

Internal Revenue Code (26 U.S.C.)

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**26 U.S.C.**

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Title 26 - INTERNAL REVENUE CODE

Subtitle A - Income Taxes

CHAPTER 1 - NORMAL TAXES AND SURTAXES

Subchapter N - Tax Based on Income From Sources Within or Without the United States

PART III - INCOME FROM SOURCES WITHOUT THE UNITED STATES

Subpart I - Admissibility of Documentation Maintained in Foreign Countries

Sec. 982 - Admissibility of documentation maintained in foreign countries

From the U.S. Government Printing Office, [www.gpo.gov](http://www.gpo.gov)**§982. Admissibility of documentation maintained in foreign countries****(a) General rule**

If the taxpayer fails to substantially comply with any formal document request arising out of the examination of the tax treatment of any item (hereinafter in this section referred to as the “examined item”) before the 90th day after the date of the mailing of such request on motion by the Secretary, any court having jurisdiction of a civil proceeding in which the tax treatment of the examined item is an issue shall prohibit the introduction by the taxpayer of any foreign-based documentation covered by such request.

**(b) Reasonable cause exception****(1) In general**

Subsection (a) shall not apply with respect to any documentation if the taxpayer establishes that the failure to provide the documentation as requested by the Secretary is due to reasonable cause.

**(2) Foreign nondisclosure law not reasonable cause**

For purposes of paragraph (1), the fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the requested documentation is not reasonable cause.

**(c) Formal document request**

For purposes of this section—

**(1) Formal document request**

The term “formal document request” means any request (made after the normal request procedures have failed to produce the requested documentation) for the production of foreign-based documentation which is mailed by registered or certified mail to the taxpayer at his last known address and which sets forth—

- (A) the time and place for the production of the documentation,
- (B) a statement of the reason the documentation previously produced (if any) is not sufficient,
- (C) a description of the documentation being sought, and
- (D) the consequences to the taxpayer of the failure to produce the documentation described in subparagraph (C).

**(2) Proceeding to quash****(A) In general**

Notwithstanding any other law or rule of law, any person to whom a formal document request is mailed shall have the right to begin a proceeding to quash such request not later than the 90th day after the day such request was mailed. In any such proceeding, the Secretary may seek to compel compliance with such request.

**(B) Jurisdiction**

The United States district court for the district in which the person (to whom the formal document request is mailed) resides or is found shall have jurisdiction to hear any proceeding brought under subparagraph (A). An order denying the petition shall be deemed a final order which may be appealed.

**(C) Suspension of 90-day period**

The running of the 90-day period referred to in subsection (a) shall be suspended during any period during which a proceeding brought under subparagraph (A) is pending.

**(d) Definitions and special rules**

For purposes of this section—

**(1) Foreign-based documentation**

The term “foreign-based documentation” means any documentation which is outside the United States and which may be relevant or material to the tax treatment of the examined item.

**(2) Documentation**

The term “documentation” includes books and records.

**(3) Authority to extend 90-day period**

The Secretary, and any court having jurisdiction over a proceeding under subsection (c)(2), may extend the 90-day period referred to in subsection (a).

**(e) Suspension of statute of limitations**

If any person takes any action as provided in subsection (c)(2), the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which the proceeding under such subsection, and appeals therein, are pending.

(Added Pub. L. 97–248, title III, §337(a), Sept. 3, 1982, 96 Stat. 629; amended Pub. L. 98–369, div. A, title VII, §714(k), July 18, 1984, 98 Stat. 963.)

**AMENDMENTS**

**1984**—Subsec. (d)(3), (4). Pub. L. 98–369 redesignated par. (4) as (3) and struck out former par. (3) which provided that an item was to be treated as foreign connected if directly or indirectly from a source outside the United States, or the item (in whole or in part) purported to arise outside the United States, or was otherwise dependent on transactions occurring outside the United States.

**EFFECTIVE DATE OF 1984 AMENDMENT**

Amendment by Pub. L. 98–369 effective as if included in the provision of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248, to which such amendment relates, see section 715 of Pub. L. 98–369, set out as a note under section 31 of this title.

**EFFECTIVE DATE**

Section 337(c) of Pub. L. 97–248, as amended by Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that: “The amendments made by this section [enacting this section] shall apply with respect to formal document requests (as defined in section 982(c)(1) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954], as added by this section) mailed after the date of the enactment of this Act [Sept. 3, 1982].”

## **§6038. Information reporting with respect to certain foreign corporations and partnerships**

### **(a) Requirement**

#### **(1) In general**

Every United States person shall furnish, with respect to any foreign business entity which such person controls, such information as the Secretary may prescribe relating to—

(A) the name, the principal place of business, and the nature of business of such entity, and the country under whose laws such entity is incorporated (or organized in the case of a partnership);

(B) in the case of a foreign corporation, its post-1986 undistributed earnings (as defined in section 902(c));

(C) a balance sheet for such entity listing assets, liabilities, and capital;

(D) transactions between such entity and—

(i) such person,

(ii) any corporation or partnership which such person controls, and

(iii) any United States person owning, at the time the transaction takes place—

(I) in the case of a foreign corporation, 10 percent or more of the value of any class of stock outstanding of such corporation, and

(II) in the case of a foreign partnership, at least a 10-percent interest in such partnership; and

(E)(i) in the case of a foreign corporation, a description of the various classes of stock outstanding, and a list showing the name and address of, and number of shares held by, each United States person who is a shareholder of record owning at any time during the annual accounting period 5 percent or more in value of any class of stock outstanding of such foreign corporation, and

(ii) information comparable to the information described in clause (i) in the case of a foreign partnership.

The Secretary may also require the furnishing of any other information which is similar or related in nature to that specified in the preceding sentence or which the Secretary determines to be appropriate to carry out the provisions of this title.

#### **(2) Period for which information is to be furnished, etc.**

The information required under paragraph (1) shall be furnished for the annual accounting period of the foreign business entity ending with or within the United States person's taxable year. The information so required shall be furnished at such time and in such manner as the Secretary shall prescribe.

#### **(3) Limitation**

No information shall be required to be furnished under this subsection with respect to any foreign business entity for any annual accounting period unless the Secretary has prescribed the furnishing of such information on or before the first day of such annual accounting period.

#### **(4) Information required from certain shareholders in certain cases**

If any foreign corporation is treated as a controlled foreign corporation for any purpose under subpart F of part III of subchapter N of chapter 1, the Secretary may require any United States person treated as a United States shareholder of such corporation for any purpose under subpart F to furnish the information required under paragraph (1).

#### **(5) Information required from 10-percent partner of controlled foreign partnership**

In the case of a foreign partnership which is controlled by United States persons holding at least 10-percent interests (but not by any one United States person), the Secretary may require each United States person who holds a 10-percent interest in such partnership to furnish information relating to

such partnership, including information relating to such partner's ownership interests in the partnership and allocations to such partner of partnership items.

**(b) Dollar penalty for failure to furnish information**

**(1) In general**

If any person fails to furnish, within the time prescribed under paragraph (2) of subsection (a), any information with respect to any foreign business entity required under paragraph (1) of subsection (a), such person shall pay a penalty of \$10,000 for each annual accounting period with respect to which such failure exists.

**(2) Increase in penalty where failure continues after notification**

If any failure described in paragraph (1) continues for more than 90 days after the day on which the Secretary mails notice of such failure to the United States person, such person shall pay a penalty (in addition to the amount required under paragraph (1)) of \$10,000 for each 30-day period (or fraction thereof) during which such failure continues with respect to any annual accounting period after the expiration of such 90-day period. The increase in any penalty under this paragraph shall not exceed \$50,000.

**(c) Penalty of reducing foreign tax credit**

**(1) In general**

If a United States person fails to furnish, within the time prescribed under paragraph (2) of subsection (a), any information with respect to any foreign business entity required under paragraph (1) of subsection (a), then—

(A) in applying section 901 (relating to taxes of foreign countries and possessions of the United States) to such United States person for the taxable year, the amount of taxes (other than taxes reduced under subparagraph (B)) paid or deemed paid (other than those deemed paid under section 904(c)) to any foreign country or possession of the United States for the taxable year shall be reduced by 10 percent, and

(B) in the case of a foreign business entity which is a foreign corporation, in applying sections 902 (relating to foreign tax credit for corporate stockholder in foreign corporation) and 960 (relating to special rules for foreign tax credit) to any such United States person which is a corporation (or to any person who acquires from any other person any portion of the interest of such other person in any such foreign corporation, but only to the extent of such portion) for any taxable year, the amount of taxes paid or deemed paid by each foreign corporation with respect to which such person is required to furnish information during the annual accounting period or periods with respect to which such information is required under paragraph (2) of subsection (a) shall be reduced by 10 percent.

If such failure continues 90 days or more after notice of such failure by the Secretary to the United States person, then the amount of the reduction under this paragraph shall be 10 percent plus an additional 5 percent for each 3-month period, or fraction thereof, during which such failure to furnish information continues after the expiration of such 90-day period.

**(2) Limitation**

The amount of the reduction under paragraph (1) for each failure to furnish information with respect to a foreign business entity required under subsection (a)(1) shall not exceed whichever of the following amounts is the greater:

(A) \$10,000, or

(B) the income of the foreign business entity for its annual accounting period with respect to which the failure occurs.

**(3) Coordination with subsection (b)**

The amount of the reduction which (but for this paragraph) would be made under paragraph (1) with respect to any annual accounting period shall be reduced by the amount of the penalty imposed by subsection (b) with respect to such period.

**(4) Special rules**

(A) No taxes shall be reduced under this subsection more than once for the same failure.

(B) For purposes of this subsection and subsection (b), the time prescribed under paragraph (2) of subsection (a) to furnish information (and the beginning of the 90-day period after notice by the Secretary) shall be treated as being not earlier than the last day on which (as shown to the satisfaction of the Secretary) reasonable cause existed for failure to furnish such information.

(C) In applying subsections (a) and (b) of section 902, and in applying subsection (a) of section 960, the reduction provided by this subsection shall not apply for purposes of determining the amount of post-1986 undistributed earnings.

**(d) Two or more persons required to furnish information with respect to same foreign corporation**

Where, but for this subsection, two or more United States persons would be required to furnish information under subsection (a) with respect to the same foreign business entity for the same period, the Secretary may by regulations provide that such information shall be required only from one person. To the extent practicable, the determination of which person shall furnish the information shall be made on the basis of actual ownership of stock.

**(e) Definitions**

For purposes of this section—

**(1) Foreign business entity**

The term “foreign business entity” means a foreign corporation and a foreign partnership.

**(2) Control of corporation**

A person is in control of a corporation if such person owns stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or more than 50 percent of the total value of shares of all classes of stock, of a corporation. If a person is in control (within the meaning of the preceding sentence) of a corporation which in turn owns more than 50 percent of the total combined voting power of all classes of stock entitled to vote of another corporation, or owns more than 50 percent of the total value of the shares of all classes of stock of another corporation, then such person shall be treated as in control of such other corporation. For purposes of this paragraph, the rules prescribed by section 318(a) for determining ownership of stock shall apply; except that—

(A) subparagraphs (A), (B), and (C) of section 318(a)(3) shall not be applied so as to consider a United States person as owning stock which is owned by a person who is not a United States person, and

(B) in applying subparagraph (C) of section 318(a)(2), the phrase “10 percent” shall be substituted for the phrase “50 percent” used in subparagraph (C).

**(3) Partnership-related definitions****(A) Control**

A person is in control of a partnership if such person owns directly or indirectly more than a 50 percent interest in such partnership.

**(B) 50-percent interest**

For purposes of subparagraph (A), a 50-percent interest in a partnership is—

(i) an interest equal to 50 percent of the capital interest, or 50 percent of the profits interest, in such partnership, or

(ii) to the extent provided in regulations, an interest to which 50 percent of the deductions or losses of such partnership are allocated.

For purposes of the preceding sentence, rules similar to the rules of section 267(c) (other than paragraph (3)) shall apply.

**(C) 10-percent interest**

A 10-percent interest in a partnership is an interest which would be described in subparagraph (B) if “10 percent” were substituted for “50 percent” each place it appears.

**(4) Annual accounting period**

The annual accounting period of a foreign business entity is the annual period on the basis of which such foreign business entity regularly computes its income in keeping its books. In the case of a specified foreign business entity (as defined in section 898), the taxable year of such foreign business entity shall be treated as its annual accounting period.

**(f) Cross references**

**(1) For provisions relating to penalties for violations of this section, see section 7203.**

**(2) For definition of the term “United States person”, see section 7701(a)(30).**

(Added Pub. L. 86–780, §6(a), Sept. 14, 1960, 74 Stat. 1014; amended Pub. L. 87–834, §20(a), Oct. 16, 1962, 76 Stat. 1059; Pub. L. 88–554, §4(b)(6), Aug. 31, 1964, 78 Stat. 764; Pub. L. 94–455, title X, §1031(b)(5), title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1623, 1834; Pub. L. 97–248, title III, §338(a)–(c), Sept. 3, 1982, 96 Stat. 631; Pub. L. 99–514, title XII, §§1202(c), 1245(b)(5), Oct. 22, 1986, 100 Stat. 2530, 2581; Pub. L. 101–239, title VII, §7712(a), Dec. 19, 1989, 103 Stat. 2393; Pub. L. 101–508, title XI, §11701(f), Nov. 5, 1990, 104 Stat. 1388–508; Pub. L. 104–188, title I, §1704(f)(5)(A), (t)(40), (46), Aug. 20, 1996, 110 Stat. 1880, 1889; Pub. L. 105–34, title XI, §1142(a)–(e)(2), Aug. 5, 1997, 111 Stat. 981–983; Pub. L. 105–206, title VI, §6011(f), July 22, 1998, 112 Stat. 818.)

**§6038A. Information with respect to certain foreign-owned corporations****(a) Requirement**

If, at any time during a taxable year, a corporation (hereinafter in this section referred to as the “reporting corporation”)—

- (1) is a domestic corporation, and
- (2) is 25-percent foreign-owned,

such corporation shall furnish, at such time and in such manner as the Secretary shall by regulations prescribe, the information described in subsection (b) and such corporation shall maintain (in the location, in the manner, and to the extent prescribed in regulations) such records as may be appropriate to determine the correct treatment of transactions with related parties as the Secretary shall by regulations prescribe (or shall cause another person to so maintain such records).

**(b) Required information**

For purposes of subsection (a), the information described in this subsection is such information as the Secretary may prescribe by regulations relating to—

- (1) the name, principal place of business, nature of business, and country or countries in which organized or resident, of each person which—

- (A) is a related party to the reporting corporation, and
  - (B) had any transaction with the reporting corporation during its taxable year,

- (2) the manner in which the reporting corporation is related to each person referred to in paragraph (1), and

- (3) transactions between the reporting corporation and each foreign person which is a related party to the reporting corporation.

**(c) Definitions**

For purposes of this section—

**(1) 25-percent foreign-owned**

A corporation is 25-percent foreign-owned if at least 25 percent of—

- (A) the total voting power of all classes of stock of such corporation entitled to vote, or
- (B) the total value of all classes of stock of such corporation,

is owned at any time during the taxable year by 1 foreign person (hereinafter in this section referred to as a “25-percent foreign shareholder”).

**(2) Related party**

The term “related party” means—

- (A) any 25-percent foreign shareholder of the reporting corporation,
- (B) any person who is related (within the meaning of section 267(b) or 707(b)(1)) to the reporting corporation or to a 25-percent foreign shareholder of the reporting corporation, and
- (C) any other person who is related (within the meaning of section 482) to the reporting corporation.

**(3) Foreign person**

The term “foreign person” means any person who is not a United States person. For purposes of the preceding sentence, the term “United States person” has the meaning given to such term by section 7701(a)(30), except that any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States shall not be treated as a United States person.

**(4) Records**

The term “records” includes any books, papers, or other data.



**(5) Section 318 to apply**

Section 318 shall apply for purposes of paragraphs (1) and (2), except that—

- (A) “10 percent” shall be substituted for “50 percent” in section 318(a)(2)(C), and
- (B) subparagraphs (A), (B), and (C) of section 318(a)(3) shall not be applied so as to consider a United States person as owning stock which is owned by a person who is not a United States person.

**(d) Penalty for failure to furnish information or maintain records****(1) In general**

If a reporting corporation—

- (A) fails to furnish (within the time prescribed by regulations) any information described in subsection (b), or
- (B) fails to maintain (or cause another to maintain) records as required by subsection (a),

such corporation shall pay a penalty of \$10,000 for each taxable year with respect to which such failure occurs.

**(2) Increase in penalty where failure continues after notification**

If any failure described in paragraph (1) continues for more than 90 days after the day on which the Secretary mails notice of such failure to the reporting corporation, such corporation shall pay a penalty (in addition to the amount required under paragraph (1)) of \$10,000 for each 30-day period (or fraction thereof) during which such failure continues after the expiration of such 90-day period.

**(3) Reasonable cause**

For purposes of this subsection, the time prescribed by regulations to furnish information or maintain records (and the beginning of the 90-day period after notice by the Secretary) shall be treated as not earlier than the last day on which (as shown to the satisfaction of the Secretary) reasonable cause existed for failure to furnish the information or maintain the records.

**(e) Enforcement of requests for certain records****(1) Agreement to treat corporation as agent**

The rules of paragraph (3) shall apply to any transaction between the reporting corporation and any related party who is a foreign person unless such related party agrees (in such manner and at such time as the Secretary shall prescribe) to authorize the reporting corporation to act as such related party's limited agent solely for purposes of applying sections 7602, 7603, and 7604 with respect to any request by the Secretary to examine records or produce testimony related to any such transaction or with respect to any summons by the Secretary for such records or testimony. The appearance of persons or production of records by reason of the reporting corporation being such an agent shall not subject such persons or records to legal process for any purpose other than determining the correct treatment under this title of any transaction between the reporting corporation and such related party.

**(2) Rules where information not furnished**

If—

- (A) for purposes of determining the correct treatment under this title of any transaction between the reporting corporation and a related party who is a foreign person, the Secretary issues a summons to such corporation to produce (either directly or as agent for such related party) any records or testimony,
- (B) such summons is not quashed in a proceeding begun under paragraph (4) and is not determined to be invalid in a proceeding begun under section 7604(b) to enforce such summons, and
- (C) the reporting corporation does not substantially comply in a timely manner with such summons and the Secretary has sent by certified or registered mail a notice to such reporting corporation that such reporting corporation has not so substantially complied,

the Secretary may apply the rules of paragraph (3) with respect to such transaction (whether or not

the Secretary begins a proceeding to enforce such summons). If the reporting corporation fails to maintain (or cause another to maintain) records as required by subsection (a), and by reason of that failure, the summons is quashed in a proceeding described in subparagraph (B) or the reporting corporation is not able to provide the records requested in the summons, the Secretary may apply the rules of paragraph (3) with respect to any transaction to which the records relate.

**(3) Applicable rules in cases of noncompliance**

If the rules of this paragraph apply to any transaction—

(A) the amount of the deduction allowed under subtitle A for any amount paid or incurred by the reporting corporation to the related party in connection with such transaction, and

(B) the cost to the reporting corporation of any property acquired in such transaction from the related party (or transferred by such corporation in such transaction to the related party),

shall be the amount determined by the Secretary in the Secretary's sole discretion from the Secretary's own knowledge or from such information as the Secretary may obtain through testimony or otherwise.

**(4) Judicial proceedings**

**(A) Proceedings to quash**

Notwithstanding any law or rule of law, any reporting corporation to which the Secretary issues a summons referred to in paragraph (2)(A) shall have the right to begin a proceeding to quash such summons not later than the 90th day after such summons was issued. In any such proceeding, the Secretary may seek to compel compliance with such summons.

**(B) Review of secretarial determination of noncompliance**

Notwithstanding any law or rule of law, any reporting corporation which has been notified by the Secretary that the Secretary has determined that such corporation has not substantially complied with a summons referred to in paragraph (2) shall have the right to begin a proceeding to review such determination not later than the 90th day after the day on which the notice referred to in paragraph (2)(C) was mailed. If such a proceeding is not begun on or before such 90th day, such determination by the Secretary shall be binding and shall not be reviewed by any court.

**(C) Jurisdiction**

The United States district court for the district in which the person (to whom the summons is issued) resides or is found shall have jurisdiction to hear any proceeding brought under subparagraph (A) or (B). Any order or other determination in such a proceeding shall be treated as a final order which may be appealed.

**(D) Suspension of statute of limitations**

If the reporting corporation brings an action under subparagraph (A) or (B), the running of any period of limitations under section 6501 (relating to assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to any affected taxable year shall be suspended for the period during which such proceeding, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such proceeding. For purposes of this subparagraph, the term “affected taxable year” means any taxable year if the determination of the amount of tax imposed for such taxable year is affected by the treatment of the transaction to which the summons relates.

**(f) Cross reference**

**For provisions relating to criminal penalties for violation of this section, see section 7203.**

(Added Pub. L. 97–248, title III, §339(a), Sept. 3, 1982, 96 Stat. 632; amended Pub. L. 97–448, title III, §306(b)(4), Jan. 12, 1983, 96 Stat. 2406; Pub. L. 98–369, div. A, title VII, §714(f), July 18, 1984, 98 Stat. 963; Pub. L. 99–514, title XII, §1245(a), (b)(1)–(4), Oct. 22, 1986, 100 Stat. 2581; Pub. L. 101–239, title VII, §7403(a)–(d), Dec. 19, 1989, 103 Stat. 2358, 2359; Pub. L. 101–508, title XI, §§11315(b)(1), 11704(a)(23), Nov. 5, 1990, 104 Stat. 1388–457, 1388–519; Pub. L. 104–188, title I, §§1702(c)(5), 1704(f)(5)(B), Aug. 20, 1996, 110 Stat. 1869, 1880.)

**§7601. Canvass of districts for taxable persons and objects****(a) General rule**

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

**(b) Penalties**

**For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212.**

(Aug. 16, 1954, ch. 736, 68A Stat. 901; Pub. L. 94-455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834.)

**AMENDMENTS**

**1976**—Pub. L. 94-455 struck out “or his delegate” after “Secretary”.

**§7602. Examination of books and witnesses****(a) Authority to summon, etc.**

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

**(b) Purpose may include inquiry into offense**

The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

**(c) Notice of contact of third parties****(1) General notice**

An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

**(2) Notice of specific contacts**

The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

**(3) Exceptions**

This subsection shall not apply—

- (A) to any contact which the taxpayer has authorized;
- (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or
- (C) with respect to any pending criminal investigation.

**(d) No administrative summons when there is Justice Department referral****(1) Limitation of authority**

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

**(2) Justice Department referral in effect**

For purposes of this subsection—

**(A) In general**

A Justice Department referral is in effect with respect to any person if—

- (i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or
- (ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

**(B) Termination**

A Justice Department referral shall cease to be in effect with respect to a person when—

- (i) the Attorney General notifies the Secretary, in writing, that—
  - (I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,
  - (II) he will not authorize a grand jury investigation of such person with respect to such an offense, or
  - (III) he will discontinue such a grand jury investigation,
- (ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or
- (iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

**(3) Taxable years, etc., treated separately**

For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

**(e) Limitation on examination on unreported income**

The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.

(Aug. 16, 1954, ch. 736, 68A Stat. 901; Pub. L. 94-455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub. L. 97-248, title III, §333(a), Sept. 3, 1982, 96 Stat. 622; Pub. L. 105-206, title III, §§3412, 3417(a), July 22, 1998, 112 Stat. 751, 757.)

**AMENDMENTS**

**1998**—Subsec. (c). Pub. L. 105-206, §3417(a), added subsec. (c). Former subsec. (c) redesignated (d). Subsec. (d). Pub. L. 105-206, §3417(a), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Pub. L. 105–206, §3412, added subsec. (d).

Subsec. (e). Pub. L. 105–206, §3417(a), redesignated subsec. (d) as (e).

**1982**—Pub. L. 97–248 redesignated existing provisions as subsec. (a), added subsec. (a) heading, and added subsecs. (b) and (c).

**1976**—Pub. L. 94–455 struck out “or his delegate” after “Secretary” wherever appearing.

#### **EFFECTIVE DATE OF 1998 AMENDMENT**

Pub. L. 105–206, title III, §3417(b), July 22, 1998, 112 Stat. 758, provided that: “The amendments made by subsection (a) [amending this section] shall apply to contacts made after the 180th day after the date of the enactment of this Act [July 22, 1998].”

#### **EFFECTIVE DATE OF 1982 AMENDMENT**

Section 333(b) of Pub. L. 97–248 provided that: “The amendments made by subsection (a) [amending this section] shall take effect on the day after the date of the enactment of this Act [Sept. 3, 1982].”

### **§7603. Service of summons**

#### **(a) In general**

A summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

#### **(b) Service by mail to third-party recordkeepers**

##### **(1) In general**

A summons referred to in subsection (a) for the production of books, papers, records, or other data by a third-party recordkeeper may also be served by certified or registered mail to the last known address of such recordkeeper.

##### **(2) Third-party recordkeeper**

For purposes of paragraph (1), the term “third-party recordkeeper” means—

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A)),

(B) any consumer reporting agency (as defined under section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))),

(C) any person extending credit through the use of credit cards or similar devices,

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4))),

(E) any attorney,

(F) any accountant,

(G) any barter exchange (as defined in section 6045(c)(3)),

(H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof,

(I) any enrolled agent, and

(J) any owner or developer of a computer software source code (as defined in section 7612(d)(2)).

Subparagraph (J) shall apply only with respect to a summons requiring the production of the source code referred to in subparagraph (J) or the program and data described in section 7612(b)(1)

(A)(ii) to which such source code relates.

(Aug. 16, 1954, ch. 736, 68A Stat. 902; Apr. 2, 1956, ch. 160, §4(i), 70 Stat. 91; June 29, 1956, ch. 462, title II, §208(d)(4), 70 Stat. 396; Pub. L. 89–44, title II, §202(c)(4), June 21, 1965, 79 Stat. 139; Pub. L. 91–258, title II, §207(d)(9), May 21, 1970, 84 Stat. 249; Pub. L. 94–455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub. L. 94–530, §1(c)(6), Oct. 17, 1976, 90 Stat. 2488; Pub. L. 95–599, title V, §505(c)(5), Nov. 6, 1978, 92 Stat. 2760; Pub. L. 96–223, title II, §232(d)(4)(E), Apr. 2, 1980, 94 Stat. 278; Pub. L. 97–424, title V, §515(b)(12), Jan. 6, 1983, 96 Stat. 2182; Pub. L. 98–369, div. A, title IX, §911(d)(2)(G), July 18, 1984, 98 Stat. 1007; Pub. L. 99–514, title XVII, §1703(e)(2)(G), Oct. 22, 1986, 100 Stat. 2778; Pub. L. 100–647, title I, §1017(c)(9), (12), Nov. 10, 1988, 102 Stat. 3576, 3577; Pub. L. 105–206, title III, §§3413(c), 3416(a), July 22, 1998, 112 Stat. 754, 756; Pub. L. 106–554, §1(a)(7) [title III, §319(26)], Dec. 21, 2000, 114 Stat. 2763, 2763A–648.)

#### AMENDMENTS

**2000**—Subsec. (b)(2)(A) to (G). Pub. L. 106–554 substituted a comma for semicolon at end.

**1998**—Subsec. (a). Pub. L. 105–206, §3416(a), designated existing provisions as subsec. (a) and inserted heading.

Subsec. (b). Pub. L. 105–206, §3416(a), added subsec. (b).

Subsec. (b)(2). Pub. L. 105–206, §3413(c), added subpar. (J) and concluding provisions.

**1988**—Pub. L. 100–647, §1017(c)(12), made technical correction to language of Pub. L. 99–514, §1703(e)(2)(G), see 1986 Amendment note below.

Pub. L. 100–647, §1017(c)(9), substituted “6421(g)(2)” for “6421(f)(2)”.

**1986**—Pub. L. 99–514, as amended by Pub. L. 100–647, §1017(c)(12), substituted “6427(j)(2)” for “6427(i)(2)”.

**1984**—Pub. L. 98–369 substituted “6427(i)(2)” for “6427(h)(2)”.

**1983**—Pub. L. 97–424 struck out “6424(d)(2),” after “6421(f)(2),”.

**1980**—Pub. L. 96–223 substituted “6427(h)(2)” for “6427(g)(2)”.

**1978**—Pub. L. 95–599 substituted “6427(g)(2)” for “6427(f)(2)”.

**1976**—Pub. L. 94–530 substituted “6427(f)(2)” for “6427(e)(2)”.

Pub. L. 94–455 struck out “or his delegate” after “Secretary”.

**1970**—Pub. L. 91–258 inserted reference to section 6427(e)(2).

**1965**—Pub. L. 89–44 inserted reference to section 6424(d)(2).

**1956**—Act June 29, 1956, inserted reference to section 6421(f)(2).

Act Apr. 2, 1956, inserted reference to section 6420(e)(2).

#### EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by section 3413(c) of Pub. L. 105–206 applicable to summonses issued, and software acquired, after July 22, 1998, see section 3413(e)(1) of Pub. L. 105–206, set out as an Effective Date note under section 7612 of this title.

Pub. L. 105–206, title III, §3416(b), July 22, 1998, 112 Stat. 757, provided that: “The amendment made by this section [amending this section] shall apply to summonses served after the date of the enactment of this Act [July 22, 1998].”

#### EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99–514, to which such amendment relates, see section 1019(a) of Pub. L. 100–647, set out as a note under section 1 of this title.

#### EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–514 applicable to gasoline removed (as defined in section 4082 of this title as amended by section 1703 of Pub. L. 99–514) after Dec. 31, 1987, see section 1703(h) of Pub. L. 99–514, set out as a note under section 4081 of this title.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–369 effective Aug. 1, 1984, see section 911(e) of Pub. L. 98–369, set out as a note under section 6427 of this title.

#### EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–424 applicable with respect to articles sold after Jan. 6, 1983, see section 515(c)

of Pub. L. 97–424, set out as a note under section 34 of this title.

#### **EFFECTIVE DATE OF 1980 AMENDMENT**

Amendment by Pub. L. 96–223 effective Jan. 1, 1979, see section 232(h)(2) of Pub. L. 96–223, set out as a note under section 6427 of this title.

#### **EFFECTIVE DATE OF 1978 AMENDMENT**

Amendment by Pub. L. 95–599 effective Jan. 1, 1979, see section 505(d) of Pub. L. 95–599, set out as a note under section 6427 of this title.

#### **EFFECTIVE DATE OF 1976 AMENDMENT**

Amendment by Pub. L. 94–530 effective Oct. 1, 1976, see section 1(d) of Pub. L. 94–530, set out as a note under section 4041 of this title.

#### **EFFECTIVE DATE OF 1970 AMENDMENT**

Amendment by Pub. L. 91–258 effective July 1, 1970, see section 211(a) of Pub. L. 91–258, set out as a note under section 4041 of this title.

#### **EFFECTIVE DATE OF 1965 AMENDMENT**

Amendment by Pub. L. 89–44 effective Jan. 1, 1966, see section 701(a)(1), (2), of Pub. L. 89–44, set out as a note under section 4161 of this title.

#### **EFFECTIVE DATE OF 1956 AMENDMENT**

Amendment by act June 29, 1956, effective June 29, 1956, see section 211 of act June 29, 1956, set out as a note under section 4041 of this title.

### **§7604. Enforcement of summons**

#### **(a) Jurisdiction of district court**

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

#### **(b) Enforcement**

Whenever any person summoned under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States magistrate judge for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or magistrate judge to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States magistrate judge shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

#### **(c) Cross references**

##### **(1) Authority to issue orders, processes, and judgments**

For authority of district courts generally to enforce the provisions of this title, see section 7402.

##### **(2) Penalties**

For penalties applicable to violation of section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602, see section 7210.

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ment made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

(Added Pub. L. 94-550, § 1(a), Oct. 18, 1976, 90 Stat. 2534.)

#### PRIOR PROVISIONS

A prior section 1746 was renumbered section 1745 of this title.

### CHAPTER 117—EVIDENCE; DEPOSITIONS

Sec.	
1781.	Transmittal of letter rogatory or request.
1782.	Assistance to foreign and international tribunals and to litigants before such tribunals.
1783.	Subpoena of person in foreign country.
1784.	Contempt.
1785.	Subpoenas in multiparty, multiforum actions.

#### AMENDMENTS

2002—Pub. L. 107-273, div. C, title I, § 11020(b)(4)(B)(ii), Nov. 2, 2002, 116 Stat. 1829, added item 1785.

1964—Pub. L. 88-619, §§ 8(b), 9(b), 10(b), 12(b), Oct. 3, 1964, 78 Stat. 997, 998, substituted "Transmittal of letter rogatory or request" for "Foreign witnesses" in item 1781, "Assistance to foreign and international tribunals and to litigants before such tribunals" for "Testimony for use in foreign countries" in item 1782, "person" for "witness" in item 1783, and struck out item 1785 "Privilege against incrimination".

#### DEPOSITIONS IN ADMIRALTY CASES

Prior to the general unification of civil and admiralty procedure and the rescission of the Admiralty Rules on July 1, 1966, Revised Statutes §§ 863 to 865, as amended, which related to depositions de bene esse, when and how taken, notice, mode of taking, and transmission to court, provided as follows:

"SEC. 863. The testimony of any witness may be taken in any civil cause depending in a district court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court

of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

"SEC. 864. Every person deposing as provided in the preceding section [R.S. § 863] shall be cautioned and sworn to testify the whole truth, and carefully examined.

"His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent. [As amended May 23, 1900, ch. 541, 31 Stat. 182.]

"SEC. 865. Every deposition taken under the two preceding sections [R.S. §§ 863, 864] shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause."

R.S. §§ 863 to 865, as amended, quoted above, were applicable to admiralty proceedings only. Proceedings in bankruptcy and copyright are governed by rule 26 et seq. of Federal Rules of Civil Procedure. See also Rules of Bankruptcy Procedure set out in the Appendix to Title 11, Bankruptcy.

### § 1781. Transmittal of letter rogatory or request

(a) The Department of State has power, directly, or through suitable channels—

(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude—

(1) the transmittal of a letter rogatory or request directly from a foreign or international

tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

(June 25, 1948, ch. 646, 62 Stat. 948; Pub. L. 88-619, § 8(a), Oct. 3, 1964, 78 Stat. 996.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 653 (R.S. § 875; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 241; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Word "officer" was substituted for "commissioner" to obviate uncertainty as to the person to whom the letters or commissions may be issued.

The third sentence of section 653 of title 28, U.S.C., 1940 ed., providing for admission of testimony "so taken and returned" without objection as to the method of return, was omitted as unnecessary. Obviously, if the method designated by Congress is followed, it cannot be objected to.

The last sentence of section 653 of title 26, U.S.C., 1940 ed., relating to letters rogatory from courts of foreign countries, is incorporated in section 1782 of this title.

The revised section extends the provisions of section 653 of title 28, U.S.C., 1940 ed., which applied only to cases wherein the United States was a party or was interested, so as to insure a uniform method of taking foreign depositions in all cases.

Words "courts of the United States" were inserted to make certain that the section is addressed to the Federal rather than the State courts as obviously intended by Congress.

Changes were made in phraseology.

#### AMENDMENTS

1964—Pub. L. 88-619 substituted provisions authorizing the Department of State to transmit a letter rogatory or request by a foreign or international tribunal, or by a tribunal in the United States, to the tribunal, officer or agency in the United States or its foreign or international counterpart, to whom addressed, and to return it after execution, and providing that this section does not preclude direct transmission of letters rogatory or requests between interested tribunals, officers or agencies of foreign, international and of United States origin, for provisions authorizing United States ministers or consuls, whenever a United States court issues letters rogatory or a commission to take a deposition, to receive the executed letters or commissions from foreign courts or officers, endorse them with the place and date of receipt and any change in the deposition, and transmit it to the clerk of the issuing court in the same manner as his official dispatches, in text and "Transmittal of letter rogatory or request" for "Foreign witnesses" in section catchline.

### § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, be-

fore a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

(June 25, 1948, ch. 646, 62 Stat. 949; May 24, 1949, ch. 139, § 93, 63 Stat. 103; Pub. L. 88-619, § 9(a), Oct. 3, 1964, 78 Stat. 997; Pub. L. 104-106, div. A, title XIII, § 1342(b), Feb. 10, 1996, 110 Stat. 486.)

#### HISTORICAL AND REVISION NOTES

##### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 649-653, 701, 703, 704 (R.S. §§ 871-875, 4071, 4073, 4074; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 241; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1936, ch. 804, 49 Stat. 1921).

Sections 649-652 of title 28, U.S.C., 1940 ed., applied only to the District of Columbia and contained detailed provisions for issuing subpoenas, payment of witness fees and procedure for ordering and taking depositions. These matters are all covered by Federal Rules of Civil Procedure, Rules 26-32.

Provisions in sections 649-652 of title 28, U.S.C., 1940 ed., relating to the taking of testimony in the District of Columbia for use in State and Territorial courts were omitted as covered by section 14-204 of the District of Columbia Code, 1940 ed., and Rules 26 et seq., and 46 of the Federal Rules of Civil Procedure.

Only the last sentence of section 653 of title 28, U.S.C., 1940 ed., is included in this revised section. The remaining provisions relating to depositions of witnesses in foreign countries form the basis of section 1781 of this title.

Sections 701, 703, and 704 of title 28, U.S.C., 1940 ed., were limited to "suits for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest."

The revised section omits this limitation in view of the general application of the last sentence of section 653 of title 28, U.S.C., 1940 ed., consolidated herein. The improvement of communications and the expected growth of foreign commerce will inevitably increase litigation involving witnesses separated by wide distances.

Therefore the revised section is made simple and clear to provide a flexible procedure for the taking of depositions. The ample safeguards of the Federal Rules of Civil Procedure, Rules 26-32, will prevent misuse of this section.

The provisions of section 703 of title 28, U.S.C., 1940 ed., for punishment of disobedience to subpoena or refusal to answer is covered by Rule 37(b)(1) of Federal Rules of Civil Procedure.

The provisions of section 704 of title 28, U.S.C., 1940 ed., with respect to fees and mileage of witnesses are

covered by Rule 45(c) of Federal Rules of Civil Procedure.

Changes were made in phraseology.

1949 ACT

This amendment corrects restrictive language in section 1782 of title 28, U.S.C., in conformity with original law and permits depositions in any judicial proceeding without regard to whether the deponent is "residing" in the district or only sojourning there.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to this title.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-106 inserted "including criminal investigations conducted before formal accusation" after "proceeding in a foreign or international tribunal" in first sentence.

1964—Pub. L. 88-619 substituted provisions which empowered district courts to order residents to give testimony or to produce documents for use in a foreign or international tribunal, pursuant to a letter rogatory, or request, of a foreign or international tribunal or upon application of any interested person, and to direct that the evidence be presented before a person appointed by the court, provided that such person may administer oaths and take testimony, that the evidence be taken in accordance with the Federal Rules of Civil Procedure unless the order prescribes using the procedure of the foreign or international tribunal, that a person may not be compelled to give legally privileged evidence, and that this chapter doesn't preclude a person from voluntarily giving evidence for use in a foreign or international tribunal, for provisions permitting depositions of witnesses within the United States for use in any court in a foreign country with which the United States was at peace to be taken before a person authorized to administer oaths designated by the district court of the district where the witness resides or is found, and directing that the procedure used be that generally used in courts of the United States, in text, and "Assistance to foreign and international tribunals and to litigants before such tribunals" for "Testimony for use in foreign countries" in section catchline.

1949—Act May 24, 1949, struck out "residing" after "witness", and substituted "judicial proceeding" for "civil action" after "to be used in any".

**§ 1783. Subpoena of person in foreign country**

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of

process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

(June 25, 1948, ch. 646, 62 Stat. 949; Pub. L. 88-619, § 10(a), Oct. 3, 1964, 78 Stat. 997.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 711, 712, and 713 (July 3, 1926, ch. 762, §§ 1-3, 44 Stat. 835).

Word "resident" was substituted for "or domiciled therein." (See reviser's note under section 1391 of this title.)

Words "or any assistant or district attorney acting under him," after "Attorney General" in section 712 of title 28, U.S.C., 1940 ed., were omitted, since, in any event, the approval of the Attorney General would be required. (See section 507 of this title.)

Changes were made in phraseology.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (b), are set out in the Appendix to this title.

AMENDMENTS

1964—Pub. L. 88-619 amended section generally, and among other changes, authorized a United States court to issue a subpoena to require the appearance of a witness before it or a person or body designated by it, and the production of documents or other tangible evidence, when necessary in the interest of justice, and in other than criminal actions or proceedings, if the court finds, in addition, that it is not possible to obtain admissible evidence in any other manner, and provided that the procedure relating to the subpoena shall be in accordance with the Federal Rules of Civil Procedure, and struck out provisions which authorized the issuance of a subpoena when a personally notified individual failed to appear to testify pursuant to letter rogatory, or failed to answer any question he would have to answer in any examination before the court or if such person was beyond United States jurisdiction and the testimony was desired by the Attorney General in a criminal proceeding, provided that the subpoena issue to any United States consul, that the consul make personal service of the subpoena and of any order, rule, judgment or decree, that he make return of the subpoena and tender expenses to the witness, and substituted "person" for "witness" in section catchline.

**§ 1784. Contempt**

(a) The court of the United States which has issued a subpoena served in a foreign country may order the person who has failed to appear or who has failed to produce a document or other thing as directed therein to show cause before it at a designated time why he should not be punished for contempt.

(b) The court, in the order to show cause, may direct that any of the person's property within the United States be levied upon or seized, in the manner provided by law or court rules governing levy or seizure under execution, and held to satisfy any judgment that may be rendered against him pursuant to subsection (d) of this section if adequate security, in such amount as the court may direct in the order, be given for any damage that he might suffer should he not be found in contempt. Security under this subsection may not be required of the United States.

(c) A copy of the order to show cause shall be served on the person in accordance with section 1783(b) of this title.

(d) On the return day of the order to show cause or any later day to which the hearing may be continued, proof shall be taken. If the person is found in contempt, the court, notwithstanding any limitation upon its power generally to punish for contempt, may fine him not more than \$100,000 and direct that the fine and costs of the proceedings be satisfied by a sale of the property levied upon or seized, conducted upon the notice required and in the manner provided for sales upon execution.

(June 25, 1948, ch. 646, 62 Stat. 949; Pub. L. 88-619, § 11, Oct. 3, 1964, 78 Stat. 998.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 714, 715, 716, 717, and 718 (July 3, 1926, ch. 762, §§ 4-8, 44 Stat. 836).

Sections 714-718 of title 28, U.S.C., 1940 ed., were consolidated, since all relate to contempt by a witness served personally in a foreign country.

The last sentence omits specific reference to section 118 of title 28, U.S.C., 1940 ed., now incorporated in section 1655 of this title, which provides for the method of opening judgments rendered on publication of process. (See also Rule 60(b) of the Federal Rules of Civil Procedure.)

Changes were made in phraseology.

#### AMENDMENTS

1964—Pub. L. 88-619 amended section generally, and among other changes, authorized the court to order a person to show cause for failing to produce a document or other thing in subsec. (a), provided that a copy of the order to show cause shall be served in accordance with section 1783(b) of this title, and struck out provisions requiring the marshal making levy or seizure to forward to any United States consul in the country where the witness may be, a copy of the order and a request for its personal service, and to cause publication of the order in the district where the issuing court sits, in subsec. (c), and struck out provisions in subsec. (d) permitting any judgment rendered upon service by publication only to be opened for answer within one year.

#### § 1785. Subpoenas in multiparty, multiforum actions

When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.

(Added Pub. L. 107-273, div. C, title I, § 11020(b)(4)(B)(i), Nov. 2, 2002, 116 Stat. 1828.)

#### PRIOR PROVISIONS

A prior section 1785, act June 25, 1948, ch. 646, 62 Stat. 950, provided a privilege against self-incrimination on examination under letters rogatory, prior to repeal by Pub. L. 88-619, § 12(a), Oct. 3, 1964, 78 Stat. 998. See section 1782(a) of this title.

#### EFFECTIVE DATE

Section applicable to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after Nov. 2, 2002, see section 11020(c) of Pub. L. 107-273, set out as a note under section 1369 of this title.

### CHAPTER 119—EVIDENCE; WITNESSES

Sec.	
1821.	Per diem and mileage generally; subsistence.
1822.	Competency of interested persons; share of penalties payable.
[1823.	Repealed.]
1824.	Mileage fees under summons as both witness and juror.
1825.	Payment of fees.
1826.	Recalcitrant witnesses.
1827.	Interpreters in courts of the United States.
1828.	Special interpretation services.

#### AMENDMENTS

1978—Pub. L. 95-539, § 2(b), Oct. 28, 1978, 92 Stat. 2042, added items 1827 and 1828.

1970—Pub. L. 91-563, § 5(b), Dec. 19, 1970, 84 Stat. 1478, struck out item 1823 "United States officers and employees".

Pub. L. 91-452, title III, § 301(b), Oct. 15, 1970, 84 Stat. 932, added item 1826.

#### § 1821. Per diem and mileage generally; subsistence

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

## Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

## **20. CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS<sup>1</sup>**

*(Concluded 18 March 1970)*

The States signatory to the present Convention,  
Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,  
Desiring to improve mutual judicial co-operation in civil or commercial matters,  
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions –

### CHAPTER I – LETTERS OF REQUEST

#### Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

#### Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

#### Article 3

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.

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<sup>1</sup> This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law ([www.hcch.net](http://www.hcch.net)), under "Conventions" or under the "Evidence Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves* (219 pp.).

- 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.

A Letter may also mention any information necessary for the application of Article 11.  
No legalisation or other like formality may be required.

#### Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorised in either State.

#### Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

#### Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

#### Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

#### Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.

#### Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is 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. A Letter of Request shall be executed expeditiously.

#### Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

#### Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

- a) under the law of the State of execution; or
- b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

#### Article 12

The execution of a Letter of Request may be refused only to the extent that –

- a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or
- b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

#### Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

#### Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.



Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

- a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if –

- a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

#### Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

#### Article 21

Where a diplomatic officer, consular agent or commissioner is authorised under Articles 15, 16 or 17 to take evidence –

- a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;
- b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;
- c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;
- d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;
- e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

#### Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

### CHAPTER III – GENERAL CLAUSES

#### Article 23

A Contracting State may at the time of signature, ratification or accession, 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.

#### Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

#### Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

#### Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of

Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.  
Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

#### Article 27

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

- a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
- 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.

#### Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –

- a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
- b) the provisions of Article 4 with respect to the languages which may be used;
- c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
- d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
- e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
- f) the provisions of Article 14 with respect to fees and costs;
- g) the provisions of Chapter II.

#### Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

#### Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

#### Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

#### Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

#### Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

#### Article 34

A State may at any time withdraw or modify a declaration.

#### Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following –

- a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
- b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
- c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
- d) any withdrawal or modification of the above designations and declarations;
- e) the withdrawal of any reservation.

#### Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

#### Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

#### Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

#### Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

#### Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

#### Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

#### Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following –

- a) the signatures and ratifications referred to in Article 37;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
- c) the accessions referred to in Article 39 and the dates on which they take effect;
- d) the extensions referred to in Article 40 and the dates on which they take effect;
- e) the designations, reservations and declarations referred to in Articles 33 and 35;
- f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

## Cases

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)

*Societe Nationale Industrielle Aerospatiale v. U.S District Court for the Southern District of Iowa*, 482 U.S. 522 (1987)

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444 U.S. 286

100 S.Ct. 559

62 L.Ed.2d 490

WORLD-WIDE VOLKSWAGEN CORPORATION et al.,  
Petitioners,

v.

Charles S. WOODSON, District Judge of Creek County,  
Oklahoma, et al.

*No. 78-1078.**Argued Oct. 3, 1979.**Decided Jan. 21, 1980.*

### *Syllabus*

A products-liability action was instituted in an Oklahoma state court by respondents husband and wife to recover for personal injuries sustained in Oklahoma in an accident involving an automobile that had been purchased by them in New York while they were New York residents and that was being driven through Oklahoma at the time of the accident. The defendants included the automobile retailer and its wholesaler (petitioners), New York corporations that did no business in Oklahoma. Petitioners entered special appearances, claiming that Oklahoma's exercise of jurisdiction over them would offend limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment. The trial court rejected petitioners' claims and they then sought, but were denied a writ of prohibition in the Oklahoma Supreme Court to restrain respondent trial judge from exercising *in personam* jurisdiction over them.

*Held:* Consistently with the Due Process Clause, the Oklahoma trial court may not exercise *in personam* jurisdiction over petitioners. Pp. 291–209.

(a) A state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice, *id.*, at 316, 66 S.Ct., at 158, and the relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there," *id.*, at 317, 66 S.Ct., at 158. The Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.*, at 319, 66 S.Ct., at 159. Pp. 291–294.

(b) Here, there is a total absence in the record of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry

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on no activity whatsoever in Oklahoma; they close no sales and perform no services there, avail themselves of none of the benefits of Oklahoma law, and solicit no business there either through salespersons or through advertising reasonably calculated to reach that State. Nor does the record show that they regularly sell cars to Oklahoma residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. Although it is foreseeable that automobiles sold by petitioners would travel to Oklahoma and that the automobile here might cause injury in Oklahoma, "foreseeability" alone is not a sufficient benchmark for personal jurisdiction under the Due Process Clause. The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State, but rather is that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there. Nor can jurisdiction be supported on the theory that petitioners earn substantial revenue from goods used in Oklahoma. Pp. 295–299.

Okl., 585 P.2d 351, reversed.

Herbert Rubin, New York City, for petitioners.

Jefferson G. Greer, Tulsa, Okl., for respondents.

Mr. Justice WHITE delivered the opinion of the Court.

1 The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma.

2 \* Respondents Harry and Kay Robinson purchased a new Audi automobile from petitioner Seaway Volkswagen, Inc. (Seaway), in Massena, N. Y., in 1976. The following year the Robinson family, who resided in New York, left that State for a new home in Arizona. As they passed through the State of Oklahoma, another car struck their Audi in the rear, causing a fire which severely burned Kay Robinson and her two children.<sup>1</sup>

3 The Robinsons<sup>2</sup> subsequently brought a products-liability action in the District Court for Creek County, Okla., claiming that their injuries resulted from defective design and placement of the Audi's gas tank and fuel system. They joined as defendants the automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); its importer Volkswagen of America, Inc. (Volkswagen); its regional distributor, petitioner World-Wide Volkswagen Corp. (World-Wide); and its retail dealer, petitioner Seaway. Seaway and World-Wide entered special appearances,<sup>3</sup> claiming that Oklahoma's exercise of jurisdiction over them would offend the limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment.<sup>4</sup>

The facts presented to the District Court showed that World-Wide is incorporated and has its business office in New York. It distributes vehicles, parts, and accessories, under contract with Volkswagen, to retail dealers in New York, New Jersey, and Connecticut. Seaway, one of these retail dealers, is incorporated and has its place of business in New York. Insofar as the record reveals, Seaway and World-Wide are fully independent corporations whose relations with each other and with



- 4 Volkswagen and Audi are contractual only. Respondents adduced no evidence that  
 « up either World-Wide or Seaway does any business in Oklahoma, ships or sells any  
 products to or in that State, has an agent to receive process there, or purchases  
 advertisements in any media calculated to reach Oklahoma. In fact, as respondents'  
 counsel conceded at oral argument, Tr. of Oral Arg. 32, there was no showing that  
 any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the  
 single exception of the vehicle involved in the present case.
- 5 Despite the apparent paucity of contacts between petitioners and Oklahoma, the  
 District Court rejected their constitutional claim and reaffirmed that ruling in  
 denying petitioners' motion for reconsideration.<sup>5</sup> Petitioners then sought a writ of  
 prohibition in the Supreme Court of Oklahoma to restrain the District Judge,  
 respondent Charles S. Woodson, from exercising *in personam* jurisdiction over  
 them. They renewed their contention that, because they had no "minimal contacts,"  
 App. 32, with the State of Oklahoma, the actions of the District Judge were in  
 violation of their rights under the Due Process Clause.
- 6 The Supreme Court of Oklahoma denied the writ, 585 P.2d 351 (1978),<sup>6</sup> holding  
 that personal jurisdiction over petitioners was authorized by Oklahoma's "long-  
 arm" statute Okla.Stat., Tit. 12, § 1701.03(a)(4) (1971).<sup>7</sup> Although the court noted  
 that the proper approach was to test jurisdiction against both statutory and  
 constitutional standards, its analysis did not distinguish these questions, probably  
 because § 1701.03(a)(4) has been interpreted as conferring jurisdiction to the limits  
 permitted by the United States Constitution.<sup>8</sup> The court's rationale was contained  
 in the following paragraph, 585 P.2d, at 354:
- 7 "In the case before us, the product being sold and distributed by the petitioners is  
 by its very design and purpose so mobile that petitioners can foresee its possible use  
 in Oklahoma. This is especially true of the distributor, who has the exclusive right to  
 distribute such automobile in New York, New Jersey and Connecticut. The evidence  
 presented below demonstrated that goods sold and distributed by the petitioners  
 were used in the State of Oklahoma, and under the facts we believe it reasonable to  
 infer, given the retail value of the automobile, that the petitioners derive substantial  
 income from automobiles which from time to time are used in the State of  
 Oklahoma. This being the case, we hold that under the facts presented, the trial  
 court was justified in concluding that the petitioners derive substantial revenue  
 from goods used or consumed in this State."
- 8 We granted certiorari, 440 U.S. 907, 99 S.Ct. 1212, 59 L.Ed.2d 453 (1979), to  
 consider an important constitutional question with respect to state-court  
 jurisdiction and to resolve a conflict between the Supreme Court of Oklahoma and  
 the highest courts of at least four other States.<sup>9</sup> We reverse.

## II

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko v. California Superior Court*, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978). A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer v. Neff*, 95 U.S. 714, 732-733, 24 L.Ed. 565 (1878). Due process requires that the defendant be given adequate notice of the suit, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and be subject to the personal jurisdiction of the court, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In the present case, it is not contended that notice was

9 inadequate; the only question is whether these particular petitioners were subject to  
 « up the jurisdiction of the Oklahoma courts.

10 As has long been settled, and as we reaffirm today, a state court may exercise  
 personal jurisdiction over a nonresident defendant only so long as there exist  
 "minimum contacts" between the defendant and the forum State. *International  
 Shoe Co. v. Washington*, *supra*, at 316, 66 S.Ct., at 158. The concept of minimum  
 contacts, in turn, can be seen to perform two related, but distinguishable, functions.  
 It protects the defendant against the burdens of litigating in a distant or  
 inconvenient forum. And it acts to ensure that the States through their courts, do  
 not reach out beyond the limits imposed on them by their status as coequal  
 sovereigns in a federal system.

11 The protection against inconvenient litigation is typically described in terms of  
 "reasonableness" or "fairness." We have said that the defendant's contacts with the  
 forum State must be such that maintenance of the suit "does not offend 'traditional  
 notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*,  
*supra*, at 316, 66 S.Ct., at 158, quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct.  
 339, 342, 85 L.Ed. 278 (1940). The relationship between the defendant and the  
 forum must be such that it is "reasonable . . . to require the corporation to defend  
 the particular suit which is brought there." 326 U.S., at 317, 66 S.Ct., at 158. Implicit  
 in this emphasis on reasonableness is the understanding that the burden on the  
 defendant, while always a primary concern, will in an appropriate case be  
 considered in light of other relevant factors, including the forum State's interest in  
 adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220,  
 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957); the plaintiff's interest in obtaining  
 convenient and effective relief, see *Kulko v. California Superior Court*, *supra*, 436  
 U.S., at 92, 98 S.Ct., at 1697, at least when that interest is not adequately protected  
 by the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner*, 433 U.S. 186,  
 211, n. 37, 97 S.Ct. 2569, 2583, n. 37, 53 L.Ed.2d 683 (1977); the interstate judicial  
 system's interest in obtaining the most efficient resolution of controversies; and the  
 shared interest of the several States in furthering fundamental substantive social  
 policies, see *Kulko v. California Superior Court*, *supra*, 436 U.S., at 93, 98, 98  
 S.Ct., at 1697, 1700.

12 The limits imposed on state jurisdiction by the Due Process Clause, in its role as a  
 guarantor against inconvenient litigation, have been substantially relaxed over the  
 years. As we noted in *McGee v. International Life Ins. Co.*, *supra*, 355 U.S., at  
 222223, 78 S.Ct., at 201, this trend is largely attributable to a fundamental  
 transformation in the American economy:

13 "Today many commercial transactions touch two or more States and may involve  
 parties separated by the full continent. With this increasing nationalization of  
 commerce has come a great increase in the amount of business conducted by mail  
 across state lines. At the same time modern transportation and communication  
 have made it much less burdensome for a party sued to defend himself in a State  
 where he engages in economic activity."

14 The historical developments noted in *McGee*, of course, have only accelerated in  
 the generation since that case was decided.

Nevertheless, we have never accepted the proposition that state lines are  
 irrelevant for jurisdictional purposes, nor could we, and remain faithful to the  
 principles of interstate federalism embodied in the Constitution. The economic  
 interdependence of the States was foreseen and desired by the Framers. In the  
 Commerce Clause, they provided that the Nation was to be a common market, a

- 15 "free trade unit" in which the States are debarred from acting as separable  
 « up economic entities. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538, 69 S.Ct. 657, 665, 93 L.Ed. 865 (1949). But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.
- 16 Hence, even while abandoning the shibboleth that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," *Pennoyer v. Neff*, *supra*, 95 U.S., at 720, we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of government," *International Shoe Co. v. Washington*, 326 U.S., at 317, 66 S.Ct., at 158, and stressed that the Due Process Clause ensures not only fairness, but also the "orderly administration of the laws," *id.*, at 319, 66 S.Ct., at 159. As we noted in *Hanson v. Denckla*, 357 U.S. 235, 250-251, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958):
- 17 "As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation omitted.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."
- 18 Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 159. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson v. Denckla*, *supra*, 357 U.S., at 251, 254, 78 S.Ct., at 1238, 1240.

### III

Applying these principles to the case at hand,<sup>10</sup> we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in

19 New York to New York residents, happened to suffer an accident while passing  
 « up through Oklahoma.

20 It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the Robinsons' Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. In *Hanson v. Denckla*, *supra*, it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally exercise jurisdiction over a Delaware trustee that had no other contacts with the forum State. In *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978), it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.

21 If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, see *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (CA4 1956); a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, *Reilly v. Phil Toltan Pontiac, Inc.*, 372 F.Supp. 1205 (N.J.1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, see *Uppgren v. Executive Aviation Services, Inc.*, 304 F.Supp. 165, 170-171 (Minn.1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. We recently abandoned the outworn rule of *Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905), that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor. *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). Having inferred the mechanical rule that a creditor's amenability to a *quasi in rem* action travels with his debtor, we are unwilling to endorse an analogous principle in the present case.<sup>11</sup>

22 This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. See *Kulko v. California Superior Court*, *supra*, 436 U.S., at 97-98, 98 S.Ct., at 1699-1700; *Shaffer v. Heitner*, 433 U.S., at 216, 97 S.Ct., at 2586, and see *id.*, at 217-219, 97 S.Ct., at 2586-2587 (Stevens, J., concurring in judgment). The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 159, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S., at 253, 78 S.Ct., at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those

23 States if its allegedly defective merchandise has there been the source of injury to its  
 « up owner or to others. The forum State does not exceed its powers under the Due  
 Process Clause if it asserts personal jurisdiction over a corporation that delivers its  
 products into the stream of commerce with the expectation that they will be  
 purchased by consumers in the forum State. Cf. *Gray v. American Radiator &*  
*Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

24 But there is no such or similar basis for Oklahoma jurisdiction over World-Wide  
 or Seaway in this case. Seaway's sales are made in Massena, N. Y. World-Wide's  
 market, although substantially larger, is limited to dealers in New York, New  
 Jersey, and Connecticut. There is no evidence of record that any automobiles  
 distributed by World-Wide are sold to retail customers outside this tristate area. It  
 is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway  
 may take them to Oklahoma. But the mere "unilateral activity of those who claim  
 some relationship with a nonresident defendant cannot satisfy the requirement of  
 contact with the forum State." *Hanson v. Denckla*, *supra*, at 253, 78 S.Ct., at 1239-  
 1240.

25 In a variant on the previous argument, it is contended that jurisdiction can be  
 supported by the fact that petitioners earn substantial revenue from goods used in  
 Oklahoma. The Oklahoma Supreme Court so found, 585 P.2d, at 354-355, drawing  
 the inference that because one automobile sold by petitioners had been used in  
 Oklahoma, others might have been used there also. While this inference seems less  
 than compelling on the facts of the instant case, we need not question the court's  
 factual findings in order to reject its reasoning.

26 This argument seems to make the point that the purchase of automobiles in New  
 York, from which the petitioners earn substantial revenue, would not occur *but for*  
 the fact that the automobiles are capable of use in distant States like Oklahoma.  
 Respondents observe that the very purpose of an automobile is to travel, and that  
 travel of automobiles sold by petitioners is facilitated by an extensive chain of  
 Volkswagen service centers throughout the country, including some in  
 Oklahoma.<sup>12</sup> However, financial benefits accruing to the defendant from a  
 collateral relation to the forum State will not support jurisdiction if they do not  
 stem from a constitutionally cognizable contact with that State. See *Kulko v.*  
*California Superior Court*, 436 U.S., at 94-95, 98 S.Ct., at 1698-1699. In our view,  
 whatever marginal revenues petitioners may receive by virtue of the fact that their  
 products are capable of use in Oklahoma is far too attenuated a contact to justify  
 that State's exercise of *in personam* jurisdiction over them.

27 Because we find that petitioners have no "contacts, ties, or relations" with the  
 State of Oklahoma, *International Shoe Co. v. Washington*, *supra*, 326 U.S., at 319,  
 66 S.Ct., at 159, the judgment of the Supreme Court of Oklahoma is

28 *Reversed.*

29 Justice BRENNAN, dissenting.

30 The Court holds that the Due Process Clause of the Fourteenth Amendment bars  
 the States from asserting jurisdiction over the defendants in these two cases. In  
 each case the Court so decides because it fails to find the "minimum contacts" that  
 have been required since *International Shoe Co. v. Washington*, 326 U.S. 310, 316,  
 66 S.Ct. 154, 158, 90 L.Ed.2d 95 (1945). Because I believe that the Court reads  
*International Shoe* and its progeny too narrowly, and because I believe that the  
 standards enunciated by those cases may already be obsolete as constitutional  
 boundaries, I dissent.

31       \* The Court's opinions focus tightly on the existence of contacts between the  
 « up forum and the defendant. In so doing, they accord too little weight to the strength of  
 the forum State's interest in the case and fail to explore whether there would be any  
 actual inconvenience to the defendant. The essential inquiry in locating the  
 constitutional limits on state-court jurisdiction over absent defendants is whether  
 the particular exercise of jurisdiction offends "traditional notions of fair play and  
 substantial justice." " *International Shoe, supra*, at 316, 66 S.Ct., at 158, quoting  
*Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940). The  
 clear focus in *International Shoe* was on fairness and reasonableness. *Kulko v.*  
*California Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132  
 (1978). The Court specifically declined to establish a mechanical test based on the  
 quantum of contacts between a State and the defendant:

32       "Whether due process is satisfied must depend rather upon the quality and  
 nature of the activity *in relation to the fair and orderly administration of the laws*  
*which it was the purpose of the due process clause to insure*. That clause does not  
 contemplate that a state may make binding a judgment *in personam* against an  
 individual or corporate defendant with which the state has *no* contacts, ties, or  
 relations." 326 U.S., at 319, 66 S.Ct., at 160 (emphasis added).

33       The existence of contacts, so long as there were some, was merely one way of  
 giving content to the determination of fairness and reasonableness.

34       Surely *International Shoe* contemplated that the significance of the contacts  
 necessary to support jurisdiction would diminish if some other consideration  
 helped establish that jurisdiction would be fair and reasonable. The interests of the  
 State and other parties in proceeding with the case in a particular forum are such  
 considerations. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct.  
 199, 201, 2 L.Ed.2d 223 (1957), for instance, accorded great importance to a State's  
 "manifest interest in providing effective means of redress" for its citizens. See also  
*Kulko v. California Superior Court, supra*, 436 U.S., at 92, 98 S.Ct., at 1697;  
*Shaffer v. Heitner*, 433 U.S. 186, 208, 97 S.Ct. 2569, 2581, 53 L.Ed.2d 683 (1977);  
*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94  
 L.Ed. 865 (1950).

35       Another consideration is the actual burden a defendant must bear in defending  
 the suit in the forum. *McGee, supra*. Because lesser burdens reduce the unfairness  
 to the defendant, jurisdiction may be justified despite less significant contacts. The  
 burden, of course, must be of constitutional dimension. Due process limits on  
 jurisdiction do not protect a defendant from all inconvenience of travel, *McGee*,  
*supra*, at 224, 78 S.Ct., at 201, and it would not be sensible to make the  
 constitutional rule turn solely on the number of miles the defendant must travel to  
 the courtroom.<sup>1</sup> Instead, the constitutionally significant "burden" to be analyzed  
 relates to the mobility of the defendant's defense. For instance, if having to travel to  
 a foreign forum would hamper the defense because witnesses or evidence or the  
 defendant himself were immobile, or if there were a disproportionately large  
 number of witnesses or amount of evidence that would have to be transported at  
 the defendant's expense, or if being away from home for the duration of the trial  
 would work some special hardship on the defendant, then the Constitution would  
 require special consideration for the defendant's interests.

That considerations other than contacts between the forum and the defendant are  
 relevant necessarily means that the Constitution does not require that trial be held  
 in the State which has the "best contacts" with the defendant. See *Shaffer v.*  
*Heitner, supra*, 433 U.S., at 228, 97 S.Ct., at 2592 (BRENNAN, J., dissenting). The  
 defendant has no constitutional entitlement to the best forum or, for that matter, to

36 any particular forum. Under even the most restrictive view of *International Shoe*,  
 « up several States could have jurisdiction over a particular cause of action. We need  
 only determine whether the forum States in these cases satisfy the constitutional  
 minimum.<sup>2</sup>

## II

37 In each of these cases, I would find that the forum State has an interest in  
 permitting the litigation to go forward, the litigation is connected to the forum, the  
 defendant is linked to the forum, and the burden of defending is not unreasonable.  
 Accordingly, I would hold that it is neither unfair nor unreasonable to require these  
 defendants to defend in the forum State.

### A.

38 In No. 78-952, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516, a number of  
 considerations suggest that Minnesota is an interested and convenient forum. The  
 action was filed by a bona fide resident of the forum.<sup>3</sup> Consequently, Minnesota's  
 interests are similar to, even if lesser than, the interests of California in *McGee*,  
*supra*, "in providing a forum for its residents and in regulating the activities of  
 insurance companies" doing business in the State.<sup>4</sup> 444 U.S., at 332, 100 S.Ct., at  
 579. Moreover, Minnesota has "attempted to assert [its] particularized interest in  
 trying such cases in its courts by . . . enacting a special jurisdictional statute." *Kulko*,  
*supra*, 436 U.S., at 98, 98 S.Ct., at 1700; *McGee, supra*, 355 U.S., at 221, 224, 78  
 S.Ct., at 199, 201. As in *McGee*, a resident forced to travel to a distant State to  
 prosecute an action against someone who has injured him could, for lack of funds,  
 be entirely unable to bring the cause of action. The plaintiff's residence in the State  
 makes the State one of a very few convenient fora for a personal injury case (the  
 others usually being the defendant's home State and the State where the accident  
 occurred).<sup>5</sup>

39 In addition, the burden on the defendant is slight. As Judge Friendly has  
 recognized, *Shaffer* emphasizes the importance of identifying the real impact of the  
 lawsuit. *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 200 (CA2 1978)  
 (upholding the constitutionality of jurisdiction in a very similar case under New  
 York's law after *Shaffer* ). Here the real impact is on the defendant's insurer, which  
 is concededly amenable to suit in the forum State. The defendant is carefully  
 protected from financial liability because the action limits the prayer for damages to  
 the insurance policy's liability limit.<sup>6</sup> The insurer will handle the case for the  
 defendant. The defendant is only a nominal party who need be no more active in the  
 case than the cooperation clause of his policy requires. Because of the ease of airline  
 transportation, he need not lose significantly more time than if the case were at  
 home. Consequently, if the suit went forward in Minnesota, the defendant would  
 bear almost no burden or expense beyond what he would face if the suit were in his  
 home State. The real impact on the named defendant is the same as it is in a direct  
 action against the insurer, which would be constitutionally permissible. *Watson v.*  
*Employers Liability Corp.*, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1954);  
*Minichiello v. Rosenberg*, 410 F.2d 106, 109-110 (CA2 1968). The only distinction is  
 the formal, "analytica[l] prerequisite," 444 U.S., at 331, 100 S.Ct., at 578, of making  
 the insured a named party. Surely the mere addition of appellant's name to the  
 complaint does not suffice to create a due process violation.<sup>7</sup>

Finally, even were the relevant inquiry whether there are sufficient contacts  
 between the forum and the named defendant, I would find that such contacts exist.  
 The insurer's presence in Minnesota is an advantage to the defendant that may well  
 have been a consideration in his selecting the policy he did. An insurer with offices

40 in many States makes it easier for the insured to make claims or conduct other  
 « up business that may become necessary while traveling. It is simply not true that "State  
 Farm's decision to do business in Minnesota was completely adventitious as far as  
 Rush was concerned." 444 U.S., at 328-329, 100 S.Ct., at 577. By buying a State  
 Farm policy, the defendant availed himself of the benefits he might derive from  
 having an insurance agent in Minnesota who could, among other things, facilitate a  
 suit for appellant against a Minnesota resident. It seems unreasonable to read the  
 Constitution as permitting one to take advantage of his nationwide insurance  
 network but not to be burdened by it.

41 In sum, I would hold that appellant is not deprived of due process by being  
 required to submit to trial in Minnesota, first because Minnesota has a sufficient  
 interest in and connection to this litigation and to the real and nominal defendants,  
 and second because the burden on the nominal defendant is sufficiently slight.

#### B

42 In No. 78-1078, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490, the interest of the  
 forum State and its connection to the litigation is strong. The automobile accident  
 underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in  
 Oklahoma when they brought suit. Essential witnesses and evidence were in  
 Oklahoma. See *Shaffer v. Heitner*, 433 U.S., at 208, 97 S.Ct., at 2581. The State has  
 a legitimate interest in enforcing its laws designed to keep its highway system safe,  
 and the trial can proceed at least as efficiently in Oklahoma as anywhere else.

43 The petitioners are not unconnected with the forum. Although both sell  
 automobiles within limited sales territories, each sold the automobile which in fact  
 was driven to Oklahoma where it was involved in an accident.<sup>8</sup> It may be true, as  
 the Court suggests, that each sincerely intended to limit its commercial impact to  
 the limited territory, and that each intended to accept the benefits and protection of  
 the laws only of those States within the territory. But obviously these were  
 unrealistic hopes that cannot be treated as an automatic constitutional shield.<sup>9</sup>

44 An automobile simply is not a stationary item or one designed to be used in one  
 place. An automobile is *intended* to be moved around. Someone in the business of  
 selling large numbers of automobiles can hardly plead ignorance of their mobility  
 or pretend that the automobiles stay put after they are sold. It is not merely that a  
 dealer in automobiles foresees that they will move. 444 U.S., at 295, 100 S.Ct., at  
 566. The dealer actually intends that the purchasers will use the automobiles to  
 travel to distant States where the dealer does not directly "do business." The sale of  
 an automobile does *purposefully* inject the vehicle into the stream of interstate  
 commerce so that it can travel to distant States. See *Kulko*, 436 U.S., at 94, 98 S.Ct.,  
 at 1698; *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283  
 (1958).

45 This case is similar to *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 91 S.Ct.  
 1005, 28 L.Ed.2d 256 (1971). There we indicated, in the course of denying leave to  
 file an original-jurisdiction case, that corporations having no direct contact with  
 Ohio could constitutionally be brought to trial in Ohio because they dumped  
 pollutants into streams outside Ohio's limits which ultimately, through the action of  
 the water, reach Lake Erie and affected Ohio. No corporate acts, only their  
 consequences, occurred in Ohio. The stream of commerce is just as natural a force  
 as a stream of water, and it was equally predictable that the cars petitioners  
 released would reach distant States.<sup>10</sup>

The Court accepts that a State may exercise jurisdiction over a distributor which  
 "serves" that State "indirectly" by "deliver[ing] its products into the stream of



46 commerce with the expectation that they will be purchased by consumers in the  
forum State." 444 U.S., at 297-298, 100 S.Ct., at 567. It is difficult to see why the  
« up Constitution should distinguish between a case involving goods which reach a  
distant State through a chain of distribution and a case involving goods which reach  
the same State because a consumer, using them as the dealer knew the customer  
would, took them there.<sup>11</sup> In each case the seller purposefully injects the goods into  
the stream of commerce and those goods predictably are used in the forum State.<sup>12</sup>

47 Furthermore, an automobile seller derives substantial benefits from States other  
than its own. A large part of the value of automobiles is the extensive, nationwide  
network of highways. Significant portions of that network have been constructed by  
and are maintained by the individual States, including Oklahoma. The States,  
through their highway programs, contribute in a very direct and important way to  
the value of petitioners' businesses. Additionally, a network of other related  
dealerships with their service departments operates throughout the country under  
the protection of the laws of the various States, including Oklahoma, and enhances  
the value of petitioners' businesses by facilitating their customers' traveling.

48 Thus, the Court errs in its conclusion, 444 U.S., at 299, 100 S.Ct., at 568  
(emphasis added), that "petitioners have *no* 'contacts, ties, or relations' " with  
Oklahoma. There obviously are contacts, and, given Oklahoma's connection to the  
litigation, the contacts are sufficiently significant to make it fair and reasonable for  
the petitioners to submit to Oklahoma's jurisdiction.

### III

49 It may be that affirmance of the judgments in these cases would approach the  
outer limits of *International Shoe's* jurisdictional principle. But that principle, with  
its almost exclusive focus on the rights of defendants, may be outdated. As Mr.  
Justice MARSHALL wrote in *Shaffer v. Heitner*, 433 U.S., at 212, 97 S.Ct., at 2584:  
"[T]raditional notions of fair play and substantial justice' can be as readily  
offended by the perpetuation of ancient forms that are no longer justified as by the  
adoption of new procedures . . . ."

50 *International Shoe* inherited its defendant focus from *Pennoyer v. Neff*, 95 U.S.  
714, 24 L.Ed. 565 (1878), and represented the last major step this Court has taken  
in the long process of liberalizing the doctrine of personal jurisdiction. Though its  
flexible approach represented a major advance, the structure of our society has  
changed in many significant ways since *International Shoe* was decided in 1945.  
Mr. Justice Black, writing for the Court in *McGee v. International Life Ins. Co.*, 355  
U.S. 220, 222, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957), recognized that "a trend is  
clearly discernible toward expanding the permissible scope of state jurisdiction over  
foreign corporations and other nonresidents." He explained the trend as follows:

51 "In part this is attributable to the fundamental transformation of our national  
economy over the years. Today many commercial transactions touch two or more  
States and may involve parties separated by the full continent. With this increasing  
nationalization of commerce has come a great increase in the amount of business  
conducted by mail across state lines. At the same time modern transportation and  
communication have made it much less burdensome for a party sued to defend  
himself in a State where he engages in economic activity." *Id.*, at 222-223, 78 S.Ct.,  
at 201.

As the Court acknowledges, 444 U.S., at 292-293, 100 S.Ct., at 565, both the  
nationalization of commerce and the ease of transportation and communication  
have accelerated in the generation since 1957.<sup>13</sup> The model of society on which the  
*International Shoe* Court based its opinion is no longer accurate. Business people,

52 no matter how local their businesses, cannot assume that goods remain in the  
« up business' locality. Customers and goods can be anywhere else in the country usually  
in a matter of hours and always in a matter of a very few days.

53 In answering the question whether or not it is fair and reasonable to allow a  
particular forum to hold a trial binding on a particular defendant, the interests of  
the forum State and other parties loom large in today's world and surely are entitled  
to as much weight as are the interests of the defendant. The "orderly administration  
of the laws" provides a firm basis for according some protection to the interests of  
plaintiffs and States as well as of defendants.<sup>14</sup> Certainly, I cannot see how a  
defendant's right to due process is violated if the defendant suffers no  
inconvenience. See 444 U.S., at 294, 100 S.Ct., at 565.

54 The conclusion I draw is that constitutional concepts of fairness no longer require  
the extreme concern for defendants that was once necessary. Rather, as I wrote in  
dissent from *Shaffer v. Heitner*, *supra*, 433 U.S., at 220, 97 S.Ct., at 2588  
(emphasis added), minimum contacts must exist "among the *parties*, the contested  
transaction, and the forum State."<sup>15</sup> The contacts between any two of these should  
not be determinative. "[W]hen a suitor seeks to lodge a suit in a State with a  
substantial interest in seeing its own law applied to the transaction in question, we  
could wisely act to minimize conflicts, confusion, and uncertainty by adopting a  
liberal view of jurisdiction, unless considerations of fairness or efficiency strongly  
point in the opposite direction."<sup>16</sup> 433 U.S., at 225-226, 97 S.Ct., at 2591. Mr.  
Justice Black, dissenting in *Hanson v. Denckla*, 357 U.S., at 258-259, 78 S.Ct., at  
1242, expressed similar concerns by suggesting that a State should have jurisdiction  
over a case growing out of a transaction significantly related to that State "unless  
litigation there would impose such a heavy and disproportionate burden on a  
nonresident defendant that it would offend what this Court has referred to as  
'traditional notions of fair play and substantial justice.' "<sup>17</sup> Assuming that a State  
gives a nonresident defendant adequate notice and opportunity to defend, I do not  
think the Due Process Clause is offended merely because the defendant has to board  
a plane to get to the site of the trial.

55 The Court's opinion in No. 78-1078 suggests that the defendant ought to be  
subject to a State's jurisdiction only if he has contacts with the State "such that he  
should reasonably anticipate being haled into court there."<sup>18</sup> 444 U.S., at 297, 100  
S.Ct., at 567. There is nothing unreasonable or unfair, however, about recognizing  
commercial reality. Given the tremendous mobility of goods and people, and the  
inability of businessmen to control where goods are taken by customers (or  
retailers), I do not think that the defendant should be in complete control of the  
geographical stretch of his amenability to suit. Jurisdiction is no longer premised  
on the notion that nonresident defendants have somehow impliedly consented to  
suit. People should understand that they are held responsible for the consequences  
of their actions and that in our society most actions have consequences affecting  
many States. When an action in fact causes injury in another State, the actor should  
be prepared to answer for it there unless defending in that State would be unfair for  
some reason other than that a state boundary must be crossed.<sup>19</sup>

56 In effect the Court is allowing defendants to assert the sovereign rights of their  
home States. The expressed fear is that otherwise all limits on personal jurisdiction  
would disappear. But the argument's premise is wrong. I would not abolish limits  
on jurisdiction or strip state boundaries of all significance, see *Hanson*, *supra*, 357  
U.S., at 260, 78 S.Ct., at 1243 (Black, J., dissenting); I would still require the  
plaintiff to demonstrate sufficient contacts among the parties, the forum, and the  
litigation to make the forum a reasonable State in which to hold the trial.<sup>20</sup>

- 57 I would also, however, strip the defendant of an unjustified veto power over  
« up certain very appropriate fora—a power the defendant justifiably enjoyed long ago  
when communication and travel over long distances were slow and unpredictable  
and when notions of state sovereignty were impractical and exaggerated. But I  
repeat that that is not today's world. If a plaintiff can show that his chosen forum  
State has a sufficient interest in the litigation (or sufficient contacts with the  
defendant), then the defendant who cannot show some real injury to a  
constitutionality protected interest, see *O'Connor v. Lee-Hy Paving Corp.*, 579  
F.2d, at 201, should have no constitutional excuse not to appear.<sup>21</sup>
- 58 The plaintiffs in each of these cases brought suit in a forum with which they had  
significant contacts and which had significant contacts with the litigation. I am not  
convinced that the defendants would suffer any "heavy and disproportionate  
burden" in defending the suits. Accordingly, I would hold that the Constitution  
should not shield the defendants from appearing and defending in the plaintiffs'  
chosen fora.
- 59 Mr. Justice MARSHALL, with whom Mr. Justice BLACKMUN joins, dissenting.
- 60 For over 30 years the standard by which to measure the constitutionally  
permissible reach of state-court jurisdiction has been well established:
- 61 "[D]ue process requires only that in order to subject a defendant to a judgment *in*  
*personam*, if he be not present within the territory of the forum, he have certain  
minimum contacts with it such that the maintenance of the suit does not offend  
'traditional notions of fair play and substantial justice.' " *International Shoe, Co. v.*  
*Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), quoting  
*Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940).
- 62 The corollary, that the Due Process Clause forbids the assertion of jurisdiction  
over a defendant "with which the state has no contacts, ties, or relations," 326 U.S.,  
at 319, 66 S.Ct., at 160, is equally clear. The concepts of fairness and substantial  
justice as applied to an evaluation of "the quality and nature of the [defendant's]  
activity," *ibid.*, are not readily susceptible of further definition, however, and it is  
not surprising that the constitutional standard is easier to state than to apply.
- 63 This is a difficult case, and reasonable minds may differ as to whether  
respondents have alleged a sufficient "relationship among the defendant[s], the  
forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569,  
2580, 53 L.Ed.2d 683 (1977), to satisfy the requirements of *International Shoe*. I  
am concerned, however, that the majority has reached its result by taking an  
unnecessarily narrow view of petitioners' forum-related conduct. The majority  
asserts that "respondents seek to base jurisdiction on one, isolated occurrence and  
whatever inferences can be drawn therefrom: the fortuitous circumstance that a  
single Audi automobile, sold in New York to New York residents, happened to suffer  
an accident while passing through Oklahoma." *Ante*, at 295. If that were the case, I  
would readily agree that the minimum contacts necessary to sustain jurisdiction are  
not present. But the basis for the assertion of jurisdiction is not the happenstance  
that an individual over whom petitioner had no control made a unilateral decision  
to take a chattel with him to a distant State. Rather, jurisdiction is premised on the  
deliberate and purposeful actions of the defendants themselves in choosing to  
become part of a nationwide, indeed a global, network for marketing and servicing  
automobiles.
- Petitioners are sellers of a product whose utility derives from its mobility. The  
unique importance of the automobile in today's society, which is discussed in Mr.  
Justice BLACKMUN'S dissenting opinion, *post*, at 318, needs no further

64 elaboration. Petitioners know that their customers buy cars not only to make short  
 « up trips, but also to travel long distances. In fact, the nationwide service network with  
 which they are affiliated was designed to facilitate and encourage such travel.  
 Seaway would be unlikely to sell many cars if authorized service were available only  
 in Massena, N. Y. Moreover, local dealers normally derive a substantial portion of  
 their revenues from their service operations and thereby obtain a further economic  
 benefit from the opportunity to service cars which were sold in other States. It is  
 apparent that petitioners have not attempted to minimize the chance that their  
 activities will have effects in other States; on the contrary, they have chosen to do  
 business in a way that increases that chance, because it is to their economic  
 advantage to do so.

65 To be sure, petitioners could not know in advance that this particular automobile  
 would be driven to Oklahoma. They must have anticipated, however, that a  
 substantial portion of the cars they sold would travel out of New York. Seaway, a  
 local dealer in the second most populous State, and WorldWide, one of only seven  
 regional Audi distributors in the entire country, see Brief for Respondents 2, would  
 scarcely have been surprised to learn that a car sold by them had been driven in  
 Oklahoma on Interstate 44, a heavily traveled transcontinental highway. In the case  
 of the distributor, in particular, the probability that some of the cars it sells will be  
 driven in every one of the contiguous States must amount to a virtual certainty. This  
 knowledge should alert a reasonable businessman to the likelihood that a defect in  
 the product might manifest itself in the forum State—not because of some  
 unpredictable, aberrant, unilateral action by a single buyer, but in the normal  
 course of the operation of the vehicles for their intended purpose.

66 It is misleading for the majority to characterize the argument in favor of  
 jurisdiction as one of " 'foreseeability' alone." *Ante*, at 295. As economic entities  
 petitioners reach out from New York, knowingly causing effects in other States and  
 receiving economic advantage both from the ability to cause such effects themselves  
 and from the activities of dealers and distributors in other States. While they did  
 not receive revenue from making direct sales in Oklahoma, they intentionally  
 became part of an interstate economic network, which included dealerships in  
 Oklahoma, for pecuniary gain. In light of this purposeful conduct I do not believe it  
 can be said that petitioners "had no reason to expect to be haled before a[n  
 Oklahoma] court." *Shaffer v. Heitner*, *supra*, 433 U.S., at 216, 97 S.Ct., at 2586; see  
*ante*, at 297, and *Kulko v. California Superior Court*, 436 U.S. 84, 97-98, 98 S.Ct.  
 1690, 1699-1700, 94 L.Ed.2d 132 (1978).

67 The majority apparently acknowledges that if a product is purchased in the forum  
 State by a consumer, that State may assert jurisdiction over everyone in the chain of  
 distribution. See *ante*, at 297-298. With this I agree. But I cannot agree that  
 jurisdiction is necessarily lacking if the product enters the State not through the  
 channels of distribution but in the course of its intended use by the consumer. We  
 have recognized the role played by the automobile in the expansion of our notions  
 of personal jurisdiction. See *Shaffer v. Heitner*, *supra*, 433 U.S., at 204, 97 S.Ct., at  
 2579; *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927). Unlike  
 most other chattels, which may find their way into States far from where they were  
 purchased because their owner takes them there, the intended use of the  
 automobile is precisely as a means of traveling from one place to another. In such a  
 case, it is highly artificial to restrict the concept of the "stream of commerce" to the  
 chain of distribution from the manufacturer to the ultimate consumer.

I sympathize with the majority's concern that the persons ought to be able to  
 structure their conduct so as not to be subject to suit in distant forums. But that  
 may not always be possible. Some activities by their very nature may foreclose the

68 option of conducting them in such a way as to avoid subjecting oneself to  
 « up jurisdiction in multiple forums. This is by no means to say that all sellers of  
 automobiles should be subject to suit everywhere; but a distributor of automobiles  
 to a multistate market and a local automobile dealer who makes himself part of a  
 nationwide network of dealerships can fairly expect that the cars they sell may  
 cause injury in distant States and that they may be called on to defend a resulting  
 lawsuit there.

69 In light of the quality and nature of petitioners' activity, the majority's reliance on  
*Kulko v. California Superior Court, supra*, is misplaced. *Kulko* involved the  
 assertion of state-court jurisdiction over a nonresident individual in connection  
 with an action to modify his child custody rights and support obligations. His only  
 contact with the forum State was that he gave his minor child permission to live  
 there with her mother. In holding that exercise of jurisdiction violated the Due  
 Process Clause, we emphasized that the cause of action as well as the defendant's  
 actions in relation to the forum State arose "*not from the defendant's commercial*  
*transactions in interstate commerce*, but rather from his personal, domestic  
 relations," 436 U.S., at 97, 98 S.Ct., at 1699 (emphasis supplied), contrasting  
*Kulko's* actions with those of the insurance company in *McGee v. International Life*  
*Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), which were undertaken  
 for commercial benefit.\*

70 Manifestly, the "quality and nature" of commercial activity is different, for  
 purposes of the *International Shoe* test, from actions from which a defendant  
 obtains no economic advantage. Commercial activity is more likely to cause effects  
 in a larger sphere, and the actor derives an economic benefit from the activity that  
 makes it fair to require him to answer for his conduct where its effects are felt. The  
 profits may be used to pay the costs of suit, and knowing that the activity is likely to  
 have effects in other States the defendant can readily insure against the costs of  
 those effects, thereby sparing himself much of the inconvenience of defending in a  
 distant forum.

71 Of course, the Constitution forbids the exercise of jurisdiction if the defendant  
 had no judicially cognizable contacts with the forum. But as the majority  
 acknowledges, if such contacts are present the jurisdictional inquiry requires a  
 balancing of various interests and policies. See *ante*, at 292; *Rush v. Savchuk*, 444  
 U.S., at 332, 100 S.Ct., at 579. I believe such contacts are to be found here and that,  
 considering all of the interests and policies at stake, requiring petitioners to defend  
 this action in Oklahoma is not beyond the bounds of the Constitution. Accordingly,  
 I dissent.

72 Mr. Justice BLACKMUN, dissenting.

73 I confess that I am somewhat puzzled why the plaintiffs in this litigation are so  
 insistent that the regional distributor and the retail dealer, the petitioners here, who  
 handled the ill-fated Audi automobile involved in this litigation, be named  
 defendants. It would appear that the manufacturer and the importer, whose  
 subjectability to Oklahoma jurisdiction is not challenged before this Court, ought  
 not to be judgment-proof. It may, of course, ultimately amount to a contest between  
 insurance companies that, once begun, is not easily brought to a termination.  
 Having made this much of an observation, I pursue it no further.

For me, a critical factor in the disposition of the litigation is the nature of the  
 instrumentality under consideration. It has been said that we are a nation on  
 wheels. What we are concerned with here is the automobile and its peripatetic  
 character. One need only examine our national network of interstate highways, or

74 make an appearance on one of them, or observe the variety of license plates present  
 « up not only on those highways but in any metropolitan area, to realize that any  
 automobile is likely to wander far from its place of licensure or from its place of  
 distribution and retail sale. Miles per gallon on the highway (as well as in the city)  
 and mileage per tankful are familiar allegations in manufacturers' advertisements  
 today. To expect that any new automobile will remain in the vicinity of its retail  
 sale—like the 1914 electric driven car by the proverbial "little old lady"—is to blink  
 at reality. The automobile is intended for distance as well as for transportation  
 within a limited area.

75 It therefore seems to me not unreasonable—and certainly not unconstitutional  
 and beyond the reach of the principles laid down in *International Shoe Co. v.*  
*Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny—to  
 uphold Oklahoma jurisdiction over this New York distributor and this New York  
 dealer when the accident happened in Oklahoma. I see nothing more unfair for  
 them than for the manufacturer and the importer. All are in the business of  
 providing vehicles that spread out over the highways of our several States. It is not  
 too much to anticipate at the time of distribution and at the time of retail sale that  
 this Audi would be in Oklahoma. Moreover, in assessing "minimum contacts,"  
 foreseeable use in another State seems to me to be little different from foreseeable  
 resale in another State. Yet the Court declares this distinction determinative. *Ante*,  
 at 297-299.

76 Mr. Justice BRENNAN points out in his dissent, 444 U.S., at 307, 100 S.Ct., at  
 585, that an automobile dealer derives substantial benefits from States other than  
 its own. The same is true of the regional distributor. Oklahoma does its best to  
 provide safe roads. Its police investigate accidents. It regulates driving within the  
 State. It provides aid to the victim and thereby, it is hoped, lessens damages.  
 Accident reports are prepared and made available. All this contributes to and  
 enhances the business of those engaged professionally in the distribution and sale  
 of automobiles. All this also may benefit defendants in the very lawsuits over which  
 the State asserts jurisdiction.

77 My position need not now take me beyond the automobile and the professional  
 who does business by way of distributing and retailing automobiles. Cases  
 concerning other instrumentalities will be dealt with as they arise and in their own  
 contexts.

78 I would affirm the judgment of the Supreme Court of Oklahoma. Because the  
 Court reverses that judgment, it will now be about parsing every variant in the  
 myriad of motor vehicles fact situations that present themselves. Some will justify  
 jurisdiction and others will not. All will depend on the "contact" that the Court sees  
 fit to perceive in the individual case.

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<sup>1</sup> The driver of the other automobile does not figure in the present litigation.

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<sup>2</sup> Kay Robinson sued on her own behalf. The two children sued through Harry Robinson  
 as their father and next friend.

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<sup>3</sup> Volkswagen also entered a special appearance in the District Court, but unlike World-  
 Wide and Seaway did not seek review in the Supreme Court of Oklahoma and is not a  
 petitioner here. Both Volkswagen and Audi remain as defendants in the litigation  
 pending before the District Court in Oklahoma.

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« up <sup>4</sup> The papers filed by the petitioners also claimed that the District Court lacked "venue of the subject matter," App. 9, or "venue over the subject matter," *id.*, at 11.

<sup>5</sup> The District Court's rulings are unreported, and appear at App. 13 and 20.

<sup>6</sup> Five judges joined in the opinion. Two concurred in the result, without opinion, and one concurred in part and dissented in part, also without opinion.

<sup>7</sup> This subsection provides:

"A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . ."

The State Supreme Court rejected jurisdiction based on § 1701.03(a)(3), which authorizes jurisdiction over any person "causing tortious injury in this state by an act or omission in this state." Something in addition to the infliction of tortious injury was required.

<sup>8</sup> *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (Okla.1976); *Carmack v. Chemical Bank New York Trust Co.*, 536 P.2d 897 (Okla.1975); *Hines v. Clendenning*, 465 P.2d 460 (Okla.1970).

<sup>9</sup> Cf. *Tilley v. Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968); *Granite States Volkswagen, Inc. v. District Court*, 177 Colo. 42, 492 P.2d 624 (1972); *Pellegrini v. Sachs & Sons*, 522 P.2d 704 (Utah 1974); *Oliver v. American Motors Corp.*, 70 Wash.2d 875, 425 P.2d 647 (1967).

<sup>10</sup> Respondents argue, as a threshold matter, that petitioners waived any objections to personal jurisdiction by (1) joining with their special appearances a challenge to the District Court's subject-matter jurisdiction, see n. 4, *supra*, and (2) taking depositions on the merits of the case in Oklahoma. The trial court, however, characterized the appearances as "special," and the Oklahoma Supreme Court, rather than finding jurisdiction waived, reached and decided the statutory and constitutional questions. Cf. *Kulko v. California Superior Court*, 436 U.S. 84, 91, n. 5, 98 S.Ct. 1690, 1696, n. 5, 56 L.Ed.2d 132 (1978).

<sup>11</sup> Respondents' counsel, at oral argument, see Tr. of Oral Arg. 19-22, 29, sought to limit the reach of the foreseeability standard by suggesting that there is something unique about automobiles. It is true that automobiles are uniquely mobile, see *Tyson v. Whitaker & Son, Inc.*, 407 A.2d 1, 6, and n. 11 (Me.1979) (McKusick, C. J.), that they did play a crucial role in the expansion of personal jurisdiction through the fiction of implied consent, *e. g.*, *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), and that some of the cases have treated the automobile as a "dangerous instrumentality." But today, under the regime of *International Shoe*, we see no difference for jurisdictional purposes between an automobile and any other chattel. The "dangerous instrumentality" concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability.

<sup>12</sup> As we have noted, petitioners earn no direct revenues from these service centers. See *supra*, at 289.

<sup>1</sup> In fact, a courtroom just across the state line from a defendant may often be far more convenient for the defendant than a courtroom in a distant corner of his own State.

« up <sup>2</sup> The States themselves, of course, remain free to choose whether to extend their jurisdiction to embrace all defendants over whom the Constitution would permit exercise of jurisdiction.

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<sup>3</sup> The plaintiff asserted jurisdiction pursuant to Minn.Stat. § 571.41, subd. 2 (1978), which allows garnishment of an insurer's obligation to defend and indemnify its insured. See 444 U.S., at 322-323, n. 3, 100 S.Ct., at 574, n. 3, and accompanying text. The Minnesota Supreme Court has interpreted the statute as allowing suit only to the insurance policy's liability limit. The court has held that the statute embodies the rule of *Seider v. Roth*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966).

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<sup>4</sup> To say that these considerations are relevant is a far cry from saying that they are "substituted for . . . contacts with the defendant and the cause of action." 444 U.S., at 332, 100 S.Ct., at 579. The forum's interest in the litigation is an independent point of inquiry even under traditional readings of *International Shoe's* progeny. If there is a shift in focus, it is not away from "the relationship *among* the defendant, the forum, and the litigation." 444 U.S., at 332, 100 S.Ct., at 579 (emphasis added). Instead it is a shift within the same accepted relationship from the connections *between* the defendant and the forum to those between the forum and the litigation.

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<sup>5</sup> In every *International Shoe* inquiry, the defendant, necessarily, is outside the forum State. Thus it is inevitable that either the defendant or the plaintiff will be inconvenienced. The problem existing at the time of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, that a resident plaintiff could obtain a binding judgment against an unsuspecting, distant defendant, has virtually disappeared in this age of instant communication and virtually instant travel.

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<sup>6</sup> It is true that the insurance contract is not the subject of the litigation. 444 U.S., at 329, 100 S.Ct., at 578. But one of the undisputed clauses of the insurance policy is that the insurer will defend this action and pay any damages assessed, up to the policy limit. The very purpose of the contract is to relieve the insured from having to defend himself, and under the state statute there could be no suit absent the insurance contract. Thus, in a real sense, the insurance contract is the source of the suit. See *Shaffer v. Heitner*, 433 U.S. 186, 207, 97 S.Ct. 2569, 2581, 53 L.Ed.2d 683 (1977).

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<sup>7</sup> Were the defendant a real party subject to actual liability or were there significant noneconomic consequences such as those suggested by the Court's note 20, 444 U.S., at 331, 100 S.Ct., at 579, a more substantial connection with the forum State might well be constitutionally required.

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<sup>8</sup> On the basis of this fact the state court inferred that the petitioners derived substantial revenue from goods used in Oklahoma. The inference is not without support. Certainly, were use of goods accepted as a relevant contact, a plaintiff would not need to have an exact count of the number of petitioners' cars that are used in Oklahoma.

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<sup>9</sup> Moreover, imposing liability in this case would not so undermine certainty as to destroy an automobile dealer's ability to do business. According jurisdiction does not expand liability except in the marginal case where a plaintiff cannot afford to bring an action except in the plaintiff's own State. In addition, these petitioners are represented by insurance companies. They not only could, but did, purchase insurance to protect them should they stand trial and lose the case. The costs of the insurance no doubt are passed on to customers.

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<sup>10</sup> One might argue that it was more predictable that the pollutants would reach Ohio than that one of petitioners' cars would reach Oklahoma. The Court's analysis, however, excludes jurisdiction in a contiguous State such as Pennsylvania as surely as in more distant States such as Oklahoma.

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- « up
- <sup>11</sup> For example, I cannot understand the constitutional distinction between selling an item in New Jersey and selling an item in New York expecting it to be used in New Jersey.
- 
- <sup>12</sup> The manufacturer in the case cited by the Court, *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), had no more control over which States its goods would reach than did the petitioners in this case.
- 
- <sup>13</sup> Statistics help illustrate the amazing expansion in mobility since *International Shoe*. The number of revenue passenger-miles flown on domestic and international flights increased by nearly three orders of magnitude between 1945 (450 million) and 1976 (179 billion). U.S. Department of Commerce, Historical Statistics of the United States, pt. 2, p. 770 (1975); U.S. Department of Commerce, Statistical Abstract of the United States 670 (1978). Automobile vehicle-miles (including passenger cars, buses, and trucks) driven in the United States increased by a relatively modest 500% during the same period, growing from 250 billion in 1945 to 1,409 billion in 1976. Historical Statistics, *supra*, at 718; Statistical Abstract, *supra*, at 647.
- 
- <sup>14</sup> The Court has recognized that there are cases where the interests of justice can turn the focus of the jurisdictional inquiry away from the contacts between a defendant and the forum State. For instance, the Court indicated that the requirement of contacts may be greatly relaxed (if indeed any personal contacts would be required) where a plaintiff is suing a nonresident defendant to enforce a judgment procured in another State. *Shaffer v. Heitner*, 433 U.S., at 210-211, nn. 36, 37, 97 S.Ct., at 2582-2583, nn. 36, 37.
- 
- <sup>15</sup> In some cases, the inquiry will resemble the inquiry commonly undertaken in determining which State's law to apply. That it is fair to apply a State's law to a nonresident defendant is clearly relevant in determining whether it is fair to subject the defendant to jurisdiction in that State. *Shaffer v. Heitner*, *supra*, at 225, 97 S.Ct., at 2590 (BRENNAN, J., dissenting); *Hanson v. Denckla*, 357 U.S. 235, 258, 78 S.Ct. 1228, 1242, 2 L.Ed.2d 1283 (1958) (Black, J., dissenting). See n. 19, *infra*.
- 
- <sup>16</sup> Such a standard need be no more uncertain than the Court's test "in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' *Estin v. Estin*, 334 U.S. 541, 545, 68 S.Ct. 1213, 1216, 92 L.Ed. 1561 (1948)." *Kulko v. California Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132 (1978).
- 
- <sup>17</sup> This strong emphasis on the State's interest is nothing new. This Court, permitting the forum to exercise jurisdiction over nonresident claimants to a trust largely on the basis of the forum's interest in closing the trust, stated:
- "[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950).
- 
- <sup>18</sup> The Court suggests that this is the critical foreseeability rather than the likelihood that the product will go to the forum State. But the reasoning begs the question. A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is.
- 
- <sup>19</sup> One consideration that might create some unfairness would be if the choice of forum also imposed on the defendant an unfavorable substantive law which the defendant could justly have assumed would not apply. See n. 15, *supra*.
- 
- <sup>20</sup> For instance, in No. 78-952, if the plaintiff were not a bona fide resident of Minnesota when the suit was filed or if the defendant were subject to financial liability, I might well

reach a different result. In No. 78-1078, I might reach a different result if the accident had not occurred in Oklahoma.

« up

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<sup>21</sup> Frequently, of course, the defendant will be able to influence the choice of forum through traditional doctrines, such as venue or *forum non conveniens*, permitting the transfer of litigation. *Shaffer v. Heitner*, 433 U.S., at 228, n. 8, 97 S.Ct., at 2592, n. 8 (BRENNAN, J., dissenting).

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\* Similarly, I believe the Court in *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), was influenced by the fact that trust administration has traditionally been considered a peculiarly local activity.

« up

482 U.S. 522

107 S.Ct. 2542

96 L.Ed.2d 461

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and  
Societe de Construction d'Avions de Tourisme, Petitioners

v.

UNITED STATES DISTRICT COURT FOR the SOUTHERN  
DISTRICT OF IOWA, etc.

*No. 85-1695.**Argued Jan. 14, 1987.**Decided June 15, 1987.*

### *Syllabus*

The United States, France, and 15 other countries have acceded to the Hague Evidence Convention, which prescribes procedures by which a judicial authority in one contracting state may request evidence located in another. Plaintiffs brought suits (later consolidated) in Federal District Court for personal injuries resulting from the crash of an aircraft built and sold by petitioners, two corporations owned by France. Petitioners answered the complaints without questioning the court's jurisdiction, and engaged in initial discovery without objection. However, when plaintiffs served subsequent discovery requests under the Federal Rules of Civil Procedure, petitioners filed a motion for a protective order, alleging that the Convention dictated the exclusive procedures that must be followed since petitioners are French and the discovery sought could only be had in France. A Magistrate denied the motion, and the Court of Appeals denied petitioners' mandamus petition, holding, *inter alia*, that when a district court has jurisdiction over a foreign litigant, the Convention does not apply even though the information sought may be physically located within the territory of a foreign signatory to the Convention.

### *Held:*

1. The Convention does not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory's territory. The Convention's plain language, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures for obtaining evidence abroad. Its preamble speaks in nonmandatory terms, specifying its purpose to "facilitate" discovery and to "improve mutual judicial co-operation." Similarly, its text uses permissive language, and does not expressly modify the law of contracting states or require them to use the specified procedures or change their own procedures. The Convention does not deprive the District Court of its jurisdiction to order, under the Federal Rules, a foreign national party to produce evidence physically located within a signatory nation. Pp. 529-540.

« up

2. The Court of Appeals erred in concluding that the Convention "does not apply" to discovery sought from a foreign litigant that is subject to an American court's jurisdiction. Although they are not mandatory, the Convention's procedures are available whenever they will facilitate the gathering of evidence, and "apply" in the sense that they are one method of seeking evidence that a court may elect to employ. Pp. 540—541.

3. International comity does not require in all instances that American litigants first resort to Convention procedures before initiating discovery under the Federal Rules. In many situations, Convention procedures would be unduly time consuming and expensive, and less likely to produce needed evidence than direct use of the Federal Rules. The concept of comity requires in this context a more particularized analysis of the respective interests of the foreign and requesting nations than a blanket "first resort" rule would generate. Thus, the determination whether to resort to the Convention requires prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that such resort will prove effective. Pp. 541–546.

782 F.2d 120 (CA8 1986), vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, POWELL, and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post*, p. 547.

John W. Ford, for petitioners.

Jeffrey P. Minear, as amicus curiae, by special leave of Court.

Richard H. Doyle, IV, Des Moines, Iowa, for respondent.

Justice STEVENS delivered the opinion of the Court.

1 The United States, the Republic of France, and 15 other Nations have acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.<sup>1</sup> This Convention—sometimes referred to as the "Hague Convention" or the "Evidence Convention"—prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state. The question presented in this case concerns the extent to which a federal district court must employ the procedures set forth in the Convention when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court has personal jurisdiction.

\* The two petitioners are corporations owned by the Republic of France.<sup>2</sup> They are engaged in the business of designing, manufacturing, and marketing aircraft. One of their planes, the "Rallye," was allegedly advertised in American aviation publications as "the World's safest and most economical STOL plane."<sup>3</sup> On August 19, 1980, a Rallye crashed in Iowa, injuring the pilot and a passenger. Dennis Jones, John George, and Rosa George brought separate suits based upon this accident in the United States District Court for the Southern District of Iowa, alleging that petitioners had manufactured and sold a defective plane and that they were guilty of negligence and breach of warranty. Petitioners answered the complaints, apparently without questioning the jurisdiction of the District Court. With the

2 parties' consent, the cases were consolidated and referred to a Magistrate. See 28  
 « up U.S.C. § 636(c)(1).

3 Initial discovery was conducted by both sides pursuant to the Federal Rules of  
 Civil Procedure without objection.<sup>4</sup> When plaintiffs<sup>5</sup> served a second request for  
 the production of documents pursuant to Rule 34, a set of interrogatories pursuant  
 to Rule 33, and requests for admission pursuant to Rule 36, however, petitioners  
 filed a motion for a protective order. App. 27-37. The motion alleged that because  
 petitioners are "French corporations, and the discovery sought can only be found in  
 a foreign state, namely France," the Hague Convention dictated the exclusive  
 procedures that must be followed for pretrial discovery. App. 2. In addition, the  
 motion stated that under French penal law, the petitioners could not respond to  
 discovery requests that did not comply with the Convention. *Ibid.*<sup>6</sup>

4 The Magistrate denied the motion insofar as it related to answering  
 interrogatories, producing documents, and making admissions.<sup>7</sup> After reviewing  
 the relevant cases, the Magistrate explained:

5 "To permit the Hague Evidence Convention to override the Federal Rules of Civil  
 Procedure would frustrate the courts' interests, which particularly arise in products  
 liability cases, in protecting United States citizens from harmful products and in  
 compensating them for injuries arising from use of such products." App. to Pet. for  
 Cert. 25a.

6 The Magistrate made two responses to petitioners' argument that they could not  
 comply with the discovery requests without violating French penal law. Noting that  
 the law was originally " 'inspired to impede enforcement of United States antitrust  
 laws,' " <sup>8</sup> and that it did not appear to have been strictly enforced in France, he first  
 questioned whether it would be construed to apply to the pretrial discovery requests  
 at issue.<sup>9</sup> *Id.*, at 22a-24a. Second, he balanced the interests in the "protection of  
 United States citizens from harmful foreign products and compensation for injuries  
 caused by such products" against France's interest in protecting its citizens "from  
 intrusive foreign discovery procedures." The Magistrate concluded that the former  
 interests were stronger, particularly because compliance with the requested  
 discovery will "not have to take place in France" and will not be greatly intrusive or  
 abusive. *Id.*, at 23a-25a.

Petitioners sought a writ of mandamus from the Court of Appeals for the Eighth  
 Circuit under Federal Rule of Appellate Procedure 21(a). Although immediate  
 appellate review of an interlocutory discovery order is not ordinarily available, see  
*Kerr v. United States District Court*, 426 U.S. 394, 402-403, 96 S.Ct. 2119, 2123-  
 2124, 48 L.Ed.2d 725 (1976), the Court of Appeals considered that the novelty and  
 the importance of the question presented, and the likelihood of its recurrence, made  
 consideration of the merits of the petition appropriate. 782 F.2d 120 (1986). It then  
 held 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." *Id.*, at 124.  
 The Court of Appeals disagreed with petitioners' argument that this construction  
 would render the entire Hague Convention "meaningless," noting that it would still  
 serve the purpose of providing an improved procedure for obtaining evidence from  
 nonparties. *Id.*, at 125. The court also rejected petitioners' contention that  
 considerations of international comity required plaintiffs to resort to Hague  
 Convention procedures as an initial matter ("first use"), and correspondingly to  
 invoke the federal discovery rules only if the treaty procedures turned out to be  
 futile. The Court of Appeals believed that the potential overruling of foreign

7 tribunals' denial of discovery would do more to defeat than to promote  
 « up international comity. *Id.*, at 125-126. Finally, the Court of Appeals concluded that  
 objections based on the French penal statute should be considered in two stages:  
 first, whether the discovery order was proper even though compliance may require  
 petitioners to violate French law; and second, what sanctions, if any, should be  
 imposed if petitioners are unable to comply. The Court of Appeals held that the  
 Magistrate properly answered the first question and that it was premature to  
 address the second.<sup>10</sup> The court therefore denied the petition for mandamus. We  
 granted certiorari. 476 U.S. 1168, 106 S.Ct. 2888, 90 L.Ed.2d 976 (1986).

## II

8 In the District Court and the Court of Appeals, petitioners contended that the  
 Hague Evidence Convention "provides the exclusive and mandatory procedures for  
 obtaining documents and information located within the territory of a foreign  
 signatory." 782 F.2d, at 124.<sup>11</sup> We are satisfied that the Court of Appeals correctly  
 rejected this extreme position. We believe it is foreclosed by the plain language of  
 the Convention. Before discussing the text of the Convention, however, we briefly  
 review its history.

9 The Hague Conference on Private International Law, an association of sovereign  
 states, has been conducting periodic sessions since 1893. S.Exec. Doc. A, 92d Cong.,  
 2d Sess. p. v (1972) (S.Exec. Doc. A). The United States participated in those  
 sessions as an observer in 1956 and 1960, and as a member beginning in 1964  
 pursuant to congressional authorization.<sup>12</sup> In that year Congress amended the  
 Judicial Code to grant foreign litigants, without any requirement of reciprocity,  
 special assistance in obtaining evidence in the United States.<sup>13</sup> In 1965 the Hague  
 Conference adopted a Convention on the Service Abroad of Judicial and  
 Extrajudicial Documents in Civil or Commercial Matters (Service Convention), 20  
 U.S.T. 361, T.I.A.S. No. 6638, to which the Senate gave its advice and consent in  
 1967. The favorable response to the Service Convention, coupled with the  
 longstanding interest of American lawyers in improving procedures for obtaining  
 evidence abroad, motivated the United States to take the initiative in proposing that  
 an evidence convention be adopted. Statement of Carl F. Salans, Deputy Legal  
 Adviser, Department of State, Convention on Taking of Evidence Abroad,  
 S.Exec.Rep. No. 92-25, p. 3 (1972). The Conference organized a special commission  
 to prepare the draft convention, and the draft was approved without a dissenting  
 vote on October 26, 1968. S.Exec. Doc. A, at p. v. It was signed on behalf of the  
 United States in 1970 and ratified by a unanimous vote of the Senate in 1972.<sup>14</sup> The  
 Convention's purpose was to establish a system for obtaining evidence located  
 abroad that would be "tolerable" to the state executing the request and would  
 produce evidence "utilizable" in the requesting state. Amram, Explanatory Report  
 on the Convention on the Taking of Evidence Abroad in Civil or Commercial  
 Matters, in S.Exec. Doc. A, p. 11.

10 In his letter of transmittal recommending ratification of the Convention, the  
 President noted that it was "supported by such national legal organizations as the  
 American Bar Association, the Judicial Conference of the United States, the  
 National Conference of Commissions on Uniform State Laws, and by a number of  
 State, local, and specialized bar associations." S.Exec. Doc. A, p. iii. There is no  
 evidence of any opposition to the Convention in any of those organizations. The  
 Convention was fairly summarized in the Secretary of State's letter of submittal to  
 the President:

"The willingness of the Conference to proceed promptly with work on the  
 evidence convention is perhaps attributable in large measure to the difficulties

11 encountered by courts and lawyers in obtaining evidence abroad from countries  
 12 with markedly different legal systems. Some countries have insisted on the  
 13 « up exclusive use of the complicated, dilatory and expensive system of letters rogatory  
 or letters of request. Other countries have refused adequate judicial assistance  
 because of the absence of a treaty or convention regulating the matter. The  
 substantial increase in litigation with foreign aspects arising, in part, from the  
 unparalleled expansion of international trade and travel in recent decades had  
 intensified the need for an effective international agreement to set up a model  
 system to bridge differences between the common law and civil law approaches to  
 the taking of evidence abroad.

12 "Civil law countries tend to concentrate on *commissions rogatoires*, while  
 common law countries take testimony on notice, by stipulation and through  
 commissions to consuls or commissioners. Letters of request for judicial assistance  
 from courts abroad in securing needed evidence have been the exception, rather  
 than the rule. The civil law technique results normally in a resume of the evidence,  
 prepared by the executing judge and signed by the witness, while the common law  
 technique results normally in a verbatim transcript of the witness's testimony  
 certified by the reporter.

13 "Failure by either the requesting state or the state of execution fully to take into  
 account the differences of approach to the taking of evidence abroad under the two  
 systems and the absence of agreed standards applicable to letters of request have  
 frequently caused difficulties for courts and litigants. To minimize such difficulties  
 in the future, the enclosed convention, which consists of a preamble and forty-two  
 articles, is designed to:

14 "1. Make the employment of letters of request a principal means of obtaining  
 evidence abroad;

15 "2. Improve the means of securing evidence abroad by increasing the powers of  
 consuls and by introducing in the civil law world, on a limited basis, the concept of  
 the commissioner;

16 "3. Provide means for securing evidence in the form needed by the court where  
 the action is pending; and

17 "4. Preserve all more favorable and less restrictive practices arising from internal  
 law, internal rules of procedure and bilateral or multilateral conventions.

18 "What the convention does is to provide a set of minimum standards with which  
 contracting states agree to comply. Further, through articles 27, 28 and 32, it  
 provides a flexible framework within which any future liberalizing changes in policy  
 and tradition in any country with respect to international judicial cooperation may  
 be translated into effective change in international procedures. At the same time it  
 recognizes and preserves procedures of every country which now or hereafter may  
 provide international cooperation in the taking of evidence on more liberal and less  
 restrictive bases, whether this is effected by supplementary agreements or by  
 municipal law and practice." *Id.*, vi.

### III

In arguing their entitlement to a protective order, petitioners correctly assert that  
 both the discovery rules set forth in the Federal Rules of Civil Procedure and the  
 Hague Convention are the law of the United States. Brief for Petitioners 31. This  
 observation, however, does not dispose of the question before us; we must analyze  
 the interaction between these two bodies of federal law. Initially, we note that at

19 least four different interpretations of the relationship between the federal discovery  
 « up rules and the Hague Convention are possible. Two of these interpretations assume  
 that the Hague Convention by its terms dictates the extent to which it supplants  
 normal discovery rules. First, the Hague Convention might be read as requiring its  
 use to the exclusion of any other discovery procedures whenever evidence located  
 abroad is sought for use in an American court. Second, the Hague Convention  
 might be interpreted to require first, but not exclusive, use of its procedures. Two  
 other interpretations assume that international comity, rather than the obligations  
 created by the treaty, should guide judicial resort to the Hague Convention. Third,  
 then, the Convention might be viewed as establishing a supplemental set of  
 discovery procedures, strictly optional under treaty law, to which concerns of  
 comity nevertheless require first resort by American courts in all cases. Fourth, the  
 treaty may be viewed as an undertaking among sovereigns to facilitate discovery to  
 which an American court should resort when it deems that course of action  
 appropriate, after considering the situations of the parties before it as well as the  
 interests of the concerned foreign state.

20 In interpreting an international treaty, we are mindful that it is "in the nature of a  
 contract between nations," *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466  
 U.S. 243, 253, 104 S.Ct. 1776, 1783, 80 L.Ed.2d 273 (1984), to which "[g]eneral  
 rules of construction apply." *Id.*, at 262, 104 S.Ct., at 1788. See *Ware v. Hylton*, 3  
 Dall. 199, 240-241, 1 L.Ed. 568 (1796) (opinion of Chase, J.). We therefore begin  
 "with the text of the treaty and the context in which the written words are used." *Air  
 France v. Saks*, 470 U.S. 392, 397, 105 S.Ct. 1338, 1341, 84 L.Ed.2d 289 (1985). The  
 treaty's history, "the negotiations, and the practical construction adopted by the  
 parties" may also be relevant. *Id.*, at 396, 105 S.Ct., at 1341 (quoting *Choctaw  
 Nation of Indians v. United States*, 318 U.S. 423, 431-432, 63 S.Ct. 672, 677-678, 87  
 L.Ed. 877 (1943)).

21 We reject the first two of the possible interpretations as inconsistent with the  
 language and negotiating history of the Hague Convention. The preamble of the  
 Convention specifies its purpose "to facilitate the transmission and execution of  
 Letters of Request" and to "improve mutual judicial co-operation in civil or  
 commercial matters." 23 U.S.T., at 2557, T.I.A.S. No. 7444. The preamble does not  
 speak in mandatory terms which would purport to describe the procedures for all  
 permissible transnational discovery and exclude all other existing practices.<sup>15</sup> The  
 text of the Evidence Convention itself does not modify the law of any contracting  
 state, require any contracting state to use the Convention procedures, either in  
 requesting evidence or in responding to such requests, or compel any contracting  
 state to change its own evidence-gathering procedures.<sup>16</sup>

22 The Convention contains three chapters. Chapter I, entitled "Letters of Requests,"  
 and chapter II, entitled "Taking of Evidence by Diplomatic Officers, Consular  
 Agents and Commissioners," both use permissive rather than mandatory language.  
 Thus, Article 1 provides that a judicial authority in one contracting state "may"  
 forward a letter of request to the competent authority in another contracting state  
 for the purpose of obtaining evidence.<sup>17</sup> Similarly, Articles 15, 16, and 17 provide  
 that diplomatic officers, consular agents, and commissioners "may . . . without  
 compulsion," take evidence under certain conditions.<sup>18</sup> The absence of any  
 command that a contracting state must use Convention procedures when they are  
 not needed is conspicuous.<sup>19</sup>

Two of the Articles in chapter III, entitled "General Clauses," buttress our  
 conclusion that the Convention was intended as a permissive supplement, not a pre-  
 -emptive replacement, for other means of obtaining evidence located abroad.<sup>20</sup>  
 Article 23 expressly authorizes a contracting state to declare that it will not execute



23 any letter of request in aid of pretrial discovery of documents in a common-law  
 « up country.<sup>21</sup> Surely, if the Convention had been intended to replace completely the  
 broad discovery powers that the common-law courts in the United States previously  
 exercised over foreign litigants subject to their jurisdiction, it would have been most  
 anomalous for the common-law contracting parties to agree to Article 23, which  
 enables a contracting party to revoke its consent to the treaty's procedures for  
 pretrial discovery.<sup>22</sup> In the absence of explicit textual support, we are unable to  
 accept the hypothesis that the common-law contracting states abjured recourse to  
 all pre-existing discovery procedures at the same time that they accepted the  
 possibility that a contracting party could unilaterally abrogate even the  
 Convention's procedures.<sup>23</sup> Moreover, Article 27 plainly states that the Convention  
 does not prevent a contracting state from using more liberal methods of rendering  
 evidence than those authorized by the Convention.<sup>24</sup> Thus, the text of the Evidence  
 Convention, as well as the history of its proposal and ratification by the United  
 States, unambiguously supports the conclusion that it was intended to establish  
 optional procedures that would facilitate the taking of evidence abroad. See Amram,  
 The Proposed Convention on the Taking of Evidence Abroad, 55 A.B.A.J. 651, 655  
 (1969); President's Letter of Transmittal, Sen. Exec. Doc. A, p. iii.

24 An interpretation of the Hague Convention as the exclusive means for obtaining  
 evidence located abroad would effectively subject every American court hearing a  
 case involving a national of a contracting state to the internal laws of that state.  
 Interrogatories and document requests are staples of international commercial  
 litigation, no less than of other suits, yet a rule of exclusivity would subordinate the  
 court's supervision of even the most routine of these pretrial proceedings to the  
 actions or, equally, to the inactions of foreign judicial authorities. As the Court of  
 Appeals for the Fifth Circuit observed in *In re Anschuetz & Co., GmbH*, 754 F.2d  
 602, 612 (1985), cert. pending, No. 85-98:

25 "It seems patently obvious that if the Convention were interpreted as preempting  
 interrogatories and document requests, the Convention would really be much more  
 than an agreement on taking evidence abroad. Instead, the Convention would  
 amount to a major regulation of the overall conduct of litigation between nationals  
 of different signatory states, raising a significant possibility of very serious  
 interference with the jurisdiction of United States courts.

26 \* \* \* \* \*

27 "While it is conceivable that the United States could enter into a treaty giving  
 other signatories control over litigation instituted and pursued in American courts,  
 a treaty intended to bring about such a curtailment of the rights given to all litigants  
 by the federal rules would surely state its intention clearly and precisely identify  
 crucial terms."

28 The Hague Convention, however, contains no such plain statement of a pre-  
 emptive intent. We conclude accordingly that the Hague Convention did not  
 deprive the District Court of the jurisdiction it otherwise possessed to order a  
 foreign national party before it to produce evidence physically located within a  
 signatory nation.<sup>25</sup>

#### IV

While the Hague Convention does not divest the District Court of jurisdiction to  
 order discovery under the Federal Rules of Civil Procedure, the optional character  
 of the Convention procedures sheds light on one aspect of the Court of Appeals'  
 opinion that we consider erroneous. That court concluded that the Convention  
 simply "does not apply" to discovery sought from a foreign litigant that is subject to

29 the jurisdiction of an American court. 782 F.2d, at 124. Plaintiffs argue that this  
 « up conclusion is supported by two considerations. First, the Federal Rules of Civil  
 Procedure provide ample means for obtaining discovery from parties who are  
 subject to the court's jurisdiction, while before the Convention was ratified it was  
 often extremely difficult, if not impossible, to obtain evidence from nonparty  
 witnesses abroad. Plaintiffs contend that it is appropriate to construe the  
 Convention as applying only in the area in which improvement was badly needed.  
 Second, when a litigant is subject to the jurisdiction of the district court, arguably  
 the evidence it is required to produce is not "abroad" within the meaning of the  
 Convention, even though it is in fact located in a foreign country at the time of the  
 discovery request and even though it will have to be gathered or otherwise prepared  
 abroad. See *In re Anschuetz & Co., GmbH*, 754 F.2d, at 611; *In re Messerschmitt  
 Bolkow Blohm GmbH*, 757 F.2d 729, 731 (CA5 1985), cert. vacated, 476 U.S. 1168,  
 106 S.Ct. 2887, 90 L.Ed.2d 975 (1986); No. 85-99; *Daimler-Benz  
 Aktiengesellschaft v. United States District Court*, 805 F.2d 340, 341-342 (CA10  
 1986).

30 Nevertheless, the text of the Convention draws no distinction between evidence  
 obtained from third parties and that obtained from the litigants themselves; nor  
 does it purport to draw any sharp line between evidence that is "abroad" and  
 evidence that is within the control of a party subject to the jurisdiction of the  
 requesting court. Thus, it appears clear to us that the optional Convention  
 procedures are available whenever they will facilitate the gathering of evidence by  
 the means authorized in the Convention. Although these procedures are not  
 mandatory, the Hague Convention does "apply" to the production of evidence in a  
 litigant's possession in the sense that it is one method of seeking evidence that a  
 court may elect to employ. See Briefs of *Amici Curiae* for the United States and the  
 SEC 9-10, the Federal Republic of Germany 5-6, the Republic of France 8-12, and  
 the Government of the United Kingdom and Northern Ireland 8.

## V

31 Petitioners contend that even if the Hague Convention's procedures are not  
 mandatory, this Court should adopt a rule requiring that American litigants first  
 resort to those procedures before initiating any discovery pursuant to the normal  
 methods of the Federal Rules of Civil Procedure. See, e.g., *Laker Airways, Ltd. v.  
 Pan American World Airways*, 103 F.R.D. 42 (DC 1984); *Philadelphia Gear Corp.  
 v. American Pfauter Corp.*, 100 F.R.D. 58 (ED Pa.1983). The Court of Appeals  
 rejected this argument because it was convinced that an American court's order  
 ultimately requiring discovery that a foreign court had refused under Convention  
 procedures would constitute "the greatest insult" to the sovereignty of that tribunal.  
 782 F.2d, at 125-126. We disagree with the Court of Appeals' view. It is well known  
 that the scope of American discovery is often significantly broader than is permitted  
 in other jurisdictions, and we are satisfied that foreign tribunals will recognize that  
 the final decision on the evidence to be used in litigation conducted in American  
 courts must be made by those courts. We therefore do not believe that an American  
 court should refuse to make use of Convention procedures because of a concern that  
 it may ultimately find it necessary to order the production of evidence that a foreign  
 tribunal permitted a party to withhold.

Nevertheless, we cannot accept petitioners' invitation to announce a new rule of  
 law that would require first resort to Convention procedures whenever discovery is  
 sought from a foreign litigant. Assuming, without deciding, that we have the  
 lawmaking power to do so, we are convinced that such a general rule would be  
 unwise. In many situations the Letter of Request procedure authorized by the  
 Convention would be unduly time consuming and expensive, as well as less certain

32 to produce needed evidence than direct use of the Federal Rules.<sup>26</sup> A rule of first  
 « up resort in all cases would therefore be inconsistent with the overriding interest in the  
 just, speedy, and inexpensive determination" of litigation in our courts. See  
 Fed.Rule Civ.Proc. 1.

33 Petitioners argue that a rule of first resort is necessary to accord respect to the  
 sovereignty of states in which evidence is located. It is true that the process of  
 obtaining evidence in a civil-law jurisdiction is normally conducted by a judicial  
 officer rather than by private attorneys. Petitioners contend that if performed on  
 French soil, for example, by an unauthorized person, such evidence-gathering  
 might violate the "judicial sovereignty" of the host nation. Because it is only through  
 the Convention that civil-law nations have given their consent to evidence-  
 gathering activities within their borders, petitioners argue, we have a duty to  
 employ those procedures whenever they are available. Brief for Petitioners 27-28.  
 We find that argument unpersuasive. If such a duty were to be inferred from the  
 adoption of the Convention itself, we believe it would have been described in the  
 text of that document. Moreover, the concept of international comity<sup>27</sup> requires in  
 this context a more particularized analysis of the respective interests of the foreign  
 nation and the requesting nation than petitioners' proposed general rule would  
 generate.<sup>28</sup> We therefore decline to hold as a blanket matter that comity requires  
 resort to Hague Evidence Convention procedures without prior scrutiny in each  
 case of the particular facts, sovereign interests, and likelihood that resort to those  
 procedures will prove effective.<sup>29</sup>

34 Some discovery procedures are much more "intrusive" than others. In this case,  
 for example, an interrogatory asking petitioners to identify the pilots who flew flight  
 tests in the Rallye before it was certified for flight by the Federal Aviation  
 Administration, or a request to admit that petitioners authorized certain advertising  
 in a particular magazine, is certainly less intrusive than a request to produce all of  
 the "design specifications, line drawings and engineering plans and all engineering  
 change orders and plans and all drawings concerning the leading edge slats for the  
 Rallye type aircraft manufactured by the Defendants." App. 29. Even if a court  
 might be persuaded that a particular document request was too burdensome or too  
 "intrusive" to be granted in full, with or without an appropriate protective order, it  
 might well refuse to insist upon the use of Convention procedures before requiring  
 responses to simple interrogatories or requests for admissions. The exact line  
 between reasonableness and unreasonableness in each case must be drawn by the  
 trial court, based on its knowledge of the case and of the claims and interests of the  
 parties and the governments whose statutes and policies they invoke.

American courts, in supervising pretrial proceedings, should exercise special  
 vigilance to protect foreign litigants from the danger that unnecessary, or unduly  
 burdensome, discovery may place them in a disadvantageous position. Judicial  
 supervision of discovery should always seek to minimize its costs and  
 inconvenience and to prevent improper uses of discovery requests. When it is  
 necessary to seek evidence abroad, however, the district court must supervise  
 pretrial proceedings particularly closely to prevent discovery abuses. For example,  
 the additional cost of transportation of documents or witnesses to or from foreign  
 locations may increase the danger that discovery may be sought for the improper  
 purpose of motivating settlement, rather than finding relevant and probative  
 evidence. Objections to "abusive" discovery that foreign litigants advance should  
 therefore receive the most careful consideration. In addition, we have long  
 recognized the demands of comity in suits involving foreign states, either as parties  
 or as sovereigns with a coordinate interest in the litigation. See *Hilton v. Guyot*, 159  
 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895). American courts should therefore take  
 care to demonstrate due respect for any special problem confronted by the foreign

35 litigant on account of its nationality or the location of its operations, and for any  
 « up sovereign interest expressed by a foreign state. We do not articulate specific rules to  
 guide this delicate task of adjudication.<sup>30</sup>

## VI

36 In the case before us, the Magistrate and the Court of Appeals correctly refused to  
 grant the broad protective order that petitioners requested. The Court of Appeals  
 erred, however, in stating that the Evidence Convention does not apply to the  
 pending discovery demands. This holding may be read as indicating that the  
 Convention procedures are not even an option that is open to the District Court. It  
 must be recalled, however, that the Convention's specification of duties in executing  
 states creates corresponding rights in requesting states; holding that the  
 Convention does not apply in this situation would deprive domestic litigants of  
 access to evidence through treaty procedures to which the contracting states have  
 assented. Moreover, such a rule would deny the foreign litigant a full and fair  
 opportunity to demonstrate appropriate reasons for employing Convention  
 procedures in the first instance, for some aspects of the discovery process.

37 Accordingly, the judgment of the Court of Appeals is vacated, and the case is  
 remanded for further proceedings consistent with this opinion.

38 *It is so ordered.*

39 Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and  
 Justice O'CONNOR join, concurring in part and dissenting in part.

40 Some might well regard the Court's decision in this case as an affront to the  
 nations that have joined the United States in ratifying the Hague Convention on the  
 Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature,  
 Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. The Court ignores the importance  
 of the Convention by relegating it to an "optional" status, without acknowledging  
 the significant achievement in accommodating divergent interests that the  
 Convention represents. Experience to date indicates that there is a large risk that  
 the case-by-case comity analysis now to be permitted by the Court will be  
 performed inadequately and that the somewhat unfamiliar procedures of the  
 Convention will be invoked infrequently. I fear the Court's decision means that  
 courts will resort unnecessarily to issuing discovery orders under the Federal Rules  
 of Civil Procedure in a raw exercise of their jurisdictional power to the detriment of  
 the United States' national and international interests. The Court's view of this  
 country's international obligations is particularly unfortunate in a world in which  
 regular commercial and legal channels loom ever more crucial.

I do agree with the Court's repudiation of the positions at both extremes of the  
 spectrum with regard to the use of the Convention. Its rejection of the view that the  
 Convention is not "applicable" at all to this case is surely correct: the Convention  
 clearly applies to litigants as well as to third parties, and to requests for evidence  
 located abroad, no matter where that evidence is actually "produced." The Court  
 also correctly rejects the far opposite position that the Convention provides the  
*exclusive* means for discovery involving signatory countries. I dissent, however,  
 because I cannot endorse the Court's case-by-case inquiry for determining whether  
 to use Convention procedures and its failure to provide lower courts with any  
 meaningful guidance for carrying out that inquiry. In my view, the Convention  
 provides effective discovery procedures that largely eliminate the conflicts between  
 United States and foreign law on evidence gathering. I therefore would apply a  
 general presumption that, in most cases, courts should resort first to the

41 Convention procedures.<sup>1</sup> An individualized analysis of the circumstances of a  
 « up particular case is appropriate only when it appears that it would be futile to employ  
 the Convention or when its procedures prove to be unhelpful.

42 \* Even though the Convention does not expressly require discovery of materials  
 in foreign countries to proceed exclusively according to its procedures, it cannot be  
 viewed as merely advisory. The Convention was drafted at the request and with the  
 enthusiastic participation of the United States, which sought to broaden the  
 techniques available for the taking of evidence abroad. The differences between  
 discovery practices in the United States and those in other countries are significant,  
 and "[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." Restatement of Foreign Relations Law of the United States (Revised) § 437,  
 Reporters' Note 1, p. 35 (Tent. Draft No. 7, Apr. 10, 1986). Of particular import is  
 the fact that discovery conducted by the parties, as is common in the United States,  
 is alien to the legal systems of civil-law nations, which typically regard evidence  
 gathering as a judicial function.

43 The Convention furthers important United States interests by providing channels  
 for discovery abroad that would not be available otherwise. In general, it establishes  
 "methods to reconcile the differing legal philosophies of the Civil Law, Common  
 Law and other systems with respect to the taking of evidence." Rapport de la  
 Commission speciale, 4 Conference de La Haye de droit international prive: Actes et  
 documents de la Onzieme session 55 (1970) (Actes et documents). It serves the  
 interests of both requesting and receiving countries by advancing the following  
 goals:

44 "[T]he techniques for the taking of evidence must be 'utilizable' in the eyes of the  
 State where the lawsuit is pending and must also be 'tolerable' in the eyes of the  
 State where the evidence is to be taken." *Id.*, at 56.

45 The Convention also serves the long-term interests of the United States in  
 helping to further and to maintain the climate of cooperation and goodwill  
 necessary to the functioning of the international legal and commercial systems.

46 It is not at all satisfactory to view the Convention as nothing more than an  
 optional supplement to the Federal Rules of Civil Procedure, useful as a means to  
 "facilitate discovery" when a court "deems that course of action appropriate." *Ante*,  
 at 533. Unless they had expected the Convention to provide the normal channels for  
 discovery, other parties to the Convention would have had no incentive to agree to  
 its terms. The civil-law nations committed themselves to employ more effective  
 procedures for gathering evidence within their borders, even to the extent of  
 requiring some common-law practices alien to their systems. At the time of the  
 Convention's enactment, the liberal American policy, which allowed foreigners to  
 collect evidence with ease in the United States, see *ante*, at 529—530, and n. 13, was  
 in place and, because it was not conditioned on reciprocity, there was little  
 likelihood that the policy would change as a result of treaty negotiations. As a result,  
 the primary benefit the other signatory nations would have expected in return for  
 their concessions was that the United States would respect their territorial  
 sovereignty by using the Convention procedures.<sup>2</sup>

## II

By viewing the Convention as merely optional and leaving the decision whether  
 to apply it to the court in each individual case, the majority ignores the policies  
 established by the political branches when they negotiated and ratified the treaty.

47 The result will be a duplicative analysis for which courts are not well designed. The  
 « up discovery process usually concerns discrete interests that a court is well equipped to  
 accommodate—the interests of the parties before the court coupled with the interest  
 of the judicial system in resolving the conflict on the basis of the best available  
 information. When a lawsuit requires discovery of materials located in a foreign  
 nation, however, foreign legal systems and foreign interests are implicated as well.  
 The presence of these interests creates a tension between the broad discretion our  
 courts normally exercise in managing pretrial discovery and the discretion usually  
 allotted to the Executive in foreign matters.

48 It is the Executive that normally decides when a course of action is important  
 enough to risk affronting a foreign nation or placing a strain on foreign commerce.  
 It is the Executive, as well, that is best equipped to determine how to accommodate  
 foreign interests along with our own.<sup>3</sup> Unlike the courts, "diplomatic and executive  
 channels are, by definition, designed to exchange, negotiate, and reconcile the  
 problems which accompany the realization of national interests within the sphere of  
 international association." *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*,  
 235 U.S.App.D.C. 207, 253, 731 F.2d 909, 955 (1984). The Convention embodies the  
 result of the best efforts of the Executive Branch, in negotiating the treaty, and the  
 Legislative Branch, in ratifying it, to balance competing national interests. As such,  
 the Convention represents a political determination—one that, consistent with the  
 principle of separation of powers, courts should not attempt to second-guess.

49 Not only is the question of foreign discovery more appropriately considered by  
 the Executive and Congress, but in addition, courts are generally ill equipped to  
 assume the role of balancing the interests of foreign nations with that of our own.  
 Although transnational litigation is increasing, relatively few judges are experienced  
 in the area and the procedures of foreign legal systems are often poorly understood.  
 Wilkey, *Transnational Adjudication: A View from the Bench*, 18 Int'l Lawyer 541,  
 543 (1984); Ristau, *Overview of International Judicial Assistance*, 18 Int'l Lawyer  
 525, 531 (1984). As this Court recently stated, it has "little competence in  
 determining precisely when foreign nations will be offended by particular acts."  
*Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194, 103 S.Ct. 2933, 2955, 77  
 L.Ed.2d 545 (1983). A pro-forum bias is likely to creep into the supposedly neutral  
 balancing process<sup>4</sup> and courts not surprisingly often will turn to the more familiar  
 procedures established by their local rules. In addition, it simply is not reasonable  
 to expect the Federal Government or the foreign state in which the discovery will  
 take place to participate in every individual case in order to articulate the broader  
 international and foreign interests that are relevant to the decision whether to use  
 the Convention. Indeed, the opportunities for such participation are limited.<sup>5</sup>  
 Exacerbating these shortcomings is the limited appellate review of interlocutory  
 discovery decisions,<sup>6</sup> which prevents any effective case-by-case correction of  
 erroneous discovery decisions.

### III

50 The principle of comity leads to more definite rules than the ad hoc approach  
 endorsed by the majority. The Court asserts that the concept of comity requires an  
 individualized analysis of the interests present in each particular case before a court  
 decides whether to apply the Convention. See *ante*, at 543-544. There is, however,  
 nothing inherent in the comity principle that requires case-by-case analysis. The  
 Court frequently has relied upon a comity analysis when it has adopted general  
 rules to cover recurring situations in areas such as choice of forum,<sup>7</sup> maritime  
 law,<sup>8</sup> and sovereign immunity,<sup>9</sup> and the Court offers no reasons for abandoning  
 that approach here.

51 Comity is not just a vague political concern favoring international cooperation  
 « up when it is in our interest to do so. Rather it is a principle under which judicial  
 decisions reflect the systemic value of reciprocal tolerance and goodwill. See Maier,  
 Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and  
 International Law, 76 Am. J. Int'l L. 280, 281-285 (1982); J. Story, Commentaries  
 on the Conflict of Laws §§ 35, 38 (M. Bigelow ed. 1883).<sup>10</sup> As in the choice-of-law  
 analysis, which from the very beginning has been linked to international comity, the  
 threshold question in a comity analysis is whether there is in fact a true conflict  
 between domestic and foreign law. When there is a conflict, a court should seek a  
 reasonable accommodation that reconciles the central concerns of both sets of laws.  
 In doing so, it should perform a tripartite analysis that considers the foreign  
 interests, the interests of the United States, and the mutual interests of all nations  
 in a smoothly functioning international legal regime.<sup>11</sup>

52 In most cases in which a discovery request concerns a nation that has ratified the  
 Convention there is no need to resort to comity principles; the conflicts they are  
 designed to resolve already have been eliminated by the agreements expressed in  
 the treaty. The analysis set forth in the Restatement (Revised) of Foreign Relations  
 Law of the United States, see *ante*, at 544, n. 28, is perfectly appropriate for courts  
 to use when no treaty has been negotiated to accommodate the different legal  
 systems. It would also be appropriate if the Convention failed to resolve the conflict  
 in a particular case. The Court, however, adds an additional layer of so-called  
 comity analysis by holding that courts should determine on a case-by-case basis  
 whether resort to the Convention is desirable. Although this analysis is unnecessary  
 in the absence of any conflicts, it should lead courts to the use of the Convention if  
 they recognize that the Convention already has largely accommodated all three  
 categories of interests relevant to a comity analysis—foreign interests, domestic  
 interests, and the interest in a well-functioning international order.

A.

53 I am encouraged by the extent to which the Court emphasizes the importance of  
 foreign interests and by its admonition to lower courts to take special care to  
 respect those interests. See *ante*, at 546. Nonetheless, the Court's view of the  
 Convention rests on an incomplete analysis of the sovereign interests of foreign  
 states. The Court acknowledges that evidence is normally obtained in civil-law  
 countries by a judicial officer, *ante*, at 543, but it fails to recognize the significance  
 of that practice. Under the classic view of territorial sovereignty, each state has a  
 monopoly on the exercise of governmental power within its borders and no state  
 may perform an act in the territory of a foreign state without consent.<sup>12</sup> As  
 explained in the Report of United States Delegation to Eleventh Session of the  
 Hague Conference on Private International Law, the taking of evidence in a civil-  
 law country may constitute the performance of a public judicial act by an  
 unauthorized foreign person:

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

"The act of taking evidence in a common-law country from a willing witness,  
 without compulsion and without a breach of the peace, in aid of a foreign  
 proceeding, is a purely private matter, in which the host country has no interest and  
 in which its judicial authorities have normally no wish to participate. To the

- 55       contrary, the same act in a civil-law country may be a public matter, and may  
 « up       constitute the performance of a public judicial act by an unauthorized foreign  
              person. It may violate the 'judicial sovereignty' of the host country, unless its  
              authorities participate or give their consent." 8 Int'l Legal Materials 785, 806  
              (1969).<sup>13</sup>
- 56       Some countries also believe that the need to protect certain underlying  
              substantive rights requires judicial control of the taking of evidence. In the Federal  
              Republic of Germany, for example, there is a constitutional principle of  
              proportionality, pursuant to which a judge must protect personal privacy,  
              commercial property, and business secrets. Interference with these rights is proper  
              only if "necessary to protect other persons' rights in the course of civil litigation."  
              See Meessen, *The International Law on Taking Evidence From, Not In, a Foreign*  
              *State*, *The Anschutz and Messerschmitt* opinions of the United States Court of  
              Appeals for the Fifth Circuit (Mar. 31, 1986), as set forth in App. to Brief for  
              *Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH as Amici*  
              *Curiae* 27a-28a.<sup>14</sup>
- 57       The United States recently recognized the importance of these sovereignty  
              principles by taking the broad position that the Convention "must be interpreted to  
              preclude an evidence taking proceeding in the territory of a foreign state party if the  
              Convention does not authorize it and the host country does not otherwise permit  
              it." Brief for United States as *Amicus Curiae* in *Volkswagenwerk Aktiengesellschaft*  
              *v. Falzon*, O.T. 1983, No. 82-1888, p. 6. Now, however, it appears to take a  
              narrower view of what constitutes an "evidence taking procedure," merely stating  
              that "oral depositions on foreign soil . . . are improper without the consent of the  
              foreign nation." Tr. of Oral Arg. 23. I am at a loss to understand why gathering  
              documents or information in a foreign country, even if for ultimate production in  
              the United States, is any less an imposition on sovereignty than the taking of a  
              deposition when gathering documents also is regarded as a judicial function in a  
              civil-law nation.
- 58       Use of the Convention advances the sovereign interests of foreign nations  
              because they have given *consent* to Convention procedures by ratifying them. This  
              consent encompasses discovery techniques that would otherwise impinge on the  
              sovereign interests of many civil-law nations. In the absence of the Convention, the  
              informal techniques provided by Articles 15-22 of the Convention taking evidence  
              by a diplomatic or consular officer of the requesting state and the use of  
              commissioners nominated by the court of the state where the action is pending—  
              would raise sovereignty issues similar to those implicated by a direct discovery  
              order from a foreign court. "Judicial" activities are occurring on the soil of the  
              sovereign by agents of a foreign state.<sup>15</sup> These voluntary discovery procedures are a  
              great boon to United States litigants and are used far more frequently in practice  
              than is compulsory discovery pursuant to letters of request.<sup>16</sup>
- Civil-law contracting parties have also agreed to use, and even to compel,  
              procedures for gathering evidence that are diametrically opposed to civil-law  
              practices. The civil-law system is inquisitorial rather than adversarial and the judge  
              normally questions the witness and prepares a written summary of the evidence.<sup>17</sup>  
              Even in common-law countries no system of evidence-gathering resembles that of  
              the United States.<sup>18</sup> Under Article 9 of the Convention, however, a foreign court  
              must grant a request to use a "special method or procedure," which includes  
              requests to compel attendance of witnesses abroad, to administer oaths, to produce  
              verbatim transcripts, or to permit examination of witnesses by counsel for both  
              parties.<sup>19</sup> These methods for obtaining evidence, which largely eliminate conflicts  
              between the discovery procedures of the United States and the laws of foreign



59 systems, have the consent of the ratifying nations. The use of these methods thus  
 « up furthers foreign interests because discovery can proceed without violating the  
 sovereignty of foreign nations.

B

60 The primary interest of the United States in this context is in providing effective  
 procedures to enable litigants to obtain evidence abroad. This was the very purpose  
 of the United States' participation in the treaty negotiations and, for the most part,  
 the Convention provides those procedures.

61 The Court asserts that the letters of request procedure authorized by the  
 Convention in many situations will be "unduly time consuming and expensive."  
*Ante*, at 542. The Court offers no support for this statement and until the  
 Convention is used extensively enough for courts to develop experience with it, such  
 statements can be nothing other than speculation.<sup>20</sup> Conspicuously absent from  
 the Court's assessment is any consideration of resort to the Convention's less formal  
 and less time-consuming alternatives—discovery conducted by consular officials or  
 an appointed commissioner. Moreover, unless the costs become prohibitive, saving  
 time and money is not such a high priority in discovery that some additional burden  
 cannot be tolerated in the interest of international goodwill. Certainly discovery  
 controlled by litigants under the Federal Rules of Civil Procedure is not known for  
 placing a high premium on either speed or cost-effectiveness.

62 There is also apprehension that the Convention procedures will not prove fruitful.  
 Experience with the Convention suggests otherwise—contracting parties have  
 honored their obligation to execute letters of request expeditiously and to use  
 compulsion if necessary. See, *e.g.*, Report on the Work of the Special Commission  
 on the Operation of the Convention of 18 March 1970 on the Taking of Evidence  
 Abroad in Civil or Commercial Matters, 17 Int'l Legal Materials 1425, 1431, § F  
 (1978) ("[r]efusal to execute turns out to be very infrequent in practice"). By and  
 large, the concessions made by parties to the Convention not only provide United  
 States litigants with a means for obtaining evidence, but also ensure that the  
 evidence will be in a form admissible in court.

There are, however, some situations in which there is legitimate concern that  
 certain documents cannot be made available under Convention procedures.  
 Thirteen nations have made official declarations pursuant to Article 23 of the  
 Convention, which permits a contracting state to limit its obligation to produce  
 documents in response to a letter of request. See *ante*, at 536, n. 21. These  
 reservations may pose problems that would require a comity analysis in an  
 individual case, but they are not so all-encompassing as the majority implies—they  
 certainly do not mean that a "contracting party could unilaterally abrogate . . . the  
 Convention's procedures." *Ante*, at 537. First, the reservations can apply only to  
*letters of request for documents*. Thus, an Article 23 reservation affects neither the  
 most commonly used informal Convention procedures for taking of evidence by a  
 consul or a commissioner nor formal requests for depositions or interrogatories.  
 Second, although Article 23 refers broadly to "pre-trial discovery," the intended  
 meaning of the term appears to have been much narrower than the normal United  
 States usage.<sup>21</sup> The contracting parties for the most part have modified the  
 declarations made pursuant to Article 23 to limit their reach. See 7 Martindale-  
 Hubbell Law Directory (pt. VII) 14-19 (1986).<sup>22</sup> Indeed, the emerging view of this  
 exception to discovery is that it applies only to "requests that lack sufficient  
 specificity or that have not been reviewed for relevancy by the requesting court."  
 Oxman, The Choice Between Direct Discovery and Other Means of Obtaining  
 Evidence Abroad: The Impact of the Hague Evidence Convention, 37 U. Miami

- 63 L.Rev., at 777. Thus, in practice, a reservation is not the significant obstacle to  
 « up discovery under the Convention that the broad wording of Article 23 would  
 suggest.<sup>23</sup>
- 64 In this particular case, the "French 'blocking statute,' " see *ante*, at 526, n. 6,  
 poses an additional potential barrier to obtaining discovery from France. But any  
 conflict posed by this legislation is easily resolved by resort to the Convention's  
 procedures. The French statute's prohibitions are expressly "subject to"  
 international agreements and applicable laws and it does not affect the taking of  
 evidence under the Convention. See Toms, *The French Response to the*  
*Extraterritorial Application of United States Antitrust Laws*, 15 *Int'l Lawyer* 585,  
 593-599 (1981); Heck, *Federal Republic of Germany and the EEC*, 18 *Int'l Lawyer*  
 793, 800 (1984).
- 65 The second major United States interest is in fair and equal treatment of litigants.  
 The Court cites several fairness concerns in support of its conclusion that the  
 Convention is not exclusive and apparently fears that a broad endorsement of the  
 use of the Convention would lead to the same "unacceptable asymmetries." See  
*ante*, at 540, n. 25. Courts can protect against the first two concerns noted by the  
 majority—that a foreign party to a lawsuit would have a discovery advantage over a  
 domestic litigant because it could obtain the advantages of the Federal Rules of  
 Civil Procedure, and that a foreign company would have an economic competitive  
 advantage because it would be subject to less extensive discovery—by exercising  
 their discretionary powers to control discovery in order to ensure fairness to both  
 parties. A court may "make any order which justice requires" to limit discovery,  
 including an order permitting discovery only on specified terms and conditions, by  
 a particular discovery method, or with limitation in scope to certain matters.  
 Fed.Rule Civ.Proc. 26(c). If, for instance, resort to the Convention procedures  
 would put one party at a disadvantage, any possible unfairness could be prevented  
 by postponing that party's obligation to respond to discovery requests until  
 completion of the foreign discovery. Moreover, the Court's arguments focus on the  
 nationality of the parties, while it is actually the locus of the evidence that is  
 relevant to use of the Convention: a foreign litigant trying to secure evidence from a  
 foreign branch of an American litigant might also be required to resort to the  
 Convention.
- 66 The Court's third fairness concern is illusory. It fears that a domestic litigant  
 suing a national of a state that is not a party to the Convention would have an  
 advantage over a litigant suing a national of a contracting state. This statement  
 completely ignores the very purpose of the Convention. The negotiations were  
 proposed by the United States in order to *facilitate* discovery, not to hamper  
 litigants. Dissimilar treatment of litigants similarly situated does occur, but in the  
 manner opposite to that perceived by the Court. Those who sue nationals of  
 noncontracting states are disadvantaged by the unavailability of the Convention  
 procedures. This is an unavoidable inequality inherent in the benefits conferred by  
 any treaty that is less than universally ratified.

In most instances, use of the Convention will serve to advance United States  
 interests, particularly when those interests are viewed in a context larger than the  
 immediate interest of the litigants' discovery. The approach I propose is not a rigid  
*per se* rule that would require first use of the Convention without regard to strong  
 indications that no evidence would be forthcoming. All too often, however, courts  
 have simply *assumed* that resort to the Convention would be unproductive and  
 have embarked on speculation about foreign procedures and interpretations. See,  
*e.g.*, *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435,  
 449-450 (SDNY 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 509-512 (ND

67 Ill.1984). When resort to the Convention would be futile, a court has no choice but  
 « up to resort to a traditional comity analysis. But even then, an attempt to use the  
 Convention will often be the best way to discover if it will be successful, particularly  
 in the present state of general inexperience with the implementation of its  
 procedures by the various contracting states. An attempt to use the Convention will  
 open a dialogue with the authorities in the foreign state and in that way a United  
 States court can obtain an authoritative answer as to the limits on what it can  
 achieve with a discovery request in a particular contracting state.

### C

68 The final component of a comity analysis is to consider if there is a course that  
 furthers, rather than impedes, the development of an ordered international system.  
 A functioning system for solving disputes across borders serves many values,  
 among them predictability, fairness, ease of commercial interactions, and "stability  
 through satisfaction of mutual expectations." *Laker Airways, Ltd. v. Sabena,  
 Belgian World Airlines*, 235 U.S.App.D.C., at 235, 731 F.2d, at 937. These interests  
 are common to all nations, including the United States.

69 Use of the Convention would help develop methods for transnational litigation by  
 placing officials in a position to communicate directly about conflicts that arise  
 during discovery, thus enabling them to promote a reduction in those conflicts. In a  
 broader framework, courts that use the Convention will avoid foreign perceptions of  
 unfairness that result when United States courts show insensitivity to the interests  
 safeguarded by foreign legal regimes. Because of the position of the United States,  
 economically, politically, and militarily, many countries may be reluctant to oppose  
 discovery orders of United States courts. Foreign acquiescence to orders that ignore  
 the Convention, however, is likely to carry a price tag of accumulating resentment,  
 with the predictable long-term political cost that cooperation will be withheld in  
 other matters. Use of the Convention is a simple step to take toward avoiding that  
 unnecessary and undesirable consequence.

### IV

70 I can only hope that courts faced with discovery requests for materials in foreign  
 countries will avoid the parochial views that too often have characterized the  
 decisions to date. Many of the considerations that lead me to the conclusion that  
 there should be a general presumption favoring use of the Convention should also  
 carry force when courts analyze particular cases. The majority fails to offer guidance  
 in this endeavor, and thus it has missed its opportunity to provide predictable and  
 effective procedures for international litigants in United States courts. It now falls  
 to the lower courts to recognize the needs of the international commercial system  
 and the accommodation of those needs already endorsed by the political branches  
 and embodied in the Convention. To the extent indicated, I respectfully dissent.

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<sup>1</sup> The Hague Convention entered into force between the United States and France on  
 October 6, 1974. The Convention is also in force in Barbados, Cyprus, Czechoslovakia,  
 Denmark, Finland, the Federal Republic of Germany, Israel, Italy, Luxemburg, the  
 Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom. Office of  
 the Legal Adviser, United States Dept. of State, *Treaties in Force* 261-262 (1986).

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<sup>2</sup> Petitioner Societe Nationale Industrielle Aerospatiale is wholly owned by the  
 Government of France. Petitioner Societe de Construction d'Avions de Tourisme is a  
 wholly owned subsidiary of Societe Nationale Industrielle Aerospatiale.

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3 App. 22, 24. The term "STOL," an acronym for "short takeoff and landing," "refers to a  
 « up fixed-wing aircraft that either takes off or lands with only a short horizontal run of the  
 aircraft." *Douglas v. United States*, 206 Ct.Cl. 96, 99, 510 F.2d 364, 365, cert. denied,  
 423 U.S. 825, 96 S.Ct. 40, 46 L.Ed.2d 41 (1975).

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4 Plaintiffs made certain requests for the production of documents pursuant to Rule 34(b) and for admissions pursuant to Rule 36. App. 19-23. Apparently the petitioners responded to those requests without objection, at least insofar as they called for material or information that was located in the United States. App. to Pet. for Cert. 12a. In turn, petitioners deposed witnesses and parties pursuant to Rule 26, and served interrogatories pursuant to Rule 33 and a request for the production of documents pursuant to Rule 34. App. 13. Plaintiffs complied with those requests.

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5 Although the District Court is the nominal respondent in this mandamus proceeding, plaintiffs are the real respondent parties in interest.

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6 Article 1A of the French "blocking statute," French Penal Code Law No. 80-538, provides:

"Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith."

"Art. 1er bis.—Sous reserve des traites ou accords internationaux et des lois et reglements en vigueur, il est interdit a toute personne de demander, de rechercher ou de communiquer, par ecrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre economique, commercial, industriel, financier ou technique tendant a la constitution de preuves en vue de procedures judiciaires ou administratives etrangeres ou dans le cadre de celles-ci."

Article 2 provides:

"The parties mentioned in [Article 1A] shall forthwith inform the competent minister if they receive any request concerning such disclosures.

"Art. 2. Les personnes visees aux articles 1er et 1er bis sont tenues d'informer sans delai le ministre competent lorsqu'elles se trouvent saisies de toute demande concernant de telles communications." App. to Pet. for Cert. 47a-50a.

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7 *Id.*, at 25a. The Magistrate stated, however, that if oral depositions were to be taken in France, he would require compliance with the Hague Evidence Convention. *Ibid.*

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8 His quotation was from Toms, *The French Response to Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 586 (1981).

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9 He relied on a passage in the Toms article stating that "the legislative history [of the Law] shows only that the Law was adopted to protect French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction. Nowhere is there an indication that the Law was to impede litigation preparations by French companies, either for their own defense or to institute lawsuits abroad to protect their interests, and arguably such applications were unintended." App. to Pet. for Cert. 22a-23a (citing Toms, *supra*, at 598).

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10 "The record before this court does not indicate whether the Petitioners have notified the appropriate French Minister of the requested discovery in accordance with Article 2 of the French Blocking Statute, or whether the Petitioners have attempted to secure a waiver of prosecution from the French government. Because the Petitioners are corporations owned by the Republic of France, they stand in a most advantageous position to receive such a waiver. However, these issues will only be relevant should the

Petitioners fail to comply with the magistrate's discovery order, and we need not presently address them." 782 F.2d, at 127.

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<sup>11</sup> The Republic of France likewise takes the following position in this case:

"THE HAGUE CONVENTION IS THE EXCLUSIVE MEANS OF DISCOVERY IN TRANSNATIONAL LITIGATION AMONG THE CONVENTION'S SIGNATORIES UNLESS THE SOVEREIGN ON WHOSE TERRITORY DISCOVERY IS TO OCCUR CHOOSES OTHERWISE." Brief for Republic of France as *Amicus Curiae* 4.

<sup>12</sup> See S.Exec. Doc. A, p. v; Pub.L. 88-244, 77 Stat. 775 (1963).

<sup>13</sup> As the Rapporteur for the session of the Hague Conference which produced the Hague Evidence Convention stated: "In 1964 Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 were amended to offer to foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States. The amendments named the Department of State as a conduit for the receipt and transmission of letters of request. They authorized the use in the federal courts of evidence taken abroad in civil law countries, even if its form did not comply with the conventional formalities of our normal rules of evidence. No country in the world has a more open and enlightened policy." Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651 (1969).

<sup>14</sup> 118 Cong.Rec. 20623 (1972).

<sup>15</sup> The Hague Conference on Private International Law's omission of mandatory language in the preamble is particularly significant in light of the same body's use of mandatory language in the preamble to the Hague Service Convention, 20 U.S.T. 361, T.I.A.S. No. 6638. Article 1 of the Service Convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Id.*, at 362, T.I.A.S. No. 6638. As noted, *supra*, at 7, the Service Convention was drafted before the Evidence Convention, and its language provided a model exclusivity provision that the drafters of the Evidence Convention could easily have followed had they been so inclined. Given this background, the drafters' election to use permissive language instead is strong evidence of their intent.

<sup>16</sup> At the time the Convention was drafted, Federal Rule of Civil Procedure 28(b) clearly authorized the taking of evidence on notice either in accordance with the laws of the foreign country or in pursuance of the law of the United States.

<sup>17</sup> The first paragraph of Article 1 reads as follows:

"In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act." 23 U.S.T., at 2557, T.I.A.S. 7444.

Thus, Article 17 provides:

<sup>18</sup> "In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

"(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

"(b) he complies with the conditions which the competent authority has specified in the permission.

"A Contracting State may declare that evidence may be taken under this Article without its prior permission." *Id.*, at 2565, T.I.A.S. 7444.

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<sup>19</sup> Our conclusion is confirmed by the position of the Executive Branch and the Securities and Exchange Commission, which interpret the "language, history, and purposes" of the Hague Convention as indicating "that it was not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence." Brief for United States as *Amicus Curiae* 9 (citation omitted). "[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185, 102 S.Ct. 2374, 2379, 72 L.Ed.2d 765 (1982); see also *O'Connor v. United States*, 479 U.S. 27, 33, 107 S.Ct. 347, ---, 93 L.Ed.2d 206 (1986). As a member of the United States delegation to the Hague Conference concluded:

"[The Convention] makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the other front, it will give the United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants." Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S.Exec. Doc. A, at pp. 1, 3.

<sup>20</sup> In addition to the Eighth Circuit, other Courts of Appeals and the West Virginia Supreme Court have held that the Convention cannot be viewed as the exclusive means of securing discovery transnationally. See *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 788 F.2d 1408, 1410 (CA9 1986); *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729, 731 (CA5 1985), cert. vacated, 476 U.S. 468, 106 S.Ct. 2887, 90 L.Ed.2d 975 (1986); *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 606-615, and n. 7 (CA5 1985), cert. pending, No. 85-98; *Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher*, 328 S.E.2d 492, 497-501 (W.Va.1985).

<sup>21</sup> Article 23 provides:

"A Contracting State may at the time of signature, ratification or accession, 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." 23 U.S.T., at 2568, T.I.A.S. 7444.

<sup>22</sup> Thirteen of the seventeen signatory states have made declarations under Article 23 of the Convention that restrict pretrial discovery of documents. See 7 Martindale-Hubbell Law Directory (pt. VII) 15-19 (1986).

<sup>23</sup> "The great object of an international agreement is to define the common ground between sovereign nations. Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262, 104 S.Ct. 1776, 1788, 80 L.Ed.2d 273 (1984) (STEVENS, J., dissenting). The utter absence in the Hague Convention of an exclusivity provision has an obvious explanation: The contracting states did not agree that its procedures were to be exclusive. The words of the treaty delineate the extent of their agreement; without prejudice to their existing rights and practices, they bound themselves to comply with any request for judicial assistance that did comply with the treaty's procedures. See Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures, 13 Int'l Law. 5, 11, n. 14 (1979) (common-law nations and civil-law jurisdictions have separate traditions of bilateral judicial cooperation; the Evidence Convention "attempts to bridge" the two traditions.)

The separate opinion reasons that the Convention procedures are not optional because unless other signatory states "had expected the Convention to provide the normal channels for discovery, [they] would have had no incentive to agree to its terms." *Post*, at 550. We find the treaty language that the parties have agreed upon and ratified a surer indication of their intentions than the separate opinion's hypothesis about the

« up expectations of the parties. Both comity and concern for the separation of powers counsel the utmost restraint in attributing motives to sovereign states which have bargained as equals. Indeed, Justice BLACKMUN notes that "the Convention represents a political determination—one that, consistent with the principle of separation of powers, courts should not attempt to second guess." *Post*, at 552. Moreover, it is important to remember that the evidence-gathering procedures implemented by the Convention would still provide benefits to the signatory states even if the United States were not a party.

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<sup>24</sup> Article 27 provides:

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

"(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

"(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." 23 U.S.T., at 2569, T.I.A.S. 7444.

Thus, for example, the United Kingdom permits foreign litigants, by a letter of request, to "apply directly to the appropriate courts in the United Kingdom for judicial assistance" or to seek information directly from parties in the United Kingdom "if, as in this case, the court of origin exercises jurisdiction consistent with accepted norms of international law." Brief for the Government of the United Kingdom and Northern Ireland as *Amicus Curiae* 6 (footnote omitted). On its face, the term "Contracting State" comprehends both the requesting state and the receiving state. Even if Article 27 is read to apply only to receiving states, see, e.g., *Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher*, 328 S.E.2d, at 499-500, n. 11 (rejecting argument that Article 27 authorizes more liberal discovery procedures by requesting as well as executing states), the treaty's internal failure to authorize more liberal procedures for obtaining evidence would carry no pre-emptive meaning. We are unpersuaded that Article 27 supports a "negative inference" that would curtail the pre-existing authority of a state to obtain evidence in accord with its normal procedures.

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<sup>25</sup> The opposite conclusion of exclusivity would create three unacceptable asymmetries. First, within any lawsuit between a national of the United States and a national of another contracting party, the foreign party could obtain discovery under the Federal Rules of Civil Procedure, while the domestic party would be required to resort first to the procedures of the Hague Convention. This imbalance would run counter to the fundamental maxim of discovery that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947).

Second, a rule of exclusivity would enable a company which is a citizen of another contracting state to compete with a domestic company on uneven terms, since the foreign company would be subject to less extensive discovery procedures in the event that both companies were sued in an American court. Petitioners made a voluntary decision to market their products in the United States. They are entitled to compete on equal terms with other companies operating in this market. But since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors. A general rule according foreign nationals a preferred position in pretrial proceedings in our courts would conflict with the principle of equal opportunity that governs the market they elected to enter.

Third, since a rule of first use of the Hague Convention would apply to cases in which a foreign party is a national of a contracting state, but not to cases in which a foreign party is a national of any other foreign state, the rule would confer an unwarranted advantage on some domestic litigants over others similarly situated.

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« up <sup>26</sup> We observe, however, that in other instances a litigant's first use of the Hague Convention procedures can be expected to yield more evidence abroad more promptly than use of the normal procedures governing pre-trial civil discovery. In those instances, the calculations of the litigant will naturally lead to a first-use strategy.

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<sup>27</sup> Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states. This Court referred to the doctrine of comity among nations in *Emory v. Grenough*, 3 Dall. 369, 370, n., 1 L.Ed. 640 (1797) (dismissing appeal from judgment for failure to plead diversity of citizenship, but setting forth an extract from a treatise by Ulrich Huber (1636-1694), a Dutch jurist):

" '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 convenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law. . . . ' " *Ibid.* (quoting 2 Huber, *Praelectiones Juris Romani et hodierni*, bk. 1, tit. 3, pp. 26-31 (C. Thomas, L. Menke, & G. Gebauer eds. 1725)).

See also *Hilton v. Guyot*, 159 U.S. 113, 163-164, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895):

" '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."

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<sup>28</sup> The nature of the concerns that guide a comity analysis is suggested by the Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent.Draft No. 7, 1986) (approved May 14, 1986) (Restatement). While we recognize that § 437 of 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, these factors are relevant to any comity analysis:

"(1) the importance to the . . . 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 noncompliance 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." *Ibid.*

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<sup>29</sup> The French "blocking statute," n. 6, *supra*, does not alter our conclusion. It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. See *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-206, 78 S.Ct. 1087, 1091-1092, 2 L.Ed.2d 1255 (1958). Nor can the enactment of such a statute by a foreign nation require American courts to engraft a rule of first resort onto the Hague Convention, or otherwise to provide the nationals of such a country with a preferred status in our courts. It is clear that American courts are not required to adhere blindly to the directives of such a statute. Indeed, the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district



judge, forbidding him or her to order any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party  
 « up could respond to on the basis of personal knowledge. It would be particularly incongruous to recognize such a preference for corporations that are wholly owned by the enacting nation. Extraterritorial assertions of jurisdiction are not one-sided. While the District Court's discovery orders arguably have some impact in France, the French blocking statute asserts similar authority over acts to take place in this country. The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign. The blocking statute thus is relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.

The American Law Institute has summarized this interplay of blocking statutes and discovery orders: "[W]hen a state has jurisdiction to prescribe and its courts have jurisdiction to adjudicate, adjudication should (subject to generally applicable rules of evidence) take place on the basis of the best information available. . . . [Blocking] statutes that frustrate this goal need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States." See Restatement, § 437, Reporter's Note 5, pp. 41, 42. "On the other hand, the degree of friction created by discovery requests . . . and the differing perceptions of the acceptability of American-style discovery under national and international law, suggest some efforts to moderate the application abroad of U.S. procedural techniques, consistent with the overall principle of reasonableness in the exercise of jurisdiction." *Id.*, at 42.

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<sup>30</sup> Under the Hague Convention, a letter of request must specify "the evidence to be obtained or other judicial act to be performed," Art. 3, and must be in the language of the executing authority or be accompanied by a translation into that language. Art. 4, 23 U.S.T., at 2558-2559, T.I.A.S. 7444. Although the discovery request must be specific, the party seeking discovery may find it difficult or impossible to determine in advance what evidence is within the control of the party urging resort to the Convention and which parts of that evidence may qualify for international judicial assistance under the Convention. This information, however, is presumably within the control of the producing party from which discovery is sought. The district court may therefore require, in appropriate situations, that this party bear the burden of providing translations and detailed descriptions of relevant documents that are needed to assure prompt and complete production pursuant to the terms of the Convention.

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<sup>1</sup> Many courts that have examined the issue have adopted a rule of first resort to the Convention. See, e.g., *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa.1983) ("avenue of first resort for plaintiff [is] the Hague Convention"); *Gebr. Eickhoff Maschinenfabrik und Eisengießerei mbH v. Starcher*, W.Va., 328 S.E.2d 492, 504-506 (1985) ("principle of international comity dictates first resort to [Convention] procedures"); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 723, 475 A.2d 686, 690 (App. Div. 1984) (litigant should first attempt to comply with Convention); *Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443, 445 (Tex. App. 1984) (Convention procedures not mandatory but are "avenue of first resort"); *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 247, 186 Cal. Rptr. 876, 882-883 (1982) (plaintiffs must attempt to comply with the Convention); *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 857-859, 176 Cal. Rptr. 874, 885-886 (1981) ("Hague Convention establishes not a fixed rule but rather a minimum measure of international cooperation").

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<sup>2</sup> Article 27 of the Convention, see *ante*, at 538, n. 24, is not to the contrary. The only logical interpretation of this Article is that a state receiving a discovery request may permit less restrictive procedures than those designated in the Convention. The majority finds plausible a reading that authorizes both a requesting and a receiving state to use methods outside the Convention. *Ibid.* If this were the case, Article 27(c), which allows a state to permit methods of taking evidence that are not provided in the Convention,

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would make the rest of the Convention wholly superfluous. If a requesting state could dictate the methods for taking evidence in another state, there would be no need for the detailed procedures provided by the Convention.

Moreover, the United States delegation's explanatory report on the Convention describes Article 27 as "designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants." S.Exec.Doc. A, 92d Cong., 2d Sess., 39 (1972). Article 27 authorizes the use of alternative methods for gathering evidence "if the internal law or practice of the *State of execution* so permits." *Id.*, at 39-40 (emphasis added).

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<sup>3</sup> Our Government's interests themselves are far more complicated than can be represented by the limited parties before a court. The United States is increasingly concerned, for example, with protecting sensitive technology for both economic and military reasons. It may not serve the country's long-term interest to establish precedents that could allow foreign courts to compel production of the records of American corporations.

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<sup>4</sup> One of the ways that a pro-forum bias has manifested itself is in United States courts' preoccupation with their own power to issue discovery orders. All too often courts have regarded the Convention as some kind of threat to their jurisdiction and have rejected use of the treaty procedures. See, e.g., *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 606, 612 (CA5 1985), cert. pending, No. 85-98. It is well established that a court has the power to impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-206, 78 S.Ct. 1087, 1091-1092, 2 L.Ed.2d 1255 (1958). But once it is determined that the Convention does not provide the *exclusive* means for foreign discovery, jurisdictional power is not the issue. The relevant question, instead, becomes whether a court should forgo exercise of the full extent of its power to order discovery. The Convention, which is valid United States law, provides an answer to that question by establishing a strong policy in favor of self-restraint for the purpose of furthering United States interests and minimizing international disputes.

There is also a tendency on the part of courts, perhaps unrecognized, to view a dispute from a local perspective. "[D]omestic courts do not sit as internationally constituted tribunals. . . . The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests." *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 235 U.S.App.D.C. 207, 249, 731 F.2d 909, 951 (1984) (footnotes omitted); see also *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1148 (ND Ill.1979).

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<sup>5</sup> The Department of State in general does not transmit diplomatic notes from foreign governments to state or federal trial courts. In addition, it adheres to a policy that it does not take positions regarding, or participate in, litigation between private parties, unless required to do so by applicable law. See 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, 748, n. 39 (1983).

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<sup>6</sup> See *Kerr v. United States District Court*, 426 U.S. 394, 402-405, 96 S.Ct. 2119, 2123-2125, 48 L.Ed.2d 725 (1976); see also *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (CA1 1985) (refusing to review on interlocutory appeal District Court order involving extra-territorial discovery).

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<sup>7</sup> See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630, 105 S.Ct. 3346, 3355, 87 L.Ed.2d 444 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-519, 94 S.Ct. 2449, 2455-2457, 41 L.Ed.2d 270 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-14, 92 S.Ct. 1907, 1914-15, 32 L.Ed.2d 513 (1972).

« up <sup>8</sup> See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-384, 79 S.Ct. 468, 475, 3 L.Ed.2d 368 (1959); *Lauritzen v. Larsen*, 345 U.S. 571, 577-582, 73 S.Ct. 921, 925-928, 97 L.Ed. 1254 (1953); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575, 46 S.Ct. 611, 613, 70 L.Ed. 1088 (1926); *Wildenhus's Case*, 120 U.S. 1, 12, 7 S.Ct. 385, 387, 30 L.Ed. 565 (1887); *The Belgenland*, 114 U.S. 355, 363-364, 5 S.Ct. 860, 863-864, 29 L.Ed. 152 (1885); *The Scotia*, 14 Wall. 170, 187-188, 20 L.Ed. 822 (1872); *Brown v. Duchesne*, 19 How. 183, 198, 15 L.Ed. 595 (1857); *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 137, 3 L.Ed. 287 (1812).

<sup>9</sup> See, e.g., *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627, 103 S.Ct. 2591, 2599-2600, 77 L.Ed.2d 46 (1983) (presumption that for purposes of sovereign immunity "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such" on the basis of respect for "principles of comity between nations").

<sup>10</sup> 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." § 38. "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." § 35.

<sup>11</sup> Choice-of-law decisions similarly reflect the needs of the system as a whole as well as the concerns of the forums with an interest in the controversy. "Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states." Restatement (Second) of Conflict of Laws § 6, Comment *d*, p. 13 (1971).

<sup>12</sup> Chief Justice Marshall articulated the American formulation of this principle in *The Schooner Exchange v. McFaddon*, 7 Cranch, at 136, 3 L.Ed. 287:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction. . . .

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

<sup>13</sup> Many of the nations that participated in drafting the Convention regard nonjudicial evidence taking from even a willing witness as a violation of sovereignty. A questionnaire circulated to participating governments prior to the negotiations contained the question, "Is there in your State any legal provision or any official practice, based on concepts of sovereignty or public policy, preventing the taking of voluntary testimony for use in a foreign court without passing through the courts of your State?" Questionnaire on the Taking of Evidence Abroad, with Annexes, Actes et documents 9, 10. Of the 20 replies, 8 Governments—Egypt, France, West Germany, Italy, Luxembourg, Norway, Switzerland, and Turkey—stated that they did have objections to unauthorized evidence taking. Responses des Gouvernements au Questionnaire sur la reception des depositions a l'etranger, Actes et documents 21-46; see also Oxman, 37 U.Miami L.Rev., at 764, n. 84.

<sup>14</sup> The Federal Republic of Germany, in its diplomatic protests to the United States, has emphasized the constitutional basis of the rights violated by American discovery orders. See, e.g., Diplomatic Note, dated Apr. 8, 1986, from the Embassy of the Federal Republic of Germany. App. A to Brief for Federal Republic of Germany as *Amicus Curiae* 20a.

« up <sup>15</sup> See Edwards, Taking of Evidence Abroad in Civil or Commercial Matters, 18 Int'l & Comp.L.Q. 618, 647 (1969). A number of countries that ratified the Convention also expressed fears that the taking of evidence by consuls or commissioners could lead to abuse. *Ibid.*

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<sup>16</sup> According to the French Government, the overwhelming majority of discovery requests by American litigants are "satisfied willingly . . . before consular officials and, occasionally, commissioners, and without the need for involvement by a French court or use of its coercive powers." Brief for Republic of France as *Amicus Curiae* 24. Once a United States court in which an action is pending issues an order designating a diplomatic or consular official of the United States stationed in Paris to take evidence, oral examination of American parties or witnesses may proceed. If evidence is sought from French nationals or other non-Americans, or if a commissioner has been named pursuant to Article 17 of the Convention, the Civil Division of International Judicial Assistance of the Ministry of Justice must authorize the discovery. The United States Embassy will obtain authorization at no charge or a party may make the request directly to the Civil Division. Authorization is granted routinely and, when necessary, has been obtained within one to two days. Brief, at 25.

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<sup>17</sup> For example, after the filing of the initial pleadings in a German court, the judge determines what evidence should be taken and who conducts the taking of evidence at various hearings. See, e.g., Langbein, The German Advantage in Civil Procedure, 52 U.Chi.L.Rev. 823, 826-828 (1985). All these proceedings are part of the "trial," which is not viewed as a separate proceeding distinct from the rest of the suit. *Id.*, at 826.

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<sup>18</sup> "In most common law countries, even England, one must often look hard to find the resemblances between pre-trial discovery there and pre-trial discovery in the U.S. In England, for example, although document discovery is available, depositions do not exist, interrogatories have strictly limited use, and discovery as to third parties is not generally allowed." S. Seidel, Extraterritorial Discovery in International Litigation 24 (1984).

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<sup>19</sup> In France, the Nouveau Code de Procedure Civile, Arts. 736-748 (76th ed. Dalloz 1984), implements the Convention by permitting examination and cross-examination of witnesses by the parties and their attorneys, Art. 740, permitting a foreign judge to attend the proceedings, Art. 741, and authorizing the preparation of a verbatim transcript of the questions and answers at the expense of the requesting authority, Arts. 739, 748. German procedures are described in Shemanski, Obtaining Evidence in the Federal Republic of Germany: The Impact of The Hague Evidence Convention on German-American Judicial Cooperation, 17 Int'l Lawyer 465, 473-474 (1983).

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<sup>20</sup> The United States recounts the time and money expended by the SEC in attempting to use the Convention's procedures to secure documents and testimony from third-party witnesses residing in England, France, Italy, and Guernsey to enforce the federal securities laws' insider-trading provisions. See Brief for United States and Securities and Exchange Commission as *Amici Curiae* 15-18. As the United States admits, however, the experience of a governmental agency bringing an enforcement suit is "atypical" and has little relevance for the use of the Convention in disputes between private parties. In fact, according to the State Department, private plaintiffs "have found resort to the Convention more successful." *Id.*, at 18.

The SEC's attempts to use the Convention have raised questions of first impression, whose resolution in foreign courts has led to delays in particular litigation. For example, in *In re Testimony of Constandi Nasser*, Trib. Admin. de Paris, 6eme section 2eme chambre, No. 51546/6 (Dec. 17, 1985), the French Ministry of Justice approved expeditiously the SEC's letter of request for testimony of a nonparty witness. The witness then raised a collateral attack, arguing that the SEC's requests were administrative and therefore outside the scope of the Convention, which is limited by its terms to "civil or commercial matters." The Ministry of Justice ruled against the attack and, on review, the French Administrative Court ruled in favor of the French Government and the SEC. By

then, however, the SEC was in the process of settling the underlying litigation and did not seek further action on the letter of request. See Reply Brief for Petitioners 17, and nn. 35, 36.

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<sup>21</sup> The use of the term "pre-trial" seems likely to have been the product of a lack of communication. According to the United States delegates' report, at a meeting of the Special Commission on the Operation of the Evidence Convention held in 1978, delegates from civil-law countries revealed a "gross misunderstanding" of the meaning of "pre-trial discovery," thinking that it is something used before the *institution* of a suit to search for evidence that would lead to litigation. Report of the United States Delegation, 17 Int'l Legal Materials 1417, 1421 (1978). This misunderstanding is evidenced by the explanation of a French commentator that the "pre-trial discovery" exception was a reinforcement of the rule in Article 1 of the Convention that a letter of request "shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated" and by his comment that the Article 23 exception referred to the collection of evidence in advance of litigation. Gouguenheim, *Convention sur l'obtention des preuves a l'etranger en matiere civile et commerciale*, 96 Journal du Droit International 315, 319 (1969).

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<sup>22</sup> France has recently modified its declaration as follows:

"The declaration made by the Republic of France pursuant to Article 23 relating to letters of request whose purpose is 'pre-trial discovery of documents' does not apply so long as the requested documents are limitatively enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation."

"La declaration faite par la Republique francaise conformement a l'article 23 relatif aux commissions rogatoires qui ont pour objet la procedure de 'pre-trial discovery of documents' ne s'applique pas lorsque les documents demandes sont limitativement enumeres dans la commission rogatoire et ont un lien direct et precis avec l'objet du litige." Letter from J.B. Raimond, Minister of Foreign Affairs, France, to van den H.H. Broek, Minister of Foreign Affairs, The Netherlands (Dec. 24, 1986).

The Danish declaration is more typical:

"The declaration made by the Kingdom of Denmark in accordance with article 23 concerning 'Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' shall apply to any Letter of Request which requires a person:

"a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, other than particular documents specified in the Letter of Request;

"or

"b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession." Declaration of July 23, 1980, 7 Martindale-Hubbell Law Directory (pt. VII) 15 (1986).

The Federal Republic of Germany, Italy, Luxembourg, and Portugal continue to have unqualified Article 23 declarations, *id.*, at 16-18, but the German Government has drafted new regulations that would "permit pretrial production of specified and relevant documents in response to letters of request." Brief for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH as *Amici Curiae* 21.

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<sup>23</sup> An Article 23 reservation and, in fact, the Convention in general require an American court to give closer scrutiny to the evidence requested than is normal in United States discovery, but this is not inconsistent with recent amendments to the Federal Rules of Civil Procedure that provide for a more active role on the part of the trial judge as a means of limiting discovery abuse. See Fed. Rule Civ. Proc. 26(b), (f), and (g) and accompanying Advisory Committee Notes.