Extraterritorial Discovery and the Hague Evidence Convention after *Société Nationale Industrielle Aerospatiale*: An American Interests Approach to Comity

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Extraterritorial discovery between litigants located in different nations has long been a source of conflict in foreign relations. Such discovery efforts not only can be costly and cumbersome, but also may be perceived by foreign nations as infringing upon their sovereign rights. In 1968, in an attempt to resolve this problem, the United States and twenty-three other countries met at the Hague and drafted the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.[1] The Convention, which the United States and nineteen other nations have signed,[2] outlines specific procedures by which member states may obtain evidence located in the territory of other signatories. United States courts, however, dissatisfied with the Convention's procedures, have repeatedly disregarded them, resorting instead to the discovery procedures prescribed in the Federal Rules of Civil Procedure. In turn, many foreign countries have revived their protests that the extraterritorial application of the Federal Rules impinges upon their sovereignty.

In response to this conflict, and after years of silence, the Supreme Court recently decided *Société Nationale Industrielle Aerospatiale v. United States District Court*.[3] In *Société*, the Court held that U.S. courts

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1. *Opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter Convention].

2. Signatories to the Convention include Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States. 8 MARTINDALE-HUBBELL LAW DIRECTORY (pt. VII) 15 (1988). Switzerland is considering ratification of the Convention. Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners at 2, Société Nationale Industrielle Aerospatiale v. United States District Court, 107 S. Ct. 2542 (1987) (No. 85-1695).

3. 462 U.S. —, 107 S. Ct. 2542 (1987). For other discussions of *Société*, see Note, *A Look Behind the Aerospatiale Curtain, or Why the Hague Evidence Convention Had to Be Effectively Nullified*, 23 TEX. INT'L L.J. 269 (1988); Recent Development, 29 HARV. INT'L L.J. 160 (1988); Recent Development, 24 STAN. J. INT'L L. 309 (1987); Recent Development, 17 GA. J. INT'L & COMP. L. 591 (1987); Rogers, *On the Exclusivity of the Hague Evidence Convention*, 21 TEX. INT'L L.J. 441 (1986).

must conduct a case-by-case comity analysis to determine whether to apply the discovery procedures described in the Convention or those of the Federal Rules.[4] The Court cited the Tentative Draft of the Restatement of Foreign Relations Law of the United States[5] as containing considerations "relevant to any comity analysis."[6] It did not identify, however, more precise principles that the lower courts should employ in conducting the type of comity analysis it envisioned.

This Comment argues for the adoption of a principled comity analysis that focuses solely on American interests instead of on a balancing of American and foreign interests as suggested by the *Restatement*. Section I reviews the history of the Convention and discusses the Supreme Court's reasoning in *Société*. Section II demonstrates that the comity analysis proposed in *Société* and outlined in the *Restatement*, while identifying certain American interests in particular cases, fails to provide an underlying principle that can guide lower courts in weighing those interests. Finally, section III argues that what is actually at issue in a comity analysis is the maximization of U.S. interests, and describes the analytical and practical effects of a recognition of the importance of such interests. This Comment concludes that the American interests approach would clarify the task of U.S. courts conducting comity analyses in the context of extraterritorial discovery disputes, thereby eliminating many of the difficulties currently hindering extraterritorial discovery.

I. The Convention and *Société*

A. *The Convention's History and Provisions*

In 1968, representatives from twenty civil law countries and four common law countries convened at the Hague in an effort to reconcile differences among their respective systems of civil procedure relating to the procurement of evidence.[7] The negotiations focused on the development of a system for obtaining evidence abroad that would be "tolerable" to the state fulfilling an extraterritorial discovery request and would result in the production of evidence that would be "utilizable" in the requesting state.[8] The product of this effort, the Hague Evidence Convention, was a

4. *Société*, 107 S. Ct. at 2555-56.

5. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 437 (Tent. Draft No. 7, 1986) [hereinafter RESTATEMENT].

6. *Société*, 107 S. Ct. at 2556 n.28.

7. Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae at 7, *Société* (No. 85-1695) (citing 4 CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES ET DOCUMENTS DE LA ONZIEME SESSION 202 (1970)).

8. Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, in S. EXEC. DOC. A, 92d Cong., 2d Sess. 11 (1972).

major improvement for American litigants over the pre-Convention regime, in which obtaining evidence located abroad was solely a matter of international comity and customary international law.[9]

Pursuant to Chapter I of the Convention, discovery from involuntary witnesses can be obtained through "Letters of Request" sent by a court of the requesting state to the designated Central Authority in the receiving state, asking the receiving state for assistance in compelling production of the information.[10] The Central Authority of the receiving state first determines whether the request complies with the provisions of the Convention,[11] and then forwards the request to the local authority competent to execute it.[12] If the request does not fulfill the Convention's requirements, the Central Authority conveys its objections to the authority in the requesting state that transmitted the Letter.[13]

Under Chapter II, a requesting state may obtain information from voluntary witnesses by appointing a "commissioner" as its representative or by contacting its own consular officers in the foreign state to take the evidence.[14] The commissioner or consular officer then requests permission from the Central Authority in the receiving state to take evidence from the witness and proceeds, if permission is granted, according to the conditions specified by the Central Authority.[15]

Despite the apparent simplicity of the Convention, a number of its provisions are problematic. For example, the Convention allows the

9. 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, 747 n.4 (1983).

10. Convention, *supra* note 1, arts. 1-2.

11. *Id.* art. 5. Article 3 of the Convention provides:

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed. Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

12. *Id.* art. 2.

13. *Id.* art. 5.

14. *Id.* arts. 15, 17.

15. *Id.* art. 19.

receiving state considerable latitude in determining whether to execute Letters of Request. If the Central Authority decides that execution of the request would not fall "within the functions of the judiciary" or would prejudice the "sovereignty or security" of the state, the request may be summarily refused.[16] Moreover, the local authority will not compel an individual to give evidence if she has a "privilege or duty" not to provide that evidence under the law of the executing state, nor may it compel the production of evidence protected by the law of the requesting state or by the law of a relevant third state.[17] Finally, and most importantly, a signatory state may "declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."[18]

Even if the receiving state executes the Letter of Request, the local judicial authority "shall apply its own law as to the methods and procedures to be followed" in obtaining the evidence.[19] Since laws defining the proper methods of obtaining evidence vary greatly among nations, evidence obtained through Convention procedures may not qualify for admission in the requesting state's courts. Although an executing state may attempt to comply with requests for the use of special procedures

16. *Id.* art. 12; *see also* Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 42, 48 (D.D.C. 1984) (noting ability of government of Federal Republic of Germany (FRG) to deny Letters of Request "if, in its sole discretion, a response would be contrary to the sovereignty or security interests" of that country).

17. Convention, *supra* note 1, art. 11; *see also* Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465, 485-86 (1983) (enumerating German privileges based on familial relationships, professional secrecy, technical grounds such as immediate financial damage, disgrace or prosecution of family members, or disclosure of a trade secret, which preclude enforcement of Letter of Request).

18. Convention, *supra* note 1, art. 23. There has been some debate over whether the term "pretrial" as used in the Convention was meant to have the same meaning it has in the United States. According to the Report of the U.S. Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 I.L.M. 1417, 1421 (1978) [hereinafter Report of the U.S. Delegation], the delegates to the Convention from civil law countries demonstrated a "gross misunderstanding" of the meaning of "pretrial discovery," interpreting the phrase to involve the procurement of evidence prior to the initiation of litigation for the purpose of gathering evidence to file suit. Nonetheless, the FRG, Italy, Luxembourg, and Portugal still maintain unqualified Article 23 declarations. 8 MARTINDALE-HUBBELL LAW DIRECTORY, *supra* note 2, at 17-18, 20. Such declarations may well be enforced by foreign courts. In SEC v. Banca della Svizzera Italiana, No. 81 Civ. 1836 (MP) (S.D.N.Y. filed Mar. 27, 1981), the Magistrate's Court of Milan refused to compel production of documents pursuant to Italy's declaration under Article 23. Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 17 n.17, *Société* (No. 85-1695) (citing Statement on the Examination of Witnesses as Requested by a Foreign Letter Rogatory (Pret. Milano, Italy Oct. 2, 1985)); *see also* Shemanski, *supra* note 17, at 481-82 (Central Authority of FRG refused to fulfill Letter of Request, and Munich Higher Regional Court affirmed, because trial had not yet begun and American court had not yet scrutinized evidentiary request).

19. Convention, *supra* note 1, art. 9.

necessary for the admissibility of the evidence in the requesting state, this effort will only be made to the extent that a requested special procedure is not "incompatible with the internal law of the State of execution[,] or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties."[20] Even the presence of an attorney from the requesting state to assist with special procedures requires the affirmative approval of the executing state.[21] The result is that discovery under the Convention's procedures may lead only to the procurement of evidence that is inadmissible in the requesting state's courts.[22]

Finally, even if the local authority in the foreign state complies with the Letter of Request and permits the use of the appropriate special procedures, the measure of compulsion applied by that authority to enforce the order will only be equivalent to that provided by local law.[23] Local laws, however, are frequently ineffective, thus further reducing the likelihood of successful discovery under the Convention.[24]

As a consequence of these limitations on the scope and quality of evidence obtainable under the Convention, and the additional time and expense often involved in following the Convention's procedures,[25] American litigants typically prefer that discovery proceed under the Federal Rules.[26] The more familiar Federal Rules frequently cost less to follow, and allow discovery that is "often significantly broader than is permitted in other jurisdictions."[27] Furthermore, under the Federal Rules, if the holder of the information that is located in another country

20. *Id.; see also In re* Anschuetz & Co., GmbH, 754 F.2d 602, 610 (5th Cir. 1985) ("[T]he breadth of evidence ordinarily expected from a full fledged American deposition might be restricted for any number of reasons: the foreign state's own procedures might limit or foreclose cross-examination, full participation of counsel might not be allowed, or a verbatim record might not result, thus limiting admissability of testimony in an American court."), *vacated sub nom.*, Anschuetz & Co., GmbH v. Mississippi River Bridge Auth., 107 S. Ct. 3223 (1987).

21. Convention, *supra* note 1, art. 8.

22. Work v. Bier, 106 F.R.D. 45, 54-55 (D.D.C. 1985) (discussing difficulty of obtaining admissible evidence in FRG under Convention).

23. Convention, *supra* note 1, art. 10.

24. *See* Brief for the United States and the Securities and Exchange Commission at 16 n.16, *Société* (No. 85-1695) (citing *In re* Testimony of Constandi Nasser, Trib. admin. de Paris, 6e section—2e chambre, No. 51546/6 (Dec. 17, 1985), in which French court imposed only "minor fine" on French witness who refused to provide evidence requested in Letter of Request).

25. Struve, *Discovery from Foreign Parties in Civil Cases Before U.S. Courts*, 16 N.Y.U. J. INT'L L. & POL. 1101, 1111 (1984) ("The Hague Convention represents a mode of discovery which is significantly less certain, less effective, more costly and more burdensome" than the Federal Rules).

26. Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 INT'L LAW. 575, 577 (1982) (advising American litigants to avoid Convention if evidence can be obtained without it).

27. *Société*, 107 S. Ct. at 2554.

is a party, she must cooperate or risk losing the lawsuit altogether.[28] In response to these considerations, lower courts have frequently granted discovery under the Federal Rules, even in nations which are signatories to the Convention.[29]

Predictably, the American preference for the Federal Rules has created intense friction in the international litigation arena.[30] Indeed, "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States."[31] The breadth of discovery provided by the Federal Rules, together with the active participation of litigants in the discovery process, has been a constant source of irritation, particularly to civil law countries, where such activity is often considered a threat to the sovereignty of the state and, in some cases, even a crime.[32]

Nonetheless, U.S. courts and commentators have been reluctant to abandon the American approach to discovery. A standard argument is that if foreign persons choose to do business in the United States or otherwise to benefit from the laws of the United States, then they should be obliged to follow the Federal Rules in the event of litigation.[33] In addition, even when American companies are conducting business abroad and litigation results, there is a sense that the American discovery system is likely to be fairer and more objective in balancing the interests of the two parties.[34] United States courts sometimes have doubts about the impartiality of foreign governments upon which they would have to rely for discovery if they were to order discovery to proceed under the Convention.[35]

Mistrust and confusion are enhanced by the differing conceptions of the role of the judiciary in civil and common law countries. Under a common law system, judges rely primarily on the adversary parties to

28. Shemanski, *supra* note 17, at 484.

29. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239, 240 n.3 (1986).

30. *See* Brief for the Federal Republic of Germany as Amicus Curiae at 14 n.40, *Société* (No. 85-1695) (citing Letter from Embassy of FRG to U.S. Department of State (Nov. 7, 1983), *reprinted in* Brief for the United States as Amicus Curiae at 1, Volkswagenwerk v. Falzon, 465 U.S. 1014 (1983) (No. 82-1888)).

31. RESTATEMENT, *supra* note 5, § 437 note 1.

32. *See* Shemanski, *supra* note 17, at 479; D. ROSENTHAL & W. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE 75 (1982).

33. *See, e.g.*, RESTATEMENT, *supra* note 5, § 437 note 1.

34. D. ROSENTHAL & W. KNIGHTON, *supra* note 32, at 71.

35. *See, e.g.*, *In re* Uranium Antitrust Litigation, 617 F.2d 1248, 1256 (7th Cir. 1980) (briefs presented by foreign governments found by court to be significantly biased in favor of foreign litigant).

provide the necessary facts through the discovery process.[36] In civil law countries, on the other hand, judges act as inquisitors and are often independently involved in compiling the evidence that will provide the basis for the court's decision.[37] Similarly, the division in common law countries between the pretrial and the trial stages is not formally evident in civil law countries.[38] Hence, the discovery process in civil law countries is normally perceived as part of an official government function,[39] and encroaching upon that function is viewed as a direct infringement upon the sovereignty of the state.[40]

It would appear at first glance that since the Convention was ratified after the adoption of the Federal Rules, the Convention's procedures, under the "latest law controls" rule, should govern all discovery by American litigants in member states. The preamble of the Convention, however, does not indicate that its provisions are mandatory,[41] and the Supreme Court held in *Société* that the Convention does not preclude the use of alternate means of obtaining evidence.[42]

Since both the Convention and the Federal Rules are of equal legal force, the dilemma faced by U.S. courts has been choosing which set of procedures to apply. Prior to *Société*, lower courts and commentators had adopted several different approaches. At one extreme, some commentators urged that the Convention should provide the exclusive means of obtaining evidence from foreign parties, since application of the Federal Rules would defeat the purpose of the Convention.[43] Following a more moderate approach, a number of courts instead required that the

36. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 531 (1953).

37. *Id.*

38. *See* R. SCHLESINGER, H. BAADE, M. DAMĂSKA & P. HERZOG, COMPARATIVE LAW 426-27 (5th ed. 1980) [hereinafter COMPARATIVE LAW].

39. Maier, *supra* note 29, at 242-43.

40. Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 INT'L & COMP. L.Q. 646, 647 (1969). It should be noted, however, that the American scope of discovery is not offensive just to civil law countries. Those countries that follow the common law tradition, such as the United Kingdom, Canada, and Australia, find the scope of American pretrial discovery to be equally exasperating. D. ROSENTHAL & W. KNIGHTON, *supra* note 32, at 68-70.

41. Convention, *supra* note 1, preamble.

42. *Société*, 107 S. Ct. at 2552 ("In the absence of explicit textual support, we are unable to accept the hypothesis that the common law contracting States abjured recourse to all preexisting discovery procedures at the same time that they accepted the possibility that a contracting Party could unilaterally abrogate even the Convention's procedures." (footnote omitted)).

43. *See, e.g.*, Radvan, *The Hague Evidence Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: Several Notes Concerning Its Scope, Method and Compulsion*, 16 N.Y.U. J. INT'L L. & POL. 1031 (1985); Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231 (1986).

Convention be the discovery method of first resort, arguing that such a rule would respect the sovereignty of foreign states yet leave open the possibility of discovery under the Federal Rules if the Convention proved ineffective.[44] More recently, some courts suggested that use of the Convention is optional with respect to foreign parties over whom a court has *in personam* jurisdiction, since courts generally have greater authority over these litigants.[45]

B. Société

It was this conflict between the Federal Rules and the Convention that the Supreme Court recently addressed in *Société*. The decision represented the first attempt by the Court in twenty-nine years to address some of the conflicts created by the breadth of American discovery procedures.[46] The extent of the concern over the outcome was demonstrated by the numerous amici briefs filed by representatives of the Convention's signatories and by American organizations.[47]

In *Société*, the pilot and passenger of an airplane manufactured by two corporations owned by the government of France brought suit in the Federal District Court for the Southern District of Iowa, claiming that they had suffered personal injuries as a result of the crash of the airplane. The French defendants responded to initial discovery requests under the Federal Rules without objection, but later filed a motion for a protective order, arguing that since they were French corporations and discovery was to be conducted in France, the Convention should provide the exclusive procedures for conducting discovery. The Magistrate denied the defendants' motion, reasoning that the U.S. interest in protecting its citizens from defective foreign products outweighed the French interest in protecting its citizens from broad American discovery procedures. The Eighth Circuit permitted immediate appellate review, due to the sig-

44. *See, e.g.*, Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983); Laker Airways, Ltd. v. Pan American World Airways, 103 F.R.D. 42, 51 (D.D.C. 1984).

45. *See, e.g.*, *In re* Anschuetz & Co., GmbH, 754 F.2d 602 (5th Cir. 1985), *vacated sub nom.*, Anschuetz & Co., GmbH v. Mississippi River Bridge Auth., 107 S. Ct. 3223 (1987).

46. The last such case heard by the Court, and the only one since World War II, was Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). In *Rogers*, the Court addressed the conflict created by a Swiss penal statute that prohibited the discovery permitted under the Federal Rules. The Court held that the Swiss plaintiff could not be sanctioned for failing to provide the requested evidence, since Swiss blocking statutes prohibited such discovery, and the Swiss plaintiff had made a good faith effort to comply with the American court order.

47. Briefs were filed by representatives from France, Italy, Germany, Switzerland, and several American organizations, including the Securities and Exchange Commission on behalf of the U.S. government.

nificance of the question presented, but ultimately denied the mandamus petition, holding that the Convention is inapplicable to foreign litigants over whom a lower court has jurisdiction.[48]

After considering and rejecting numerous means of dealing with the conflict,[49] the Supreme Court ultimately adopted the approach of a case-by-case comity analysis to resolve extraterritorial discovery disputes under the Convention.[50] The Court summarily rejected the Court of Appeal's position, noting that "the text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves."[51] In addition, the Court indicated that under the text of the Convention, U.S. courts are not required to adhere to the procedures outlined in the Convention, nor are they obliged to attempt to use the Convention's procedures first before resorting to the Federal Rules.[52] Thus, given the countervailing U.S. interest in the " 'just, speedy, and inexpensive determination' of litigation,"[53] forcing U.S. courts to comply with either set of rules would be "unwise."[54] The Court concluded that "the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation . . . ."[55] To assist the lower courts in conducting this individual comity analysis, the Court referred to the provisions of the *Restatement* as containing "concerns that guide a comity analysis."[56] But the development of more specific principles or rules was left to the lower courts.

II. Comity and the *Restatement*: A Critique

The concept of comity between nations was first discussed by the Supreme Court in 1797 in *Emory v. Grenough*.[57] Citing Ulrich Huber, a Dutch jurist of the seventeenth century, the Court stated:

> "By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens . . . . [N]othing would be more inconvenient in the promiscuous intercourse and practice of mankind, than

48. *Société*, 107 S. Ct. at 2546-48.
49. *Id.* at 2550-56.
50. *Id.* at 2555-56.
51. *Id.* at 2554.
52. *Id.* at 2553-55.
53. *Id.* at 2555 (citing FED. R. CIV. P. 1).
54. *Id.*
55. *Id.*
56. *Id.* at 2555 n.28.
57. 3 U.S. (3 Dall.) 369 (1797).

> that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law . . . ."[58]

Just short of a century later the Court rearticulated its notion of comity in *Hilton v. Guyot*,[59] in what is perhaps the Court's most frequently cited comity formulation to date:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[60]

A. *Problems with the Concept of Comity*

In recent years, various attempts have been made by lower courts and by commentators to give some content to the *Hilton* Court's abstract notion of comity through the articulation of factors that are pertinent to a comity analysis.[61] But the mere proviso of the Supreme Court that comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other," has not provided the definitional guidance necessary either to select factors or to make decisions based on those factors. Consequently, decisions by courts attempting a comity analysis have been marked by inconsistency, unpredictability, and, at times, even unfairness.[62] With respect to extraterritorial discovery in particular, the lack of a more explicit standard has thus led lower courts to conduct only a cursory evaluation of factors deemed relevant.[63] The inherent bias of U.S. courts toward use of the

58. *Id.* at 370 n.* (quoting 2 HUBERUS, B.I., Tit. 3, 260).
59. 159 U.S. 113 (1895).
60. *Id.* at 163-64.
61. *See infra* note 70.
62. Laker Airways Ltd. v. Sabena, 731 F.2d 909, 937 (D.C. Cir. 1984) ("Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain.").
63. For instance, numerous courts have abandoned the Convention when the receiving country in question has declared, pursuant to article 23 of the Convention, that it will not execute Letters of Request that are "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." *See, e.g.*, *In re* Anschuetz & Co., GmbH, 754 F.2d 602, 612 (5th Cir. 1985), *vacated sub nom.*, Anschuetz & Co., GmbH v. Mississippi River Bridge Auth., 107 S. Ct. 3223 (1987); Wilson v. Lufthansa German Airlines, 489 N.Y.S.2d 575, 578 (A.D. 1985). These courts summarily determined that their need for the documents superceded the foreign sovereign's interest. Since article 23 is, however, not clearly designed to bar all discovery of documents but rather to limit the scope of discovery, it was probably not necessary for these court to abandon the Convention completely. Report of the U.S. Delegation, *supra* note 18, at 1421; *see also* Shemanski, *supra* note 17, at 480. Other courts have been similarly cursory in their analysis. *See, e.g.*, Murphy v. Reifenhauser K.G. Maschinenfabrik, 101 F.R.D. 360, 363 (D. Vt. 1984) (comity does not require use of Conven-

more familiar Federal Rules has resulted in ill-considered decisions favoring the party seeking discovery.[64] Even when the lower courts have conducted a more thoughtful evaluation of what they consider to be relevant factors, the lack of definition of the concept of comity has often resulted in conflicting holdings under similar factual circumstances.[65] Despite the obvious weaknesses of many of these decisions, their fundamental unfairness has more often than not gone unremedied, since appellate review of trial court decisions on discovery issues is only available before final judgment through the unusual and difficult process of extraordinary writ.[66]

The holding in *Société* has the potential to perpetuate the foregoing difficulties. In *Société*, the Court vaguely summarized the doctrine of comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[67] After noting that "the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation,"[68] the Court cited certain factors proposed by the seventh tentative draft of the revised Restatement of Foreign Relations Law as "relevant" to this "particularized analysis."[69] Neither the opinion nor the *Restatement*, however, provide an underlying definition of comity that would better guide the selection of relevant factors or serve as a basis for future court decisions.[70] As Justice Blackmun noted in his separate opinion in *Société*,

tion during latter stages of discovery, particularly where it appears that a request under Convention would be "futile"); Lasky v. Continental Prod. Corp., 569 F. Supp. 1227, 1229 (E.D. Pa. 1983) (uncertainty whether plaintiff's discovery request would violate German law or German sovereignty led to denial of protective order); Work v. Bier, 106 F.R.D. 45, 55 (D.D.C. 1985) (relying primarily on law review article, court concluded that it was "obvious" that Convention would be "highly ineffectual").

64. Oxman, *supra* note 9, at 741-42.

65. Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 505 (W. Va. 1985) (reconciling contradictory decisions).

66. Boreri v. Fiat S.P.A., 763 F.2d 17, 20 (1st Cir. 1985) (review of lower court's decision to use Convention as opposed to Federal Rules denied).

67. 107 S. Ct. at 2555 n.27.

68. *Id.* at 2555 (footnote omitted).

69. *Id.* at 2555 n.28.

70. Numerous attempts have been made, in contexts other than discovery, to propose factors that are relevant to a comity analysis, and all or some may be relevant in particular extraterritorial discovery cases. Part of the objective of this Comment is to provide a framework for a comity analysis that can effectively utilize not only the *Restatement* factors but also any additional factors, such as those suggested below, when they become relevant to American interests.

In Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), the court suggested the following factors:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the location or principal places of business of corporations, the extent to which en-

the majority opinion fails "to provide lower courts with any meaningful guidance for carrying out [the Court's case-by-case] inquiry."[71]

B. *Application of the* Restatement *Approach to Comity*

The *Restatement* typifies the approach taken by many lower courts when conducting a comity analysis: it simply lists a number of factors that should be balanced by courts considering whether to compel production of evidence located abroad under the Federal Rules or the Convention. The basic assumption underlying the *Restatement*'s analysis is that foreign and American interests should be weighed against each other on an equal basis. A review of section 437 of the *Restatement* explains how it is meant to operate in practice:

> (1)(a) [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

forcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614 (footnote omitted).

The Third Circuit has suggested some additional considerations when the issue is the application of antitrust laws outside the United States:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979).

In the context of international discovery disputes, many courts have relied upon section 40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). *See, e.g.*, Compagnie Francaise d'Assurance v. Phillips Petroleum Co., 105 F.R.D. 16, 29-30 (S.D.N.Y. 1984). That section suggests considering the following factors when the laws of two states with concurrent enforcement jurisdiction over the conduct conflict:

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(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.

71. *Id.* at 2558 (Blackmun, J., concurring in part, dissenting in part).

> 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. . . .
>
> . . . .
>
> (c) In issuing an order directing production of information located abroad, a court or agency in the United States should take into account [1] the importance to the investigation or litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] whether the information originated in the United States; [4] the availability of alternative means of securing the information; and [5] 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.

Each of the factors listed in the *Restatement* flows from some short- or long-term American domestic or external interest. Factors (1) and (4), for example, assist a court in assessing the significance of the short-term, domestic U.S. interest in the fair resolution of a specific dispute. Consideration of the "importance" and "availability" of documents is crucial to a court's evaluation of the litigant's need for the discovery.

Factors (2) and (3), on the other hand, address the short-term American interest in the fair treatment of the individual from whom discovery is sought. "[T]he degree of specificity of the request" helps a court determine whether the burden that it might be placing upon the person from whom discovery is sought is justified, considering both the difficulty of providing the requested information and the degree to which the request runs contrary to the normal privileges to which the individual would be entitled in her own country. "[W]hether the information originated in the United States" informs the court as to whether the person holding the evidence brought the situation upon herself, either by benefiting from U.S. laws while conducting her affairs in the United States, or by intentionally moving the information to another state to block discovery. In either case, the party is considered to deserve less consideration for the difficulties she might endure in providing the discovery.

Finally, the fifth factor listed in the *Restatement*, referring to "important interests" of the United States and of the foreign state, is a catch-all category that includes within it the short-term, domestic policy interests of the United States in the fair resolution of the particular case at issue, as well as the long-term external American interests in maintaining positive relations with the foreign country. In the comments on factor (5), the *Restatement* notes a distinction between these two types of American

interests but still implicitly maintains that foreign interests are something distinct from both.[72]

This distinction between the interests of the foreign nation and U.S. interests is artificial, and confuses the basic purpose of a realistic comity analysis. Nonetheless, the factors suggested by the *Restatement* are still relevant to an individualized comity decision and should not be discarded.[73] Instead, the principle underlying the use of these factors should be clarified to give courts a set of workable guidelines for their task.

72. RESTATEMENT, *supra* note 5, § 437 comment c.

73. The *Restatement* is useful in defining the American interests at stake in any given case. However, the factors listed by the *Restatement* do not represent a comprehensive list of all the considerations that might bear on a comity analysis. The *Société* Court recognized this when it indicated that "the *Restatement* may not represent a consensus of international views on the scope of the District Court's power to order foreign discovery in the face of objections by foreign states." 107 S. Ct. at 2555-56 n.28. Nonetheless, the Court explicitly stated that "[t]he nature of the concerns that guide a comity analysis are suggested by the *Restatement*." *Id.* at 2555 (citation omitted). In spite of its elevation to the status of "guide," the *Restatement* is incomplete.

An initial flaw of the *Restatement* is that it focuses solely on the treatment of parties to the dispute, and fails to address how the distinction between parties and non-parties might bear on a court's decision. In particular, the additional offense to foreign states often associated with discovery from non-parties might strongly counsel in favor of the Convention when information is sought from non-parties.

A second weakness of the *Restatement* is that it only addresses those situations in which a court is *compelling* a party to provide evidence under the Federal Rules. According to a comment, "[R]equests to produce documents or information located abroad should, as a matter of good practice, be issued as an order by the court, not merely in the form of a demand by a private party." RESTATEMENT, *supra* note 5, § 437 comment a. The extraterritorial use of compulsive discovery measures by an American court is certain to be less well received by the foreign state than the passive allowance of voluntary production of the same information, as it carries with it the official sanction of the U.S. government. Discovery requests that are independently served upon a foreign witness by a litigant in an American court are less offensive, since the parties involved are acting independently of their governments. Thus it is not in the United States' best interest for its courts to interfere with voluntary production of evidence under the Federal Rules, since any damage to positive relations between the countries is likely to be minimal.

A final failing of the *Restatement* is that it omits any distinction between those cases where the *scope* of discovery is at stake and those where the issue is the *speed or expense* of discovery. With its reference to "the importance to the litigation . . . of the documents or other information requested" as a relevant consideration, RESTATEMENT, *supra* note 5, § 437(1)(c), the *Restatement* implicitly suggests that it is primarily addressed to those situations where the scope of discovery is at issue, that is, where the possibility exists of not obtaining important information at all. The relevance of the speed or expense of discovery is left unaddressed.

The *Restatement* is thus generally limited in its utility to those situations where a court is determining whether to compel a party to provide information under the Federal Rules to protect the scope of discovery. Although the Court suggested that the *Restatement* factors should merely "guide" a comity analysis, these additional considerations are highly relevant and should not be excluded from consideration.

III. An American Interests Approach to Comity

Lower courts need a unifying principle to guide them through the large number of potentially conflicting factors that they must consider to follow the *Restatement*'s comity analysis for extraterritorial discovery disputes. This Comment suggests that the underlying principle of a realistic comity anlysis is, in fact, very simple: consideration of American interests only. In contrast to the *Restatement*'s presumption of balancing U.S. interests against foreign interests, all comity requires is an examination of the U.S. interests that, in and of themselves, include consideration of foreign interests. The Supreme Court hinted at the ultimate primacy of American interests in *Société* when, quoting *Hilton v. Guyot*, it stated its unwillingness to compromise "the rights of its own citizens or of other persons who are under the protection of its laws."[74] Concerns about the interests of foreign states are similarly based in self-interest, though they tend to be indirect long-term interests. Justice Blackmun noted in his separate opinion in *Société* some relevant comments of Justice Story on the subject:

> Justice Story used the phrase "comity of nations" to "express the true foundation and extent of the obligation of the laws of one nation within the territories of another. The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from *mutual interest and utility*, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, *in order that justice may be done to us in return*."[75]

Justice Story thus emphasized the self-interest that motivates nations to engage in a comity analysis.

Similarly, in their comments on section 437 of the *Restatement*, the drafters recognized that the interests of the United States include

> not merely the interest of the prosecuting or investigating agency in the particular case, but the interests of the United States generally in international cooperation in law enforcement and judicial assistance, in the joint

74. *Société*, 107 S. Ct. at 2555 n.27 (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)). This quotation suggests that comity requires U.S. courts to operate within certain parameters. On the one hand, "international duty and convenience" normally require that the "acts" of a foreign sovereign be recognized. On the other hand, the nation according recognition need not sacrifice the "rights of its own citizens or of other persons who are under the protection of its laws." *Id.* These considerations thus represent boundaries rather than factors that are traded off against one another.

75. *Id.* at 2561 n.10 (Blackmun, J., concurring in part, dissenting in part) (citing J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 35, 38 (8th ed. 1883)) (emphasis added) (citations omitted).

approach to problems of common concern, in the applicability of formal or informal international agreements, and in effective international relations.[76]

At the same time, however, the *Restatement* also proposes independent techniques for determining a foreign state's interest in a particular case,[77] and thus separates the discussion of foreign interests from that of the United States' interest in effective and positive foreign relations. This distinction is artificial; the reasons why American courts should examine and consider foreign interests are already suggested by the listing of American interests.

A. *Ramifications of the American Interests Approach*

Interpreting comity to require that American courts consider the United States' interest in maintaining good relations with other countries, rather than the interests of foreign nations in and of themselves, has numerous positive analytical ramifications. As an initial matter, instead of viewing foreign interests as having independent value, under the American interests approach the courts would determine as a practical matter the potential damage that a decision in favor of the Federal Rules might cause to relations with foreign nations. This determination would involve an evaluation of the strength of the American interest in good relations with a particular country, and a review of the possible harm that might occur to those relations should the court employ the Federal Rules.[78]

Following an American interests approach would provide the lower courts with a more precise definition of comity to guide them in arriving at decisions. In contrast to the amorphous zone between "obligation, on the one hand, . . . [and] courtesy and good will, upon the other,"[79] the point at which *American interests are maximized* is a more specific standard that lower courts can apply to the choice between the Federal Rules and the Convention. Under the vague standard currently endorsed by the Supreme Court, lower courts have no guidance as to how seriously to treat foreign interests. When those interests conflict with American

76. RESTATEMENT, *supra* note 5, § 437 comment c.

77. *Id.*

78. An objection to the American interests approach is that explicit acknowledgement of the primacy of U.S. interests will offend foreign states, and might itself harm long-term American interests through retaliatory action by foreign states attempting to discourage use of the Federal Rules. Such a backlash is already evident; many countries have passed blocking statutes and in some cases have refused to enforce judgments by American courts. D. ROSENTHAL & W. KNIGHTON, *supra* note 32, at 75-76. The courts must treat this issue as a strategic concern, and attempt to construct their opinions to propitiate foreign states while pursuing the American interests rationale described herein.

79. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

concerns, the lower courts are left to their own devices to determine which should prevail. Under the American interests approach, the foreign interests could be only as weighty as the United States' desire for positive relations with the nation in question, and then only to the extent that frustration of the foreign interests would harm those relations. Conversely, the degree to which foreign interests conflict with American principles of justice would tend to weigh against such interests from the perspective of domestic American concerns. Straightforward balancing of these considerations would provide an answer to the question of how the court should treat the foreign interests and thus, in conjunction with other relevant American interests, point to which discovery rules the court should apply.

The results arrived at under the American interests test would also differ from those provided by the alternative of weighing foreign and American interests equally. Under the American interests approach to comity, a foreign state may have a greater formal interest in having the Convention applied than the United States has in seeing the Federal Rules applied. The foreign interests may, however, be so repugnant or contrary to American notions of justice that, although the simple balancing of interests might lead to application of the Convention (since the foreign interest would be technically weightier than the U.S. interest), the American desire for positive relations would not merit the compromise of other important American interests such as judicial fairness. For example, a foreign state might provide less discovery under the Convention to foreign parties than it does to domestic parties seeking discovery under the state's domestic procedures. In such a case, the foreign state would argue that this difference in procedure represented a strong national interest in protecting its citizens. Nonetheless, American interests, however nominal, would still favor the use of the Federal Rules, since the expressed foreign interest would not be worthy of significant consideration.

The American interests approach is also acceptable from a separation of powers perspective. This is true despite the fact that the notion of courts conducting any type of international comity analysis seems to run counter to the traditional separation of powers among the three branches of the federal government. In an amicus brief in *Société*, the Executive Branch explicitly encouraged the Court to adopt a comity approach to

resolving conflicts under the Convention,[80] and Congress has not objected.

It might be argued that this encouragement is only valid in the context of a particular case, where a court is adjudicating primarily the interests of the parties before it. This quintessentially judicial element would validate the court's involvement in foreign relations. The American interests approach, however, might be viewed as extraneous to the parties and to the heart of the dispute, and thus more likely to encourage the sort of policy-making typically reserved to the political branches. All cases involving comity, however, necessarily involve considerations that go beyond the parties and into the realm of foreign relations. Even when a court gives direct consideration to a foreign sovereign's interests, the court is involved in as much, if not more, of an "executive" exercise than when it views those interests from the perspective of long-term American interests.[81] Both types of interests go beyond the concerns of the particular parties involved in the dispute: a decision to sacrifice a foreign interest is an executive-type decision, whether that interest is weighed directly against U.S. interests or is considered simply as one factor in the U.S. interest in positive relations. The Executive urged the Court to make this type of determination in all extraterritorial discovery disputes in *Société*,[82] and even the *Restatement* clearly suggests that this process must include consideration of how long-term American interests might be affected by a decision bearing on foreign interests.[83]

A reasoned comity analysis should thus go forward on the basis of the honest and pragmatic realization that what are truly being balanced are American interests that, in and of themselves, include consideration of foreign interests.[84] The lower courts would be performing their duties

80. Brief for the United States and the Securities and Exchange Commission at 19-20, *Société* (No. 85-1695). Note, however, that the Executive did not advocate the use of the *Restatement*'s factors in its brief. In fact, an American interests approach to comity would be more respectful of the traditional separation of powers than the *Restatement*'s equal balancing of foreign and U.S. interests. *See infra* note 81.

81. In some instances, a more traditional approach of equally balancing foreign and American interests places a greater strain on the separation of powers. For instance, if a lower court were to allow a foreign interest that is antithetical to American interests to prevail because the foreign state felt particularly strongly about the issue, the court would be straining at the boundary of its power in the area of foreign affairs, encroaching upon the Executive's efforts to act in the United States' best interest in the arena of foreign relations. Any approach that considers foreign interests as independently valid, instead of as relevant only to the American interests that they promote or harm, ignores the fact that the foreign interests vary in legitimacy by American standards, forcing U.S. courts into the role of international arbiters.

82. Brief for the United States and the Securities and Exchange Commission at 19-20, *Société* (No. 85-1695).

83. RESTATEMENT, *supra* note 5, § 437 comment c.

84. Such an approach might conflict with Justice Blackmun's separate opinion where he states that "[c]omity is not just a vague political concern favoring international cooperation

within the parameters of the Supreme Court's declaration that comity is neither a matter of absolute obligation nor of mere courtesy and good will. Moreover, the American interests approach would provide lower courts with a more precise rule of decision and a definition of comity upon which an analytical framework could be constructed.

B. *Application of the American Interests Approach*

Assuming that a realistic comity analysis simply requires courts to consider foreign interests solely as they impact upon the American interest in positive foreign relations, a straightforward categorization of the various American interests involved would provide a framework for a comity analysis. In brief, each discovery dispute involving the Federal Rules and the Convention essentially involves American policy interests in both internal and foreign affairs. The United States has an immediate, domestic interest in providing a just outcome for the participants in the discovery dispute.[85] It also has longer-term interests in advancing the policies underlying the claim at issue. Finally, the United States has an interest in ensuring that positive relations with foreign states are maintained.[86]

With regard to more immediate domestic concerns, when an individual seeks discovery under the Federal Rules, the implicit principles of American justice underlying the discovery provisions of the Federal Rules translate into an interest in providing the individual with speedy and inexpensive[87] discovery of a broad scope.[88] On the other hand, the United States does not want to unduly burden the individual from whom discovery is sought.[89] If utilization of the Federal Rules would work some substantial hardship upon the individual resisting discovery, then the U.S. desire for "just" treatment of the participants in the discovery dispute should incline a court to forgo use of the Federal Rules. This approach is supported by the Supreme Court's holding in *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, where the Court held that a litigant who would have faced sanctions in the country within which discovery was sought if he had provided discovery under the Federal Rules should not be sanctioned by U.S. courts for his failure to provide the information, since he had made a

when it is in our interest to do so." *Société*, 107 S. Ct. at 2561 n.10 (Blackmun, J., concurring in part, dissenting in part).

85. FED. R. CIV. P. 1.
86. *See generally* RESTATEMENT, *supra* note 5, § 437 comment c.
87. FED. R. CIV. P. 1.
88. FED. R. CIV. P. 26(b)(1).
89. FED. R. CIV. P. 1.

good faith effort to comply with the request.[90] Under this rationale, courts normally should forego discovery under the Federal Rules, if doing so would cause some substantial injustice to the individual from whom discovery is sought.

Of course, as the major thesis of this Comment has indicated, a U.S. court is obliged to balance the individual equities to determine whether American internal interests favor use of the Federal Rules or the Convention. The short-term American interest articulated in the Federal Rules in "just" treatment of the individuals involved in a discovery dispute[91] may thus lead to a different conclusion as to the applicability of the Federal Rules than would a focus on positive U.S. foreign relations. Only when these short-term, domestic policies weigh in favor of the Federal Rules, however, does a comity issue arise. Were the scales of American internal interests to tilt in favor of the Convention, then the U.S. interest in positive relations with foreign states would not be a factor, since the application of the Convention's procedures to discovery in signatory nations would not threaten their sovereignty.

Assuming that in a particular case U.S. domestic, short-term interests favor use of the Federal Rules, the issue then becomes whether the net sum of the U.S. long-term policy and foreign relations interests similarly supports application of the Federal Rules. Here again, there are two sides to the issue. On the one hand, the United States has policy interests of varying strength in rigorous enforcement of the law underlying the substantive claim in dispute.[92] Whether a government agency or a private party is pursuing the claim, discovery that is adequate in scope, speed, and cost is vital to the effective enforcement of the substantive law. On the other hand, the foregoing must be balanced against the desire of the United States to maintain good relations with other countries. If the court determines that long-term American policy interests outweigh the United States' desire for positive relations, then this determination, in tandem with the earlier determination relating to immediate domestic interests, would clearly indicate that application of the Federal Rules would maximize American interests.

The most difficult cases will arise when the American short-term, domestic policy interests do not outweigh the desire for positive relations. In these instances, U.S. foreign affairs goals are pitted directly against U.S. domestic principles mandating fair and effective discovery for the individual litigant under the Federal Rules. Of course, the two types of

90. 357 U.S. 197 (1958); *see also supra* note 46.
91. *See* FED. R. CIV. P. 1.
92. *See generally* RESTATEMENT, *supra* note 5, § 437 comment c.

interests do not lend themselves well to comparison, for such a comparison would involve not merely the separate balancing of individual equities or of abstract national concerns; instead, it would require interactive consideration of both.

But courts undertake this type of analysis frequently. National and state governments often compromise individual rights for the sake of some state objective through legislation. The courts have evaluated the constitutionality of many such laws by weighing the importance of the ostensible state objective against the extent to which the individual is being compromised.[93] Disputes over application of the Federal Rules or the Convention should be viewed in a similar manner, with the only difference being that it will largely be left to the courts to determine the exact nature of the individual and state interests prior to balancing them.[94]

Conclusion

The recent history of comity analysis in the arena of American extraterritorial discovery has been a confused one. The unguided efforts of the lower courts have resulted in uncertain and unpredictable decisions of questionable fairness and utility. Unfortunately, the vague decision by

93. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (Amish forced to pay social security tax despite religious objections); Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) (woman allowed not to have picture on driver's license for religious reasons), *aff'd by an equally divided Court*, 472 U.S. 478 (1985).

94. When facing particularly difficult comity decisions, the lower courts might follow an approach that is similar in effect to that which preceded adoption of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1602-1611 (FSIA). The FSIA states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided [for in certain cases]." *Id.* § 1604. In the years immediately prior to the adoption of the FSIA, the State Department issued "Tate Letters" that expressed the administration's position on whether the courts should grant foreign parties sovereign immunity. *See, e.g.*, 22 STATE DEP'T BULL. 984-85 (1952); *see also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (discussing development of *Bernstein* exception which permits judicial branch to respond to advice of executive branch and not apply Act of State Doctrine); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949); Bernstein v. Van Heyghen Freres S.A., 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). Even after the passage of the FSIA, the State Department has occasionally acted in an advisory role in determining entitlement to immunity. *See, e.g.*, United States v. Arlington County, Va., 702 F.2d 485 (4th Cir. 1983). Having the Executive advise the courts in a similar manner on difficult comity issues would help courts more accurately assess American foreign policy interests. Although, as the Supreme Court noted in Banco Nacional de Cuba v. Sabbatino, "It cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance,' " 376 U.S. 398, 423 (1984) (quoting Baker v. Carr, 369 U.S. 186, 211 (1964)), the Executive is usually better situated to evaluate long-term American foreign policy interests. Furthermore, this solution would be consistent with the *Restatement*, as it suggests that the involvement of the U.S. Government would be a useful means of determining the United States' interests in a particular case. RESTATEMENT, *supra* note 5, § 437 comment c.

the Supreme Court in *Société* has done little to alleviate the problem. While the Court's reference to the factors in the *Restatement* might assist lower courts in defining the American interests in certain cases, even the *Restatement* is of limited use. Like the majority opinion in *Société*, the *Restatement* does not provide a clear underlying principle to guide a comity analysis, nor do the factors proposed in the *Restatement* comprise a complete list of relevant considerations.

The adoption of an American interests approach to comity would effectively eliminate many of the foregoing difficulties. As a threshold matter, it would provide U.S. courts with a sharp definition of the basic interests truly at issue in a comity analysis—American interests—and would therefore facilitate the development of a systematic means of weighing the importance of those interests. Given that the natural objective of the balancing exercise is the maximization of American interests, this schema would also provide a rule of decision and a way to evaluate the relevance of specific factors, such as those included and excluded by the *Restatement*.

Although the Supreme Court failed to provide principled guidance for extraterritorial discovery disputes in *Société*, the lower courts are not compelled to repeat the mistakes of the past. Courts must now begin to fashion principles to guide them in implementing the general standard set forth in *Société*. The American interests approach is one suggestion to help them with this task.