Washington and Lee Law Review

Volume 42 | Issue 4 Article 8

Fall 9-1-1985

Transnational Discovery: The Balancing Act of American Trial Courts and the Northern District of Illinois' New Approach to the Hague Convention

TRANSNATIONAL DISCOVERY: THE BALANCING ACT OF AMERICAN TRIAL COURTS AND THE NORTHERN DISTRICT OF ILLINOIS' NEW APPROACH TO THE HAGUE CONVENTION

The broad scope of the discovery procedures in the Federal Rules of Civil Procedure (Federal Rules) guarantees litigants before United States federal courts access to more information than do the discovery procedures of any other nation.[1] When parties to litigation pending in United States courts have sought to utilize the expansive discovery methods of the Federal Rules to discover evidence abroad, however, the litigants often have met

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1. Rosenthal & Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery,* 16 N.Y.U.L. INT'L L. & POL. 1075, 1075 (1984) (United States procedural rules permit litigants before United States courts to discover more information than do laws of any other nation). Rules 26 through 37 of the Federal Rules of Civil Procedure (Federal Rules) provide procedures for litigants to obtain pretrial discovery of information and documents. FED. R. CIV. P. 26-37. The discovery methods of the Federal Rules include interrogatories, oral and written depositions, procedures for inspecting or copying documents, procedures for inspecting, copying or testing tangible "things" in custody or control of a party, and procedures for inspecting land or other property of a party. *Id.* The scope of information obtainable pursuant to the Federal Rules is liberal. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2007 (1970) (litigants have great freedom in discovery under Federal Rules) [hereinafter cited as WRIGHT & MILLER]. The Federal Rules do not limit the scope of discovery merely to information that is admissible at trial. *See* FED. R. CIV. P. 26(b)(1); Rosenthal & Yale-Loehr, *supra,* at 1075 (United States discovery rules do not limit discovery to information that is relevant or admissible). A litigant may discover information that is inadmissible so long as the information "appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). The broad scope of American discovery, by providing parties an opportunity to obtain full knowledge of the issues and facts before trial, helps to clarify and narrow issues for trial, avoid the possible miscarriage of justice that may result from trials carried on without full disclosure of information and eliminate cases where the outcome solely depends on fortuitous availability of evidence. *See* WRIGHT & MILLER, *supra,* at § 2001 (discussion of purposes behind broad scope of discovery under Federal Rules). Under the Federal Rules, the parties conduct discovery without judicial assistance or intervention unless a party affirmatively seeks the court's assistance to compel discovery or for protection from a request, or unless a breach of peace occurs. *See* FED. R. CIV. P. 26(c) (court may, upon motion, enter order to protect person from discovery request that is annoying, embarrassing, oppressive or constitutes undue burden or expense); FED. R. CIV. P. 37(a) (court may, upon motion, enter order compelling person to comply with discovery requests); Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad,* 132 U. PA. L. REV. 1461, 1464 (United States courts are not involved in American discovery unless breach of peace occurs or party seeks compulsion). A court will not subject a party to sanctions for failure to comply with another party's discovery request, but the court may require the noncomplying party to pay the requesting party's expenses, including reasonable attorney fees, should the requesting party subsequently convince the court that the discovery request is valid and that the court therefore should issue an order compelling compliance with the request. FED. R. CIV. P. 37(a)(4) (court granting motion to compel compliance with discovery request may impose requesting party's expenses on party whose conduct necessitated motion, unless court finds that opposition to request was

resistance from the foreign nation.[2] In fact, several nations have enacted legislation that limits or forecloses the ability of litigants before foreign

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justified or award of expenses would be unjust). A party that persists and refuses to comply with a discovery request after a court has ordered the party to comply, however, risks sanctions under Federal Rule 37(b). FED. R. CIV. P. 37(b) (sanctions for failure to comply with judicial discovery order). Under Rule 37, the sanctions a court may impose on a party who fails to comply with a discovery order include a court order designating findings of fact adverse to the noncomplying party, refusing to allow the noncomplying party to support or oppose designated claims or defenses, striking out pleadings, rendering a default judgment, dismissing the action, and finding the noncomplying party in contempt. *Id.*

2. *See* von Mehren, *Discovery Abroad: The Perspective of the U.S. Private Practitioner,* 16 N.Y.U.J. INT'L L & POL. 985, 985-86 (1984) (broad United States discovery provisions are primary reason for uncooperativeness abroad). Foreign hostility toward American discovery proceedings results not only from the broad scope of discovery under the Federal Rules of Civil Procedure, but also from foreign opposition to United States substantive law. *Id.* at 986 (foreign disagreement with American substantive law is contributing factor to hostility of American discovery abroad); *see* Comment, *supra* note 1, at 1464 n.8 (American attempts to enforce substantive policies abroad have led to discovery conflicts between United States and foreign nations); *see also In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1143 (N.D. Ill. 1979) (discussion of statutes prohibiting American discovery that three foreign nations enacted to frustrate American enforcement of United States antitrust legislation). Moreover, the fact that civil-law procedures for obtaining evidence differ significantly from United States discovery procedures has caused additional hostility toward American discovery in civil-law countries. *See* Comment, *supra* note 1, at 1464 (differences between civil-law discovery procedures and common-law discovery procedures has created tension in transnational litigation). The primary difference between United States and civil-law discovery is that discovery under the Federal Rules is a private matter between the parties. *See* Comment, *supra* note 1, at 1464. United States courts do not become involved in the discovery proceedings unless a party seeks the court's assistance to compel discovery or for protection from a request. *See supra* note 1 (United States courts are not involved in discovery proceedings unless party seeks order to compel compliance with request or order to protect from request that is annoying, embarrassing, oppressive or constitutes undue burden or expense). In civil-law countries, however, the court, not the parties, gathers the evidence for trial. *See* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 59-60 (E.D. Pa. 1983) (gathering of evidence is function of judiciary in civil-law system); Comment, *supra* note 1, at 1464 (judges gather evidence for trial in civil-law countries). The judge in the civil-law system decides which witnesses to interview and performs the questioning. *See Philadelphia Gear,* 100 F.R.D. at 59 (judge interrogates witnesses in civil-law discovery); Comment, *supra* note 1, at 1464 (civil-law judge decides which witnesses to interview and what questions to ask in civil-law discovery). The civil-law system limits the parties merely to suggesting questions. *See Philadelphia Gear,* 100 F.R.D. at 59 (civil-law attorneys may suggest questions but civil-law discovery affords no opportunity for counsel to question or cross-examine witnesses). After completing the questioning, the judge prepares a nonverbatim summary of the evidence. *See Philadelphia Gear,* 100 F.R.D. at 59 (civil-law judge prepares summary record of evidence after judge has completed questioning of witnesses). The summary then becomes the official record of the discovery proceeding. *See Philadelphia Gear,* 100 F.R.D. at 59 (judicial summary of witness testimony is official record of discovery proceeding); Comment, *supra* note 1, at 1464 (civil-law systems do not keep verbatim transcript of testimony witnesses give during discovery). Since the gathering of evidence is a judicial function in civil-law countries, civil-law countries often consider attempts by United States parties and courts to gather evidence within their borders a violation of judicial sovereignty. *See Philadelphia Gear,* 100 F.R.D. at 60 (gathering of evidence in civil-law countries is judicial

courts to discover information located within the nations' territory.[3] These statutes, known as "blocking statutes," prohibit disclosure of information to foreign tribunals and often impose criminal penalties upon violators.[4] Nations enacting blocking statutes claim that such statutes are necessary to protect national sovereignty.[5] In contrast to the sovereign interest of foreign nations, the United States has an interest in assuring that United States courts afford every litigant adequate discovery so that the litigant may present fully his claim or defense.[6] The United States position is that broad discovery encourages litigants and witnesses to completely and truthfully disclose all relevant information involved in the litigation, thus facilitating enforcement of policies encompassed in United States substantive law.[7] Neither the United States Supreme Court, the United States Congress nor the Federal Rules has provided federal trial courts significant guidance in accommodating the conflicting interests involved when litigants attempt to

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function and therefore civil-law countries may consider discovery attempts by foreign courts or foreign citizens a violation of judicial sovereignty).

3. *See* Rosenthal & Yale-Loehr, *supra* note 1, at 1080 (blocking legislation has constituted primary response of foreign nations to unacceptable United States discovery methods). The "blocking statutes" that most frequently arise in United States litigation are those enacted by Australia, Canada, England, France and South Africa. *See* Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation,* 17 INT'L LAW. 61, 62 n.1 (1983) (discussion of major foreign blocking statutes and American judicial response to such statutes).

4. *See* RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 Reporter's Notes, at 20-22 (Tent. Draft No. 3, 1982) (blocking statutes prohibit disclosure of information located in enacting state's territory and carry some form of penal sanction for violations). There are two principle types of foreign blocking statutes, those that attempt to force an American litigant to use the foreign state's discovery procedures or procedures of an international treaty, and those that attempt to completely foreclose discovery of information related to certain subject matters. Batista, *supra* note 3, at 63-64.

5. *See* Rosenthal & Yale-Loehr, *supra* note 1, at 1080 (nations adopting blocking legislation view blocking statutes as necessary to protect domestic laws and policies).

6. *See In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 999 (10th Cir. 1977) (United States has interest in providing litigants before United States courts adequate discovery).

7. *Id.;* 4 J. MOORE, J. LUCAS & G. GROTHEER, JR., MOORE'S FEDERAL PRACTICE § 26.02[2] (2d ed. 1984) (United States liberal discovery rules encourage disclosure of truth). Since the United States position is that liberal discovery promotes disclosure of the truth, United States courts have emphasized that a foreign state often frustrates United States substantive policies underlying a cause of action when the foreign state prevents a litigant before an American court from obtaining information. *See, e.g.,* United States v. First Nat'l City Bank, 396 F.2d 897, 902-03 (2d Cir. 1968) (in ordering defendant to disclose information, court emphasized great importance of United States policy interests underlying American antitrust laws and found that permitting defendant to justify failure to disclose relevant information to grand jury because of German blocking statute would frustrate important United States policies); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 512-13 (N.D. Ill. 1984) (inadequate discovery in private patent infringement actions frustrates important United States substantive interests encompassed in United States patent laws).

discover evidence abroad.[8] As a result of this lack of guidance, United States trial courts have struggled to formulate an acceptable method of resolving discovery conflicts between the United States and foreign nations.[9]

The leading authority concerning transnational discovery conflict is the decision of the United States Supreme Court in *Societe Internationale v. Rogers*[10] in which the Supreme Court addressed the critical issues that arise when a party before a United States court objects to discovery on grounds that a foreign blocking statute prohibits the party's compliance with discovery requests.[11] In *Societe,* the plaintiff[12] failed to comply with a discovery order issued by the United States District Court for the District of Columbia, maintaining that to fully comply with the discovery order would subject the plaintiff to criminal penalties under Swiss secrecy laws.[13] The district court found that the plaintiff's defense did not constitute an adequate excuse for

8. *See* Rosenthal & Yale-Loehr, *supra* note 1, at 1081 (Congress, Supreme Court, federal law enforcement agencies and Federal Rules of Civil Procedure provide little direction in resolving transnational discovery conflict); Comment, *supra* note 1, at 1470-72 (Federal Rules of Civil Procedure fail to provide specific method to obtain evidence abroad).

9. Comment, *supra* note 1, at 1461 (American courts have struggled when faced with problem of obtaining evidence abroad).

10. 357 U.S. 197 (1958).

11. *See* Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies,* 16 N.Y.U.J. INT'L L. & POL. 1061, 1066-67 (1984) (*Societe* is sole Supreme Court opinion addressing issue concerning what standards trial courts should apply to resolve conflict between United States discovery and foreign blocking statutes). In *Societe Internationale v. Rogers,* a Swiss company brought an action to recover assets the United States had seized during World War II as enemy-owned property. *Societe,* 357 U.S. at 198-99. The United States alleged that the Swiss plaintiff had conspired with a German firm to conceal ownership of property located in the United States. *Id.* at 199. To establish its defense, the Government sought a discovery order requiring the plaintiff to produce its bank records for inspection. *Id.* at 199-200. The United States District Court for the District of Columbia granted the United States' request for a discovery order. *Id.* at 200. The Swiss plaintiff sought to avoid production on grounds that disclosure of the bank records would violate Swiss secrecy laws and subject the plaintiff to criminal penalties. *Id.* The district court found that the plaintiff's defense did not constitute an adequate excuse for failing to comply with the court's discovery order and the court dismissed the plaintiff's complaint with prejudice. *Id.* at 203. The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal. *Id.* The Supreme Court reversed and held that the plaintiff's failure to comply did not justify such a drastic sanction because the plaintiff had established that its failure to comply was a result of conflicting foreign law and did not result from any bad faith or willfulness. *Id.* at 212. The Swiss plaintiff established its good faith by the fact that even though the plaintiff had failed to comply fully with the United States' discovery request, the plaintiff had attempted to secure waivers and consent from the Swiss government and eventually did produce over 190,000 documents for inspection. *Id.* at 200.

12. *See Societe,* 357 U.S. at 199. In *Societe,* a Swiss company sued to recover assets the United States had seized during World War II. *Id.* Since *Societe* was a post-deprivation action, the Swiss plaintiff was in a position similar to a typical defendant. *Societe,* 357 U.S. at 210; *Graco, Inc. v. Kremlin, Inc.,* 101 F.R.D. 503, 509 n.7 (N.D. Ill. 1984). Therefore, courts generally do not emphasize the fact that the party opposing discovery in *Societe* was the plaintiff. *Id.*

13. *Societe,* 357 U.S. at 200.

failing to comply with the court's discovery order, and consequently dismissed the plaintiff's complaint with prejudice.[14] The Supreme Court reversed, holding that the district court's dismissal of the complaint was unwarranted because the plaintiff had established that its failure to comply was a result of conflicting foreign law and did not result from any bad faith or willfullness.[15]

In resolving foreign discovery conflict, the *Societe* opinion provides only limited assistance because the Supreme Court did not attempt to set out a general test to be used in all cases involving foreign discovery conflict, but instead attempted to limit *Societe* to the facts of the case.[16] A further limitation on the usefulness of the *Societe* decision arises from the fact that subsequent United States cases have focused on different aspects of the Supreme Court's opinion, resulting in inconsistent interpretations.[17] Despite the varied interpretations of its opinion, the *Societe* Court did not hold that

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14. *Id.* at 203.

15. *Id.* at 212-13.

16. *See Societe*, 357 U.S. at 205-06; *see also In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1147 (N.D. Ill. 1979) (*Societe* Court explicitly limited ruling to facts of case before court); Rosdeitcher, *supra* note 11, at 1069 (*Societe* Court confined its ruling to particular facts of case before Court).

17. *See* Rosdeitcher, *supra* note 11, at 1067 (United States courts have interpreted Supreme Court's opinion in *Societe* inconsistently). Some cases subsequent to *Societe* have focused on the fact that the *Societe* Court refused to impose a drastic sanction on the party subject to the Swiss blocking statute because the party had attempted in good faith to obtain a waiver from the blocking statute. *See* RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 Reporters' Notes, at 24 (Tent. Draft No. 3, 1982) (United States cases subsequent to *Societe* have focused on Supreme Court's unwillingness to impose drastic sanction when Court determined requested information was subject to foreign blocking statute); *see, e.g.*, Seabrook v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984) (citing *Societe* for proposition that dismissal is not proper sanction when party is unable to comply); *In re* Grand Jury Proceedings, 691 F.2d 1384, 1388-89 (11th Cir. 1982) (stating that *Societe* Court merely held that sanction of outright dismissal was inappropriate because plaintiff's failure to comply was result of Swiss blocking statute and did not result from bad faith of plaintiff), *cert. denied*, 462 U.S. 1119 (1983). Some courts have stressed that under *Societe*, courts may require a party to make a good faith effort to secure waiver of a foreign blocking statute. *See* RESTATEMENT § 420 Reporters' Notes, at 24 (United States cases subsequent to *Societe* have interpreted *Societe* as authorizing courts to require party to make good faith effort to obtain exemption from foreign blocking statute); *see, e.g.*, Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 525-26 (N.D. Ill. 1984) (warning foreign defendant that court, under authority of *Societe*, would impose most severe sanctions if defendant failed to comply with court's discovery order unless defendant attempted in good faith to comply with order despite applicability of French blocking statute); United Nuclear Corp. v. General Atomic Co., 96 N.M. 155,____, 629 P.2d 231, 305 (1980) (citing *Societe* for proposition that litigant is under duty to make every effort to secure relaxation of foreign nondisclosure law). Other courts have focused on the *Societe* Court's suggestion that courts may draw findings of fact adverse to the noncomplying party even if the noncomplying party has acted in good faith. *See* RESTATEMENT § 420 Reporters' Notes, at 24 (United States cases subsequent to *Societe* have followed *Societe* Court's suggestion that courts may draw findings of fact adverse to noncomplying party even if noncomplying party has acted in good faith). Still other courts have stressed the *Societe* Court's preference for a case by case approach

a foreign blocking statute is an absolute bar to an order compelling compliance with foreign discovery requests.[18] However, *Societe* does stand for the proposition that United States courts may not ignore foreign blocking legislation.[19] Therefore, when faced with a foreign blocking statute, trial courts must balance the conflicting interests, either at the order stage of discovery to determine whether a discovery order should issue or at the sanction stage of discovery to determine what sanctions are appropriate should a party fail to comply with the order.[20]

Although the Supreme Court in *Societe* did not intend to establish a test applicable in all blocking statute cases, the United States District Court for the Northern District of Illinois, in *In re Uranium Antitrust Litigation,*[21] utilized the *Societe* opinion as a guide to create a universal three-factor balancing test.[22] The Northern District of Illinois designed the *Uranium Antitrust* test to provide guidance for trial courts at the discovery order stage

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and the court's emphasis on trial court discretion in discovery matters. *See id.* (United States cases subsequent to *Societe* have focused on *Societe* Court's emphasis on case by case approach and on district court discretion); *see, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 997 (10th Cir. 1977) (*Societe* requires United States courts to utilize balancing approach on case by case basis); Wilson v. Stillman & Hoag, Inc., 121 Misc. 2d 374, 375 (N.Y. App. Div. 1983) (*Societe* requires trial courts to use case by case balancing approach to resolve foreign discovery conflict).

18. *See Societe,* 357 U.S. at 205-06 (district court was justified in issuing discovery order even though requested information was subject to Swiss blocking statute); *see, e.g.,* United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 345 (7th Cir. 1983) (foreign blocking statutes do not bar automatically United States courts from compelling production of documents); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 997 (10th Cir. 1977) (*Societe* Court held that United States courts have power to order compliance with discovery requests despite fact that complying with such order would subject complying party to criminal sanctions in foreign state); Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976) (*Societe* implies that existence of foreign blocking statute is not relevant to decision whether discovery order should issue), *cert. denied,* 429 U.S. 1096 (1977); Laker Airways Ltd. v. Pan American World Airways, 23 I.L.M. 748, 750 (D.D.C. 1984) (foreign blocking statute is not absolute defense to discovery request); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 509 (N.D. Ill. 1984) (Supreme Court in *Societe* clearly indicated that foreign blocking statute does not bar order compelling production of documents); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 114-15 (S.D.N.Y. 1981) (foreign blocking statutes do not bar automatically United States courts from issuing a foreign discovery order); *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1145 (N.D. Ill. 1979) (foreign blocking statute does not prevent exercise of United States court's power to order production of documents).

19. *See Societe,* 357 U.S. at 211-13 (district court should consider foreign blocking statutes at sanctions stage); *see also Uranium Antitrust,* 480 F. Supp. at 1145 (American courts should not ignore fact that foreign blocking statute exists).

20. *See supra* notes 18-19 and accompanying text(foreign blocking statutes do not constitute absolute bar to foreign discovery but trial courts may not ignore blocking statutes when transnational discovery conflicts arise); *infra* note 23 (discussion of two stages of discovery involved in transnational discovery conflict).

21. 480 F. Supp. 1138 (N.D. Ill. 1979).

22. *See id.* at 1146-48 (Supreme Court opinion in *Societe* provides that decision whether to order foreign discovery is discretionary and informed by three primary factors).

of cases involving foreign blocking statutes.[23] The first factor of the *Uranium Antitrust* test is the importance of the United States policies that underlie the substantive basis of the plaintiff's claim.[24] The *Uranium Antitrust* court stated that, generally, a United States court should grant a litigant's request for an order to produce if to do so would effectuate strong Congressional policies.[25] Under the *Uranium Antitrust* test, the policy interests of the foreign state are not relevant.[26] The second factor of the *Uranium Antitrust* test is the importance of the requested information in illuminating a key issue in the involved claim.[27] In measuring the second factor, the *Uranium Antitrust* court stated that a court should not apply the normal relevance standard of the Federal Rules.[28] Instead, the requested information must be crucial in illuminating or resolving a key issue in the litigation before a court may determine that the second factor of the *Uranium Antitrust* test weighs in favor of the party requesting production.[29] The third and final factor of the *Uranium Antitrust* test is the degree of flexibility in the foreign nation's enforcement of its nondisclosure laws.[30] The more flexible a foreign country is in applying its blocking statute, the greater the likelihood that a United States trial court will issue an order compelling discovery under the *Uranium Antitrust* test.[31]

Notwithstanding the three-factor balancing test of *Uranium Antitrust,* several courts have adopted a balancing test found in section 40 of the Restatement (Second) of the Foreign Relations Law of the United States

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23. *See id.* at 1148, 1154-56. Controversies regarding foreign discovery conflicts occur at two separate stages. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 comment f, at 17-18 (Tent. Draft No. 3 1982). In the first stage, a party seeks judicial assistance to obtain evidence abroad and the court must decide whether to issue an order to compel compliance with the movant's discovery requests. *Id.* The *Uranium Antitrust* court stated that a trial court should apply the three factor *Uranium Antitrust* balancing test at the order stage to determine whether the court should order foreign discovery despite the existence of a blocking statute. *Uranium Antitrust,* 480 F. Supp. at 1146-48, 1154-56. The second stage is the sanctions stage. RESTATEMENT, *supra* § 420 comment f, at 17-18. If the court decides to issue a discovery order and the responding party fails to comply with the order, the court must determine whether to impose sanctions for failure to comply. *Id.* The Uranium Antitrust court also listed three factors that United States courts should consider exclusively at the sanctions stage. *Uranium Antitrust,* 480 F. Supp. at 1147-48. The *Uranium Antitrust* sanctions factors are whether the noncomplying party deliberately courted legal impediments in a foreign country to evade discovery, the scope and applicability of the blocking statute and the severity of penalties imposed for violation of the blocking statute. *Id.*

24. *Uranium Antitrust,* 480 F. Supp. at 1148.

25. *Id.* at 1146.

26. *Id.*

27. *Id.* at 1148.

28. *Id.* at 1146. Under the Federal Rules of Civil Procedure, a party is entitled to discover information that is relevant to the subject matter of the litigation or that reasonably will lead to the discovery of admissible evidence. FED. R. CIV. P. 26(b) (1).

29. *Uranium Antitrust,* 480 F. Supp. at 1146.

30. *Id.* at 1148.

31. *Id.* at 1146-47.

(section 40)[32] to resolve discovery conflicts involving foreign blocking statutes.[33] Section 40 addresses international conflicts in general and does not address specifically the conflict between discovery procedures and blocking statutes.[34] The text of section 40 provides that when a jurisdictional conflict develops between two nations, the nations should consider five factors to determine whether to moderate the exercise of their enforcement jurisdiction.[35] When applying section 40 to resolve transnational discovery conflicts, the section 40 factors are the national interests of both states, the hardship of inconsistent enforcement on the person opposing discovery, the place of performance, the nationality of the person opposing discovery and the extent to which the foreign nation enforces the blocking legislation.[36]

Although several courts have adopted the section 40 balancing test, the section 40 test recently has come under substantial criticism.[37] Commentators

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32. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (list of factors nations should consider in moderating enforcement jurisdiction when jurisdictional conflict between two nations arises) [hereinafter cited as RESTATEMENT § 40].

33. *See* United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 345-46 (7th Cir. 1983) (court utilized § 40 balancing test to reverse district court's order compelling production); *In re* Grand Jury Proceedings, 691 F.2d 1384, 1389-91 (11th Cir. 1982) (court affirmed sanctions for noncompliance with discovery order after concluding that United States interests outweighed foreign interests under § 40 test), *cert. denied,* 462 U.S. 1119 (1983). United States v. Vetco, Inc., 644 F.2d 1324, 1329-33 (9th Cir. 1981) (court employed § 40 and *Societe* Court's good faith standard to uphold sanctions for noncompliance with IRS summonses); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 512-15 (N.D. Ill. 1984) (court used § 40 and other balancing tests to grant in part party's request to compel discovery of information held in France); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-19 (S.D.N.Y. 1981) (court employed § 40 to grant SEC's request to compel discovery of information held by Swiss corporation even though disclosure would subject corporation to criminal liability in Switzerland). At least three courts expressly had adopted the § 40 test to resolve foreign discovery conflict prior to *Uranium Antitrust. See In re* Westinghouse Elec. Corp. Litig., 563 F.2d 992, 997-99 (10th Cir. 1977) (court employed § 40 and Societe Court's good faith standard to vacate district court's contempt sanction); *In re* Grand Jury Proceedings, 532 F.2d 404, 407-10 (5th Cir.) (court employed § 40 to uphold grand jury subpoena served on nonresident alien even though nonresident alien's act of testifying violated foreign law), *cert. denied,* 429 U.S. 940 (1976); United States v. First Nat'l City Bank, 396 F.2d 897, 902-05 (2d Cir. 1968) (court employed § 40 to affirm district court's sanctions issued for failure to comply with grand jury subpoena ducus tecum even though compliance would violate West German law). The *Uranium Antitrust* court, however, expressly rejected the section 40 balancing test. *See Uranium Antitrust,* 480 F. Supp. at 1148.

34. *See* RESTATEMENT § 40 (factors nations should consider in moderating enforcement jurisdiction when jurisdictional conflict between two nations arises); Rosenthal & Yale-Loehr, *supra* note 1, at 1084 (§ 40 does not deal specifically with discovery conflicts).

35. *See* RESTATEMENT § 40. In foreign relations law, there are two types of jurisdiction, prescriptive jurisdiction and enforcement jurisdiction. *See Uranium Antitrust,* 480 F. Supp. at 1144. Prescriptive jurisdiction refers to the power of a state under international law to enact a rule of law. *Id.* Enforcement jurisdiction refers to the power of a state under international law to enforce a rule of law. *Id.*

36. RESTATEMENT § 40.

37. *See supra* note 33 (listing several courts that have adopted § 40 balancing test); *infra* notes 38-40 and accompanying text (criticism of § 40 balancing test).

have argued that the factors of section 40 are too vague and open-ended[38] and that courts easily can predetermine the outcome of the balance by finding the United States interest paramount.[39] Commentators further have criticized section 40 because the terms of section 40 do not require a balancing approach but merely provide that a court should, in the exercise of the court's discretion, consider the five section 40 factors when faced with an enforcement jurisdiction conflict between the United States and a foreign nation.[40]

To improve the section 40 balancing test as applied to discovery conflict with foreign nations, the American Law Institute (ALI) reformulated the section 40 test in section 420 of the Restatement (Revised) of the Foreign Relations Law of the United States (section 420).[41] Unlike section 40, section 420 specifically addresses discovery conflicts between the United States and foreign nations.[42] Under section 420(1), a litigant before a United States court that satisfies three major requirements may obtain information located in a foreign nation.[43] First, unlike the Federal Rules of Civil Procedure, section 420(1) requires a court order before a party may obtain transnational discovery.[44] By creating the court order requirement, the drafters of section 420 have attempted to decrease conflict with foreign interests by providing for judicial supervision at the initial stage of discovery.[45] Second, section 420(1) replaces the normal relevance standard of the Federal Rules with a more stringent relevance standard.[46] To discover information abroad, section

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38. *See* Rosenthal & Yale-Loehr, *supra* note 1, at 1085 (§ 40 standards are indefinite and open-ended).

39. *See* Rosdeitcher, *supra* note 11, at 1073 (American courts rarely give much weight to foreign state's interests when performing § 40 balancing); Note, *Extraterritorial Jurisdiction of U.S. Courts Regarding the Use of Subpoena* Duces Tecum to *Obtain Discovery in Transnational Litigation: The Search for a Limiting Principle,* 16 N.Y.U.J. INT'L L. & POL. 1135, 1145-46 (1984) (§ 40 is invitation to chauvinism because court can preresolve outcome of test by finding its nation's interest paramount).

40. *See* Rosenthal & Yale-Loehr, *supra* note 1, at 1084 (§ 40's restraint merely is discretionary and does not require balancing of conflicting interests).

41. *See* Note, *supra* note 39, at 1146 (ALI reformulated § 40 in §§ 419 and 420 of Restatement (Revised) to correct inadequacies of § 40).

42. *See* RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 (Tent. Draft No. 3, 1982) (guide for United States courts when confronted with transnational discovery conflict) [hereinafter cited as RESTATEMENT § 420].

43. *See infra* notes 44-51 and accompanying text (to obtain foreign discovery under § 420, United States litigants first must obtain court order, which court will issue only if litigant demonstrates that information is crucial and issuance of discovery order would be reasonable).

44. *See* RESTATEMENT § 420(1)(a) (United States court may order foreign discovery); RESTATEMENT § 420 comment a, at 14 (§ 420(1) requires party to obtain court order before seeking evidence abroad); *cf. supra* note 1 (discovery under Federal Rules of Civil Procedure is private matter between parties).

45. *See* RESTATEMENT § 420 Reporters' Notes, at 19-20 (purpose of court order requirement is to advance balancing test to initial stage rather than compliance stage of discovery).

46. *See* RESTATEMENT § 420(a) (litigant may not obtain information held in foreign nation unless information is "directly relevant, necessary, and material to action"); *cf. supra* note 1 (pursuant to rule 26(b)(1) of Federal Rules of Civil Procedure litigant is entitled to discover

420 requires a United States litigant to demonstrate that the information sought is "directly relevant, necessary and material."[47] The apparent intent of the ALI in imposing the stringent relevance standard is to decrease foreign resistance to United States discovery methods by eliminating what foreign nations have labeled American fishing expeditions.[48] The "principle of reasonableness" is the final requirement for the discovery of foreign evidence under section 420. Section 420(1)(c) sets forth a five-factor balancing test to assist courts in determining the reasonableness of a discovery request.[49] The factors included in the section 420 balancing test are the importance of the requested information, the specificity of the request, the origin of the information, the extent to which the discovery request implicates the foreign state's interests, and the possibility of securing the information through alternative means.[50] If upon balancing the five factors of section 420(1)(c) a court determines that the discovery request is reasonable, the court should enter an order compelling compliance with the request.[51]

If a court determines under section 420(1) that a foreign discovery order should issue, section 420(2) provides guidance to the court in enforcing the order when the nation in which the evidence is located has enacted blocking legislation.[52] When a foreign blocking statute prohibits a person to whom a United States court has directed a discovery order from disclosing the requested information, the court, under section 420(2)(a), may require that person to make a good faith effort to secure from the foreign nation an exemption to the blocking statute.[53] Additionally, section 420(2)(b) states that a court ordinarily may not subject a party who makes such a good faith effort to the sanctions of default, dismissal or contempt.[54] A court, however, may make findings of fact adverse to a party who fails to comply with a

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information that is relevant to subject matter of litigation or that reasonably will lead to discovery of admissible evidence).

47. RESTATEMENT § 420(a).

48. *See* RESTATEMENT § 420 comment a, at 15 (foreign resistance to United States discovery justifies strict relevance standard); von Mehren, *supra* note 2, at 985-86 (broad scope of United States discovery that allows litigants to conduct fishing expeditions is primary reason for foreign hostility).

49. *See* RESTATEMENT § 420(1)(c) (five-factor balancing test designed to assist courts in determining reasonableness of foreign discovery requests). The United States position regarding foreign discovery is that persons who transact business in the United States or otherwise bring themselves within United States jurisdiction are subject to the burdens as well as the benefits of United States law, including United States discovery law. RESTATEMENT § 420 Reporters' Notes, at 19. The section 420 balancing test accepts the United States' position subject, however, to the principle of reasonableness. *Id.*

50. RESTATEMENT § 420(1)(c).

51. *Id.; see supra* note 49 (foreign citizens who are within United States jurisdiction must comply with United States discovery rules, subject to principle of reasonableness).

52. *See* RESTATEMENT § 420(2)(a)-(c) (guidelines for American trial courts in enforcing foreign discovery order in face of foreign blocking statute).

53. RESTATEMENT § 420(2)(a).

54. RESTATEMENT § 420(2)(b).

discovery order even if the party has made a good faith effort to secure an exemption.[55]

Evaluation of the above three balancing tests as tools to assist American courts in resolving transnational discovery conflicts reveals that the section 420 test is superior to the section 40 and *Uranium Antitrust* tests. Section 420's requirement that a United States litigant must obtain a court order before conducting discovery abroad is a valuable requirement.[56] Threshold review by a court assures that the foreign state's sovereignty interest will be considered before any discovery takes place within the foreign state.[57] Moreover, section 420's substitution of a stringent relevance standard for the normal relevance standard of the Federal Rules of Civil Procedure will reduce foreign hostility toward United States discovery.[58] The primary foreign criticism of United States discovery concerns the broad scope of information that a litigant may secure under the permissive relevance standard of the Federal Rules.[59] The section 420(1)(c) balancing test, however, would benefit by incorporating three factors that are found in the section 40 and *Uranium Antitrust* tests.[60] First, unlike both the section 40 and *Uranium Antitrust* test, the section 420 balancing test does not include as a factor the United

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55. RESTATEMENT § 420(2)(c).

56. *See* Rosenthal & Yale-Loehr, *supra* note 1, at 1088 (§ 420's requirement that all foreign discovery requests must be reviewed by court is valuable improvement in United States procedural law); RESTATEMENT § 420 comment a, at 14 (§ 420(1) requires party to obtain court order before seeking evidence abroad). Initially, discovery under the Federal Rules of Civil Procedure is a private matter between the parties. *See supra* note 1 (United States courts are not involved in discovery proceedings unless party seeks order to compel compliance with request or order to protect from request that is annoying, embarrassing, oppressive or constitutes undue burden or expense). Unless a party affirmatively seeks judicial assistance to compel discovery or for protection from a discovery request, the parties conduct discovery without judicial assistance or intervention. *Id.* Section 420's court order requirement prevents parties from taking evidence in a foreign nation without first seeking judicial approval. RESTATEMENT § 420 comment a, at 14 (§ 420 (1) requires party to obtain court order before seeking evidence abroad). Since an interested private party might not consider the foreign state's sovereign interests, section 420's court order requirement is necessary to assure that the foreign state's interests are considered before litigants conduct any activity in the foreign state. *See* RESTATEMENT 420 Reporters' Notes, at 19-20 (purpose of court order requirement is to advance consideration of various interests to initial stage rather than compliance stage of discovery).

57. *See supra* note 56 (§ 420's court order requirement assures consideration of foreign state's sovereignty interests before parties conduct any activity within foreign state).

58. *See* Rosenthal & Yale-Loehr, *supra* note 1, at 1088-89 (§ 420's stringent relevance standard is valuable improvement in United States procedural law); RESTATEMENT § 420(a) (litigant may not obtain information held in foreign nation unless information is "directly relevant, necessary, and material to action").

59. *See* von Mehren, *supra* note 2, at 985-86 (broad scope of United States discovery that allows litigants to conduct fishing expeditions is primary reason for foreign hostility).

60. *See infra* notes 61-66 and accompanying text (ALI could improve § 420 balancing test by incorporating United States' interest, extent to which conduct must take place within the foreign state and foreign state's flexibility in applying its blocking statute as factors for court to balance).

States policy interest encompassed in the plaintiff's underlying substantive claim.[61] To protect the sovereign interest of the United States, American courts should consider the underlying United States policies that form the basis of the cause of action.[62] Second, when balancing the conflicting interests, American courts should consider the extent to which conduct necessitated under a discovery order must take place within the foreign state, a factor found in section 40 but not in section 420.[63] A court can reduce the degree to which a discovery order conflicts with the sovereignty interest of a foreign nation by prescribing forms of discovery that require the parties to conduct little activity within the foreign state's borders.[64] Finally, if a foreign state has enacted blocking legislation, a United States court should consider the foreign state's flexibility in applying its blocking statute, a factor found in the *Uranium Antitrust* test.[65] A foreign state that takes a flexible attitude in enforcing its blocking statute is more likely to cooperate with discovery within its borders than a foreign state that stringently enforces its blocking legislation, especially when a United States court has balanced the conflicting interests, including the foreign state's interests, and determined that a discovery order should issue despite the existence of the blocking statute.[66]

All of the foregoing balancing tests attempt to weigh the interests of the United States against the interests of a foreign nation to determine whether a United States court is justified in utilizing the discovery procedures of the

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61. *See Uranium Antitrust,* 480 F. Supp. at 1148 (first factor of *Uranium Antitrust* test is United States interest underlying plaintiff's cause of action); RESTATEMENT § 40(a) (United States courts should consider moderating enforcement jurisdiction when there is jurisdiction conflict with another nation in light of interests of both nations); *cf.* RESTATEMENT § 420(1)(c) (five-factor balancing test is designed to assist courts in determining reasonableness of foreign discovery requests).

62. *See supra* text accompanying notes 24-26 (American courts should consider underlying United States policies that form basis of cause of action when balancing interests under *Uranium Antitrust* test).

63. *See* RESTATEMENT § 40(c) (United States courts should consider amount of activity that must take place in foreign state when litigant seeks court order to compel discovery abroad); *cf.* RESTATEMENT § 420(1)(c) (five-factor balancing test designed to assist courts in determining reasonableness of foreign discovery requests).

64. *See* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 513 (N.D. Ill. 1984) (to reduce infringement on foreign state's sovereignty, district court drafted discovery order so that litigants would conduct little activity in foreign state).

65. *See Uranium Antitrust,* 480 F. Supp. at 1148 (United States courts should consider degree of flexibility in foreign nation's enforcement of its blocking statute under *Uranium Antitrust* balancing test); *cf.* RESTATEMENT § 420(1)(c) (five-factor balancing test designed to assist courts in determining reasonableness of foreign discovery requests).

66. *See Uranium Antitrust,* 480 F. Supp. at 1146-47 (United States courts should be more willing to issue discovery order if foreign state takes flexible attitude in enforcing its blocking statute). A court should apply the modified eight-factor balancing test derived from section 420, section 40 and *Uranium Antitrust* at the order stage to determine whether the court should order foreign discovery. *See supra* note 23 (foreign discovery controversies occur at both order stage and sanctions stage of Federal Rules discovery proceedings).

Federal Rules of Civil Procedure to obtain evidence in a foreign nation.[67] Since 1972, when the United States entered into force the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention or Convention),[68] United States courts have had to contend with the argument that the United States never may obtain foreign discovery by means of the Federal Rules if the foreign nation is a signatory to the Hague Convention.[69] Parties before United States courts have argued that the Convention provides the exclusive means for one signatory nation to discover evidence within the territory of another signatory nation.[70] The Hague Convention is an international treaty designed to establish evidence-taking procedures that are acceptable to the nation in which a litigant before a foreign court takes evidence and at the same time are "utilizable" in the forum nation.[71] Twenty-five nations participated in the negotiation and drafting of the treaty.[72] To date, seventeen nations, including the United States, have ratified the Hague Convention.[73]

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67. *See supra* notes 22-66 (discussion of balancing tests designed to assist United States courts to determine whether to order compliance with party's Federal Rules discovery requests when information sought is held in foreign nation).

68. *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C. § 1781 (supp. 1983)) [hereinafter cited as Hague Convention].

69. *See infra* notes 87-118 and accompanying text (principal controversy concerning Hague Convention in United States is whether Convention provides exclusive means to obtain evidence in foreign signatory nation).

70. *See* Comment, *supra* note 1, at 1462 (litigants insisting that Hague Convention provides exclusive means to obtain evidence abroad have presented new dimension to problem of obtaining foreign evidence).

71. *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law,* 8 INT'L LEGAL MATERIALS 785, 806 (1969) (drafters of Hague Convention sought to establish transnational discovery procedures that would be tolerable to nation where evidence is taken and utilizable in forum state).

72. Comment, *supra* note 1, at 1463. On April 17, 1970, the following nations signed the Hague Convention: Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Great Britain, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Northern Ireland, Sweden, Switzerland, Spain, Turkey, the United Arab Republic, the United States, and Yugoslavia. Hague Convention, *supra* note 68, 23 U.S.T. at 2576-77.

73. *See* 7 MARTINDALE-HUBBELL LAW DIRECTORY pt. 7, at 14 (1985). The following nations have entered the Hague Convention into force: Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom, and the United States. *Id.* The international treaty-making process generally involves four stages: negotiation, provisional acceptance demonstrated by the affixing of signatures, ratification and entry into force. *See* G. VON GLAHN, LAW AMONG NATIONS 484 (4th ed. 1981) (treatise on public international law). As with most international treaties, the Hague Convention does not become effective or binding on signature alone. *See* Hague Convention, *supra* note 68, at article 38 (Convention enters into force for each signatory state when state ratifies and deposits instrument of ratification); *see also* G. VON GLAHN, *supra,* at 487 (treaties rarely become effective and binding on signature alone). The Hague Convention provides that the Convention enters into force for each signatory state when the state ratifies the treaty and deposits a document with the Ministry of Foreign Affairs of the Netherlands evincing such ratification. *See* Hague Convention, *supra* note 68, at articles 37-38.

The Hague Convention provides two different methods to obtain evidence located in a foreign nation.[74] Chapter I establishes procedures for a "letter of request," a request from a court in one nation to authorities in another nation seeking foreign judicial assistance in taking discovery in the second nation.[75] Under a letter of request, the nation in which discovery of evidence occurs, the state of execution, utilizes its own discovery procedures to obtain information.[76] The state of execution may not refuse to execute a letter of request unless the state determines that execution would violate state sovereignty or security, or that the request requires action not within the province of the judiciary.[77] Alternatively, Chapter II of the Hague Convention sets forth procedures whereby a litigant may obtain discovery in a foreign state through diplomatic officers, consular personnel or a designated commissioner.[78] A foreign litigant may utilize Chapter II procedures only if the litigant takes the evidence "without compulsion."[79] Chapter II proce-

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74. *See* Hague Convention, *supra* note 68, at chapters I-II. The Hague Convention establishes two different methods for obtaining evidence abroad, the letter of request procedure and procedures for obtaining evidence through diplomatic officers, consular personnel or a designated commissioner. *Id.* A court, however, reasonably may interpret the Hague Convention as providing three different procedures for obtaining evidence because there are minor procedural differences between obtaining evidence through a commissioner and obtaining evidence through diplomatic or consular personnel. *See id.* at articles 15-17; *see also* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983) (Hague Convention provides three methods to obtain evidence abroad); Comment, *supra* note 1, at 1466 (Hague Convention establishes three basic methods to discover evidence in foreign nation).

75. Hague Convention, *supra* note 68, at Chapter I (provision establishes procedures governing letter of request). To utilize the letter of request procedure, a litigant must apply to the district court through motion for issuance of a letter of request. *See* Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide,* 16 INT'L LAW. 575, 576-77 (1982) (application to court for issuance of letter of request is first step to obtain letter of request under Hague Convention). The movant also should submit to the court an affidavit stating the reasons why the court should issue the letter of request and a proposed letter of request that complies with Convention requirements. *Id.* at 577. If the district court issues the letter of request, the court, not the litigant, must send the request to the central authority of the foreign state. *Id.* at 578; Hague Convention, *supra* note 68, at article 2 (each signatory shall designate central authority to receive letters of request). The procedures of the foreign states in processing and executing letters of request vary greatly. Platto, *supra,* at 578.

76. *See* Hague Convention, *supra* note 68, at article 9 (state receiving letter of request will apply own procedure when executing letters of request).

77. *Id.* at article 12 (state receiving letter of request may refuse to execute only if request requires action not within functions of judiciary or receiving state determines that execution would prejudice its sovereignty or security).

78. *Id.* at articles 15-17 (procedures for taking evidence through diplomatic agents, consular personnel or designated commissioners).

79. *Id.* at articles 15-17 (litigants may take evidence pursuant to Chapter II of Hague Convention only if litigants take such evidence without compulsion). Although litigants may take evidence pursuant to Chapter II procedures only if the litigant takes such evidence without compulsion, article 18 of the Convention provides that a state may make a declaration establishing procedures whereby a diplomatic agent, consular officer or commissioner may apply to the declaring state for assistance in compelling production of evidence. *Id.* at article 18.

dures, therefore, are ineffective against recalcitrant witnesses.[80] Furthermore, the state in which discovery of evidence is to occur may require a foreign litigant to obtain prior permission before taking evidence pursuant to the Chapter II procedures.[81] Chapter III of the Hague Convention sets out several provisions that apply to the Convention as a whole.[82] The important Chapter III provisions include article 23 and article 33. Article 23 provides that a signatory may refuse to execute letters of request that seek to obtain pretrial discovery of documents.[83] Article 23 is significant because a signatory state may utilize an article 23 declaration to effectively block discovery of nearly all documents.[84] Under article 33 of the Convention, a signatory state may modify or exclude use of the Convention's Chapter II procedures and thereby remove the opportunity to obtain evidence through diplomatic officers, consular personnel and designated commissioners.[85]

However, only Czechoslovakia, Italy, the United Kingdom and the United States have made article 18 declarations. 7 MARTINDALE-HUBBELL LAW DIRECTORY, pt. 7, at 14-21 (1985).

80. *See* Comment, *supra* note 1, at 1467 (Chapter II procedures of Hague Convention generally will be ineffective unless witness is willing to testify); Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning Its Scope, Methods and Compulsion,* 16 N.Y.U.J. INT'L L. & POL. 1031, 1051 (1984) (discovery methods of Chapter II of Hague Convention are unsuitable when litigant anticipates significant reluctance on part of witnesses to comply with requests).

81. *See* Hague Convention, *supra* note 68, at Chapter II. Under article 15 of the Hague Convention, a diplomatic or consular agent may take evidence from nationals of the nation that he represents within the territory of another signatory state without first obtaining permission from the state in which the evidence is located. *Id.* at article 15. Under article 16, however, a diplomatic or consular agent may not take evidence from nationals of any nation other than the nation he represents without first obtaining permission from the state in which the evidence is located. *Id.* at article 16. Under article 17, a designated commissioner never may take evidence without permission of the state in which the evidence is located. *Id.* at article 17. Notwithstanding all of the foregoing, however, the Convention grants a signatory state the right to make a declaration altering the permission requirements. *Id.* at articles 15-17. Therefore, a signatory state may require diplomats or consular agents proceeding under article 15 to obtain permission before taking evidence from nationals of the nation the diplomat or consular agent represents. *Id.* at article 15. Furthermore, a signatory state may waive the permission requirements of articles 16 and 17. *Id.* at articles 16-17.

82. *Id.* at Chapter III (general provisions of Hague Convention).

83. *Id.* at article 23. Of the seventeen nations signatory to the Hague Convention, twelve nations have made article 23 declarations preventing pretrial discovery of documents. 7 MARTINDALE-HUBBELL LAW DIRECTORY, pt. 7, at 14-21 (1985). Only Barbados, Cyprus, Czechoslovakia, Israel and the United States have made no article 23 declarations. *Id.* Seven other signatory states, including Denmark, Finland, the Netherlands, Norway, Singapore, Sweden and the United Kingdom, have made limited article 23 declarations. Comment, *supra* note 1, at 1468 n.35. The limited article 23 declarations attempt only to prevent pretrial fishing expeditions and do not bar requests for specific documents. *Id.* France, West Germany, Italy, Luxembourg and Portugal have made broad article 23 declarations that bar pretrial discovery of all documents, regardless of the specificity of the request. *Id.*

84. *See* Batista, *supra* note 3, at 68 (Hague Convention provides no meaningful assistance in obtaining pretrial disclosure of evidence in France because of French government's application of French article 23 declaration).

85. *See* Hague Convention, *supra* note 68, at article 33 (nation may exclude application

In the United States, the principal controversy concerning the Hague Convention has been whether the Convention provides the exclusive means to discover evidence situated in a signatory nation.[86] Several litigants before United States courts and at least one commentator have argued that the Hague Convention provides the exclusive means to obtain evidence abroad.[87] American courts, however, have gone only as far as holding that the Convention provides a mandatory initial procedure, leaving open the possibility of later resort to standard discovery procedures should the information obtained through Convention procedures prove inadequate.[88] For example, in *Philadelphia Gear Corp. v. American Pfauter Corp.*,[89] Judge Ditter of the United States District Court for the Eastern District of Pennsylvania found that principles of international comity[90] require a party seeking evidence located in a signatory state to resort initially to the discovery procedures of the Hague Convention, rejecting the plaintiff's argument that the United States intended the Convention merely to supplement the discovery procedures of the Federal Rules of Civil Procedure.[91] In another 1983 case

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of Chapter II procedures at time of signature, ratification or accession); RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 comment b, at 44 (Tent. Draft No. 5, 1984) (contracting states can opt out of Chapter II of Hague Convention) [hereinafter cited as RESTATEMENT § 483].

86. *See infra* notes 87-118 and accompanying text (discussion of conflicting interpretation on issue of whether Hague Convention provides exclusive means by which litigants before American courts may obtain evidence in foreign signatory).

87. *See, e.g.*, Laker Airways Ltd. v. Pan American World Airways, 23 I.L.M. 748, 751 (D.D.C. 1984) (West German defendant argued that Hague Convention was exclusive means for plaintiff to obtain evidence from defendant in West Germany); Lasky v. Continental Products Corp., 569 F. Supp. 1227, 1228 (E.D. Pa. 1983) (West German defendant argued that Hague Convention was sole means for plaintiff to obtain evidence in West Germany); *see also* Comment, *supra* note 1, at 1475-85 (Hague Convention provides exclusive means to obtain evidence in foreign signatory based on American constitutional doctrine and principles of treaty interpretation).

88. *See* Comment, *supra* note 1, at 1470-75 (no American court has held that Hague Convention provides exclusive means to obtain evidence abroad); *cf. infra* notes 91-94 and accompanying text (discussion of American decisions finding Hague Convention provides mandatory initial procedures for obtaining evidence abroad).

89. 100 F.R.D. 58 (E.D. Pa. 1983).

90. *See generally* G. VON GLAHN, LAW AMONG NATIONS 27 (4th ed. 1981) (treatise on public international law). International comity is the courtesy and respect between nations for each other's laws and institutions. BLACK'S LAW DICTIONARY 242 (5th ed. 1979). A rule of international comity, as opposed to customary or conventional law, does not represent a binding or legal obligation. G. VON GLAHN, *supra*, at 27.

91. *Philadelphia Gear*, 100 F.R.D. at 60-61. In Philadelphia *Gear Corp. v. American Pfauter Corp.*, Philadelphia Gear Corporation purchased a gear grinding machine from a West German manufacturer. *Id.* at 59. The machine subsequently caught fire and caused extensive damage. *Id.* Philadelphia Gear Corporation brought an action against the West German manufacturer, alleging defective design. *Id.* The plaintiff then served interrogatories and a request to produce documents on the West German defendant. *Id.* The West German defendant failed to comply with Philadelphia Gear's requests. *Id.* The plaintiff filed a motion to compel and the defendant defended on the ground that the Hague Convention provided the exclusive means to obtain evidence in West Germany. *Id.* The United States District Court for the Eastern

interpreting the Hague Convention, *Schroeder v. Lufthansa German Airlines,*[92] Judge Kocoras of the United States District Court for the Northern District of Illinois similarly held that the principles of international comity required the plaintiff to proceed under the Convention to obtain evidence in West Germany.[93] The *Schroeder* court stated that the Hague convention provides the obvious and preferable means to obtain evidence in West Germany, but refused to rule that the Convention preempted all other methods of obtaining evidence in a state signatory to the treaty.[94]

Not all American courts have agreed that a party seeking to discover evidence abroad must resort initially to the procedures of the Hague Convention.[95] In *Lasky v. Continental Products Corp.,*[96] a plaintiff served interrogatories and a request to produce documents on the defendant, a West German corporation.[97] The defendant sought a protective order, claiming that the plaintiff should conduct all discovery pursuant to the procedures of the Hague Convention.[98] In denying the defendant's protective order, Judge Newcomer of the United States District Court for the Eastern District of Pennsylvania emphasized the fact that the Hague Convention does not provide that the Convention procedures are exclusive.[99] The *Lasky* court

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District of Pennsylvania denied the plaintiff's motion to compel, finding that principles of international comity required Philadelphia Gear to resort initially to the procedures of the Hague Convention. *Id.*

92. 18 Av. Cas. (CCH) 17,222 (N.D. Ill. 1983).

93. *Id.* at 17,222-24, 17,224 n.1. In *Schroeder v. Lufthansa German Airlines,* a plaintiff served interrogatories upon a defendant, a West German air carrier. *Id.* at 17,222. The defendant moved for a protective order alleging that the Hague Convention provided the exclusive means for United States litigants to obtain evidence in West Germany. *Id.* The *Schroeder* court granted the defendant's protective order finding that principles of international comity required the plaintiff to proceed initially under the Hague Convention. *Id.* at 17,222-24, 17,224 n.1.

94. *Id.* at 17,223, 17,224 n.1.

95. *See also infra* notes 97-118 and accompanying text (discussion of two United States cases refusing to require litigant to resort initially to procedures of Hague Convention to discover evidence in foreign signatory).

96. 569 F. Supp. 1227 (E.D. Pa. 1983).

97. *Id.* at 1228. The plaintiffs in *Lasky v. Continental Products Corp.* brought a product liability action in the United States District Court for the Eastern District of Pennsylvania against CGW, a West German tire manufacturer. *Id.* The plaintiffs sought damages from CGW for injuries sustained in an automobile accident. *Id.* The plaintiffs alleged that defective CGW tires caused the accident. *Id.* After the plaintiffs served interrogatories and a request to produce documents on CGW, CGW moved for a protective order arguing that it was not subject to the Federal Rules of Civil Procedure and that the plaintiff could obtain evidence only through the procedures of the Hague Convention. *Id.* The *Lasky* court denied the defendant's motion for a protective order,finding that the Hague Convention did not require the plaintiff to proceed initially under the Convention's procedures. *Id.* at 1228-29.

98. *Id.* at 1228.

99. *See id.* (language of Hague Convention is not mandatory). In *Lasky,* the United States District Court for the Eastern District of Pennsylvania based its decision that the Hague Convention was not exclusive, at least in part, on article 27 of the Convention. *Id.* Article 27 of the Convention, in pertinent part, states:

found the language of the Hague Convention to be permissive, not mandatory, and concluded that the Convention did not supersede in any way the discovery procedures of the Federal Rules of Civil Procedure.[100] The *Lasky* court, therefore, ordered the defendant to comply with the plaintiff's discovery requests.[101]

Consonant with the *Lasky* decision, Judge Getzendanner of the United States District Court for the Northern District of Illinois, in *Graco Inc. v. Kremlin, Inc.*,[102] also rejected the first resort approach.[103] In *Graco,* Graco, Inc. filed a patent infringement suit against SKM, a French corporation.[104] Shortly after filing the suit, Graco served interrogatories and requests to

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The provisions of the present Convention shall not prevent a Contracting State from—

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Hague Convention, *supra* note 68, at article 27. *But see infra* notes 133-34 and accompanying text (drafters of Convention did not intend article 27 to preserve alternative methods of taking evidence for signatory states seeking evidence).

100. 569 F. Supp. at 1228.

101. *Id.* at 1228-29.

102. 101 F.R.D. 503 (N.D. Ill. 1984).

103. *Id.* at 517-24. In *Graco,* Graco, Inc., a Minnesota corporation, filed a patent infringement suit in the United States District Court for the Northern District of Illinois against SKM, a French corporation, and Kremlin Incorporated, an Illinois corporation wholly owned by SKM. *Id.* at 507. Kremlin, Inc., was in the business of buying and reselling paint spraying equipment. *See* Graco, Inc. v. Kremlin, Inc., 558 F. Supp. 188, 189 (N.D. Ill. 1982). SKM, Kremlin's parent corporation, manufactured a large percentage of the paint spraying equipment that Kremlin purchased and resold. *Id.* Graco's complaint alleged that SKM and Kremlin infringed upon a patent held by Graco on the manufacture and sale of hydraulic paint spraying equipment. *Graco,* 101 F.R.D. at 507, 527. Shortly after filing its complaint, Graco served interrogatories and requests to produce pursuant to the Federal Rules of Civil Procedure on SKM and Kremlin. *Id.* at 507; *supra* note 1 (discussion of discovery methods available under Federal Rules of Civil Procedure). SKM filed a motion to dismiss for lack of personal jurisdiction. *Graco,* 101 F.R.D. at 507. The Northern District of Illinois, per Judge Getzendanner, stayed discovery against SKM, pending its ruling on SKM's motion to dismiss. *Id.* Judge Getzendanner denied SKM's motion to dismiss for lack of personal jurisdiction on August 23, 1982. *See Graco,* 558 F. Supp. 188, 193. Judge Getzendanner found that SKM's products regularly entered the state of Illinois and that SKM received substantial revenue from the sale of SKM products in the state. *Id.* at 192-93. The court concluded that SKM was "doing business" in Illinois and, therefore, constructively had consented to being sued in the state of Illinois. *Id.* at 192. Graco and SKM informally discussed Graco's discovery requests in the months following Judge Getzendanner's denial of SKM's motion to dismiss, but SKM did not file a formal response to those requests. *Graco,* 101 F.R.D. at 507. On February 8, 1983, Graco filed a motion to compel SKM to comply with Graco's discovery requests without objection. *Id.* On April 4, 1983, the *Graco* court ordered SKM to file formal discovery responses, effectively denying Graco's request that the court order SKM to comply without objection. *Id.* at 507, 516. SKM filed a formal response on May 17, 1983, which consisted almost entirely of objections, including an objection based on the allegation that compliance with Graco's discovery requests would violate the Hague Convention because the Convention provided the exclusive means for Graco to obtain information from SKM. *Id.* at 507.

104. *Graco,* 101 F.R.D. at 507.

produce on SKM, but SKM failed to respond.[105] Graco filed a motion to compel SKM to comply with Graco's discovery requests.[106] In defense to Graco's motion, SKM argued that compliance with Graco's discovery requests would violate the Hague Convention because the Convention provided the exclusive means for Graco to obtain information from SKM.[107]

In rejecting the defendants argument that the Hague Convention provides the exclusive means for a United States court to obtain evidence in France, the *Graco* court emphasized that judicial treatment of the Hague Convention procedures as exclusive would change drastically the conduct of litigation between nationals of different signatory states.[108] The *Graco* court stated that requiring a party to process through foreign authorities a necessary and routine aspect of a lawsuit, such as discovering information from an opposing party, would greatly increase expenses and would amount to a major regulation of the overall conduct of transnational litigation.[109] Judge Getzendanner also stated that treatment of the Hague Convention procedures as exclusive would interfere seriously with United States judicial sovereignty, granting foreign authorities the final decision on what evidence American courts may take from the foreign states' nationals even when those nationals are within the jurisdiction of an American court.[110] Noting that the text of the Hague Convention does not explicitly prohibit alternative methods of taking evidence, the *Graco* court surmised that the United States would not enter into a treaty granting foreign states such great power over American judicial proceedings without stating clearly the intention to do so.[111]

As further support for its finding that the Hague Convention did not provide the sole means for the plaintiff to obtain information from SKM, Judge Getzendanner emphasized the fact that SKM was a defendant in *Graco,* not merely a witness, and that SKM could comply with Graco's discovery requests without conducting an evidence-taking proceeding in France.[112] The *Graco* court acknowledged that a court reasonably might interpret the Hague Convention to provide the exclusive discovery procedures for taking evidence within a signatory state's borders.[113] Nevertheless, the court stated that the United States did not intend the Convention to protect

105. *Id.*
106. *Id.*
107. *Id.*
108. 101 F.R.D. at 521.
109. *Id.* at 521-23.
110. *Id.* at 522.
111. *Id.* at 520, 522. The *Graco* court agreed with the *Lasky* court's interpretation of article 27 of the Hague Convention, finding that article 27 appears to preserve alternative methods of taking evidence. *Id.* at 520; *see supra* note 99 (discussion of *Lasky* court's interpretation of article 27 of Hague Convention). *But see infra* notes 133-34 and accompanying text (drafters of Convention did not intend article 27 to preserve alternative methods of taking evidence for signatory states seeking evidence).
112. *See Graco,* 101 F.R.D. at 521.
113. *See id.* at 520.

foreign parties from the discovery methods of the Federal Rules of Civil Procedure when discovery "proceedings" are not conducted within the foreign state's territory.[114] The *Graco* court found that the location of the evidence-taking proceeding constituted the dispositive factor, concluding that foreign discovery procedures threaten a nation's judicial sovereignty only when the procedures take place within the nation's borders.[115] In defining the situs of discovery proceedings, the *Graco* court found that discovery does not take place within a foreign state's borders merely because information or documents to be produced in a United States court originally were located in the foreign state.[116] Judge Getzendanner further stated that a United States court order compelling a resident of a foreign state to appear for deposition outside the foreign state's borders similarly does not violate the foreign state's judicial sovereignty, assuming the resident is subject to the jurisdiction of the United States court.[117] Consequently, the *Graco* court refused to limit Graco to proceeding exclusively under the Hague Convention because SKM could comply with Graco's discovery requests without conducting any "proceedings" in France and thus SKM's compliance with Graco's requests would not violate the treaty.[118]

In arriving at the conclusion that the plaintiff did not need to utilize the discovery procedures of the Hague Convention, the *Graco* court's analysis involved an unnecessary metaphysical distinction. Although conceding that a court reasonably might interpret the Hague Convention as providing exclusive procedures for taking evidence within a signatory state's borders, the *Graco* court adopted a very narrow and artificial definition of when discovery takes place within a state's borders.[119] The *Graco* court's finding that discovery takes place within a state's territory only when a litigant conducts an actual evidence-taking proceeding within the state's borders is a simple but unsatisfactory answer to the problem presented in *Graco*.[120] Notwithstanding the court's attempt to eliminate the charge that its discovery

114. *See id.* at 521.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Graco,* 101 F.R.D. at 521, 524.

119. *See id.* at 521; *supra* notes 113-18 and accompanying text (*Graco* court found that discovery does not take place within foreign nation unless discovery proceeding is conducted within foreign nation's borders). The *Graco* court found that discovery takes place within a state's territory only when litigants actually conduct an evidence taking proceeding within the state's borders. *See Graco,* 101 F.R.D. at 521. The *Graco* court found that the act of physically producing documents or answers to interrogatories in the United States did not constitute discovery in France merely because the necessary information initially was located in France. *Id.* The *Graco* court, therefore, concluded that since the court was not ordering discovery within French territory, the order did not infringe on French judicial sovereignty and Graco was not required to proceed solely under the Hague Convention. *Id.* at 521-24.

120. *But cf. infra* note 147 (Graco court's reasoning concerning whether Hague Convention procedures should be avenue of first resort was not correct, but court's decision to not require Graco to utilize Convention procedures was correct decision).

order infringed upon French judicial sovereignty by creating a metaphysical distinction turning on where discovery takes place, the fact remains that an American court is compelling a French resident to disclose information located within the territory of France, thereby potentially interfering with French judicial sovereignty.[121] The *Graco* court's decision to not conduct an evidence-taking proceeding in French territory undoubtedly reduced the degree to which the court's order conflicted with French judicial sovereignty.[122] Contrary to what the *Graco* court stated, however, the court's order did not avoid violation of French sovereignty.[123] As the legislative history of the French blocking statute demonstrates, France is concerned with protecting information held by French residents as well as preventing United States courts from conducting actual discovery procedures within French territory.[124] The legislative history of the French blocking statute makes clear that one of the primary purposes of the statute is to protect information held by French corporations from abusive foreign pretrial discovery procedures.[125] France clearly views a foreign court compelling a French resident to disclose information held in France as an infringement on French sovereignty, regardless of where the French resident is to produce the information.[126] Most, if not all, of the signatory states likely would not accept Judge Getzendanner's view that a court can avoid violating a foreign state's sovereignty by merely requiring a foreign resident to produce information outside of the territorial limits of the foreign state.[127] Consequently,

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121. *See infra* notes 124-26 and accompanying text (France has sovereign interest in information held within French territory).

122. *See* RESTATEMENT § 40, *supra* note 32 (list of factors nations should consider in moderating enforcement jurisdiction when jurisdictional conflict between two nations arises). Under the section 40 balancing test, the extent to which activity must be conducted in the foreign nation is a factor that United States courts must consider when deciding whether to order discovery within the foreign nation, presumably because the more discovery activity an American court conducts in a foreign nation the greater the infringement of the foreign nation's sovereignty interests. *Id.* By not permitting Graco to conduct an evidence taking proceeding in France, the *Graco* court reduced the amount of discovery activity conducted within French territory and thereby reduced the degree to which the *Graco* court's order conflicted with French judicial sovereignty. *Id.*

123. *See infra* notes 124-26 and accompanying text (France has sovereign interest in information held within French territory).

124. *See* Batista, *supra* note 3, at 66 (central purpose of French blocking statute is to protect information held by French corporations).

125. *Id.*

126. *Id.*

127. *Cf.* Protection of Trading Interests Act, 1980, ch. 11, Preamble (English blocking statute). The preamble and legislative history of the English blocking statute demonstrate that England is concerned with protecting information held by English residents and not just concerned with preventing foreign states from conducting evidence taking proceedings within England. *Id.* (preamble of English blocking statute states that purpose of statute is to protect Britains from foreign compulsion requiring disclosure of information affecting trading and other interests of England); Rosen, *The Protection of Trading Interests Act,* 15 INT'L LAW.

the *Graco* court should not have side-stepped the issue of whether the plaintiff was required to utilize exclusively the procedures of the Hague Convention by finding that the discovery order did not violate French sovereignty and that the plaintiff therefore could use the discovery provisions of the Federal Rules of Civil Procedure.[128]

In determining whether the Hague Convention provides the exclusive means by which an American litigant may obtain evidence in a signatory state, the text of the Convention provides a good starting point.[129] As the *Graco* court noted, the text of the Hague Convention does not provide expressly that the Convention procedures are the exclusive means of obtaining transnational discovery.[130] The fact that the text of the Hague Convention does not exclude alternative methods of taking evidence is undoubtedly the primary reason no American court directly has held the Convention to be the exclusive channel for obtaining evidence abroad.[131] However, the text of the Hague Convention also does not state that the Convention procedures are not exclusive.[132] The *Graco* court's finding that article 27 of the Convention preserves to signatory states alternative methods of seeking foreign evidence is not the interpretation the drafters of the Convention intended.[133] The drafters of the Hague Convention merely intended article 27 to give a signatory state the discretion to permit broader discovery within its own borders if the state so desired.[134] In short, the text of the Hague Convention does not provide that the Convention procedures are exclusive or that alternative discovery methods are preserved.[135]

Although the text of the Hague Convention provides no assistance in determining whether the Convention's procedures are exclusive, the under-

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213, 213 (1981) (legislative history of English blocking statute demonstrates that statute constituted attempt to prevent United States courts from obtaining information necessary to enforce United States antitrust laws against British citizens).

128. *See supra* notes 121-27 and accompanying text (American courts do not avoid violation of foreign state's sovereignty by merely requiring foreign resident to produce information outside of foreign state's territorial limits).

129. *See infra* notes 130-35 and accompanying text (discussion of whether text of Hague Convention provides that Convention procedures are to be exclusive means for courts in one signatory state to obtain information in another signatory state).

130. *See Graco,* 101 F.R.D. at 520 (text of Hague Convention does not prohibit expressly alternative means of obtaining evidence); Hague Convention, *supra* note 68 (same).

131. *See* Comment, *supra* note 1, at 1470-75 (no American court has held that Hague Convention provides exclusive means to obtain evidence abroad).

132. *See generally* Hague Convention, *supra* note 68 (text of Hague Convention does not state that Convention's procedures are not exclusive).

133. *See* Comment, *supra* note 1, at 1475-78 (negotiating history of Hague Convention demonstrates that drafters of Convention merely intended article 27 to give signatory states in which foreign litigant takes evidence discretion to permit broader discovery than discovery provided by Hague Convention).

134. *Id.*

135. *See supra* notes 130-34 (text of Hague Convention does not state that Convention is exclusive means to obtain foreign evidence or that Convention is non-exclusive).

lying policies of the Convention provide valuable guidance.[136] The Hague Convention aims to provide procedural uniformity in transnational discovery and to reconcile the differences between the discovery methods of common-law countries, such as the United States, and civil-law countries, such as France.[137] In civil-law countries, the court, and not private attorneys, gather the evidence necessary for trial.[138] Since discovery is a judicial function in civil-law countries, these countries often view attempts by private parties to secure information within their borders as a violation of the nation's judicial sovereignty.[139] The policies of the Hague Convention and international comity, therefore, support a requirement that a party first resort to the procedures of the Hague Convention to obtain evidence in civil-law countries.[140] However, a United States court should require a party to utilize the Hague Convention procedures only if, taking into consideration from which foreign state the party is seeking evidence, the Convention procedures will be effective in providing the requesting party the information to which it is entitled.[141] Since some signatory states have made restrictive stipulations, the effectiveness requirement will prevent needless expenditures of time and money when a United States court can determine that an attempt to obtain useful information through Hague Convention procedures in a particular country would be futile.[142]

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136. *See infra* notes 137-39 and accompanying text (purpose of Hague Convention is to provide procedural uniformity in transnational discovery and bridge discovery differences between common-law and civil-law nations).

137. *See Philadelphia Gear,* 100 F.R.D. at 59 (purpose of Hague Convention is to provide procedural uniformity in transnational discovery and bridge discovery differences between common-law and civil-law nations); Letter of Submittal from Secretary of State William P. Rodgers to the President Regarding the Evidence Convention, S. EXEC. DOC. A., AT V., 92d. Cong., 2d Sess. (Feb. 1, 1972) (purpose of Hague Convention is to set up system of taking foreign evidence that bridges differences between common-law and civil-law discovery procedures), *reprinted in* 12 INT'L LEGAL MATERIALS 324 (1973).

138. *Philadelphia Gear,* 100 F.R.D. at 59-60; *see supra* note 2 (discussion of differences between common-law and civil-law discovery).

139. *Philadelphia Gear,* 100 F.R.D. at 60; *see supra* note 2 (discussion of differences between common-law and civil-law discovery).

140. *Cf. supra* notes 97-118 and accompanying text (discussion of two cases holding that principles of international comity required plaintiff to initially resort to procedures of Hague Convention).

141. *See* Rosenthal & Yale-Loehr, *supra* note 1, at 1097 (Hague Convention procedures should be means of first resort to obtain evidence in a foreign signatory unless Convention procedures would be unavailing); RESTATEMENT § 483 comment i, at 47-48 (United States court should not require litigant to resort initially to Hague Convention procedures if it is clear that foreign state will not honor Convention request).

142. *See* Batista, *supra* note 3, at 69 (requiring litigant to utilize Hague Convention to obtain evidence in France is requiring litigant to engage in futile quest); RESTATEMENT § 483 comment i, at 47-48 (United States courts should not require litigants to utilize Hague Convention procedures if litigant is seeking documentary evidence and foreign state has made Article 23 declaration).

In addition to the concern that added expense in time and money would result if United States courts required plaintiffs to utilize Hague Convention procedures exclusively to obtain information abroad, the potential infringement of United States sovereignty is another factor favoring a nonexclusive approach toward the Hague Convention discovery procedures.[143] In *Graco,* Judge Getzendanner stated that treating the Convention's procedures as exclusive would permit foreign states to determine what evidence an American court may take from foreign nationals even when the foreign national was a party properly within the American court's jurisdiction.[144] The *Graco* court correctly concluded that such a result would constitute a serious limitation on the sovereign power of the United States and on the sovereign power of American courts.[145] However, if United States courts require litigants to utilize Hague Convention procedures only as a first resort and not as the exclusive means to obtain discovery in a foreign state, the sovereignty of the United States is preserved. A first resort requirement would preserve to American courts the final decision on what evidence a foreign party before American courts must disclose.[146] Requiring parties to resort to the procedures of the Hague Convention in the first instance, when the court determines that Convention procedures will be effective, permits the court to strike a balance between the sovereign powers of the foreign country and the sovereign powers of the United States, while minimizing costs in time and money.[147]

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143. *See Graco,* 101 F.R.D. at 521-22 (treating Hague Convention procedures as exclusive would give foreign states final decision on what evidence United States court may take from foreign state's nationals even when foreign national properly is within jurisdiction of United States court, thereby raising possibility of serious interference with United States judicial sovereignty).

144. *Id.* at 522.

145. *Id.* at 521-22.

146. *See Philadelphia Gear,* 100 F.R.D. at 61 (court required litigant to utilize Hague Convention procedures to obtain evidence in West Germany but expressly stated that court reserved right to take further action should efforts under Convention prove futile).

147. *See supra* notes 136-46 and accompanying text (first resort requirement balances sovereignty interests of United States and foreign nation and effectiveness requirement prevents needless expenditure of time and money). The *Graco* court's reasoning on the issue of whether Hague Convention procedures should be the avenue of first resort was not correct. *See supra* notes 119-34 and accompanying text (criticism of Northern District of Illinois' analysis in *Graco).* A first resort-effectiveness analysis, however, supports the *Graco* court's decision to not require the plaintiff in *Graco* to utilize the Convention procedures because Convention procedures ultimately would not have been effective in *Graco.* France has made an article 23 reservation and utilized the reservation to virtually foreclose the letter of request procedure. *See* Batista, *supra* note 3, at 68 (Hague Convention provides no meaningful assistance in obtaining pretrial disclosure of evidence in France because of French government's application of French article 23 declaration); *supra* notes 75-77 and accompanying text (discussion of Hague Convention's letter of request procedure). France also has limited severely the effectiveness of the Chapter II procedures. *See supra* notes 78-81 and accompanying text (discussion of Hague Convention's Chapter II procedures). To take evidence through diplomatic or consular officials or an appointed commissioner in France, a litigant first must secure permission from the French

United States courts are faced with a difficult task when a litigant seeks to obtain evidence in a foreign nation.[148] A United States court order compelling foreign discovery potentially may infringe upon the sovereign interest of the foreign nation, while insufficient discovery may frustrate United States policies underlying the plaintiff's cause of action.[149] The Hague Convention attempts to establish evidence taking procedures that are acceptable to the nation in which a litigant seeks to discover evidence and at the same time "utilizable" in the forum nation.[150] Even though the terms of the Hague Convention do not state expressly that the Convention provides the exclusive means for one signatory to obtain information located in another signatory, if the foreign nation is a signatory to the Convention, a United States court, in the interest of international comity, should require the requesting party to resort initially to the Hague procedures unless the court determines that the Convention procedure would be ineffective in obtaining the evidence to which the requesting party is entitled.[151]

If a United States court determines that Hague Convention procedures would not be effective, or the court has required the requesting party to utilize Convention procedures and the requesting party has been unable to obtain the evidence to which he is entitled, or the foreign state is not a party to the Convention, the United States court must weigh carefully the interests of the United States and the foreign nation to determine whether the requesting party may proceed pursuant to discovery procedures of the Federal Rules.[152] Section 420 of the Restatement of Foreign Relations Law provides

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government and may take evidence only if that litigant takes evidence without compulsion. *See* Hague Convention, *supra* note 68, at Chapter II, French declarations. Since SKM was a party and subject to sanctions, SKM argued in *Graco* that it would be under compulsion and, therefore, the plaintiff could not take evidence under Chapter II procedures. *Graco,* 101 F.R.D. at 511. Considering French hostility toward United States discovery procedures, France likely would have interpreted "compulsion" in the manner that SKM contended, thereby foreclosing Chapter II procedures. *See* Batista, *supra* note 3, at 65 (France enacted blocking statute to frustrate United States discovery because France perceives United States discovery as inherently abusive). In light of the probable ineffectiveness of obtaining the information to which *Graco* was entitled through the procedures of the Hague Convention, a first resort-effectiveness analysis supports the *Graco* court's decision to not require the plaintiff in *Graco* to utilize the Convention procedures.

148. *See supra* notes 2-9 and accompanying text (United States and foreign nation's sovereign interests are in conflict when litigant before United States court seeks to obtain evidence in foreign nation).

149. *Id.*

150. *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law,* 8 INT'L LEGAL MATERIALS 785, 806 (1969) (drafters of Hague Convention sought to establish transnational discovery procedures that would be tolerable to nation in which evidence is taken and utilizable in forum state).

151. *See supra* notes 136-46 and accompanying text (first resort requirement balances sovereignty interests of United States and foreign nation and effectiveness requirement prevents needless expenditure of time and money).

152. *See supra* note 141 (United States courts should not require litigants to resort initially to Hague Convention procedures if Convention procedures would be unavailing); *Philadelphia*

United States courts significant guidance in balancing the competing interests.[153] Section 420's court order requirement and stringent relevance standard are both valuable requirements.[154] The five factor section 420 balancing test, however, would benefit by incorporating three additional factors to form a modified section 420 balancing test.[155] The factors of a modified section 420 balancing test would be:

1) the importance of the information sought to the investigation or litigation in progress;
2) the specificity of the request;
3) the origin of the information;
4) the extent to which compliance with the request would undermine important interest of the state where the information is located;
5) the possibility of alternative means of securing the information requested;
6) the extent to which failure to comply with the request would undermine important United States interests;
7) the extent to which activity must take place within the territory of the foreign state in order to comply with the request; and
8) the foreign states flexibility in applying the state's blocking statute.[156]

If the procedures of the Hague Convention are not available for obtaining evidence in a foreign nation, a United States court should utilize the modified section 420 balancing test to determine whether, on balance, it would be reasonable for the court to issue an order compelling compliance with a litigant's Federal Rules discovery request.

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Gear, 100 F.R.D. at 61 (court required litigant to utilize Hague Convention procedures to obtain evidence in West Germany but expressly stated that court reserved right to take further action should efforts under Convention prove futile); *see supra* notes 22-55 and accompanying text (discussion of three balancing tests derived from *Societe Internationale v. Rogers* that courts have utilized in attempting to balance conflicting interests in transnational discovery).

153. *See supra* notes 42-59 and accompanying text (discussion and analysis of § 420).

154. *See supra* notes 56-59 and accompanying text (§ 420's court order requirement and strict relevance standard are valuable requirements).

155. *See supra* notes 60-66 and accompanying text (courts should consider § 420 factors and three additional factors when deciding whether to order foreign discovery under Federal Rules).

156. *See supra* notes 42-66 and accompanying text (discussion and analysis of § 420 balancing test and suggestion that courts should incorporate three additional factors).