Michigan Journal of International Law

Volume 7 | Issue 1

1985

The Hague Convention on Taking Evidence Abroad: Conflict Over Pretrial Discovery

Margaret T. Burns
University of Michigan Law School

The Hague Convention On Taking Evidence Abroad: Conflict Over Pretrial Discovery

Margaret T. Burns*

Litigation in the United States involves extensive pretrial discovery which attorneys conduct with minimal court intervention.[1] When litigation involves evidence located in foreign nations, however, the traditional U.S. approach to discovery often conflicts with those nations' established trial practice.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention or Convention)[2] provides signatory nations, including the United States, with internationally accepted procedures for obtaining evidence located in foreign countries. The Convention describes three methods of taking evidence abroad: submission of letters of request,[3] inquiries by diplomatic officers and consular agents,[4] and inquiries by specially appointed commissioners.[5] Letters of request, the principal method of taking evidence

* Class of 1986, University of Michigan Law School.

1. *See* FED. R. CIV. P. 26(a)–(b). The literature discussing the ramifications of this type of discovery is extensive. *See, e.g., Discovery Abuse*, 2 THE REVIEW OF LITIGATION 1 (1981) (symposium issue); Comment, *Making Discovery a Civil Procedure? Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure*, 1982 ARIZ. ST. L.J. 725; Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982) (discussing the adequacy of the Federal Rules in coping with discovery abuse).

2. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1985) (including declarations by the Contracting States) [hereinafter cited as Hague Convention]. The Hague Convention is currently in force between 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.

3. *Id.* at arts. 1–14.

4. *Id.* at arts. 15–16.

5. *Id.* at art. 17.

abroad,[6] are the focus of growing judicial interest in the appropriate use of the Hague Convention.

Letters of request provide a vehicle through which the judicial authority of one Contracting State may request the judicial authority of another Contracting State to obtain evidence necessary to pending litigation.[7] The Convention requires that Contracting States designate a central authority to receive letters of request,[8] specifies the form, content, and language of letters of request,[9] and outlines the privileges and duties of the person affected by the execution of letters of request.[10] Letters of request are intended to provide a procedure for the taking of evidence that is "tolerable" to the authorities of the state where the evidence is being taken and "utilizable" in the forum where the action is pending.[11]

Letters of request bridge the difference between common law and civil law methods of taking evidence. In civil law countries, the function of securing and presenting evidence is primarily the duty of the court.[12] The act of taking evidence in civil law countries, even when the evidence is taken from a willing witness without compulsion and without a breach of the peace, constitutes a public judicial act.[13] Civil law countries view discovery by private citizens as a violation of judicial sovereignty.[14] The Hague Convention, by requiring that letters of request emanate from the court of the country of the inquiring party and be addressed, through a central authority, to the court of the country where

6. *See* Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad,* 67 AM. J. INT'L L. 104, 105 (1973). The Convention itself does not explicitly suggest the superiority of letters of request. However, execution of the other two methods of discovery is subject to an array of reservations which undercut their effectiveness in obtaining evidence. For example, under articles 33 and 35, a party to the Convention is expressly permitted to reserve the right not to allow the taking of evidence before a consular officer or diplomat or before a private commissioner. For a discussion of the differences in the execution of letters of request and inquiries by diplomatic officers, consular agents, and specially-appointed commissioners, see 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, 1049–53 (1984).

7. For a discussion on how letters of request are transmitted, see *Convention on Taking of Evidence Abroad in Civil or Commercial Matters,* S. DOC. EXECUTIVE A, 92d Cong., 2d Sess. 15–18 (1972) (explanatory report on the Convention by Rapporteur Philip W. Amram) [hereinafter cited as S. DOC. EXECUTIVE A]. Various materials regarding the Hague Convention, including the Rapporteur's Report and the Letter of Submittal from the Secretary of State to the President, are reprinted from *S. Doc. Executive A* in 12 I.L.M. 323 (1973).

8. Hague Convention, *supra* note 2, at art. 2.

9. *Id.* at arts. 3, 4.

10. *See id.* at art. 11.

11. *See* Report of the United States Delegation on the Convention on Taking Evidence Abroad, *reprinted in* 8 I.L.M. 785, 804–06 (1969) [hereinafter cited as Delegation's Report].

12. *See id.*, 8 I.L.M. at 806; *see also* Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters,* 18 INT'L & COMP. L.Q. 646, 647 (1969).

13. *See* Delegation's Report, *supra* note 11, 8 I.L.M. at 806.

14. *See* Edwards, *supra* note 12, at 647.

information is sought,[15] transforms what in common law countries is a private act into a public act.

U.S. courts and litigants are not satisfied with the scope of discovery allowed under the Convention. Letters of request provide for narrower discovery of information in the possession of persons who are parties to pending litigation than that guaranteed by the Federal Rules of Civil Procedure. The Federal Rules allow broad pretrial discovery.[16] In contrast, the Hague Convention provides that "[a] contracting state may . . . declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law Countries."[17] The Convention also allows persons to whom letters of request are directed to refuse to give evidence insofar as they have a privilege or duty to refuse under the law of the state of execution or the state of origin of the request.[18] Discovery procedures under the Federal Rules contain no such provision for the respect of privileges and immunities ensured to the citizens of other countries.[19]

These discrepancies have raised the issue of whether U.S. courts must use the Hague Convention whenever discovery is sought against a party litigant in a foreign country.[20] Parties seeking discovery of evidence in the possession of other party litigants would prefer to use the Federal Rules of Civil Procedure. Asserting that courts have the power to order discovery from parties regardless of the location of the requested materials, they contend that party litigants who are the targets of discovery requests cannot limit discovery procedures to those of the

15. *See* Hague Convention, *supra* note 2, at arts. 1–14.

16. *See* Fed. R. of Evid. 26(b).

17. Hague Convention, *supra* note 2, at art. 23.

18. *See* Hague Convention, *supra* note 2, at art. 11.

19. Foreign nations object to this disregard of their procedural law in the Federal Rules of Evidence. *See, e.g.*, Brief for the United States as Amicus Curiae, at app. 8a–9a, Volkswagenwerk Aktiengesellschaft v. Falzon, 103 S. Ct. 1810 (1983), *reprinted in* 23 I.L.M. 412, 421 (1984) (informal translation of German Federal Foreign Office Note Verbale of April 28, 1983 to the U.S. Embassy, Bonn) [hereinafter cited as Falzon Brief]. For a discussion of the French position, see *infra* notes 17–32 and accompanying text. *See also* Robinson, *Compelling Discovery and Evidence in International Litigation*, 18 INT'L LAW. 533, 534–35 (1984); Radvan, *supra* note 6, at 1047.

20. U.S. courts have only recently confronted this issue since major U.S. trading partners did not become signatories to the Convention until the late 1970s. This note focuses on conflicts with the United Kingdom, France, and the Federal Republic of Germany.

It should also be noted that while this note is concerned with the use of the Hague Convention to obtain evidence in the possession of party litigants, U.S. courts also use the Convention to take evidence from non-parties located beyond the territorial reach of the court. The compulsory power of U.S. courts over non-parties is limited by their territorial jurisdiction. The Hague Convention enables a U.S. court to invoke a foreign authority's compulsory powers, thereby making accessible evidence which otherwise would not have been accessible. Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 520 (N.D. Ill. 1984); *see also* Laker Airways v. Pan American World Airways, No. M 8-85, slip op. (S.D.N.Y. Mar. 22, 1985).

Hague Convention simply because the requested material is located beyond the geographical boundries of the United States.

In contrast, parties against whom discovery is sought and Contracting States that believe that their sovereignty is threatened by U.S.-style, attorney-conducted discovery, argue that U.S. courts may not order discovery against party litigants which requires discovery activites to take place within the boundries of signatory nations. These countries, in effect, argue that the Hague Convention is the exclusive means available to U.S. litigants to obtain evidence abroad.

This note asserts that the Hague Convention is not the exclusive vehicle available to U.S. litigants for taking evidence abroad.[21] It argues that in certain circumstances, U.S. courts should allow litigants to use the more liberal methods of the Federal Rules when seeking evidence from party litigants in other signatory nations.

Part I describes the effect of foreign objections to U.S. discovery practices. It looks to foreign interpretations of the Hague Convention that limit discovery by litigants before U.S. courts. Part II examines recent use of letters of request by U.S. courts and the consequent emergence of a standard to determine when the Federal Rules of Civil Procedure should be used rather than the Hague Convention.

Part III outlines the appropriate use of letters of request by U.S. courts. It argues that policy considerations weigh in favor of selective, rather than exclusive, use of letters of request. Furthermore, it demonstrates that the language of the Convention and the drafters' intent do not require that contracting parties always use the Hague Convention when seeking evidence abroad. Part III suggests that the use of letters of request, as defined by the Hague Convention, should depend on two issues: whether the discovery sought requires infringement of the territorial sovereignty of a foreign nation, and whether the foreign nation allows adequate discovery to take place within the context of the Hague Convention. Application of this two-part inquiry on a case-by-case basis will enable U.S. courts to balance the concerns of full and fair adjudication before U.S. courts against sovereignty objections of foreign nations.

21. The majority of federal cases prior to 1984 held that judicial self-restraint required recourse to the Hague Convention and therefore never explictly reached the issue of exclusivity. *See infra* note 68 and accompanying text. However, the perception that the Hague Convention might be exclusive was reinforced by an amicus brief filed by the U.S. Department of Justice in 1983. *See* Falzon Brief, *supra* note 19, at 5, 23 I.L.M. at 414. In an apparent change of position, the Justice Department later stated unequivocally that it views the Hague Convention as non-exclusive. *See* Brief for the United States as Amicus Curiae at 8, Club Mediterranée, S.A. v. Dorin, 105 S. Ct. 256 (1984) (the Supreme Court denied the appeal for want of jurisdiction) [hereinafter cited as Dorin Brief]. During the time between the two amicus briefs, debate evolved on the exclusivity of the Hague Convention. *See, e.g.*, Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733 (1983); 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 (1984).

I. The Effect of Foreign Objections to U.S. Discovery Activities

Objections to U.S. discovery activities have prompted various reactions from foreign governments. The Federal Republic of Germany (the Federal Republic or West Germany) has adopted the position that the Hague Convention is the exclusive means of taking evidence in its territory. In a communication to the U.S. State Department for transmission to the Michigan Supreme Court, the Embassy of the Federal Republic of Germany stated:

> [T]he Embassy wishes to reiterate that it remains the formal position of the government of the Federal Republic of Germany that evidence for use in civil matters pending in the United States which is not being given by German citizens on a strictly voluntary basis, may only be obtained in the Federal Republic of Germany through the channels authorized by and in accordance with the provisions of the Hague Evidence Convention.[22]

The Embassy did not cite any language in the Convention or any preparatory work to support its view that the Hague Convention is the exclusive vehicle for taking evidence abroad.

Other nations have adopted domestic legislation limiting U.S. discovery activities. Article 12(b) of the Convention specifies that the execution of a letter of request may be refused if the state addressed considers that its sovereignty or security would be prejudiced thereby.[23] Several contracting nations have adopted blocking statutes that inhibit or may entirely prohibit the disclosure, copying, inspection, or removal, in compliance with requests from foreign tribunals,[24] of documents located within their boundaries. These blocking statutes fall under the Convention's 12(b) exception.

Blocking statutes vary in their breadth and applicability,[25] but all carry some form of penal sanction.[26] France has enacted a broad blocking statute which, like the formal statement of the Federal Republic of Germany, limits extra-jurisdictional discovery to the procedures provided for in the Hague Convention. The French statute states in part:

> Subject to treaties or international agreements and laws and regulations in force, it is forbidden to all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial,

22. Falzon Brief, *supra* note 19, at app. 1a–2a, 23 I.L.M. at 418–19 (communication from the Embassy of the Federal Republic of Germany).

23. Hague Convention, *supra* note 2, at art. 12(b).

24. *See* Restatement (Revised) of Foreign Relations Law § 420 reporters' note 3 (Tent. Draft No. 3 1982) (citing blocking statutes in France and the United Kingdom) [hereinafter cited as Restatement].

25. *See id.*

26. *Id.*

> industrial, financial or technical matters leading to establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.[27]

The French Ministry of Justice explains that the French statute is "essentially designed to insure respect in France for the application of the rules which define the system of obtaining evidence abroad."[28] The laws referred to include the French Code of Civil Procedure and the Hague Convention.[29] The Ministry states that "the law is certainly not intended either to impair business relations with foreign countries or to limit or control the relations of international lawyers with their clients."[30]

Governments have also enacted blocking statutes that preclude the discovery of evidence even when the provisions of the Hague Convention have been utilized. For example, the Protection of Trading Interests Act of 1980 (PTIA)[31] enables the British Secretary of State to prohibit the disclosure of commercial documents or information for use in a foreign judicial proceeding if the documents are not within the territorial jurisdiction of the requesting court and if disclosure would infringe the sovereignty or jurisdiction of the United Kingdom of Great Britain and Northern Ireland.[32] This act is narrower than the French statute in that it is

27. Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign, Natural or Legal Persons art. 1 *bis*, *translated in*, 75 AM. J. INT'L L. 382, 383 (1981).

28. Response of the French Ministry of Justice to written questions of M. Roger Chinaud, Journal Officiel, Jan. 26, 1981, *attached to* Letter from L. Chatin, Director of Civil Affairs and the Seal, French Ministry of Justice, to Baker & McKenzie (July 6, 1984) (in French) (Baker & McKenzie trans.) (the letter from the French Ministry of Justice and attachments are exhibits to Defendant SKM's Motion to Direct a Letter of Request Regarding Plaintiff's Outstanding Discovery Requests to the French Ministry of Justice, Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. (1984)).

29. *Id.*

30. *Id.*

31. Protection of Trading Interests Act, 1980, ch. 11.

32. The statute states in section 2:

> (1) If it appears to the Secretary of State—
> (a) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal, or authority; or
> (b) that any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information, the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement.
> (2) A requirement such as is mentioned in subsection (1)(a) or (b) above is inadmissible—
> (a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom. . . .
>
> *Id.* at § 2.

limited to commercial documents that affect the trading interests of the United Kingdom, it requires the Secretary of State to invoke its provisions, and it is not subject to international treaties or agreements. It may reach farther than the French statute, however, in that it can be used to bar requests made through the Hague Convention. While the British PTIA has been used to block discovery,[33] its impact on the general stream of litigation involving the United Kingdom has yet to be established.

In addition to article 12(b), the Hague Convention contains a second provision enabling contracting nations to narrow the scope of U.S. discovery practices. Under article 23, Contracting States may declare that they will not execute letters of request "issued for the purpose of obtaining pretrial discovery of documents as is known in Common Law Countries."[34] All contracting states except Barbados, Czechoslovakia, Israel, and the United States have entered such declarations.[35] The United Kingdom, Singapore, Finland, Denmark, Sweden, and the Netherlands have limited the preclusive effect of their article 23 declarations to letters of request which lack specificity.[36] The Federal Republic of Germany and France have not defined the scope of their declarations.

In the United Kingdom, the enabling legislation giving effect to the Hague Convention[37] specifies that a letter of request can only be executed if it seeks "evidence." Section two of the legislation provides that a person need not "produce any document other than particular documents specified in the order."[38] This legislation was interpreted by the House of Lords in a variety of cases initiated by utility companies against the Westinghouse Electric Corpora-

33. *See* Laker Airways v. Sabena, Belgian World Airways, 731 F.2d 909, 920 (D.C. Cir. 1984).

34. Hague Convention, *supra* note 2, at art. 23.

35. *See* 28 U.S.C.A. § 1781 nn.1–14 (West Supp. 1985) (footnotes to list of Contracting States to the Hague Convention).

36. *Id.* at § 1781 nn.2, 3, 8 & 11–13. The Danish declaration under article 23 is typical of this group. It states:

> The declaration made by the Kingdom of Denmark in accordance with article 23 concerning "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" shall apply to any Letter of Request which requires a person:
>
> a) to state what documents relevant to the proceedings to which the Letter of request relates are, or have been, in his possession, other than particular documents specified in the Letter of Request; or
>
> b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession.

Id. at § 1781 n.2.

37. Evidence (Proceedings in Other Jurisdictions) Act, 1975, ch. 34.

38. *Id.* at § 2.

tion.[39] In its opinion, the House of Lords distinguished between direct evidence and indirect discovery of evidence.[40] Even though the letter of request at issue stated that the testimony and documents requested were intended to be used at trial, the House of Lords looked beyond the wording of the letter of request to the "nature of the testimony sought."[41] It tested the nature of the testimony by the specificity of the request.[42] It found that the vague description of the documents sought indicated that the letter of request was not seeking direct evidence but indirect discovery of evidence. The House of Lords limited the effect of the letter of request to those documents which were specifically identified.[43] In effect, the decision interprets article 23 as prohibiting what it termed "broad fishing expeditions."[44]

The Federal Republic of Germany has also entered a declaration under article 23. The only judicial interpretation of the German declaration to date was written by the Bavarian appellate court in the course of litigation between Corning Glass Works and International Telephone and Telegraph.[45] It is unclear whether the opinion reflects the West German Government's interpretation of their Declaration under article 23, but until further court or government action is taken, U.S. courts and litigants should be aware of the opinion. Discussing the meaning of pretrial discovery, the court stated:

> Contrary to Petitioner's contention the proceeding does not lose its character as a "pre-trial discovery of documents" because Petitioner's suit against Corning Glass has been pending in the American court since 1976 and because the American court in its follow-up letter of 19 February 1980 stated "that this request was not issued for purposes of pretrial discovery of documents but for the purpose, as stated in the original request, of the actual trial of this action." For said letter also reveals that the "actual trial" had been scheduled for the beginning of September 1980. . . . It is manifest that the inspection of the documents to be produced is to serve the trial and the determination of the controversy between the parties; that does not, however, alter the fact that under American concepts and its system of civil procedure

39. *See* Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., slip op., *reprinted in* 17 I.L.M. 38 (1978) (reported decision appears at [1978] 2 W.L.R. 81 (H.L. 1977)). The Westinghouse litigation involved a number of suits by utility companies alleging breach of contract by Westinghouse for the supply of uranium. Westinghouse claimed a defense of commercial impracticability arising from the actions of an alleged uranium producers' cartel. The U.S. court issued letters of request to the High Court of Justice in England seeking the examination of nine persons who were former or present directors or employees of two British companies and the production of documents in the posession of those companies. The High Court gave effect to the letters of request in a slightly modified form and that order was appealed to the House of Lords. *Id.* at 1–2, 17 I.L.M at 38–39.

40. *Id.* at 2, 17 I.L.M. at 39.

41. *See id.* at 4, 17 I.L.M. at 40.

42. *See* id., 17 I.L.M. at 40.

43. *See id.* at 5, 17 I.L.M. at 41.

44. *See id.* at 3, 17 I.L.M. at 40.

45. Corning Glass Works v. International Telephone and Telegraph, *translated in* 20 I.L.M. 1049 (1981) (Bavarian Civil Court of Appeals).

> . . . the request for judicial assistance was in fact issued within the scope and at the stage of pre-trial discovery.[46]

This opinion indicates that any attempt by litigants in U.S. courts to utilize the Hague Convention for pretrial discovery would be prohibited by the Federal Republic of Germany's article 23 declaration. If this opinion reflects the position of the West German Government, then the Hague Convention, including letters of request, is ineffective for pre-trial discovery in the Federal Republic.

The effect of the French declaration under article 23 is even more ambiguous than that of the German. To date, there has been little judicial interpretation or administrative discussion of the appropriate scope of the declaration. One U.S. court directed a French defendant against whom discovery was sought to contact French authorities to determine whether, in light of the French declaration, the plaintiff could effect most or all of his discovery requests through a letter of request.[47] Upon inquiry, the French Ministry of Justice responded that it would only interpret specific letters of request.[48]

II. Use of Letters of Request by U.S. Courts

U.S. courts are not insensitive to the objections of foreign governments to U.S. discovery practices. Current cases reflect attempts to balance the need for discovery in U.S. cases against the alleged infringement of sovereignty which such discovery entails.[49] The Federal Rules of Civil Procedure apply to the conduct of all civil litigation in the U.S. district courts.[50] The Rules grant extensive discovery rights to litigants in U.S. courts. Rule 26 enables litigants to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[51] This rule provides not only for

46. *Id.*, 20 I.L.M. at 1055–56.

47. *See* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 526 (N.D. Ill. 1984).

48. *See* Letter from L. Chatin, Director of Civil Affairs and the Seal, French Ministry of Justice, to Baker & McKenzie 3 (July 6, 1984) (in French) (Baker & McKenzie trans.) (the letter is an exhibit to Defendant SKM's Motion to Direct a Letter of Request Regarding Plaintiff's Outstanding Discovery Requests to the French Ministry of Justice, Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984)).

49. Such balancing is based on the principle of international comity. Comity, in the legal sense, is neither a matter of absolute obligation nor of mere courtesy and goodwill. It is the recognition which one nation allows in its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895); *Sabena*, 731 F.2d at 937; United States v. First Nat'l Bank, 699 F.2d 341, 345–47 (7th Cir. 1983); United States v. Vetco, Inc., 691 F.2d 1281, 1288–89 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

50. Fed. R. Civ. P. 1.

51. Fed. R. Civ. P. 26(b)(1).

the discovery of evidence admissible at trial, but also for material "reasonably calculated to lead to the discovery of admissible evidence."[52]

In order to implement this right, U.S. law provides for the production of documents in the possession, custody, or control of any party.[53] The term control has been construed liberally by U.S. courts. They have held that a corporation controls documents even when they are held by a foreign affiliated corporation.[54] If a party refuses to comply with an order to compel discovery, the Federal Rules provide sanctions ranging from an adverse finding of fact to judgment by default.[55] However, if a party is unable to produce documents because it is under order of a foreign court not to produce, U.S. courts will consider that party's good faith effort to comply with the U.S. order when setting the severity of the sanction.[56] If a default judgment is entered, the party in whose favor it is entered can proceed against the assets of the other party which are located in the United States[57] or attempt to enforce the judgment abroad.

Analysis of recent U.S. case law involving the Hague Convention and the discovery of evidence abroad reveals an emerging test for the appropriate recourse to the methods of the Convention. This test requires use of the Hague Convention only when discovery would result in territorial infringement of a foreign country. The cases define territorial infringement as the entering of adverse litigants into a foreign country to carry out discovery activities. This standard was first articulated in a 1984 case, *Graco, Inc. v. Kremlin, Inc.*[58]

Graco v. Kremlin involved a patent infringement suit brought by Graco against SKM, a French corporation, and Kremlin, an Illinois corporation wholly owned by SKM. Graco attempted to compel discovery against SKM but SKM objected, claiming that the French blocking statute precluded the taking of evidence in France unless the provisions of the Hague Convention were utilized.[59] The court found that the discovery request did conflict with the French statute but it rejected

52. *Id.*

53. FED. R. CIV. P. 34(a).

54. *See* Société Internationale Pour Participations Industrielles et Commercialles, S.A. v. Rogers, 357 U.S. 197 (1956).

55. *See* Fed R. Civ P. 37(b). Failure to comply with an order directing discovery can be sanctioned in various ways. Rule 37(b)(2) provides that the court in which the action is pending may designate certain facts to be taken as established, refuse to allow the disobedient party to support or oppose designated claims, strike out pleadings or parts thereof, dismiss the action or any part thereof, and render a default judgment against the disobedient party.

56. *See Rogers*, 357 U.S. at 208–13.

57. *Cf.* FED. R. CIV. P. 64.

58. 101 F.R.D. 503 (N.D. Ill. 1984).

59. *Id.* at 507. The blocking statute was not the only ground on which SKM objected to discovery. It also asserted lack of personal jurisdiction, lack of subject matter jurisdiction, attorney-client privilege, and various relevance grounds. Both Graco and SKM agreed that the French statute was not violated by discovery that complied with the provisions of the Hague Convention. *Id.* at 510.

the conclusion that discovery activity had to conform to the provisions of the Hague Convention.[60]

In analyzing SKM's claim, the court first examined the scope of discovery that would be obtained from France were a letter of request submitted. This inquiry was relevant because France's article 23 declaration, on its face, precludes execution of letters of request issued for the purpose of pretrial discovery. SKM submitted conflicting testimony on this issue. In one submission, SKM indicated that only evidence "relevant, competent and admissible at trial"[61] could be obtained through a letter of request, while at another point it indicated that the reservation was meant to exclude only requests "in the nature of a fishing expedition."[62] Based on this ambiguous response, the court tentatively concluded that a letter of request would not be adequate to allow Graco the discovery to which it was entitled under the Federal Rules.[63]

The court then turned to the issue of the appropriate function of the Hague Convention. It found that the Convention was not the exclusive vehicle for gathering evidence abroad and warned that it would be a mistake "to view the Convention as an international agreement to protect foreign nationals from American discovery when they are parties properly before American courts."[64] It stated that the role of the Convention was to discourage or preempt the taking of evidence within a signatory state's borders without securing local judicial approval or cooperation.[65]

Based on this view of the Convention, the critical issue is the location of the evidence-taking activity; a nation's judicial sovereignty is only threatened when discovery takes place within its borders.[66] The court concluded:

> [D]iscovery does not "take place within [a state's] borders" merely because documents to be produced somewhere else are located there. Similarly, discovery should be considered as taking place [in the U.S.], not in another country, when interrogatories are served [in the U.S.], even if the necessary information is located in the other country. The court's view is the same with respect to people residing in another country. If they are subject to the court's jurisdiction . . . then the court may order that they be produced for deposition; violation of the other country's judicial sovereignty is avoided by ordering that the deposition take place outside the country.[67]

This standard requires resort to the Hague Convention only when discovery activities must be conducted inside of a foreign state's borders. If the activity—

60. *Id.* at 510.
61. *Id.* at 511 (quoting SKM memo re: commission filed Mar. 14, 1983).
62. *Id.* (quoting SKM memo re: commission filed Mar. 14, 1983).
63. *Id.*
64. *Id.* at 519, 520.
65. *Id.* at 520.
66. *See id.* at 521.
67. *Id.*

defined by the court as the serving of interrogatories, the taking of depositions, or the production of documents before the court—occurs in the United States, no infringement of judicial sovereignty results and the Federal Rules are applicable.

Cases prior to *Graco* emphasize judicial self-restraint when ordering discovery involving evidence abroad.[68] An early California state court opinion exemplifies this standard. In *Volkswagenwerk Aktiengesellschaft v. Superior Court*,[69] plaintiffs sought to conduct depositions and on-site inspections in the Federal Republic of Germany. Volkswagenwerk objected on the basis that such discovery would encroach impermissibly upon the judicial sovereignty of the Federal Republic. The state court of appeals reasoned that although the trial court had the power to order discovery under the Federal Rules, as Volkswagen was a party properly before it, deference should be given to the foreign government and discovery should proceed under the Hague Convention.[70] However, in addressing the issue of the West German declaration under article 23, the court stated: "The Convention expressly contemplates that the German courts should seek in good faith to implement any legitimate discovery procedure the California court may request . . . we suggest that this limitation [the article 23 reservation] should be tested. . . ."[71] This language allows this early case to be reconciled with *Graco* and subsequent decisions.

The California Court of Appeals declined to exercise its jurisdictional powers because it believed that adequate discovery could be obtained through the Hague Convention.[72] However, as became clear in *Graco* and subsequent cases, discovery under the Hague Evidence Convention will likely be ineffective in at least several Contracting States.[73] Unwilling to accept an erosion of their jurisdiction, U.S. courts have been fashioning a test that reconciles the *Volkswagenwerk* concept of judicial self-restraint with the *Graco* court's warning that the Hague Convention should not be used to protect foreign nationals from American discovery when they are are properly before U.S. courts.

68. *See, e.g.*, Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) ¶ 27,222 (N.D. Ill. Sept. 15, 1983); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983). *But cf.* Lasky v. Continental Products, 569 F. Supp. 1227 (E.D. Pa. 1983) (holding that, where it is unclear whether or not a discovery request violates foreign law or impinges on foreign sovereignty, a protective order precluding discovery is inappropriate).

69. Volkswagenwerk Aktiengesellschaft v. Superior Court [Volkswagenwerk II], 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981). There were two additional state court opinions dealing with the Hague Convention: Volkswagenwerk Aktiengesellschaft v. Superior Court [Volkswagenwerk I], 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973), and Pierburg GmbH & Co. v. Superior Court, 137 Cal. App. 3d 238, 186 Cal Rptr. 876 (1982). It should be noted that the Federal Republic of Germany did not sign the Hague Convention until 1979, rendering the discussion in *Volkswagenwerk I* outdated.

70. *Volkswagenwerk II*, 123 Cal. App. at 859, 176 Cal. Rptr. at 885.

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

72. *Id.* at 859, 176 Cal. Rptr. at 885.

73. In addition to the cases discussed *infra* notes 78–93 and accompanying text, see Murphy v. Reifenhauser KG Maschinenfabrik and Rextrusion Systems, 101 F.R.D. 360 (D. Vt. 1984) (resort to the Hague Convention not required when request for documents under the Convention appears futile).

In *Adidas (Canada) Limited v. SS Seatrain Bennington*,[74] the court found that discovery activity scheduled to take place in the U.S. did not infringe foreign judicial sovereignty; therefore, recourse to the Hague Convention was unnecessary. *Adidas* involved the loss of a shipment of sports equipment aboard the SS Seatrain Bennington. The containers had been loaded by a French company, Les Toles, which was impleaded as a third party defendant. The other defendants served notice on Les Toles calling for depositions and the production of documents at their attorney's office in New York. Les Toles attempted to limit discovery to procedures provided for in the Hague Convention.[75]

The court found that because the discovery requested did not require an adverse party to enter France to gather evidence, neither French sovereignty nor judicial custom would be violated and, thus, recourse to the Hague Convention was unnecessary.[76] The court explained:

> No adverse party will enter on French soil to gather evidence (or otherwise). No oath need be administered on French soil or by French judicial authority.
>
> What is required of Les Toles on French soil is certain acts preparatory to the giving of evidence. It must select appropriate employees to give depositions in the forum state: likewise it must select the relevant documents which it will reveal to its adversaries in the forum state. These acts do not call for French judicial participation.[77]

The decision in *Cooper Airways Inc. v. British Aerospace, Inc.*[78] reaffirmed the *Adidas* reasoning. In *Cooper,* the court found that an order for production of documents located in the United Kingdom did not infringe British sovereignty because it called merely for documents, not a personal appearance.[79] Like the *Graco* court, the courts in *Adidas* and *Cooper* looked to the nature of the requested discovery activity to determine whether the Hague Convention was the only acceptable method of obtaining evidence. They determined that if an adverse party need not enter a foreign state, the activities would not result in an infringement of judicial sovereignty and use of the Hague Convention was inappropriate.

To date, the Fifth Circuit is the only federal circuit court to address the issue of the necessity of using the Hague Convention when taking evidence abroad. In two 1985 cases, the court followed the reasoning of the *Graco* opinion. *In re Anscheutz*[80] involved a West German corporation impleaded as a third party defendant in a ship collision suit brought in the Eastern District of Louisiana.

74. No. 80 Civ. 1911, slip op. (S.D.N.Y. May 30, 1984).
75. *Id.* at 2.
76. *Id.* at 5.
77. *Id.*
78. 102 F.R.D. 918 (S.D.N.Y. 1984).
79. *Id.* at 920.
80. 754 F.2d 602 (5th Cir. 1985).

Anscheutz had been ordered by the district court to (1) produce eleven employees of its West German plant for deposition in the Federal Republic of Germany; (2) produce before the district court documents located in the Federal Republic; and (3) pay attorney's travel expenses for preliminary depositions in Kiel, West Germany. Anscheutz appealed the order, alleging that it constituted a violation of the Hague Convention.

Both the government of the Federal Republic of Germany and the Department of Justice filed amicus briefs in the case. The Federal Republic stated that the taking of oral depositions in West Germany and the production of documents located in Kiel would violate German sovereignty unless the order was transmitted through a letter of request as specified in the Hague Convention.[81] The Department of Justice argued that the Hague Convention is not the exclusive means of taking evidence abroad and that the district court order did not conflict with U.S. treaty obligations under the Hague Convention.[82]

In analyzing these issues, the court cited with approval the *Graco, Adidas,* and *Cooper* opinions. In accordance with the analysis of those decisions, the court concluded: "The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."[83] The court directed the district court to fashion new discovery orders, adding that "[i]f Anscheutz is not voluntarily forthcoming in Germany, the court can order the production of documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty."[84] The court reserved the option of conducting discovery under the Hague Convention if the discovery sought became "particularly intrusive or is contemplated for persons not subject to the court's jurisdiction."[85]

The *Anscheutz* court reaffirmed its holding in *In re Messerschmidt Bolkow Blohm, GmbH.*[86] In this wrongful death action arising out of a helicopter crash in Texas, suit was brought against Messerschmidt, a German corporation, and its wholly owned U.S. subsidiary. Plaintiffs requested an order for production in the United States of documents located in the Federal Republic of Germany and permission to depose in the United States any expert witnesses Messerschmidt expected to use at trial. The experts, employees of Messerschmidt, resided in the Federal Republic of Germany.

Messerschmidt argued that the provisions of the Hague Convention were the exclusive means of taking evidence in the Federal Republic of Germany. The

81. *Id.* at 605.

82. *Id.* The Justice Department's argument on this point is also contained in the Dorin Brief, *supra* note 15. *See also infra* notes 83–94 and accompanying text.

83. *In re Anscheutz,* 754 F.2d at 615.

84. *Id.*

85. *Id.*

86. 757 F.2d 729 (5th Cir. 1985).

court rejected Messerschmidt's arguments, reasoning that "the Convention does not apply to the discovery sought here because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad."[87]

To arrive at this conclusion, the court analyzed the degree of territorial infringement required both by the requested document production and the depositions; in each case it looked to whether adverse parties were required to enter the foreign state. As to document production, the court said: "The district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany."[88] The opinion reasoned that since the order only required a party properly before the court to produce documents in the United States, the order was appropriate. The court also held the order requiring deposition of the expert witnesses valid because "it does not involve alien procedures on German soil, is directed to the party-defendant and not the foreign witnesses, and is enforceable only by procedures and sanctions directed to a party to the litigation in the forum court."[89]

These two Fifth Circuit opinions confirm the emerging view that recourse to the Hague Convention should be deemed mandatory only when domestic litigants are required to enter the territory of a foreign state. According to this view, the question of judicial sovereignty arises only when actual territorial infringement occurs.

III. Appropriate Application of The Hague Convention

In attempting to determine what situations require the use of letters of request, U.S. courts in recent decisions have assumed that the Hague Convention is not the exclusive vehicle for taking evidence abroad. This section argues that policy considerations support this assumption. Turning to the language and intent of the drafters, it concludes that there is no bar to such a reading of the Convention. Finally, using the recent cases as a guide, it outlines a method for determining appropriate recourse to letters of request when litigants in U.S. courts seek evidence in foreign countries controlled by other litigants.

A. Policy Arguments

If the procedures of the Hague Convention were the exclusive means of taking evidence abroad, litigants possessing evidence located abroad that their opponents wished to discover would have an unfair advantage over litigants against

87. *Id.* at 731.
88. *Id.* at 732.
89. *Id.* at 733.

whom all discovery could be carried out in the United States. Article 23 of the Convention allows foreign states to refuse to permit the taking of evidence for the purpose of pretrial discovery. Although foreign states interpret the provision in different ways,[90] the overall impact of article 23 is to limit the range of permissible discovery methods in foreign nations. On the other hand, litigants undertaking discovery in the United States may use any of the methods authorized by the Federal Rules of Civil Procedure to obtain a broad array of information possessed by their opponents. This results in an unequal discovery burden. Some litigants are required to fully comply with discovery requests under the Federal Rules while other litigants, party to the same action, can shield documents or other information by invoking the limited discovery procedures of the Hague Convention.

The U.S. Government has addressed the unfair advantage that this interpretation of the Hague Convention would bestow on some litigants. In an amicus curiae brief filed in connection with *Club Mediterranée, S.A. v. Dorin,*[91] the U.S. Department of Justice addressed the issue of interrogatories served in France according to New York law. It argued that to require the Hague Convention to be the exclusive means of taking evidence abroad would be adverse to U.S. interests: "It would give foreign signatory states the final say in determining the extent of extraterritorial discovery to be permitted in U.S. courts. As a result, litigants in United States courts might find it impossible to obtain necessary discovery from foreign based parties."[92] The amicus brief is unequivocal in contending that the Hague Convention should not be construed as the exclusive vehicle for taking evidence abroad.

Courts are also aware of the danger of allowing some litigants to evade the Federal Rules of Civil Procedure by invoking the protection of the Hague Convention or national blocking statutes. One court articulated this fear:

> Defendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad. Nor can it shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliates abroad. If defendants could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents.[93]

The advantage accruing to a party that can avoid discovery of sensitive documents is obvious. The defense that the party or its affiliates are foreign should not be considered compelling. Parties who freely chose to do business in the United States should not be unequivocally shielded from laws with which their counterparts located in the United States must comply.

90. *See supra* text accompanying notes 36–50.
91. Dorin Brief, *supra* note 21.
92. *Id.* at 8.
93. *Cooper,* 102 F.R.D. at 920.

In addition to protecting litigants in control of evidence located abroad, restrictions imposed by national blocking statutes, enacted under article 12(b) of the Hague Convention, may also erode the jurisdiction of U.S. courts. In the Laker Airways antitrust litigation,[94] Laker attempted to sue two British airlines, British Airways and British Caledonia, and various other U.S. and foreign airlines and corporations for violations of the Sherman and Clayton Acts. The British defendants were ordered not to produce certain documents by the British Secretary of State in compliance with the British Protection of Trading Interests Act.[95] The British defendants subsequently argued to the British Court of Appeals that their inability to produce documents so prejudiced the case that their involvement in the proceedings before the U.S. court should be enjoined. The British court granted an antisuit injunction, finding that the restrictions placed on the British airlines rendered Laker's claim "wholly untriable."[96]

Foreign courts thus can take measures to protect parties from injustice created by a blocking statute. However, such measures are likely, as was the case in the Laker litigation, to deprive U.S. courts of jurisdiction over parties properly before them.[97] Such erosion of jurisdiction is undesirable. Not only does it preclude U.S. courts from upholding U.S. substantive laws such as the Sherman and Clayton Acts, but it places litigants in an untenable position. When a litigant obtains an antisuit injunction from its national government, one nation or another must capitulate or a deadlock ensues. This frustrates both national interests and the interests of litigants.[98] Blocking statutes and the Hague Convention should not be used as an excuse to deprive litigants of a full and fair hearing in court.

B. Language and Drafters' Intent

Neither the language of the Hague Convention nor the drafters' intent bar an interpretation allowing selective use of the agreement. The language of the Hague Convention is permissive, not mandatory. The provisions indicate that a contracting party "may" request another Contracting State to use the methods set out.[99] The absence of language indicating exclusivity does not appear to be an

94. For a discussion of the procedural complexities of this litigation, see *Sabena*, 731 F.2d at 917–21.

95. *See* British Airways Board v. Laker Airways, [1983] 3 W.L.R. 544, 584–85 (C.A.) (reprinting Protection of Trading Interest (U.S. Antitrust Measures) Order 1983 and general directions dated June 23 and July 11, 1983).

96. British Airways Board v. Laker Airways, [1983] 3 W.L.R. at 591 (footnotes omitted).

97. The British court could enjoin Laker from pursuing its claims against British Airways and British Caledonia because it had in personam jurisdiction over Laker, a British corporation. *See id.* at 549. It is beyond the scope of this note to fully address the issues of concurrent jurisdiction and antisuit injunctions; this case is cited merely as an illustration of the effect of blocking statutes.

98. *Sabena*, 731 F.2d at 954.

99. Hague Convention, *supra* note 2, at arts. 1, 15, 17.

oversight. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents,[100] which was negotiated by the same body that negotiated the Evidence Convention, provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[101] The Hague Evidence Convention does not contain any similar express provision for exclusivity.[102]

It has been argued that the inclusion of article 27[103] in the Hague Evidence Convention indicates that although no express provision for exclusivity exists, the Hague Convention should be read to infer exclusivity.[104] Article 27 allows the executing state to use methods other than those provided for in the Convention to give effect to discovery requests. It does not state the converse, however. Neither article 27 nor any other provision of the Convention bars a requesting state from using methods other than those stipulated in the Convention. Philip Amram, the official Rapporteur of the Hague Convention and Co-chairman of the drafting committee, explains in his Rapporteur's Report that article 27 was "designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants."[105] In the absence of express language indicating exclusivity, article 27 should not be interpreted to mandate such a reading.

Analysis of the preparatory and explanatory reports on the Hague Convention indicate that the Convention was meant to supplement the Federal Rules of Civil Procedure, not supplant them. To give effect to this intent, the Convention must

100. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter cited as Service Convention].

101. *Id.* at art. 1.

102. The Service Convention was negotiated at the Tenth Sesssion of the Hague Conference on Private International Law. Like the Evidence Convention, the Service Convention is a revision and modernization of Chapter I of the Hague Convention on Civil Procedure of 1954. *See* Delegation's Report, *supra* note 11, at 804. The Service Convention was drafted prior to the Evidence Convention. If delegates had wanted to provide the same exclusivity provision in the Evidence Convention, they could have easily employed the general language of article 1 of the Service Convention.

103. Article 27 of the Hague Convention states:

> The provisions of the present Convention shall not prevent a Contracting State from—
>
> . . . .
>
> (b) permiting, by its internal law or practice, any act provided for in this Convention to be performed under less restrictive conditions;
>
> (c) permitting, by its internal law of practice, methods of taking evidence other than those provided for in this Convention.

104. *See* Comment, *supra* note 21, at 1477.

105. S. Doc. Executive A, *supra* note 7, at 39 (explanatory report on the Convention by Rapporteur Philip W. Amram).

be viewed as a non-exclusive document. This view was supported by Philip Amram: "The Convention makes no major changes in U.S. procedure and requires no changes in U.S. legislation or rules."[106] The State Department echoed Amram's position when it submitted the Convention to Congress: "A significant aspect of the Evidence Convention is the fact that although it requires little change in the present procedures in the United States it promotes changes, in the direction of modern and efficient procedures, in the present practice of many states."[107] Finally, the U.S. delegation report on the draft Convention concluded that "the Convention is a major contribution to the elimination of formal and technical obstacles to securing evidence abroad" and that the advantages of signing the Convention "far outweigh the minor adjustments in procedure that would be required."[108] While these statements do not expressly address the question of exclusivity, they do indicate that at the time the Convention was drafted and submitted to Congress no usurpation of the Federal Rules of Civil Procedure was envisioned. If the Convention had been intended to be the exclusive vehicle for taking evidence abroad, not only would the Federal Rules have been supplanted, but the procedural rights of litigants in U.S. courts would have been drastically altered. The drafters' intent does not support a reading of exclusivity.

C. A Two-Tiered Test for U.S. Courts

The preceding discussion indicates that while most courts have agreed that the Hague Convention is not the exclusive vehicle for taking evidence abroad, they have not clearly articulated an objective standard for determining appropriate recourse to the Convention. One balancing test has been proposed by the *Restatement (Revised) of Foreign Relations Law.*[109] The *Restatement* argues that the Hague Convention need not be viewed as an exclusive procedure and suggests a five-factor test to determine if international comity requires recourse to the Hague Convention. Section 420 of the *Restatement* requires that courts ordering discovery in states signatory to the Hague Convention consider: (1) the importance to the investigation or litigation of the documents requested; (2) the degree of specificity of the request; (3) the states involved; (4) the extent to which compliance with the request would undermine important interests of the state where the information is located; and (5) possible alternative means of securing the information.[110] The problem with this balancing test is that it does not suggest

106. Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 105 (1973).

107. S. DOC. EXECUTIVE A, *supra* note 7, at xi (letter of submittal from Secretary of State William P. Rodgers to the President).

108. Delegation's Report, *supra* note 11, at 820.

109. *See* RESTATEMENT, *supra* note 24, at § 420 comment b and reporter's note 6.

110. *Id.* at § 420(1)(c). *See generally* Robinson, *supra* note 16, at 538–39.

how to weigh the various factors. While the factors embody important considerations in a comity analysis, they do not provide objective standards according to which courts can make consistent rulings on the appropriate method of taking evidence.

Objectivity and consistency can be derived by using a two-tiered inquiry that incorporates the evolving territorial test of recent U.S. court decisions. Once it has been established that the discovery sought involves evidence controlled by a party to the litigation, courts should inquire into the nature of the discovery activity requested. If the activity does not require the litigant seeking discovery to enter the foreign country, no infringement of the sovereignty of the foreign nation is involved. The Federal Rules can be used without the requirement of balancing foreign and domestic interests.

On the other hand, if discovery activities would require territorial infringement, recourse to the letter of request or other provisions of the Hague Convention should be considered. To determine if recourse to the Hague Convention is appropriate, courts should undertake a second inquiry to determine whether the foreign nation allows adequate discovery under its interpretation of the Hague Convention. This is a politically sensitive inquiry and should only be undertaken if the litigant seeking discovery must enter the foreign country. Here courts should balance the need for discovery against the likelihood that such discovery can be effected under the Hague Convention. For example, if discovery is required against a British corporation and it is likely that all documents specifically named will be produced, utilization of the Hague Convention is reasonable. If, however, discovery is sought against a West German corporation, and it is unlikely that any documents will be produced, the Federal Rules should be utilized.

This use of the Federal Rules is justified because the court does have jurisdiction over the discovery target. A dual standard for discovery should not be allowed to evolve. Reluctance to use the Federal Rules will provide an unfair advantage to foreign litigants and possibly erode the jurisdiction of U.S. courts. Once a party chooses to do business in the United States, it should not be allowed to evade the legal repercussions of that choice. Perhaps foreign governments will modify their opposition to U.S. discovery practices, but until that time, U.S. courts should be willing to proceed under the Federal Rules when ordering the taking of evidence abroad.