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In re Societe Nationale Industrielle Aerospatiale: International Conflict over Discovery of Evidence in Foreign Countries

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In re Société Nationale Industrielle Aerospatiale: 
International Conflict over Discovery of Evidence in Foreign Countries

The discovery provisions of the Federal Rules of Civil Procedure\(^1\) grant litigants broad powers to investigate an adverse party. “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending action.”\(^2\) The parties conduct the investigation themselves, seeking judicial intervention only if a dispute arises. Such unrestricted party discovery, a cornerstone of U.S. civil litigation, is alien to other legal systems.\(^3\) Most nations allow comparatively limited discovery. England, for example, does not permit depositions from non-parties, and interrogatories are available only by court order.\(^4\) Especially in civil law jurisdictions, discovery is mostly a judicial function.\(^5\) A court official determines what evidence is necessary for litigation, orders document production, and questions witnesses.\(^6\) In France, if a non-party's testimony is necessary, the court appoints a judge to interrogate the witness and submit a report to the litigants and the court.\(^7\) A French judge may even personally visit premises involved in the litigation and submit a report.\(^8\)

When a foreign citizen is a litigant in a U.S. court, a domestic party’s attempt to conduct discovery in the foreign country commonly conflicts with foreign procedure. Many foreign courts perceive U.S. discovery methods as an infringement on the foreign

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1 FED. R. CIV. P. 26-37.
2 FED. R. CIV. P. 26(b)(1) (emphasis added).
3 PRACTISING LAW INSTITUTE, EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION 23 (1984).
6 See PRACTISING LAW INSTITUTE, supra note 3, at 9-23; Edwards, supra note 5, at 646-47.
7 C. PR. CIV. arts. 252-280. This procedure is an enquête. See also INTERNATIONAL COOPERATION IN LITIGATION: EUROPE 130-49 (H. Smit ed. 1965) (compilation and comparison of procedures for all European jurisdictions).
8 This report, a descente sur les lieux, is prepared by the juge d'instruction. C. PR. CIV. arts. 295-301.
country's judicial sovereignty. In response to this perceived intrusion, many nations have entered into treaties with the United States to limit U.S. discovery, or even made compliance with American discovery a criminal offense under "blocking statutes" or "anti-disclosure laws." These efforts have not eased the international conflict; by most accounts, the political tension is increasing.

In In re Société Nationale Industrielle Aerospatiale, the Eighth Circuit Court of Appeals addressed issues involving both a discovery treaty and a blocking statute. Two corporations, owned by the Republic of France, were defendants in a products liability suit. The corporations advertised and sold airplanes in the United States. Actions for damages were instituted by plaintiffs following an accident involving one of defendants' aircraft. The plaintiffs sought discovery, and the defendant French corporations moved for a protective order. The French corporations argued that, as the materials sought by discovery were located in France, the plaintiffs must conduct discovery in France, the plaintiffs must conduct dis-

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12 See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 437 (Tent. Draft No. 7, April 10, 1986) [hereinafter RESTATEMENT (Revised)]. "No aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction as the requests for documents associated with investigation and litigation in the United States." Id., Reporters' Note 1, at 95. See also Robinson, Compelling Discovery and Evidence in International Litigation, 18 INT'L L. W. 533 (1984) (attorney in the Office of the Legal Adviser, United States Department of State, stating that extraterritorial discovery issues have been among the most important concerns of the State Department in recent years).


14 782 F.2d at 122. The actions were consolidated in the district court for the Southern District of Iowa. By agreement, the district court referred the actions to a magistrate in accordance with 28 U.S.C. § 636(c)(1) (1982).
covery in accordance with the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention), to which the United States and France are signatories. The French corporations also argued that they should not have to comply with discovery because to do so would subject them to criminal liability under a French blocking statute. The district court denied defendants' motion for a protective order and ordered compliance with discovery. The French corporations petitioned the Eighth Circuit Court of Appeals for a writ of mandamus, seeking to overturn the discovery order.

The court of appeals, noting that mandamus review is generally available only under extraordinary circumstances, found this an appropriate situation for such review due to "the novel and important questions" concerning the interplay between the Federal Rules of Civil Procedure, the Hague Convention, and the French blocking statute. Rejecting the French corporations' arguments regarding the Hague Convention, the court held that the Convention does not set exclusive or mandatory procedures for obtaining documents and information located in a signatory's jurisdiction. The court also rejected an argument that the Hague Convention requires "first resort" under its provisions, then subsequently to the Federal Rules as a last resort if the discovery attempts are unsuccessful. The court ruled that "when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention."

15 Hague Convention, supra note 10.
16 French Blocking Statute, supra note 11, art. 3. The relevant provisions of the French blocking statute forbid "all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings." Art. 1-bis (translation in In re Société Nationale, 782 F.2d at 126). For a translation of the complete statute, see Toms, supra note 9, at 597, or Current Development, supra note 9, at 382-83. Article 3 of the statute requires imprisonment for two to six months and a fine of 10,000 to 120,000 francs (approximately $1,750 to $21,000 U.S. dollars as of December 31, 1986) for conviction under the statute.
17 In re Société Nationale, 782 F.2d at 123.
18 "Mandamus has traditionally issued in response to abuses of judicial power. Thus, where a... judge refuses to take some action he is required to take or takes some action he is not empowered to take, mandamus will lie." BLACK'S LAW DICTIONARY 866 (5th ed. 1979), citing Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953). "[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." Will v. United States, 389 U.S. 90, 95 (1967).
19 In re Société Nationale, 782 F.2d at 123.
20 Id. at 124.
21 Id. at 125.
22 Id. at 124.
In reaching its decision on the inapplicability of the Hague Convention, the court relied heavily upon a Fifth Circuit decision, *In re Anschuetz & Co., GmbH.* In that case, the court required a West German third-party defendant in a personal injury suit to comply with discovery, despite the defendant’s argument that the Hague Convention controlled extraterritorial discovery. The Fifth Circuit held that “[t]he 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.” The *In re Société Nationale* court accepted the Fifth Circuit’s statement that the Hague Convention has “no application at all” when the parties are subject to a U.S. court’s jurisdiction.

The court acknowledged the dilemma in which the French blocking statute placed the French corporations; they faced criminal liability in France if they complied with discovery, and sanctions in the U.S. district court if they did not. However, the court stated that “[t]he fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production.” The court held that the competing national interests at stake must be balanced to determine if the French defendant should be compelled to produce the requested materials. The court utilized a balancing test derived from section 40 of the Restatement (Second) of the Foreign Relations Law of the United States. The court did not explain its analysis of this balancing test, but merely stated that the magistrate properly employed the test and properly ordered compliance with discovery.

The court of appeals addressed separately the issue whether the district court could impose sanctions on the defendants if the French blocking statute prevented them from complying with the discovery order. The court held that “the foreign party’s good faith in attempting to comply with the order is relevant to what sanctions, if
any, should be imposed." Although the record did not reveal if the corporations had attempted to secure a waiver of prosecution from the French government, or some other means of making compliance possible, the court noted that because the corporations are owned by the French government, they stand in "a most advantageous position" to receive permission to comply with the U.S. court order.

Consequently the court denied the writ of mandamus, upheld the discovery order and permitted the district court to impose sanctions if the French corporations did not comply. The severity of the sanctions was to turn upon the "good faith" of the corporations in attempting to seek permission of the French government to release the information. The court concluded that the discovery order did not threaten French judicial sovereignty, as it only required the French corporations to bring documents and information from France, and did not require any participation by French judicial officials. The court stated that it would be "the greatest insult to a civil law country's sovereignty" to invoke the foreign country's judicial aid subject to eventual override by the Federal Rules of Civil Procedure.

To avoid such international insults, in 1970 the United States and sixteen other nations entered into a multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, commonly called the Hague Convention. The Convention's stated purpose is "to improve mutual judicial co-operation in civil or commercial matters" between the signatory nations. Most foreign nations participated in the Convention because of their displeasure with the intrusion of U.S. discovery procedure into their borders. In contrast, the United States participated primarily because of the frustration American lawyers had experienced in obtaining evidence

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32 Id. (citing Société Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 357 U.S. 197, 204-06 (1958)).
33 782 F.2d at 127.
34 Id.
36 782 F.2d at 125-26 (quoting Anschuetz, 754 F.2d at 613).
37 The signatory nations are 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. Hague Convention, supra note 10.
38 Id.
39 Id.
in the other countries. While U.S. discovery practices arouse the hostility of foreign countries, the evidence obtained by extraterritorial discovery requests is often not in a form admissible in a U.S. court. The Hague Convention, therefore, was designed to make discovery "tolerable" to the signatory nations, and permit the gathering of evidence "utilizable" in a U.S. court.

The Hague Convention establishes three procedures for obtaining evidence abroad: through consular officials, court-appointed commissioners, or letters of request from the forum court to a court in the foreign nation. The Convention establishes language requirements, methods of submission to the foreign court, and allows a country "to declare that it will not execute Letters of Request issued for the purposes of obtaining pre-trial discovery of documents as known in Common Law countries." The procedures established by the Hague Convention, with the required court or consular participation, are more formal and time consuming than the discovery permitted by the Federal Rules.

The primary controversy that has developed in U.S. courts is whether the Hague Convention preempts the Federal Rules regarding extraterritorial discovery within the boundaries of nations that have ratified the Convention. Three discernible patterns have emerged in federal and state court analysis of the conflict. Although some state courts, and numerous commentators, have argued

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42 Id. at 37.
43 Hague Conference Report, supra note 9, at 806.
44 A diplomatic officer or consular agent of the forum nation may take evidence within the boundaries of another nation with prior permission. No compulsory process is available. Hague Convention, supra note 10, at Chapter II, arts. 15-16, 21.
45 A court-appointed commissioner may take evidence in a foreign nation only with permission of authorities in which the evidence is to be taken. No compulsory process is available. Hague Convention, supra note 10, at Chapter II, arts. 17, 21.
46 A letter of request, or letter rogatory, is transmitted through the court in which the suit is being heard to a "central authority" in the foreign nation. Compulsory process may be available depending upon the law of the foreign nation. Hague Convention, supra note 10, at Chapter I, arts. 1-14.
47 These three procedures are also provided in the Federal Rules of Civil Procedure. Fed. R. Civ. P. 28(b).
48 Id. note 10, art. 4.
49 Id. arts. 2-14.
51 Pierburg, GmbH v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876
that the Hague Convention is the exclusive means of discovering evidence abroad, apparently no federal court has accepted this argument. Some federal courts have taken the position that, as a matter of international comity, first resort should be made to the Hague Convention procedures, then to the Federal Rules if efforts at discovery are unsuccessful. The majority of federal courts, however, have concluded that the Convention does not preempt the Federal Rules, and a litigant has the option to seek discovery under either set of procedures.

State courts have been the strongest advocates of the position that the Hague Convention is the exclusive means for obtaining evidence abroad. A Connecticut Superior Court stated that the Hague Convention "represents the sole avenue open to an American party wishing to obtain evidence in one of the contracting states." Similarly, in *Pierburg, GmbH v. Superior Court,* a West German defendant in a products liability suit sought protection from a California trial court's discovery order. The California Court of Appeals


53 Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Hilton v. Guyot, 159 U.S. 113, 164 (1894). See also R. CRANTON, D. CURRIE & H. KAY, CONFLICTS OF LAWS 1-8 (2d ed. 1975) (discussion of international comity).


56 See supra note 51.

57 Cuisinarts, slip op. at 5 (patent infringement suit).

overturned the discovery order and ruled that the plaintiff must comply with procedural requirements of the Hague Convention, rather than California discovery procedure. Both the Connecticut and the California courts based their decisions on the supremacy clause of the U.S. Constitution. They both acknowledged that the federal government's ratification of an international treaty preempted the state's authority.

The federal courts that have concluded that first resort should be made to the Hague Convention have based their rulings on notions of international comity and judicial restraint from interfering in international politics. On the other hand, the courts that have concluded that the Convention does not preempt the Federal Rules have focused on the harm that American litigants would incur if forced to resort solely to the Convention for discovery. The concern of these courts is that foreign litigants not have the opportunity to shield crucial documents from discovery merely by storing them abroad. One U.S. district court expressed its fear that if a party could so easily evade discovery, U.S. businesses would open foreign offices for the sole purpose of storing sensitive documents.

The Hague Convention contains some ambiguous language regarding the relationship of the Convention and the signatory nations’ individual domestic procedures. Article 27 states that “[t]he provisions of the present Convention shall not prevent a Contracting State from— . . . (b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions; (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.” Many commentators have argued that this language allows a contracting state to offer less restrictive judicial assistance than that

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59 U.S. Const. art. VI, § 2.
60 Cuisinart, slip. op. at 5; Pierburg, 137 Cal. App. 3d at 244, 186 Cal. Rptr. at 880.
62 See, e.g., Anschultz, 754 F.2d at 606. This interpretation of the treaty [that the Hague Convention is exclusive], taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States courts. Insofar as [the foreign party] seeks discovery, it would be permitted the full range of free discovery provided by the Federal Rules. But when a United States adversary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention.
64 Hague Convention, supra note 10.
required by the Convention. Most federal courts, however, have interpreted this language as permitting a contracting state to use the Convention procedures or not at its discretion.

Federal district and circuit courts have stated that foreign parties subject themselves to the in personam jurisdiction of U.S. courts by conducting business in America, and they are subject to discovery under the Federal Rules as is any U.S. litigant. In Anschuetz, the Fifth Circuit unequivocally stated that 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." The court grounded its holding on a position that the discovery actually takes place in the United States, the situs of the litigation, not in the foreign country, the situs of the information. An increasing majority of federal courts have held that the Hague Convention procedures do not control discovery in federal courts, even though the information sought is within the boundaries of a signatory nation.

Although the federal courts are establishing a predictable position on the relationship between the Hague Convention and the Federal Rules of Civil Procedure, much confusion still exists. An examination of recent decisions of the U.S. District Court for the Eastern District of Pennsylvania illustrates this confusion. In Lasky v. Continental Products Corp., a West German defendant in a products liability suit sought an order requiring the plaintiff to use the Hague Convention procedures for discovery of documents located in West Germany. The court denied the German defendant's request on the grounds that the Hague Convention preserved the less restrictive procedures of the Federal Rules, and that requiring Hague Convention procedures would severely restrict the scope of the U.S. plaintiff's discovery. The Lasky court's opinion in effect gives a litigant the option to use either the Hague Convention or the Federal Rules.

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65 Id.
67 See, e.g., Anschuetz, 754 F.2d at 615 (5th Cir.); Graco, 101 F.R.D. at 521 (N.D. Ill.).
68 754 F.2d at 615.
69 Id. at 615. See also Messerschmitt, 757 F.2d at 731. "[T]he Convention does not apply to 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." Id. at 731.
70 See Phillips Petroleum, 105 F.R.D. at 26-28 (tracing the movement of federal courts to this position).
72 Id. at 1228-29.
73 Id. at 1229.
By contrast, in *Philadelphia Gear Corp. v. American Pfauter Corp.*, which also involved a West German defendant in a products liability suit, the court stated that the Hague Convention was "the avenue of first resort" and required the U.S. plaintiff to conduct discovery under the Hague Convention procedures. Although the court acknowledged that the plaintiff might be able to proceed under the Federal Rules if the Convention procedures proved futile, the court required the plaintiff to proceed first according to the Hague Convention.

Subsequent cases in the Eastern District of Pennsylvania have become increasingly confused. In *McLaughlin v. Fellows Gear Shaper Co.*, yet another West German defendant sought a protective order in a products liability suit. The German defendant relied upon *Philadelphia Gear*; the plaintiffs relied upon *Lasky*. The court drew a distinction between one set of interrogatories requesting general information about the defendant's business, which the court required the defendant to answer, and another set of interrogatories requesting the identity and qualification of the defendant's expert witnesses, which the court did not require the defendant to answer. The court held that the second set of interrogatories and a request for document production were "substantially equivalent to producing evidence" in West Germany, and that the Hague Convention therefore controlled.

The confusion in the opinions of the U.S. District Court for the Eastern District of Pennsylvania represents similar uncertainty in other federal courts. In 1984, two appeals from state court decisions presented to the U.S. Supreme Court the issue whether the Hague Convention supercedes the Federal Rules. The Court, however, declined to decide the cases on their merits. The Court has granted a petition for writ of certiorari to review the Fifth Circuit's decision in *Anschutz*. Additionally, the Court has granted a peti-

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75 Id. at 61.
76 Id. at 60-61.
78 Id. at 958-59.
79 Id. at 959.
80 See Comment, *Extraterritorial Discovery*, supra note 52, at 269-72 (discussing the contradictions presented by the Eastern District of Pennsylvania opinions and the confusion in other federal courts).
82 754 F.2d 602, cert. granted sub nom. Anschuetz & Co., GmbH v. Mississippi River Bridge Auth., 106 S. Ct. 52 (1986). The Court had also granted a writ of certiorari to review the Fifth Circuit's decision in *Messerschmitt*, but subsequently vacated the order granting the petition. 757 F.2d 729 (1985), cert. granted sub nom. Messerschmitt Bolkow Blohm, GmbH v. Mississippi River Bridge Auth., 106 S. Ct. 1633, order granting cert. vacated,
The Court will address nearly identical issues regarding the Hague Convention in its review of *Anschuetz* and *In re Société Nationale*. The Eighth Circuit, in deciding *In re Société Nationale*, relied heavily upon the Fifth Circuit's opinion in *Anschuetz*. In *In re Société Nationale*, the court of appeals held that the Hague Convention does not apply when a district court has jurisdiction over a foreign litigant, even though the documents and information sought under discovery are located within the boundaries of a foreign signatory to the Convention. The court rejected the foreign litigant's contentions that the Hague Convention should be the exclusive means for obtaining evidence abroad, or alternatively that the Convention should be the first resort. In doing so, the Eighth Circuit rejected the state court opinions that acknowledged the exclusivity of the Hague Convention, and the federal court opinions that adopted the "first resort" position.

The Eighth Circuit in *In re Société Nationale* also accepted the view that "discovery does not "take place within [a state's] borders" merely because documents to be produced somewhere else are located there." The court adopted the theory that the discovery actually takes place within the jurisdiction of the U.S. court, and does not constitute discovery addressed by the Hague Convention. The court concluded that the primary significance retained by the Hague Convention is the establishment of procedures for discovery from foreign non-parties not subject to a U.S. court's jurisdiction. Commentators have argued that the foreign signatories did not have this understanding of the Convention's purpose at the time of its ratification.

The Eighth Circuit also rejected the contention that its decision would undermine the purposes of the Hague Convention. The court stated that the discovery order would aid in the flow of information, which is the intent of the Convention. Further, the court concluded that

106 U.S. 2887 (1986). The Court apparently vacated the order in *Messerschmitt* because identical issues are raised in *Anschuetz*, and the Fifth Circuit relied completely upon the *Anschuetz* opinion to decide *Messerschmitt*.


84 Id. at 124.

85 Id.

86 See supra note 51.

87 See supra note 61.

88 782 F.2d at 124 (quoting *Anschuetz*, 754 F.2d at 611 (quoting *Grace*, 101 F.R.D. at 521)).

89 Id.

90 Id. at 125 (emphasis added).

91 See Heck, supra note 52, at 239-40, 251 (comparing German perception of the Hague Convention with U.S. judicial interpretation).
that its order would not affront France's judicial sovereignty. In contrast, the court reasoned that giving the Hague Convention first resort would be "the greatest insult to a civil law country's sovereignty" by invoking the country's judicial aid, subject to eventual override by the Federal Rules.92

The Eighth Circuit's decision in In re Société Nationale grants the greatest possible protection to U.S. litigants and gives little significance to the Hague Evidence Convention. This position had already been adopted by the Fifth Circuit93 and various U.S. district courts,94 and has since been adopted by the Ninth Circuit.95

In addition to entering cooperative treaties intended to control U.S. discovery, many nations have enacted blocking statutes and anti-disclosure laws to limit the intrusion of U.S. discovery into their borders.96 The majority of these statutes have been enacted since 1970, largely as a response to the increasing amount of international antitrust litigation in U.S. courts.97 The United Kingdom, Canada, Australia, West Germany, and France, among other of the United States' best trading partners, have enacted blocking statutes targeted at U.S. discovery.98

The French blocking statute99 involved in In re Société Nationale was a direct response to perceived abuses in the extraterritorial application of U.S. antitrust laws.100 Paradoxically, blocking statutes place foreign nationals, the class that the statutes are intended to

92 782 F.2d at 125-26.
93 See Anschuetz, 754 F.2d at 604; Messerschmitt, 757 F.2d at 729.
95 Société Nationale Industrielle Aerospatiale v. United States Dist. Court for the Dist. of Alaska, 788 F.2d 1408 (9th Cir. 1986) (relying upon the Eighth Circuit's In re Société Nationale opinion). The petitioning party in both the Ninth Circuit and the Eighth Circuit cases is the same, as are the issues, but the cases arise from different products liability suits.
96 See supra note 11 for a partial list of recently enacted foreign blocking statutes.
98 Supra note 11 lists the citations of the blocking statutes enacted in these countries.
99 See French Blocking Statute, supra note 16 for text of relevant portions of the statute.
100 Toms, supra note 9, at 585-86.
protect, in an awkward legal position. The foreign party faces the dilemma of either violating a criminal law of its home nation or violating a discovery order and receiving sanctions in a U.S. civil court. Possible sanctions range from imprisonment for contempt to default judgments to adverse findings of fact that could destroy the foreign party's case.

The seminal case discussing the problem presented by blocking statutes is Société Internationale Pour Participations Industrielles, S.A. v. Rogers. A Swiss holding company brought suit to recover one hundred million dollars of assets seized by the United States under the Trading with the Enemy Act. The U.S. government sought discovery of documents maintained in Switzerland to investigate plaintiff's claims. The Swiss plaintiff opposed on the grounds that Swiss penal law prohibited disclosure of banking records. Upon the government's motion, the District Court for the District of Columbia ordered the plaintiff to produce the records despite the Swiss prohibition. The plaintiff gained the consent of the Swiss government to produce much, but not all, of the relevant evidence. The district court dismissed the complaint for failure to comply with discovery completely, and the Court of Appeals for the District of Columbia upheld the dismissal.

On a petition for writ of certiorari, the Supreme Court reversed the dismissal, reasoning that the Swiss company had demonstrated a "good faith attempt" to comply with discovery by seeking consent of the Swiss government. The Court ordered the trial to proceed on the merits, but acknowledged that in the absence of complete disclosure by the plaintiff, the district court would be justified in making findings of fact adverse to the plaintiff. Although the Court did not permit dismissal, allowing the trial judge to make adverse findings of fact could fatally injure the plaintiff's case.

Société Internationale is the Supreme Court's only decision directly considering the conflict between a U.S. court's discovery order and a foreign blocking statute. The decision is the primary statement of the "good faith test" for blocking statute defenses. The test may be stated as follows: When there are foreign legal barriers to the production of documents, the party asserting the barrier must

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101 357 U.S. 197 (1958). This is commonly referred to as the Interhandel litigation. See Onkelinx, supra note 9, at 504-08.
102 357 U.S. 199-200.
103 Id. at 202. The district court dismissed the complaint as a Rule 37 sanction. Fed. R. Civ. P. 37.
104 243 F.2d 254 (1957).
105 357 U.S. at 208-13.
106 Id. at 212-13.
107 For a discussion of Société Internationale's impact, see Comment, Extraterritorial Discovery: An Analysis Based on Good Faith, 83 Colum. L. Rev. 1320 (1983); Note, Strict Enforcement of Extraterritorial Discovery, 38 Stan. L. Rev. 841, 854-56 (1986).
demonstrate a good faith effort to gain the consent of its sovereign to produce the required records.\textsuperscript{108} Federal courts in subsequent cases have consistently employed this test.\textsuperscript{109} If a foreign party asserts its inability to comply due to legal barriers, the court will examine the party’s “good faith” efforts to comply in considering what sanctions to impose.\textsuperscript{110}

This “good faith” test, however, goes only to a determination of what sanctions to impose on a noncomplying foreign party. Before addressing the issue of appropriate sanctions, a court must determine whether it is proper to exercise jurisdiction to order discovery, or for reasons of international comity, to defer to the foreign blocking statute. The Court in \textit{Société Internationale} determined that the district court could properly order the foreign party to comply with discovery. The Court placed particular emphasis on three factors: the importance of the U.S. statute involved, the importance and relevance of the documents requested, and the nationality of the party asserting the blocking statute as a barrier. The Court reasoned that the U.S. interest in preventing collusion with the enemy justified ordering discovery, and that the documents requested were vital to the litigation.\textsuperscript{111} As the plaintiff was a Swiss national, it was in “a most advantageous position” to obtain permission of the Swiss government to release requested information.\textsuperscript{112}

Some federal courts have employed analysis nearly identical to the Court’s in \textit{Société Internationale} in deciding whether a U.S. court should exercise its jurisdiction to compel discovery by a foreign party.\textsuperscript{113} Since publication of the Restatement (Second) of the Foreign Relations Law of the United States in 1965,\textsuperscript{114} most federal courts have employed a balancing test contained within section 40\textsuperscript{115}

\textsuperscript{108} See Onkelinx, supra note 9, at 507-08.
\textsuperscript{109} E.g.s, United States v. First Nat’l City Bank, 396 F.2d 897 (2d Cir. 1968); \textit{In re Westinghouse Elec. Corp. Uranium Litigation}, 563 F.2d 992 (10th Cir. 1977); Graco v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984); United States v. First Nat’l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983).
\textit{But cf. In re Chase Manhattan Bank}, 297 F.2d 611 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); First Nat’l City Bank of N.Y. v. IRS, 271 F.2d 616 (2d Cir. 1959). In these three Second Circuit cases, the court deferred completely to foreign anti-disclosure laws and “fundamental principles of international comity,” \textit{Chase Manhattan Bank}, 297 F.2d at 613, and did not apply a balancing test. Other federal courts, and eventually the Second Circuit, rejected this approach. See Comment, supra note 107, at 1320; Note, supra note 107, at 854-56.
\textsuperscript{110} See Comment, supra note 97, at 947-48.
\textsuperscript{111} Id. at 204-06.
\textsuperscript{112} Id. at 205.
\textsuperscript{113} Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972) (affirming district court’s refusal to order disclosure of a Swiss bank’s customer lists); \textit{In re Uranium Antitrust Litigation}, 480 F. Supp. 1138 (N.D. Ill. 1979) (granting motion to compel discovery of documents located in Canada).
\textsuperscript{114} \textsc{Restatement (Second) of Foreign Relations Law of the United States} (1965).
\textsuperscript{115} Section 40 of the Restatement provides:
Where two states have jurisdiction to prescribe and enforce rules of law and
to examine the interests of the nations involved and to determine whether a foreign party should be ordered to comply with discovery.\footnote{116}

The Second Circuit's decision in \textit{United States v. First National City Bank of New York} \footnote{117} was the first federal appellate court application of the Restatement balancing test. First National City Bank (Citibank) refused to produce documents located in West Germany. A grand jury investigating antitrust violations issued a \textit{subpoena duces tecum} to obtain the documents.\footnote{118} Citibank claimed that compliance with the subpoena would violate West German law and that its West German customers might bring civil suits for disclosing their accounts. The district court found Citibank in contempt, imposed a fine of two thousand dollars per day until compliance, and sentenced its vice-president to a jail term of sixty days if it did not comply earlier.\footnote{119} The Second Circuit Court of Appeals affirmed, relying most heavily in its analysis on subsection (a) of the Restatement section 40. The court held that the "vital national interests" of the United States in enforcing subpoenas outweighed the West German government's interest in bank secrecy.\footnote{120}

Other courts have similarly focused on the competing "vital national interests" criteria of subsection (a). In \textit{United States v. Vetco Inc.},\footnote{121} the court held that the U.S. interest in collecting taxes and

\begin{itemize}
\item the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
\begin{itemize}
\item (a) vital national interests of each of the states,
\item (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
\item (c) the extent to which the required conduct is to take place in the territory of the other state,
\item (d) the nationality of the person, and
\item (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.
\end{itemize}
\end{itemize}

\textbf{RESTATEMENT (SECOND) § 40.}


\footnote{117}{396 F.2d 897 (2d Cir. 1968).}

\footnote{118}{To underscore the procedural conflicts involved in international discovery, the court noted that German law has no procedural device such as the \textit{subpoena duces tecum}. A person may be compelled to testify before a West German magistrate regarding the contents of documents, but he is apparently not required to produce the documents themselves. \textit{First Nat'l City Bank}, 396 F.2d at 900, n.7.}

\footnote{119}{\textit{Id.} at 900.}

\footnote{120}{\textit{Id.} at 900-02.}

\footnote{121}{691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981) (proceeding to enforce subpoena issued by Internal Revenue Service and to obtain documents stored in Switzerland).}

Section 403 of the Tentative Draft of the Restatement (Revised) lists additional factors for courts to consider in determining whether it should exercise its enforcement jurisdiction. More significantly, the Tentative Draft of the revised Restatement adds a section specifically addressed to the conflict of U.S. discovery and foreign blocking statutes. Section 437 attempts to codify the holdings of *Société In-

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122 105 F.R.D. 16 (S.D.N.Y. 1984) (French plaintiff seeking to avoid American defendant's requested discovery of documents located in France).
123 *Id.* at 30.
124 *Restatement* (Revised), supra note 12, § 403.
125 *Id.* § 437 provides in full:

**Discovery and Foreign Government Compulsion: Law of the United States**

(1) (a) Subject to Subsection (1)(c), a court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.

(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party.

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

(2) (a) If disclosure of information located outside the United States is prohibited by law, regulation or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which the prospective witness is a national,

(b) the person to whom the order is directed may be required by the court or agency to make a good faith effort to secure permission from the foreign authorities to make the information available;

(c) sanctions of contempt, dismissal, or default should not ordinarily be imposed on the party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(d) the court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

(This section was numbered § 420 in TENT. DRAFT No. 3, March 15, 1982).
In re Société Nationale and subsequent lower federal court decisions. The section provides that a U.S. court "may order a person subject to its jurisdiction" to comply with discovery requests.\textsuperscript{126} This directive follows the conclusion by some federal courts that "[a]s long as a federal court has personal jurisdiction over the party in possession or control of the material sought, the court can order production."\textsuperscript{127} Section 437 also recognizes that a court may impose sanctions of contempt, dismissal of claims or defenses, or default judgment upon a noncomplying party, despite any blocking statute barrier.\textsuperscript{128} If a party, however, has made a good faith effort to secure permission from the foreign authorities to release the information, sanctions of contempt, dismissal or default should not be imposed.\textsuperscript{129} The court may still make findings of fact adverse to a noncomplying party, despite evidence of good faith efforts to comply,\textsuperscript{130} which could fatally injure the noncomplying party's case.

In In re Société Nationale the Eighth Circuit reiterated the standard position of federal courts since the Supreme Court's decision in Société Internationale. The Eighth Circuit did not recognize the French blocking statute as a bar to production of information located abroad and required the foreign litigant to choose one horn of the dilemma presented by the blocking statute. Either the French defendant must violate a criminal statute of its home country, or it must violate a discovery order in a U.S. court and face sanctions in its civil suit. In effect, the court demanded that a foreign party doing business within the United States submit to U.S. civil procedure.

The Eighth Circuit also employed the established analysis of federal courts in examining blocking statute defenses. First, the Eighth Circuit determined whether U.S. courts had jurisdiction to order compliance with discovery.\textsuperscript{131} Then the court analyzed whether the district court properly exercised its jurisdiction to compel discovery. In doing so, the court of appeals utilized the Restatement (Second) of Foreign Relations Law section 40 test used by other circuits\textsuperscript{132} to balance the competing national interests. The In re Société Nationale court, as have most federal courts that have employed the section 40 analysis, concluded that the U.S. interest in full disclosure outweighed the foreign state's interest in business secrecy. The In re Société Nationale decision reinforces what has become accepted by the U.S. federal judiciary—a foreign party doing business within the United States will have to comply with U.S. civil dis-

\textsuperscript{126} \textit{Id.} § 437(1)(a).
\textsuperscript{127} \textit{First Nat'l City Bank}, 396 F.2d at 900-01.
\textsuperscript{128} \textit{RESTATEMENT, supra} note 125, § 437(1)(b).
\textsuperscript{129} \textit{Id.} §§ 437(2)(a), (b).
\textsuperscript{130} \textit{Id.} § 437(2)(c).
\textsuperscript{131} 782 F.2d at 126-27.
\textsuperscript{132} \textit{See supra} notes 114 to 124 and accompanying text.
covery procedures, despite criminal statutes forbidding disclosure in the foreign party's home nation.

The Eighth Circuit applied the *Société Internationale* "good faith" test to determine what sanctions, if any, to impose. The court did not examine the French defendant's good faith attempts to comply with the district court's discovery order, as the defendant petitioned the court of appeals to review the propriety of the order itself. The court of appeals ruled that the foreign defendant's attempts at compliance would only be relevant if it did not fully comply. The district court would then have wide discretion to impose any sanctions it deemed appropriate. In *In re Société Nationale*, the court reiterated established federal analysis, which is so firmly established that section 437 of the Restatement (Revised) of the Foreign Relations Law of the United States explicitly recognizes it.

With its decision in *In re Société Nationale*, the Eighth Circuit follows precedent established in other federal courts. First, the Eighth Circuit joins other courts of appeals holding that the Hague Convention neither sets the exclusive and mandatory procedures for discovering evidence abroad, nor is the treaty to be considered a first resort for discovery, with final recourse to the Federal Rules. Second, the Eighth Circuit reaffirms that foreign blocking statutes do not constitute an automatic bar to discovery. Rather, a federal court will weigh the competing national interests. The Eighth Circuit, like most other federal circuits employing such a test, finds the balance in favor of the U.S. litigant. In effect, if a federal court establishes jurisdiction over a foreign party, the court will almost certainly order discovery. *In re Société Nationale*, though a predictable decision, emphasizes the increasing conflict between U.S. discovery procedures and international relations. Not only is the foreign litigant a citizen of a foreign government, it is owned by a foreign government.

Foreign nations' suspicion and hostility toward U.S. discovery, and their enactment of blocking statutes, is understandable. U.S. citizens themselves caustically criticize the frequent abuse of U.S. discovery procedure. But foreign nationals doing business in the United States, with sufficient "minimum contacts" to establish U.S. jurisdiction, should be expected to submit to U.S. discovery. If a

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133 782 F.2d at 127.
134 Id.
135 See supra notes 125 to 130 and accompanying text.
136 782 F.2d at 123-25; see supra notes 62 to 70 and accompanying text.
137 782 F.2d at 123-25.
138 Id. at 126-27.
139 Burger, *Abuses of Discovery: Judges are Correcting the Problem*, 20 TRIAL, No. 9, Sept. 1984, at 18. "Probably no single criticism of the judicial process ... has prompted more discussion in recent years than complaints about abuse of discovery." Id. at 19 (statement of Warren Burger, former Chief Justice, U.S. Supreme Court).
foreign party avails itself of the advantages of the U.S. market, it should be willing to submit to U.S. civil litigation procedures. U.S. courts should strictly enforce international discovery orders, despite foreign blocking laws, as long as the requested party has control over the information. Sanctions should be imposed upon noncomplying foreign parties who assert a blocking statute objection to discovery. Additionally, the position of the noncomplying foreign party should be considered in determining what sanctions to impose. If the foreign party is the plaintiff, compliance with U.S. discovery and production of information maintained in its foreign locations should be expected. Courts should, however, guard against a U.S. plaintiff using a foreign blocking statute against a foreign defendant as an offensive strategy to effect default judgments or adverse findings. Sanctions should be limited to adverse findings of fact if the foreign party demonstrates a good faith attempt to comply, particularly if the foreign party is a defendant.\footnote{Note, supra note 110, at 874-90 makes similar arguments and discusses necessary exceptions and goals of strict enforcement.}

Actions of foreign governments to enact blocking statutes cause the greatest harm to their own citizens.\footnote{See Graco, 101 F.R.D. at 527.} If a foreign party is unable to comply with discovery, it faces default judgment, dismissal, or other sanctions. Furthermore, foreign nationals may be at the mercy of their American business counterparts, who could commit fraud knowing that the foreign citizen would not be able to prove its case with documents stored abroad. Foreign blocking statutes intended to prevent U.S. discovery only aggravate the international conflict to the detriment of the foreign citizen.

The Hague Evidence Convention presents entirely different issues on international discovery. The Hague Convention is a multilateral treaty regarding international discovery between the signatory nations. As a signatory, the United States is bound by its provisions. For the U.S. judiciary to declare that "Hague Convention does not apply to the production of evidence . . . physically located within the territory of a foreign signatory"\footnote{In re Société Nationale, 782 F.2d at 124.} emasculates the Convention. International comity, rules of treaty interpretation, and constitutional doctrines of separation of powers dictate that the Hague Convention supercedes the Federal Rules of Civil Procedure in international discovery inside the signatory nations.\footnote{See Comment, Hague Convention, supra note 52 at 1485 (discussion of principles of treaty interpretation that require use of Hague Convention's procedures over the Federal Rules).} If a litigant demands discovery under the Hague Convention, courts should recognize this demand to avoid trivializing the significance of this important multilateral treaty. However, as the Convention contains
language permitting an interpretation that the Convention procedures are discretionary.\textsuperscript{145} American courts will probably continue to use familiar domestic discovery procedures.

The tension between American discovery and civil law discovery may be irreconcilable. By deciding that the Federal Rules of Civil Procedure override the Hague Evidence Convention, U.S. courts have entered international politics. With their interpretation that the Hague Convention does not apply to litigants subject to U.S. jurisdiction, U.S. courts have exacerbated the tension, as has the foreign nations' enactment of blocking statutes.

David Jamison Laing

\textsuperscript{145} See supra notes 64 to 66 and accompanying text.