognized by civil law nations for obtaining evidence located on their soil for use in foreign judicial proceedings. The procedures for preparing and serving such letters were often technically cumbersome, execution could be refused on numerous grounds, and the evidence generated through this process was not always in a form utilisable in the court of the nation where the request originated.

14. The act of taking evidence from a willing witness in a civil law nation "may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the 'judicial sovereignty' of the host country, unless its authorities participate or give their consent." 1969 U.S. Hague Delegation Report, supra note 11, 8 I.L.M. at 806.
15. Senate Foreign Relations Committee Report, supra note 11, at 1–2.
The Convention liberalizes and simplifies former practices with respect to letters rogatory, which it terms "letters of request," and provides improved means for taking evidence abroad without the direct participation of the foreign judiciary. These alternative methods, contained in chapter II of the Convention, are an important innovation for which the United States pushed hard.20 Also, the U.S. objective of minimizing difficulties in obtaining evidence from abroad is furthered by article 27 of the Convention, which "[p]reserve[s] all more favorable and less restrictive practices arising from internal law, internal rules of procedure and bilateral or multilateral conventions."21 As discussed in the next section, the majority opinion misinterprets this provision in such a way as to undermine any obligations that the treaty might create.

II. Exclusivity

All members of the Court agreed that the Convention’s procedures are not exclusive of domestic discovery rules. The majority opinion, however, slides from the conclusion that the Convention is not exclusive to the conclusion that its procedures are merely "optional."22 If "optional" means "wholly discretionary with the trial court," this interpretation is a non sequitur. The disagreement between the United States and the civil law nations on the question of exclusivity is a reason why resort to the Convention in the first instance should be the preferred choice of the trial court. The majority, however, seems to regard exclusivity and first-use as one and the same and rejection of the former as requiring rejection of the latter.

The majority’s discussion of the Convention’s history begins with the tenet that a treaty is "in the nature of a contract between nations,"23 but its mode of analysis is legislative rather than contractual. It starts from the premise that implied preemption is disfavored and, therefore, finds the lack of language mandating Convention use to be dispositive.24 It "buttresses" this conclusion with discussion of articles 27 and 23.25

24. Id. at 4846.
25. Id.
The lack of exclusivity language in the Convention does not evince an intent that use of its procedures be wholly optional, or even that domestic procedures would remain available. A more probable explanation is that the Convention contains no exclusivity language because the parties expected its procedures would be supplemented through further bilateral and multilateral agreements. For example, the Hague Convention of 1954 remains effective in part for those signatories that were also parties to this earlier agreement. Perhaps the United States would have objected to exclusivity language, had any been proposed, or would have refused to ratify the treaty if such language were adopted, but this is purely conjecture.

The majority opinion erroneously treats article 27 as evidence of the parties' intent to establish merely optional procedures. This interpretation reduces the Convention to a nullity. Article 27 states, inter alia, that the Convention "shall not prevent" a signatory from "permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." It is central to the Convention's scheme of setting forth the common ground on which all signatories could agree, while leaving the parties free to supplement it through bilateral and multilateral agreements (authorized by articles 28 and 32) or through domestic procedure applicable in the state where the evidence is sought.

As Justice Blackmun's opinion notes, if article 27 is construed to permit a requesting nation to supplement the Convention unilaterally, that makes "the rest of the Convention wholly superfluous." This construction also ignores the Convention's history. No agreement was necessary for foreign litigants to gain access to evidence through the U.S. courts; prior U.S. law unilaterally made U.S. discovery procedures available to them. In

29. The explanatory report prepared after the Convention was completed and signed describes article 27 as "designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants." CONVENTION HISTORY, supra note 17, at 215. The discussion that follows makes clear that article 27 authorizes the use of alternative methods for gathering evidence but only "if the internal law or practice of the State of execution so permits." Id. (emphasis added). These statements are echoed in the report that accompanied the Convention's transmittal to Congress. See S. Exec. A., 92d Cong., 2d Sess. 39-40 (1972) (identical statements).
30. 55 U.S.L.W. at 4850 n.2.
contrast, the protection of judicial sovereignty was of great importance to the civil law nations. In the discussions that resulted in the Hague Evidence Convention, the civil law nations agreed to liberalize and simplify the process for obtaining evidence through their courts for use abroad as the quid pro quo for lessening U.S. intrusions on their sovereignty.Article 27 should be read in light of this history.

Underlying the majority opinion, as well as lower court decisions that have concluded that Convention procedures are merely optional, is a skepticism, not clearly articulated, about their effectiveness as a means for obtaining evidence. A major source of this skepticism is article 23 of the Convention, which permits a party to reserve the right not to execute letters of request “issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.” All Convention signators, except the United States, Czechoslovakia, and Israel, have made a declaration under this article. Many signators, however, have qualified their reservation, making it applicable only to requests that are overbroad and not specific. France never intended that its reservation be an absolute bar to the production of documents, and, during the course of the Aerospatiale proceedings, it submitted a formal qualification of its reservation to the Hague stating that the reservation does not apply to letters of request that ask only for documents having “a direct and clear

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

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

1969 U.S. HAGUE DELEGATION REPORT, supra note 11, 8 I.L.M. at 806.

32. [I]f the convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful quid pro quo for their concessions to the United States under the convention. While there is no requirement of “consideration” in international treaty law, unilateral concession is not the most probable explanation for the behavior of governments in international negotiations. 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, 760–61 (1983).

33. The Brief for the United States and the Securities and Exchange Commission as Amici Curiae, which argued for a position very similar to the majority opinion’s, did not advocate the majority’s interpretation of article 27. Nor did the amicus brief of any foreign government.

34. See MARTINDALE-HUBBELL, supra note 12, at 15–19.

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nexus with the subject matter of the litigation and which enumerate the documents sought.\textsuperscript{35}

Article 23 reflects, to some extent, a misunderstanding of the term "pre-trial discovery" and the role of pre-trial discovery in common law countries,\textsuperscript{36} but it also expresses European antipathy to the lack of relevancy constraints and judicial control on the evidence-gathering activities of United States litigants.\textsuperscript{37} Nonetheless, even an unqualified article 23 reservation is not a complete bar to the production of documents through Convention procedures. An article 23 reservation applies only to letters of request; the alternative methods of evidence gathering found in chapter II of the Convention are not affected by it. While, in many nations, a person cannot be judicially compelled to cooperate in the use of these methods,\textsuperscript{38} any person who is a party to United States litigation and who wishes to continue doing business in the U.S. (or has assets here) will have a strong incentive to be cooperative.\textsuperscript{39} Thus, in most cases in which

\textsuperscript{35} Amicus Curiae Brief of the Republic of France in Support of Petitioners at 22-23, app. B. After the amicus brief was filed, France sent a similarly worded qualification of its article 23 reservation to the Ministry of Foreign Affairs of the Netherlands and submitted a copy to the Court.


\textsuperscript{38} Compulsion is available to facilitate the gathering of evidence under the alternative methods of chapter II only for those states who so declare. Convention, supra note 3, art. 18. Only the United States and Italy have made unqualified declarations of assistance under article 18. Czechoslovakia, Cyprus, and the United Kingdom have declared that compulsion will be applied in the case of States offering reciprocal assistance. Martindale-Hubbell, supra note 12, at 15-21.

\textsuperscript{39} The Convention contains no requirement that a court of the requesting State forego appropriate sanctions against a party who unreasonably refuses to cooperate in voluntary procedures to which the State of execution has consented. In fact, the history of the Convention's negotiations suggests that, under such circumstances, sanctions might be appropriate. The question of the effect of a refusal by a witness to give evidence voluntarily before a consul or commissioner was considered by the Special Commission that convened in advance of the full Conference to prepare an initial draft Convention. The Commission reached no decision on this issue. Report of the Special Commission, supra note 37, at 72. During the Conference, the Danish delegation proposed that:

"where no order of compulsion has been issued under article 16, refusal of a person to appear or to give evidence before the consul shall not render such person liable to any penalty or prejudice in relation to the proceedings for which the evidence is required."

Convention History, supra note 17, at 149.

The Danish proposal was rejected by a vote of thirteen to five with one abstention. \textit{Id.} This vote was, in essence, ratification of the views of the Convention Rapporteur (Mr. Amram of the United States) who stated:
the question arises of whether to use the Convention procedures or domestic discovery rules, the scope of evidence available through the Convention is, in fact, quite broad. The availability of chapter II methods make limitations on the letter of request procedure less significant.

One of the most troubling aspects of the majority’s analysis is its tendency to equate exclusivity with first-use. Had the Court found the Convention exclusive, that would mean that Convention procedures preempt domestic discovery rules whenever it applies. Thus, the question of what evidence can be compelled through Convention procedures would have far greater import, because litigants would have no further recourse and the incentives for foreign litigants to cooperate in the use of voluntary methods would be diminished. In contrast, a first-use rule would not so limit the jurisdictional power of U.S. courts. They would retain their power to compel discovery, to draw adverse inferences from failures to produce evidence, or to impose other sanctions. Moreover, in determining whether such measures are appropriate and in fashioning an order, the court would have the benefit of a developed record.

Because both the Convention and its history are silent on exclusivity, they are likewise silent on whether, or when, a signator who is a requesting State may resort to domestic procedures. Viewed in the context of the civil law nations’ legal heritage, this silence leads to a result diametrically opposite to the majority’s conclusion that Convention procedures are optional. France and Germany (and probably other civil law nations who did not participate in the *Aerospatiale* case) regard the Convention’s procedures as the mandatory and exclusive means by which U.S. civil litigants may seek evidence located on their soil. This view is rooted in customary private international law and in the role which the civil law nations’ judiciary plays in the evidence-gathering process. In particular, the civil law nations’ view is grounded in the long-established international law principle of territorial sovereignty—i.e., that the exercise of sovereign power within the territory of another nation requires the foreign nation’s

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[T]he Danish proposal related to a question which was fundamentally a matter for the internal law of each Contracting State. It should be for that law to determine the effect which would be given to a failure by a witness to give evidence. The Convention should not attempt to regulate this question. The effect of the Danish proposal would be to impinge on the administration of justice within the forum where the lawsuit was pending. *Id.* at 150.

40. In fact, petitioners never urged exclusivity to the Court, although a careful reading of the majority opinion is required to discern this.

41. This would include, in the case of an unexecuted letter of request, a statement of reasons from a foreign court. *Convention, supra* note 3, art. 13.

consent. To these nations, silence on the use of the requesting state's domestic procedures means that consent to the use of such procedures has not been given.

Curiously, the majority opinion does not address the principle of territorial sovereignty or how it operates with regard to discovery, even though the Convention history (as well as the amicus briefs) makes quite clear that civil law nations regard evidence-gathering, whether by a judicial officer or by a private party acting pursuant to discovery rules, as the exercise of sovereign power for which consent must be obtained. The majority says only that it finds arguments based on territorial sovereignty unpersuasive because the Convention does not state an exclusivity or first-use rule.

By giving no weight to the arguments of the civil law nations based on territorial sovereignty and rejecting both exclusivity and first-use on the basis of the Convention's silence, the Court simply recreates the differences that the Convention was intended to bridge.

III. Comity

International comity is a well established doctrine in our jurisprudence. It concerns the tempering of extraterritorial application of U.S. law in order to accommodate the interests and policies of a foreign sovereign. Both the majority and minority opinions agree that comity is a critical principle in determining whether to make use of Convention procedures. In Justice Blackmun's view, however, considerations of comity lead to a general presumption of first-use, while the majority opinion regards

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43. Chief Justice Marshall authored the classic American formulation of this principle:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.


This principle remains an established tenet of our jurisprudence. In Club Mediterranean, S.A. v. Dorin, 465 U.S. 1019 (1984), the Solicitor General told the Court:

Under established principles of both domestic and international law . . . 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.

Brief for the United States as Amicus Curiae, reprinted in 23 I.L.M. 1332, 1338 n.10 (1984); see also 1 Restatement of the Foreign Relations Law of the United States (Revised) 386 (Tent. Draft No. 6, 1985).

44. 55 U.S.L.W. at 4848.

45. Id. at 4849.
comity as a talisman to be applied by trial courts on a case-by-case basis. Although cautioning the trial courts to show "special vigilance" and "due respect" in their treatment of foreign litigants, the majority declines to "articulate specific rules to guide this delicate task of adjudication."

This case-by-case approach is unsatisfactory because it neither defines the duty of the lower courts in administering an effective treaty of the United States nor identifies the U.S. interests that require that the treaty be disregarded. First, the cases in which the issue of Convention use arise are not so dissimilar as the majority opinion seems to suggest. Yet the Court cites no precedent for permitting the lower courts to decide on a case-by-case basis whether to apply an effective U.S. treaty. Second, the majority opinion does not acknowledge that the principle of comity, as developed in the Court's prior decisions, is a conflicts-of-law principle. Rather, the majority approach appears to direct a comity analysis in every case in which a request for use of Convention procedures is opposed, without asking whether a true conflict exists. Third, the majority opinion does not articulate the U.S. interests to be weighed in this analysis, thus inviting the lower courts to second-guess foreign sovereigns' conceptions of their own interests.

Notwithstanding the Court's and the Solicitor General's repeated references to the need for a "particularized" or "individualized" comity analysis, the factual contexts in which the question of Convention use arise are usually quite similar. The issue nearly always surfaces in discovery in response to a motion to compel or as the basis for a motion for a protective order. The majority of the cases reported to date have been product liability actions. Occasionally, some discovery under domestic rules occurred before the issue arose. Apart from limited discovery in

46. Id. at 4848.
47. Id. at 4849.
48. Id. at 4848-49; Amicus Curiae Brief for the United States and the Securities Exchange Commission at 11-13, 19-21, 28.
those few cases, the only record available to the courts to aid in their decisions has been pleadings and affidavits written by the parties. I have found no case reported in which a party had previously made an unsuccessful attempt to obtain evidence through Convention procedures or in which a party proffered evidence that use of the Convention would prove fruitless.\footnote{51. In several cases a party has argued that, because a country had taken a reservation under article 23 with respect to the pretrial discovery of documents, resort to Convention procedures would be a futile act. See, e.g., Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686, 690 (Super. Ct., App. Div. 1984); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 511 (N.D. Ill. 1984); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60-61 (E.D. Pa. 1983). These cases do not indicate, however, whether any consideration was given to the use of voluntary Convention procedures or whether evidence was presented concerning the interpretation or the administration of the article 23 reservation by the country in question.}

motivated not by a genuine concern with the factual diversity of the cases, but rather by a reluctance to require adherence to the treaty.

The Court's hesitancy to settle conclusively even the controversy before it is troubling. The question of Convention use arose at an early stage of discovery when the defendants responded to production requests and interrogatories, which asked for evidence located in France, with a motion for a protective order. Appearing as amicus curiae, the Republic of France informed the Court that the Convention provides effective procedures for obtaining evidence of the kind plaintiffs sought in France, and the defendants represented to the Court that they would cooperate in the use of such procedures. What further record could the trial court be expected to develop? How would such a record be relevant to a comity analysis? The majority opinion does not provide satisfactory answers to these questions.

In the majority opinion, the label "comity" becomes a substitute for analysis. Historically, the principle of international comity has been a doctrine of self-restraint under which U.S. courts, to the extent practicable, have considered foreign sovereign interests and attempted to accommodate them in adjudicating disputes affecting such interests. In essence, it is a conflicts-of-law principle, requiring U.S. courts faced with choice-of-law decisions to weigh U.S. self-interest in the development of an effectively functioning international legal system against the domes-

55. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) ("concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require that we enforce [the arbitration clause in question], even assuming that a contrary result would be forthcoming in a domestic context"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) ("achievement of the orderliness and predictability essential to any international business transaction"); Romero v. International Terminal Operating Co., 358 U.S. 354, 383 (1959) ("the interacting interests of the United States and of foreign countries"); Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) ("rules designed to foster amicable and workable commercial relations"); Hilton v. Guyot, 159 U.S. 113, 191 (1895) ("[i]f a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations") (quoting Bradstreet v. Neptune Ins. Co., 3 Sumner 600, 608-09 (C.C.D. Mass 1839)); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135 (1812) ("[t]he world being composed of distinct sovereignties . . . whose mutual benefit is promoted by intercourse with each other"). Cf. Restatement (Second) of Conflict of Laws § 6 comment d (1971) ("[a]doption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result").
typically created rights of U.S. citizens.\textsuperscript{56} So applied, the principle of comity has often been used by the Court in formulating general rules to govern recurrent factual situations.\textsuperscript{57} The Court, however, has not employed the principle in that way here. Not only does the majority opinion decline to state any general rules, it does not articulate the supposed conflict that the principle of comity should be used to resolve.

No inherent conflict exists between the Hague Evidence Convention and the federal discovery rules. Both are laws of the United States that provide effective procedures through which useful evidence can be obtained. Foreign signatories have agreed to the use of Convention procedures on their soil, but they generally have not given consent to discovery conducted under other signatories' applicable domestic rules. Thus, absent some showing that important evidence cannot be obtained through Convention procedures, any conflict between U.S. and foreign law would appear to have been resolved by the treaty itself. In the great majority of cases, the approach of the majority opinion in \textit{Aerospatiale} introduces an additional and unnecessary layer of comity analysis. As Justice Blackmun's opinion notes:

In most cases in which a discovery request concerns a nation that has ratified the Convention there is no need to resort to comity principles; the conflicts they are designed to resolve already have been eliminated by the agreements expressed in the treaty. The [comity] analysis set forth in the Restatement (Revised) of Foreign Relations Law of the United States . . . is perfectly appropriate for courts to use when no treaty has been negotiated to accommodate the different legal systems. It would also be appropriate if the Convention failed to resolve the conflict in a particular case. The Court, however, adds an additional layer of so-called comity analysis by holding that courts should determine on a case-by-case basis whether resort to the Convention is desirable.\textsuperscript{58}

\textsuperscript{56} In \textit{Hilton v. Guyot}, 159 U.S. 113, 163–64 (1895), the Court explained international comity as follows: "'Comity,' in the legal sense . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." \textit{See also} Maier, \textit{Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law}, 76 Am. J. Int'l L. 280, 281–84 (1982) (tracing the historical origin of the principle of comity in Anglo-American jurisprudence).

\textsuperscript{57} "The Court frequently has relied upon a comity analysis when it has adopted general rules to cover recurring situations in areas such as choice of forum, maritime law, and sovereign immunity, and the Court offers no reasons for abandoning that approach here." 55 U.S.L.W. at 4851 (Blackmun, J.) (footnotes omitted). \textit{See, e.g.,} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 629 (1985) (comity requires enforcement of provisions in international agreements to arbitrate antitrust claims); Lauritzen v. Larsen, 345 U.S. 571, 577–78, 593 (1953) (Jones Act not applicable to injuries occurring on foreign flag vessel outside U.S. waters); Canada S. Ry. v. Gebhard, 109 U.S. 527, 539 (1883) (comity requires U.S. courts to recognize bankruptcy reorganization plans in foreign courts).

\textsuperscript{58} 55 U.S.L.W. at 4851.
In Justice Blackmun's view, the particularized comity analysis required by the majority opinion, although unnecessary in the absence of conflicts, should, if properly performed, lead the courts to use the Convention, because the Convention has already largely accommodated the relevant interests.\(^5\) First, use of the Convention accommodates foreign interests by protecting the judicial sovereignty of the Convention's civil law signators. Second, the Convention appears to accommodate the primary U.S. interest by providing effective procedures for obtaining evidence located abroad. While there may be some difficulties in obtaining evidence through Convention procedures in particular instances, in general, an attempt to use the Convention is the best way to determine whether such difficulties in fact exist and to create a developed record on which to determine whether to order discovery under domestic rules notwithstanding foreign objections.\(^6\) Finally, there can be no doubt that use of the Convention further development of an ordered international system for resolving transnational litigation.\(^6\)

The majority opinion's particularized comity analysis, however, proceeds along a different track. It places upon the proponent of Convention use the burden of demonstrating in each case "appropriate reasons for employing Convention procedures,"\(^6\) including, apparently, a demonstration of both the sovereign interests at stake and the "likelihood that resort to [Convention] procedures will prove effective."\(^6\) Further, in evaluating such factors, the trial courts are encouraged to examine the extent to which specific discovery procedures are "intrusive" on foreign sovereign interests.\(^6\)

Imposing the burden of proof on the proponent of Convention use each time that it arises creates a presumption of disuse and does not give "due regard" to the international obligations created by a treaty that has been executed by the parties, ratified by the U.S. Senate, and entered into force.\(^6\) Where Convention procedures clearly do not protect the U.S.

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59. *Id.* at 4851–52.
60. *See id.* at 4853–54.
61. *Id.* at 4854–55.
62. *Id.* at 4849.
63. *Id.* at 4848.
64. *Id.* at 4849.
65. The duty of a signator to implement fully an effective treaty has traditionally been expressed in international law as the doctrine of *pacta sunt servanda*, which states that an international agreement "is binding upon the parties to it and must be performed by them in good faith." 2 *Restatement of the Foreign Relations Law of the United States (Revised)* § 321 (Tent. Draft No. 6, 1985); *see also* Jordan v. Tashiro, 278 U.S. 123, 127 (1928) ("The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.")
interests of providing effective procedures for obtaining evidence and fairness to U.S. litigants, then an order requiring discovery under the domestic rules would be appropriate. This situation is difficult to assess, however, if no attempt to use Convention procedures has been made. Given the large number of Convention signatories and the flexibility in the procedures provided for by the Convention, it is not inappropriate to ask in some instances for assurances from the foreign litigant that the particular evidence sought can be obtained through Convention procedures in the particular foreign nation in question. Yet insofar as the majority opinion’s analysis goes beyond such a requirement, it disregards the comity principle that it purports to be implementing.

When a foreign sovereign has clearly stated its interest in regulating all evidence-gathering on its soil, a court that permits Convention procedures to be disregarded on the grounds that a particular evidence-gathering in question is not very “intrusive” improperly discounts the foreign sovereign’s statements of its own interests. A particularized comity analysis that purports to distinguish between “legitimate” and “illegitimate” foreign sovereign interests is not a comity analysis at all; the label predetermines the outcome on the basis of some U.S. rule of decision. Similarly, requiring a civil law nation to demonstrate a “specific” foreign interest at stake each time the question of Convention use arises is asking the foreign nation to justify the limitations of its law on foreign evidence-gathering in American common law terms. Further, this line of reasoning fails to realize that the judicially controlled evidence-gathering procedures followed in civil law nations are themselves substantive protections provided to those countries’ citizens.

IV. After Aerospatiale

The first district court to address the issue of Convention use since the Supreme Court’s decision in Aerospatiale has in fact performed a comity

66. The heart of the Convention’s compromise between the U.S. and civil law views is to establish minimum standards and procedures for extraterritorial evidence-gathering that are tolerable to the authorities of the State where evidence is taken and of use in the forum where the action will be tried. 1969 U.S. HAGUE DELEGATION REPORT, supra note 11, 8 I.L.M. at 806; CONVENTION EXPLANATORY REPORT, reprinted in CONVENTION HISTORY, supra note 17, at 211. Because of the various reservations and declarations that the Convention permits (see, e.g., arts. 8, 9–18, 23) as well as the Convention provisions that permit its terms to be supplemented (arts. 27–32), one commentator has characterized the Convention as “sixteen separate and disparate treaty arrangements” between the United States and each of the other signatories. J. B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) § 55–40, at 254 (1984).

analysis similar to that urged by Justice Blackmun and advocated above. In *Hudson v. Herman Pfauter GmbH & Co.*, the court granted a motion for a protective order requiring plaintiffs to use Convention procedures to obtain answers to interrogatories. The court rejected unsubstantiated claims of unfairness and inconvenience, stating: "'To assume that the 'American' rules are superior to those procedures agreed upon by the signatories of the Hague Convention without first seeing how effective Convention procedures will be in practice would reflect the same parochial biases that the Convention was designed to overcome.'" The court noted that the type of discovery at issue would not be affected by Germany's article 23 reservation. It concluded that the inconvenience of being required to use unfamiliar procedures was not unfairly prejudicial to plaintiffs and would protect defendants' privacy rights under West German law.

V. Conclusion

Justice Blackmun's opinion concludes with the observation that the majority had missed its opportunity to provide predictable and effective procedures for international litigants and thus "'[i]t now falls to the lower courts to recognize the needs of the international commercial system and the accommodation of those needs already endorsed by the political branches and embodied in the Convention.'" The *Hudson* decision is a first step in that direction; one hopes other trial courts will emulate it. Otherwise, increased friction with our principal European trading partners over U.S. demands for documents and information located abroad appears inevitable.

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68. The discovery dispute remanded to the trial court in *Aerospatiale* has also been resolved in a manner consistent with Justice Blackmun's view, but without the need for a written opinion. On remand, the defendants represented that responses to the outstanding discovery requests could be quickly and easily obtained through the procedures of chapter II of the Convention, and the judge so ordered. Responses were made within the time limits set by the order, and the controversy ended.


70. *Id.* slip op. at 12.

71. *Id.* at 12-13. The court further noted that, even if document requests were at issue, it would not be clear that use of Convention procedures would prove fruitless, since West Germany permits the taking of evidence by duly appointed commissioners and since it has drafted new regulations that will qualify its article 23 reservation.

72. *Id.* at 17.

73. 55 U.S.L.W. at 4855.