

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

ORIGINAL

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1695

TITLE SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND SOCIETE de
CONSTRUCTION d'AVIONS de TOURISM, Petitioners V. UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, ETC.

PLACE Washington, D. C.

DATE January 14, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SOCIETE NATIONALE INDUSTRIELLE ;

4 AEROSPATIALE AND SOCIETE de ;

5 CONSTRUCTION d'AVIONS de TOURISM, ;

6 Petitioners, ;

7 v. ; No. 85-1695

8 UNITED STATES DISTRICT COURT FOR ;

9 THE SOUTHERN DISTRICT OF IOWA, ;

10 ETC. ;

11 - - - - -;

12 Washington, D.C.

13 Wednesday, January 14, 1987

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:04 o'clock a.m.

17 APPEARANCES:

18 JOHN W. FORD, ESQ., San Francisco, California; on behalf
19 of the petitioners.

20 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States and Securities and
23 Exchange Commission, as amicus curiae.

24 RICHARD H. DOYLE, IV, ESQ., Des Moines, Iowa; on behalf
25 of the respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments first this morning in No. 85-1695, Societe Nationale Industrielle, et cetera, versus United States District Court for the Southern District of Iowa.

Mr. Ford, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN W. FORD, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. FORD: Mr. Chief Justice, and may it please the Court, this case concerns The Hague Evidence Convention which establishes procedures for gathering evidence located on the soil of other signator nations. The United States and the other Convention signators before the Court all agree the court below erred in holding the Convention does not apply here. They all agree the decision of the Eighth Circuit should be vacated and the case remanded.

The major issue before the Court today is how to harmonize the Convention with the Federal Rules of Civil Procedure because both are the law of the United States. As the amicus briefs show, the extent to which the Convention displaces U.S. discovery rules is a question on which the Convention signators hold divergent views. To reconcile those differences and to

1 effectuate the Convention's purpose, today we urge the
2 Court to adopt a general rule requiring resort by
3 American courts to The Hague Evidence Convention in the
4 first instance.

5 The Convention preamble states its basic
6 purpose of mutual judicial cooperation in civil or
7 commercial matters. Its history shows the Convention
8 was adopted in large measure to avoid the friction
9 created by the extraterritorial application of American
10 discovery procedures as the new restatement of the law
11 of foreign relations of the United States recognizes
12 American attempts to conduct discovery abroad have been
13 a major source of friction with our European trading
14 partners.

15 In negotiation of the treaty the United States
16 obtained significant concessions from the civil law
17 nations on the basis that Convention procedures would be
18 a substitute for the unsupervised extraterritorial use
19 of American discovery rules, or as some writers have
20 referred to it, legal tourism by American lawyers on the
21 discovery trail.

22 At the bargaining table the civil law nations
23 made clear they regarded such American discovery
24 practices as invasive of their sovereign rights.
25 Ultimately, the civil law nations agreed to liberalize

1 and simplify the process for obtaining evidence through
2 their Courts for use abroad as the quid pro quo for
3 lessening foreign intrusions of their sovereignty.

4 QUESTION: Mr. Ford, may I just interrupt?
5 You say your position now is that they should resort to
6 The Hague Convention in the first instance. Is that the
7 same position you took in the trial court?

8 MR. FORD: Justice Stevens, it is to this
9 extent. In the trial court we urged first upon the
10 Court exclusive use.

11 QUESTION: Right.

12 MR. FORD: Alternatively we argued --

13 QUESTION: And are you abandoning the
14 exclusive use position?

15 MR. FORD: We are not abandoning, Justice
16 Stevens, the exclusive use position. As a French
17 national, my client supports the position of its home
18 sovereign as stated in the amicus brief filed for the
19 Republic of France. However, as an independent entity,
20 an independently managed entity, although albeit we are
21 owned, our shares are owned by the government of France,
22 we must face the practical results of litigating before
23 United States courts, and recognizing the position taken
24 by the Solicitor General, particularly after the opinion
25 given to the Court in Falzon, Volkswagen versus Falzon,

1 cited in the briefs, we today urge the Court for a
2 general rule for American courts of first use.

3 QUESTION: We are bound by The Hague
4 Convention, are we not?

5 MR. FORD: It is our position, Justice
6 Marshall, that we are.

7 QUESTION: Can't that be answered yes or no?

8 MR. FORD: I beg your pardon?

9 QUESTION: Can't that be answered yes or no?

10 MR. FORD: It can, and the answer is yes.

11 QUESTION: And so what else is there before
12 us?

13 MR. FORD: I believe what is before the Court
14 is the opportunity to establish a general rule for
15 American courts.

16 QUESTION: (Inaudible.)

17 MR. FORD: To have resort to the Convention in
18 the first use, on a first use basis.

19 QUESTION: We are not resorting to it, we are
20 bound by it.

21 MR. FORD: I am sorry, I did not --

22 QUESTION: We are not resorting to it. We are
23 bound by it. The Constitution says that.

24 MR. FORD: I agree, Justice Marshall.

25 QUESTION: I don't understand what the case is

1 about.

2 MR. FORD: I believe in the American courts
3 the opinions below have a great deal of confusion. A
4 number of cases, without saying so, look upon the
5 Convention in a particular case as somehow a conflict of
6 law problem with foreign law, and as the Justice
7 observed, it is not foreign law, it is the law of the
8 United States. Very few cases have, and we have cited
9 them in the brief, addressed the problem of reconciling
10 The Hague Evidence Convention with the Federal Rules of
11 Civil Procedure.

12 QUESTION: Mr. Ford, as I understand it, the
13 Solicitor General doesn't agree that it has to always be
14 resorted to in the first instance, does he? How does
15 your position now differ from that of the Solicitor
16 General, would you say?

17 MR. FORD: The present position of the
18 Solicitor General as I understand it, Justice O'Connor,
19 is, this case should be remanded for a case by case
20 comity analysis.

21 QUESTION: Which wouldn't necessarily require
22 a resort to the Hague procedures in the first instance.

23 MR. FORD: In our view a comity analysis
24 certainly in this case and any similar case necessarily
25 leads to that conclusion, but the rule proposed a change

1 from the Solicitor General's earlier position in
2 Volkswagen versus Falzon, where the Solicitor General of
3 the United States amicus took the position the
4 Convention was exclusive --

5 QUESTION: Right.

6 MR. FORD: -- just a few years ago, now turns
7 us to the suggestion the case be sent back for American
8 courts in each case to have a factually laden, a
9 factually burdened comity inquiry.

10 QUESTION: And as I understand it it would not
11 under his view, at least, require resort in the first
12 instance to The Hague procedures --

13 MR. FORD: That is --

14 QUESTION: -- necessarily.

15 MR. FORD: That is my understanding.

16 QUESTION: Now, what is your position on who
17 has the burden of proof to show what other procedures
18 can accommodate a plaintiff's needs? For example, does
19 your client, being a foreign national, should your
20 client have the burden of proof on what accommodation
21 should be made, if any?

22 MR. FORD: I do not believe so, Justice
23 O'Connor, because it is not a fact question. To the
24 extent we have a factual inquiry, of course, of comity
25 analysis it would rest with the party proposing it, but

1 it is not a fact question. I do not view it and submit
2 it is not a conflict of law question. It is part of the
3 law of the forum, and for the application of the proper
4 law of the forum no one has the burden of proof.

5 QUESTION: Well, certainly the foreign
6 national is going to know what the procedures are in
7 that country better than the American litigant,
8 presumably, and you don't think there should be any
9 burden on the foreign national, at least, to go forward
10 and establish what the procedures are which are
11 available in the foreign country?

12 MR. FORD: I do not, Justice O'Connor. I
13 think it is a logical assumption to be made but it does
14 need further analysis. I speak as one in that position,
15 and I have no better information than respondent. If I
16 do, of course, I pass it immediately to him. We share
17 the same information. There is, I submit, no proper
18 warrant for placing a burden of proof concept upon a
19 party urging the applicability of The Hague Evidence
20 Convention outside of the comity analysis. It is the
21 law of the forum.

22 QUESTION: Well, Mr. Ford, are you urging the
23 applicability of The Hague Convention? I admire your
24 statesmanship in backing off from the position that it
25 is exclusive and you must use it, but once you back off

1 of that position, what is left other than the doctrine
2 of comity? But we didn't need The Hague Convention for
3 the doctrine of comity. That presumably existed before
4 The Hague Convention was even entered into.

5 And I don't see why the obligation of a
6 federal court to consider the sensitivities of foreign
7 governments is increased a whit by the existence of The
8 Hague Convention from what it was before that was
9 adopted. So how is the Hague Convention a part of your
10 argument any more?

11 MR. FORD: Well, Justice Scalia, if I may
12 point out, we are urging that this be a rule for all
13 American courts. As we see from the cases below state
14 courts must deal with the problem as well.

15 QUESTION: I understand, but what imposes that
16 rule? Where does that rule come from? It doesn't come
17 from The Hague Convention, if The Hague Convention is
18 not exclusive.

19 MR. FORD: It comes from a consideration of
20 comity, which we have discussed in the brief.

21 QUESTION: Right, which would have existed
22 before The Hague Convention, right?

23 MR. FORD: Yes, that is true, Justice Scalia.
24 Also --

25 QUESTION: So we can just stop talking about

1 The Hague Convention.

2 MR. FORD: Well, I would like to say --

3 QUESTION: And all we are discussing is
4 whether as a matter of comity American courts should
5 generally not conduct discovery abroad, or not permit
6 discovery to be conducted abroad.

7 MR. FORD: I should have made it clear in the
8 first instance, a reading of the Convention itself and
9 the Convention history supports prior to any resort to
10 comity principles the proposition that The Hague
11 Evidence Convention by an American court must be -- must
12 be used in the first instance. Resort must be had in
13 the first instance. It is clear that any fair reading
14 of the negotiations, the bargaining table --

15 QUESTION: May I interrupt you? Must be
16 used? Suppose a plaintiff serves you with an
17 interrogatory, did you place this ad in this flying
18 magazine, and you could answer it yes or no. You say
19 you can't answer that question without requiring resort
20 to The Hague Convention?

21 MR. FORD: We do not, Justice Stevens.

22 QUESTION: So it is not must in every sense.
23 It is something you could waive as a defense.

24 MR. FORD: We have responded to all discovery
25 against us.

1 QUESTION: And you didn't violate any
2 international treaties by doing that, did you?

3 MR. FORD: Based on any and all information we
4 could get in the United States. It is not part of the
5 Joint Appendix. We did admit --

6 QUESTION: I understand --

7 MR. FORD: -- to the genuineness of those
8 advertising articles after, through U.S. sources.

9 QUESTION: And by doing so you acted
10 consistently with the Convention, as I understand.

11 MR. FORD: That is our position.

12 QUESTION: Well, then, when must the
13 Convention first be resorted to, just whenever the
14 defendant, whenever the party opposing discovery
15 requests that they do?

16 MR. FORD: When we are unable within the
17 United States to reach the evidence gathering process to
18 respond, we or any other party, or, to put it another
19 way, when the evidence must be gathered by whatever
20 means on foreign soil of a signator, it is not the
21 nationality, if the Court will permit, that controls,
22 and there is where we find much confusion below.

23 It is the geographic location of the evidence,
24 whatever the evidence may be.

25 QUESTION: Even if the officer of the

1 corporate defendant who is subject to the jurisdiction
2 of the American court could write a letter that says
3 please send me a copy of this document, it still means
4 they have to go through The Hague Convention?

5 MR. FORD: That is our position, because
6 otherwise the divergent --

7 QUESTION: Even if the officer is willing to
8 do it?

9 MR. FORD: That is correct, because in the
10 case of France we have the defensive legislation
11 referred to in the cases as the blocking statute, a term
12 we have adopted to avoid confusion, and in the case put
13 to me by Justice --

14 QUESTION: The statute, which, if I understand
15 it correctly, you would not have needed if the
16 Convention means what you say it means.

17 MR. FORD: We would not have needed --

18 QUESTION: At least if the Convention is
19 exclusive you wouldn't have needed that statute.

20 MR. FORD: Well, it isn't so much a question
21 of our need as France's declaration of its own policy.
22 The statute is a criminal statute. It is a declaration
23 of the policy of France with respect to essentially
24 growing out of its judicial control as a civil law
25 nation of evidence gathering within its borders, as we

1 know, of course, vastly different from common law
2 countries and the American courts.

3 In the case of the corporate officer that the
4 Court posed to me again it is the location of the
5 evidence. Of course the Court has jurisdiction over
6 him, has the power, but the inquiry is whether or not it
7 is a proper exercise of that power in ordering a foreign
8 national over whom an American court has jurisdiction to
9 gather evidence on the foreign soil of a signatory when
10 it is the clear and unambiguous policy of that foreign
11 country signatory that it and it alone controls evidence
12 gathering on its soil and within its borders.

13 QUESTION: Would this be true also of an
14 American corporation with a French wholly owned
15 subsidiary? The American corporation could also say
16 that the evidence that you request is in France and we
17 insist that you follow the procedures?

18 MR. FORD: If we have the situation where the
19 evidence reposes on French soil and French soil alone
20 and we are dealing with the The Hague Convention, again,
21 it is the location of the evidence controls.

22 QUESTION: Right, even if it is a wholly owned
23 subsidiary, say, of General Motors or some company like
24 that? They could make the same objection, I suppose.

25 MR. FORD: That is correct. They are in the

1 same position. The first use rule, as I have recited,
2 we believe, does reconcile the divergent viewpoints.
3 France regards the Convention as exclusive.

4 QUESTION: I don't understand -- if I
5 understood your response to Justice O'Connor correctly,
6 it isn't a first use rule. Or if it is a first use rule
7 it is substantially different from what the Solicitor
8 General is proposing. Right?

9 MR. FORD: It is.

10 QUESTION: Okay, so you think that you always
11 must do it first, or generally must do it first? What
12 is --

13 MR. FORD: Always.

14 QUESTION: Always?

15 MR. FORD: Absent an absolute extreme
16 situation where there has been a demonstrated record
17 that this would be completely futile. We find none of
18 that in the courts below. We find American courts
19 speculating what a contracting national sovereign, a
20 contracting state might or might not do. There is the
21 first folly. That is for the contracting state. And
22 this -- and it is in the record in this case.

23 QUESTION: And this would be so even though it
24 has become clear from the past experience of a
25 particular federal court or of all the federal courts or

1 state courts that a particular country, a particular
2 signatory to the Convention in fact has not permitted
3 these procedures to be used properly?

4 MR. FORD: Or has returned --

5 QUESTION: Right.

6 MR. FORD: -- letter after letter of request
7 unexecuted. We now have a developed record in that
8 situation, Justice Scalia, and that is exactly what we
9 are contending is the wisdom of the general rule. The
10 American courts have no reported experience with France
11 or any of the other signatory nations, certainly with
12 France --

13 QUESTION: Right. Are you going to answer my
14 question, though?

15 MR. FORD: -- of dissatisfaction.

16 QUESTION: Are you going to answer my
17 question? What if you do have such experience? Does
18 your first use rule still apply?

19 MR. FORD: That is for the Court upon a record
20 to create an exception to the general rule, so my answer
21 would be --

22 QUESTION: So it isn't absolute first use
23 rule. A court can use some factors to say --

24 MR. FORD: Of course. Of course. I am sorry
25 I -- I was --

1 QUESTION: I am trying to understand what your
2 position is.

3 MR. FORD: And I didn't quite make it clear.
4 The position is, for a general rule with the Court to
5 carve out such exceptions as experience warrants, it is
6 that experience that is currently lacking.

7 QUESTION: And as experience warrants. What
8 other exceptions might there be besides the fact that we
9 know that a particular foreign country won't in fact
10 allow these procedures to be used properly? Anything
11 else?

12 MR. FORD: Obviously where there are some
13 exceptions or reservations taken that show
14 incompatibility and collide with overriding national
15 interests of the United States is one that occurs to me,
16 but I say that only experience could determine this with
17 a general rule in place from this Court.

18 QUESTION: Mr. Ford, for example, haven't some
19 countries party to the Convention made an Article 23
20 reservation so that, for example, documents will not
21 be -- requests for documents will not be honored. Isn't
22 that so?

23 MR. FORD: They have, Justice O'Connor.

24 QUESTION: And what is an American court to do
25 when a party plaintiff, for example, is seeking

1 production of documents that are in a country with an
2 Article 23 reservation?

3 MR. FORD: I suggest what the American courts
4 have done is to have moved --

5 QUESTION: I am asking under your proposal
6 what is it the American court would have to do?

7 MR. FORD: It would have to make a first use
8 of the Convention to test the meaning of the Article 23
9 reservation by the country.

10 QUESTION: Well, suppose we know the meaning,
11 and the country simply will not permit the production of
12 documents. Now, what is the court to do under your
13 version?

14 MR. FORD: Well, under the question as put,
15 with the court knows, we know, if that knowledge is true
16 knowledge and factually correct, the court is obviously
17 faced with the option of carving out an exception. If I
18 may say, it is the presumption below of many courts that
19 they knew when in fact we know from looking at the
20 Convention history they didn't know. There is a major
21 misunderstanding of the Article 23 reservation of the
22 civil law countries.

23 QUESTION: What is the position of France
24 today in honoring requests for documents that are
25 relevant to the litigation in this country?

1 MR. FORD: The position of France today is as
2 expressed in the letter from the Minister of Justice to
3 the Minister of Foreign Affairs in Appendix A to the
4 amicus brief for the Republic of France. And it is my
5 understanding that the Minister of Foreign Affairs has
6 addressed The Hague conference as recommended in that
7 letter, and we see in that letter an intent clearly
8 expressed to honor direct nexus focused document
9 requests, and it is --

10 QUESTION: Are you aware of any such requests
11 being made through American courts since that letter was
12 issued?

13 MR. FORD: I am aware of none. I understand
14 the letter is -- Justice O'Connor's question was today,
15 and I understand the letter has just gone out or is just
16 going out in furtherance of the interdepartmental
17 memorandum, but the Convention, the Report of Convention
18 Proceedings in 1985 shows the civil law countries do not
19 have the same understanding that American courts think
20 they do with respect to unfocused document requests on
21 the one hand as opposed to pretrial discovery as known
22 in the common law countries on the other. There simply
23 has not been sufficient experience.

24 QUESTION: Well, suppose there is insufficient
25 experience to show that these requests just aren't going

1 to be honored, and you say, well, then the American
2 court has -- can recognize an exception. What is it
3 supposed to do when it recognizes the exception, order
4 the party to produce the documents?

5 MR. FORD: It must then make, with the benefit
6 of a developed record, a comity analysis.

7 QUESTION: All right, it makes it, and it says
8 we need the documents. May it order the party to --

9 MR. FORD: First of all --

10 QUESTION: If it is against the law for the
11 party to produce them --

12 MR. FORD: We suggest --

13 QUESTION: -- in the home state, in the home
14 country.

15 MR. FORD: First of all, we suggest, Justice
16 White, that orders should not become routine merely
17 directing, it has to be a considered comity analysis.

18 QUESTION: Could the court ever order the
19 party to produce the documents if it is against the law,
20 say, of France to produce them?

21 MR. FORD: Yes. Well, following, for example,
22 the Interhandle case, or Societe Internationale versus
23 Rogers, cited in the brief, we suggest that following
24 the analysis the court would fashion an appropriate
25 discovery order, a workaday item for any American trial

1 court, and in fashioning that appropriate order it would
2 not make dismissals or such similar types of sanctions
3 become routine at all, if ever.

4 Indeed, in fashioning an appropriate order it
5 would consider such options as evidentiary preclusion,
6 the issue elimination, perhaps, other type of similar
7 control over the evidentiary stream as the result of a
8 limitation on the flow of pretrial information.

9 And of course therefore it is then for the
10 party whose evidence is on foreign soil to consider in a
11 genuinely voluntary basis the use of the Chapter 2
12 proceedings, and there is the other option that has been
13 removed from any nationals, be they foreign nationals as
14 my client or anyone else, where the evidence can be
15 found only abroad.

16 Without that appropriate discovery order
17 fashioned, Justice White, they cannot adequately
18 consider what could be done under voluntary methods and
19 considered in the proper light. We ask here, of course,
20 that respondent avail itself of the Convention as we
21 have from the beginning. They have not chosen to do so,
22 which has brought us here.

23 The first use rule, we submit, as a general
24 rule, with exceptions carved out as necessary, has every
25 chance of working in practice and is exactly what is

1 needed to develop an experience in this area within the
2 American courts subject, of course, to review at
3 appropriate stages by this Court.

4 I would like to reserve if I may any remaining
5 time I have for rebuttal.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ford.

7 We will hear now from you, Mr. Minear.

8 ORAL ARGUMENT OF JEFFREY P. MINEAR, ESQ.,

9 ON BEHALF OF THE UNITED STATES AND

10 SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

11 MR. MINEAR: Mr. Chief Justice, and may it
12 please the Court, the United States agrees that the
13 Court of Appeals erred in holding that The Hague
14 Evidence Convention has no application in this case. We
15 do not agree, however, that this Court should adopt a
16 general first use rule in using the Convention.
17 Instead, the determination whether to use the Convention
18 should be made on a case by case basis. The judgment
19 below should therefore be vacated and the case remanded
20 for further proceedings.

21 QUESTION: Now, Mr. Minear, the SG appears to
22 have changed his position regarding the use of The Hague
23 Convention.

24 MR. MINEAR: Your Honor, we don't believe that
25 that is really accurate. The first case in which this

1 issue arose --

2 QUESTION: Well, I reread the briefs filed by
3 the SG, and it certainly appears that way to me.

4 MR. MINEAR: You are referring to the brief
5 that we filed in Falzon.

6 QUESTION: Yes.

7 MR. MINEAR: Falzon dealt with the problem of
8 oral depositions on foreign soil. The United States
9 adheres to the position that those depositions are
10 improper without the consent of the foreign nation.
11 However, this matter concerns strictly the production of
12 documents and interrogatories, and in that case --

13 QUESTION: Now, as to the taking of
14 depositions do you adhere to the position that The Hague
15 Convention procedures are exclusive?

16 MR. MINEAR: No. No, we do not, Your Honor.
17 There is a statement on Page 6 of the Falzon brief that
18 mentioned exclusivity, which said strictly within the
19 confines of depositions on foreign soil. We still
20 believe that depositions could be taken in the United
21 States without violation of a nation's judicial
22 sovereignty.

23 QUESTION: But not in France, for example, in
24 this case.

25 MR. MINEAR: Yes, that is correct, Your Honor.

1 QUESTION: By reason of The Hague Convention,
2 or by reason of some other principle?

3 MR. MINEAR: By reason of what we believe is
4 customary international law that the general view of
5 foreign nations is that this would be a violation of
6 their sovereignty, and the United States is willing to
7 honor that viewpoint even though we might not
8 necessarily agree with it fully.

9 QUESTION: It would have nothing to do with
10 The Hague Convention.

11 MR. MINEAR: No, that would be quite apart
12 from The Hague Convention.

13 QUESTION: Why does your current position have
14 anything to do with The Hague Convention?

15 MR. MINEAR: The problem here, Your Honor --

16 QUESTION: I mean, either The Hague Convention
17 is mandatory, in which case you use it, or it is not
18 mandatory, and all it does is supplement the procedures
19 that countries have to make information available
20 abroad, right?

21 MR. MINEAR: Your Honor, that --

22 QUESTION: It is either one or the other, and
23 if it is the latter, then I don't see why it creates a
24 new rule of comity that didn't exist before. It mainly
25 alters the procedures in the civil law countries,

1 right?

2 MR. MINEAR: Yes, that is right.

3 QUESTION: So why didn't we use comity before
4 with respect to England? Are you aware of any federal
5 court that felt compelled in a discovery matter to
6 withhold action until use of the British internal
7 procedures for obtaining the information was resorted
8 to?

9 MR. MINEAR: Prior to the formulation of The
10 Hague Convention these issues typically arose in the
11 case of depositions that were to take place on foreign
12 soil. In a number of cases American litigants simply
13 went to the foreign country and attempted to take
14 depositions, and this, in fact, was what the genesis for
15 the Convention was.

16 QUESTION: But weren't those third party
17 depositions, for the most part?

18 MR. MINEAR: For the most part they were.
19 That is correct, Your Honor. Now --

20 QUESTION: Well, Mr. Minear, does the fact
21 that this country has entered into The Hague Convention
22 now weigh in the comity balance? Is it now a factor in
23 the comity analysis?

24 MR. MINEAR: Your Honor, it weighs in in this
25 way, that the foreign nations generally view The Hague

1 Convention as exclusive. The United States' view is
2 that this supplements American procedures for obtaining
3 evidence. It does impose obligations on the United
4 States in response to your question, Justice Scalia,
5 particularly as a receiving state.

6 We now have to meet the minimum requirements
7 for providing evidence to foreign countries, and they do
8 likewise. But with respect to the comity analysis the
9 conflict right now exists in the fact that we view this
10 as a supplemental matter and that parties in the United
11 States can typically choose among the discovery methods
12 they might use.

13 The respondents here are free to use the
14 Convention if they wish under American laws but they are
15 not mandated to do so. This is where the conflict
16 arises, and this is why there is a need for a comity
17 type of analysis.

18 QUESTION: How do you get a treaty and
19 comity? Treaty is the opposite of comity. Treaty is,
20 you must do you it.

21 MR. MINEAR: Again, Justice Marshall, the
22 things that we must do is, we must provide the evidence
23 as specified when a foreign nation requests it.

24 QUESTION: You must follow The Hague
25 Convention, period.

1 MR. MINEAR: Yes, but The Hague Convention
2 says that requests for foreign --

3 QUESTION: But I mean there is no comity
4 involved.

5 MR. MINEAR: As a receiving state that is
6 correct, Your Honor.

7 QUESTION: The treaty, the Constitution says a
8 treaty is it.

9 MR. MINEAR: Yes, but it only provides a
10 supplement --

11 QUESTION: And it binds everybody, including
12 us and the Department of Justice.

13 MR. MINEAR: Your Honor, yes, the treaty is
14 mandatory insofar as we must provide evidence to foreign
15 countries. Now, a court adjudicating a transnational
16 dispute is faced with a choice of employing The Hague
17 Convention, using traditional American discovery
18 methods, or a combination of both methods. Petitioners
19 contend that the Court must always choose the
20 Convention, at least in the first instance, to obtain
21 any foreign evidence.

22 QUESTION: Well, that is a perfectly fair
23 position, and even if comity wouldn't have required
24 resorting to foreign mechanisms in the first instance,
25 it is perfectly fair to argue that The Hague Convention

1 does require it, no matter what comity would have said.

2 MR. MINEAR: We disagree.

3 QUESTION: I know. Why do you? Why do you
4 say that The Hague Convention does not require first
5 resort?

6 MR. MINEAR: Our view is, first of all, there
7 is nothing in the Convention that indicates a first use
8 requirement, and there is nothing in the ratification
9 history that indicates a first use requirement as well,
10 but furthermore petitioner's rule rests on the
11 assumption that The Hague Convention will always produce
12 fair, effective, and efficient discovery, and that is a
13 matter that is subject to considerable debate.

14 QUESTION: Well, if it just requires first
15 resort I am not so sure about that.

16 MR. MINEAR: Your Honor, the problem here is a
17 domestic plaintiff who is forced to go through first
18 resort to the Convention may in fact encounter so many
19 obstacles that he is forced to give up his lawsuit.

20 QUESTION: What if Congress in so many words
21 said, you will resort to The Hague Convention in federal
22 cases and you will not do otherwise?

23 MR. MINEAR: Then that would be controlling.
24 There would be no doubt that if Congress in fact made
25 that declaration explicit --

1 QUESTION: So we are just talking basically
2 about how stringent the provisions of The Hague
3 Convention are, you know, what impetus Congress gave or
4 the executive gave to require some sort of use of it
5 before you get to ordinary discovery proceedings.

6 MR. MINEAR: Yes, Your Honor, but the record
7 here is rather unclear, quite frankly, on to what extent
8 Congress expected these matters to be used even in the
9 first instance.

10 QUESTION: Well, if we construe, if we say
11 that The Hague Convention does not require exclusive use
12 or first resort, do we have to decide anything else? Do
13 we have to get into comity? Or is the only issue here
14 the effect of The Hague Convention?

15 MR. MINEAR: We believe that the Court should
16 identify those principles that should control the comity
17 analysis. For instance, we think it is important that a
18 foreign nation identify the foreign interest, the reason
19 why the use of The Hague Convention is necessary within
20 its country.

21 We also believe the Court should stress --

22 QUESTION: Are they supposed to do that in
23 each case? Is that your point? Each case they should
24 find out the foreign interest considerations that should
25 affect the District Court's comity analysis?

1 MR. MINEAR: Yes, Your Honor, we believe that
2 that is --

3 QUESTION: But did they do that in this case?
4 Didn't they just take a position that there can be no
5 discovery except pursuant to The Hague Convention? They
6 didn't put out any facts that say there is anything
7 special about this lawsuit.

8 MR. MINEAR: Yes, Your Honor, but the
9 statement that a foreign nation objects, and being able
10 to point to specific policies of the foreign nation we
11 believe will generally suffice to show that there is a
12 legitimate foreign interest here.

13 Now, some foreign interests are entitled to
14 greater weight or greater comity than perhaps other
15 interests. For instance, we believe that the Court
16 could reasonably conclude that the privacy interests of
17 a nation, for instance, trade secret laws require use of
18 The Hague Convention.

19 QUESTION: Yes, but don't they have to say in
20 their motion to limit discovery, we have got a trade
21 secret problem in this case that you have got to be
22 sensitive about, and they didn't do that.

23 MR. MINEAR: Well, yes, Your Honor, and this
24 brings up another problem. These issues are typically
25 arising in the context of protective orders, and in fact

1 there is a mechanism, the Federal Rules.

2 QUESTION: But they didn't ask for anything
3 except a 100 percent protective order here.

4 MR. MINEAR: Yes, that is true, Your Honor.

5 QUESTION: And even the District Judge said
6 you must take the depositions in France. He did that
7 independently.

8 MR. MINEAR: Yes. Now, Your Honor, with
9 respect to the record that should be created, we believe
10 the petitioners do have an obligation of some sort to
11 explain how their law works and whether or not the
12 discovery could be obtained in this case.

13 QUESTION: Do you think they made the kind of
14 showing that requires reversal in this case? Is the
15 showing they made in this case enough to justify
16 reversal under the government's position? That is
17 really what I am driving at.

18 MR. MINEAR: Yes, Your Honor. We believe that
19 the case should be vacated and remanded for a fuller
20 comity analysis. We do not believe the record here is
21 really adequate to conduct the sort of comity analysis
22 that we are discussing.

23 QUESTION: Who has the burden of supplementing
24 the record?

25 MR. MINEAR: In this case it is difficult to

1 speak of burdens in this situation. Instead --

2 QUESTION: Well, somebody has got to go
3 forward before the judge first.

4 MR. MINEAR: We believe that the domestic
5 litigant has an obligation to identify the types of
6 discovery that it feels is necessary.

7 QUESTION: Well, he has done that.

8 MR. MINEAR: And in return petitioner should
9 indicate or the foreign litigant should indicate whether
10 or not this discovery could be obtained through the use
11 of the Convention. They are in the best position to
12 provide that sort of information.

13 QUESTION: So are you going to order somebody
14 to violate the laws of France?

15 MR. MINEAR: Your Honor, may I answer that
16 question? My time has expired.

17 QUESTION: Go right ahead.

18 MR. MINEAR: Yes. Our view is that Societe
19 Internationale v. Rogers controls that inquiry. In some
20 situations it may be appropriate for a District Court to
21 order production even though it might violate a foreign
22 law.

23 QUESTION: And get a man arrested and
24 convicted.

25 MR. MINEAR: Well first of all, there is a

1 real question whether or not these laws are in fact
2 being applied to French citizens. There is a question
3 of whether --

4 QUESTION: You and your court are not going to
5 determine what the law of France is when they put him in
6 jail. France is going to decide that.

7 MR. MINEAR: Yes, Your Honor. Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Minear.

10 We will hear now from you, Mr. Doyle.

11 ORAL ARGUMENT OF RICHARD H. DOYLE, IV, ESQ.,
12 ON BEHALF OF THE RESPONDENT

13 MR. DOYLE: Mr. Chief Justice, and may it
14 please the Court, we respectfully request this Court to
15 affirm the lower court's decision and allow the
16 plaintiffs in this case, John and Rosa George and Dennis
17 Jones, to proceed with their request of discovery under
18 the Federal Rules of Civil Procedure as opposed to the
19 procedures under The Hague Evidence Convention.

20 QUESTION: Do you agree that the Eighth
21 Circuit was in error?

22 MR. DOYLE: No, I do not, Your Honor.

23 QUESTION: Well, your opponent said everybody
24 agreed to that.

25 MR. DOYLE: We certainly agree with the

1 result, Your Honor. Where we differ with the parties
2 and the amicus parties to this case is that The Hague
3 Evidence Convention does not apply at all to the
4 discovery requested in this case, that being
5 interrogatories, requests for admissions, and requests
6 for production, for the reason that the discovery
7 requested in this case does not fall within the very
8 terms of the Convention itself, that is, the taking of
9 evidence abroad.

10 In this case the plaintiffs are not abroad
11 taking evidence. The evidence is produced in the United
12 States.

13 QUESTION: Yes, but they are requiring the
14 documents to be brought from France.

15 MR. DOYLE: That is true, Your Honor.
16 Necessarily there will be preparatory acts performed in
17 the country of France in order to comply with these
18 discovery requests.

19 QUESTION: Well, France believes that the
20 Hague Convention covers the production of these
21 documents.

22 MR. DOYLE: That is true, your Honor, and we
23 disagree with their reading of the Convention. That is
24 a fundamental difference.

25 QUESTION: Well, if we disagree with you on

1 that the case has to go back, doesn't it, to see if
2 there are some grounds for an exception?

3 MR. DOYLE: Your Honor, I believe that the
4 magistrate in the District Court and the Eighth Circuit
5 made the necessary analysis so that it is not necessary
6 for this case to be remanded in order to perform that
7 analysis again.

8 QUESTION: Well, did the Court below agree
9 with you that The Hague Convention just didn't reach
10 these documents?

11 MR. DOYLE: That is true, Your Honor.

12 QUESTION: Did they also say, even if it --
13 even if it -- even if it applies there is an exception?

14 MR. DOYLE: That is true. That is true. And
15 our basic position is that The Hague Evidence Convention
16 by its very terms does not apply to this particular
17 discovery.

18 QUESTION: I am really puzzled, because
19 Article 3(g) of the Convention says in words "The letter
20 request shall specify the documents or other property,
21 real or personal, to be inspected." Now, do you mean it
22 doesn't apply because they are documents possessed by a
23 party? Or it just has no application to document
24 production?

25 MR. DOYLE: No, The Hague Evidence Convention

1 applies to document production, Your Honor. As we view
2 the Convention if the discovery takes place in the
3 United States, in other words, if there are no
4 adversaries, United States adversaries intruding upon
5 French soil, that The Hague Convention does not apply.
6 Those provisions with regard to the production of
7 documents would apply in the taking of a deposition upon
8 French soil.

9 QUESTION: Well, it may not apply in the sense
10 that it mandates that the procedure be adopted, but is
11 it not at least an optional procedure that you could
12 have requested a letter of request and you could have
13 asked the Court to follow The Hague Convention if you
14 thought it would be advantageous?

15 MR. DOYLE: Your Honor, I don't think there is
16 any question but that the plaintiffs in this case could
17 have --

18 QUESTION: You see, using the words "doesn't
19 apply" is really kind of a confusing term. When you use
20 it you mean it does not mandate following the
21 procedures, but conceivably it would apply in the sense
22 that it is an optional alternative available to you.
23 What do you mean when you say it doesn't apply?

24 MR. DOYLE: I think an American litigant
25 always has that option --

1 QUESTION: Okay.

2 MR. DOYLE: -- of using The Hague Evidence
3 Convention for the type discovery that we requested in
4 this particular case .

5 QUESTION: So when you say and maybe when the
6 Court of Appeals said it doesn't apply, all they meant
7 was, it is not exclusive. Is that what you are saying?

8 MR. DOYLE: Well, there is no question but
9 that The Hague Evidence Convention is not exclusive,
10 Your Honor.

11 QUESTION: Well, the government of France
12 disagrees with you on that, so there is a question.

13 QUESTION: Well, there are common law
14 countries who certainly think it is exclusive. Isn't
15 that so?

16 MR. DOYLE: That is true, Your Honor.

17 QUESTION: And that is one of the issues we
18 have to resolve.

19 MR. DOYLE: Yes, Your Honor. The exclusivity
20 issue has not been resolved by the signatories to the
21 Convention, and in the 1985 special commission that they
22 had the parties were in disagreement as to whether or
23 not the Convention was exclusive.

24 QUESTION: Now, even if the Court were -- even
25 if we were to decide it isn't exclusive, do you think

1 that a trial court has no obligation to consider whether
2 Convention procedures could be followed in obtaining the
3 requested discovery?

4 MR. DOYLE: In this case, Your Honor, it is
5 our position that the trial court indeed has no
6 obligation to consider whether or not Hague Evidence
7 Convention procedures should be applied.

8 QUESTION: And why? You don't think that the
9 United States interests in getting information might be
10 affected by international concerns to a degree that the
11 Court should consider that question?

12 MR. DOYLE: There are two reasons why it
13 should not apply in this case. Number One, it is our
14 position that we are not intruding upon French judicial
15 sovereignty or French soil in the production of
16 documents, answers to interrogatories, requests for
17 admissions that are made, produced in the United States,
18 and secondly --

19 QUESTION: Well, if we disagree with the court
20 below on that point and believe that if the document is
21 presently on foreign soil and has to be taken from there
22 to be produced here, and if we think that is something
23 that would trigger The Hague Convention as a possible
24 procedure to use, then must the trial court not think
25 about these international concerns?

1 MR. DOYLE: In this particular case, Your
2 Honor, no. Not in this case, for the reason that, one,
3 the terms of the Convention itself is not exclusive. In
4 a reading of the history, particularly the history of
5 the American adoption of the Convention, clearly shows
6 that there was no intent by the United States to make
7 the Convention exclusive.

8 Thirdly, the problem in this case is that
9 France has adopted Article 23 where they state
10 unequivocally that they will refuse to honor any letters
11 of request for production of documents for pretrial
12 discovery, as known in common law countries.

13 QUESTION: But now we have the letter from the
14 foreign minister indicating possible availability of the
15 procedure, do we not?

16 MR. DOYLE: Your Honor, I have some
17 difficulties with that letter. Number One, that letter
18 was generated six days before the French amicus brief
19 was filed with this Court. That position was not raised
20 in the lower courts at any other time until six days
21 before they filed their brief.

22 Secondly, that is an intergovernmental
23 communication. It is not the law of France. It has not
24 been adopted by the French legislature. Article 23
25 indeed has. Another problem with that letter, Your

1 Honor, is, if France receives a favorable ruling from
2 this Court, what is to prevent the Ministry of Justice
3 in France from changing their position away from that
4 letter?

5 QUESTION: Do you know that it has to be
6 adopted by the French legislature in order to be binding
7 in France?

8 MR. DOYLE: No, I do not, Your Honor.

9 QUESTION: Well, while you are speculating,
10 what happens if this Court, a District Court here orders
11 this man to go over there and get these documents, and
12 France locks him up?

13 MR. DOYLE: Your Honor, our position is that
14 if there is no intrusion by the adversary on French
15 soil, that The Hague Evidence Convention does not apply.

16 QUESTION: How could that help him over
17 there? How does that help him out of the jail?

18 MR. DOYLE: It is our position, Your Honor,
19 and we conceded and agreed with the lower court --

20 QUESTION: You just feel sorry for him?

21 MR. DOYLE: We conceded that if activity by
22 the adversary, the American adversary takes place on
23 French soil, that The Hague Evidence Convention
24 procedures should apply. The example of the American
25 lawyer going to France to obtain the requested documents

1 we agree that conduct should be governed by The Hague
2 Evidence Convention as The Hague Evidence Convention is
3 the supreme law of this land, as are the Federal Rules,
4 of course.

5 QUESTION: What if the French lawyer goes to
6 France representing the French company and he is subject
7 to some sort of sanctions by the French government
8 because he is attempting to comply with the District
9 Court discovery order?

10 MR. DOYLE: The safety valve in that case is
11 that the French litigant would inform the District Court
12 that if we comply with this discovery order we are
13 subject to criminal penalties. At that point, I think
14 the District Court has to make an analysis as to whether
15 or not that is a valid argument, in other words, that in
16 fact is going to have.

17 The French have adopted their blocking
18 statute, which makes it a criminal penalty to release
19 certain information. The question is, and the question
20 the District Court should look at is, can that blocking
21 statute be waived, and we don't have any sufficient
22 record in this case.

23 QUESTION: Do you think the District Court can
24 focus solely on the concerns of the litigants before it
25 to get information pertinent to their lawsuit and ignore

1 foreign policy considerations in making this sort of a
2 determination?

3 MR. DOYLE: Your Honor, no. In this case we
4 submit that The Hague Evidence Convention is not
5 applicable to the discovery requested. The Court need
6 go no further. If the Court needs not go any further,
7 of course, it doesn't have to make that analysis.

8 QUESTION: When you say it is not applicable,
9 you are saying, I take it, not that it would not be
10 available if you chose to use it, but that by its terms
11 it is not required to be used?

12 MR. DOYLE: Absolutely, Your Honor. It is not
13 required to be used in the circumstances of this case.

14 QUESTION: What does The Hague Convention have
15 to do with that? Suppose France had a blocking statute
16 and The Hague Convention didn't exist. In that
17 situation do you think the District Court would have no
18 obligation to consider the situation it was putting the
19 litigant in by compelling information to be handed over
20 where perhaps some other means could be devised?

21 MR. DOYLE: Your Honor, the Court certainly
22 has to take into consideration that statute.

23 QUESTION: So the inapplicability of The Hague
24 statute is really irrelevant. Even if we accept your
25 position that maybe a particular procedure in The Hague

1 Convention was not usable, the District Court should
2 still consider when it is dealing with a foreign
3 litigant what kind of a situation its discovery order is
4 putting him in, no?

5 MR. DOYLE: That's really a two-pronged test.
6 One, does The Hague Evidence Convention apply, and
7 secondly, if it does not can we obtain the information
8 without subjecting someone to the violation of French
9 criminal law. The Societe Internationale versus Rogers
10 case, of course, dealt with that type of situation long
11 before The Hague Evidence Convention came into being.
12 In that case, of course, the Court required the District
13 Court to make a comity analysis to see whether or not in
14 imposing sanctions for failure to make discovery,
15 whether or not the foreign national had made a good
16 faith effort to get around that blocking statute, in
17 other words, to waive that blocking statute.

18 QUESTION: So your argument about the
19 applicability of The Hague Convention merely goes to the
20 manner in which the comity decision should be made. It
21 doesn't go to whether you make any kind of a comity
22 judgment.

23 MR. DOYLE: That's right. Our position is
24 that rather than make the comity analysis up front is
25 that you make the comity analysis when the discovery

1 procedure falls apart, and you cannot receive the
2 discovery because of the blocking statute. In other
3 words, we need no comity analysis to determine whether
4 or not The Hague Evidence Convention would be applicable
5 in a particular case initially.

6 But when the Court gets down the road to
7 determine whether or not sanctions should be imposed
8 against a foreign national, then, of course, the comity
9 analysis should be made to determine whether or not
10 those sanctions are appropriate.

11 QUESTION: Do you understand your opponents to
12 say that if an American plaintiff wants to take the
13 deposition of a French national and the French national
14 is completely willing to have his deposition taken on
15 French soil, that you have to go through some official
16 authority have it done?

17 MR. DOYLE: I understand that that's what our
18 opponent's position is, Your Honor, yes.

19 QUESTION: And that if the defendants in this
20 case had said, well, we are quite willing to furnish
21 these documents, is it their position that The Hague
22 Convention, wholly aside from the blocking statute,
23 would prevent them from doing that?

24 MR. DOYLE: Our position is that The Hague
25 Evidence Convention is not mandatory, and that, yes, a

1 foreign national or a foreign country could provide less
2 restrictive procedures.

3 QUESTION: Yes, but could these defendants
4 simply have produced the documents without complying
5 with any -- without regard to The Hague Convention?

6 MR. DOYLE: They certainly could do that, Your
7 Honor. Obviously, it is not our opponent's position
8 that they could do that. It is our position that they
9 in fact could do that and should have done it.

10 QUESTION: Yes, but your opponents say that
11 the Hague Convention would forbid them from just
12 voluntarily producing the documents?

13 MR. DOYLE: No, because The Hague Convention
14 is not exclusive.

15 QUESTION: Yes, all right.

16 MR. DOYLE: And is not mandatory.

17 QUESTION: Well, presumably you could waive
18 any procedures required by The Hague Convention
19 voluntarily like any other procedures, can't you? You
20 can say, we are not going to have to go through a
21 discovery motion. I will produce this. You can do that
22 in this case like anything else.

23 MR. DOYLE: That is true, Your Honor.

24 QUESTION: But if you voluntarily turn them
25 over, you are in trouble with France.

1 MR. DOYLE: That is what our opponents say,
2 Your Honor.

3 QUESTION: Is that true?

4 MR. DOYLE: We have no personal experience,
5 Your Honor.

6 QUESTION: But as you read the statute or the
7 treaty, and you turn them over voluntarily, wouldn't you
8 be violating the treaty?

9 MR. DOYLE: You would be violating the
10 blocking statute, Your Honor, and not the treaty. The
11 blocking statute requires --

12 QUESTION: That is what I meant to say. I am
13 sorry. Yes, I meant to say you would be violating the
14 blocking statute.

15 MR. DOYLE: That is correct, Your Honor.

16 QUESTION: And you would be subject to jail.

17 MR. DOYLE: That is correct. Possibility of a
18 fine. The record is not sufficient in this case --

19 QUESTION: To some people like me a fine is
20 just as bad as jail.

21 (General laughter.)

22 MR. DOYLE: Me, too, Your Honor.

23 The record is not sufficient in this case to
24 determine whether or not France in fact enforces that
25 blocking statute. Of course, the impetus behind that

1 blocking statute was --

2 QUESTION: One way to find out.

3 MR. DOYLE: That is correct. That is
4 correct.

5 QUESTION: Mr. Doyle --

6 QUESTION: (Inaudible.)

7 MR. DOYLE: Yes, Your Honor.

8 QUESTION: That would be one way to find out.

9 QUESTION: Did your client explore in this
10 case whether the requested information, for example,
11 about advertisements in the United States could have
12 been obtained from sources outside France?

13 MR. DOYLE: Our client has not, Your Honor.
14 We have presumed that some of that evidence in fact was
15 generated in the United States and in fact was in the
16 United States. Mr. Ford has indicated this morning that
17 the information we were given in response to our
18 discovery requests and documents indeed came from United
19 States sources.

20 We don't know whether or not there is any
21 additional information that could be obtained from
22 United States sources in this particular case.

23 QUESTION: Mr. Doyle, the District Court
24 order, if I remember correctly, permitted you to take
25 depositions only in France, but it did permit you to go

1 ahead and take them. Have you taken any depositions
2 yet?

3 MR. DOYLE: No, we haven't. We have not, Your
4 Honor. Your Honor, I believe the order in the District
5 Court case said that we could take depositions in the
6 United States, but that if we were to take depositions
7 in France, that the provisions of The Hague Evidence
8 Convention would apply.

9 QUESTION: Who was your District Judge?

10 MR. DOYLE: It was Magistrate Ronald
11 Longstaff, Your Honor.

12 QUESTION: Well, that is why I asked, because
13 I thought it was a magistrate's case, not a District
14 Court's case.

15 MR. DOYLE: The case was submitted to the
16 magistrate under Section 636, Your Honor, for
17 submission.

18 The Hague Evidence Convention is not exclusive
19 in any way. One, the terms of the Convention can't
20 indicate any --

21 QUESTION: Mr. Doyle, the order says if
22 discovery depositions are to be undertaken the court
23 will require compliance with The Hague Convention. It
24 doesn't say undertaken in France. That is why I thought
25 they had to all be in France. You say I misread the

1 order.

2 MR. DOYLE: Well, we read the order as saying,
3 if we are to take depositions in France, The Hague
4 Evidence Convention applies.

5 QUESTION: That is not what it says.

6 MR. DOYLE: It is our position that the Federal
7 Rules of Civil Procedure certainly allow us to --

8 QUESTION: Oh, I see. I see what you are
9 saying.

10 MR. DOYLE: -- to require parties --

11 QUESTION: But you haven't taken any
12 depositions in the United States either, then, have
13 you?

14 MR. DOYLE: No, we have not, Your Honor. The
15 total extent of discovery in this case is before this
16 Court. And we have proceeded no further. And of course
17 the reason for that, Your Honor, is that we are
18 subjected to a stay which was entered originally by the
19 District Court and then by the Eighth Circuit Court of
20 Appeals, and we are still under a stay to this day, so
21 even if we wanted to take additional depositions we
22 could not, Your Honor.

23 The Hague Convention cannot be exclusive. The
24 results, if this Court finds it to be exclusive,
25 particularly in view of France's adoption of Article 23

1 and the blocking statute, will have significant effects
2 with regard to litigation and also the economy of this
3 country.

4 If The Hague Evidence Convention is exclusive,
5 as argued by some parties in this case, the Federal
6 Rules of Civil Procedure necessarily would not apply,
7 and that would include the sanction provisions. This,
8 we submit, would cause the creation of information
9 havens, the example of General Motors using a subsidiary
10 to house its documents in a foreign country, a signatory
11 to The Hague Evidence Convention, with the adoption of
12 an Article 23 and a blocking statute.

13 An American litigant would not be able to
14 obtain those documents, and secondly, it may well create
15 offshore immunity. In other words, an American
16 manufacturer may decide to manufacture his products in a
17 foreign country so he is not subjected in a real sense
18 to liability in this country because they can
19 effectively thwart any meaningful discovery.

20 To thwart any meaningful discovery flies in
21 the face of the fundamental principles of this country's
22 judicial system. Discovery is critical in these cases,
23 and without it American litigants would have their hands
24 tied and be unable to proceed meaningfully with their
25 litigation against foreign nationals.

1 The Court may want to look at the fairness
2 issue in this case. It is totally unfair to allow a
3 French nationalized company to be subject to the in
4 personam jurisdiction of the United States court to be
5 able to shield itself from pretrial discovery by use of
6 The Hague Convention and the blocking statute, and on
7 the other hand and at the same time have the
8 availability of the Federal Rules of Civil Procedure,
9 which are liberal in regard to their discovery
10 positions, to be used offensively against a domestic
11 litigant, and the domestic litigant not having an
12 opportunity to use those same Federal Rules of Civil
13 Procedure.

14 A totally unfair situation, and I think that
15 when the United States adopted The Hague Convention
16 there was no intent that such a result be reached.

17 QUESTION: Well, even under your theory you
18 don't get equality. I mean, you acknowledge that you
19 can't take depositions in France under the Federal
20 Rules, right?

21 MR. DOYLE: That is true, Your Honor.

22 QUESTION: So there is no way to get parity.

23 MR. DOYLE: That is true. That is true. If
24 there is --

25 QUESTION: Do you acknowledge that you

1 couldn't compel an officer of your opposing party to
2 appear in the United States and give his testimony?

3 MR. DOYLE: Your Honor, this court, the United
4 States court cannot compel an individual to transport
5 himself from France to the United States.

6 QUESTION: No, I am not talking about the
7 individual. You have got a corporate defendant. You
8 say you don't think you could serve notice to have them
9 produce the president of the corporation if he has
10 knowledge of the whole matter in the United States for
11 testimony?

12 MR. DOYLE: Yes. The United States Court
13 certainly has that power. The Court does not have the
14 power to force that individual to physically come to the
15 United States. If --

16 QUESTION: Well, they can tell the corporation
17 we will dismiss your -- strike your answer if you don't
18 show up, or something like that. There are all sorts of
19 sanctions --

20 MR. DOYLE: And that is the remedy, Your
21 Honor. That is the remedy, are these sanctions
22 available under the Federal Rules if they fail to --

23 QUESTION: Do you contend there is any
24 difference at all between the power -- just forgetting
25 the Convention between the power of the Federal District

1 Judge to order an officer of an American corporation --
2 say his office is in New York -- to testify in Iowa or
3 California and an officer of a French corporation who
4 does business in Iowa to testify in Iowa? What is the
5 difference?

6 MR. DOYLE: The jurisdiction of the Court to
7 force --

8 QUESTION: Assume they've got jurisdiction
9 over the corporation. They transact business in Iowa,
10 and they have an officer who is either in New York or
11 Paris. Is there a difference in the power of the
12 District Judge to compel the officer to appear and
13 testify?

14 MR. DOYLE: No, there is not, Your Honor.
15 There is not.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Doyle.

19 Mr. Ford, you have two minutes remaining.

20 ORAL ARGUMENT OF JOHN W. FORD, ESQ.,
21 ON BEHALF OF THE PETITIONER - REBUTTAL

22 MR. FORD: With respect to respondent's
23 remarks regarding questions of the applicability of the
24 French defensive legislation or blocking statute and the
25 Solicitor General's representative's remarks, which I

1 understood to be there was some question in that office
2 whether or not the French law applies to French
3 attorneys highlights one of the major points we are
4 trying to make.

5 That is not a question to be second-guessed on
6 this shore. That is what has led all of the American
7 courts into the quagmire again without a general rule.
8 That is France's prerogative as it is of any foreign
9 sovereign nation to state its own philosophy. Whether
10 or not it reflects fines, imprisonment, or whatever, in
11 declaring that philosophy it is for that sovereign, and
12 as we know from the Schooner Exchange versus McFadden,
13 cited in the briefs, it is not for the courts of this
14 nation to perform any function with respect to that
15 declaration of a foreign sovereign other than
16 understanding what it is the foreign sovereign --

17 QUESTION: Mr. Ford, as I understand the
18 questions presented and the position you espouse here,
19 it doesn't depend at all on a blocking statute. You
20 would make exactly the same argument if they repealed
21 the blocking statute, that you must resort in the first
22 instance to The Hague Convention.

23 MR. FORD: Oh, yes, Justice Stevens.

24 QUESTION: And your questions presented don't
25 mention the blocking statute, in your cert petition. So

1 I don't see how that affects the analysis of the issue
2 you have asked us to decide, the blocking statute,
3 because you would make the same argument if there were
4 no blocking statute.

5 MR. FORD: The same argument would be made for
6 a general rule if there were no blocking statute.

7 QUESTION: Correct.

8 MR. FORD: The issue of the blocking statute
9 comes into play only when we reach the comity analysis,
10 Justice Stevers.

11 QUESTION: If you reach it.

12 MR. FORD: If indeed it is reached, and
13 Article 23 also has its voluntary --

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Ford. The case is submitted.

16 (Whereupon, at 11:05 o'clock a.m., the case in
17 the above-entitled matter was submitted.)

CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1695 - SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND SOCIETE de CONSTRUCTION
d. AVIONS de TOURISM, Petitioners V. UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA, ETC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)