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## **Beyond *Aerospatiale*: A Commentary on Foreign Discovery Provisions of the Restatement (Third) and the Proposed Amendments to the Federal Rules of Civil Procedure**

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## **Beyond *Aérospatiale*: A Commentary on Foreign Discovery Provisions of the Restatement (Third) and the Proposed Amendments to the Federal Rules of Civil Procedure**

This article examines the foreign discovery provisions in the Restatement (Third) of the Foreign Relations Law of the United States. First, the article discusses those provisions in conjunction with the Supreme Court's decision in the *Aérospatiale* case.<sup>1</sup> Second, the article comments on the application by lower courts of the principles contained in *Aérospatiale* and the Restatement (Third's) foreign discovery provisions. Third, the article addresses the proposed amendments to the Federal Rules of Civil Procedure (FRCP), which would, in effect, overrule *Aérospatiale* and would require a major revision to the relevant provisions of the Restatement (Third). The resulting conclusion is that the ad hoc balancing test set out in *Aérospatiale* has not been implemented by lower courts in the manner intended. The proposed changes to FRCP 26 and 28 provide firmer

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1. *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522 (1987) [hereinafter *Aérospatiale*].

guidance to the lower courts and should result in a more balanced consideration of the conflicting U.S. and foreign interests.

## I. Present Law

### A. DISCUSSION OF THE RESTATEMENT (THIRD)

The Restatement (Third) contains two sections that specifically address international discovery: section 442, "Requests for Disclosure: Law of the United States"<sup>2</sup> and section 473, "Obtaining Evidence in Foreign State."<sup>3</sup>

#### 2. Section 442 states:

Requests for Disclosure: Law of the United States

- (1)(a) A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.
- (b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party.
- (c) In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.
- (2) If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,
  - (a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;
  - (b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);
  - (c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (1987)  
[hereinafter RESTATEMENT (THIRD)].

#### 3. Section 473 states:

Obtaining Evidence in Foreign State

- (1) Under international law, a state may determine the conditions for taking evidence in its territory in aid of litigation in another state, but the state of the forum may determine its admissibility, probative value, and effect.
- (2) Under the Hague Evidence Convention,
  - (a) each contracting state is required to designate a Central Authority to which letters of request for assistance in obtaining evidence for use in civil or commercial litigation may be addressed by courts of other contracting states, and the Central Authority must direct that any letter of request meeting the requirements of the Convention be executed expeditiously, in accordance with the procedures, including measures of compulsion, for obtaining evidence for use in the requested state's courts;
  - (b) a contracting state may determine the conditions for taking evidence in its territory, without compulsion, by diplomatic or consular officers, or by commissioners designated by a court in another contracting state, for use in civil or commercial litigation pending in that state.
- (3) A person required or requested to give evidence for use in a foreign state, whether pursuant to the Hague Evidence Convention or through other arrangements for judicial assistance, may refuse to do so insofar as he has a privilege or a duty of nondisclosure under either the law of the state of origin of the request or of the state in which the evidence is sought.

RESTATEMENT (THIRD), *supra* note 2, § 473.

Section 442 deals with efforts to secure information under direct order of a U.S. court or comparable authority.<sup>4</sup> It begins with the premise that U.S. courts and agencies retain full authority over persons under their jurisdiction in discovery matters regardless of the foreign situs of the information sought.<sup>5</sup> A court or agency may impose sanctions for failure to comply with an order to produce information.<sup>6</sup> This authority to compel production should be tempered by a balancing of the competing national interests and the litigation realities of the case at hand.<sup>7</sup> Previously, in order to resolve international discovery conflicts, courts referred to the balancing test found in section 40 of the original Restatement of Foreign Relations Law, a section dealing with conflicts of enforcement jurisdiction.<sup>8</sup>

The remainder of section 442 addresses instances in which a foreign statute prohibits discovery of the information at issue. In such cases, U.S. courts and agencies can order the party against whom discovery is sought to make a good faith effort to obtain permission from the foreign government to make the information available.<sup>9</sup> However, U.S. courts and agencies usually should refrain from the issuance of sanctions such as contempt, dismissal, or default in those cases in which a foreign statute prevents discovery, unless the party has failed to make the required good faith effort or has deliberately concealed or removed evidence.<sup>10</sup> Courts and agencies remain free to make findings of fact adverse to a party who, despite making a good faith effort, is still unable or unwilling to produce the information.<sup>11</sup>

Section 473 sets out the procedural and evidentiary guidelines for gathering evidence in a foreign state using international judicial assistance. The state in which the evidence is gathered may set conditions for this process, but it is the forum state that determines the admissibility, probative value, and effect of the evidence.<sup>12</sup> The second paragraph of section 473 repeats the procedures and

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4. *Id.* § 442 comment a.

5. *Id.* § 442(1)(a).

6. *Id.* § 442(1)(b).

7. *Id.* § 442(1)(c).

8. Section 40 requires two states that both may have jurisdiction over a person and that may require inconsistent conduct of a person to consider moderating their enforcement jurisdiction over that person in light of such factors as the person's nationality and the national interests at stake. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). Section 403 of the Restatement (Third) contains comparable provisions. See RESTATEMENT (THIRD), *supra* note 2, § 403.

9. RESTATEMENT (THIRD), *supra* note 2, § 442(2)(a).

10. *Id.* § 442(2)(b).

11. *Id.* § 442(2)(c).

12. *Id.* § 473(1).

obligations of contracting states under the Hague Evidence Convention (HEC).<sup>13</sup> The final paragraph of section 473 notes that a person may refuse to give evidence, for use in a foreign state, that is privileged in either the state of the origin of the request or the state in which the evidence is sought.<sup>14</sup>

Sections 442 and 473 of the Restatement (Third) are related to principles set out in two Supreme Court cases: *Société Nationale Industrielle Aérospatiale v. United States District Court*<sup>15</sup> and *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers (Interhandel)*.<sup>16</sup> *Aérospatiale* in particular has been important and therefore is examined in detail. This analysis begins with a short summary of that case and then focuses on the efforts of the lower courts to implement the test devised by the majority in *Aérospatiale*.

#### B. AÉROSPATIALE<sup>17</sup>

In *Aérospatiale* individuals allegedly injured in an airplane crash in Iowa sued two French aircraft manufacturing and marketing corporations under negligence and breach of warranty theories.<sup>18</sup> The plaintiffs sought the production of documents located in France and the answering of interrogatories by the French defendant corporations pursuant to the discovery procedures in the FRCP.<sup>19</sup> The French defendants moved for a protective order from the court on two grounds. First, they contended that discovery in France could be conducted only pursuant to the procedures set forth in the HEC, and therefore plaintiffs should be required to pursue their discovery by that method.<sup>20</sup> Second, they argued that the French "blocking" statute forbade them from responding to discovery requests that did not comply with the HEC.<sup>21</sup>

The Supreme Court rejected both of the defendants' contentions. As to the defendants' first contention, a unanimous Court held that the HEC is not the

13. *Id.* § 473(2); see Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, reprinted at 28 U.S.C.A. § 1781 (West Supp. 1990) [hereinafter HEC].

14. RESTATEMENT (THIRD), *supra* note 2, § 473(3).

15. 482 U.S. 522 (1987).

16. 357 U.S. 197 (1958).

17. This discussion of *Aérospatiale* is based in large part on an article previously published by one of the co-authors. Griffin, *Procedures for Civil Discovery Outside the United States after Aérospatiale*, 15 INT'L BUS. LAW. 350 (1987).

18. *Aérospatiale*, 482 U.S. at 524-25.

19. *Id.* at 525-26.

20. *Id.*

21. *Id.* at 526.

exclusive means for discovery involving countries that are signatories to the HEC.<sup>22</sup> The Court then split sharply on the proper role of the HEC. A five-Justice majority refused to endorse a rule of first resort to the HEC.<sup>23</sup> Instead, the majority created an ad hoc balancing test calling for a weighing "of the particular facts, sovereign interests, and likelihood that resort to . . . [HEC] procedures will prove effective."<sup>24</sup> The majority stressed concerns about the "time consuming and expensive" procedures that may be necessary under the HEC.<sup>25</sup>

The four-Justice minority advocated a general presumption of first resort to the HEC.<sup>26</sup> Arguing that most U.S. judges have little experience in transnational litigation and little competence in determining what particular acts offend foreign nations, the minority contended that "pro-forum bias" would creep into the majority's balancing test resulting in infrequent use of the HEC.<sup>27</sup> In turn, this would subvert the policies established by the President and the Senate in negotiating and ratifying the HEC.<sup>28</sup>

The bulk of the minority's criticism, however, was reserved for the majority's comity analysis. The minority took issue with the use of FRCP discovery measures in foreign states, especially civil law states that have consented to the HEC.<sup>29</sup> Use of discovery methods other than the HEC in signatory countries, the minority argued, impinges upon the sovereignty of foreign states.<sup>30</sup> The minority proposed a test of its own. It would require consideration of U.S. interests, foreign interests, and the international interest "in a smoothly functioning international legal regime" in determining if the HEC should be applied.<sup>31</sup>

The defendants' second argument, that the French blocking statute prohibits discovery except in accordance with the HEC, was also rejected.<sup>32</sup> Citing *Interhandel*,<sup>33</sup> the majority stated that blocking statutes do not deprive a U.S. court of the power to order a party subject to its jurisdiction to produce evidence, even

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22. *Id.* at 539-40, 548.

23. *Id.* at 542.

24. *Id.* at 544 (footnote omitted).

25. *Id.* at 542.

26. *Id.* at 548-49.

27. *Id.* at 553.

28. *Id.* at 551-52.

29. *Id.* at 554-61.

30. *Id.* at 556-57.

31. *Id.* at 555 (footnote omitted).

32. *Id.* at 544 n.29.

33. *Interhandel*, 357 U.S. 197, 204-06 (1958).

though the act of production may violate a blocking statute.<sup>34</sup> The majority acknowledged that the existence of such a statute is relevant to the trial court's comity analysis, but only to the degree that the statute can be linked with a foreign sovereign's interest in the nondisclosure of specific information.<sup>35</sup>

## II. Survey of Lower Court Implementation of *Aérospatiale*<sup>36</sup>

In performing the supposedly neutral balancing test advocated by the *Aérospatiale* majority, lower courts have shown the pro-forum bias toward FRCP discovery rules and U.S. interests predicted by the *Aérospatiale* minority. Lower courts have consistently placed the burden of proving the HEC's effectiveness on the party advocating use of the HEC. This has proven a difficult and impractical burden to sustain. In addition, lower courts have accorded little or no weight to international comity concerns in resolving disputes about foreign discovery.<sup>37</sup> Thus lower courts have applied the majority's balancing test in a manner that rarely results in use of the HEC.

### A. PLACING THE BURDEN ON THE PARTY MOVING FOR USE OF THE HEC DISCOURAGES USE OF THE CONVENTION

The majority opinion in *Aérospatiale* is not clear as to whether the proponent of the HEC or the proponent of the FRCP should bear the burden of proving that its method should be used for foreign discovery.<sup>38</sup> Most lower courts, relying on the Supreme Court's statement that a foreign litigant should have "a full and fair opportunity to demonstrate appropriate reasons for employing Convention procedures,"<sup>39</sup> have found that the proponent of the HEC (the HEC movant) has the burden of proving that its use is appropriate.<sup>40</sup>

34. *Aérospatiale*, 482 U.S. at 544 n.29.

35. *Id.*

36. For a further discussion of the application by lower courts of the principles contained in *Aérospatiale*, see Born, *Comity and the Lower Courts: Post-Aérospatiale Application of the Hague Evidence Convention*, 24 INT'L LAW. 393 (1990).

37. See, e.g., *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987); *Scarminach v. Goldwell GmbH*, 531 N.Y.S.2d 188, 191 (Sup. Ct. 1988).

38. In contrast, the HEC signatory states believe "the burden of proof should be on the party wishing to resist application of the Convention." Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, 28 I.L.M. 1556, 1566 (1989) [hereinafter Special Commission Report].

39. *Aérospatiale*, 482 U.S. at 547.

40. *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 257 (M.D.N.C. 1988); *Lyons v. Bell Asbestos Mines, Ltd.*, 119 F.R.D. 384, 387-89 (D.S.C. 1988); *Benton Graphics*, 118 F.R.D. at 389; *Scarminach*, 531 N.Y.S.2d at 190. But see *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987) (court places on the party opposing use of the HEC the burden of proving that use of HEC procedures will frustrate the interests of West Germany and the United States and the interests of all nations in a smoothly functioning international legal system). See also Born, *supra* note 36, at 401-03.

This burden on HEC movants has generally proved to be insurmountable. In *Benton Graphics v. Uddeholm Corp.*, the court required the HEC movant to prove that the particular facts of the case and the sovereign interests involved supported the use of the HEC and that HEC procedures would prove effective.<sup>41</sup> Similarly, in *Rich v. KIS California, Inc.*, the HEC movant was required to prove that the opposing party's discovery requests were overly intrusive, that an important sovereign interest of the foreign state was at stake, and that use of HEC procedures could be effective.<sup>42</sup> In both cases the moving party failed to sustain the burden.<sup>43</sup> By contrast, in the one case in which a court placed the burden on the party advocating use of the FRCP discovery methods and opposing use of the HEC, the party could not sustain the burden and the HEC was used.<sup>44</sup>

#### B. COMITY CONCERNS HAVE BEEN UNDEREMPHASIZED

Lower courts, in implementing the *Aérospatiale* test, have not given appropriate weight to concerns of international comity. The Supreme Court has described comity as the cooperative spirit a domestic tribunal brings to the "resolution of cases touching the laws and interests of other sovereign states."<sup>45</sup> The majority in *Aérospatiale* admonished lower courts to "take care to demonstrate due respect for any special problem 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>46</sup> In practice, however, the lower courts, as predicted by the minority,<sup>47</sup> have given little weight to the laws and interests of foreign states.

In one case, the HEC movant, a Swedish company, produced a declaration by the Assistant Under-Secretary of the Swedish Ministry for Foreign Affairs stating that use of the HEC was necessary to ensure protection of a variety of Swedish

41. *Benton Graphics*, 118 F.R.D. at 389.

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

43. *Rich*, 121 F.R.D. at 258; *Benton Graphics*, 118 F.R.D. at 391.

44. *Hudson*, 117 F.R.D. at 38. In the cases reviewed discussing the burden of proof, the party assigned the burden failed in every case to sustain it. See, e.g., *Rich*, 121 F.R.D. at 258 (HEC movants did not meet "their burden of showing that plaintiffs should be required to resort to discovery via the [HEC]"); *Lyons*, 119 F.R.D. at 387; *Haynes v. Kleinwebers*, 119 F.R.D. 335, 337 (E.D.N.Y. 1988) (HEC movant "has failed to offer any cogent reasons to employ the Convention procedures"); *Benton Graphics*, 118 F.R.D. at 390-91; *Hudson*, 117 F.R.D. at 38 (FRCP movants "have not sustained" the burden of proving that use of the HEC would damage sovereign and litigant interests); *Scarminach*, 531 N.Y.S.2d at 191 (HEC movant "clearly failed to meet its burden").

45. *Aérospatiale*, 482 U.S. at 543 n.27; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (the decision to allow arbitration of antitrust claims is premised on concerns of international comity).

46. *Aérospatiale*, 482 U.S. at 546.

47. See *id.* at 553-54. See generally Comment, *The Supreme Court's Impact on Swiss Banking Secrecy: Société Nationale Industrielle Aérospatiale v. United States District Court*, 37 AM. U.L. REV. 827 (1988).

sovereign interests.<sup>48</sup> The court downplayed these interests, labeling them “merely general reasons why Sweden prefers civil law discovery procedures to the more liberal discovery permitted under the federal rules.”<sup>49</sup> The court found the declaration insufficient because it did not explain why a particular discovery request of the FRCP movant would violate a specific sovereign interest of Sweden.<sup>50</sup>

Instead of giving proper recognition and weight to a declaration of interests produced by a high-level government official of a foreign state, the district court in *Benton Graphics* dismissed the declaration as little more than an essay on the comparative law of Sweden and the United States. The court remarked that “[d]efendants cite no reasons how the *specific* discovery sought by [the FRCP movant] implicates any *specific* sovereign interest of Sweden.”<sup>51</sup> Possibly no less than a statement by a Swedish official that the FRCP movant’s request for a specific piece of paper implicated an important Swedish sovereign interest would have sufficed. It stretches the bounds of practicality and reasonableness to require high government officials in foreign states to respond with that level of specificity.<sup>52</sup>

Other U.S. courts have been similarly unsympathetic to comity concerns. In *Roberts v. Heim*, a Swiss defendant in a fraud case was compelled to testify in the United States at his own expense.<sup>53</sup> The special master appointed to resolve the issue reviewed *Aérospatiale* and noted its reminder to lower courts to pay careful heed to the concerns of foreign litigants and to foreign sovereign inter-

48. *Benton Graphics*, 118 F.R.D. at 391. The declaration claimed that discovery under the HEC served such interests as enabling Swedish courts to limit discovery in protected areas (trade secrets and national security), balancing the divergent rules of the United States and Sweden in determining which party bears the costs of litigation, and discouraging the “fishing expeditions” so resented by Sweden and other common law countries. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (emphasis in original). In requiring such specificity, the court perhaps was relying on the *Aérospatiale* majority’s statement that a “blocking statute thus is relevant to the court’s particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interest in nondisclosure of specific kinds of material.” *Aérospatiale*, 482 U.S. at 544 n.29. This is a strained reading of the majority’s opinion. The majority’s statement was made in the context of analyzing the conflict between aggressive discovery and blocking statutes. The Swedish sovereign interests enumerated by the HEC movant in *Benton Graphics* do not stem from a blocking statute, but instead flow from the “coordinate interest” of Sweden as sovereign in the litigation. See *Aérospatiale*, 482 U.S. at 546.

52. See also *Scaminach v. Goldwell GmbH*, 531 N.Y.S.2d 188, 191 (Sup. Ct. 1988). An affidavit by the HEC movant’s attorney described West Germany as a civil law country where evidence gathering was done by the judiciary and indicated that private evidence gathering without resort to the HEC might violate West Germany’s judicial sovereignty. *Id.* The state court rejected this assertion on the ground that the affidavit of an attorney unfamiliar with West German law was not sufficient “to advance the argument that a particular discovery device, employed against a manufacturer of consumer products, would violate the judicial sovereignty of [West Germany].” *Id.* The state court apparently would have required costly expert testimony on West Germany’s judicial system before considering whether a discovery request violated West Germany’s judicial sovereignty.

53. *Roberts v. Heim*, 130 F.R.D. 430 (N.D. Cal. 1990).

ests.<sup>54</sup> He also considered the brief filed by the Swiss Government as *amicus curiae* in support of the French petitioners in *Aérospatiale*, which highlighted the impact of FRCP discovery on Swiss sovereignty.<sup>55</sup> Nevertheless, the special master did not appear to place any weight on "the sensitivity of the Swiss government with respect to foreign discovery and its impact on Swiss sovereignty."<sup>56</sup> Instead, the special master relied on his finding that no particular Swiss law would be violated if the Swiss defendant was compelled to testify and that in *Aérospatiale* the Supreme Court had "rejected the arguments of the Swiss government as set forth in its *amicus* brief."<sup>57</sup>

To their credit, some lower courts have given more careful consideration to the laws and interests of foreign sovereigns.<sup>58</sup> The Seventh Circuit affirmed a district court's decision not to compel post-judgment discovery of records of an insurance company located in Romania and wholly owned by the Romanian Government.<sup>59</sup> The defendant insurance company claimed that Romanian law regarding "state secrets" and "service secrets" prohibited disclosure of this information.<sup>60</sup> The court noted that the information requested was a "service secret" under Romanian law and that the Romanian statute was directed at domestic affairs instead of being merely a blocking statute.<sup>61</sup> To address the competing interests, the court used two tests. First, the court used the test contained in section 40 of the original Restatement.<sup>62</sup> It weighed the "relative interests of Romania in its national secrecy and the American interest in enforcing its judicial decisions," and "determined that Romania's [interest], at least on the facts [in

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54. *Id.* at 437.

55. *Id.* at 437-38.

56. *Id.* at 438. For an interesting contrast, see *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 524 (S.D.N.Y. 1987) (*Bunker Hunt Silver* case) (court finds Swiss interest in bank secrecy to be substantial though it is personal and can be waived). See generally Comment, *supra* note 47.

57. *Roberts*, 130 F.R.D. at 438. The *Roberts* court's reliance on the Supreme Court's "rejection" of Switzerland's *amicus* brief in *Aérospatiale* seems misplaced. The Supreme Court did not specifically address or even mention the Swiss *amicus* brief. Furthermore, even if the Supreme Court had found that Switzerland's sovereign interests in *Aérospatiale* were not compelling, such a holding would not mean that, as a general rule, Switzerland's interests in its bank secrecy laws should be discounted in every case. It is the heart of the majority's test that "in each case [scrutiny of] the particular facts, sovereign interests, and likelihood that resort to [HEC] procedures will prove effective" be performed. *Aérospatiale*, 482 U.S. at 544 (footnote omitted) (emphasis added). The special master had a duty to evaluate independently the sovereign interests of Switzerland that were at stake in this case.

58. A state court ordered discovery from a nonparty to occur, according to the HEC. Relying on *Aérospatiale*, the court cited concerns of international comity and respect for the judicial sovereignty of West Germany as requiring use of the HEC. *Orlich v. Helm Brothers, Inc.*, 560 N.Y.S.2d 10, 15 (App. Div. 1990).

59. *Reinsurance Co. of Am. V. Administratia Asigurarilor de Stat*, 902 F.2d 1275 (7th Cir. 1990).

60. *Id.* at 1279.

61. *Id.*

62. See *supra* note 8.

the record], appears to be the more immediate and compelling."<sup>63</sup> Next, the court analyzed the case under section 442 of the Restatement (Third). The court found that section 442 and section 40 were equivalent except for the requirement in section 442(2)(a) that the party against whom discovery is sought make a good faith effort to secure from foreign authorities permission to comply with the discovery request.<sup>64</sup> The court held that no such "good faith" effort was required in this instance because the Romanian statute rendered such an effort futile.<sup>65</sup>

Both the minority in *Aérospatiale*<sup>66</sup> and the lower courts<sup>67</sup> have recognized the difficulty of balancing competing U.S. and foreign interests. This difficulty is evident in the uneven decision making among lower courts considering various foreign sovereign interests and laws. Many U.S. courts resort to FRCP discovery without full consideration of the interests underlying the HEC. This has had the unfortunate effect of motivating foreign governments to enact and strengthen blocking statutes to protect their nationals from what is perceived as the excessive extraterritorial reach of U.S. law.

### III. Proposed Amendments to Federal Rules of Civil Procedure

#### A. PROPOSED AMENDMENTS

The Judicial Conference Advisory Committee on the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure proposed various amendments to the existing rules in September 1989.<sup>68</sup> The Judicial Conference of the United States approved the proposed amendments, in modified form, in September 1990 and sent them to the United States Supreme Court for review.<sup>69</sup> The

63. *Reinsurance Co. of Am.*, 902 F.2d at 1280-81 (footnote omitted).

64. *Id.* at 1282.

65. *Id.* at 1282-83. The concurring opinion by Judge Easterbrook in *Reinsurance Co. of Am.* criticized § 442 on the ground that it enumerates many considerations without providing any real guidance. He also expressed doubt that the balancing test in 442, which in this case made the judgment against the Romanian company uncollectible, is sufficient authority to countermand Congress's decision in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1988), to authorize enforcement of such judgments. *Reinsurance Co. of Am.*, 902 F.2d at 1283-84.

66. *Aérospatiale*, 482 U.S. at 552 (American "courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own").

67. See, e.g., *Reinsurance Co. of Am.*, 902 F.2d at 1280; *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987). ("[T]he obvious, albeit troublesome, requirement for us is to balance the national interests of the United States and Germany . . .") (quoting *United States v. First National City Bank*, 396 F.2d 897, 902 (2d. Cir. 1968)).

68. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE FEDERAL RULES OF CIVIL PROCEDURE (Sept. 1989) [hereinafter PROPOSED RULES—PRELIMINARY DRAFT].

69. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (Sept. 1990) [hereinafter PROPOSED RULES]. The Supreme Court has until May 1, 1991, to transmit the proposed

proposed amendments to rules 26 and 28 of the Federal Rules of Civil Procedure are of particular interest because they would, in effect, overrule *Aérospatiale*.

### 1. Rule 26

The proposed amendments would add the following language to FRCP 26(a):

Discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the treaty.<sup>70</sup>

The intent of this amendment is to "reflect a policy of balanced accommodation to international agreements bearing on methods of discovery."<sup>71</sup> According to the Advisory Committee, concern for positive international relations requires use of internationally approved discovery methods, provided such methods allow litigants timely access to information.<sup>72</sup> Under the proposed new rule, courts could not authorize discovery methods that violate a treaty to which the United States is a signatory.<sup>73</sup>

The proposed amendment's broad language favoring the HEC is narrowed considerably by the Advisory Committee Notes.<sup>74</sup> The proposed amendment would not apply to depositions of parties (or persons they control) who may be deposed in the United States. The Advisory Committee Notes also state:

The rule of comity stated in this rule does not apply to discovery of documents and things from parties who are subject to the court's personal jurisdiction, and who may be required to produce such materials at the place of trial. *E.g.*, *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694 (1982).<sup>75</sup>

This language apparently means that once personal jurisdiction over a party has been established, the proposed amendment would no longer require first resort to the HEC. First resort to the HEC would only be required in two cases—discovery from foreign nonparties<sup>76</sup> and discovery of jurisdictional facts.<sup>77</sup>

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amendments to Congress. The proposed amendments, if not disapproved by Congress, could take effect as early as December 1, 1991. *See* 28 U.S.C.A. §§ 2072, 2074 (West Supp. 1990).

70. PROPOSED RULES, *supra* note 69, rule 26.

71. *Id.* rule 26, advisory committee notes subdivision (a) (citing *Aérospatiale* concurring opinion).

72. *Id.* rule 26 advisory committee notes subdivision (a).

73. *Id.* rule 26(a), rule 26 advisory committee notes subdivision (a).

74. The Advisory Committee Notes to the first version of the proposed amendment to rule 26(a) required use of the HEC in a greater number of cases than the present draft requires. Those notes to the first version discussed restrictions on use of the HEC due only to "inequitable" discovery. PROPOSED RULES—PRELIMINARY DRAFT, *supra* note 68, rule 26 advisory committee notes subdivision (a). The Preliminary Draft apparently required HEC use even after personal jurisdiction had been established. *See id.*

75. PROPOSED RULES, *supra* note 69, rule 26 advisory committee notes subdivision (a).

76. Present law already requires that discovery of foreign nonparties proceed under the HEC. *See* *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 257 (M.D.N.C. 1988); *Orlich v. Helm Brothers, Inc.*, 560 N.Y.S.2d 10, 15 (App. Div. 1990).

77. There has been some controversy as to whether discovery under the FRCP can occur against foreign parties contesting the personal jurisdiction of a federal court. Foreign litigants have argued

The Advisory Committee Notes for proposed rule 26 discuss the tension between the desirability of following approved international methods of discovery and the need to ensure that international litigants are not placed at an advantage as compared to similarly situated domestic litigants:

The rule also directs the court to authorize the use of other discovery methods as may be needed to assure that discovery is not "inequitable." International litigants should not be placed in a favored position as compared to American litigants similarly situated, especially in commercial matters with respect to which the similar American litigants may be their economic competitors. Especially, an international litigant using the provisions of Rule 26-37 should not be permitted to use the Hague Convention or a similar international agreement or even the law of the party's own country to create obstacles to equivalent discovery by an adversary.<sup>78</sup>

To ensure that discovery is equitable, a court may order discovery that violates the laws of another country,<sup>79</sup> but may not authorize discovery methods that violate a treaty that is the law of the United States.<sup>80</sup> The proposed rule also need not be applied if internationally approved discovery methods are "inadequate."<sup>81</sup> A court may "make a discreet judgment on the facts as to the sufficiency of the internationally agreed discovery methods."<sup>82</sup> The contours of this exception are unclear.

Proposed rule 26 and the associated Advisory Committee Notes do not discuss the issue of the allocation of burden of proof. Two alternative approaches are possible. The party advocating HEC discovery could be required to prove that its use will be "equitable" and "adequate." This approach finds support in present case law.<sup>83</sup> It would also better protect American litigants from unfair discovery practices by foreign litigants—a concern clearly and forcefully made in the Advisory Committee Notes.<sup>84</sup> Alternatively, the party advocating FRCP discovery could be required to prove that use of the HEC would be inequitable or inadequate. This approach is supported by the plain language of proposed rule

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that, in such instances, they are more like nonparties. *Rich*, 121 F.R.D. at 258; *In re Bedford Computer Corp.* (Bedford Computer Corp. v. Israel Aircraft Indus., Ltd.), 114 B.R. 2, 5 (Bankr. D.N.H. 1990). Nonparties are generally subject to discovery solely through HEC procedures. *Rich*, 121 F.R.D. at 258; *Orlich*, 560 N.Y.S.2d at 15. Courts have been unsympathetic to this argument. *Rich*, 121 F.R.D. at 260; *Bedford*, 114 B.R. at 6. The proposed amendment would reverse the rule announced in these decisions.

78. PROPOSED RULES, *supra* note 69, rule 26 advisory committee notes subdivision (a).

79. *Id.*, *Interhandel*, 357 U.S. 197 (1958).

80. *Id.* rule 26 advisory committee notes subdivision (a).

81. *Id.*

82. *Id.*

83. *See supra* note 40 and accompanying text.

84. *See* PROPOSED RULES, *supra* note 69, rule 26 advisory committee notes subdivision (a).

26, which states that "[d]iscovery . . . *shall* be conducted by methods authorized by the treaty *unless* the court determines that those methods are inadequate or inequitable . . . ."<sup>85</sup> The mandatory language "shall" establishes a strong presumption favoring use of the HEC in relevant circumstances, which is rebuttable only if a court is convinced that use of the HEC will be inadequate or inequitable.<sup>86</sup> Also, the policy considerations underlying proposed rule 26 favor this approach.<sup>87</sup> Overall, the plain language and policy of proposed rule 26 imply that the burden is on the party opposing use of the HEC to prove use of the HEC will be inequitable or inadequate.

## 2. Rule 28

The proposed amendments to rule 28(b) subject the taking of depositions in foreign countries to the balancing provisions of revised rule 26(a).<sup>88</sup> The party taking the deposition must follow applicable treaty or convention procedures if an effective deposition can be taken by such means.<sup>89</sup> This remains true even if under such procedures a verbatim transcript is not available or testimony cannot be taken under oath.<sup>90</sup> The proposed amendments also allow the taking of depositions in a foreign country in accordance with applicable international agreements or by a letter of request.<sup>91</sup>

85. *Id.* rule 26(a) (emphasis added).

86. *See id.*

87. *See id.* rule 26 advisory committee notes subdivision (a) (proposed rule 26(a) added to "reflect a policy of balanced accommodation to international agreements bearing on methods of discovery").

88. The proposed amendments would revise the current Rule 28(b) as follows (new language is *underscored*):

Rule 28. Persons Before Whom Depositions May Be Taken.

(b) In Foreign Countries. *Subject to the provisions of rule 26(a)*, depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or by descriptive title. A letter of request may be addressed "To the appropriate Authority in [here name the country]." *When a letter of request or any other device is used pursuant to any applicable treaty or convention it shall be captioned in the form prescribed by that treaty or convention.* Evidence obtained in response to a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules. PROPOSED RULES, *supra* note 69, rule 28(b).

89. *Id.* advisory committee note.

90. *Id.*

91. *Id.* rule 28(b). The term "letter of request" is substituted for "letter rogatory" throughout rule 28(b). The letter of request is the primary method provided by the Hague Convention for seeking

## B. BENEFITS OF PROPOSED AMENDMENTS

The proposed amendments have two immediate benefits. First, by making first resort to the HEC mandatory<sup>92</sup> under some circumstances, the uncertainty engendered by the *Aérospatiale* majority's test and the section 442 test is avoided to some extent. In relevant cases lower courts would be required to turn first to the HEC unless its use could be deemed "inadequate or inequitable."<sup>93</sup> Courts would not have to determine which party carried the burden of proof or make difficult determinations of whether U.S. or foreign interests should prevail. The more structured framework of the proposed amendments is likely to lead to more consistent decision making among the lower courts.

The second major benefit of the proposed amendments would be increased attention and deference to international comity concerns and the interests and laws of foreign sovereigns. Since the proposed amendments require, in some cases, first use of the HEC for foreign discovery, lower courts will have to familiarize themselves more thoroughly with the HEC and the international comity concerns that support it. Judicial expertise will be gained, and with it, an enhanced appreciation of the interests and laws of foreign states.

In addition, use of HEC discovery methods is more palatable to foreign signatory states than is use of the FRCP. Many foreign states have explicitly consented to the HEC's procedures and therefore have consented to whatever infringements of their sovereignty such procedures might entail.<sup>94</sup> However, few foreign states have consented to U.S. discovery methods. Use of the HEC will no doubt reduce diplomatic tensions<sup>95</sup> between the United States and foreign states. In addition, it would eliminate the impetus for the enactment by foreign governments of additional "blocking" statutes.<sup>96</sup> In turn "the mutual interests of all nations in a smoothly functioning international legal regime"<sup>97</sup> will be advanced.

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foreign judicial assistance in the taking of depositions. *Id.* advisory committee note. There are no changes between the proposed amendment to rule 28 approved by the Judicial Conference and that originally proposed in the September 1989 Preliminary Draft. Compare PROPOSED RULES, *supra* note 69, rule 28 with PROPOSED RULES—PRELIMINARY DRAFT, *supra* note 68, rule 28.

92. "Discovery . . . shall be conducted by methods authorized by the treaty. . . ." PROPOSED RULES, *supra* note 69, rule 26(a) (emphasis added).

93. *Id.* rule 26(a).

94. See *Aérospatiale*, 482 U.S. at 556.

95. See, e.g., *id.* at 558 n. 14.

96. Some blocking statutes, such as that of France, provide an exception for discovery done in accordance with treaties such as the HEC. *Aérospatiale*, 482 U.S. at 565. This further reinforces the argument that HEC signatory states are willing to comply with the procedures of a treaty to which they have consented.

97. *Id.* at 555.

If the proposed amendments are accepted, U.S. courts will have to reconsider their position on article 23 declarations<sup>98</sup> made by HEC signatory states.<sup>99</sup> Many foreign states have made blanket article 23 declarations, forbidding pretrial discovery of documents, in acceding to the HEC.<sup>100</sup> Many of these same states have ameliorated the effect of these blanket declarations by the enactment of laws or regulations allowing pretrial discovery of documents in certain instances.<sup>101</sup> Thus, some states' blanket declarations have been converted into partial article 23 declarations.

The Advisory Committee Notes, in discussing the adequacy of foreign discovery methods, provide that a "party should be required to make first resort under the Hague Convention despite a partial article 23 reservation by the country in which discovery is sought, but not if that country has imposed a blanket reservation as an obstacle to discovery."<sup>102</sup> The Advisory Committee Notes apparently require U.S. judges to conduct a detailed statutory and treaty analysis of a foreign state's law to determine if a blanket reservation has been sufficiently ameliorated so as to constitute a partial article 23 declaration. Such determinations are likely to be time-consuming and difficult.

### C. CRITICISMS OF PROPOSED AMENDMENTS

Strong criticisms have been leveled at the proposed amendments. Some commentators have argued that the proposed amendments are inequitable to American litigants, who are subject to full FRCP discovery when litigating against foreign parties, while their foreign adversaries are subject to the more "limited" HEC procedures.<sup>103</sup> Other commentators argue that the district courts presently

98. Article 23 of the HEC provides:

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries. HEC, *supra* note 13, at 101. Except for the United States, Israel, and Czechoslovakia, all signatory states have made such a declaration limiting pretrial discovery. Born, *supra* note 36, at 397.

99. Courts have ordered discovery in foreign states that have made article 23 reservations. See, e.g., *Aérospatiale*, 482 U.S. at 536-37; *Scarminach v. Goldwell GmbH*, 531 N.Y.S.2d 188, 191 (Sup. Ct. 1988).

100. See, e.g., Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, accessions reprinted at 28 U.S.C.A. § 1781, at 104-16; see *supra* note 98.

101. See, e.g., *Aérospatiale*, 482 U.S. at 564 n.22 (France modified its blanket article 23 declaration; Germany promulgated new regulations permitting some pretrial discovery); Special Commission Report, *supra* note 38, at 1566 (U.S. courts should be "most impressed by alterations made in the laws of civil law countries to accommodate American procedural methods. . . .") The Special Commission also "encouraged any States which have made or contemplate making the reservation under article 23 to limit the scope of such reservation" in order to make the HEC more useful to litigants from common law states. *Id.* at 1564.

102. PROPOSED RULES, *supra* note 69, rule 26 advisory committee notes subdivision (a).

103. Comments of Professor Carrington, reporter of hearing, at the Hearing on the Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure at San Francisco, Cal. (Jan. 9, 1990) at 84; Letter from Mr. Eisenstat (President N.J. State Bar Ass'n)

are applying the majority's test fairly, and the proposed amendments are unnecessary.<sup>104</sup> A few commentators contend that it is inappropriate for a Supreme Court decision to be overturned through the rulemaking process.<sup>105</sup> Some have stated their belief that the HEC is ineffective or overly time-consuming.<sup>106</sup> Two of the concerns raised by the commentators, the supposed inefficiency and inequity of the proposed amendments, merit special attention.<sup>107</sup>

1. *HEC Discovery Methods May Not Be Substantially  
Less Efficient than FRCP Discovery Methods*

Many courts<sup>108</sup> and commentators<sup>109</sup> have complained that use of the HEC slows down discovery, making U.S. litigation less efficient and more expensive.<sup>110</sup> When the bases for many of these assertions are examined closely, they seem to rest more on conjecture than on reality. For example, in *Aérospatiale* the majority viewed the letter of request procedure under the HEC as "unduly time consuming and expensive."<sup>111</sup> However, the minority correctly pointed out that "[t]he Court offers no support for this statement and until the Convention is used extensively enough for courts to develop experience with it, such statements can be nothing other than speculation."<sup>112</sup>

Lower courts frequently have made similar assumptions about the HEC's expense or inefficiency, which are supported by little more than speculation. In one case a court relied in part on a 1959 study highlighting "[t]he myriad practical problems and expenses involved in taking evidence abroad"<sup>113</sup> to support a finding that the cost of HEC procedures for foreign discovery in a 1980

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to James E. Macklin (Committee Reporter) (Mar. 15, 1990) at 16; Letter from Mr. Gerson (Asst. Att'y General—Civil Division) to Judge Weis (Mar. 15, 1990) at 3 [hereinafter Gerson letter].

104. Comments of Mr. Riesenberger, Division of Enforcement at Securities Exchange Commission of Hearing on the Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure at Chicago, Ill. (Feb. 2, 1990) at 75 [hereinafter Riesenberger comments].

105. *Id.* at 75; Letter from Professor Burbank to James E. Macklin (Mar. 14, 1990) at 4–5.

106. Riesenberger comments, *supra* note 104, at 75–76; Gerson letter, *supra* note 103, at 3.

107. These were also the two main considerations analyzed by Justice Blackmun in his separate opinion. *Aérospatiale*, 482 U.S. at 561, 565.

108. *Id.* at 542–44; *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988); *Haynes v. Kleinwebers*, 119 F.R.D. 335, 338 (E.D.N.Y. 1988); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987); *In re Bedford Computer Corp.*, 114 B.R. 2, 5–6 (Bankr. D.N.H. 1990) (citing *Rich*); *Scarminach v. Goldwell GmbH*, N.Y.S.2d 188, 191 (Sup. Ct. 1988).

109. See *supra* note 106.

110. This is an interesting complaint, given that FRCP discovery methods often are not particularly efficient or cost-effective. See *Aérospatiale*, 482 U.S. at 562.

111. *Id.* at 542.

112. *Id.* at 561 (footnote omitted).

113. *Pain v. United Technologies Corp.*, 637 F.2d 775, 790 n.75 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

lawsuit "would be exceedingly high."<sup>114</sup> Because the HEC did not exist in 1959, the study can only support the general proposition that foreign discovery without the HEC was relatively more expensive in 1959.

More recently, in *Haynes v. Kleinweifers*, the court found, with no original analysis, that the use of HEC procedures in Germany "can be a very time-consuming and expensive effort."<sup>115</sup> The court then noted that new German regulations allow pretrial production of specific, relevant documents in response to letters of request.<sup>116</sup> However, the court did not take the next logical steps of analyzing the new regulations or requiring further evidence from the parties concerning the efficacy of the new regulations. Instead, the court assumed that the new regulations would not provide for adequate discovery.<sup>117</sup> The court cited no authority to support this assumption and provided no analysis of this alleged inadequacy of the German regulations. It appears the court never seriously considered the possibility that these new regulations could make the HEC an effective alternative to FRCP discovery.<sup>118</sup>

In light of the limited acceptance by lower courts of HEC procedures, it remains unclear whether discovery under the HEC is substantially less efficient than FRCP discovery. Even in those instances where resort to the HEC might prove somewhat more costly or time-consuming, the inconvenience to the individual litigant may be more than outweighed by the substantial U.S. interest in respecting the sovereignty of foreign states and in supporting international comity.

## 2. *FRCP 26(c) Would Protect Domestic Litigants from Potential Discovery Inequities*

The concern that a rule of first resort to the HEC would prove unfair to domestic parties litigating against foreign parties is a very real one. This is particularly true in instances where the HEC may be manipulated to provide a

114. 637 F.2d at 790. Another court later cited *Pain* as support for the statement that HEC procedures are "cumbersome and costly, and often fail to adequately secure full foreign discovery." *Jennings v. Boeing Co.*, 660 F. Supp. 796, 806 (E.D. Pa. 1987), *aff'd*, 838 F.2d 1206 (3d Cir. 1988). See also *Murphy v. Reifenhäuser KG Maschinenfabrik*, 101 F.R.D. 360, 361 (D. Vt. 1984).

115. *Haynes v. Kleinweifers*, 119 F.R.D. 335, 338 (E.D.N.Y. 1988) (citing *Murphy*, 101 F.R.D. at 361). It is important to note how the speculation of courts about HEC procedures has spread and become transmuted into authority. *Haynes* cites *Murphy*, which partially relies upon *Pain*, and *Pain* relies on the outdated 1959 study for the proposition that use of the HEC is expensive and time-consuming. A state court came to an identical and equally unsupported conclusion about the new West German regulation. *Scarminach v. Goldwell GmbH*, 531 N.Y.S.2d 188, 191 (Sup. Ct. 1988). But see *Hudson v. Hermann Fauter GmbH & Co.*, 117 F.R.D. 33, 39 (N.D.N.Y. 1987) (court cites the new West German regulations to support its conclusion that use of the HEC can yield adequate results).

116. *Haynes*, 119 F.R.D. at 338 (citing *Aérospatiale*, 482 U.S. at 564 n.22).

117. *Id.* at 338.

118. See also *Scarminach*, 531 N.Y.S.2d at 191.

litigation or economic advantage to a foreign litigant to the detriment of a domestic litigant subject to FRCP discovery.<sup>119</sup> The majority in *Aérospatiale* cites this concern as one rationale for rejecting first use of the HEC.<sup>120</sup> However, the text of the proposed amendment to rule 26(a) and the Advisory Committee Notes show considerable sensitivity to fairness concerns.<sup>121</sup> Vigilance and effective use by the courts of their power under FRCP 26(c)<sup>122</sup> to limit discovery may be an acceptable accommodation of the competing interests.<sup>123</sup>

In at least one case a district court recognized the utility of rule 26(c) in limiting inequitable discovery.<sup>124</sup> The court recognized the United States' interest in assuring fair and equal treatment to all litigants in its courts.<sup>125</sup> This interest could be upset if one party to a lawsuit used FRCP discovery, and another party to the same suit used HEC discovery.<sup>126</sup> The court ordered discovery to proceed under the HEC.<sup>127</sup> However the court, drawing on its powers under rule 26(c), warned that "if justice requires, [the court] can compel discovery from [the West German defendant] pursuant to the Federal Rules if the use of the Convention's provisions leaves [American] plaintiffs at an unfair disadvantage."<sup>128</sup> This case demonstrates that, even absent the specific authority set out in the proposed amendment to rule 26(a), district courts have the capability to reconcile use of the HEC with concerns of fairness to American litigants.<sup>129</sup>

#### D. REMAINING QUESTIONS

The proposed amendments leave several issues unresolved. First, proposed rule 26(a) is silent as to what method of discovery is preferred once personal jurisdiction has been established. Courts still may be required to engage in the *Aérospatiale* majority's balancing test; alternatively they may be able to order FRCP discovery immediately, under the rationale that the rule enumerates the

119. See PROPOSED RULES, *supra* note 69, rule 26(a) advisory committee notes subdivision (a).

120. *Aérospatiale*, 482 U.S. at 540 n.25.

121. PROPOSED RULES, *supra* note 69, rule 26(a); PROPOSED RULES, *supra* note 69, rule 26(a) advisory committee notes.

122. FRCP 26(c) reads in relevant part: "[A] court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c).

123. See *Aérospatiale*, 482 U.S. at 565-66.

124. *Hudson v. Hermann Pfauder GmbH & Co.*, 117 F.R.D. 33, 39 (N.D.N.Y. 1987).

125. *Id.*

126. *Id.*

127. *Id.* at 40.

128. *Id.* at 39.

129. If the proposed rules are adopted, district court judges may have to devote more time than is now the case to supervising discovery in transnational litigations in order to ensure fairness. This will impose a burden on scarce judicial resources. However, it can be argued that the added expenditure of supervisory time is fully justified by the important sovereign and litigant interests that are at stake. Moreover, the additional time required may be insubstantial given that district courts are already required, in transnational litigation, to "supervise pretrial proceedings particularly closely to prevent discovery abuses." *Aérospatiale*, 482 U.S. at 546.

only instances that HEC discovery methods are to be used. Second, the proposed rule leaves parties in doubt at the inception of a litigation as to which discovery method will be used. It makes discovery dependent on the defenses asserted by the defendant. Third, the proposed rule may require a mini-hearing on personal jurisdiction before a court may order FRCP discovery. This would interpose another layer of delay into the already lengthy litigation process.

#### IV. Conclusion

The majority opinion in *Aérospatiale* creates an undesirable and unworkable framework in which lower courts must make determinations about the appropriate use of the HEC. Lower courts, inexperienced in transnational litigation and unfamiliar with the HEC, have given little weight to concerns of international comity or to the legitimate interests of foreign states in their laws and sovereignty, and they have applied the majority's ad hoc test unevenly. Some courts have placed a nearly insurmountable burden of proof on a party moving for use of the HEC, while other courts have perfunctorily dismissed legitimate sovereign interests advanced by foreign litigants and governments.

The proposed amendments to FRCP 26 and 28 are a fair compromise between conflicting U.S. interests, foreign interests, and international comity concerns in the discovery process. By providing a rule of first resort to the HEC for the purposes of establishing jurisdiction and deposing nonparties, the proposed amendments better structure and define the analysis district courts must utilize in transnational litigation. The foreign evidence provisions of the Restatement (Third) adequately track current law. However, the law appears to be shifting in a direction not anticipated by the Restatement's authors.

