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## Comity and Lower Courts: Post-Aerospatiale Applications of the Hague Evidence Convention

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## Comity and the Lower Courts: Post-*Aérospatiale* Applications of the Hague Evidence Convention

It is commonplace to observe that “[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.”<sup>1</sup> Broad pretrial discovery rights in civil disputes are, of course, ingrained traits of the American legal system. Many foreign states, however, have quite different notions of privacy and the acceptable scope of discovery from those prevailing in the United States and have frequently reacted with considerable displeasure to U.S. efforts to obtain discovery of materials located within their territory.

As in other transnational litigation contexts, U.S. courts have invoked the doctrine of international comity to moderate the conflicts that have arisen between extraterritorial U.S. discovery orders and foreign laws and sovereign interests. Most notably, the United States Supreme Court’s recent decision in *Société Nationale Industrielle Aérospatiale v. U.S. District Court*<sup>2</sup> adopted an international comity analysis for determining when extraterritorial discovery must be sought pursuant to the Hague Evidence Convention, rather than pursuant to direct U.S. discovery rules.<sup>3</sup>

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporters’ note 1 (1987).

2. 482 U.S. 522 (1987).

3. International comity has also been invoked by U.S. courts in determining the appropriate resolution of conflicts between U.S. discovery requests and foreign nondisclosure laws or policies, e.g., *United States v. First Nat’l City Bank*, 396 F.2d 897 (2d Cir. 1968), and in considering whether

The comity analysis applied by the Court in *Aérospatiale* has provoked substantial commentary. In this article we do not review that commentary or reexamine the *Aérospatiale* decision in any detail. Instead, we survey recent lower court applications of the Court's comity analysis in *Aérospatiale* and consider what light these decisions shed upon the wisdom and utility of the Court's analysis. Our survey shows, at least preliminarily, that the lower courts have found the *Aérospatiale* comity analysis cumbersome and unhelpful and have almost uniformly refused to order extraterritorial discovery pursuant to the Hague Evidence Convention. These findings suggest that more generally applicable criticisms of ad hoc case-by-case comity analyses may have especial force in the discovery context.

## I. Background

International litigation in U.S. courts frequently requires access to materials or witnesses located outside the United States. When foreign witnesses are willing to provide evidence voluntarily for use in U.S. proceedings, U.S. litigants have generally encountered few insurmountable difficulties in obtaining extraterritorial discovery. Obtaining discovery from recalcitrant foreign litigants or witnesses has often been much more problematic. For U.S. litigants seeking evidence abroad in these circumstances, two basic routes were available historically: obtaining "direct" discovery under U.S. procedural rules and seeking foreign judicial assistance pursuant to letters rogatory.

United States courts have traditionally favored the use of direct discovery orders under applicable federal or state rules of civil procedure to obtain evidence located abroad.<sup>4</sup> United States courts have long held that foreign litigants and witnesses can be required, pursuant to U.S. discovery rules, to provide discovery of documents and other information, even though these are located outside the United States.<sup>5</sup> Direct extraterritorial discovery under U.S. procedural rules will only be ordered, however, from persons subject to the personal jurisdiction of the U.S. court.<sup>6</sup> Persons subject to a court's personal jurisdiction can be required to produce

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to restrict the scope of traditional U.S.-style direct discovery in deference to foreign interests, e.g., *Garpeg, Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984).

4. For a detailed discussion of U.S. extraterritorial discovery procedures, see G. BORN & D. WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 261-309 (1989).

5. *FED. R. CIV. P.* 34, 45; see also 4A J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 34.16 (2d ed. 1988); C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2210 (1970).

6. The requirement of personal jurisdiction for purposes of discovery is generally comparable to that for other U.S. proceedings: the person over whom jurisdiction is being asserted must have sufficient "minimum contacts" with the forum resulting from "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state," and the assertion of jurisdiction must be "reasonable." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); see also *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 108-12, 116-21 (1987) (separate opinions of Justices O'Connor and Brennan concerning meaning of "minimum contacts" test in

any discoverable information within their possession or "control," regardless whether it is located inside or outside the United States and regardless whether foreign law forbids its disclosure.<sup>7</sup> Failure to comply with extraterritorial U.S. discovery orders is punishable by sanctions, ranging from default judgments to monetary sanctions to less drastic measures.<sup>8</sup>

In many circumstances, foreign persons refusing to provide information voluntarily will not be subject to the personal jurisdiction of U.S. courts. In such cases U.S. courts are unable to order discovery directly and must seek the assistance of foreign courts in obtaining the sought-after evidence. The customary method of obtaining foreign judicial assistance in taking evidence abroad, in the absence of a specific treaty obligation, has been by letter rogatory.<sup>9</sup> Letters rogatory have significant disadvantages, most notably the fact that there is generally no legal obligation for foreign courts to execute them; if compliance occurs it is only because of the good will of the foreign tribunal.<sup>10</sup>

Foreign states have often reacted with hostility to unilateral U.S. efforts to obtain discovery of evidence located on their territory. Many nations have seen these U.S. discovery efforts as violating their "judicial sovereignty," as well as their notions of privacy and the appropriate scope of evidence-taking.<sup>11</sup> Some of these countries have responded to extraterritorial U.S. discovery by filing sharp diplomatic protests with the United States government or, more recently, by enacting so-called "blocking statutes" that nominally forbid compliance with U.S. discovery orders.<sup>12</sup>

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product liability context). In addition, discovery from nonparty witnesses is constrained by the territorial limitations upon the service of subpoenas. G. BORN & D. WESTIN, *supra* note 4, at 271-72.

7. See *Elder-Beerman Stores Corp. v. Federated Dep't Stores*, 45 F.R.D. 515 (S.D.N.Y. 1968); *In re Grand Jury Subpoenas Duces Tecum Addressed to Can. Int'l Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

8. Rule 37 of the Federal Rules of Civil Procedure permits a U.S. court to treat the refusal of a litigant to comply with discovery requests as a contempt of court and to issue an order dismissing the action, placing the litigant in default, or imposing monetary fines, assuming certain facts or precluding introduction of certain evidence. See *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); *Société Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958).

9. A letter rogatory is a formal request by a court of one nation to the courts of another country for assistance in performing judicial acts. See, e.g., *United States v. Paraffin Wax*, 225.5 Bags, 23 F.R.D. 289 (E.D.N.Y. 1959); *Danisch v. Guardian Life Ins. Co.*, 19 F.R.D. 235 (S.D.N.Y. 1956); *Branyan v. KLM*, 13 F.R.D. 425 (S.D.N.Y. 1953); *De Villeneuve v. Morning Journal Ass'n*, 206 F. 70 (S.D.N.Y. 1913); *Gross v. Palmer*, 105 F. 833 (C.C.N.D. Ill. 1900).

10. See, e.g., Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 529-34 (1953). Moreover, because letters rogatory are executed only in accordance with the foreign country's own judicial procedures and customs, a U.S. litigant frequently may not be able to obtain a verbatim transcript and may not have its own counsel conduct the questioning. The letter rogatory process is also typically slow and unpredictable; it often requires six months for completion, and delays of a year or more are not uncommon.

11. G. BORN & D. WESTIN, *supra* note 4, at 264-65.

12. Blocking statutes prohibit, as a matter of law, compliance with U.S. discovery orders for the production of evidence located within the blocking nation's territory. All foreign blocking statutes

## II. Hague Evidence Convention

Because of widely perceived difficulties with existing mechanisms for transnational discovery, the United States acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention) in 1972.<sup>13</sup> The Convention is a multilateral agreement that prescribes procedures by which litigants involved in civil and commercial disputes may obtain evidence from abroad. There are now some twenty parties to the Convention, including most major Western trading states.<sup>14</sup>

A primary objective of the Convention was to provide a workable and internationally acceptable mechanism for taking evidence abroad. A particular concern was to ensure that the taking of evidence in a foreign state would be consistent with the laws and sovereignty of that country, while nonetheless providing useful results for foreign litigants and courts.<sup>15</sup> Thus, the Convention's framers were careful to avoid offending notions of judicial sovereignty prevailing in many civil law nations, which required that local judicial authorities supervise all evidence-taking.<sup>16</sup>

The principal means of evidence-taking under the Convention is through the "Letter of Request" procedure provided by articles 1 through 14.<sup>17</sup> Under these provisions, all signatory States to the Convention are required to establish "Central Authorities"—governmental agencies responsible for receiving incoming Letters of Request from foreign nations and overseeing their execution. A litigant may request the domestic court where its action is pending to transmit a Letter of Request—seeking the production of specified materials or the taking of tes-

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carry some sort of penal sanction for violating the statutory provisions forbidding disclosure. Recently enacted foreign blocking statutes fall into three broad categories. First, some prohibit the disclosure of documents or other information pursuant to foreign discovery orders, unless the orders are passed through appropriate foreign governmental channels. Second, other blocking statutes provide particular governmental agencies discretionary authority to forbid compliance with specific discovery orders. Finally, the largest number of blocking statutes either grant administrative discretion to prohibit disclosure of information concerning particular industries or automatically prohibit such disclosure.

13. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter *Hague Evidence Convention*].

14. These include: Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States.

15. *Rapport de la Commission speciale*, 4 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ: ACTES ET DOCUMENTS DE LA ONZIÈME SESSION 55 (1970) (Actes et documents) [hereinafter *HAGUE EVIDENCE CONVENTION NEGOTIATING HISTORY*]. The *Hague Evidence Convention Negotiating History* is a collection of reports, questionnaires, drafts, and other communications as well as transcripts of certain negotiating sessions.

16. *Id.*

17. Under the second method of conducting evidence-taking permitted by the Convention, the litigant may request a diplomatic or consular officer of the country where the action is pending to take evidence in the foreign country to which he is accredited. *See id.* arts. 15–16. Under the third method, the litigant may request that a specially appointed commissioner take evidence in the foreign country.

timony from a specified witness—to the Central Authority in the country where sought-after evidence is located.<sup>18</sup> The foreign Central Authority then transmits the Letter of Request to the foreign court where the witness is located, which conducts an evidentiary proceeding and returns the completed Letter of Request to the requesting court.<sup>19</sup>

Importantly, the Convention offers a mechanism for compelling discovery from recalcitrant witnesses. Thus, article 10 provides that the requested state “shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law” for internal proceedings.<sup>20</sup> Evidence taken by a foreign tribunal pursuant to a Letter of Request will ordinarily be taken according to the procedures of the requested State.<sup>21</sup>

In an important departure from customary modes of judicial assistance, the Convention also requires member states to fulfill properly completed Letters of Request. The Convention provides only a few exceptions to this rule. First, a state may refuse to execute Letters of Request in those limited circumstances in which it believes its “sovereignty or security are threatened.”<sup>22</sup> Second, under article 23, member states may declare that they “will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.” With the exception of Czechoslovakia, Israel, and the United States, all member states to the Convention have entered various types of article 23 declarations. A number of these declarations provide that the declaring State will not execute any Letter of Request seeking pretrial discovery. Several other member states have made somewhat more limited article 23 declarations, which refuse execution of requests except for specified documents or classes of documents.<sup>23</sup>

18. See Hague Evidence Convention, *supra* note 13, arts. 1–2.

19. See *id.* arts. 5–13.

20. This obligation, however, is subject to two conditions. First, any compulsion must be “appropriate.” Second, the requested state is only required to use the type of compulsion that its domestic law provides for in analogous internal proceedings. *Id.* art. 10. Thus, the requested court need not use compulsion in attempting to execute a Letter of Request under the Convention if compulsory process would not be available in purely domestic proceedings.

21. *Id.* art. 9. In addition, however, because member states employ different methods of evidence-taking, article 9 also provides that requested states follow a “special method or procedure” for evidence-taking if requested by the applicant unless such procedure 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.” Thus, under this provision, counsel for U.S. litigants can request permission, among other things, to take verbatim transcripts of witnesses’ testimony and to participate in questioning.

22. See *id.* art. 12. This provision has seldom been invoked and the negotiating history of the Convention indicates that it was intended to be a narrow exception.

23. For example, the article 23 reservation of the United Kingdom provides, in relevant part: In accordance with Article 23 Her Majesty’s Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty’s Government further declare that Her Majesty’s Government understand “Letters of Request issued for the purpose of

On the whole, the Convention's procedures function in an adequate fashion for U.S. litigants. Many Letters of Request are executed in full, without substantial delays, and many foreign courts have been willing to adopt various U.S.-style procedures in connection with their evidence-taking.<sup>24</sup> Nonetheless, foreign courts have not infrequently invoked their nation's article 23 reservation in refusing to execute fully U.S. Letters of Request.<sup>25</sup> Instead, foreign courts have sometimes either rejected U.S. Letters of Request, or restricted their scope, typically requiring production only of specifically described documents (e.g., Agreement dated 1/1/88 between A and B) or of fairly well-specified and narrow categories of documents (e.g., correspondence between A and B during May 1988 relating to a specific subject). It is this significant limitation of the Hague Evidence Convention that has provoked much of the resistance to the Convention's use in the United States.

### III. Application of the Hague Evidence Convention in *Aéropatiale*

The Hague Evidence Convention has become the subject of frequent litigation in the United States. The principal issue in this litigation has been the so-called "exclusivity" of the Convention—i.e., the extent to which U.S. litigants are required to use the Convention's procedures, instead of the more customary route of direct U.S. discovery mechanisms, in order to obtain evidence located abroad.

Before the Supreme Court's *Aéropatiale* decision, lower courts had reached a variety of differing conclusions about the exclusivity of the Convention. At least one court held that the Convention was the only permissible means for obtaining evidence from the territory of a signatory state.<sup>26</sup> Other courts adopted a blanket "first-use" rule requiring exhaustion of the Convention's procedures before resort to direct U.S. discovery, at least where use of the Convention did not appear futile.<sup>27</sup> Finally, some courts held flatly that the Convention was

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obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including 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, custody, or power; or
- b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requesting court to be, or to be likely to be, in his possession, custody or power.

24. Assuming that no foreign litigation ensues, Letters of Request are ordinarily executed in three to six months.

25. It is important to note that the article 23 option is by its terms limited to pretrial discovery of documents. It does not allow foreign governments to refuse to provide oral testimony and other forms of discovery, as well as evidence-taking that is not for discovery purposes. These distinctions have apparently not always been fully appreciated. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 537 (1987) (erroneously stating that article 23 "enables a contracting party to revoke its consent to treaty's procedures for pretrial discovery:").

26. *Cuisinarts v. Robot Coupe, S.A.*, No. CV 80 0050083C (Conn. Super. Ct. July 22, 1982).

27. See, e.g., *Pierburg GmbH & Co. v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982) (abuse of discretion for trial court to rule that the Hague Convention need not be complied

simply not applicable when the recipient of the discovery request had to produce the information in the United States, rather than on foreign territory.<sup>28</sup>

In *Société Nationale Industrielle Aérospatiale v. U.S. District Court*<sup>29</sup> the Supreme Court held unanimously that the Hague Evidence Convention was not, by its own terms or otherwise, the exclusive means of discovering evidence located in a signatory state.<sup>30</sup> Similarly, the Court unanimously rejected the argument that the Convention was wholly inapplicable to the discovery of materials from abroad, merely because the recipient of the discovery request was required to produce information in the United States.<sup>31</sup> Instead, according to the Court, the circumstances in which Convention procedures must be used depend on the principle of international comity, which the Court defined as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."<sup>32</sup>

The *Aérospatiale* Court was sharply divided, however, over precisely what the comity doctrine requires in the context of extraterritorial discovery. A five-Justice majority held that comity requires an ad hoc, case-by-case weighing of foreign and U.S. interests in order to determine when first-use of the Convention is required. A four-Justice dissent took the position that comity should require a general rule of first use of the Convention, subject to an exception for cases where resort to the Convention would be futile.

The majority's comity analysis sought to offer something for everyone. On the one hand the Court emphasized that the Convention only provided "optional procedures" and did not "require any contracting State to use" these procedures.<sup>33</sup> The Court also observed that:

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with by a U.S. plaintiff seeking discovery of a West German defendant); Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981) (trial court should have exercised judicial restraint based on international comity and declined to proceed other than under the Hague Convention); Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686 (Super. Ct. App. Div. 1984) (U.S. retailer filing third-party complaint against French corporation required to make discovery application through Hague Convention channels); Th. Goldschmidt A.G. v. Smith, 676 S.W.2d 443 (Tex. App.-Houston [1st Dist.] 1984, no writ) (American company required to comply with Hague Convention provisions as avenue of first resort in seeking production of documents by West German corporation and the taking of depositions in West Germany); Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher, 328 S.E.2d 492 (W. Va. 1985) (U.S. citizen seeking discovery order against West German corporation must resort to Hague Convention procedures until it appears such attempts have proven fruitless).

28. *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985) (German corporation subject to jurisdiction of district court required to comply with discovery pursuant to the Federal Rules of Civil Procedure); *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985).

29. 482 U.S. 522 (1987).

30. *Id.* at 539-40.

31. *Id.* at 541.

32. *Id.* at 543-46. The Court traced the comity doctrine to Ulrich Huber, a 17th century Dutch jurist. *Id.* at 543 n.27; see Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966); E. LORENZEN, *Huber's De Conflictu Legum*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS 136 (1947).

33. *Aérospatiale*, 482 U.S. at 534.



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.<sup>34</sup>

On the other hand the Court also made gestures in the direction of foreign concerns: "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,"<sup>35</sup> and "American courts should . . . take care to demonstrate due respect for any special problems confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign State."<sup>36</sup>

Against the background of these conflicting concerns, the *Aérospatiale* majority held that international comity required lower courts to consider a wide variety of factors on a case-by-case basis in determining whether to conduct extraterritorial discovery pursuant to the Convention or pursuant to direct U.S. discovery rules. Among other things, the Court's comity analysis required lower courts to consider: (a) the sovereign interests of the United States;<sup>37</sup> (b) the sovereign interests of the relevant foreign State;<sup>38</sup> (c) the likelihood that resort to the Convention's procedures would prove effective in a particular case;<sup>39</sup> (d) the breadth and intrusiveness of the requested discovery;<sup>40</sup> and (e) the peculiar problems and burdens that foreign litigants might confront when faced by U.S.-style discovery requests.<sup>41</sup> Having catalogued the considerations that might affect the determination whether to require first use of the Convention, the Court flatly refused to provide any guidance as to the results that these factors might produce in particular cases: "We do not articulate specific rules to guide this delicate task of adjudication."<sup>42</sup> Indeed, apart from a general aura of hostility towards the Convention, the Court provided virtually no hint as to whether the Convention generally should or should not be used, either for all or some types of discovery.

Four Justices dissented from the portion of the Court's opinion adopting a case-by-case comity analysis. The dissent reasoned that "[t]he principle of

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34. *Id.* at 542.

35. *Id.* at 546.

36. *Id.*

37. *Id.* at 544.

38. *Id.*

39. *Id.* ("likelihood that resort to those procedures will prove effective"); *id.* n.28 (quoting RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED) § 437(1)(c) (Tent. Draft No. 7, (1986))).

40. *Id.* The Court observed that "[s]ome discovery procedures are much more 'intrusive' than others," and suggested that even though a particularly burdensome document request might be required to be fulfilled pursuant to the Convention, "the court might well refuse to insist upon the use of Convention procedures before requiring responses to simple interrogatories or requests for admissions." *Id.* at 545-46.

41. *Id.*

42. *Id.* at 546.

comity leads to more definite rules than the *ad hoc* approach endorsed by the majority."<sup>43</sup> It instead urged a general rule requiring first use of the Convention except where there were "strong indications that no evidence would be forthcoming."<sup>44</sup> The dissent warned that "[e]xperience to date indicates that there is a large risk that a case-by-case comity analysis . . . will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently."<sup>45</sup>

#### IV. Lower Court Applications of *Aérospatiale*

Although the *Aérospatiale* case provoked substantial commentary—both before and after the Supreme Court's decision—relatively little attention has been given to lower court efforts to apply the *Aérospatiale* comity analysis. The lower courts have rendered ten published decisions concerning the Convention in the two years since the Supreme Court decided *Aérospatiale*. These opinions, together with those unpublished decisions that have come to our attention, provide the basis for some preliminary observations about the wisdom and utility of the comity analysis adopted by the *Aérospatiale* decision.

On a general level, four related aspects of post-*Aérospatiale* lower court decisions give rise to fairly fundamental concerns about the workability of the Court's *ad hoc* balancing analysis. First, lower courts appear to have found the *Aérospatiale* comity analysis cumbersome and unhelpful. One lower court commented that "[r]egrettably, the [Supreme] Court [in *Aérospatiale*] declined to set forth specific rules to guide" a comity analysis.<sup>46</sup> Another court flatly refused to apply the analysis, choosing instead to follow the first-use rule urged in Justice Blackmun's dissent in *Aérospatiale*.<sup>47</sup> These trial court decisions that do attempt to apply the Court's comity analysis frequently offer little more than conclusory generalizations about foreign and U.S. interests.<sup>48</sup>

Second, post-*Aérospatiale* decisions have almost uniformly held that the party seeking to require first use of the Convention bears the burden of proof that comity requires such a result. As one court reasoned, "[t]he proponent of using the Hague Evidence Convention bears the burden of demonstrating the necessity of using

43. *Id.* at 554.

44. *Id.* at 566–67.

45. *Id.* at 548.

46. *Scarminach v. Goldwell GmbH*, 140 Misc. 2d 103, 531 N.Y.S.2d 188, 189 (Sup. Ct. 1988); cf. *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 389 n.2 (D.N.J. 1987) ("Justice Blackmun's [dissenting] opinion certainly is thoughtful and well-reasoned.').

47. *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987).

48. *E.g.*, *Haynes v. Kleinwebers*, 119 F.R.D. 335 (E.D.N.Y. 1988).

those procedures."<sup>49</sup> This result has been explained both by the apparent implication of a passage in the *Aérospatiale* majority opinion and by a perception that foreign litigants are in the better position to prove the existence of foreign sovereign interests that might require resort to the Convention.<sup>50</sup> Although placing the burden of proof on the party urging direct U.S. discovery would appear most consistent with the Court's comity principle, only one lower court has reached this conclusion.<sup>51</sup>

Third, U.S. courts have virtually never required litigants to forgo direct extraterritorial discovery from foreign witnesses and instead resort in the first instance to the Convention's procedures.<sup>52</sup> Indeed, apparently only one reported decision requires first use of the Convention. Ironically, this decision comes close to being the exception that proves the rule: it relies on Justice Blackmun's dissent in *Aérospatiale*, rather than on the Court's comity analysis.<sup>53</sup> In five other published cases courts have concluded that comity does not require first use of the Convention to obtain discovery from a litigant.<sup>54</sup> Almost all of these decisions have relied in large part on their perception that direct discovery under the Federal Rules of Civil Procedure is substantially quicker and more efficient than discovery under the Convention.<sup>55</sup> In particular, lower U.S. courts have ruled that the existence of a blanket article 23 reservation by the nation where requested

49. *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 257-58 (M.D.N.C. 1988); *Benton*, 118 F.R.D. at 389 & n.2; *Scarminach*, 531 N.Y.S.2d at 190-91; see Transcript, *supra* note 54.

50. Several lower courts have relied upon the language used by the Supreme Court in *Aérospatiale* in rejecting the court of appeals' rule because it "would deny the foreign litigant a full and fair opportunity to demonstrate appropriate reasons for employing Convention procedures in the first instance." *Aérospatiale*, 482 U.S. at 547.

51. *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987).

52. Of course, where discovery is to occur physically on foreign territory, as in the holding of a deposition abroad, U.S. courts have required use of the Convention. See *Scotch Whiskey Ass'n v. Majestic Distilling Co.*, No. 88-808 (D. Md. Nov. 30, 1988) (depositions in England); *Jenco v. Martech Int'l, Inc.*, 1988 U.S. Dist. LEXIS 4727 (E.D. La. May 20, 1988) (depositions in Norway).

53. *Hudson*, 117 F.R.D. at 33.

54. *Haynes*, 119 F.R.D. at 335 (interrogatories and document requests from Germany); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254 (M.D.N.C. 1988) (interrogatories from France); *Benton*, 118 F.R.D. at 386 (interrogatories and document requests from Sweden); *Scarminach*, 531 N.Y.S.2d at 188 (interrogatories and document request from Germany); *Sandsend Fin. Consultants, Ltd. v. Wood*, 743 S.W.2d 364 (Tex. App.-Houston [1st Dist.] 1988, no writ) (deposition and document request from Channel Islands). Similarly, the unpublished decisions that the authors are aware of have not required first use of the Convention. See also Transcript of hearing on motions July 24, 1989, *Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188 (D.N.J. 1989) No. 88-4707 (ordering direct discovery from France) [hereinafter Transcript].

55. See, e.g., *Benton*, 118 F.R.D. at 391 ("The [affidavit of an official Swedish of the Foreign Ministry] states that the defendant's letter of request should be processed by the Swedish authorities in approximately two months. That is an approximation based upon past history; there are certainly no guarantees. This case has already endured numerous delays and discovery should proceed apace. Another delay while the Swedish authorities determine what discovery will be permitted and the further litigation undoubtedly spawned by their decision may bring actual discovery to a standstill."); Transcript, *supra* note 54, at 17 (COURT: "Are you seriously suggesting that the Hague Convention is a speedy process?").

evidence is located reduces the Convention's value to U.S. litigants so significantly that first use of the Convention is not a tenable alternative to direct discovery.<sup>56</sup> In one court's words, "since documents are sought, it is not at all certain in view of Germany's Article 33 [sic] declaration, that the plaintiff would obtain the information he seeks through use of the Convention provisions."<sup>57</sup> Importantly, however, this conclusion has also been reached in cases where no blanket article 23 reservation is involved or where discovery other than document discovery is sought.<sup>58</sup> Lower courts have thus far found no need to draw distinctions between the efficacy of different types of discovery under the Convention; they have concluded simply that the Convention is not comparable in expedition or efficiency to U.S.-style discovery, and thus have been disinclined to require use of the Convention.

And fourth, appellate court review of lower court decisions promises to be nonexistent, owing to the broad discretion that trial judges enjoy under the *Aérospatiale* analysis.<sup>59</sup> According to one court of appeals, the "[d]istrict court has complete discretion to determine the most appropriate manner of producing evidence in cases before it."<sup>60</sup> To date, no appellate court has reversed a trial court's application of *Aérospatiale*.

These difficulties that trial and appellate courts have encountered in applying the *Aérospatiale* comity analysis would be troubling even taken by themselves. They raise special concerns, however, because of the serious criticisms—both academic and practical—that have been levelled more generally against other comity-based ad hoc balancing tests. Simply put, these criticisms have challenged the ability of district judges accurately to identify and assess foreign sovereign interests or neutrally to weigh those interests against U.S. interests.<sup>61</sup> Lower court applications of the ad hoc *Aérospatiale* balancing analysis do little to allay these concerns. The almost inevitable predisposition of trial judges to ignore the Convention suggests that doubts about parochial bias may well have some substance. These questions are reinforced by the lower courts' nearly unanimous conclusion—apparently based on little more than surmise, and applied without regard to the specific type of discovery or article 23 reservation at issue—that the Convention will be slow and inefficient. And finally, the

56. *E.g.*, *Haynes v. Kleinwebers*, 119 F.R.D. 335, 339 (E.D.N.Y. 1988); *Scarminach*, 531 N.Y.S.2d at 191.

57. *Haynes*, 119 F.R.D. at 339.

58. *See supra* note 50.

59. *See In re Anschuetz & Co., GmbH.*, 838 F.2d 1362, 1363 (5th Cir. 1988); *Sandsend*, 743 S.W.2d at 364 ("It is within the trial court's discretion to determine whether the Hague Convention procedures should be used as a first resort").

60. *In re Anschuetz & Co., GmbH.*, 838 F.2d at 1363.

61. These criticisms have been most prevalent in the context of the extraterritorial application of national laws and the so-called jurisdictional rule of reason. *See Maier, Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948–54 (D.C. Cir. 1984).

general unwillingness of lower courts seriously to examine foreign sovereign interests would appear to bolster suggestions of an inherent institutional inability of trial courts to perform such a function.

A few of the post-*Aérospatiale* decisions do evidence conscientious efforts by lower courts to come to grips with the balance of foreign and U.S. sovereign interests. In evaluating foreign interests these courts have usually held that sweeping foreign blocking statutes or policies favoring resort to the Convention are not entitled to any significant deference by U.S. courts.<sup>62</sup> In the words of one court, these sorts of foreign statutes and policies are "overly broad and vague" and thus do not "warrant much deference."<sup>63</sup> These courts have instead demanded a showing of some specific, narrowly tailored foreign interest in the nondisclosure of particular evidence, such as the protection of trade secrets, confidential communications, and the like.<sup>64</sup>

The same lower courts have adopted what amounts to an analogous approach to evaluating the U.S. interests at stake in particular discovery disputes. These courts have usually ordered direct discovery pursuant to U.S. procedural rules, but only after requiring the party seeking discovery to narrow the scope and intrusiveness of its U.S. discovery requests.<sup>65</sup> Thus, one lower court has reasoned that "expansive discovery without concomitant relevance is not what the Court envisioned when it handed down the *Aérospatiale* decision. . . . I believe that a number of the requests are not 'simple' and may require streamlining if we are to proceed under the federal rules."<sup>66</sup>

A comity analysis, along these lines, that would require a considerable degree of specificity in the definition of both foreign and U.S. interests has some initial appeal. At least in principle, this analysis would provide a mechanism for compromising extraterritorial discovery disputes by carefully identifying what U.S. and foreign sovereign interests actually are at stake in particular cases and by carefully tailoring U.S.-style discovery to avoid compromising relevant foreign interests. In practical terms, the lower courts' heightened scrutiny of sovereign interests would mean that extraterritorial discovery would be conducted pursuant to U.S. procedural rules, but would be more limited than occurs in the purely domestic context; direct U.S. discovery would also apparently be subject to a requirement of first use of the Convention where specific and clearly articulated

62. *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987).

63. *Rich*, 121 F.R.D. at 258.

64. *Id.*

65. *Benton*, 118 F.R.D. at 390; see also *Rich*, 121 F.R.D. at 260; *Scarminach v. Goldwell GmbH*, 40 Misc. 2d 103, 531 N.Y.S.2d 188, 191 (Sup. Ct. 1988). These decisions have relied on the Supreme Court's statement in *Aérospatiale* that "[e]ven if a court might be persuaded that a particular document request was too burdensome or too 'intrusive' to be granted in full . . . it might well refuse to insist upon the use of Convention procedures before requiring responses to simple interrogatories or requests for admissions." 482 U.S. at 545 (1987).

66. *Benton*, 118 F.R.D. at 390; see also Transcript, *supra* note 54, at 11.

foreign nondisclosure laws exist. There is undeniably an attractive element of rough justice and reciprocity about this proposal.

Ultimately, however, this approach is premised on a faulty view of foreign and U.S. sovereign interests. Specific foreign nondisclosure laws are generally relevant to the ultimate substantive question whether particular evidence can ever be produced, not to the procedures governing how such evidence should be produced. Foreign bank secrecy laws and privileges for confidential relationships do not reflect a desire that discovery into these matters occur pursuant to the Convention—instead, these laws generally reflect a prohibition against any discovery of protected materials. Similarly, in considering U.S. interests, the lower courts have typically inquired whether particular evidence is really needed by the U.S. litigant and how intrusive such discovery would be. Again, these questions are not relevant to the procedure for taking discovery into a particular matter, but instead go to the ultimate issue of whether particular materials should be discoverable at all.

All of this suggests that the lower courts that have attempted conscientiously to apply the *Aérospatiale* comity analysis have considered the wrong types of sovereign interests. These courts should be examining the U.S. interest in obtaining broad discovery very promptly (rather than somewhat less broadly and less quickly pursuant to the Convention), not the more generalized question whether discovery of certain subjects is needed. Conversely, lower courts should inquire whether the foreign State has expressed a specific interest that particular types of inquiries be conducted pursuant to the Convention, not whether the foreign State has indicated that inquiries in a particular field are simply forbidden. Only by evaluating U.S. and foreign sovereign interests for and against use of the Convention can U.S. courts determine intelligently whether or not use of the Convention is required by comity. Evaluating other interests simply does not bear on the desirability of requiring resort to the Convention.

## V. Other Post-*Aérospatiale* Issues

Post-*Aérospatiale* decisions have also dealt with several issues not directly related to application of the Court's international comity analysis. Three lower court decisions have considered whether so-called "jurisdictional discovery"—ordered only with respect to jurisdictional facts against a foreign defendant who challenges the personal jurisdiction of the U.S. court<sup>67</sup>—must be obtained pursuant to the Convention. Two courts have rejected the argument that the Convention was the sole basis for extraterritorial discovery until after personal jurisdiction over the defendant was affirmatively established and held that

67. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1982); *In re Marc Rich & Co. AG*, 707 F.2d 663, 670 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *In re Sealed Case*, 832 F.2d 1268, 1274 (D.C. Cir. 1987).

“jurisdictional discovery” may proceed directly under U.S. discovery rules.<sup>68</sup> Indeed, the courts apparently were of the view that the possible lack of U.S. personal jurisdiction over the party from whom discovery was sought was not even relevant to the *Aérospatiale* comity analysis. One other lower court, in a brief unpublished order, required jurisdictional discovery to proceed under the Convention, but without offering a rationale for its conclusion.<sup>69</sup> Nevertheless, sound justifications support this result—a serious question as to the propriety of a U.S. court’s personal jurisdiction over a foreign defendant surely ought to be a significant factor in a comity analysis weighing U.S. and foreign interests, since the absence of jurisdiction over the defendant would necessarily also result in an absence of legitimate U.S. interests in direct discovery.

Two state courts have considered whether or not to require exclusive or first use of the Convention procedures in ordering extraterritorial discovery pursuant to state procedural rules.<sup>70</sup> Both courts have concluded that state courts are bound by the *Aérospatiale* holding that the Convention is not by its terms exclusive.<sup>71</sup> Moreover, both lower state courts also followed the international comity analysis set out in *Aérospatiale*, without considering whether they might be permitted to establish either stricter or more lenient requirements for use of the Convention.<sup>72</sup>

## VI. Conclusion

Based on these preliminary observations about the application of *Aérospatiale*, it is difficult to be enthusiastic about the Court’s comity analysis. By both their words and deeds trial judges have found it difficult to apply the Court’s ad hoc balancing test. Appellate courts have generally refused seriously to scrutinize application of the *Aérospatiale* analysis, instead deferring to trial courts. These courts, in turn, have almost uniformly refused to require resort to what they perceive as the cumbersome procedures of the Convention. Whatever one might

68. *Rich*, 121 F.R.D. at 258–60. See Transcript, *supra* note 54.

69. *Jenco v. Martech Int’l, Inc.*, 1988 WL 54733 (E.D. La. May 19, 1988). Importantly, *Jenco* also involved depositions to be held on the territory of the Foreign State (Norway). Other courts have concluded that as to discovery actually conducted abroad, the Convention must be used. *E.g.*, *Scotch Whiskey Ass’n v. Majestic Distilling Co.*, No. 88-808 (D. Md. Nov. 30, 1988).

70. *Aérospatiale* arose from an action in federal district court and technically involved only the interplay between the Federal Rules of Civil Procedure and the Hague Evidence Convention. The Supreme Court did not expressly address the effect of either the Convention or the doctrine of international comity on state discovery rules. See Westin & Born, *Applying the Aérospatiale Decision in State Court Proceedings*, 26 COLUM. J. TRANSNAT’L L. 297 (1988).

71. *Scarminach v. Goldwell GmbH*, 140 Misc. 2d 103, 531 N.Y.S. 2d 188, 190 (Sup. Ct. 1988); *Sandsend Fin. Consultants v. Wood*, 743 S.W.2d 364, 366 (Tex. App.—Houston [1st Dist.] 1988, no writ) (“In construing a treaty . . . this Court is duty bound to follow Supreme Court precedent.”).

72. See Westin & Born, *supra* note 69, at 303–11, arguing that state courts are required, as a matter of federal common law, to apply a comity analysis that is at least as strict in requiring use of the Convention as that in *Aérospatiale*, and that in certain circumstances state courts might be permitted to adopt an even stricter first use or exclusivity requirement.

think of the desirability of this result, it is hardly the outcome that foreign states would expect from a comity analysis expressly designed to reflect "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."<sup>73</sup>

Ironically, some lower courts have also required U.S. litigants to reduce the scope of their direct U.S. extraterritorial discovery requests. As a result, post-*Aérospatiale* decisions have probably devised a procedure for extraterritorial discovery calculated to satisfy almost nobody. Foreign States and witnesses will be unhappy that the Convention's mechanisms and procedural safeguards are ignored; U.S. litigants will be dissatisfied when their customary U.S.-style discovery rights are restricted and will be even more disappointed if (as is likely) foreign courts refuse to enforce their U.S. judgments because of noncompliance with the Convention;<sup>74</sup> and finally, U.S. trial courts are themselves encumbered with a comity analysis that they find difficult and unproductive, and that ultimately has little relevance to their inevitable decisions to order direct discovery. It may of course be that, at the end of the day, this system offers some sort of rough justice—less extensive and less intrusive discovery requests fulfilled unilaterally under more expeditious U.S. discovery rules. Nonetheless, any result with what tentatively appears to be this array of disadvantages should receive careful scrutiny before it becomes standard U.S. practice.

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73. *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 543 n.27 (1987).

74. Cf. Landgericht Berlin, Urteil vom 13.6.1989 (Docket No. 20.0.314188), reprinted in *Recht der Internationalen Wirtschaft* (RIW 1989) at 989–90.



