

# Case Note

## Sovereignty on Our Terms

*In re Vitamins Antitrust Litigation*, 120 F. Supp. 2d 45 (D.D.C. 2000).

In an era of economic globalization, U.S. judges must increasingly consider the international consequences of their decisions, even when those decisions are purely procedural or managerial. A salient example of the need for such consideration is the dispute over the procedures for conducting discovery of evidence located abroad:<sup>1</sup> U.S. judges have been eager to employ the Federal Rules of Civil Procedure when ordering discovery, while foreign nations and defendants have insisted that the United States comply with its treaty obligations and employ the Hague Evidence Convention.<sup>2</sup> In a recent decision, *In re Vitamins Antitrust Litigation*, the District Court for the District of Columbia intervened in this debate by ordering that the Federal Rules be used not only for discovery on the merits, but also for discovery necessary to resolve a dispute over the court's jurisdiction.<sup>3</sup> The court extended a questionable line of precedents that displaced the Hague Convention in the management of discovery in federal courts.

Part I of this Case Note reviews the background and substance of the D.C. court's ruling. Part II criticizes the decision for its inattentiveness to fundamental due process principles, sovereignty considerations, and U.S. treaty commitments. Part III analyzes the potential repercussions of the decision and offers an approach aimed at averting these repercussions.

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1. "No 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 requests for documents in investigation and litigation in the United States." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, Reporters' Notes 1, at 354 (1990) [hereinafter RESTATEMENT].

2. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

3. 120 F. Supp. 2d 45, 47 (D.D.C. 2000) (relying on the special master's report for its holding).

## I

Upon the urging of practitioners dissatisfied with the burdensome and unreliable process for obtaining discovery of evidence located abroad, a group of states participating in the Hague Conference on Private International Law negotiated the Hague Evidence Convention as a means to facilitate the process of extraterritorial discovery. In place of a patchwork of inconsistent and complicated procedures that varied from state to state,<sup>4</sup> the Hague Convention set minimum standards that harmonized the procedures for extraterritorial discovery used in civil-law and common-law countries.<sup>5</sup> The Hague Convention was initiated by the U.S. delegation<sup>6</sup> and was duly signed and ratified by the United States.<sup>7</sup>

In response to inconsistent treatment of the Convention by lower courts, the Supreme Court addressed the Convention's applicability to U.S. cases in *Société Nationale Industrielle Aérospatiale v. United States District Court*.<sup>8</sup> The Court held the Convention to be "optional" and established a balancing test for trial courts to follow in determining whether to use the Hague Convention or the Federal Rules for obtaining evidence from abroad.<sup>9</sup> Lower courts were directed to evaluate the facts of the case (such as the burden that discovery imposed on the defendant), the sovereign interests involved, and the effectiveness of the Convention in facilitating the desired discovery.<sup>10</sup> *Aérospatiale* has been criticized by scholars at length for its inherent bias against foreign parties,<sup>11</sup> and practice has confirmed their suspicion that the *Aérospatiale* test disfavors the Hague

4. Problems with the old discovery practices included the expense of translations, delays in producing the evidence, and the inappropriate form in which the evidence was ultimately produced. James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 TUL. J. INT'L & COMP. L. 189, 190-91 (2000).

5. For example, it made letters of request the principal means of obtaining evidence abroad, increased the powers of consuls, and established a mechanism for securing evidence in the form needed by the court where the action is pending. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 531-32 (1987).

6. The U.S. decision to propose the drafting of an evidence convention reflected a "longstanding interest of American lawyers in improving procedures for obtaining evidence abroad." *Id.* at 530 (citing S. EXEC. REP. NO. 92-25, at 3 (1972) (statement of Carl F. Salans, Deputy Legal Adviser, Department of State)).

7. The Convention is codified at 28 U.S.C. § 1871 (1994).

8. 482 U.S. 522 (1987).

9. *Id.* at 544-46.

10. *Id.* The last prong of the test manifests the Court's underlying mistrust of the Hague Convention's effectiveness. The mistrust is echoed in many post-*Aérospatiale* decisions, yet it is not supported by empirical evidence. *E.g.*, Chalmers, *supra* note 4, at 200-01.

11. *E.g.*, George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TUL. L. REV. 525 (1989); Patricia Anne Kuhn, Comment, *Société Nationale Industrielle Aérospatiale: The Supreme Court's Misguided Approach to the Hague Evidence Convention*, 69 B.U. L. REV. 1011 (1989); Roger C. Wilson, Recent Development, *The Hague Evidence Convention in U.S. Courts: Aérospatiale and the Path Not Taken*, 17 GA. J. INT'L & COMP. L. 591 (1987).

Convention. Lower courts relying on the test have almost universally found that the Federal Rules were the proper vehicle for obtaining discovery abroad.<sup>12</sup>

In *Vitamins*, the District Court for the District of Columbia not only joined other courts in conducting the balancing test in favor of the Federal Rules, but also extended *Aérospatiale* to cases of jurisdictional discovery.<sup>13</sup> The *Vitamins* defendants, most of whom were multinational companies based in Europe, were accused of violating antitrust laws by conspiring to fix the price of vitamins sold on the U.S. market. They contested the court's personal jurisdiction over them,<sup>14</sup> so the court ordered discovery to resolve the issue. The court found that the choice of procedures for conducting jurisdictional discovery abroad was a question of first impression in the District of Columbia. The *Aérospatiale* decision was not found to be controlling because it involved discovery on the merits,<sup>15</sup> whereas the *Vitamins* case concerned pre-jurisdiction discovery, relating only to the defendants' contacts with the forum.<sup>16</sup> In the absence of evidence of such contacts, the defendants' claim not to be subjected to a foreign forum's rules was much weightier and the case for the application of the Hague Convention much stronger. This argument, however, was ultimately rejected by the *Vitamins* court.

The court opined that the sovereign interests of foreign nations were not greater in the pre-jurisdiction than in the post-jurisdiction stage and that the court inherently possessed jurisdiction to determine its own jurisdiction. It decided that first resort to the Hague Convention would be inappropriate and fell back on the *Aérospatiale* balancing test, despite the earlier acknowledgment that the two cases were different in critical respects. After

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12. Chalmers, *supra* note 4.

13. The *Vitamins* decision was not the first to extend the *Aérospatiale* balancing test to jurisdictional discovery, but it was the first to offer an extended justification for this holding. See Fishel v. BASF Group, 175 F.R.D. 525, 529 (S.D. Iowa 1997); *In re Bedford Computer Corp.*, 114 B.R. 2, 5-6 (Bankr. D.N.H. 1990); Rich v. Kis Cal., Inc., 121 F.R.D. 254, 260 (M.D.N.C. 1988). But see Jenco v. Martech Int'l, Inc., No. 86-4229, 1988 WL 54733 (E.D. La. 1988) (ordering first resort to the Hague Convention); Knight v. Ford Motor Co., 615 A.2d 297, 301 n.11 (N.J. Super. Ct. Law Div. 1992) (same).

14. The plaintiffs claimed that the defendants' guilty plea in a criminal investigation of the vitamins conspiracy in Texas sufficed to establish personal jurisdiction under the national contacts test of Rule 4(k)(2), while the defendants countered that: (1) the use of the guilty plea violated due process because the defendants had not consented to jurisdiction in the civil case; and (2) precedent required that, under the national contacts test, a link be established with the forum where the action was initially filed—in this case, Illinois. The court found the defendants' assertions "highly suspect," but felt bound by precedent and ordered jurisdictional discovery to resolve the matter. *In re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26, 28 (D.D.C. 2000).

15. As the *Vitamins* court acknowledges, the Supreme Court repeatedly asserted that the *Aérospatiale* test applies to cases where personal jurisdiction has already been established. *Vitamins*, 120 F. Supp. 2d at 48-49.

16. *Id.* at 47.

examining the litigants' interests, sovereignty concerns,<sup>17</sup> and the efficiency of the Hague Convention, the court ruled that the Federal Rules should be used to obtain extraterritorial discovery pertaining to jurisdiction.

## II

The extension of *Aérospatiale* to jurisdictional discovery is plagued by a logical inconsistency underlying all orders for discovery at the pre-jurisdiction stage. In the absence of an established link between the defendant and the forum, the court has no authorization to exercise its power over that defendant. As the Supreme Court has declared more than once, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."<sup>18</sup> The power to order jurisdictional discovery is a concession to pragmatism. If the court did not possess such power, a defendant could thwart the process by challenging jurisdiction and then withholding the evidence needed to resolve the jurisdictional question.<sup>19</sup>

These pragmatic justifications do not, however, overcome the fact that the court's legitimacy in issuing discovery orders is tenuous. If "jurisdiction is power," then pre-jurisdiction lies at the threshold between power and powerlessness. Fundamental considerations of fairness and due process demand that the court proceed with caution in imposing its rules upon a defendant who might not have reasonably foreseen being brought before it.<sup>20</sup> Fairness considerations become even more central when the defendant is a foreign party who owes no allegiance to the forum and is unfamiliar with the mandates of the forum's legal system. As the Supreme Court noted in *Asahi Metal Industry v. Superior Court*, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."<sup>21</sup>

Extraterritorial discovery also affects the sovereign interests of the defendants' home states. Private parties conducting discovery abroad, with

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17. Unfortunately, the court recognized as a sovereign interest of the states involved only that of protecting their citizens from abusive discovery, which was deemed incidental compared to the U.S. interest in enforcing its laws. For a discussion of why this conception of sovereignty interests is incomplete, see *infra* text accompanying notes 22-27.

18. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

19. See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978); *Compagnie des Bauxites de Guinée v. Ins. Co. of N. Am.*, 651 F.2d 877, 882 (3d Cir.), *aff'd sub nom. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1981).

20. *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

21. 480 U.S. at 114.

the permission of the U.S. court, assume a function that in civil-law countries is reserved to the judiciary. These countries believe that U.S. court orders authorizing discovery in their territory interfere with their judicial sovereignty.<sup>22</sup>

American jurisprudence recognizes that undue expansion of a court's personal jurisdiction raises sovereignty concerns. As the Supreme Court declared in *World-Wide Volkswagen Corp. v. Woodson*, the minimum contacts test not only protects the defendant against the burdens of litigating in a distant forum, but also "acts to ensure that the States through their courts, do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system."<sup>23</sup> In *Asahi*, the Court found that concerns about interfering with a foreign forum's sovereignty are more pressing in the international context and declared that sovereign interests would be "best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case."<sup>24</sup> The Court emphasized that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."<sup>25</sup>

The *Restatement (Third) of Foreign Relations Law* also calls for reasonableness in the exercise of jurisdiction, as mandated by both U.S. and international law. After listing traditional grounds for jurisdiction, such as territoriality and nationality, the *Restatement* clarifies that "an exercise of jurisdiction on one of the bases . . . is nonetheless unlawful if it is unreasonable[. This principle] is established in United States law, and has emerged as a principle of international law as well."<sup>26</sup> Reasonableness hinges on factors such as the firmness of the link between the defendant and the forum, the importance of the regulations to the regulating state, the

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22. *E.g.*, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 557-58 (Blackmun, J., dissenting).

23. 444 U.S. 286, 292 (1980). Despite the Court's admonitions, the sovereignty aspect of the minimum contacts test has sometimes been overlooked. *See, e.g.*, *Rich v. Kis Cal., Inc.*, 121 F.R.D. 254, 259 (M.D.N.C. 1988) (noting that, because the standard for determining personal jurisdiction is grounded in the Due Process Clause and not in Article III, courts need only look to the individual liberty interests of the defendants and not to sovereignty interests).

24. *Asahi*, 480 U.S. at 115.

25. *Id.* (citing *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

26. RESTATEMENT, *supra* note 1, § 403 cmt. a. For further discussion of how extraterritorial discovery may conflict with public international law norms, most importantly, with the principle of noninterference with the sovereignty of other states, see David J. Gerbert, *International Discovery After Aérospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521, 534-35 (1988). *Cf.* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 21, U.N. Doc. A/8028 (1970), reprinted in 9 I.L.M. 1292 (1970) ("(c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable. . ."); MALCOLM N. SHAW, INTERNATIONAL LAW 454 (1997) ("It follows from the nature of the sovereignty of states that while a state is supreme internally, that is within its own territorial frontiers, it must not intervene in the domestic affairs of another nation.").

potential for conflict with regulations by another state, and, importantly, the extent to which the regulation is consistent with the traditions of the international system.<sup>27</sup> This last consideration—consistency with the traditions of the international system—is notably absent from the *Vitamins* opinion, and the sovereignty interests of the home states are reduced to the interest in protecting their citizens from abusive discovery.

The failure to give effect to the Hague Convention in federal courts also violates treaty obligations undertaken by the United States in signing and ratifying the agreement.<sup>28</sup> It is arguable that *Aéropatiale* itself was such a violation: The holding that the Convention did not provide a mandatory framework for conducting extraterritorial discovery was not shared by all parties to the treaty.<sup>29</sup> *Aéropatiale*, however, preserved a role for the Convention in cases of jurisdictional discovery and discovery directed to nonparties. The *Vitamins* court's extension of that holding, on the other hand, deprives the Convention of any practical significance in U.S. courts and effectively nullifies the executive's decision to sign and Congress's choice to ratify the Convention. Furthermore, it is inconsistent with the primacy accorded to treaties under both U.S. and international law.

### III

In resolving questions of jurisdictional discovery, balancing the values of international treaties against the Federal Rules is neither a prudent nor a legitimate course for courts to take. The Hague Convention adequately protects the plaintiffs' and United States' interests in obtaining discovery. Unlike a decision on jurisdiction, the application of the Hague Convention is not outcome-determinative, but rather concerns the choice of a method for arriving at the jurisdictional question. The plaintiff is not denied her day in court—only ordered to employ internationally accepted procedures to gather evidence on her jurisdictional claims.

On the other hand, the reluctance to employ the Hague Convention produces significant negative consequences both for U.S. foreign relations and for the international system as a whole. To outsiders, the interest "balancing" conducted by the *Vitamins* court appears more like "the

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27. RESTATEMENT, *supra* note 1, § 403. The consideration of systemic interests is critical in jurisdictional decisions: "Jurisdictional rules . . . describe community expectations about the reach of sovereign power. Therefore, [they] especially must reflect community interests. If they do not, jurisdictional principles become instruments of anarchy, not of order, and lose their utility as organizing principles for transnational conduct." Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 584 (1983).

28. *See, e.g.*, Brief for the Republic of France as Amicus Curiae, *Société Nationale Industrielle Aéropatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695); Kuhn, *supra* note 11, at 1037-42.

29. Kuhn, *supra* note 11, at 1037-42.

assertion of the primacy of United States interests in the guise of applying an international jurisdictional rule of reason.”<sup>30</sup> While it purports to be balanced and fair, the *Vitamins* court sends quite a different message to the outside world: In a world with no supreme sovereign, we will take sovereignty by judicial fiat and assert it fully whenever pragmatic concerns motivate us and our power over a defendant with property or interests in the United States allows us. The court’s balancing insinuates that sovereignty matters only insofar as it is American sovereignty.

Such a message has far-reaching international consequences. First, it invites antagonism and defensive reactions by the countries most likely to be affected by the ruling: the closest U.S. trading partners. These reactions might take the form of foreign countries’ liberally extending their laws and procedures to U.S. parties who have only tenuous links to their jurisdiction. More generally, the antagonism incited by the extraterritorial application of U.S. discovery rules might result in unwillingness by foreign countries to compromise their values in other areas and hurt wider U.S. interests in the international arena. It might also jeopardize valuable efforts—often spearheaded by the United States—to reach international agreements on jurisdiction and procedure.

The unilateral extension of U.S. laws across borders might also tarnish the image of the U.S. judiciary and lead to the increased use of international arbitration to settle disputes—a process that, like the Hague Convention, usually relies on a mix of civil-law and common-law procedures for gathering evidence, but that, unlike the Convention, is subject to very little supervision by national courts.<sup>31</sup>

All of these considerations weigh in favor of applying the rules of the Hague Convention on a first-resort basis when jurisdiction is contested. An even better way to ensure the uniform application of this standard would be to revive efforts to codify the *Aérospatiale* minority opinion, calling for first resort to the Hague Convention, at least in cases of jurisdictional discovery.<sup>32</sup> District courts have proven unable to apply the balancing test

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30. Maier, *supra* note 27, at 590.

31. It is notable that, in recognition of U.S. commitments under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Supreme Court has declared antitrust matters to be arbitrable, despite the significant public policy issues at stake. *E.g.*, *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

32. The amendment proposed by the Advisory Committee in 1989 would have codified the minority opinion in *Aérospatiale* by adding to Rule 26(a) the following language:

If an applicable treaty or convention provides for discovery in another country, the discovery methods agreed to in such treaty or convention shall be employed; but if discovery conducted by such methods is inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the methods here provided in addition to those provided by such convention or treaty.

Gary B. Born & Andrew N. Vollmer, *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 242 (1993). For a good account of the amendment’s history, see *id.*

consistently and clearly, and the limited opportunity to appeal rulings on discovery has exacerbated this tendency. Codification would be very useful in ensuring a more predictable and coherent application of the Convention.

The use of the Hague Convention rules might result in a somewhat less rapid resolution of jurisdictional disputes, but to quote Justice Blackmun's dissent in *Aérospatiale*, "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."<sup>33</sup> The strong negative reactions by foreign states to U.S. court orders for discovery on their territory have clearly indicated that international goodwill might be endangered by an aggressive approach to the regulation of extraterritorial discovery.<sup>34</sup> When jurisdiction is contested, forum-centric regulation of discovery abroad becomes all the more unpalatable, as it conflicts with "traditional notions of fair play and substantive justice"<sup>35</sup> and with international norms of reasonableness in the exercise of jurisdiction. It is therefore imperative that higher courts or legislators temper the assertiveness of district courts in the regulation of international jurisdictional discovery before the district courts' scattered decisions coalesce into a body of precedent carrying its own force.

—*Jenia Iontcheva*

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33. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 562 (1987).

34. *See, e.g., Aérospatiale*, 482 U.S. at 526 n.6 (citing a French statute that criminalizes cooperation with foreign orders for jurisdictional discovery unless they are done in accordance with international agreements or French law); Brief for the Federal Republic of Germany as Amicus Curiae, *Aérospatiale*, 482 U.S. 522 (No. 85-1695); Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae, *Aérospatiale*, 482 U.S. 522; Brief for the Republic of France as Amicus Curiae, *Aérospatiale*, 482 U.S. 522; *see also* Born & Vollmer, *supra* note 32, at 243-44 (noting foreign governments' protests against attempts to codify procedures for extraterritorial discovery that are even more aggressive than *Aérospatiale*).

35. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).