11-1-1988

Societe Nationale Industrielle Aeorspatiale v. United States District Court: The Supreme Court Undermines the Hague Evidence Convention and Confounds the International Discovery Process

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/lr/vol22/iss1/4
SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE V. UNITED STATES DISTRICT COURT: THE SUPREME COURT UNDERMINES THE HAGUE EVIDENCE CONVENTION AND CONFOUNDS THE INTERNATIONAL DISCOVERY PROCESS

I. INTRODUCTION

The American approach to gathering evidence abroad during litigation of transnational disputes in domestic courts has given rise to more international friction than any other aspect of the American legal system.\(^1\) The liberal pre-trial procedures used in the United States differ materially from those in most other common-law and civil-law countries.\(^2\) The American method of “leaving no stone unturned” during pre-trial discovery conflicts both philosophically and procedurally with the legal systems of foreign nations.\(^3\) For example, in civil-law countries,\(^4\)


In other common-law countries, pre-trial procedures permit little discovery of matters that are not clearly relevant for trial. \(\text{Id.}\) at 6. Therefore, American “discovery” is often spoken of as “the portion of pre-trial discovery not within the realm of competent, material and admissible evidence.” \(\text{Id.}\) The two spheres are considered mutually exclusive. \(\text{Id.}\) (footnote omitted).

Civil-law systems do not share the common law concept of a trial as a separate, isolated episode of litigation. \(\text{Id.}\) “The typical civil proceeding in a civil law country is actually a series of isolated meetings . . . and written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made, and so on.” J. MERRYMAN, THE CIVIL LAW TRADITION 112 (2d ed. 1985). Matters that are ordinarily concentrated into a common-law trial are spread over numerous appearances and written acts before the judge who is taking the evidence. \(\text{Id.}\) Each appearance is relatively brief and involves only a small portion of the entire case, such as examining only one witness or introducing only one or two pieces of material evidence. \(\text{Id.}\) at 113. Therefore, the element of surprise usually associated with American trial proceedings is reduced to a minimum. \(\text{Id.}\) “Discovery is less necessary because there is little, if any, tactical or strategic advantage to be gained from the element of surprise.” \(\text{Id.}\) Pre-trial proceedings are unnecessary because there is no trial. \(\text{Id.}\) “[I]n a sense every appearance in the first two stages of a civil law proceeding has both trial and pre trial characteristics.” \(\text{Id.}\) See infra text accompanying notes 21-52 for a comparison of the civil-law and common-law systems.


4. “The civil law world includes a great number of national legal systems in Europe, Latin America, Asia, Africa, and the Middle East.” J. MERRYMAN, supra note 2, at ix-x.
evidence gathering is regarded as a judicial function. Judges, not the parties or lawyers, question witnesses and prepare a resume of the evidence during the course of the proceedings. In addition, foreign litigants are often prohibited by foreign penal statutes from disclosing certain evidence, or are protected from disclosing information based on extremely broad notions of privilege and confidentiality. American at-

France, Germany, Italy, Switzerland, Argentina, Brazil, Chile and Japan are all considered civil-law nations. Id. at 1. Nevertheless, there are differences in procedures and rules among the legal systems of these countries. Id. France and Germany, for example, have been characterized as "atypical" and "more advanced" than other civil-law systems. Id. at ix-x. Therefore, in this Note, any comparative discussion of common-law and civil-law legal systems is necessarily limited only to the significant, general differences between those systems. For an excellent list of books on the civil law generally, on elements of the civil-law tradition, and on the law of specific nations or areas, see Recommended Readings in J. MERRYMAN, supra note 2, at 161-64.

5. S. SEIDEL, EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION 23 (1984). In France, for example, "evidence is only submitted in written form, at least at the beginning of a trial." Borel & Boyd, Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States, 13 INT'L LAW. 35, 36 (1979). Oral testimony is not required unless the judge considers the documents submitted by the parties to be inconclusive. Id. Borel and Boyd explain further:

At this stage, control of the evidence gathering process passes from the parties to the judge, to whom the French Code of Civil Procedure grants broad and exclusive powers. The judge alone has power to order specific types of factual investigation which he deems appropriate: for example, inspection of particular sites; examination or testing of physical evidence; and written reports of oral testimony by expert witnesses. Only the judge has power to appoint an expert or an investigator, define his terms of reference, fix his compensation, and set a time limit for submission of the investigative report.

Similarly, the judge alone has the right to summon the parties or non-party witnesses to give oral evidence and to take official note of their testimony. Such testimony is never transcribed verbatim; only a written summary is prepared. Each of the parties or their counsel may request the judge to summon additional parties, witnesses or experts, but a French judge is not bound to accede to such requests, and there is no right of appeal from an adverse decision. Id. at 36 (footnote omitted). For the most part, the parties and their attorneys are silent spectators. They are permitted to speak only when the judge authorizes them to do so. Id. at 37. The French Code of Civil Procedure illustrates how limited the parties' roles are: "The parties must not interrupt, interrogate, or seek to influence witnesses who give evidence, nor address them directly, under penalty of being excluded from the Court." Id. at 36-37 (citing C. Pr. Civ., art. 214).

tempts to obtain evidence abroad often produce hostile opposition from foreign governments as well. American discovery methods affect the sovereign jurisdiction of foreign countries and are often inconsistent with the underlying philosophies and domestic practices of those states.

Transnational litigation thus presents unique problems for our court system as well as for multinational enterprises caught between United States laws compelling discovery and foreign laws prohibiting it. Foreign and multinational enterprises that become parties to domestic litigation are often compelled to produce evidence located abroad, the disclosure of which is contrary to the laws and public policies of the foreign state in which the enterprises are organized. In the United States, litigants rely on the courts to ensure that relevant information from adversaries is produced during litigation. At the same time, our courts face serious problems enforcing domestic discovery laws extraterritorially against foreign parties.

The complexity of transnational discovery disputes has hampered the development of a uniform and practical method of conducting discovery abroad. Any workable solution must reconcile issues of private and public international law with existing state and federal rules of procedure. In 1972, the United States ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, a multilateral treaty intended to resolve the problem of securing evidence abroad.

13. The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Com-
Although the Hague Evidence Convention was intended to facilitate international discovery and encourage judicial cooperation,\textsuperscript{14} it has not been used extensively by American litigants.\textsuperscript{15} The effectiveness of the treaty has been undermined by judicial disagreement over whether it is the exclusive means of obtaining evidence abroad and over how the treaty interacts with the Federal Rules of Civil Procedure. State and federal courts disagree on the impact of the Convention on the domestic laws of the United States.\textsuperscript{16}

In \textit{Société Nationale Industrielle Aérospatiale v. United States District Court},\textsuperscript{17} the United States Supreme Court was presented with the question of whether a domestic litigant should employ the procedures of the Hague Evidence Convention or the Federal Rules of Civil Procedure when attempting to collect evidence from a foreign party litigant over whom the court has personal jurisdiction.\textsuperscript{18} The Court held that the Hague Evidence Convention is merely an optional supplement to the Federal Rules, but does not preempt or supercede them.\textsuperscript{19} Lower courts were instructed to assess each case individually to determine whether the Convention should be used.

The Court’s holding sidestepped significant problems associated with transnational discovery disputes\textsuperscript{20} and created a serious setback for litigants involved in international litigation. The Court’s decision also thwarts the effectiveness of the Hague Evidence Convention. As a result, many complex obstacles associated with foreign evidence gathering, which the Hague Evidence Convention was intended to alleviate, once again will plague courts and litigants. Moreover, the Court’s decision displays a weak commitment to international judicial cooperation, and can only foster the perception held by foreign nations that the United States is an inflexible and uncooperative international participant.

\textsuperscript{14} Hague Evidence Convention, \textit{supra} note 13, at Preamble.
\textsuperscript{15} von Mehren, \textit{supra} note 9, at 992.
\textsuperscript{17} 107 S. Ct. 2542 (1987) [hereinafter \textit{Aérospatiale}].
\textsuperscript{18} \textit{Id.} at 2546.
\textsuperscript{19} \textit{Id.} at 2553.
\textsuperscript{20} \textit{See infra} text accompanying notes 21-52.
This Note examines the ramifications of *Aérospatiale* on the international discovery process. As background to the discussion of *Aérospatiale*, this Note initially explores the problems associated with gathering evidence abroad, which arise from conflicting substantive and procedural national customs and from the existence of foreign legislation designed to curb intrusive American discovery procedures. Second, this Note provides an overview of the history and relevant procedures of the Hague Evidence Convention. Next, this Note reviews the conflicting lines of precedents that emerged prior to *Aérospatiale* concerning the application of the Hague Evidence Convention, as well as the evolution of the Supreme Court’s current position on the Convention. The analysis of *Aérospatiale* follows. Finally, since the Court failed to provide any guidance for lower courts on how to assess whether the Hague Evidence Convention should be used, this Note proposes guidelines to assist trial courts in that determination.

II. THE DIFFICULTIES ASSOCIATED WITH OBTAINING EVIDENCE ABROAD

A. Conflicting Legal Systems

Obtaining evidence abroad is required in a variety of situations. Over the past decade, the United States government’s ability to gather evidence abroad has been crucial to its efforts to enforce antitrust laws and to investigate and prosecute securities violations. Private products liability disputes involving foreign nationals are also increasing as global economic interdependence intensifies.

Most often, evidence is needed from nonparty witnesses located abroad. In these circumstances, domestic litigants expect to be sub-

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21. Carter, *supra* note 2, at 8. Although extraterritoriality problems arise in many areas of the law, including antitrust, securities regulation and tax, this Note focuses only on the issues that relate to private litigation of tort, contract and commercial disputes.


If the witness is an American citizen or resident located abroad, a jurisdictional basis for the issuance of a subpoena directing appearance in this country may be found in 28 U.S.C. § 1783. There is no reported record of the use of this power to direct an American subpoena to a resident alien located outside the United States, however. *Id.* n.6. The uniform procedures of the Hague Evidence Convention have been considered particularly useful for obtaining evidence from non-party witnesses. See generally *id.* at 9-17.
jected to the procedural and substantive constraints of a foreign jurisdiction. Frequently, however, discovery is sought from foreign litigants over whom an American court has asserted personal jurisdiction. In these instances, courts and lawyers often encounter difficulties in obtaining evidence in countries with markedly different legal systems. Conflicts arise both as to the scope of evidence sought and the procedures by which evidence is obtained.

The first source of conflict in transnational discovery disputes concerns the scope of the evidence sought by American litigators. American discovery practices are the most extensive in the world. Pre-trial discovery includes “both the process by which counsel learn about the facts in issue and the methods by which they preserve testimony, obtain written admissions and authenticate documents for introduction at trial.” Ordinarily, both functions are accomplished simultaneously with pre-trial investigation overlapping with the preparation of relevant evidence in a suitable form for introduction at trial. Under Federal Rule of Civil Procedure 26(b)(1), “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [as long as] the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” This broad scope of discovery often produces evidence that is neither material nor relevant, and thus proves inadmissible at trial.

In other common-law countries, pre-trial procedures generally only permit discovery of matters that are relevant for trial. In England, for example, although disclosure and production of documents are required of all parties routinely, interrogatories are only available by court order, and discovery from non-parties is generally not allowed. Depositions are rarely used and are only available when answers to

25. Id. at 8.
26. LETTER OF SUBMITTAL TO THE PRESIDENT OF THE UNITED STATES ON THE CONVENTION ON TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, SEN. EXEC. DOC. A, 92d Cong., 2d Sess., VI (1972) [hereinafter LETTER OF SUBMITTAL].
27. S. SEIDEL, supra note 5, at 21 (citing von Mehren, Discovery of Documentary and Other Evidence in a Foreign Country, 77 AM. J. INT’L. L. 896 (1983)).
29. Id.
30. FED. R. CIV. P. 26(b)(1).
32. Id.
34. Id. at 12-16, 193.
35. S. SEIDEL, supra note 5, at 24. In Collins, Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States, 13 INT’L LAW. 27 (1979), the
interrogatories are insufficient.\textsuperscript{36} In civil-law systems, such as France and Germany, it is the judge, during trial, who determines the type and scope of evidence that must be produced.\textsuperscript{37} The concept of a “pre-trial discovery phase” does not exist in the civil-law system.\textsuperscript{38} In civil-law litigation, “the issues are defined as the proceeding goes on.”\textsuperscript{39} Each appearance before the judge usually consists of examining one witness or introducing one or two pieces of relevant evidence.\textsuperscript{40} Therefore, discovery and pre-trial procedures are less important because there is “little, if any, tactical or strategic advantage to be gained from the element of surprise.”\textsuperscript{41} Civil-law lawyers often have difficulties determining when an “action” has “commenced” in a common-law court.\textsuperscript{42} They understand the term “discovery” to mean all investigation that occurs prior to the initiation of a lawsuit.\textsuperscript{43} These conceptual and linguistic differences have produced misunderstandings and intensified foreign reluctance to cooperate with American pre-trial discovery requests.\textsuperscript{44}

The author explains the essential differences between discovery procedures in the United States and England:

First, English pleadings, the equivalent to the complaint and answer in the United States, have a far greater particularity than their American counterparts, the length of which is sometimes, if not always, matched by their vagueness. Second, English discovery is limited largely (although not necessarily exclusively) to the discovery of documents—each party, once the pleadings are finalized, has to disclose to the other all relevant unprivileged documents relating to the issues in its possession. If a party makes insufficient discovery, then the other party may apply by affidavit to the court for an order for fuller disclosure—but the discovery procedure (it must be emphasized) is not oral, and does not extend to third parties. Third, there is, except in rare situations, such as libel cases, no jury in civil proceedings in England.

\textit{Id.} at 27-28. \textit{See generally} J. \textsc{Levine}, \textit{supra} note 33, at 95-111.

36. J. \textsc{Levine}, \textit{supra} note 33, at 8, 61-67.
37. \textit{See} Borel \& Boyd, \textit{supra} note 5, at 36-37; Shemanski, \textit{supra} note 7, at 466-67. In J. \textsc{Merryman}, \textit{supra} note 2, the author notes that in civil-law systems other than France and Germany, the questions put to a witness by the judge during the civil proceeding are often based on questions submitted in writing by counsel for the parties. \textit{Id.} at 114-15.

38. J. \textsc{Merryman}, \textit{supra} note 2, at 112-14; \textit{see supra} note 2.

A typical civil proceeding in a civil-law jurisdiction is divided into three separate stages. There is a brief preliminary stage, in which the pleadings are submitted and a hearing judge (usually called the instructing judge) appointed; an evidence-taking stage, in which the hearing judge takes the evidence and prepares a summary written record; and a decision-making stage, in which the judges who will decide the case consider the record transmitted to them by the hearing judge, receive counsel’s briefs, hear their arguments, and render decisions.

J. \textsc{Merryman}, \textit{supra} note 2, at 111-12. \textit{See generally} \textit{id.} at 111-23 for further comparison of civil-law and common-law practices.

39. J. \textsc{Merryman}, \textit{supra} note 2, at 113.
40. \textit{Id.}
41. \textit{Id.}
42. Carter, \textit{supra} note 2, at 6.
43. \textit{Id.}
44. \textit{Id.}
A second source of conflict arises from the procedures used to obtain evidence in different legal systems. In common-law countries, including the United States, pre-trial discovery is conducted primarily by the parties, and the role of the court is to "enforce applicable rules, resolve procedural disputes, and protect against potential abuse." In civil-law countries, an "inquisitorial" rather than an "adversarial" system of justice exists. Judges, not the parties or the lawyers, question witnesses and take evidence as a component of the trial itself. Only the judge may compel witnesses to appear and give testimony. Oral testimony is never transcribed verbatim; rather, the judge dictates a summary of the testimony to the court clerk.

Procedural differences therefore create two serious problems for the American litigator seeking evidence abroad. First, an American lawyer who conducts an unsupervised deposition or inspects documents abroad, according to American custom, may violate the "judicial sovereignty" of a foreign state by improperly performing a public judicial act. Second, evidence collected abroad may be produced in a form that is inadmissible in an American court.

B. Foreign Blocking Legislation

American litigators are often confronted by a more serious obstacle in attempting to secure information, documents and witness testimony
abroad: foreign nondisclosure laws. Commonly known as "blocking statutes," these laws are "designed to take advantage of the foreign government compulsion defense." They prohibit the "disclosure, copying, inspection or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities."

Blocking statutes cover a variety of situations. At a minimum, they prohibit foreign nationals from disclosing information that is considered vital to foreign sovereign interests, or information considered secret under foreign law. Violators are usually subject to criminal penalties, including fines and imprisonment. Foreign blocking legislation has been enacted by many nations over the past thirty years primarily in response to the extraterritorial application of American antitrust and securities laws. Although blocking statutes were originally intended to protect foreign commercial interests against the unilateral application of American economic policies, the statutes' broad prohibitions are now invoked in private commercial litigation to preclude disclosure of potentially harmful information to adverse parties.

Foreign reliance on a blocking statute typically occurs in the following situation: an American litigant who has filed suit in a federal court


54. RESTATEMENT (REVISED), supra note 1, § 437 reporters' note 4. The doctrine of foreign government compulsion consists of the notions that (1) a foreign national may not be required to do an act in the state of which he is a national if it is prohibited by the law of that state; and (2) a foreign national may not refrain from doing an act in the state of which he is a national if it is required by the law of that state. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 436 (Tent. Draft No. 6, Apr. 12, 1985).

55. RESTATEMENT (REVISED), supra note 1, § 437 reporters' note 4.

56. S. SEIDEL, supra note 5, at 33. Examples include information in connection with antitrust claims in which treble damages are unheard of in the foreign country or disclosure of information in bank secrecy situations. Id. at note.

57. RESTATEMENT (REVISED), supra note 1, § 437 reporters' note 4.

58. Carter, supra note 2, at 7. Blocking legislation has also been inspired by disputes relating to admiralty, oil, uranium and aviation. S. SEIDEL, supra note 5, at 33-34. "Some 15 states as of 1985 had adopted legislation expressly designed to counter U.S. efforts to secure production of documents situated outside the United States; other states, such as Switzerland, have had bank and business secrecy laws in effect for longer periods and not directed specifically against the United States." RESTATEMENT (REVISED), supra note 1, § 437 reporters' note 1.


60. See Brief of Amicus Curiae the Republic of France in Support of Petitioners at 10-12, Société Nationale Industrielle Aérospatiale v. United States District Court, 107 S. Ct. 2542 (1987) (No. 85-1695) (France's blocking law applies to pre-trial discovery in any matter pending outside France); D. ROSENTHAL & W. KNIGHTON, supra note 3, at 75-76; Batista, supra note 53, at 66.
serves document requests, interrogatories or a notice of deposition pursuant to the Federal Rules of Civil Procedure on a foreign party over whom the court has personal jurisdiction. The adverse party typically responds by stating that no information can be disclosed because compliance with the request may lead to the imposition of criminal penalties under foreign law. The American litigant may then seek an order compelling responses, which is generally ineffective. A litigant can attempt to enforce the order against the foreign adversary by seeking a variety of sanctions. Nevertheless, American courts, when faced with the difficult, if not insurmountable task of balancing the competing sovereign and pri-

61. Batista, supra note 53, at 62. In Batista, supra note 53, at 63-72, the author reviews the most frequently invoked blocking statutes:

1. Australia, Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Austl. Acts No. 121 (broad prohibition of disclosures related to uranium production);


3. England, Protection of Trading Interests Act, 1980, ch. 187. "Enacted in response to U.S. antitrust proceedings in the uranium and shipping industries, this legislation is an arsenal of legal devices to counter extraterritorial legislation and proceedings seen to infringe on British sovereignty. On the subject of discovery, section 2 authorizes the British Secretary of State for Trade to issue orders prohibiting, inter alia, the furnishing of commercial information or documents by any person in the U.K. to any foreign court, tribunal or authority if the foreign directive to provide such information or document 'infringes [on] the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom.'" S. SEIDEL, supra note 5, at 335-36 (citing British Protection of Trading Interests Act, 1980, ch. 11, § 2(2)(a));

4. France, Pub. Law No. 80-538, 1980 J.O. 1799, 1980 D.S.L. 285 (July 17, 1980). The legislative history of this law clearly demonstrates that it was "designed as an effort to preclude pre trial discovery of French nationals involved as parties in American litigation." Batista, supra note 53, at 65; see also Toms, French Response to U.S. Antitrust Laws, 15 INT'L LAW. 585, 588-90 (1981). The law applies to "forbid most business-related communications, if harmful to France, to foreign public authorities by persons having a presence in France, and to prohibit the gathering in France of business-related information with a view to foreign litigation." Id. at 586;

5. South Africa, Atomic Energy Act, § 30A(1)(a), 1978 (precludes the disclosure of any information connected to the production, exportation, refinement, possession, ownership of source materials or derivatives thereof).

62. Batista, supra note 53, at 62-63. The requesting party is entitled to move for an order compelling responses pursuant to FED. R. CIV. P. 37(a).

63. Pursuant to FED. R. CIV. P. 37(b), possible sanctions include the entry of a default judgment, striking pleadings or defenses, precluding the introduction of evidence, drawing adverse inferences at trial, fines, property forfeitures, impositions of fees and any other reasonable and constitutional sanction.

Of course, a litigant may forego bringing a costly, and probably futile, motion to compel, and alternatively attempt to obtain needed information from domestic subsidiaries which may have access to the same information, or from other parties to the litigation who may be in a more favorable position of producing the information. Batista, supra note 53, at 62.
vate interests involved, rarely impose "effective sanctions to enforce orders of disclosure."\textsuperscript{64}

The existence and use of foreign blocking legislation intensifies the difficulties experienced by American litigators seeking evidence from foreign litigants. The problem also affects many foreign nationals who are faced with a choice between refusing to comply with the requirements of a United States court or facing criminal sanctions for violation of their own domestic nondisclosure laws.\textsuperscript{65} By relying on the Hague Evidence Convention to gather evidence abroad, domestic litigants often can circumvent applicable blocking statutes. The French blocking statute, in particular, is subject to existing treaties and can not be invoked if a request is made pursuant to the Convention.\textsuperscript{66} However, when discovery proceeds pursuant to state or federal rules of civil procedure, the interplay between domestic and foreign laws creates complex international dilemmas.\textsuperscript{67}

\textsuperscript{64} Batista, \textit{supra} note 53, at 63; S. \textsc{Seidel}, \textit{supra} note 5, at 36. The principal case concerning the imposition of sanctions when foreign blocking legislation and domestic discovery orders conflict is \textit{Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers}, 357 U.S. 197 (1958). See \textit{infra} notes 554-57 and accompanying text for a discussion of \textit{Rogers}. The \textit{Restatement (Revised)}, \textit{supra} note 1, § 437 reporters' note 8 states:

Subsequent [to Rogers] U.S. cases have drawn on different aspects of the Supreme Court's opinion. Some have focused on the requirement of good faith in attempting to secure permission to disclose documents covered by foreign secrecy laws, . . . others have focused on the Court's unwillingness to use the ultimate sanction of dismissal in instances of foreign government compulsion; still others have applied the Court's suggestion that inferences unfavorable to the non-producing party may be drawn even if that party is not at fault; and some have stressed the Court's emphasis on a case-by-case approach and reliance on discretion of the district court.

\textit{Id.}

\textsuperscript{65} As one commentator has observed:

This dilemma is particularly acute for corporations that may have subsidiaries, affiliates, or licensees in a large number of countries. An attempt by one country to use its power over a corporation or the corporation's employees and property located in its territory to compel acts to be done in the territory of a foreign state that are illegal under the latter's laws places the corporation or its officers or employees in a situation in which they cannot avoid committing a crime in one of the countries.

\textit{Oxman, supra} note 12, at 750 n.46.

\textsuperscript{66} See \textit{infra} notes 563-65 and accompanying text.

\textsuperscript{67} S. \textsc{Seidel}, \textit{supra} note 5, at 37. The problem of foreign blocking legislation has generated a tremendous amount of controversy and comment. It is not the purpose of this Note to attempt to resolve the issues raised by the application of foreign blocking legislation; however, recognizing the problems created by nondisclosure laws is vital to understanding the complexity of transnational discovery disputes.
III. THE HAGUE EVIDENCE CONVENTION

A. History and Purpose of the Convention

The Hague Conference on Private International Law is an association of sovereign states which has conducted sessions periodically since 1893. The United States began participating as a member in 1964 pursuant to congressional authorization. In 1965, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) was adopted. It was subsequently ratified by the Senate in 1967. The Hague Service Convention is currently the exclusive means by which judicial and extrajudicial documents can be served abroad. "Because of widespread support attracted by the [Hague] Service Convention and the long-standing interest of American lawyers in improving procedures for international judicial assistance, the United States took the initiative in proposing a complementary convention on the taking of evidence abroad."

At the urging of the State Department and Department of Justice, the Hague Conference organized a Special Commission to prepare a draft of the Hague Evidence Convention. The Advisory Committee on Private International Law formed a working group of experts to assist the Special Commission in preparing the Convention. The working group consisted of practicing attorneys, professors and lawyers in the Department of Justice and the State Department. The Special Commission

69. Id. (citing LETTER OF SUBMITTAL TO THE PRESIDENT OF THE UNITED STATES ON THE CONVENTION ON TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, SEN. EXEC. DOC. A, 92d Cong., 2d Sess., V (1972)).
71. Id. at art. 1.
72. STATEMENT OF CARL F. SALANS, Deputy Legal Adviser, Department of State, Convention on Taking of Evidence Abroad, S. Exec. Rep. No. 95, 92d Cong., 2d Sess., 3 (1972) [hereinafter STATEMENT OF CARL F. SALANS].
73. Aérospatiale, 107 S. Ct. at 2548.
75. Id. at 805. The expert working group was comprised of: Philip W. Amram, Chairman; Michel A. Coccia of Baker and McKenzie, Chicago; Richard D. Kearney, Department of State; Lucien R. Le Lièvre, Coudert Brothers, New York; Arthur R. Miller, Professor of Law, Michigan Law School; Bruno A. Ristau, Civil Division, Department of Justice; Alvin J. Rockwell, Brobeck, Phleger and Harrison, San Francisco; Rudolf B. Schlesinger, Professor of Law, Cornell Law School; and Frederick Smith, Jr., Deputy Administrator, Bureau of Security and Consular Affairs, Department of State. Id.
produced a complete draft of the Convention, accompanied by a seventy-three page explanatory report. The final text of the Convention was approved by the Hague Conference in 1968 without a dissenting vote. It was signed on behalf of the United States in 1970, and ratified by a unanimous vote of the Senate in 1972. Presently, eighteen governments, including the United States, are parties to the Hague Evidence Convention.

The Hague Evidence Convention was designed to "bridge [the] differences between the common-law and civil-law approaches to the taking of evidence abroad." Prior to adopting the Convention, the United States had a liberal policy of international judicial assistance to help foreign parties obtain evidence in the United States for use abroad. Title 28, United States Code sections 1781 and 1782, and Public Law 88-619, provided an open system of assistance to foreign parties without requiring reciprocity. On the other hand, since the civil-law nations viewed evidence gathering as a judicial function, with the parties in the subordinate position of assisting the courts, many countries insisted that American litigants use complicated and expensive letters rogatory or letters of request to collect evidence within their borders. Many nations simply refused to provide meaningful judicial assistance in the absence of a treaty or convention.

76. Id.
77. Amram, supra note 73, at 104.
78. Aérospatiale, 107 S. Ct. at 2549 (citing 118 CONG. REC. 20623 (1972)).
80. LETTER OF SUBMITTAL, supra note 26, at VI. Prior to ratification, the Department of State expressed its support for the compromises embodied in the Convention:

The success of the Conference in working out a convention to improve procedures for taking evidence abroad is perhaps attributable in large measure to the difficulties experienced by courts and lawyers in obtaining evidence in countries with markedly different legal systems. In many cases existing procedures were not only complicated and expensive; once the evidence was obtained it was frequently in a form that was without value in the requesting state.

82. 78 Stat. 995 (1964).
84. Id. at 806.
86. Id.
The Convention established a system for obtaining evidence abroad that would be "tolerable" to the state executing the request but would produce "utilizable" evidence in the requesting state. The United States did not expect the European countries to change their policies and local procedures to fully conform to our domestic practices. Rather, all signatories were expected to agree, in international litigation, to follow as closely as possible the procedures of the requesting state. The Convention was intended to provide a set of minimum standards with which all contracting states agreed to comply. Significantly, the Convention was designed to preserve the availability of all internal domestic laws of each signatory state that were more flexible than Convention procedures. A focal point in the negotiations was the agreement embodied in Article 27 of the Convention. If the existing domestic laws of a responding state provided more flexible procedures than the Convention to enable a litigant to collect evidence, those domestic procedures remained available to a requesting party.

Prior to ratification of the Convention, the drafters emphasized that the existing United States policy of liberal international judicial assistance would remain unaffected. The drafters asserted that the Convention was designed to:

1. Make the employment of letters of request a principal means of obtaining evidence abroad;
2. Improve the means of securing evidence abroad by increasing the powers of consuls and by introducing in the civil law world, on a limited basis, the concept of the commissioner;
3. Provide means for securing evidence in the form needed by the court where the action is pending; and
4. Preserve all more favorable and less restrictive practices arising from internal law, internal rules of procedure and bilateral or multilateral conventions.

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87. Id. (citing P. Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Rep. A, 92d Cong., 2d Sess., 11 (1972)). The Letter of Submittal from Secretary of State William P. Rogers to President Nixon explained that the Convention was designed to:

1. Make the employment of letters of request a principal means of obtaining evidence abroad;
2. Improve the means of securing evidence abroad by increasing the powers of consuls and by introducing in the civil law world, on a limited basis, the concept of the commissioner;
3. Provide means for securing evidence in the form needed by the court where the action is pending; and
4. Preserve all more favorable and less restrictive practices arising from internal law, internal rules of procedure and bilateral or multilateral conventions.

LETTER OF SUBMITTAL, supra note 26, at VI.

88. Amram, supra note 85, at 655; see also 1969 Report of the United States Delegation, supra note 74, at 806.
90. LETTER OF SUBMITTAL, supra note 26, at VI (emphasis added); see also Amram, supra note 85, at 655.
91. Amram, supra note 80, at 107; Amram, supra note 85, at 655.
92. See infra notes 452-64 and accompanying text.
93. Amram, supra note 80, at 107.

Philip Amram observed:

For instance, the liberal and open practice in the United States under 28 U.S.C. § 1782, Section 3.02 of the Uniform Interstate and International Procedure Act and the law in most of the fifty states will remain unchanged. Any changes in the details of internal United States practice will be minimal, while the assistance to United States courts and litigants in other nations will be enlarged.
tion "makes no major changes in United States procedure and requires no major changes in United States legislation or rules." The drafters observed that the Federal Rules of Civil Procedure had been amended to modernize domestic practices. The Convention was expected to complement the Federal Rules and provide reliable and modern discovery procedures for use in international litigation. The drafters also contemplated that the Convention might be supplemented by bilateral side agreements and side conventions.

The drafting and negotiating history of the Convention reflects that the civil-law nations agreed to radically modify their existing practices in an effort to reach a novel solution to the international discovery problem. On the other hand, the United States had “everything to gain” by ratifying the Convention and had to make very few changes in its policies in order to comply with the Convention’s terms.

B. Overview of Convention Procedures

1. Procedures for obtaining evidence abroad

The Hague Evidence Convention entitles a party to seek judicial assistance in “civil or commercial matters.” Each signatory state is required to designate a “Central Authority,” which is responsible for receiving requests and transmitting them to the proper executing authority. Three different procedures are available for obtaining evidence

Id. n.8.
95. STATEMENT OF CARL F. SALANS, supra note 72, at 5.
96. Amram, supra note 80, at 105.
97. Amram, supra note 85, at 655.
98. Amram, supra note 80, at 106-07. Amram recounted that:

One of the great failures in the prior practice was the difficulty or impossibility of securing subpoena assistance from courts abroad to require a recalcitrant witness to appear to give his testimony in aid of a U. S. proceeding. Article 10 of the Convention provides, in mandatory terms that "appropriate" compulsion must be exercised to compel a recalcitrant witness to respond to letters of request to the same extent that compulsion would be provided by the requested court under the same circumstances in a domestic proceeding in its own court. This is a vast benefit, heretofore unknown.

Id.
99. Amram, supra note 85, at 655.
100. 1969 Report of the United States Delegation, supra note 74, at 808; Amram, supra note 80, at 105.
101. Hague Evidence Convention, supra note 13, at art. 1. This Note only provides a basic overview of the procedures contained in the Hague Evidence Convention and is not intended as an exhaustive explanation of all of its terms and conditions. For a more comprehensive discussion of the Convention, see generally B. RISTAU, supra note 16; Oxman, supra note 12; McLean, supra note 8; Bett, supra note 10.
102. Hague Evidence Convention, supra note 13, at art. 2. The designated “Central Authority” for each contracting state is set forth in the declarations following the text of the
abroad, and are set forth in Chapters I and II (Articles 1-22) of the
Convention.

First, a Letter of Request, commonly known as an international let-
ter rogatory, may be forwarded to the Central Authority of a foreign
state for execution. A Letter of Request is the method most likely to
produce evidence from a reluctant witness, since a foreign judicial au-
thority may use its power to compel a witness to respond. Second,
diplomatic or consular officials (consuls) may obtain evidence. Cons-
uls are restricted to taking evidence for use only in proceedings com-
mened in the courts of a State which they represent. Consuls may,
however, take evidence for other purposes from their own nationals,
or from a national of the host state, provided that the evidence is not
obtained under compulsion. Third, evidence may be obtained through
the appointment of an official commissioner. To the extent permitted
by law, an American attorney can be appointed as a commissioner to
obtain evidence personally. Commissioners are permitted to take evi-
dence without compulsion from all types of witnesses, whether or not the
witness is a national of the host state, for use in “proceedings commenced
in the courts of another Contracting State.” When necessary, consuls

103. Articles 1 through 14 of Chapter I of the Convention deal with Letters of Request and
regulate their form, content, methods of transmission, language, method and technique of ex-
ecution, compulsion, privileges, grounds for refusal to execute the letter and costs. B. RISTAU,
supra note 16, § 5-3, at 179.
104. Hague Evidence Convention, supra note 13, at art. 10; see also Borel & Boyd, supra
note 5, at 38.
105. Hague Evidence Convention, supra note 13, at arts. 15 & 16.
106. Id. at art. 15.
107. Id. at art. 15. A consul is not required to seek permission from the host state to take
evidence from a national of his own state unless the host state has filed a declaration to that
effect. Id.
108. Id. at art. 16. A consul must obtain the permission of the competent authority in the
host state prior to taking evidence from a national of the host state; however, this requirement
may be waived by declaration. Id.
109. Id. at arts. 15 & 16.
110. Id. at art. 17.
111. See Borel & Boyd, supra note 5, at 42.
112. Hague Evidence Convention, supra note 13, at art. 17. A commissioner must obtain
the permission of the host state prior to taking evidence under Article 17; however, this re-
quirement may be waived by declaration. Id.
or commissioners can apply to the appropriate judicial authority in a host state for assistance in obtaining the evidence by compulsion. The use of a consul or commissioner is likely to be easier and quicker than a Letter of Request since neither requires the involvement of a foreign court. Nevertheless, both methods are generally effective only in cases in which a witness is willing to be deposed or produce requested evidence.

2. Article 23 and Article 27

Chapter III (Articles 23-42) contains the general clauses pertaining to the operation of the Convention. This section covers details regarding the Central Authority and contains provisions as to when a state may derogate from the Convention's procedures. Two general provisions, Article 23 and Article 27, have proven to be the most controversial aspects of the Convention.

Article 23 provides that "[a] Contracting state may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Fourteen countries have filed declarations pursuant to Article 23, out of apparent distrust of sweeping American pre-trial discovery procedures. Many American

113. Id. at art. 18. Any compulsory measures must be “appropriate” and prescribed by the host state by its law for use in internal proceedings. Id.
114. Borel & Boyd, supra note 5, at 38.
115. B. Ristau, supra note 16, § 5-3, at 179.
116. See infra text accompanying notes 426-64.
117. Hague Evidence Convention, supra note 13, at art. 23 (emphasis added). The term "Contracting state" refers to a country that is either an original party to the Convention or a country that later acceded to the Convention and agreed to be bound by its terms. The original states that were entitled to become parties to the Convention were those states which were represented at the Eleventh Session of the Hague Conference on Private International Law. B. Ristau, supra, note 16, § 5-2, at 178. After the Convention entered into force, "any other state may accede to the Convention if it is a member of the Hague Conference, or a member of the United Nations or one of its specialized agencies, or if it is a party to the Statute of the International Court of Justice . . . ." Id. Later accession is not automatic. Id. It is effective only "between the acceding state and those other states which affirmatively file a 'declaration' accepting the accession. As to states which file no such declaration, the accession will have no effect . . . ." Id.
118. Cyprus, Denmark, Finland, France, Federal Republic of Germany, Italy, Luxemburg, Monaco, Netherlands, Norway, Portugal, Singapore, Sweden and the United Kingdom have filed declarations pursuant to Article 23. Hague Evidence Convention, supra note 13.
courts have decided that this provision serves as an escape mechanism for foreign litigants who are attempting to avoid disclosure of pertinent documentary evidence. Consequently, the existence of Article 23 has fostered the belief that the Convention does not create a binding obligation to use its procedures exclusively; therefore, litigants are entitled to rely on their country's existing domestic rules of civil procedure to obtain evidence abroad.

Article 27 has also precipitated conflicting interpretations of how the Convention was intended to operate. It states:

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

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

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Many American courts have based their interpretation of the Convention on the existence of Article 27. They have reasoned that the text of Article 27 indicates that the Convention was intended to provide...
supplementary procedures for American litigants and to preserve use of alternative internal methods under the Federal Rules of Civil Procedure and state procedural rules. American courts, including the majority in *Aérospatiale*, have reasoned that the language of Article 27 demonstrates that the parties to the Convention intended to preserve existing internal policies to permit both a requesting state and a state of execution to gather evidence pursuant to more liberal internal methods. Therefore, domestic litigants have continued to rely on the familiar procedures and enforcement devices of the Federal Rules of Civil Procedure, thereby frustrating the goals and operation of the Hague Evidence Convention.

The history of the negotiation and ratification of Article 27 shows that the provision was directed only at states of execution to ensure that executing states could permit evidence to be taken in accordance with less restrictive internal procedures other than those provided for in the Convention. This Note will analyze the conflict over Articles 23 and 27 and demonstrate that they were not designed to enable contracting states to abrogate the Convention unilaterally, or to enable litigants to obtain evidence abroad pursuant to domestic rules in disregard of established Convention procedures.

**IV. JUDICIAL DECISIONS PRIOR TO AÉROSPATIALE**

Since the United States ratified the Hague Evidence Convention in 1972, the question of how the Convention interacts with existing state and federal rules of civil procedure has remained unsettled. The state and federal courts that have addressed the issue have disagreed on the effect of the Convention on domestic law. In particular, the conflict over the Convention’s relationship to the Federal Rules of Civil Procedure has produced divergent opinions on the proper use of the Convention by United States litigants. Most courts agree that the Hague Evidence

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124. See *Aérospatiale*, 107 S. Ct. at 2552-53 & n.24 (1987); see cases cited supra note 123.

125. *Id.* According to this interpretation, an American litigant would be entitled to gather evidence abroad pursuant to the Federal Rules or analogous state rules without resorting to the Convention at all. See infra text accompanying notes 452-64.

126. See generally P. Amram, EXPLANATORY REPORT ON THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, S. Exec. Rep. A, 92d Cong., 2d Sess., 11 (1972) [hereinafter P. Amram, EXPLANATORY REPORT]. “[A]ny act provided for in the Convention may be performed upon less restrictive conditions... if the internal law or practice of the State of execution so permits.” *Id.* at 39-40.

127. See infra text accompanying notes 426-64.

128. Many commentators have discussed the various judicial interpretations of the Convention that have developed since its ratification. Mr. Bruno Ristau separates the decisions into three categories for discussion: mandatory use, optional use and first-use. See B. Ristau, supra note 16, § 5-40, at 256.1. Alternatively, James S. McLean analyzes the cases in terms of
Convention, by its terms, does not provide the exclusive means of obtaining evidence abroad.\textsuperscript{129} Disagreement has centered on whether principles of international comity compel first resort to the Convention, or whether a court that has personal jurisdiction over a foreign party may ignore the Convention and rely on domestic rules of civil procedure.

\textbf{A. Discretionary Use of Convention Procedures}

The more widely-held judicial view is that the “Hague Convention does not supplant the application of the discovery provisions of the Federal Rules over foreign... nationals\[\] subject to in personam jurisdiction in a United States Court.”\textsuperscript{130} This conclusion is based primarily on the concern over interference with the jurisdiction of our courts. The court in \textit{Graco, Inc. v. Kremlin, Inc.}\textsuperscript{131} explained:

If interpreted as preempting routine interrogatories and document requests, the Convention really would be much more than an agreement on taking evidence abroad, which is what it purports to be. Instead, the Convention would amount to a major regulation of the overall conduct of litigation between

nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of the court in which the litigation is begun. . . . Treating the Convention procedures as exclusive would make foreign authorities the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court.\textsuperscript{132}

The \textit{Graco} court reasoned that the existence of an Article 23 declaration by a foreign sovereign gives that foreign authority the "significant prerogative of determining how much discovery may be taken from their nationals who are litigants before American courts," thereby diminishing the power of an American court to ensure that discovery requests are complied with.\textsuperscript{133}

Other courts have reasoned that discovery of documents that are located in the territory of a foreign nation does not, in itself, constitute the taking of evidence abroad, since the documents ultimately must be physically \textit{produced} in the United States.\textsuperscript{134} Therefore, discovery is considered to be taking place in the United States and, consequently, is not governed by the Hague Evidence Convention.\textsuperscript{135}

Some courts have concluded that requiring American litigants to use the Hague Evidence Convention may encourage foreign parties to conceal information, and confer an unfair evidentiary advantage over their American opponents. In this situation:

[i]f the foreign party would have full discovery of his opponent under the Federal Rules of Civil Procedure, while the American litigant would be forced to rely upon Hague Convention procedures. Should the foreign government prove unwilling to

\begin{thebibliography}{134}
\bibitem{id.} \textit{Id.} at 521-22.
\bibitem{id.} \textit{Id.} at 522.
\bibitem{in re Messerschmitt} In \textit{re Messerschmitt}, 757 F.2d at 731. The courts contend that what is required of foreign litigants consists merely of acts preparatory to the giving of evidence. The only act performed by the foreign litigant abroad is the selection of the relevant documents to be produced. The actual production of documents or other evidence takes place in the United States. Therefore, it is argued that such actions cannot possibly intrude on the judicial sovereignty of a foreign tribunal since no involvement by the foreign tribunal is required. \textit{See supra} note 134. In \textit{Aérospatiale}, 107 S. Ct. 2542 (1987), the Court rejected this interpretation of the Convention. \textit{See infra} note 533.
\end{thebibliography}
carry out discovery requests under the Convention, the American litigant would be unable to prepare its case against the fully-prepared foreign party.\textsuperscript{136} This line of reasoning has led some courts to conclude that the Convention simply does not apply when the court has personal jurisdiction over the foreign party.\textsuperscript{137} Other courts have decided that use of the Convention is discretionary, and a decision to require its use must be based on a case-by-case comity analysis to be performed by the trial court.\textsuperscript{138}

B. First-Use of Convention Procedures

A substantial but less influential group of courts have held that although the Hague Evidence Convention is not the exclusive means of obtaining evidence abroad, considerations of international comity require that its procedures be used in the first instance.\textsuperscript{139} In Volkswagenwerk Aktiengesellschaft v. Superior Court,\textsuperscript{140} the California Court of Appeal recognized a distinction between the court's power over the parties based on personal jurisdiction and the power to compel discovery abroad in contravention to agreed upon international procedures:

\begin{quote}
[I]n cases such as this American courts traditionally and properly recognize the countervailing force of international comity: [t]he concept that the courts of one sovereign state should not, as a matter of sound international relations, require acts or forebearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that
\end{quote}

\begin{quote}
\textsuperscript{136} In re Messerschmitt, 757 F.2d at 731; see also Sociite Nationale Industrielle Aérospatiale, 788 F.2d at 411.
\textsuperscript{137} See, e.g., Sociite Nationale Industrielle Aérospatiale, 782 F.2d at 120; In re Anschutz, 754 F.2d at 611; In re Messerschmitt, 757 F.2d at 731; Work, 106 F.R.D. at 50-51; Lowrance, 107 F.R.D. at 387-89; Wilson, 108 A.D.2d at 395, 489 N.Y.S.2d at 575.
the order is justified. Rulings based in this concept of international comity are dictated not by technical principles of jurisdiction of the parties to . . . particular lawsuits, but rather by exercise of judicial self-restraint in furtherance of policy considerations which transcend individual lawsuits.\textsuperscript{141}

\textit{Volkswagenwerk} thus emphasized that acquiring personal jurisdiction over a foreign party does not empower a court to interfere with the judicial administration and public policy of a foreign state.

Courts have noted that first resort to the Convention does not subject a plaintiff to the "vagaries of a foreign government's whims."\textsuperscript{142} Since the terms of the Convention require "cooperative and expeditious responses," domestic courts can expect that foreign tribunals will do all within their power to secure compliance by their nationals.\textsuperscript{143} Moreover, if initial attempts at discovery under the Convention prove fruitless, it is argued that domestic courts retain their powers to impose sanctions for noncompliance, or order alternative discovery pursuant to domestic rules of civil procedure.\textsuperscript{144}

Finally, a trial court's ability to perform a neutral and balanced comity analysis, which devotes adequate consideration to foreign interests, has been questioned:

Lacking definite standards, a trial court is often swayed by the immediacy of the discovery demands made by the litigant standing before it, and there is a tendency to dismiss countervailing considerations as merely abstract or hypothetical questions of judicial sovereignty. . . . [B]ecause the question of whether to require adherence with the Convention's procedures generally arises in discovery, courts are often called upon to balance comity considerations on the basis of a scanty factual record. As a result, their findings are often conclusory and result-oriented.\textsuperscript{145}

\textsuperscript{141} 123 Cal. App. 3d at 857, 176 Cal. Rptr. at 884.
\textsuperscript{142} Starcher, 328 S.E.2d at 503 (citing Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) at 17,224 (N.D. Ill. 1983)).
\textsuperscript{143} Id.
\textsuperscript{144} Starcher, 328 S.E.2d at 506.
\textsuperscript{145} Petition for a Writ of Certiorari at 17, Société Nationale Industrielle Aérospatiale v. United States District Court, 107 S. Ct. 2542 (1987) (No. 85-1695) (citation omitted).

For example, several courts have reached the conclusion that requiring a litigant to employ the Convention's procedures would be "futile" on the basis of little or nothing more than a declaration under article 23, which states that a Party may reserve the right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." This provision, however, was not intended to preclude U.S. litigants from obtaining necessary evidence from abroad, but rather to prevent discovery of a "fishing expedition" nature.
The inconsistencies that may result from flexible case-by-case comity determinations in lower courts, coupled with concerns over uniformity and international cooperation, have persuaded many courts that the Convention should always be used first to gather evidence abroad.

C. The Supreme Court's position prior to Aérospatiale

Although Aérospatiale is the first case that the Supreme Court has reviewed on the merits concerning the operation of the Hague Evidence Convention, it was not the first case presented to the Court concerning the issue. A number of similar cases have reached the Supreme Court, and a brief synopsis of their history provides useful insight into the Court's recent resolution of this conflict.

Between 1983 and 1986, the Court invited the United States Solicitor General to express the views of the United States on three petitions involving similar issues to Aérospatiale. The first case, Volkswagenwerk Aktiengesellschaft v. Falzon, involved a products liability suit against Volkswagen and its American subsidiary in a Michigan state court. Falzon noticed the depositions of twelve German Volkswagen employees pursuant to the Michigan state rules of civil procedure. The Michigan trial court ordered Volkswagen to make its employees available for depositions before United States consular officials in Germany. Volkswagen asserted that the depositions could only proceed if conducted pursuant to the Hague Evidence Convention. The trial court order was certified for interlocutory appeal. The Michigan Court of Appeals, and subsequently the Michigan Supreme Court, were unwilling to decide the question presented and denied the application for leave to appeal. Volkswagen sought review by the United States Supreme Court by asserting that the Michigan trial court order was invalid on federal grounds.

In early 1984, the Solicitor General filed the government's amicus
brief, which set forth the United States position on the application of the Convention:

[T]he Evidence Convention deals comprehensively with the methods available to United States courts and litigants to obtain proceedings abroad for taking evidence. . . . The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted. The Convention accordingly must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it.  

The Solicitor General therefore advised the Court that the depositions were barred by the Convention. The State Department ordered its consular officials not to proceed, thereby making execution of the Michigan trial court's order impossible. The Supreme Court then dismissed the appeal on the recommendation of the Solicitor General.

In September 1984, the Solicitor General submitted an amicus brief in Club Méditerranée, S.A. v. Dorin, an action arising from personal injuries sustained by Marjorie Dorin while vacationing at Club Med's resort in Haiti. In this case, counsel for Dorin served interrogatories on Club Med pursuant to New York state law. Club Med invoked the French blocking statute and refused to respond on the ground that the Hague Evidence Convention provided the exclusive method for obtaining the information. The New York Supreme Court ordered Club Med to answer the interrogatories. Club Med appealed, but the Appellate Division of the New York Supreme Court affirmed and denied leave to appeal to the New York Court of Appeals. Club Med then petitioned for

154. Id. at 5-6.
155. Id. at 2-3.
156. Id. It has been argued that the orders in Falzon were rendered by a state court, and that the Solicitor General relied on the supremacy clause of the Constitution (art. VI, cl. 2) in deciding that the Hague Evidence Convention superceded state rules of civil procedure. Laker Airways, Ltd. v. Pan Am. World Airways, 103 F.R.D. 42, 50 (D.D.C. 1984). However, in view of the revised position of the Solicitor General in Club Méditerranée, S.A. v. Dorin, 465 U.S. 1019, appeal dismissed and cert. denied, 469 U.S. 913 (1984), which also involved a state court discovery order, this position appears untenable. See infra notes 386-425 and accompanying text.
159. Id.
160. See infra note 189.
162. Id. at 2-3.
163. Id. at 3.
review in the United States Supreme Court, asserting that the order was invalid on federal grounds.164

In its amicus brief, the Solicitor General revised the earlier position of the United States and stated that the Hague Evidence Convention "is not exclusive" and "cannot be construed as absolutely restricting the authority of United States courts to employ traditional discovery devices specified in federal and state rules."165 The government's brief further urged that American courts should retain the power to demand production of evidence from foreign nationals, but use of such power must be tempered by principles of international comity.166 Since the trial court had not engaged in a proper comity analysis, the Supreme Court once again followed the suggestion of the Solicitor General and dismissed the appeal and denied certiorari.167

Most recently, the Solicitor General filed an amicus brief concerning two additional petitions, Anschuetz & Co., GmbH v. Mississippi River Bridge Authority and Messerschmitt Bolkow Blohm, GmbH v. Walker.168 Anschuetz and Messerschmitt have been regarded as two of the most well-reasoned opinions on the use of the Hague Evidence Convention.169 The
government's brief indicated that its position had not changed since *Club Méditerranée v. Dorin.* Neither *Anscheutz* nor *Messerschmitt* were heard on the merits by the Court. When the Court granted review in *Aérospatiale,* it vacated certiorari in *Messerschmitt.* After the Court decided *Aérospatiale,* it then granted certiorari in *Anscheutz* and *Messerschmitt.*

The Fifth Circuit addressed these issues again in *In re Messerschmitt Bolkow Blohm GmbH,* 757 F.2d 729 (5th Cir. 1985), vacated sub nom. Messerschmitt Bolkow Blohm GmbH v. Walker, 107 S. Ct. 3223 (1987). In *Messerschmitt,* three occupants of a helicopter died when it crashed near McKinney, Texas. Id. at 730. Suits for wrongful death were brought in federal district court in Texas against the German corporation Messerschmitt, which had manufactured the helicopter. Id. Personal jurisdiction over Messerschmitt was conceded. Id. The district court ordered Messerschmitt to respond to requests for production of documents, and to produce for deposition in advance of trial, persons it expected to call as expert witnesses. Id. Messerschmitt sought mandamus requiring the discovery to be conducted pursuant to the Hague Evidence Convention. Id. The Fifth Circuit denied mandamus and reaffirmed its holding in *Anscheutz:* "[W]e hold that the Convention does not apply to the discovery sought here because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad." Id. at 731.

The court of appeals assessed whether the Convention should be used in the interest of international comity. Id. at 732. In the court's opinion, the anticipated discovery of documents "need not directly involve German judicial officers." Id. The court, however, acknowledged that Germany might view the discovery as an infringement on its "judicial sovereignty." Id. n.12. Nonetheless, the court concluded that:

The American litigants' interest in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court must also be considered. The district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany. It requires only that a party admittedly subject to the personal jurisdiction of a United States court produce documents in the United States. The order for production of documents, therefore, appears to balance appropriately the considerations involved.

*Id.* at 732. The court further held that since the noticed depositions were to take place in the United States, they were not governed by the Hague Evidence Convention. *Id.*

170. Brief for the United States as Amicus Curiae at 8, *Anscheutz* and *Messerschmitt,* supra note 168.

serschmitt, vacated each judgment, and remanded both cases for further proceedings.\textsuperscript{172}

In each of the foregoing cases, the Supreme Court dispositions have conformed to the Solicitor General's fluctuating interpretation of the Hague Evidence Convention. Similarly, in \textit{Aérospatiale}, the Solicitor General's position was given great weight in the Court's analysis.\textsuperscript{173} The following discussion of \textit{Aérospatiale} will explore the underlying policies that may have influenced the government to change its interpretation of the Hague Evidence Convention.\textsuperscript{174}

\section*{IV. Statement of the Case}

Société Nationale Industrielle Aérospatiale and Société de Construction d'Avions de Tourism (collectively "Aérospatiale") are corporations owned by the Republic of France which engage in the business of designing, manufacturing and marketing aircraft.\textsuperscript{175} Although they design and manufacture their aircraft in France, they advertise and sell them in the United States.\textsuperscript{176} The companies allegedly advertised their "Rallye" type aircraft in American aviation publications as "the World's safest and most economical STOL plane."\textsuperscript{177} On August 19, 1980, a "Rallye" aircraft crashed in New Virginia, Iowa, injuring its pilot, Dennis Jones and a passenger, John George.\textsuperscript{178} Jones, George and George's wife brought separate suits in the United States District Court for the Southern District of Iowa, alleging that both corporations had manufactured and sold a defective plane, and were guilty of negligence and breach of warranty.\textsuperscript{179} Both companies answered the complaints without objecting to the jurisdiction of the district court.\textsuperscript{180} The parties subsequently consented to consolidate the cases and refer them to a magistrate.\textsuperscript{181}

\footnotesize
\textsuperscript{172} 107 S. Ct. 3223 (1987).
\textsuperscript{173} 107 S. Ct. at 2551 n.19. See infra notes 386-89 and accompanying text.
\textsuperscript{174} See infra notes 386-425 and accompanying text.
\textsuperscript{176} Brief for Respondent and Real Parties In Interest at 1-2, Société Nationale Industrielle Aérospatiale v. United States District Court, 107 S. Ct. at 2542 (1987) (No. 85-1695) [hereinafter Brief for Respondent].
\textsuperscript{177} \textit{Aérospatiale}, 107 S. Ct. at 2546. "The term 'STOL' [is] an acronym for 'short takeoff and landing' [and] refers to a fixed-wing aircraft that either takes off or lands with only a short horizontal run of the aircraft." \textit{Id.} n.3.
\textsuperscript{178} Brief for Respondent at 2, supra note 176.
\textsuperscript{179} \textit{Aérospatiale}, 107 S. Ct. at 2546.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.} This action was taken pursuant to 28 U.S.C. § 636(e)(1) (1987).
All of the parties conducted their initial discovery pursuant to the Federal Rules of Civil Procedure without objection. Afterwards, plaintiffs served a second request for production of documents pursuant to Rule 34, a set of interrogatories pursuant to Rule 33 and requests for admission pursuant to Rule 36. The defendants refused to comply with the requests, and filed a motion for a protective order. The motion alleged that since both defendants were “French corporations, and the discovery sought [could] only be found in a foreign state, namely France,” the Hague Convention was the exclusive method for conducting pre-trial discovery. In addition, the motion asserted that unless evidence was produced in accordance with the procedures of the Hague Evidence Convention, defendants would be subject to criminal penalties for violating a French “blocking statute.” The magistrate denied defendants’ motion.

182. *Aérospatiale*, 107 S. Ct. at 2546. Plaintiffs served an initial request for production of documents pursuant to Federal Rule of Civil Procedure 34(b) seeking the flight manual, pilot’s handbook, performance data and testing records of the aircraft involved in the crash. Plaintiffs also served an initial set of request for admissions pursuant to Federal Rule of Civil Procedure 36. Defendants responded to these requests without objection, insofar as they called for material or information that was located in the United States. *Id.* n.4; *Brief for Respondent at 2, supra* note 176. In turn, defendants availed themselves of the Federal Rules of Civil Procedure to depose witnesses and parties pursuant to Rule 26, to serve interrogatories pursuant to Rule 33 and to serve a request for production of documents pursuant to Rule 34. *Brief for Respondent at 5, supra* note 176. The plaintiffs complied fully with those requests. *Aérospatiale*, 107 S. Ct. at 2546 n.4; *Brief for Respondent at 5, supra* note 176.

183. *FED. R. CIV. P. 34.*
184. *FED. R. CIV. P. 33.*
185. *FED. R. CIV. P. 36.*
186. *Aérospatiale*, 107 S. Ct. at 2546. The second request for production of documents sought reports and design specifications for the aircraft. The requests for admissions and interrogatories were limited in scope to certain claims made about the aircraft in advertisements published in United States aviation magazines. *Brief for Respondent at 2, supra* note 176.

188. *Aérospatiale*, 107 S. Ct. at 2546.

Article 1A—Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

*Id.*

190. *Aérospatiale*, 107 S. Ct. at 2547. The magistrate stated that: “[t]o permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts’ interests, which particularly arise in products liability cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from use of such products.” *Id.* The magistrate explored the history of the French blocking statute. Since it had been instituted to impede enforcement of United States antitrust laws abroad, and had not been strictly enforced in France, it was questionable whether the statute would apply to the
Defendants petitioned the Court of Appeals for the Eighth Circuit for a writ of mandamus. Although immediate appellate review of an interlocutory discovery order is not ordinarily available, the court of appeals found the matter appropriate for review since the “novel and important questions presented” were likely to recur. The appellate court denied the petition for mandamus. It held that when a district court has jurisdiction over a foreign litigant, the Hague Evidence Convention does not apply to the production of evidence in that litigant’s possession, even though documents and information may be physically located within a foreign signatory’s territory. The court found that the district court magistrate had properly concluded that although the French blocking statute might subject defendants to criminal sanctions if they produced the requested information, the statute did not automatically bar a domestic court from compelling production.

On certiorari, the United States Supreme Court, in a 5-4 decision, vacated the judgment of the court of appeals and remanded the case for further proceedings. In the majority opinion, written by Justice Stevens, the Court disagreed in part with the position of the court of app-

discovery requests at issue. Id. Finally, the magistrate concluded that the United States’ interests in protecting its citizens from harmful foreign products, and in compensating them for injuries caused by such products, were paramount to France’s interest in protecting its citizens “from intrusive foreign discovery procedures.” Id.

191. In re Société Nationale Industrielle Aérospatiale, 782 F.2d 120 (8th Cir. 1986).
192. Federal courts of appeals are empowered to review “all final decisions of district courts of the United States.” 28 U.S.C. § 1291 (1983 & Supp. 1986). Discovery orders are interlocutory and are therefore not ordinarily immediately appealable. Pursuant to 28 U.S.C. § 1292(b) (1983 & Supp. 1986), if a district judge certifies in writing that an otherwise nonappealable interlocutory order involves a “controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation,” the court of appeals may, in its discretion, permit the appeal to be taken. Id.

193. In re Société Nationale Industrielle Aérospatiale, 782 F.2d at 123. The court explained:

This is the first time this court has been called upon to consider the novel and important questions concerning the interplay between the Federal Rules of Civil Procedure, the Hague Convention, and the French Blocking Statute. In addition, because the Plaintiffs are in the initial stages of discovery, and because the nature of the discovery requests at issue indicate that the answers generated from these requests may necessitate further discovery, we believe the questions presented here may well recur prior to any opportunity to review a final judgment.

Id.

194. Id. at 127.
195. Id. at 124.
196. Id. at 126.
198. Chief Justice Rehnquist and Justices White, Powell and Scalia also joined the majority opinion. Id. at 2545.
peals and held that both the Hague Evidence Convention and the Federal Rules of Civil Procedure may be used to obtain discovery from a litigant over whom the district court has jurisdiction. The majority instructed lower courts to scrutinize the particular facts of each case and use a case-by-case comity analysis to determine whether to proceed under the Hague Evidence Convention or the Federal Rules of Civil Procedure.

In a separate opinion, Justice Blackmun concurred with the majority view that the Convention is not the exclusive means of obtaining discovery abroad. He dissented, however, from the majority's unwillingness to adopt a rule of first resort to the Convention. He also dissented from the majority's insistence on the use of a case-by-case comity analysis, and objected to the majority's failure to provide lower courts with specific rules to guide those inquiries.

V. REASONING OF THE COURT

A. The Majority

Justice Stevens presented the majority opinion in Société Nationale Industrielle Aérospatiale v. United States District Court. The Court defined the issue presented as to what extent a federal district court must enforce use of the Hague Evidence Convention when litigants seek information and documents from a French adversary over whom the court has personal jurisdiction. After reviewing the procedural history of the case, the Court analyzed the applicability of the Convention's procedures. It examined the Convention's history, purpose and text, and then assessed whether the Convention should be applied uniformly to all discovery requests directed to litigants of signatory nations.

1. The history, purpose and text of the treaty

The Court reviewed the history and the purpose of the Convention. The Court acknowledged that the United States had proposed

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199. Id. at 2554.
200. Id. at 2555-56.
201. Justices Brennan, Marshall and O'Connor joined in the separate opinion. Id. at 2557.
202. Id. at 2558 (Blackmun, J., concurring in part and dissenting in part).
203. Id. (Blackmun, J., concurring in part and dissenting in part).
204. Id. (Blackmun, J., concurring in part and dissenting in part).
206. Id. at 2545-46.
207. Id. at 2546-48; see also supra notes 175-204 and accompanying text.
209. Id.
210. Id.
adopting an evidence convention to improve procedures for obtaining evidence abroad. The Court emphasized that the Convention was created to provide a set of minimum acceptable standards for all contracting states while preserving the "procedures of every country which . . . may provide international cooperation . . . on more liberal and less restrictive bases . . . ."

Observing that the Federal Rules of Civil Procedure and the Hague Evidence Convention constitute two bodies of valid federal law, the Court proceeded to analyze the interaction between the two. The Court analogized the Convention to a contract between nations to which

211. Id. at 2548-49. The Court relied on the Secretary of State's Letter of Submittal to President Nixon to uncover the goals of the Convention. Id. at 2549. The Letter of Submittal described the international legal climate prior to the adoption of the Hague Evidence Convention:

The willingness . . . to proceed promptly with work on the evidence convention is perhaps attributable in large measure to the difficulties encountered by courts and lawyers in obtaining evidence abroad from countries with markedly different legal systems. . . . The substantial increase in litigation with foreign aspects arising, in part, from the unparalleled expansion of international trade and travel in recent decades has intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.

Id. (quoting LETTER OF SUBMITTAL TO THE PRESIDENT OF THE UNITED STATES ON THE CONVENTION ON TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, SEN. EXEC. DOC. A, 92d Cong., 2d Sess., VI (1972)).

The Court also noted that foreign litigants did not face the same obstacles in obtaining evidence from litigants in the United States. The court stated:

In 1964 Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 were amended to offer to foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for . . . obtaining . . . evidence in the United States. . . . They authorized the use in the federal courts of evidence taken abroad in civil law countries, even if its form did not comply with the conventional formalities of our normal rules of evidence. No country in the world has a more open and enlightened policy.

Id. at 2548 n.13 (quoting Amram, The Proposed Convention on the Taking of Evidence Abroad, 55 A.B.A. J. 651, 651 (1969)).

212. Id. at 2549-50 (citation omitted).

213. Id.

214. Id. The Court explained that "at least four different interpretations of the relationship between the federal discovery rules and the Hague Convention are possible." Id. Two interpretations are based on the premise that the express terms of the Convention describe its relationship to the federal discovery rules:

(1) The Hague Convention might be interpreted to require its exclusive use whenever foreign evidence is sought for use in an American court.

(2) The Convention might be interpreted to require first, but not exclusive, use of Convention procedures.

Id. (emphasis added). Two additional interpretations are based on the premise that principles of international comity, rather than the express terms of the treaty, dictate how the treaty's procedures should be employed:

(3) The Convention could be interpreted as establishing a supplemental, optional set of
general rules of construction apply.\textsuperscript{215} The Court stated that it would begin by examining the "text of the treaty and the context in which the written words are used."\textsuperscript{216} The Court acknowledged that the treaty's history, as well as the negotiations and the practical construction adopted by the parties, would be relevant to its interpretation.\textsuperscript{217}

The Court observed a "conspicuous" absence of any language requiring mandatory use of Convention procedures.\textsuperscript{218} The Convention's permissive language, coupled with its failure to expressly exclude all other existing practices, led the Court to conclude that "[t]he text of the Evidence Convention itself does not modify the law of any contracting State, require any contracting State to use . . . Convention procedures, . . . or compel any contracting State to change its own evidence gathering procedures."\textsuperscript{219} The Court therefore determined that the plain language of the Convention refuted Aérospatiale's argument that the Convention provides the exclusive and mandatory means of obtaining discovery abroad.\textsuperscript{220}

Of pivotal importance to the Court's conclusion was the position of the Executive Branch and the Securities and Exchange Commission as amici curiae that the Convention's procedures were not exclusive,\textsuperscript{221} as discovery procedures "to which concerns of comity nevertheless require first resort by American courts in all cases.'

(4) The treaty could be viewed simply as an "undertaking among sovereigns to facilitate discovery . . . ." American courts could then resort to the Convention when they deem appropriate, after considering the interests of the parties and the interests of the foreign state. \textit{Id.}

\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.} at 2550.
\textsuperscript{218} \textit{Id.} at 2551. Particularly significant to the Court's analysis was a comparison between the Preamble to the Hague Evidence Convention and the Preamble to the Hague Service Convention. The Court noted that the Hague Service Convention had been drafted prior to the Hague Evidence Convention. The terms of the Hague Service Convention were mandatory and required its use in all civil or commercial matters between the signatory nations. The Court reasoned that since the drafters could have used the text of the Hague Service Convention as a "model exclusivity provision," the drafters' use of permissive language in the Hague Evidence Convention was "strong evidence" of their intent. \textit{Id.} at 2550-51 n.15.

\textsuperscript{219} \textit{Id.} at 2550-51.
\textsuperscript{220} \textit{Id.} at 2548. The Republic of France also took the position that the Convention is the exclusive means of conducting discovery among its signatories in transnational litigation. \textit{Id.} n.11 (quoting Brief of \textit{Amicus Curiae} the Republic of France in Support of Petitioners at 4, \textit{Aérospatiale} (No. 85-1695)).

\textsuperscript{221} \textit{Id.} at 2551 n.19. The United States interpreted the "language, history, and purposes" of the Convention and concluded that "it was not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence." Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 9, \textit{Aérospatiale} (No. 85-1695). The Court relied on the notion that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." \textit{Id.}
well as the inclusion of Articles 23\textsuperscript{222} and 27\textsuperscript{223} in the Convention.\textsuperscript{224} The Court reasoned that since a signatory nation could execute an Article 23 declaration, and thereby refuse to respond to requests for pre-trial discovery of documents, it was implausible that the contracting parties intended the Convention's procedures to be exclusive.\textsuperscript{225} Absent explicit textual support, the Court refused to accept the proposition that the United States intended to relinquish its ability to use established federal discovery procedures while permitting other signatory nations to avoid production of evidence under Article 23.\textsuperscript{226} Further, the Court suggested that the existence of Article 27, which permits a contracting State to use more liberal methods of providing evidence than those authorized by the Convention,\textsuperscript{227} implied that the parties did not intend to rely on Convention procedures exclusively.\textsuperscript{228} Without conducting a meaningful examination of the negotiating history or practical expectations of the
contracting states, the Court concluded that the history and text of the Convention "unambiguously supports the conclusion that it was intended to establish optional procedures [to] facilitate the taking of evidence abroad."\textsuperscript{229}

2. The application and use of the Convention

\textit{a. exclusive use}

The Court determined that adopting a rule requiring exclusive use of the Convention would adversely affect the jurisdiction of United States courts and create three "unacceptable asymmetries."\textsuperscript{230} First, in a lawsuit between a United States national and a foreign party, the foreign party would be entitled to obtain discovery through the Federal Rules of Civil Procedure, while the domestic party would be required to use the procedures of the Hague Evidence Convention.\textsuperscript{231} Second, a rule of exclusivity would give foreign companies an unfair competitive advantage over their domestic counterparts.\textsuperscript{232} In the event both a foreign company and a domestic company were defendants in the same action, the foreign company would be subject to less extensive discovery procedures. Third, since a limited number of nations are signatories to the Convention, a rule of exclusivity would confer an unwarranted advantage on those domestic litigants who were not required to use Convention procedures in actions involving nationals of non-Convention jurisdictions.\textsuperscript{233}

To avoid these incongruous results,\textsuperscript{234} the Court decided that the

\begin{itemize}
  \item \textsuperscript{229} Id. at 2553.
  \item \textsuperscript{230} Id. n.25.
  \item \textsuperscript{231} Id.
  \item \textsuperscript{232} Id. The Court admonished Aérospatiale and in doing so, provided a warning for other foreign companies that intend to sell products in the United States:
  
  Petitioners made a voluntary decision to market their products in the United States. They are entitled to compete on equal terms with other companies operating in this market. But since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors. A general rule according foreign nationals a preferred position in pre trial proceedings in our courts would conflict with the principle of equal opportunity that governs the market they elected to enter.
  
  \textit{Id.}
  
  \textsuperscript{233} Id. The Court assumed that use of Convention procedures creates more burdens than benefits for litigants. See \textit{infra} notes 487-90 and accompanying text; see \textit{infra} notes 540-65 and accompanying text.
  
  \textsuperscript{234} The Court adopted the reasoning of the Fifth Circuit in \textit{In re Anschuetz & Co., GmbH}, 754 F.2d 602 (5th Cir. 1985), vacated \textit{sub nom.} Anschuetz & Co., GmbH v. Mississippi River Bridge Authority, 107 S. Ct. 3223 (1987). The court of appeals in \textit{Anschuetz} stated:

  It seems patently obvious that if the Convention were interpreted as preemption interrogatories and document requests . . . [it] would amount to a major regulation of
Convention must be optional since a rule of exclusivity would effectively subject every American court to the internal laws of foreign nations. The Court suggested that a rule of exclusivity would "subordinate the court's supervision of even the most routine . . . pretrial proceedings to the actions . . . or inactions of foreign judicial authorities." Since the Convention contains no express or implied statements of preemptive intent, the Court concluded that the Convention does not deprive district courts of the power to compel production of evidence located abroad from a foreign litigant under the Federal Rules.

The majority rejected the position of the court of appeals that the Convention is entirely inapplicable to discovery sought from litigants over whom the district court has personal jurisdiction. The Court reasoned that the Convention draws no distinction between evidence obtained from third parties over whom the district court does not have personal jurisdiction, and evidence obtained from litigants themselves. Further, the Convention does not distinguish between evidence located abroad and evidence within the control of a party subject to the requesting court's jurisdiction. Therefore, the majority concluded that the Convention constitutes one method of seeking information abroad, which may be used "whenever [it] will facilitate the gathering of evidence."

b. first-use

The Court then considered whether to adopt a rule requiring American litigants to use Convention procedures initially before resorting to domestic procedural alternatives. Unable to find any textual support

the overall conduct of litigation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of United States Courts. . . . While it is conceivable that the United States could enter into a treaty giving other signatories control over litigation instituted and pursued in American courts, a treaty intended to bring about such a curtailment of the rights given to all litigants by the federal rules would surely state its intention clearly[,] and precisely identify crucial terms.

Id. at 612.
236. Id.
237. Id.
238. 782 F.2d 120, 124 (8th Cir. 1986).
239. Aérospatiale, 107 S. Ct. at 2554.
240. Id.
241. Id.; see supra text accompanying notes 134-35.
243. Id. at 2554-56. A "first-use" rule would require an American litigant to attempt to obtain discovery using the Hague Evidence Convention before resorting to the procedures of the Federal Rules of Civil Procedure. The court of appeals had rejected a "first-use" require-
in the Convention that would require adherence to a first-use rule, the Court decided that a general rule of first resort would be inconsistent with the overriding interest in just, speedy and inexpensive resolution of litigation in United States courts. The Court declared that the Convention's procedures are unduly time consuming and expensive, and less likely than the Federal Rules to produce evidence in many situations.

The Court also rejected Aérospatiale's argument that principles of international comity required the Court to apply a blanket first-use rule out of respect for the sovereignty of foreign signatory nations. Rather, the Court explained that the concept of international comity requires lower courts to scrutinize the facts of each case, balance the sovereign interests involved and assess the likelihood that use of the Convention will be effective. Consequently, the Court declined to adhere to a first-use rule in all cases.
c. the comity analysis

The Court refused to articulate specific rules to guide case-by-case comity determinations in lower courts, but briefly outlined a number of general principles that should be considered. Since some discovery requests are more intrusive than others, the Court indicated that the exact line between a reasonable and unreasonable discovery request "must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and . . . governments whose . . . policies they invoke." The Court cautioned lower courts to "exercise special vigilance" to protect foreign parties from being placed in the unfavorable position of having to respond to unnecessary or unduly burdensome discovery requests. To prevent discovery abuses, the Court instructed district courts to supervise pre-trial discovery proceedings carefully when evidence is sought abroad, and to give serious consideration to claims advanced by foreign litigants concerning abusive discovery requests. Finally, the Court emphasized that trial courts must demonstrate respect for the special problems encountered by foreign litigants, which result from nationality, location of operations and sovereign interests.

The Court therefore concluded that the Hague Evidence Convention provides domestic litigants with an optional method of obtaining evidence from a foreign national. The Court further concluded that Convention procedures must be available to all litigants to ensure access to favorable treaty procedures, and to guarantee foreign litigants a full and fair opportunity to demonstrate that use of the Convention is more appropriate for "some aspects of the discovery process."

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252. The Court used the facts of the case to illustrate this point. It noted that an interrogatory that asked petitioners to "identify the pilots who flew flight tests in the Rallye before it was certified for flight by the Federal Aviation Administration," as well as a request to admit that "petitioners authorized certain advertising in a particular magazine," clearly are "less intrusive than a request to produce all of the 'design specifications, line drawings and engineering plans and all engineering change orders, and plans and all drawings concerning the leading edge slats for the Rallye type aircraft manufactured by the Defendants.' " Id. at 2556 (citation omitted).
253. Id.
254. Id. at 2557.
255. Id.
256. Id.
257. Id. at 2554.
258. Id. at 2557.
B. The Separate Opinion

Justice Blackmun, in a separate opinion, concurred with the majority's conclusions that the Hague Evidence Convention applies to evidence sought from both litigants and third parties, but does not provide the exclusive means for obtaining discovery abroad. He dissented, however, from the majority's holding that courts must engage in a case-by-case comity analysis to determine whether Convention procedures should be used. Justice Blackmun further criticized the majority's failure to provide clearly articulated guidelines for courts to rely on when conducting those assessments. He emphasized that the majority's view of the United States' international obligations is "particularly unfortunate in a world in which regular commercial and legal channels loom ever more crucial."

Justice Blackmun criticized the majority for ignoring the significant achievements that the Convention represents. He stated that the Convention accommodates divergent interests and provides effective methods for evidence gathering, which eliminate conflicts between domestic and foreign laws. He expressed deep concern that the national and international interests of the United States may be jeopardized if lower courts routinely assess complex domestic and foreign interests when engaging in a comity analysis. Since district courts are often unfamiliar with Convention procedures, he argued that lower courts might resort "to issuing discovery orders under the Federal Rules of Civil Procedure in a raw exercise of their jurisdictional power." To avoid this unacceptable result, he concluded that, in most cases, a general presumption should be applied requiring litigants to resort to the Convention first.

In his analysis, Justice Blackmun reviewed the history and text of the Convention and took issue with the majority's interpretation of its provisions. Next, he expressed his concern over the use of a case-by-

260. Id. (Blackmun, J., concurring in part and dissenting in part).
261. Id. (Blackmun, J., concurring in part and dissenting in part).
262. Id. at 2557-58 (Blackmun, J., concurring in part and dissenting in part).
263. Id. at 2558 (Blackmun, J., concurring in part and dissenting in part).
264. Id. (Blackmun, J., concurring in part and dissenting in part).
265. Id. (Blackmun, J., concurring in part and dissenting in part).
266. Id. (Blackmun, J., concurring in part and dissenting in part). The separate opinion noted that many courts that have addressed this issue have adopted "a rule of first resort to the Convention." Id. n.1. See supra notes 139-45 and accompanying text for a discussion of those cases.
case comity analysis in the trial courts. Finally, he explored the three essential facets of a proper comity analysis, and concluded that all three interests would be furthered if the litigants in *Aérospatiale* were required to use the Hague Evidence Convention.

1. The history and text of the Convention

Justice Blackmun reiterated that the United States requested and enthusiastically participated in the drafting of the Hague Evidence Convention. Although he believed that the express terms of the Convention do not clearly require its exclusive use, he nonetheless disagreed with the majority's conclusion that the Convention is only an optional supplement to the Federal Rules of Civil Procedure. He reasoned that it would be incongruous to view the Convention as "merely advisory" in light of the procedures and policies of the United States that existed when the Convention was negotiated and drafted.

At the time the Convention was drafted, federal legislation and federal discovery rules provided special assistance to foreign litigants to obtain evidence in the United States. These policies were not conditioned on reciprocity. Justice Blackmun argued that enactment of the Convention did not have any effect on a foreign litigant's ability to obtain evidence pursuant to federal statutes. Therefore, the only plausible benefit that foreign signatories derived from ratifying the treaty was the expectation that the United States would respect their sovereignty by routinely using the procedures of the Convention.

Justice Blackmun contended that the provisions of Article 27 would not change this result. Dismissing the majority’s interpretation of Article 27 as implausible and inconsistent with the drafters' intent, he

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271. *Id.* at 2557-59 (Blackmun, J., concurring in part and dissenting in part).
272. *Id.* at 2559 (Blackmun, J., concurring in part and dissenting in part).
273. *Id.* (Blackmun, J., concurring in part and dissenting in part). *See supra* note 211.
274. *Aérospatiale*, 107 S. Ct. at 2559 (Blackmun, J., concurring in part and dissenting in part).
275. *Id.* (Blackmun, J., concurring in part and dissenting in part).
276. *Id.* (Blackmun, J., concurring in part and dissenting in part).
277. *Id.* n.2 (Blackmun, J., concurring in part and dissenting in part). *See supra* notes 122-26 and accompanying text for the provisions of Article 27.
278. *Aérospatiale*, 107 S. Ct. at 2559 n.2 (Blackmun, J., concurring in part and dissenting in part). The United States delegation's explanatory report on the Convention relates that Article 27 was "designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation
stated that "[t]he only logical interpretation of this article is that a state receiving a discovery request may permit [the use of] less restrictive [internal] procedures than those designated in the Convention." He argued that if a requesting state could unilaterally use its own domestic procedures for gathering evidence, and thereby control the methods of obtaining evidence in another state, there would, in effect, be no need for the detailed procedures of the Convention.  

Justice Blackmun noted that the type of discovery commonly conducted in the United States is completely incompatible with civil-law principles, under which evidence gathering is a judicial function. In view of the varied philosophical approaches to evidence gathering abroad, he stressed that the Convention furthers important domestic interests by furnishing channels for obtaining discovery abroad that would be unavailable otherwise. In addition, the Convention serves the long-term interests of the United States by promoting a climate of cooperation and goodwill, which is imperative for international legal and commercial systems to function properly.

2. The suitability of a case-by-case comity analysis

Justice Blackmun disagreed with the majority on the issue of whether lower courts should rely on a case-by-case comity approach to decide whether the Hague Evidence Convention or the Federal Rules should be used. First, he argued that an individualized case approach ignores important national and international policies which can only be properly considered and implemented by the Executive and Legislative branches of our government. Justice Blackmun stated that trial courts

in the taking of evidence for the benefit of foreign courts and litigants. . . . Article 27 authorizes the use of alternative methods for gathering evidence 'if the internal law or practice of the State of execution so permits.' "Id. (Blackmun, J., concurring in part and dissenting in part) (quoting P. AMRAM, EXPLANATORY REPORT ON THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, S. EXEC. REP. A, 92d Cong., 2d Sess., 39-40 (1972)).

279. Id. (Blackmun, J., concurring in part and dissenting in part).
280. Id. (Blackmun, J., concurring in part and dissenting in part).
281. Id. at 2558-59 (Blackmun, J., concurring in part and dissenting in part).
282. Id. at 2559 (Blackmun, J., concurring in part and dissenting in part).
283. Id. (Blackmun, J., concurring in part and dissenting in part). The French position on the goal of the Hague Evidence Convention confirms that the Convention was intended to establish "methods to reconcile the differing legal philosophies of the Civil Law, Common Law and other systems with respect to the taking of evidence." Id. (Blackmun, J., concurring in part and dissenting in part) (quoting Rapport de la Commission Spéciale, 4 Conférence de La Haye de Droit International Privé: Actes et documents de la Onzième session 55 (1970) (Actes et documents)).

284. Id. at 2559-60 (Blackmun, J., concurring in part and dissenting in part).
are well-equipped to accommodate domestic concerns, such as the interests of the parties and of the judicial system in resolving conflicts based on complete information. He pointed out, however, that transnational litigation also involves the interests of foreign legal systems and foreign sovereign interests, which trial courts are not well-suited to accommodate.

Justice Blackmun emphasized that reconciling our own international interests with foreign interests normally falls within the sphere of the Executive Branch. Only the Executive should decide when “a course of action is important enough to risk affronting a foreign nation or placing a strain on foreign commerce.” In Justice Blackmun’s opinion, the ratification of the Hague Evidence Convention represented a political determination by the Executive and Legislative branches that the Convention properly balanced those competing interests. Therefore, consistent with the principle of separation of powers, it is not within the province of the Judiciary to routinely engage in activities that result in political decisions, which may affect national and international interests.

To justify his position, Justice Blackmun explained why courts are generally incapable of balancing the interests of foreign nations with those of our own. Since foreign legal systems are often poorly understood, and few judges are experienced with transnational litigation, courts are not competent to assess when foreign nations will be offended.

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285. Id. at 2559 (Blackmun, J., concurring in part and dissenting in part).

286. Id. at 2560 (Blackmun, J., concurring in part and dissenting in part).

The presence of these interests creates a tension between the broad discretion our courts normally exercise in managing pre trial discovery and the discretion usually allotted to the Executive in foreign matters.

... Unlike the courts, “diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association.”

_id. (Blackmun, J., concurring in part and dissenting in part) (quoting Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 955 (D.C. Cir. 1984)).

287. Id. at 2560 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun noted:

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

_id. n.3 (Blackmun, J., concurring in part and dissenting in part).

288. Id. at 2560 (Blackmun, J., concurring in part and dissenting in part).

289. Id. (Blackmun, J., concurring in part and dissenting in part).

290. Id. (Blackmun, J., concurring in part and dissenting in part).

291. Id. at 2560-61 (Blackmun, J., concurring in part and dissenting in part).
by certain acts. He expressed concern that a pro-forum bias will "creep into the supposedly neutral balancing process" and prompt courts to rely on familiar local rules, since Convention procedures are often perceived as a threat to jurisdictional power. Further, a court's inability to look to the federal government for guidance in each individual case, along with limited appellate review of interlocutory discovery orders, precludes any effective correction of erroneous discovery orders.

Finally, Justice Blackmun argued that, in most cases, using a case-by-case comity analysis is unnecessary and duplicative. The conflicts that a trial court must attempt to resolve have already been evaluated and eliminated through ratification of the agreements contained in the Convention. Therefore, he concluded that the majority unnecessarily imposed an extra layer of comity analysis at the trial court level when the Convention had already accommodated the competing interests relevant to that analysis.


293. Aérospatiale, 107 S. Ct. at 2560 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun explained:

One of the ways that a pro-forum bias has manifested itself is in United States courts' preoccupation with their own power to issue discovery orders. . . . There is also a tendency on the part of courts, perhaps unrecognized, to view a dispute from a local perspective. . . . Thus courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests.


294. See infra text accompanying notes 597-601 for an explanation of the State Department's policy.

295. See supra note 192.

296. Aérospatiale, 107 S. Ct. at 2561 (Blackmun, J., concurring in part and dissenting in part). The Department of State maintains a policy that it does not participate in or take positions regarding litigation between private parties, unless required to do so by law. Id. n.5 (Blackmun, J., concurring in part and dissenting in part); see Oxman, supra note 12, at 748 n.39.

297. Aérospatiale, 107 S. Ct. at 2562 (Blackmun, J., concurring in part and dissenting in part).

298. Id. (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun observed that the factors contained in the RESTATEMENT (REVISED), supra note 1, are only appropriately considered when no treaty exists between the parties. He also suggested that the Restatement analysis may prove useful if the Convention fails to resolve a conflict in a particular case. Id. (Blackmun, J., concurring in part and dissenting in part).

299. Id. (Blackmun, J., concurring in part and dissenting in part).
3. The components of a complete comity analysis

The separate opinion focused on the elements of a complete comity analysis. Justice Blackmun argued that "[t]he principle of comity leads to more definite rules than the ad hoc approach endorsed by the majority." He explained that comity is not a "vague political concern" which requires international cooperation only when it is in our best interests. Rather, a comity analysis shares the same goals as a choice of law analysis, which seeks to further "harmonious relations between states and to facilitate commercial intercourse between them." The fundamental considerations in a choice of law analysis—foreign interests, domestic interests, and the interest in a well-functioning international legal order—are also essential to a comprehensive comity analysis. Justice Blackmun explored each of these factors in detail and concluded that all three interests would be furthered by use of the Convention in Aérospatiale.

a. Foreign interests

Justice Blackmun praised the majority's admonition to lower courts to pay special attention to foreign interests. Nevertheless, he asserted that the majority's interpretation of the Convention was based on an incomplete analysis of foreign sovereign interests. After explaining the differing legal philosophies of common-law and civil-law nations, he argued that the majority failed to recognize the significance of civil-law practices. Justice Blackmun reiterated that the act of gathering evi-

300. Id. at 2561 (Blackmun, J., concurring in part and dissenting in part). "The Court frequently has relied upon a comity analysis when it has adopted general rules to cover recurring situations in areas such as choice of forum, maritime law, and sovereign immunity, and the Court offers no reasons for abandoning that approach here." Id. (citations omitted).
301. Id. (Blackmun, J., concurring in part and dissenting in part).
302. Id. at 2562 n.11 (Blackmun, J., concurring in part and dissenting in part) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comment d (1971)).
303. Id. at 2562 (Blackmun, J., concurring in part and dissenting in part).
304. Id. (Blackmun, J., concurring in part and dissenting in part).
305. Id. (Blackmun, J., concurring in part and dissenting in part).
306. See supra text accompanying notes 21-52.
308. Id. (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun noted:

The act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person.
dence in a civil-law country constitutes the performance of a public judicial act if performed by an unauthorized foreign person. Unless foreign authorities participate or give their consent, evidence gathering abroad may violate the "judicial sovereignty" of that country.

By using the Convention's procedures, foreign sovereign interests are protected since ratifying states have consented to their use. Justice Blackmun noted that contracting civil-law states agreed to procedures in the Convention which conflicted with their own customary practices. He suggested that use of the Convention alleviates potential infringement on foreign judicial sovereignty which would result if the same procedures were used outside the bounds of the Convention.

b. domestic interests

The first major domestic concern to be considered by the courts is the necessity of "providing effective procedures to enable litigants to obtain evidence abroad." Justice Blackmun argued that Convention procedures are "a great boon" to litigants. He stated that experience to date proved that use of the Convention has been fruitful since contracting parties have honored their obligations.


309. Id. at 2562 (Blackmun, J., concurring in part and dissenting in part).
310. Id. at 2563 (Blackmun, J., concurring in part and dissenting in part).
311. Id. (Blackmun, J., concurring in part and dissenting in part).
312. See infra text accompanying notes 491-501.
313. Aérospatiale, 107 S. Ct. at 2563 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun underscored that some countries believe that protection of certain substantive rights requires judicial control of evidence gathering. For example, in the Federal Republic of Germany, an American discovery order may violate the German constitutional principle of proportionality which ensures protection of personal privacy, commercial property and business secrets. It is up to the German judiciary to assess whether these constitutional rights may be encroached upon in order to protect the rights of others in civil litigation. Id. (Blackmun, J., concurring in part and dissenting in part) (citing Meesen, The International Law on Taking Evidence From, Not In, a Foreign State, App. to Brief for Anschuetz & Co., GmbH and Messerschmitt-Boelkow-Blohm GmbH as Amici Curiae in Support of Petitioners at 27a-28a, Aérospatiale (No. 85-1695)). The government of the Federal Republic of Germany filed a diplomatic protest emphasizing that American discovery orders violate rights protected by their constitution. Id. n.14 (Blackmun, J., concurring in part and dissenting in part) (citing App. to Brief for Federal Republic of Germany as Amicus Curiae at 20a, Aérospatiale (No. 85-1695)).
314. Id. at 2564 (Blackmun, J., concurring in part and dissenting in part).
315. Id. (Blackmun, J., concurring in part and dissenting in part).
316. Id. at 2564-65 & n.16 (Blackmun, J., concurring in part and dissenting in part). "According to the French government, the overwhelming majority of discovery requests by American litigants are 'satisfied willingly . . . before consular officials and, occasionally,
Justice Blackmun disagreed with the majority's claim that using the Convention's procedures might be "unduly time consuming and expensive." He argued that until the Convention is used extensively and courts become familiar with its procedures, the majority's view was nothing more than speculation. Justice Blackmun pointed out that discovery conducted under the Federal Rules does not place a high premium on either speed or cost-effectiveness. He concluded that unless costs are prohibitive, some additional financial burden should be tolerated in the interest of international goodwill.

In Justice Blackmun's opinion, the existence of Article 23 did not alter his conclusion or present a significant enough obstacle to justify disregarding Convention procedures. He explained that Article 23 reservations only apply to letters of request for documents. Therefore, a reservation does not affect the most commonly used informal procedures of taking evidence through a consul or commissioner, or requests for depositions or interrogatories. Although Article 23 reservations generally preclude pre-trial discovery of documents, France and a number of other nations have modified their declarations to exclude only those requests that "lack sufficient specificity or that have not been reviewed for relevancy by the requesting court."

317. Id. at 2564-65 (Blackmun, J., concuring in part and dissenting in part).
318. Id. at 2565 (Blackmun, J., concurring in part and dissenting in part).
319. Id. (Blackmun, J., concurring in part and dissenting in part).
320. Id. (Blackmun, J., concurring in part and dissenting in part).
321. Id. at 2565-66 (Blackmun, J., concurring in part and dissenting in part).
322. Id. at 2565 (Blackmun, J., concurring in part and dissenting in part).
323. Id. (Blackmun, J., concurring in part and dissenting in part).
324. Justice Blackmun noted that France has recently modified its Article 23 declaration as follows:

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

325. Denmark has also modified its declaration and the Federal Republic of Germany has drafted new regulations to permit "pretrial production of specified and relevant documents in response to letters of request." Id. (Blackmun, J., concurring in part and dissenting in part) (quoting Letter from J. B. Raimond, Minister of Foreign Affairs, France, to H. H. Broek, Minister of Foreign Affairs, The Netherlands (Dec. 24, 1986)).
326. Id. at 2566 (Blackmun, J., concurring in part and dissenting in part) (citation omitted).
The second major domestic interest to be considered by the trial court is the goal of “fair and equal treatment of litigants.”\textsuperscript{327} Justice Blackmun disagreed with the majority’s suggestion that broad use of the Convention would lead to “unacceptable asymmetries” to the detriment of domestic litigants.\textsuperscript{328} He explained that any possible unfairness that might result from using the Convention could be neutralized by the trial court’s exercise of its power to supervise the proceedings, and to issue “any order which justice requires” to limit the intrusiveness of discovery requests from foreign parties.\textsuperscript{329}

Justice Blackmun characterized as illusory the majority’s concern that parties who do not need to use the Convention will have an advantage over litigants who do.\textsuperscript{330} Since the purpose of the Convention is to facilitate discovery, not hamper it, he reasoned that litigants who sue nationals of non-contracting states will be disadvantaged since they are unable to take advantage of the Convention’s procedures.\textsuperscript{331} Nevertheless, Justice Blackmun acknowledged that inconsistencies are unavoidable when any treaty is less than universally ratified.\textsuperscript{332} However, he concluded that in most cases, use of the Convention will advance domestic interests since it successfully facilitates the gathering of evidence abroad and furthers our relationship with foreign states.\textsuperscript{333}

c. development of an ordered international system

The final component of Justice Blackmun’s comity analysis considered whether a course of action will further, rather than impede, the development of an ordered international system.\textsuperscript{334} Justice Blackmun stressed that a smoothly functioning international legal regime furthers basic interests that are common to all nations: predictability, fairness, ease of commercial interactions and “stability through satisfaction of mutual expectations.”\textsuperscript{335} He stated that the Convention reduces conflicts between nations by facilitating communication through established diplomatic channels.\textsuperscript{336} In addition, use of the Convention eliminates “for-
eign perceptions of unfairness" which arise when domestic courts are insensitive to the interests protected by foreign legal regimes.337

Finally, Justice Blackmun urged domestic courts to "avoid the parochial views that too often have characterized the decisions to date."338 He warned that many countries may be reluctant to oppose American discovery orders because of the strong economic, political and military position of the United States.339 Justice Blackmun predicted that continued foreign acquiescence to orders that ignore the Convention will breed accumulating resentment, at the long-term political cost of diminished international cooperation.340 Justice Blackmun concluded that use of the Convention is a "simple step to take" to avoid these undesirable consequences and to foster international cooperation.341

VII. ANALYSIS

In Société Nationale Industrielle Aérospatiale v. United States District Court,342 the Supreme Court held that the Hague Evidence Convention functions as an optional supplement to the Federal Rules of Civil Procedure, and should be used when it will facilitate the gathering of evidence abroad.343 The decision reflects the Court's desire to send a strong signal abroad that the United States will not tolerate foreign nationals' attempts to manipulate domestic judicial proceedings, or foreign governments' attempts to shield their citizens from liability which may arise from adverse disclosures during pre-trial discovery. The Court's concern over reaffirming the sovereignty of our judicial system clouded the crucial issues in the case, and resulted in an inaccurate analysis of our obligations under the Hague Evidence Convention. The Court confounded, rather than resolved, the problems that have arisen in response to the extraterritorial application of our discovery procedures in private civil litigation. Aérospatiale creates new impediments for domestic litigants who are in need of predictable, uniform and effective procedures for gathering evidence abroad in transnational disputes.

The Aérospatiale decision contains three fundamental problems that require analysis. The first concerns the accuracy of the majority's interpretation of the text and history of the Hague Evidence Convention. The

337. Id. (Blackmun, J., concurring in part and dissenting in part).
338. Id. (Blackmun, J., concurring in part and dissenting in part).
339. Id. (Blackmun, J., concurring in part and dissenting in part).
340. Id. (Blackmun, J., concurring in part and dissenting in part).
341. Id. (Blackmun, J., concurring in part and dissenting in part).
343. Id. at 2554.
Court's strict textual analysis of the Convention is flawed by its failure to carefully explore the negotiating history of the Convention and its failure to interpret the Convention in accordance with its clearly articulated purpose. The second problem is whether the Court's rationale for rejecting a first-use rule is proper, in light of the operation of foreign blocking statutes and the practical realities of obtaining evidence under the Federal Rules of Civil Procedure. Third, requiring lower courts to routinely perform case-by-case comity determinations will adversely affect our judicial system and the foreign relations of the United States. This analysis explores the problems likely to result from the case-by-case approach.

A. The Majority's Interpretation of the Convention

In Aérospatiale, the majority claimed that the text of the Hague Evidence Convention, along with the history of its proposal and ratification, "unambiguously" supported the conclusion that the Convention was intended to supplement, rather than supplant, the Federal Rules of Civil Procedure.\textsuperscript{344} Although the majority purported to consider the Convention's negotiating history as well as the practical construction adopted by the parties, there is a conspicuous absence of any thoughtful examination of either factor. The decision rests almost exclusively on a textual analysis of critical provisions of the Convention. The Court did not meaningfully consider the practical and political expectations of the contracting states, or the purpose of the Convention. Therefore, the majority reached the implausible conclusion that the "text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting State to use the Convention procedures, . . . or compel any contracting State to change its own evidence gathering procedures."\textsuperscript{345}

In analyzing the Convention, the Court made two determinations regarding its applicability and operation. First, it decided that by its terms, the Convention was not intended to provide the exclusive means of conducting pre-trial discovery abroad.\textsuperscript{346} Second, the Court examined whether the Convention was nonetheless intended to prescribe mandatory procedures with which all contracting states were bound to comply based on international comity.\textsuperscript{347} The Court concluded, based

\textsuperscript{344} Société Nationale Industrielle Aérospatiale v. United States District Court, 107 S. Ct. 2542, 2552-53.
\textsuperscript{345} Id. at 2550-51.
\textsuperscript{346} Id. at 2552-53.
\textsuperscript{347} Id. at 2554-57.
on the language and operation of the Convention, that the procedures were intended to be strictly optional.348 The Court's conclusion that the Convention creates no mandatory obligations for the United States was premised on five factors: (1) the absence of mandatory language in the treaty; (2) the inclusion of Article 23; (3) the text of Article 27; (4) a number of hypothesized fairness concerns affecting the jurisdiction of United States courts and equal treatment of litigants; and (5) the Court's hypothesis regarding the expectations of the contracting parties.

1. The absence of mandatory language

It is generally accepted that a treaty is expected to reflect the intent of the parties involved.349 The primary goal of treaty interpretation is to "undertake a disciplined, responsible effort to ascertain the genuine shared expectations of the particular parties to an agreement."350 In interpreting a treaty, it often becomes necessary to construe the literal meaning of certain words in the context of the negotiating history in order to avoid conclusions which are obviously contrary to a treaty's purpose.351 In Choctaw Nation of Indians v. United States,352 the Court emphasized that "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."353 The Court has consistently relied on records of a treaty's drafting and negotiation to support subsequent interpretation.354 Moreover, the Court has often evaluated the

348. Id. at 2552-53.
352. 318 U.S. 423 (1943).
353. Id. at 431-32; see also Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933) (Court relied on diplomatic history, negotiations and diplomatic correspondence to construe Article X of Webster-Ashburton Extradition Treaty of 1842); Cook v. United States, 288 U.S. 102, 112 (1933) (Court relied on history, language and purpose of Treaty of May 22, 1924 between United States and Great Britain to determine treaty's effect on federal statute); E. Yambrusic, Treaty Interpretation: Theory and Reality 19-27 (1987) (discussing practice of treaty interpretation by United States Supreme Court).
signatories’ course of conduct after ratification to elicit a treaty’s intent and purpose, in addition to using subsequent interpretations by treaty signatories to clarify ambiguous terms. Significantly, the Court has endeavored to construe international agreements to give them the greatest effect, in order to preserve “every benefit negotiated for by the parties.”

In *Aérospatiale*, the Court decided that by its terms the Hague Evidence Convention was not intended to provide the exclusive means of gathering evidence abroad. This textual argument has never been seri-

(examination of framers’ intent from Warsaw Convention Conference Minutes); *Id.* at 265-70 (Stevens, J., dissenting) (detailed examination of deliberations of Swiss, French and British delegates to determine intent of parties to Warsaw Convention); *Maximov v. United States*, 373 U.S. 49, 54-55 (1963) (Court looked to relevant materials instructive as to intent of the parties to glean treaty’s purpose).

355. See, e.g., *O’Connor*, 107 S. Ct. at 351 (course of conduct of parties to international agreement, like course of conduct of parties to any contract, is evidence of its meaning); *Air France*, 470 U.S. at 403 (reference to conduct of parties helps clarify meaning); *Trans World Airlines*, 466 U.S. at 255, 259-60 (conduct of contracting parties in implementing treaty in first 50 years of operation cannot be ignored).

356. *O’Connor*, 107 S. Ct. at 351 (United States application of Panama Canal Treaty unchallenged by Panama); *Air France*, 470 U.S. at 403-05 (subsequent interpretations by signatories help clarify meaning of term and opinions of sister signatories entitled to considerable weight); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 n.10 (1981) (position of government of Japan entitled to great weight).

357. *Maximov*, 373 U.S. at 56. See also *Air France*, 470 U.S. at 399 (“[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.”); *Sumitomo*, 457 U.S. at 185 (“Our role is limited to giving effect to the intent of the Treaty parties.”); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) (“The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.”). In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984), Justice Stevens stated that international agreements, like other contracts, “are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting.” *Id.* at 262 (Stevens, J., dissenting). Justice Stevens also reaffirmed the relevance of Justice Story’s directives on the judiciary’s role in enforcing treaties:

In the first place, this Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. . . . We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

*Id.* at 263-64 (Stevens, J., dissenting) (quoting *The Amiable Isabella*, 6 Wheat. 1, 71-73, 5 L.Ed. 191 (1821)).

358. *Aérospatiale*, 107 S. Ct. at 2553.
ously rebutted, either by the courts or by commentators. The Preamble to the Convention contains no statement indicating that it is to be used exclusively. In contrast, the Hague Service Convention on which the Hague Evidence Convention is modeled, states that it is the exclusive mechanism for serving documents abroad.

The Court surmised that the drafters' election to omit preemptive language from the text of the Convention was strong evidence of their intent. Nevertheless, there is no indication from the negotiating his-


360. The Preamble states that the parties desire "to facilitate the transmission and execution of Letters of Request . . . to further the accomodation of the different methods which they use for this purpose[] . . . [and] to improve mutual judicial co-operation in civil or commercial matters.""]" Hague Evidence Convention, supra note 13, at Preamble.

361. See supra note 70.

362. Article 1 of the Hague Service Convention states that "[t]he present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Hague Service Convention, supra note 70, at art. 1.

363. Aérospatiale, 107 S. Ct. at 2550 n.15. It is questionable whether the omission of an exclusivity provision was in fact evidence of the drafters' intent that the Convention was to be non-exclusive. Mr. Bruno Ristau, Former Director of the Office of Foreign Litigation, U.S. Department of Justice, and a participant in the negotiations and drafting of the Convention, indicated that:

[based on his] personal notes on, and recollections of, departmental meetings prior to and following the adoption of the Evidence Convention, the question of what impact the Convention would have on outgoing requests from the United States—e.g., whether Rule 28(b), F. R. Civ. P., or other discovery Rules should be amended—was never raised or discussed.

B. Ristau, supra note 16, § 5-40, at 268.1 n.83 (emphasis in original). Similarly, in the 1985 Report of the Special Commission, supra note 119, at 1668, the Commission indicated that the question of the exclusivity of the Convention "was a new issue" which had not arisen before. Id. at 1678. This suggests that the drafters of the Convention did not intentionally omit
tory that the issue of exclusivity was ever addressed, or that the drafters intentionally omitted preemptive language from the text of the Convention. What is clear from the negotiating history is that the drafters intended to preserve the availability of existing domestic laws of each state to enable a responding state to produce evidence more expeditiously than through the Convention. Thus, although the literal text of the Convention does not reflect that it was intended to be exclusive, the lack of an exclusivity provision is not clearly attributable to the drafters' thoughtful consideration of the issue, as suggested by the Court.

The majority also observed that both Chapters I and II of the Convention, which describe the methods of gathering evidence abroad, use the permissive term "may" rather than the mandatory term "shall." Consequently, the Court reasoned that "[t]he absence of any command that a contracting State must use Convention procedures when they are not needed is conspicuous." The Court's argument is based on a superficial reading of the Convention and is unpersuasive. Since the Convention provides three alternative methods that may be used to gather evidence abroad, the use of the term "may" in each alternative provision seems entirely appropriate. Had the drafters used the word "shall" in Chapters I and II, a litigant would have been bound to use all three alternatives each time evidence was sought. This absurd result would have made compliance impossible. Comparison of the terminology contained in the Hague Service Convention supports this argument. Only one uniform procedural mechanism for serving documents abroad is available in the Hague Service Convention. Therefore, since all contracting states must use this procedure uniformly, the use of the term "shall" throughout the Hague Service Convention was required.

365. See supra notes 80-100 and accompanying text.
366. Aérospatiale, 107 S. Ct. at 2551.

Thus, Article 1 provides that a judicial authority in one contracting State "may" forward a letter of request to the competent authority in another contracting State for the purpose of obtaining evidence. Similarly, Articles 15, 16, and 17 provide that diplomatic officers, consular agents, and commissioners "may . . . without compulsion," take evidence under certain conditions.

Id. & nn.17 & 18.
367. Id.
368. See supra text accompanying notes 101-14.
369. McLean, supra note 8, at 47-50.
a. Philip Amram's statement

The Court failed to resolve a significant misunderstanding regarding the Convention which arose from a statement made prior to its ratification. Philip Amram, Rapporteur to the 1968 Hague Conference, and a member of the Special Commission which produced the initial draft of the Convention, commented prior to ratification that the Convention "makes no major changes in United States procedure and requires no major changes in United States legislation or rules." 370 This statement has been relied on repeatedly by United States courts to support the proposition that adopting the Convention resulted in no changes in United States law. 371

It has been argued, however, that in view of the compromises that were made during the negotiation of the Convention, the reliance on Mr. Amram's statement is misplaced. 372 It is well-documented that the civil-law nations that participated in the drafting of the Convention agreed to modify their internal evidence gathering practices to accommodate requests from the United States and other common-law nations. 373 This was necessary due to the inherent differences between the common-law and civil-law judicial systems. 374 The civil-law states agreed, for the purposes of satisfying requests under the Convention, to take evidence

370. Contained in Statement of Carl F. Salans, supra note 72, at 5. Mr. Amram also stated that "[o]n the other front, it will give United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants." Id.


[The] Convention effectively resolves the troublesome problem of assuring that the evidence taken will be effectively useful in the tribunal where it is to be introduced. Each party to the Convention agrees in Article 9 that if the requesting authority asks that a special method or procedure be followed (which is different from the domestic procedure of the requested authority), the requested authority shall comply with that request unless it is . . . impossible of performance. These exceptions should be inapplicable in the United States. Any "special method" which will be requested by a civil law country will doubtless be the conventional letter of request, with which all common law courts are familiar. Letters of request are neither incompatible with U.S. practice nor impossible of performance here. This article, however, will impose obligations on civil law courts to take evidence "common-law style," a method with which they are not familiar.

Id. at 106.

374. See supra notes 21-52 and accompanying text.
"common-law style." This compromise addressed the core issue that initially inspired the need for the Convention. When the Convention was drafted, the methods of evidence gathering used in the United States were broad and encompassed all of the civil-law techniques. Therefore, it was unnecessary for the United States to require judges and litigants to alter their practices in order to satisfy requests under the Convention. When the Convention was submitted to President Nixon, he was advised that "[a] significant aspect of the ... Convention is ... that although it requires little change in the present procedures in the United States[,] it promotes changes, in the direction of modern and efficient procedures, in the present practices of many other states.”

Further, since the Hague Evidence Convention is a self-executing treaty, there was no need to enact legislation or rules to implement its procedures when it was ratified. Public Law 88-619 and 28 U.S.C. 1782 were in effect and empowered the federal courts to honor requests that would be forthcoming from foreign nations. President Nixon

375. See supra note 373; P. AMRAM, EXPLANATORY REPORT, supra note 126, at 23. 376. See supra text accompanying notes 21-52 & 68-100. In the 1969 Report of the United States Delegation, supra note 74, one of the primary purposes of the Convention was explained: [It is clear that] no country could be expected to abandon its historic method of taking evidence and its local practice and procedure. What should be asked was that a country agree, in international litigation, to follow as closely as possible the practice and procedure of the requesting State, in order that the evidence might be taken in a manner which most closely approached the technique of the forum where the action was pending.

Id. at 806. 377. See supra text accompanying notes 21-52. 378. See supra note 373. 379. LETTER OF SUBMITTAL, supra note 26, at XI. 380. The constitutional requirements of many countries demand some further step beyond ratification of a treaty in order to make the treaty binding on its citizens in the same way domestic law is. G. VON GLAHN, supra note 13, at 500. In Switzerland, for example, a treaty must be published in the official government journal before it acquires any domestic authority. Id. Certain treaties require the passage of domestic legislation before they will have any effect on the citizens of the contracting country. Id. However, no additional implementing legislation needs to be passed to make a self-executing treaty binding on domestic citizens. Id. Further, a state’s failure to carry out complementary acts (proclamation, publication, legislation) subsequent to ratification of a treaty does not eliminate the obligations incurred through ratification. Id. at 501. A government’s obligations toward other parties to the agreement continue in force despite the nonperformance of any domestic acts. Id.

confirmed that the Convention was fully consistent with the existing policy of judicial assistance embodied in those laws so that ratification of the Convention "require[d] no amendments to that legislation. On the other hand, . . . many other countries, particularly civil law countries, [will have to] make important changes in their judicial assistance practice."384

It is clear that the negotiating teams devoted a substantial portion of time to resolving the inherent differences in evidence-gathering methods that existed among them. Furthermore, the drafters never discussed the Convention's relationship to existing statutory procedural rules in the United States.385 By isolating the text of Mr. Amram's statement from the circumstances that surrounded it, the majority developed a seemingly plausible, but inaccurate interpretation of the statement. The Court's reliance on Mr. Amram's statement to support its view that the Convention was not intended to alter evidence-gathering procedures abroad is misplaced.

b. the government's position

The Court also relied on the position of the Executive Branch and the Securities and Exchange Commission to support its conclusion that the Federal Rules were unaffected by ratification of the Hague Evidence Convention:386 "Our conclusion is confirmed by the position of the Executive Branch and the Securities and Exchange Commission, which interpret the 'language, history, and purposes' of the Hague Convention as indicating 'that it was not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence.' "387 The Court adhered to the principle set forth in Sumitomo Shoji America, Inc. v. Avagliano,388 that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."389

In Sumitomo and other cases involving treaty disputes, the Court has relied on foreign government interpretations of disputed provisions,

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384. Letter of Transmittal, supra note 381. See also B. Ristau, supra note 16, § 5-40, at 256; Petitioner's Reply Brief at 8, Aérospatiale (No. 85-1695).
385. See supra note 363.
387. Id. (quoting Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 9, Aérospatiale (No. 85-1695)).
389. Id. at 184-85.
as well as the position of the United States government. In those cases, however, the interpretations provided by foreign governments were in full agreement with the United States' position. In contrast, the amicus briefs filed in *Aérospatiale* on behalf of the governments of France, the United Kingdom and the Federal Republic of Germany indicated that the current United States interpretation of the Convention was inconsistent with the intent and expectations of other signatory nations. The Court, however, did not acknowledge this crucial disagreement.

The Court did not discuss the fact that the United States government radically changed its interpretation of the Convention in 1984. Although the government has never offered an explanation for the change, this did not affect the weight that the Court accorded to the Solicitor General's current position. In view of the statement by the Court in *Sumitomo* that ex post facto government interpretations are "not conclusive," it seems reasonable to expect that the Court would have scrutinized the government's position in more detail.

In December 1983, the Solicitor General unequivocally stated that the United States viewed the Hague Evidence Convention as the exclusive mechanism for conducting discovery abroad. Nine months later, the government departed from its earlier position and informed the Court that the Convention was intended to be an optional supplement to

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390. See cases cited supra note 356.

391. *O'Connor*, 107 S. Ct. at 351 (U.S. application of Panama Canal Treaty unchallenged by Panama); *Air France*, 470 U.S. at 404-05 (subsequent interpretations of term "accident" in Warsaw Convention by sister signatories in accordance with American view and entitled to considerable weight); *Sumitomo*, 457 U.S. at 184 n.10 (Japan's interpretation of Friendship, Commerce and Navigation Treaty identical to United States' interpretation and entitled to great weight).

392. See Brief of *Amicus Curiae* the Republic of France in Support of Petitioners at 8-9, *Aérospatiale* (No. 85-1695) (the Convention sets forth mandatory procedures unless the foreign sovereign permits otherwise); Brief for the Federal Republic of Germany as Amicus Curiae at 13-17, *Aérospatiale* (No. 85-1695); Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Petitioners at 8, *Aérospatiale* (No. 85-1695); Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners at 11-12, *Aérospatiale* (No. 85-1695).

The government of Switzerland also filed an amicus brief. Switzerland filed its brief in anticipation of becoming a signatory to the Convention in the future. Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners at 2, *Aérospatiale* (No. 85-1695).

393. See supra note 392.

394. See supra text accompanying notes 146-74.


domestic rules of civil procedure. The policy changes in the State Department and the Securities and Exchange Commission that influenced the Solicitor General to reinterpret the Convention in 1984 have never been disclosed. The State Department’s current position on the Convention appears to have evolved in accordance with the Reagan Administration’s approach to international adjudication and its wavering observance of United States’ treaty obligations. The recent international enforcement efforts of the Securities and Exchange Commission appear to have provided further impetus for the United States to retreat from its obligations under the Hague Evidence Convention.

i. the State Department

The Solicitor General’s office modified its position concerning the exclusivity of the Hague Evidence Convention in 1984. At that time, the United States’ commitment to international adjudication underwent a substantial change. In April, 1984, the Republic of Nicaragua filed a complaint in the International Court of Justice (ICJ) alleging that the United States was involved in military and paramilitary actions against Nicaragua in violation of international law. Three days before the complaint was filed, the United States attempted to eliminate the jurisdiction of the ICJ by withdrawing from the jurisdiction of the ICJ with regard to any disputes with Central America. Despite the fact that the United States’ filing was untimely, the ICJ held that it did have jurisdiction over the dispute. After the jurisdictional decision, and in anticipation of an adverse judgment against it, the United States boycotted further proceedings in the case. Following its walkout, the United States withdrew altogether from the compulsory jurisdiction of the ICJ effective April 7, 1986.

398. See supra text accompanying notes 396-97.
400. Id. at 415-21, paras. 52-65 (Nov. 26). The withdrawal was unsuccessful because the United States Declaration required a six month notice period before termination of the ICJ’s jurisdiction would be effective. 39 I.C.J. Y.B. 99, 100 (1985).
The State Department indicated in a press release that the United States was not withdrawing completely from the ICJ, and that it was willing to participate in the adjudication of treaties in cases which might be referred to the ICJ by both parties. The United States thus established that it was only willing to diminish its national sovereignty, by submitting to international adjudication, when it appears to be in its own best interests.

Strict adherence to treaty obligations has not been a hallmark of the Reagan Administration either. For example, the Administration has attempted to broaden the interpretation of the 1972 Anti-Ballistic Missile Treaty (ABM Treaty) between the United States and the Soviet Union in order to permit research into space-based national defense systems. In this regard, Dante B. Fascell (D.-Fla.), Chairman on Foreign Affairs, U.S. House of Representatives, has observed:

The Reagan Administration has proposed to . . . articult[e] a new interpretation of the ABM treaty which opens the door to testing in outer space, and thus to SDI. Congress has neither abandoned the treaty obligations of the United States nor thrown overboard the doctrine of mutual deterrence. Congress has a duty to insist that the case for a major shift in strategic nuclear strategy be convincingly made by the Administration and that it obtain bipartisan support (neither of which has occurred).

That support will not be forthcoming if the Administration continues to insist on its reinterpretation of the ABM treaty as a vehicle by which to dismantle the doctrine of mutual deterrence. The Administration’s tactics in this respect encroach on the Senate’s constitutional responsibility to approve only one text of a treaty as the law of the land. The executive branch has no constitutional power to unilaterally reinterpret treaties.

The Administration appears to have taken a similar approach in attempting to unilaterally reinterpret the Hague Evidence Convention. The Supreme Court’s decision in Aérospatiale, that the United States can rely on the Hague Evidence Convention only when it will facilitate evidence gathering abroad, parallels the United States’ stance on international adjudication, and appears to reflect an evolving policy within the Executive

404. Id. at 1743-45.
Branch that adherence to international obligations is unnecessary when it may be adverse to United States' interests.

ii. the Securities and Exchange Commission

Although State Department policy was important to the Solicitor General's formulation of our obligations under the Convention, it appears that the Securities and Exchange Commission provided the strongest impetus for the United States to retreat from our obligations under the Convention. For the first time in the ongoing dispute over the Hague Evidence Convention, the Securities and Exchange Commission (SEC) joined in the amicus brief of the United States.407 The Solicitor General stated that the SEC had used the Convention's procedures in the past to obtain evidence abroad and "thus has [had] actual experience with the practical operation of its transnational discovery methods."408

The increased internationalization of securities markets over the past few years has created serious challenges for SEC enforcement efforts abroad.409 Michael D. Mann of the SEC's Office of International Legal Assistance noted in 1985 that "[s]ecret and blocking laws can inhibit disclosure of critical evidence to the SEC in its investigation overseas. The documents sought by the SEC under U.S. rules may be outside of the allowable scope of discovery in a foreign nation. . . . [N]o method currently exists for resolving the conflicts in international laws . . . ."410 In 1986, SEC Commissioner Charles C. Cox presented a paper to the International Association of Securities Commissions in which he observed that the SEC's investigative power is greatly limited with regard to international offerings.411 Cox further noted that foreign law often does not permit investigative or pre-trial discovery and that the Commission has no jurisdiction to compel production of evidence in foreign countries.412 Cox stated that multinational transactions can be "advantageous to securities law violators desiring to conceal evidence of their activities from enforcement authorities."413 In Cox's opinion, the procedures for gathering evidence abroad which existed in 1986 were inade-

408. Id. at 1-2.
410. Id.
412. Id.
413. Id.
quate for the SEC to gather evidence abroad prior to litigation.\textsuperscript{414}

The SEC's dissatisfaction with the procedures of the Hague Evidence Convention were reviewed by the Solicitor General in the United States' brief.\textsuperscript{415} The Solicitor General observed that the SEC's "limited experience" with the Convention had been unsatisfactory.\textsuperscript{416} The Solicitor General explained that the SEC had only used the Convention four times to obtain documents and testimony from third party witnesses "for use in enforcement actions involving insider trading in violation of the federal securities laws."\textsuperscript{417} In each instance, the requests either failed to produce the information needed, or were successful but were extremely time consuming and expensive.\textsuperscript{418}

The Solicitor General admitted, however, that the SEC experience with the Convention was "atypical" since the Commission is a government enforcement agency and the Convention was designed to be used in private civil and commercial litigation.\textsuperscript{419} In fact, the Solicitor General was informed by the State Department that "private plaintiffs [in typical negligence or contract actions] have found resort to the Convention more successful."\textsuperscript{420} Nevertheless, the Solicitor General indicated that the SEC's experience supported the belief that adopting a "blanket presumption mandating 'first-use' of the Convention in all cases would be unwise."\textsuperscript{421}

The SEC has been involved in the past few years in negotiating bilateral agreements with foreign countries to assist the Commission in its international enforcement efforts.\textsuperscript{422} Since the SEC has not used the Hague Evidence Convention extensively, it is possible that the mere

\begin{itemize}
  \item \textsuperscript{414} Id. See Mann & Sullivan, \textit{Current Issues in International Securities Law Enforcement}, in \textit{Securities Enforcement Institute} 1987, \textit{Practicing Law Institute Corporate Law & Practice Course Handbook} 769, 789-843 (1987) for a discussion of the obstacles encountered by the SEC in its international enforcement efforts. The authors also discuss the limited utility of the Hague Evidence Convention and the SEC's need to enter into bilateral agreements to provide a reliable mechanism for obtaining evidence abroad. \textit{Id.} at 829-41.
  \item \textsuperscript{415} Brief for the United States and the Securities and Exchange Commission at 15-18, \textit{Aérospatiale} (No. 85-1695).
  \item \textsuperscript{416} Id. at 15.
  \item \textsuperscript{417} Id. at 15-16.
  \item \textsuperscript{418} Id. at 16-18.
  \item \textsuperscript{419} Id. at 18; see also \textit{Aérospatiale}, 107 S. Ct. at 2565 n.20 (Blackmun, J., concurring in part and dissenting in part).
  \item \textsuperscript{420} Brief for the United States and the Securities and Exchange Commission at 18, \textit{Aérospatiale} (No. 85-1695).
  \item \textsuperscript{421} Id.
\end{itemize}
existence of the Convention was hampering SEC efforts to negotiate additional bilateral agreements to gain access to information abroad. Although the SEC has been successful in reaching accords with Japan, the United Kingdom, Switzerland and the Cayman Islands to enable the United States to gather information abroad,\textsuperscript{423} it seems likely that the existence of a valid United States treaty on the subject of the taking of evidence abroad may have been asserted by other foreign nations to avoid entering into any additional agreements. By taking the position that the Hague Evidence Convention is merely optional, the United States gains the bargaining power to encourage other nations to enter into additional bilateral agreements concerning securities enforcement to alleviate the friction created by SEC attempts to apply United States law extraterritorially during its investigations. If this is in fact the case, it is not surprising that SEC Commissioner Joseph A. Grundfest observed that in view of the “unusually heavy docket of securities laws cases” facing the Supreme Court in 1987, including \textit{Aérospatiale}, 1987 was predicted to be “the most important year for the SEC since it was established in 1934.”\textsuperscript{424}

Despite the fact that the SEC faces problems in international securities enforcement, it must be reiterated that the object of the Hague Evidence Convention was to provide procedures for \textit{private} litigants to obtain evidence abroad in civil or commercial disputes.\textsuperscript{425} The government has effectively interjected private litigants into a problem with which they have little concern. If, based on the experience of private litigants, the Convention had proved ineffective because foreign governments were uncooperative, the United States might have been justified in retreating from our obligations under the Convention. It is disconcerting that the Solicitor General purported to justify a reinterpretation of the Convention based on the terms and operation of the Convention itself, when it appears that the current United States position on the Convention was really inspired by diplomatic problems and the hidden agenda of the Securities and Exchange Commission.

The Supreme Court’s disposition in \textit{Aérospatiale} might have been an attempt to accommodate both private and governmental interests. Government agencies can use the optional character of the Convention to their advantage in future negotiations whereas private litigants can take


\textsuperscript{425} See supra notes 68-100 and accompanying text.
advantage of the Convention when it will facilitate transnational discovery. However, the Court's failure to acknowledge that the Convention can alleviate many difficulties associated with transnational discovery disputes when it is used in the context for which it was designed—private civil and commercial litigation—might well discourage trial courts from ordering discovery to proceed under the Convention.

2. Article 23

Article 23 of the Convention permits a contracting state to declare that it will not comply with pre-trial requests for documents "as known in Common Law countries." The Court relied erroneously on the presence of Article 23 to support its conclusion that the Convention was intended as a permissive supplement to the Federal Rules. First, the majority inaccurately stated that Article 23 enables a contracting state to declare that it will not "execute any letter of request in aid of pretrial discovery in a common law country." The Court reasoned that it would have been anomalous for the United States to have agreed to Article 23 had it expected the Convention to be mandatory. The Court rejected the possibility that the United States intended to relinquish all recourse to the procedures available under the Federal Rules while permitting civil-law states to "unilaterally abrogate" the Convention's procedures by filing an Article 23 declaration.

Although the impact of Article 23 has been vigorously debated by courts and commentators alike, the Aérospatiale Court allocated only a portion of one brief paragraph to the provision. The Court not only misstated the terms of Article 23, it developed its own interpretation of the provision which supported a permissive application of the Convention. Contrary to the Court's description, however, Article 23 provides that a state may refuse to execute letters of request for the purpose of

426. Hague Evidence Convention, supra note 13, at art. 23.
427. See supra text accompanying notes 115-21 for an explanation of the conflict over Article 23.
429. Id. (emphasis added).
430. Id. at 2552.
431. Id.
432. Many courts have held that the terms of Article 23 indicate that the Convention was not designed to be mandatory. See cases cited supra note 120. Many commentators have concluded that Article 23 should not be interpreted so as to defeat the binding obligations of the Convention. See B. Ristau, supra note 16, § 5-40, at 253-256.4; Oxman, supra note 12, at 771-79; McLean, supra note 8, at 32-35; Radvan, supra note 119, at 1042-46.
obtaining pre-trial discovery of documents. Article 23 applies only to the production of documents, and does not affect responses to interrogatories or oral testimony.

On its face, Article 23 permits a contracting state to refuse to comply with pre-trial document requests. The Court therefore reasoned that the Convention is ineffective for producing needed discovery, thus leading to the conclusion that the Convention was not intended to be the sole method for obtaining evidence abroad. The course of conduct between the parties to the Convention since 1972 shows that, contrary to the Court's conclusion, Article 23 in practice has not been shown to be a barrier to effective use of the Convention.

There is almost no negotiating history regarding Article 23. It was adopted at the request of the United Kingdom delegation shortly before the final text of the Convention was approved; therefore, the drafting group did not discuss the clause. The United Kingdom proposed the provision out of its distrust of American pre-trial discovery procedures, which in their view had often led to "fishing expeditions" for evidence to support anticipated lawsuits.

After the Convention was implemented, the United Kingdom explained that Article 23 was intended to control document requests that do not indicate precisely which documents need to be produced for examination. In fact, the United Kingdom's declaration restricts only those requests that make identification of the documents to be produced impossible. This restriction conforms with Article 3, which states that

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434. Hague Evidence Convention, supra note 13, at art. 23 (emphasis added).
435. Aérospatiale, 107 S. Ct. at 2552; Brief for the United States and the Securities and Exchange Commission at 15, Aérospatiale (No. 85-1695); see supra note 120.
436. See infra notes 446-47.
438. Id. In fact, the only reference to Article 23 by the drafters in their report on the negotiation and drafting of the Convention states that "Article 23 permits a State to refuse to execute a letter, issued to obtain pre-trial discovery of documents." 1969 Report of the United States Delegation, supra note 74, at 808-09.
441. Id. The United Kingdom's declaration states:

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 obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:
a letter of request must specify the evidence to be obtained or the documents to be examined. After ratification, it became evident that Article 23 had been poorly drafted due to a gross misunderstanding of the term “pre-trial discovery” by the civil-law contracting states. Mr. Bruno Ristau, who participated in the drafting of the Convention, and served as United States delegate to the Special Commission that reviewed its operation in 1978, explained that during the 1978 review:

[i]t became apparent . . . that there was not only considerable apprehension about the sweeping pre-trial discovery practice permitted under United States law, but that the delegates from a number of civil law countries displayed an appalling misunderstanding of the institution of “pre-trial discovery[.]” To them, the term “pre-trial” was synonymous with “prior to the institution of a suit.” Almost all civil law delegates were conversant with the English expression “fishing expedition.” It therefore followed that their States had to decline lending judicial aid to such searches for potential evidence by prospective plaintiffs.

After the United States delegate explained the function of American pre-

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 requested court to be, or to be likely to be, in his possession, custody or powers.


442. Article 3 provides that a Letter of Request shall specify:
(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
(b) the names and addresses of the parties to the proceedings and their representatives, if any;
(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
(d) the evidence to be obtained or other judicial act to be performed.
In appropriate cases, the Letter of Request must also specify:
(e) the names and addresses of the persons to be examined;
(f) the questions to be put to the persons to be examined or a statement of the subject matter about which they are to be examined;
(g) the documents or other property, real or personal, to be inspected;
(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
(i) any special method or procedure to be followed under Article 9.
Hague Evidence Convention, supra note 13, at art. 3.


trial discovery and made it clear that discovery is conducted only after a lawsuit is instituted, the "delegates from the civil law jurisdictions agreed to urge their governments to reconsider their declarations under Article 23 of the Convention." 445

Since 1980, all but three signatory states have modified, or are in the process of modifying, their Article 23 declarations to restrict compliance only with those letters of request that do not specifically enumerate which documents are needed. 446 Moreover, there is no evidence that in practice Article 23 has created a roadblock for litigants, since refusals to execute have been very infrequent. 447 The Republic of France advised


446. Cyprus, Denmark, Finland, the Netherlands, Norway, Singapore, and Sweden have modified their declarations to conform to that of the United Kingdom. See supra note 441 for the text of the United Kingdom's declaration. See also 8 MARTINDALE-HUBBELL LAW DIRECTORY, Selected International Conventions, Part VII, 15-19 (1987).

In 1986, the French Ministry of Justice revised its position on Article 23. The French declaration now states:

The declaration made by the Republic of France pursuant to Article 23 relating to letters of request whose purpose is "pre-trial discovery of documents" does not apply so long as the requested documents are limitatively enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation. Aérospatiale, 107 S. Ct. at 2566 n.22 (Blackmun, J., concurring in part and dissenting in part) (quoting Letter from J. B. Raimond, Minister of Foreign Affairs, France, to H. H. Broek, Minister of Foreign Affairs, The Netherlands (Dec. 24, 1986)).

The Federal Republic of Germany has also taken steps to qualify its Article 23 declaration:

The Federal Republic of Germany has recently accelerated the procedure for the issuance of regulations which will permit the pre-trial production of documents when they are clearly identified, relevant and do not unnecessarily divulge business secrets. The government of the Federal Republic of Germany is endeavoring to issue the regulations before the end of 1986, after the necessary consent of the Bundesrat (Upper House of Parliament) has been obtained. This corresponds with suggestions made by the Government of the United States on a diplomatic level.

Brief for the Federal Republic of Germany as Amicus Curiae at 9-10, Aérospatiale (No. 85-1695). Once France and Germany officially modify their declarations, only three countries, Italy, Luxemburg and Monaco, will have unqualified Article 23 declarations still in effect. See also B. RISTAU, supra note 16, § 5-35, at 232.

447. 1978 Report of the Special Commission, supra note 439, at 1431. Petitioner Aérospatiale noted that it knew of "no case in which a French court has refused to execute a letter of request." Brief for Petitioners at 10 n.26, Aérospatiale (No. 85-1695). Further, the Federal Republic of Germany stated that:

181 formal letters of request from U.S. courts were received by German Central Authorities from 1980 through 1985. 154 of the letters of request were accepted and executed. The remaining 27 were rejected because the evidence to be taken was not sufficiently identified or the request was for the production of documents for pre-trial discovery. These figures disprove the argument that application of the Convention is futile.

Brief for the Federal Republic of Germany as Amicus Curiae at 8-9, Aérospatiale (No. 85-1695) (footnote omitted).

In addition, the Government of Switzerland indicated that even though it was not yet a
the Court in Aérospatiale, that its existing Article 23 declaration "was not intended to preclude American litigants from obtaining necessary evidence." The majority in Aérospatiale needed to examine Article 23 in more detail, to consider how it has actually been interpreted and narrowly implemented by the Convention’s signatories. Had this been done, the majority could not have reasonably concluded that any contracting state expected Article 23 to create a genuine impediment to the production of relevant evidence, and thus undermine proper operation of the Convention.

The United States received what it bargained for in the Convention in terms of document production: the assured assistance of foreign judicial authorities, by compulsion if necessary, to obtain documentary evidence that has a direct, clear nexus with the subject matter of commenced litigation. The Court was unwilling to acknowledge this. The provisions of Article 23 were fully disclosed to President Nixon and to the Senate prior to ratification. Had the State Department or the Senate been concerned with the operation of Article 23, ratification could have been postponed and negotiations could have been resumed. It would have been most anomalous for the civil-law contracting nations to enter into the treaty only to remain subject to the status quo situation that existed prior to its implementation: unrestricted extraterritorial application of United States discovery procedures in violation of foreign judicial sovereignty.

signatory to the Convention, it had been “extremely liberal in granting assistance” in gathering evidence in response to American letters rogatory. It noted that “about twenty requests per year have been received from the United States, and all have been executed. The Government of Switzerland expects to continue this liberal policy after Switzerland joins the Convention.” Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners at 6-7 n.4, Aérospatiale (No. 85-1695).


449. Article 10 of the Convention requires a state to “apply appropriate measures of compulsion...to the same extent as are provided by its internal law” to aid in executing Letters of Request. Hague Evidence Convention, supra note 13, at art. 10. The Republic of France advised the Court in Aérospatiale that “[i]n the isolated instances where the party...declines to cooperate voluntarily, French courts possess evidence-gathering powers that can be used effectively in aid of the American request. The Republic of France will continue to make use of those powers whenever so required under the Convention.” Brief of Amicus Curiae the Republic of France in Support of Petitioners at 3, Aérospatiale (No. 85-1695).

450. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, SEN. EXEC. DOC. A, 92d Cong., 2d Sess., VI (1972); P. AMRAM, EXPLANATORY REPORT, supra note 126, at 15.

451. Justice Blackmun, in his dissent, made a similar argument regarding Article 27. Aéro-
To further support its conclusion that the Convention was not intended to modify the Federal Rules of Civil Procedure, the Court declared that the language of Article 27\textsuperscript{452} "plainly states that the Convention does not prevent a contracting State from using more liberal methods of rendering evidence than those authorized by the Convention."\textsuperscript{453} The majority found that Article 27 indicates "on its face" that both a requesting state and a state of execution may rely on more liberal existing policies to request and produce evidence.\textsuperscript{454} The Court reasoned that even if Article 27 is held applicable only to states of execution, "the treaty's internal failure to authorize more liberal procedures for obtaining evidence would carry no pre-emptive meaning."\textsuperscript{455} The documented negotiating history of the Convention clearly contradicts the majority's interpretation of Article 27. Moreover, the majority's analysis of Article 27 is internally inconsistent with other portions of its opinion.

As Justice Blackmun observed, the Explanatory Report on the Convention,\textsuperscript{456} which was submitted to the Senate prior to ratification, indicates that Article 27 was designed to permit states of execution to continue using less restrictive internal methods of gathering evidence other than those in the Convention in order to respond to letters of request.\textsuperscript{457} In fact, each reference to Article 27 in the Explanatory Report plainly indicates that the provision was designed to preserve the existing internal practices of states of execution only.\textsuperscript{458} Furthermore, nothing

\textsuperscript{452} See supra text accompanying note 122 for the text of Article 27.
\textsuperscript{453} Aérospatiale, 107 S. Ct. at 2552.
\textsuperscript{454} Id. n.24.
\textsuperscript{455} Id. at 2553 n.24. The Court further stated: "We are unpersuaded that Article 27 supports a 'negative inference' that would curtail the pre-existing authority of a State to obtain evidence in accord with its normal procedures." Id.
\textsuperscript{456} P. AMRAM, EXPLANATORY REPORT, supra note 126.
\textsuperscript{457} Aérospatiale, 107 S. Ct. at 2559 n.2 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun pointed out the incongruity of the majority's reading of Article 27:

The only logical interpretation of this article is that a state receiving a discovery request may permit less restrictive procedures than those designated in the Convention. The majority finds plausible a reading that authorizes both a requesting and a receiving state to use methods outside the Convention. . . . If this were the case, Article 27(c), which allows a state to permit methods of taking evidence that are not provided in the Convention, would make the rest of the Convention wholly superfluous. If a requesting state could dictate the methods for taking evidence in another state, there would be no need for the detailed procedures provided by the Convention.

\textsuperscript{458} The Explanatory Report states:
contained in the Convention's documented history suggests that Article 27 was indicative of whether the treaty was mandatory or exclusive. 459

Most perplexing, however, is the internal inconsistency of the Court's logic in its textual analysis of the Convention. Initially, the Court reasoned that the text of Article 23 and Chapter I affirmatively demonstrated the drafters' intent not to affect the Federal Rules based on Article 27 has been discussed in connection with almost every one of articles 1 to 22.

This is a most important article, designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants.

. . . .

It provides, in sub-division (b) that any act provided for in the Convention may be performed upon less restrictive conditions than the Convention provides, if the internal law or practice of the State of execution so permits. . . .

It provides, in sub-division (c), for methods of taking evidence other than those provided in the Convention, to the extent that internal law and practice will permit. This means taking evidence without either a Letter of Request or the use of a consul or commissioner.

For example, counsel for the parties may travel to the home of a willing witness, call in a local official to administer an oath, and then question the witness, making a record by stenographer or tape-recorder. Or to save travel expense, competent local counsel in the State of execution could be briefed to examine the witness. The only conditions are that the State of execution will permit this, and that the resulting record will be admissible at the trial of the action. . . .

Another example would be for the parties or counsel, with an engineer, to inspect, examine, photograph, measure or test certain machinery in a factory, or the inside of a mine, with the consent of the owner, to obtain evidence for use at the trial of the action. Again, if the State of execution will permit this, the result may be satisfactory.

A final example is the illustration given in the Report to the draft Convention, where the courts in New York and Chicago appointed foreign German and Italian judges as "commissioners" and granted [them] 459. See supra note 457.
the inclusion of terms in those provisions. In fact, the Court stressed that absent "explicit textual support" it would be unable to accept an interpretation of Article 23 that was not evident from the face of the treaty. Similarly, the Court relied on the omission of an exclusivity provision in the Preamble as strong evidence that the drafters intended to omit the provision from the treaty in order to make it optional. The Court later contradicts its own reasoning by stating that the absence of language in Article 27 did not preclude it from drawing an inference, based on the omission, that the parties intended to preserve the availability of procedures under the Federal Rules.

The Court's result-oriented analysis reflects the parochialism that has also been evident in the lower court interpretations of the Convention. Rather than examining the documented history of the Convention, and the intent and purposes of the contracting states, the Court relied on a superficial reading of the text, and looked at crucial provisions in isolation from the overall purpose of the treaty. The Court's unwillingness to place the text in the contextual framework in which it was created hindered the Court in properly scrutinizing the Convention, clarifying its terms and effectuating its goals.

4. Fairness concerns

The Court underscored the importance of relying on explicit textual support to interpret the Convention rather than on the "hypothesis

461. Id. at 2552.
462. Id. at 2550 & n.15.
463. Id. at 2553 n.24.
464. It has been recognized that:

[I]n the process of determining the genuine shared expectations of parties to an agreement, a simple reading of the final text, while clearly indispensable, may often be of only limited assistance. Other indices of expectation, including the general features of the world social and power processes, the particular circumstances attending negotiation, the events occurring during negotiation, and the subsequent actions of the parties under the agreement, may be of much greater assistance in any given situation. The point to be stressed is that prior to a comprehensive contextual examination of an international agreement no determination of the hierarchical importance or relevance of any feature of the context may be usefully made, and any attempt to do so must ultimately frustrate the ascertainment of genuine shared expectations.

M. McDougall & H. Lasswell, supra note 349, at 96-97 (emphasis in original).
465. Aérospatiale, 107 S. Ct. at 2552 n.23. "The Preamble does not speak in mandatory terms . . . ." Id. at 2550. "The absence of any command . . . . is conspicuous." Id. at 2551. "In the absence of explicit textual support, we are unable to accept the hypothesis . . . ." Id. at 2552. "The text . . . unambiguously supports the conclusion . . . ." Id. at 2552-53. "The . . . Convention . . . contains no such plain statement of a pre-emptive intent." Id. at 2553.
about the expectations of the parties." It was willing, nonetheless, to examine its own hypothetical fairness considerations to determine whether the Convention was intended to be exclusive or optional. The Court expressed its concern that if the Convention were deemed exclusive, it would "effectively subject every American court hearing a case involving a national of a contracting State to the internal laws of that State." It further asserted that "a rule of exclusivity would subordinate the court's supervision of even the most routine pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities." The Court relied on the reasoning expressed by the Fifth Circuit in In Re Anschuetz & Co., GmbH:

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

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

The majority does not explain why it considers the Convention's procedures to be conceptually different from the letter rogatory procedure authorized under Federal Rule of Civil Procedure 28(b). In either case, a United States court retains jurisdiction and control over the parties to the suit. A court is not subject to the internal laws of a

466. Id. at 2552 n.23. The majority stressed that "both comity and concern for the separation of powers counsel the utmost restraint in attributing motives to sovereign States which have bargained as equals." Id.
467. Id. at 2553 n.25.
468. Id. at 2553.
469. Id.
471. Id. at 612.
472. FED. R. CIV. P. 28(b).
473. See FED. R. CIV. P. 26; see also supra note 329 and accompanying text.
foreign nation; rather, the foreign authority serves as a procedural conduit through which a litigant may obtain evidence abroad without violating the sovereignty of the foreign state. In fact, a letter rogatory issued pursuant to Federal Rule 28(b) contemplates that "courts of other countries may be expected to follow their customary procedure for taking testimony." Furthermore, since "some foreign countries are hostile to allowing a deposition to be taken in their country, or to lending assistance in the taking of a deposition . . . compliance with the terms of [Fed. R. Civ. P. 28(b)] may not in all cases ensure completion of a deposition abroad."

It follows then that the assumptions made by the Fifth Circuit are unfounded. A United States court can actually obtain greater assistance and protect itself against being subject to the customs and laws of a foreign state by using the Convention. A foreign authority is bound to comply with the Convention in good faith, and if asked, to use a special method of gathering evidence to comply with the request of another contracting state. Also, the Convention is designed to facilitate, rather than preempt, the transmission of interrogatories and document requests. Document requests and interrogatories served pursuant to the Federal Rules are likely to be thwarted by the existence of foreign blocking laws.

The Court also speculated that "three unacceptable asymmetries" would be created if the Convention were deemed to be exclusive.

474. Although the Hague Evidence Convention prescribes procedural mechanisms with which contracting states must comply, a request made pursuant to the Convention is subject, to an extent, to the substantive legal constraints of the state of execution. Article 9 of the Convention grants the responding party the right to withhold a response insofar as a privilege or duty to refuse to give evidence exists. Hague Evidence Convention, supra note 13, at art. 11. However, the right of a foreign national to claim a privilege also exists when discovery is conducted under the Federal Rules. See Fed. R. Civ. P. 26(b)(1).

Article 12 of the Convention also expressly states that a contracting state may not refuse to execute a request solely on the ground that "under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it." Hague Evidence Convention, supra note 13, at art. 12. A state may only refuse execution when the act requested does not fall within the function of its judiciary or if the state considers that its sovereignty or security would be prejudiced thereby. Id. The existence of foreign blocking laws demonstrates that states exert the same prerogatives with respect to discovery conducted under the Federal Rules of Civil Procedure. See supra notes 53-66 and accompanying text.


476. Id.

477. Hague Evidence Convention, supra note 13, at art. 9.

478. See supra text accompanying notes 53-66.

479. Aérospatiale, 107 S. Ct. at 2553 n.25.
First, in a lawsuit between a United States national and a foreign national, the foreign party would be entitled to obtain discovery pursuant to the Federal Rules of Civil Procedure while the domestic party would be required to use the procedures of the Hague Evidence Convention. The Court implied that a foreign party would have broader access to relevant information since it would not be constrained by the limitations of the Convention. Second, the Court asserted that if two companies, one domestic and one foreign, were both sued in a United States court, the companies would in effect be competing on unequal terms since the foreign company would be subject to less extensive discovery procedures under the Hague Evidence Convention. Third, the Court claimed that a rule of exclusivity would confer an unwarranted advantage on domestic litigants who are involved in litigation with nationals of states who are not parties to the Convention.

The majority’s theories are unpersuasive. The Court did not provide even one example to support its contention that use of the Hague Evidence Convention has actually hampered domestic litigants from obtaining evidence abroad. Similarly, the Court did not show that the strategic position of any domestic litigant in relation to a foreign adversary has ever been seriously prejudiced by reliance on the Convention. According to Justice Blackmun, a court can alleviate any potential disparity that might occur by exercising its discretionary power to control discovery to ensure fairness to all parties. He noted that under the provisions of Federal Rule 26(c), a court can “make any order which justice requires” to limit discovery, including an order permitting discovery only on specified terms and conditions, or with limitation in scope to certain matters. Therefore, if resorting to the Convention disadvantages a domestic litigant, a court can prevent potential unfairness by similarly restricting the foreign party’s access to information.

The hypothetical fairness concerns raised by the Court are based on the assumption that the Convention hampers, rather than assists, litigants in obtaining evidence abroad. This unfounded belief has served

480. Id.
481. Id.
482. Id.
483. Id. at 2554 n.25.
484. Id. at 2567 (Blackmun, J., concurring in part and dissenting in part).
485. Id. (citing Fed. R. Civ. P. 26(c)) (Blackmun, J., concurring in part and dissenting in part).
486. Justice Blackmun suggested that a court could postpone the domestic party’s obligation to respond until completion of the foreign discovery. Id. (Blackmun, J., concurring in part and dissenting in part).
487. See id. at 2567 (Blackmun, J., concurring in part and dissenting in part).
as a basis for many lower court opinions as well.\textsuperscript{488} Justice Blackmun aptly pointed out that dissimilar treatment of litigants occurs in the opposite manner posited by the majority: litigants who need evidence from nationals of noncontracting states are disadvantaged by the unavailability of Convention procedures.\textsuperscript{489} Justice Blackmun also argued that this potential disparity in treatment is not manifestly unfair, since there is "an unavoidable inequality inherent in the benefits conferred by any treaty that is less than universally ratified."\textsuperscript{490} Without any factual justification, the majority mischaracterized the Convention's utility to domestic litigants. By doing so, the Court developed an interpretation of the Convention that completely contravenes the treaty's clearly articulated purpose—to facilitate evidence gathering abroad.

5. The expectations of the contracting states

The majority did not analyze how the expectations of the signatory states affected the final agreements embodied in the Convention. The Court nevertheless made some unfounded general assumptions about the operation and effect of the Convention to support the conclusion that the Convention was not intended to be mandatory or exclusive. First, the Court reasoned that the parties did not expect the treaty to be mandatory since the text "does not modify the law of any contracting State."\textsuperscript{491} While the text of the Convention itself does not prescribe how the Convention was to affect the existing laws of each contracting state, ratification of the Convention did modify the law of the United States—it created a new body of federal law which, under the United States Constitution, became the supreme law of the land.\textsuperscript{492} According to basic principles of treaty law and customary international law, the Convention created binding obligations on the United States to adhere to its promises in good faith.\textsuperscript{493} As discussed above,\textsuperscript{494} there was no need to pass implementing legislation in the United States, and the internal evidence gathering procedures of our judicial system did not have to be modified to satisfy our obligations under the Convention.\textsuperscript{495}

\begin{footnotesize}
\textsuperscript{488} See cases cited supra note 120.
\textsuperscript{489} Aérospatiale, 107 S. Ct. at 2567 (Blackmun, J., concurring in part and dissenting in part).
\textsuperscript{490} Id.
\textsuperscript{491} Id. at 2550-51.
\textsuperscript{492} Id. at 2550; U.S. CONsT. art. VI, cl. 2.
\textsuperscript{493} See J. BRIERLY, supra note 349, at 331; G. VON GLAHN, supra note 13, at 170; E. YAMBRUSIC, supra note 353, at 27.
\textsuperscript{494} See supra text accompanying notes 380-84.
\textsuperscript{495} See supra notes 382-83.
\end{footnotesize}
Code section 1782 was in effect prior to ratification of the Convention, and it provided broad judicial assistance, without the requirement of reciprocity, to foreign nationals gathering evidence in the United States. Therefore, it seems plausible that, at least with respect to the United States, there was no need to modify any domestic law in order to comply in good faith with the terms of the Convention.

This was not true, however, for the civil-law nations that adopted the Convention. For example, the Federal Republic of Germany had to pass legislation in order to make the Convention binding on its citizens. Further, the Republic of France advised the Court that: “[t]he French Code of Civil Procedure was extensively amended in order to make the Convention procedures an integral part of domestic French law.” Following ratification of the Convention, the French government revised the French code of civil procedure to incorporate a special set of provisions on international letters of request. “Articles 733 through 748 of the Nouveau Code de Procédure Civile create an exception to French procedural rules in the case of foreign litigants using Hague Convention procedures, and radically depart from traditional French rules by opening the Republic of France’s borders to United States-style discovery.” The Court’s conclusion that the parties did not expect the Convention to be mandatory because it did not modify the laws of any contracting state is incorrect.

Second, the Court implied that since the Convention’s text does not require any contracting state to use the Convention exclusively, either to request evidence or to respond to foreign requests, the parties did not expect Convention procedures to be compulsory. In his dissent, Justice Blackmun refuted the majority’s reasoning. He asserted that if the parties had contemplated that contracting states could unilaterally abrogate the requirements of the Convention, and rely on domestic procedures instead, the entire Convention would be, in effect, “wholly

500. Id. at 19.
501. Id. (footnote omitted); see id. at 19-21 for a detailed explanation of the provisions of France’s code of civil procedure.
502. Aérospatiale, 107 S. Ct. at 2550 n.15.
503. Id. at 2559 (Blackmun, J., concurring in part and dissenting in part).
superfluous." He emphasized that although the text of the Convention on its face does not affirmatively require contracting states to use its procedures, if the parties had not "expected the Convention to provide the normal channels for discovery, . . . [they] would have had no incentive to agree to its terms."

The majority suggested that the parties did not expect the Convention to be exclusive because the text of the Convention does not compel any contracting state to "change its own evidence gathering procedures." As discussed above, it is clear from the negotiating history and subsequent implementation of the Convention that the civil-law countries understood that ratification of the Convention would require them to modify their evidence gathering procedures, despite the fact that the text of the Convention itself did not so state. After all, the Convention was conceived to improve and liberalize existing procedures for gathering evidence abroad. Had the Convention not been ratified by the United States, foreign litigants would still have broad access to information located here, whereas domestic litigants would continue to be stymied in their attempts to obtain utilizable evidence abroad. Therefore, it is only reasonable to assume that the civil-law states expected good faith reliance on the agreed Convention procedures in return for their wide-ranging compromises.

Under the majority's interpretation of the Convention, the binding and operative effects of the Hague Evidence Convention are virtually eradicated. The Court reached questionable conclusions about the Convention because it superficially examined the text, and isolated the language from the overall purpose and context of the treaty. Further, the majority did not acknowledge that international agreements impose inherent obligations on all contracting parties based on principles of treaty law and customary international law.

Justice Stevens, in his dissenting

504. Id. n.2 (Blackmun, J., concurring in part and dissenting in part).
505. Id. at 2559 (Blackmun, J., concurring in part and dissenting in part). See infra note 552.
506. Aérospatiale, 107 S. Ct. at 2551.
507. See supra notes 498-501 and accompanying text.
508. See, e.g., Brief of Amicus Curiae the Republic of France in Support of Petitioners at 2, 5, 11, Aérospatiale (No. 85-1695); Brief for the Federal Republic of Germany as Amicus Curiae at 6, Aérospatiale (No. 85-1695); Brief of Amicus Curiae the Italy-America Chamber of Commerce, Inc. in Support of Petitioners 8-10, Aérospatiale (No. 85-1695); see supra notes 498-501 and accompanying text.
509. See supra notes 80-95 and accompanying text.
510. See supra text accompanying notes 349-57; see infra text accompanying notes 521-27; G. Von Glahn, supra note 13, at 16.
opinion in *Trans World Airlines, Inc. v. Franklin Mint Corp.*\(^1\) observed that:

The frame of reference in interpreting treaties is naturally international, and not domestic. Accordingly, the language of the law of nations is always to be consulted in the interpretation of treaties. . . . Constructions of treaties yielding parochial variations in their implementation are anathema to the raison d'être of treaties, and hence to the rules of construction applicable to them.\(^2\)

In *Aérospatiale*, however, the majority overlooked crucial international considerations, and resolved the ambiguities of the Convention in a manner reminiscent of a domestic contract dispute rather than an international treaty dispute.

The majority ignored the fact that all contracting states, and particularly the United States, negotiated and ratified the Convention for the purpose of facilitating evidence gathering abroad, in order to modify existing practices that had proven unworkable.\(^3\) Moreover, the states that participated in the negotiation and drafting of the Convention believed that they were reasonably relying on the good faith performance of the obligations that arise from international law.\(^4\) The Court's analysis suggests that before the United States can adhere to international treaty obligations, it must be manifestly clear from the text of the treaty that the United States intended to be bound by the international contractual obligation. Signature and ratification are not enough. This approach, in terms of the Hague Evidence Convention, not only frustrates the goals of the signatories to the Convention, but also sends a dangerous message to our foreign trading partners that the United States will only adhere to valid international obligations when it is expedient to do so.

**B. Rejection of a First-Use Rule**

After the Court determined that the Hague Evidence Convention by its terms is not the exclusive method of gathering evidence abroad, the Court then considered whether to adopt a rule requiring litigants to use Convention procedures first, before resorting to the Federal Rules of

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512. *Id.* at 262-63 (citations omitted) (Stevens, J., dissenting).
513. See *supra* notes 498-501 and accompanying text.
514. See, e.g., Brief of *Amicus Curiae* the Republic of France in Support of Petitioners at 11-12, *Aérospatiale* (No. 85-1695); Brief for the Federal Republic of Germany as *Amicus Curiae* at 16-17, *Aérospatiale* (No. 85-1695); Brief of *Amicus Curiae* the Italy-America Chamber of Commerce, Inc. in Support of Petitioners 8, 10, 17, *Aérospatiale* (No. 85-1695).
Civil Procedure. The court of appeals had rejected this proposal based on the belief that "the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure." The Fifth Circuit had argued that this action would defeat, rather than promote, international comity. According to the majority in Aérospatiale, the court of appeals' concern was unfounded since foreign courts recognize that American courts must make the final decision on what evidence is needed in domestic tribunals. The Court then declared that adopting a first-use rule for the Convention would be unwise. The Court relied on three arguments to justify its position: (1) the text of the Convention imposes no duty to employ a first-use rule; (2) a first-use rule would adversely affect the jurisdiction of our courts; and (3) Convention procedures are more burdensome to litigants than the Federal Rules.

1. Absence of an affirmative duty in the text of the Convention

The Court stated that no duty to employ a first-use rule could be inferred from the text of the Convention. The majority asserted that the United States has no absolute duty to "accord respect to the sovereignty of states in which evidence is located" by relying on Convention procedures. This position, however, fails to acknowledge two vital concepts that influenced the agreements embodied in the Convention: the civil-law nations' belief that accepted principles of international law would be observed, and the significance of the concept of "judicial sovereignty."

A basic condition to the existence of an international legal order is the duty of every state to conduct its relations with other countries in...
accordance with international law. Although it is accepted that exi-
gent circumstances may make compliance impossible in certain in-
stances, it is undeniable that this fundamental tenet of international law creates binding obligations among states. Further, it is recognized that all states have a duty to exercise good faith in complying with obligations that arise from treaties and other sources of international law. A state may not invoke a provision in its constitution or laws as an ex-
cuse for failing to carry out this duty; the duty to honor obligations in good faith is an essential and basic condition for a legal order.

The Court’s view that the Hague Evidence Convention applies to United States litigants, but no concurrent obligation to use the Convention exists, is inherently contradictory, and does not reflect a good faith attempt to adhere to valid treaty obligations. Rather, the majority appeared to rely on this non sequitur to soften the practical effect of its decision on foreign nations. If there is no duty to employ a first-use rule, the possibility exists that very few litigants will be compelled to use Convention procedures. Sporadic reliance on the Convention cannot reasonably be considered to be good faith observance of our commitment to assist in improving international judicial cooperation.

The majority’s examination of the foreign concept of “judicial sovereignty” was also incomplete. Justice Blackmun explained that “[u]nder the classic view of territorial sovereignty, each state has a monopoly on the exercise of governmental power within its borders and no state may perform an act in the territory of a foreign state without consent.”

The Swiss government elaborated on this concept in defining the foundations of “judicial sovereignty”:

Under this fundamental principle of the civil law, which derives from the doctrine of territorial jurisdiction in interna-

523. G. VON GLAHN, supra note 13, at 171.
524. Id.
525. Id. at 170.
526. Id.
527. Id. at 171. It is accepted that the fundamental international legal principle of pacta sunt servanda (treaties must be observed) can only be vitiated under limited circumstances. See id. at 506-11.
528. See infra notes 592-601 and accompanying text.
529. The text of the Convention explicitly states that each signatory is agreeing through ratification to “improve mutual judicial co-operation in civil or commercial matters.” Hague Evidence Convention, supra note 13, at Preamble. “The States signatory to the present Convention . . . [d]esiring to improve mutual judicial co-operation in civil or commercial matters . . . [h]ave resolved to conclude a Convention to this effect . . . .” Id. at Preamble.
530. Aérospatiale, 107 S. Ct. at 2562 (Blackmun, J., concurring in part and dissenting in part).
tional law, only the state in which the requested evidence is located has the authority to enforce and execute the gathering of that evidence. If a U.S. court orders a party to produce evidence from Switzerland, and backs that order with its coercive powers, the U.S. court, in effect, substitutes its own authority for that of the competent Swiss court, and therefore violates Swiss sovereignty and international law.\(^{531}\)

Therefore, the unauthorized taking of evidence in a civil-law country is analogous to a foreign national entering the territory of the United States and attempting to perform a judicial function such as rendering a legal judgment against a United States citizen. It usurps the judicial sovereignty of the host nation. Furthermore, infringing on a civil-law nation’s judicial sovereignty may adversely affect the constitutional rights of foreign nationals.\(^{532}\)

By rejecting a first-use rule, the Court sanctioned the return of the very situation which prompted the United States to adopt the Convention: the inability to obtain evidence abroad without violating foreign judicial sovereignty. The majority’s failure to clearly articulate its concern for the sovereignty of other contracting states is an offense to the nations that attempted to accommodate American interests by entering into the Convention.\(^{533}\) More than any other factor, the Court’s failure to precisely distinguish between whether the Convention is “exclusive” and whether it nonetheless creates “mandatory” obligations on the United States precluded it from reaching a prudent decision regarding the suitability of employing a first-use rule.\(^{534}\)

\(^{531}\) Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners at 8, \textit{Adrospatiale} (No. 85-1695).

\(^{532}\) \textit{Adrospatiale}, 107 S. Ct. at 2563 (Blackmun, J., concurring in part and dissenting in part).

\(^{533}\) The Court did reject two aspects of the court of appeals’ decision that it considered erroneous. First, the Court decided that the Convention draws no distinction between evidence sought from third-party witnesses and evidence sought from the litigants themselves. \textit{Id.} at 2554. Second, the Court rejected the locus of evidence argument which has led many courts to conclude that the Convention is inapplicable in situations where evidence is physically located “abroad,” but is nonetheless within the control of a party subject to the court’s jurisdiction. \textit{Id.} The Court stated that, regardless of whether evidence ultimately will be \textit{produced in} the United States, the Convention does not distinguish between evidence that is physically located abroad and evidence that is within the control of a party subject to the jurisdiction of the court. \textit{Id.}

\(^{534}\) The Court relied on its assessment that the Convention is not “exclusive” to support its conclusion that the Convention is not “mandatory.” \textit{Id.} at 2554-56. This reasoning is faulty since the two concepts are unrelated. A determination that the Convention is not exclusive by its terms does not preclude a finding that international law and principles of international comity mandate use of the Convention in the first instance. The Court did not have to con-
2. Adverse effects on the jurisdiction of our courts

The majority asserted that employing a first-use rule would undermine the power and jurisdiction of United States courts. Justice Blackmun disputed this argument in his dissent:

One of the ways that a pro-forum bias has manifested itself is in United States courts' preoccupation with their own power to issue discovery orders. All too often courts have regarded the Convention as some kind of threat to their jurisdiction and have rejected use of the treaty procedures. It is well established that a court has the power to impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party. But once it is determined that the Convention does not provide the exclusive means for foreign discovery, jurisdictional power is not the issue. The relevant question, instead, becomes whether a court should forgo exercise of the full extent of its power to order discovery.

Thus, the majority confounded the notion of jurisdictional power with the propriety of exercising that power. The Court's rationale for rejecting a first-use rule was tied to its own objective of alerting foreign states that they too must respect the sovereignty of United States courts when actions are commenced in our territory. Aérospatiale never argued that the United States courts should relinquish their jurisdictional power in order to accommodate foreign interests. The fundamental international principle that each nation is sovereign over its own territory was not at issue. Rather, the issue concerned how the United States should interact with other nations when it does need to exercise its jurisdiction over foreign nationals.

Contrary to the Court's position, a first-use rule would not give foreign judicial authorities substantial control over proceedings in United States courts. First-use of the Convention would not affect a court's ability under Federal Rule 26(c) to "make any order which justice requires"

sider whether the Convention was exclusive to determine whether the Convention nonetheless should be mandatory, and subject to a first-use presumption.

535. Id. at 2553; see also supra text accompanying notes 468-70.

536. Aérospatiale, 107 S. Ct. at 2560 n.4 (Blackmun, J., concurring in part and dissenting in part) (citation omitted) (emphasis in original).

537. It has been noted that "[a]lthough the government clearly has the power to violate international law, the courts have nevertheless sometimes imposed limitations on the extraterritorial application of United States law." Trimble, A Revisionist View of Customary International Law, 33 UCLA L. REV. 665, 675 (1986) (footnotes omitted); see infra note 548.
to control the proceedings or the parties.\textsuperscript{538} Moreover, use of the Convention would eliminate the adverse effects of foreign blocking legislation, which gives rise to the most common situation in which discovery orders are needed under the Federal Rules.\textsuperscript{539}

3. Convention procedures more burdensome

\textit{a. alternatives under the Federal Rules}

The majority's final justification for rejecting a first-use rule was its unsupported opinion that in many situations, use of Convention procedures would be "unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules."\textsuperscript{540} Based on its earlier analysis of the operation of the Convention, the Court reasoned that a first-use rule would be inconsistent with "the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts."\textsuperscript{541} Justice Blackmun responded that until the Convention is used extensively, and courts become familiar with

\begin{itemize}
\item \textsuperscript{538} \textit{Aérospatiale}, 107 S. Ct. at 2567 (Blackmun, J., concurring in part and dissenting in part).
\item \textsuperscript{539} \textit{See infra} text accompanying notes 549-65.
\item \textsuperscript{540} \textit{Aérospatiale}, 107 S. Ct. at 2555. The United States took the position in \textit{Aérospatiale} that an individualized comity analysis is the only available method for resolving conflicts between domestic and foreign interests implicated in transnational discovery disputes. Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 11-13, \textit{Aérospatiale} (No. 85-1695). The Solicitor General cited a number of reasons for rejecting a first-use presumption, including the belief that Convention procedures are often less effective and more costly than the Federal Rules. \textit{Id.} at 15, 18. The government also relied on the Securities and Exchange Commission's "limited experience" with the Convention to support its position. \textit{Id.} at 15. The government provided a detailed description of four occasions in which the Securities and Exchange Commission has been unsuccessful in obtaining foreign evidence through the Convention in its attempts to punish insider trading violations. \textit{Id.} at 15-18. It then concluded:

The Commission's experience with the Hague Convention procedures, which has not been entirely positive, may well be atypical. The Commission is a government enforcement agency, whereas requests for discovery under the Convention are more commonly made by private parties. The Commission has resorted to the Convention only four times, each request being directed to a non-party rather than to a party before the court, and each request being made in the context of a fraud suit rather than the more typical negligence or contract action. The State Department informs us that private plaintiffs in the latter sorts of litigation have found resort to the Convention more successful. The Commission's experience, however, does buttress our belief that adoption of any blanket presumption mandating "first use" of the Convention in all cases would be unwise.

\textit{Id.} at 18. The United States did not consider, however, that the competing national interests that affect the determination of whether to resort to the Convention in private civil and commercial litigation are substantially similar in most cases. Conversely, the competing national interests that are implicated when the United States is seeking information abroad to aid in government enforcement proceedings may differ substantially from case to case.

\item \textsuperscript{541} \textit{Aérospatiale}, 107 S. Ct. at 2555 (citing \textit{FED. R. CIV. P. 1}).
\end{itemize}
its procedures, the majority's assertion was nothing more than speculation.\textsuperscript{542} He emphasized that discovery under the Federal Rules is "not known for placing a high premium on either speed or cost-effectiveness."\textsuperscript{543}

The inefficacy of relying on the Federal Rules in international litigation was, in essence, what motivated the United States to adopt the Convention:

\begin{quote}
Indeed, in the absence of a specific judicial assistance treaty . . . letters rogatory, transmitted at a leisurely pace through diplomatic channels and executed in accordance with the rules [of a foreign tribunal], have generally provided American litigants with evidence of little or no practical value before courts in the United States.\textsuperscript{544}
\end{quote}

Furthermore, it is well-known that conducting discovery abroad under the Federal Rules often requires significant financial expenditures to obtain evidence, to bring motions for orders compelling discovery and to enforce noncompliance with those discovery orders. The Convention broke a major roadblock for domestic litigants by eliminating the necessity of routing requests through diplomatic channels.\textsuperscript{545}

The majority's opinion suggests that absent the Hague Evidence Convention, American litigants would be assured of access to more effective evidence-gathering procedures under the Federal Rules. This notion is based on questionable assumptions regarding the utility of the Convention, and overlooks the fundamental principles of international law which often affect a litigant's ability to secure evidence abroad under domestic rules of civil procedure. The United States has recognized that, apart from the Hague Evidence Convention, established principles of international law preclude American courts from ordering anyone to par-

\textsuperscript{542} Id. at 2565 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun pointed out that the Convention's voluntary discovery procedures which permit evidence to be taken by a diplomatic or consular official, or by commissioners, "are a great boon to United States litigants and are used far more frequently in practice than is compulsory discovery pursuant to letters of request." Id. at 2564 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{543} Id. at 2565 (Blackmun, J., concurring in part and dissenting in part). In fact, the \textsc{Restatement (Revised)}, supra note 1, observes that orders for production of documents or other information located abroad nearly always give rise to objections that must be heard by the courts, so the requirement of increased court supervision contemplated by the Hague Evidence Convention is not likely to increase the burden on the courts or delay proceedings. Id. at § 437, reporters' note 2.

\textsuperscript{544} Borel & Boyd, supra note 5, at 37. See also supra text accompanying notes 474-78 for a discussion of the disadvantages of using the letter rogatory procedure under Federal Rule 28(b).

\textsuperscript{545} Oxman, supra note 12, at 734 n.3.
ticipate in discovery proceedings in the territory of a foreign state absent that state's consent. Furthermore, the United States has encouraged courts "to refrain, if possible, from ordering a person to perform an act that would violate the laws or clearly articulated policies of a foreign government." Therefore, it is clear that the Federal Rules themselves present obstacles to domestic litigants since extraterritorial application of United States discovery orders must be tempered by a consideration of foreign interests.

b. foreign blocking laws

Probably the most significant obstacle to frequent use of the Federal Rules in international litigation is the existence of foreign blocking statutes. Foreign blocking laws may completely thwart a litigant's ability to obtain needed evidence. The Court dealt briefly with this issue in a footnote. However, careful analysis of the operation of and underlying motivation behind foreign blocking statutes should have been crucial to the Court's determination of whether litigants should be required to use the Convention on a first-use basis.


547. Brief for the United States as Amicus Curiae at 10, Club Méditerranée (No. 83-461); Brief for the United States as Amicus Curiae at 11, Anschütz and Messerschmitt, supra note 168 ("Courts should refrain, when feasible, from ordering a party to perform acts that would violate the laws or clearly articulated policies of a foreign government.").

548. In Trimble, supra note 537, Professor Trimble points out that "[a]lthough the government clearly has the power to violate international law, the courts have nevertheless sometimes imposed limitations on the extraterritorial application of United States law." Id. at 675 (footnotes omitted). For an excellent discussion of cases in which courts have both limited or refused to limit the extraterritorial application of United States law, see id. at 699-701 & nn.125-37.

549. See supra notes 53-67 and accompanying text.

550. See supra notes 61-64 and accompanying text.

551. Aérospatiale, 107 S. Ct. at 2556 n.29.

552. It is not surprising that foreign sovereigns have resorted to the use of blocking legislation to promote compliance with the Hague Evidence Convention. The United States initiated the formulation and drafting of the Convention in response to the difficulties encountered by domestic litigants in securing evidence abroad. See supra text accompanying notes 68-95. At the time the Convention was adopted, foreign litigants had very little difficulty in obtaining evidence in the United States for use in foreign tribunals. See supra text accompanying notes 494-97. In addition, many foreign signatories had to revise existing laws and practices in order to comply with the obligations imposed by the Convention. See supra text accompanying notes 373-79. Since its adoption, the Convention has been used infrequently by domestic lit-
The Court emphasized that foreign blocking statutes "do not de-
prive an American court of the power to order a party subject to its
jurisdiction to produce evidence even though the act of production may
violate that statute."\textsuperscript{553} In \textit{Société Internationale Pour Participations In-
dustrielles et Commerciales, S.A. v. Rogers},\textsuperscript{554} the Court held that the
existence of a foreign blocking law does not automatically divest a court
gants and the United States courts have in many cases discouraged use of its procedures. See \textit{supra} text accompanying notes 130-38.

In many cases involving the Convention, diplomatic notes and protests have been unavail-
ing in exacting United States compliance with its obligations under the Convention. See \textit{supra} text accompanying notes 598-600. Therefore, it is not unreasonable that foreign governments
have sought to compel the United States to rely on the Convention so as not to render useless
the civil-law states' concessions made at the request of the United States. See \textit{supra} text ac-
companying notes 491-95. See also D. Rosenthal \& W. Knighton, \textit{supra} note 3, in which
the authors state that "it was inevitable that broad American laws compelling the furnishing of
foreign information should induce the adoption of foreign regulations compelling non-compli-
ance. In the absence of internationally accepted standards, an eye for an eye provides rough
justice." \textit{Id.} at 75.

The United States Solicitor General has tried to justify the United States' current interpre-
tation of the Convention by asserting that even if the United States does not participate in the
Convention on a regular basis, other signatories nevertheless "receive[] additional tangible
benefits from the Convention despite its nonexclusive operation." Brief for the United States
as Amicus Curiae at 10 n.11, Anschuetz and Messerschmitt, \textit{supra} note 168. The Solicitor
General believes that other signatories "enjoy[] the benefits of participation in a multilateral
convention that presumably enhances its evidence gathering opportunities in countries other
than the United States." \textit{Id.} In light of the fact that the civil-law signatories had no problems
obtaining evidence from the United States prior to ratification of the Convention and that the
European signatories arguably had no problems obtaining evidence among themselves prior to
the ratification of the Convention, the Solicitor General's position is unreasonable and thor-
oughly unpersuasive.

In \textit{Aéropatiale}, the Supreme Court has perpetuated a cycle of retaliation rather than
confronting the core of the problem: the United States' refusal to comply with its international
commitments. The majority argued that with respect to the French blocking statute:

\textit{[The enactment of such a statute by a foreign nation [cannot] require American
courts to engraft a rule of first resort onto the Hague Convention, or otherwise to
provide the nationals of such a country with a preferred status in our courts. It is
clear that American courts are not required to adhere blindly to the directives of
such a statute. Indeed, the language of the statute, if taken literally, would appear to
represent an extraordinary exercise of legislative jurisdiction . . . over a United States
District Judge, forbidding him or her from ordering any discovery from a party of
French nationality, even simple requests for admissions or interrogatories that the
party could respond to on the basis of personal knowledge. . . . The lesson of comity
is that neither the discovery order nor the blocking statute can have the same omni-
present effect that it would have in a world of only one sovereign.}

\textit{Aéropatiale}, 107 S. Ct. at 2556 n.29. Although the Court recognized the retaliatory pattern
that has emerged in the area of international discovery, it was unwilling to accept the challenge
to take some constructive action to end the cycle, and thereby promote international
cooperation.

\textsuperscript{553} \textit{Id.}

\textsuperscript{554} 357 U.S. 197 (1958).
of its power to enforce a domestic discovery order. The Rogers Court also held that the question of whether a foreign litigant should be sanctioned for noncompliance, due to the existence of a foreign blocking law, depends on a court's analysis of the facts and interests implicated in each case. Since Rogers, however, the courts have developed different approaches for assessing whether sanctions are appropriate in the international context. Frequently, once a foreign litigant demonstrates that it has attempted to comply with a discovery order in good faith, the courts deem sanctions to be unjustified. Therefore, the assertion that a court

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555. Id. at 204. See supra note 64.
556. Id. at 208. In Rogers, Interhandel, a Swiss holding company, brought suit under the Trading with the Enemy Act to recover assets which had been seized during World War II by the Alien Property Custodian. The assets, valued at more than $100,000,000 in cash and stock, "were found by the Alien Property Custodian to be 'owned or held for the benefit of' I.G. Farben, a German firm and an enemy national." Id. at 199. Interhandel claimed it owned the stock and was therefore entitled to recover the seized assets as the national of a neutral power. The government challenged Interhandel's claim and asserted that Interhandel had conspired with I.G. Farben and others to "conceal, camouflage and cloak the ownership, control and domination by I.G. Farben . . . in order to avoid seizure and confiscation in the event of war. . . ." Id.

The court ordered Interhandel to produce certain records of its Swiss bank. The records were not produced, on the grounds that their production would violate Swiss penal laws resulting in the imposition of criminal sanctions, including fines and imprisonment. Id. at 200. The district court found that there was no proof of collusion between the claimant and the Swiss government and that Interhandel had shown good faith in its efforts to comply with the production order. Id. at 201. Nevertheless, the district court dismissed Interhandel's complaint with prejudice on the ground that Swiss law did not furnish an adequate excuse for failure to comply with the production order. Id. The court of appeals affirmed. Id. at 202. The Supreme Court unanimously reversed the order of dismissal. The Court stated:

The findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.

Id. at 211. The Court noted further:

In view of the findings in this case . . . we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad-faith, or any fault of petitioner.

Id. at 212.
557. Rosdeitcher, supra note 59, at 1066-73. See also Restatement (Revised), supra note 1, § 437, reporters' notes 6-9.
558. Rosdeitcher, supra note 59, at 1071-72. In Rogers, the Court stated that a foreign party's good faith in attempting to comply with a discovery order is relevant to the nature of what sanctions, if any, should be imposed. Rogers, 357 U.S. at 212. However, one commentator has observed:

Inasmuch as "good faith," as interpreted by the courts, takes account of a party's or witness' efforts to obtain a waiver of the blocking statute, a foreign government's refusal to waive, notwithstanding diligent efforts by the party to which discovery is
can issue a discovery order to neutralize the effects of a foreign blocking statute is a good theoretical argument but one of little practical significance. A court may issue an order compelling discovery, but the chances of a litigant actually enforcing the order are slim.

A general assumption also exists that foreign governments can grant waivers of prosecution for potential violations of blocking laws to enable foreign litigants to produce information without penalty;\textsuperscript{559} however, this option is not always available. In \textit{Aérospatiale}, the court of appeals asserted that Aérospatiale could obtain a waiver from the French government to prevent prosecution under the French blocking law.\textsuperscript{560} The French government advised the Court that, contrary to the assumption of the court of appeals, the 1980 blocking law does not empower the French government to grant waivers from the law’s prohibitions against furnishing information outside the Hague Evidence Convention.\textsuperscript{561} The French government emphasized that “no mechanism for obtaining such waivers exists.”\textsuperscript{562}

Furthermore, in France, as well as in other civil-law countries, treaties are supreme over domestic legislation.\textsuperscript{563} The French blocking law is expressly subject to existing treaties.\textsuperscript{564} Therefore, any conflicts created by the existence of blocking legislation are eliminated when litigants use the Hague Evidence Convention.\textsuperscript{565} As a practical matter, first-use of the Convention eliminates those obstacles that can hamper litigants from securing evidence in a proper form for use in a domestic tribunal.

\textsuperscript{559} See RESTATEMENT (REVISED), supra note 1, § 437, reporters’ note 5; Rosdeitcher, supra note 59, at 1072.

\textsuperscript{560} See In re Société Nationale Industrielle Aérospatiale, 782 F.2d 120, 127 (8th Cir. 1986).

\textsuperscript{561} Brief of Amicus Curiae the Republic of France in Support of Petitioners at 17, Aérospatiale, 107 S. Ct. 2542 (1987) (No. 85-1695). The French government also stated:

The requirement that some American courts have sought to impose, under threat of sanctions, that a French witness seek a waiver of the 1980 Law is regarded by the Republic of France as a significant infringement or attempted infringement of its sovereignty and a material interference with its national interests.

\textit{Id.} n.24.

\textsuperscript{562} \textit{Id.} at 17.

\textsuperscript{563} G. \textsc{von Glahn}, supra note 13, at 47-51.


\textsuperscript{565} See supra notes 53-67 and accompanying text; see also Brief of Amicus Curiae the Republic of France in Support of Petitioners at 5, Aérospatiale (No. 85-1695) (“[A]bsent the Convention, application of the rules usually employed in French domestic litigation would frequently stymie American discovery.”).
The Court's position that the Convention is more burdensome to domestic litigants than the Federal Rules is not based on a thoughtful consideration of all the factors which affect transnational discovery procedures. In fact, by rejecting a first-use rule, the majority actually creates more burdens for litigants who need to obtain evidence in hand for use in domestic proceedings. First-use satisfies our obligations under international law and our obligation to comply in good faith with a valid United States treaty. The Convention vitiates the effect of foreign blocking statutes, which may preclude a litigant from actually obtaining crucial evidence. Above all, first-use promotes positive perceptions about the United States. Using the Convention demonstrates that the United States is taking a cooperative attitude, rather than engaging in unilateral and aggressive actions when discovery abroad is necessary.666

C. The Propriety of Employing a Case-By-Case Comity Analysis

The majority did not accept the proposition that the concept of international comity requires a general rule of first resort to the Convention when discovery is sought abroad. Instead, the majority adopted the position of the Solicitor General and decided that the concept of international comity requires trial courts to perform a case-by-case analysis to assess whether use of the Convention would be effective. The ma-
jority suggested that trial courts consider the factors set forth in section 437 of the Restatement of the Foreign Relations Law of the United States (Revised) to guide their analysis.

Section 437(1)(c) of the Restatement provides that the following factors are relevant to a determination of whether to issue an order directing production of information located abroad:

1. the importance to the investigation or litigation of the documents or other information requested;
2. the degree of specificity of the request;
3. whether the information originated in the United States;
4. the availability of alternative means of securing the information; and
5. the extent to which non-compliance 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.

The Court acknowledged that the factors contained in the Restatement do not represent a consensus of international views on the scope of a district court's power to order foreign discovery in response to objections by foreign states.

The Court favored a case-by-case approach because "[s]ome discovery procedures are much more 'intrusive' than others." It contemplated that use of the Convention may not be required when only responses to simple interrogatories or request for admissions are required. Lower courts are responsible for scrutinizing the facts of each case, the sovereign interests involved and the likelihood that use of Convention procedures will prove effective in order to decide whether to compel use of the Convention. The Court briefly outlined a few gen-

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569. See supra note 1.
570. Aérospatiale, 107 S. Ct. at 2555 n.28.
571. RESTATEMENT (REvised), supra note 1, § 437 (1)(c).
572. Aérospatiale, 107 S. Ct. at 2555 n.28.
573. Id. at 2556.
574. Id. "The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke." Id.
575. Id. at 2555-56. The Court did not specify whether foreign litigants must conclusively
eral concerns that courts should consider in a comity analysis, but refused to set forth any clearly defined rules to guide lower courts in making those determinations. Although the Court attempted to devise a scheme whereby foreign interests receive adequate consideration and protection at the trial court level, relying on a case-by-case comity analysis to assess the utility of the Convention in private civil and commercial litigation is questionable.

In his lengthy separate opinion, Justice Blackmun assailed the majority for rejecting a first-use presumption in favor of case-by-case comity determinations. He stated that there is nothing inherent in the comity principle that requires a case-by-case analysis:

Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systematic value of reciprocal tolerance and goodwill.

... The Court frequently has relied upon a comity analysis when it has adopted general rules to cover recurring situations in areas such as choice of forum, maritime law, and sovereign immunity, and the Court offers no reasons for abandoning that approach here.

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576. The Court stated that trial courts should pay special attention to the following concerns:

a. Protecting foreign litigants from the danger that unnecessary or unduly burdensome discovery may place them in a disadvantageous position. *Aérospatiale*, 107 S. Ct. at 2557;

b. Minimizing costs and inconvenience. *Id.**

c. Preventing discovery abuses. "Objections to 'abusive' discovery that foreign litigants advance should therefore receive the most careful consideration." *Id.*

d. Accommodating foreign interests. "American courts should ... 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." *Id.*

577. *Id.* at 2558 (Blackmun, J., concurring in part and dissenting in part).

578. *Id.* at 2561 (Blackmun, J., concurring in part and dissenting in part) (footnotes omitted). In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Court held that forum
Justice Blackmun argued that the Convention was designed to accommodate all three categories of interests that are relevant to a comity analysis—foreign interests, domestic interests and the interest in a smoothly functioning legal order. In most cases, there is no need to resort to comity principles since the conflicts they are designed to resolve have been eliminated by the agreements expressed in the treaty. Justice Blackmun asserted that the majority added a duplicative, additional “layer of so-called comity analysis by holding that the courts should de-

selection clauses in private contracts in admiralty are presumed to be enforceable absent a strong showing that enforcement is unreasonable under the circumstances. The Court stated:

We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

The argument that such clauses are improper because they tend to “oust” a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on [sic] historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are over-loaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. Id. at 9-12.

579. Aérospatiale, 107 S. Ct. at 2562 (Blackmun, J., concurring in part and dissenting in part).

580. Id. (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun acknowledged that it may be appropriate for courts to rely on the approach outlined in the RESTATEMENT (REVISED), supra note 1, in situations where no treaty has been negotiated to accommodate the different legal systems involved or if the Convention failed to resolve a conflict in a particular case. Aérospatiale, 107 S. Ct. at 2562 (Blackmun, J., concurring in part and dissenting in part). In Trimble, supra note 537, the author also questions the legitimacy of applying the balancing approach embodied in the RESTATEMENT (REVISED) rather than valid treaty law. “Customary international law is not an appropriate doctrinal vehicle for general restraint of considered political branch action. It lacks the ideological legitimacy and the widespread scrutiny that constitutional-type norms should have.” Id. at 704. Professor Trimble goes on to explain the weakness of routinely relying on the Restatement’s interest-balancing approach:

The Draft Restatement asserts that a new rule of customary international law has emerged limiting the scope of national law by reference to a standard of reasonableness. This standard is applied by balancing a number of factors to determine whether the United States interest is sufficiently high as compared with foreign interest, to justify application of United States law.

Although the courts have sometimes engaged in this kind of interest analysis and “balancing,” they generally have not characterized their activity as an application of international law. Instead they have referred to “comity,” to presumed congressional intent, or simply to judicial precedent and the Restatement. Nevertheless, let us assume that in these cases the courts implicitly were applying international law.

[There is no historical basis for the proposition that courts in fact restrain the government through the application of customary international law. To the extent that changes in judicial attitudes may be observed, the trend is toward expanding United States regulatory authority, not constraining it. Id. at 696-701 (footnotes omitted).]
termine on a case-by-case basis whether resort to the Convention is desirable." Furthermore, routine reliance on an interest balancing approach raises both practical and constitutional difficulties for trial courts.

1. The judiciary's inability to assess relevant interests properly

The objections leveled against the case-by-case comity approach are twofold. First, it is argued that the judiciary is unable to competently perform such determinations. Second, no procedural mechanism exists whereby erroneous lower court decisions can be corrected to avoid offending an interested foreign sovereign. It has been asserted that American courts are institutionally unequipped to properly engage in an interest balancing approach to decide whether to apply United States law extraterritorially. Rather, the application of treaty law is "more comfortably within the traditional confines of judicial competence." Justice Blackmun noted that relatively few judges are experienced in the area of international law or familiar with the procedures of foreign legal systems. This lack of expertise precludes most judges from accurately assessing the relevant interests incident to the application of the Hague Evidence Convention. One commentator has elaborated on this notion by drawing an analogy between the analysis required of judges under the Restatement balancing approach and the routine application of customary international law:

A common law judge may look to legislative developments, judicial precedents in related fields, and other sources of public policy. He or she may also draw on intuitions in order to ascertain the right direction for legal development. In the case of customary international law, however, the judge does not have the same opportunity or ability. Foreign developments are more difficult to learn about and understand than changes in the domestic legal landscape. The academic train-

582. *Id.* at 2559-61 (Blackmun, J., concurring in part and dissenting in part).
583. See infra text accompanying notes 599-617.
584. Trimble, *supra* note 537, at 672.
585. *Id.*
586. *Aérospatiale*, 107 S. Ct. at 2560 (Blackmun, J., concurring in part and dissenting in part). "[C]ourts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own." *Id.* (Blackmun, J., concurring in part and dissenting in part).
ing and professional experience of a person who becomes a federal judge is not likely to include widespread exposure to foreign cultures. Moreover, the regular sources of information available to professional people in the United States are not likely to cover foreign developments in significant depth. Even if counsel could remedy those deficiencies, the training, background, and ordinary experience of a judge do not provide a good basis for forming intuitions about desirable new directions for the law.\textsuperscript{588}

In \textit{Aérospatiale}, even the Supreme Court was unable to overcome the inherent disability of the Judiciary to properly implement the international policies of the Executive branch.

The majority did not demonstrate an understanding of the full import of the concept of "judicial sovereignty," nor did it acknowledge the sovereignty of foreign substantive and constitutional laws. For example, the majority stated that lower courts can require foreign parties to bear the burden of providing detailed descriptions of documents that may be needed by domestic litigants to ensure that a document request will not be rejected for lack of specificity under Article 3.\textsuperscript{589} Such a requirement, however, arguably violates the judicial sovereignty of a foreign state to the same extent as any other non-Convention request. The taking of such information as potential evidence is exclusively within the sphere of the foreign judiciary.\textsuperscript{590} Furthermore, the broad requests contemplated by the Court may likely be viewed as "fishing expeditions," and thus contravene foreign laws that protect foreign citizens against unnecessary disclosures of business information.\textsuperscript{591} One cannot reasonably expect that the insensitivity to foreign interests exhibited by the majority in \textit{Aérospatiale} will be eradicated or improved at the lower court level.

Another deficiency in the case-by-case approach is the tendency for the interest balancing to be tipped in favor of United States' interests. Justice Blackmun noted that it is easy for a "pro-forum bias . . . to creep into the supposedly neutral balancing process" and lead courts to rely on more familiar procedures established by local rules.\textsuperscript{592} This has proven

\begin{itemize}
\item \textsuperscript{588} Id. at 713-14.
\item \textsuperscript{589} \textit{Aérospatiale}, 107 S. Ct. at 2557 n.30.
\item \textsuperscript{590} See supra notes 45-50 and accompanying text.
\item \textsuperscript{591} See supra note 7 and accompanying text.
\item \textsuperscript{592} \textit{Aérospatiale}, 107 S. Ct. at 2560 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun explained that "[t]here is also a tendency on the part of courts, perhaps unrecognized, to view a dispute from a local perspective." Id. n.4 (Blackmun, J., concurring in part and dissenting in part). This occurs because:
\end{itemize}

domestic courts do not sit as internationally constituted tribunals. . . . The courts of
true with respect to decisions involving the extraterritorial application of United States law relating to antitrust, securities, intellectual property and commodity trading regulations. There is little support for the proposition that courts in fact restrain assertions abroad of United States law. In fact, the trend is toward expanding regulatory authority rather than constraining it. One commentator has remarked: “America has always had an active isolationist tendency, and even when it became actively involved on a regular basis with other countries after the Second World War, it did so with a parochialism that continues to reflect its suspicion of ‘foreign ways.’”

The unavailability of any review mechanism to correct erroneous discovery orders also detracts from the utility of the interest balancing approach. The Department of State and foreign governments are unable, or unwilling, to intervene in every case “in order to articulate the broader international and foreign interests that are relevant to the decision whether to use the Convention.” Generally, the Department of State does not transmit diplomatic notes from foreign governments to state or federal trial courts. The Department also adheres to a policy whereby it does not take positions regarding, or participate in, litigation between

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most developed countries follow international law only to the extent it is not overridden by national law. Thus courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests.


593. Trimble, *supra* note 537, at 702. Professor Trimble provides a detailed review of cases in the past decade involving extraterritorial application of United States law in these areas. *Id.* at 701-04. He notes that in only two out of nineteen cases involving extraterritorial application of United States law in these areas were United States' interests found insufficient. *Id.* at 702. In eleven of the cases, a balancing approach was rejected. *Id.* at 703. In three more cases, a balancing approach was used but United States' interests prevailed. *Id.*


595. *Id.* at 701. “Even judges of international courts are not viewed as truly independent of their national perspectives, and their opinions are not likely to be perceived as ‘objective’ determinations of international law.” *Id.* at 727 (footnotes omitted).

596. Trimble, *supra* note 537, at 721-22; see also *infra* notes 618-19.

597. *Aérospatiale*, 107 S. Ct. at 2561 (Blackmun, J., concurring in part and dissenting in part).

598. *Id.* n.5 (Blackmun, J., concurring in part and dissenting in part). Bernard Oxman has observed that:

[B]ecause courts may not perform the negotiating and political functions necessary to resolve a conflict with a foreign state if one arises, and because the federal government may be unable or reluctant to intervene in private litigation on behalf of a foreign state, the courts must be particularly careful to avoid creating international conflict in the first place.

Oxman, *supra* note 12, at 748 (footnote omitted).
private parties, unless required to do so by applicable law. Even when foreign governments do intervene through the filing of amicus briefs or diplomatic notes, it is questionable whether the actions have any substantial effect on the deliberations of the courts.

The limited appellate review of interlocutory discovery orders intensifies the shortcomings of the comity approach since any effective case-by-case correction of erroneous decisions is foreclosed. On a practical level, the case-by-case approach does not afford litigants a consistent or predictable method to assess how discovery will proceed in a particular lawsuit. The success of the approach is inextricably tied to the degree of international expertise of each individual judge.

2. Separation of powers

On a constitutional level, the role of the courts in matters affecting foreign affairs traditionally has been strictly limited. Courts generally defer to the other branches of government to avoid complicating foreign affairs in ways they cannot control through subsequent dispositions, and to reiterate the need for the nation to "speak with one voice." Routine reliance on case-by-case comity determinations creates fertile ground for the Judiciary to infringe upon the powers of the Executive. Although the courts may be well-equipped to accommodate the interests of litigants and the judicial system, the Executive normally decides when to risk following a course of action that might affront a foreign nation or place a strain on foreign commerce. One commentator has observed that "[t]he international argument over extraterritorial application of United

599. *Aérospatiale*, 107 S. Ct. at 2561 n.5 (Blackmun, J., concurring in part and dissenting in part); see also Oxman, *supra* note 12, at 748 n.39.


603. *Id.*

604. *Aérospatiale*, 107 S. Ct. at 2560 (Blackmun, J., concurring in part and dissenting in part).

605. *Id.* (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun noted that the government's interests are often far more complicated than the limited issues presented to the courts. *Id.* n.3 (Blackmun, J., concurring in part and dissenting in part). "It is the Executive . . . that is best equipped to determine how to accommodate foreign interests along with our own." *Id.* at 2560 (Blackmun, J., concurring in part and dissenting in part).
States law reflects basic national differences over economic, social, and political philosophy. The choice that must be made is a political choice. 606

Justice Blackmun believed that by ratifying the Hague Evidence Convention, the Executive and Legislative branches made a political choice that regular use of the Convention was in the best interests of the United States. 607 The decision to adopt the Convention was itself the product of a comity analysis by the Executive and Legislative branches, carried out to further United States' interests with a minimum of international friction. 608 In fact, the Solicitor General has reiterated often that the United States has a strong interest in avoiding conflicts with foreign nations that arise from transnational discovery disputes and, further, that use of the Convention alleviates potential international friction. 609

The majority's endorsement of a case-by-case comity approach, along with its failure to emphasize the United States' clearly articulated policy of avoiding international friction in all possible instances, may lead to repeated interference by the Judiciary in the Executive sphere. Regardless of whether the outcome of those assessments are adverse to foreign interests, the Judiciary will, in effect, be responsible for making policy decisions that affect the international relations of the United States. Justice Blackmun expressed concern that such interference may result in a long-term political cost for the United States in that foreign cooperation in other matters may be withheld. 610 Conversely, those

606. Trimble, supra note 537, at 706. He notes further that "[g]eneral restraint of national jurisdiction undoubtedly would facilitate international trade, investment, and corporate activity." Id.

607. Aérospatiale, 107 S. Ct. at 2560 (Blackmun, J., concurring in part and dissenting in part). "The Convention embodies the result of the best efforts of the Executive Branch, in negotiating the treaty, and the Legislative Branch, in ratifying it, to balance competing national interests." Id. (Blackmun, J., concurring in part and dissenting in part).

608. Justice Blackmun stated that "there is no need to resort to comity principles; the conflicts they are designed to resolve have been eliminated by the agreements expressed in the treaty." Id. at 2562 (Blackmun, J., concurring in part and dissenting in part).

609. Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 7, Aérospatiale (No. 85-1695). The Solicitor General has emphasized that "American courts should utilize the procedures established by the Hague Evidence Convention in appropriate cases to avoid unnecessary international friction resulting from American procedures for pretrial discovery." Brief for the United States as Amicus Curiae at 9, Anschütz and Messerschmitt, supra note 168. The Solicitor General has implied that "appropriate cases" include those in which foreign governments express objections to American discovery procedures, id. at 11, and when a conflict exists between the Federal Rules and a foreign blocking statute. Brief for the United States as Amicus Curiae at 13, Club Méditerranée S.A. v. Dorin, 465 U.S. 1019, appeal dismissed and cert. denied, 469 U.S. 913 (1984) (No. 83-461).

610. Aérospatiale, 107 S. Ct. at 2567-68 (Blackmun, J., concurring in part and dissenting in part). M. McDougal and H. Lasswell have observed:
comity determinations that result in judicial restraint and acquiescence to foreign laws may also undercut the Executive’s ability to negotiate future agreements by making it more difficult to gain concessions and cooperation from foreign governments in other areas. Further, the possibility exists that repeated unwillingness by the Judiciary to use the Convention will be relied upon by foreign signatories to invoke the doctrine of *rebus sic stantibus* and terminate the Hague Evidence Convention altogether. These constitutional and political difficulties would be alleviated, and the foreign relations of the United States substantially furthered, if trial courts were not required to engage in routine determinations regarding the applicability of the Hague Evidence Convention.

3. Inconsistent application of the convention

The most serious practical problem posed by the case-by-case comity approach is the possibility that the Convention will be applied inconsistently in state and federal trial courts. In *Aérospatiale*, the majority sought to alleviate the existing discord at the lower court level regarding use of the Convention; however, it is likely that the Court’s decision will have the opposite effect. Inevitably, reliance on the Convention will differ among districts and states, depending on the degree of judicial sensitivity to foreign interests. Further, the majority failed to recognize that

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If Governments cannot have confidence that the instruments by which they bind themselves will not be made to serve unintended purposes, if respect is not paid to terms and tenor of the obligations imposed by such instruments, the result may be a reluctance to assume further commitments and the progressive development of international law may be seriously retarded.

M. McDOUGAL & H. LASSWELL, *supra* note 349, at 84.


612. The doctrine of *rebus sic stantibus*, or changed circumstances, is “a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed.” *BLACK’S LAW DICTIONARY* 1139 (5th ed. 1979).

[In order to apply the rule of *rebus sic stantibus*, it is not necessary that the performance should be rendered impossible or that a breach of the treaty should be committed by the other party. The doctrine applies if the change of circumstances is of such a character as to destroy the objects and purposes of the treaty while literal performance could still be possible, although it would have no meaning or *raison d’être* in the sense of the treaty.]


613. Professor Trimble suggests that the limits of the government’s extraterritorial application of law should be determined in the political process rather than in the courts. He believes treaties are the appropriate vehicle for limiting or expanding extraterritorial application of law, not customary international law as embodied in the reasonableness inquiry in the *RESTATEMENT (REVISED)*, *supra* note 1. Trimble, note 537, at 707.
its decision creates an anomaly for the federal and state court systems. Even though the Court held that the Convention, although valid, is not supreme over the Federal Rules, it did not address whether the Convention remains supreme over state rules of procedure. Thus, the possibility exists that a valid United States treaty is supreme over state law but not over federal law. The Court's failure to resolve this question may lead to conflicting applications of the Convention among different state courts, thereby depriving state court litigants of predictable, fair and uniform treatment.

Although a case-by-case approach appears to give trial courts the ability to tailor use of the Convention to the type of discovery sought and the nature of the foreign interests involved, routine reliance on an individualized approach presents a multitude of problems for courts and litigants. Whether the Convention will be used appropriately depends on the ability of an individual judge to harmonize a complex set of foreign and domestic interests. Aérospatiale grants wide discretion to trial courts to guide one facet of our political relationship with foreign nations. The Hague Evidence Convention was designed specifically to improve transnational discovery procedures in private civil and commercial litigation.614 The case-by-case approach defeats this purpose because it deprives private litigants of access to a predictable and uniform method of gathering evidence abroad.

VIII. Recommendations

With respect to transnational discovery disputes, the interests of foreign sovereigns and that of the United States judicial system are not necessarily inconsistent. Foreign sovereigns are concerned with enforcing constitutional protections and substantive laws for the benefit of their citizens.615 Similarly, the United States' primary interest is in providing redress for its citizens, and ensuring that adjudication is based on the greatest amount of available information.616 It is not unreasonable, however, that foreign governments refuse to accede to American discovery requests which require their tribunals to refrain from vigorously enforcing their own laws and upholding their own judicial systems.617 Never-

615. See supra text accompanying notes 21-52.
617. The broad scope of United States legal powers that law enforcement agencies, private litigants, and judges employ to control the conduct of foreign persons abroad:

[i]s perceived by other developed nations as a threat to their sovereignty—to their
theless, domestic courts often perceive that objections to broad discovery requests by foreign governments arise from their desire to collude with foreign nationals to prevent the disclosure of relevant evidence. Do-
mestic tribunals equate nondisclosure with bad faith.

The majority opinion in Aérospatiale reflects this concern:
Petitioners made a voluntary decision to market their products in the United States. They are entitled to compete on equal terms with other companies operating in this market. But since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors. A general rule according foreign nationals a preferred position in pretrial proceedings in our courts would conflict with the principle of equal opportu-

ability to regulate, effectively, economic activity within their own territory. They are also perceived as disruptive to the traditional process of dispute resolution by diplomacy. Diplomacy, it is felt, is usually facilitated by confidentiality and clear lines of responsibility. The dispersal of power which results from the American systems of checks and balances, and from mistrust of the low visibility of executive branch discretion, is seen as weakening the reliability of the U.S. government as a political partner.

D. Rosenthal & W. Knighton, supra note 3, at 7-8. See also id. at 86.

618. D. Rosenthal and W. Knighton observe:
Americans want those who manufacture defective products, which are sold in U.S. markets and cause injury, to compensate the victims. If an import causes injury, and the defect may be structural, why shouldn’t the product’s blueprints and test results, wherever located, be subject to reasonable inspection by experts retained by the plaintiff? Arguably, making such documents available, if and when demanded in an American litigation, is one of the costs of access to the largest and most lucrative integrated market-place in the world. When foreign parties, backed up by foreign authorities, resist the production of such documents, it leads to the understandable suspicion that there is something to hide. The American perception that some businessmen are using foreign corporations in foreign jurisdictions as flags of convenience to evade American economic and compensatory regulation, often with the tacit acquiescence of foreign authorities who care more about export earnings than export ethics, heightens this suspicion.


619. This belief arises from a distinctly American perspective on government and lawmaking:
It is a keystone of the American ideology that the United States has a “government of laws not of men.” While an Englishman, Sir William Jones, observed, “My opinion is, that power should always be distrusted, in whatever hands it is placed,” it is Americans more than Europeans who have embraced the thought. Suspicion of those with political authority, and suspicion of those with economic power, both pervasive in America, encourage legal rather than administrative regulation, [and] encourage the feeling that the good faith and proper exercise of discretionary power by bureaucrats and businessmen cannot be assumed. . . . Issues which diplomats in other nations have the authority to address can, in the United States, be finally resolved only by judges in the federal court system. The American system of checks and balances is of fundamental importance.

Id. at 7.
nity that governs the market they elected to enter.\textsuperscript{620} There is no question that foreign parties should be held to answer for injuries caused by defective products and other civil and commercial wrongs. The persisting question is, what is the most effective way to accomplish this goal with the least amount of international friction?

Dismantling the Hague Evidence Convention is not the answer. Undermining the United States' foreign relations with its trading partners does not have to be a prerequisite to exacting responsibility and compliance from foreign litigants. As the Supreme Court itself has suggested, compelling foreign compliance with United States law should focus on the litigants themselves, not on foreign sovereigns.\textsuperscript{621} Foreign states cannot be expected to bear the burden of diminishing their sovereignty each time a foreign national is brought before a United States court. Rather, it is foreign litigants themselves who should bear the burden of relinquishing legal protections abroad, when necessary, to attempt in good faith to comply with American legal requirements. As the Court in \textit{Aérospatiale} made clear, foreign litigants cannot expect to receive the advantages of foreign laws when marketing products and engaging in commercial activities in the United States. But once again, it is foreign litigants, and not foreign sovereigns, who should be required to make these concessions.

All of the foregoing concerns can be reconciled by relying on the Hague Evidence Convention to collect evidence abroad. Using the Convention demonstrates respect for the sovereignty of foreign nations, and permits discovery to proceed in a manner which has been consented to by all parties.\textsuperscript{622} Use of the Convention reflects a tolerance and understanding of the responsibility of foreign governments to protect their citizens' substantive rights.\textsuperscript{623} Similarly, by relying on the Convention, the

\textsuperscript{620} \textit{Aérospatiale}, 107 S. Ct. at 2553 n.25.

\textsuperscript{621} Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 201 (1958). In \textit{Rogers}, the Court stated:

The Report of the Master bears importantly on our disposition in this case. It concluded that the Swiss Government had acted in accordance with its own established doctrines in exercising preventive police power by constructive seizure of the Sturzenegger records, and found there was "... no proof, or any evidence at all of collusion between plaintiff and the Swiss Government in the seizure of the papers herein." ... [T]he burden was on petitioner to show good faith in its efforts to comply with the production order, ... the test of good faith [being] whether petitioner had attempted all which a reasonable man would have undertaken in the circumstances to comply with the order ... .

\textit{Id.}

\textsuperscript{622} \textit{Aérospatiale}, 107 S. Ct. at 2563 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{623} See \textit{id.} (Blackmun, J., concurring in part and dissenting in part).
United States furthers its interests in avoiding international friction\textsuperscript{624} and provides domestic litigants with reliable methods by which evidence can actually be obtained abroad.\textsuperscript{625}

Nevertheless, the United States cannot permit the Hague Evidence Convention to be used as a shield by foreign nationals to avoid production of potentially damaging evidence. By implicitly discouraging use of Convention procedures, the Court has, in effect, resolved this concern at the expense of long-term international cooperation.\textsuperscript{626} As an expression of good faith, it is not unreasonable to expect a foreign litigant to relinquish those protections of foreign laws that interfere with the obligation to comply with transnational discovery requests.\textsuperscript{627} A presumption that foreign litigants should relinquish such protections would obviate the need for foreign judicial authorities to obstruct production of information to protect the substantive rights of their citizens. Foreign tribunals would only need to order non-disclosure when legitimate government interests were implicated.\textsuperscript{628}

In order for trial courts to accurately assess whether to rely on the Convention, the suggestions outlined below should be incorporated into the case-by-case analysis required by the Court in \textit{Aérospatiale}. Trial courts should frame their determinations to resemble the two-part approach used by the Court in \textit{Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers}.\textsuperscript{629}

\textbf{A. Some Basic Assumptions}

In order to avoid the parochialism and result-oriented decisions which have become common in lower court assessments of whether to employ the Hague Evidence Convention, trial courts must be willing to acknowledge two basic assumptions regarding the Convention. First, until actual experience proves otherwise, courts must begin with the premise that the Convention, in practice, will accomplish what it was intended to do: \textit{facilitate} production of tangible evidence more successfully than the Federal Rules. Second, our courts should take the position that by

\textsuperscript{624} See id. at 2568 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{625} See id. at 2564-67 (Blackmun, J., concurring in part and dissenting in part); see supra text accompanying notes 540-66.

\textsuperscript{626} See \textit{Aérospatiale}, 107 S. Ct. at 2568 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{627} See infra note 644.

\textsuperscript{628} Resort to the Federal Rules is no more calculated to produce requested information when legitimate government interests are implicated than resort to the Hague Evidence Convention.

\textsuperscript{629} 357 U.S. 197 (1958).
utilizing the Convention, they are complying with United States obligations under international law, and furthering United States interests in avoiding international conflict. Absent reliance on these assumptions, the burden on a foreign party of showing that the Convention would be useful may be insurmountable.

B. Should the Convention or the Federal Rules be Used?

The first step for the trial court must be to determine whether pretrial discovery should proceed under the Convention or the Federal Rules. The trial court should initially consider the factors outlined in section 437 of the Restatement of the Foreign Relations Law of the United States (Revised)\(^{630}\) to gauge whether resorting to the Convention will further the interests of the parties and the governments involved. Next, the trial court should make the following specific inquiries to accurately assess whether use of the Convention procedures will be effective:

1. Do the discovery requests seek information that is protected by foreign substantive laws (such as the German doctrine of proportionality,\(^ {631}\) or similar laws protecting disclosure of business secrets and confidential communications\(^ {632}\)), thereby requiring the supervision of foreign judicial authorities?\(^ {633}\)

2. Do the discovery requests seek disclosure of information that may implicate government secrecy laws, thereby requiring the intervention of foreign judicial and government authorities?\(^ {634}\)

3. Does a foreign blocking statute exist that precludes compliance with discovery under the Federal Rules?\(^ {635}\) It is recognized that the existence of foreign blocking laws cannot, in itself, compel resort to the

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\(^{630}\) See supra note 1.

\(^{631}\) See Société Nationale Industrielle Aérospatiale v. United States District Court, 107 S. Ct. 2542, 2563 (1987) (Blackmun, J., concurring in part and dissenting in part). The German constitutional doctrine of proportionality is roughly equivalent to the due process clause of the 14th Amendment to the United States Constitution. It requires that “[interference] with private rights . . . be strictly limited to situations in which interference is both unavoidable and justifiable in view of reaching certain legitimate objectives.” Meessen, The Anschütz and Messerschmitt Opinions: The International Law on Taking Evidence From, Not In, A Foreign State, App. to Brief for Anschuetz & Co., GmbH and Messerschmitt-Boelkow-Blohm GmbH as Amici Curiae in Support of Petitioners at 27a, Aérospatiale (No. 85-1695). “Under the principle of proportionality, therefore, the rights of personal privacy, commercial property, and business secrets may not be interfered with unless such interference is necessary to protect other persons’ rights in the course of civil litigation.” Id.

\(^{632}\) See supra note 7.

\(^{633}\) See supra text accompanying notes 21-52.

\(^{634}\) See supra notes 61 & 64.

\(^{635}\) See supra text accompanying notes 53-66.
Convention. However, the Restatement (Revised) and the Solicitor General suggest that the existence of foreign blocking legislation should be given serious consideration to prevent undue international conflict when possible.

An affirmative response to any one of these three inquiries indicates that the Convention would be useful to circumvent foreign procedural obstacles and to alleviate undue international conflict. The trial court should then consider:

(4) Is the foreign party a national of a contracting state that presently has an unqualified Article 23 declaration in effect, thus creating an absolute bar to production of requested documents?

If so, the Convention will not be effective for obtaining responses to requests for production of documents and may indicate that the Federal Rules should be used. Of course, the Federal Rules may be just as ineffective if a foreign blocking statute is involved. If the interested contracting state merely has a qualified Article 23 declaration in effect, the Convention should be used since effective results are assured if document requests are specifically enumerated.

C. Noncompliance with Requests Under the Convention or the Federal Rules

If use of the Convention or the Federal Rules results in nondisclosure, the trial court must make a second determination of whether sanctions should be imposed on the foreign party. The trial court should engage in the analysis outlined by the Court in Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers. If discovery has proceeded under the Federal Rules, then a court can rely on Rogers to guide its analysis. If discovery has proceeded under the Convention, a court should also consider the following factors in assessing whether a foreign litigant has acted in good faith in attempting to comply with discovery requests:

(1) Could the foreign party have waived substantive protections conferred by foreign law to enable a foreign tribunal to permit disclosure

636. Aérospatiale, 107 S. Ct. at 2556 n.29; see supra text accompanying notes 549-66.
637. Supra note 1, § 437.
638. Brief for the United States as Amicus Curiae at 15, Anschuetz and Messerschmitt, supra note 168.
639. See supra text accompanying notes 446-48.
640. See supra text accompanying notes 446-47.
641. See supra text accompanying notes 554-56.
642. See supra text accompanying notes 434-35.
of requested evidence. As discussed above, foreign litigants should not be entitled to escape the burdens associated with American litigation by invoking the protections of foreign laws. It is not unreasonable to expect a foreign national to demonstrate a good faith attempt to comply with discovery requests by declining to exercise a privilege recognized under foreign law which may hamper full disclosure of information in the United States.

(2) Was disclosure precluded by foreign government intervention based on the existence of valid government interests?

(3) If Article 23 was invoked to prevent compliance with document requests, was this reasonable? Did the document requests satisfy the specificity requirements of Article 3 of the Convention and any applicable Article 23 declaration? The trial court should consider whether requested documents were specifically enumerated and whether they had a clear nexus with the subject matter of the litigation.

As in Rogers, a court must be satisfied that a foreign party is not attempting to prevent disclosure of pertinent evidence by relying on privileges of its foreign citizenship:

Petitioner has sought no privileges because of its foreign citizenship which are not accorded domestic litigants in United States courts. . . . It does not claim that Swiss laws protecting banking records should here be enforced. It explicitly recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its

644. A distinction should be drawn between the right to claim a privilege under foreign law, which a foreign litigant arguably would be able to waive in good faith in a domestic proceeding, and the duty that arises under the foreign government compulsion doctrine, which cannot be waived under any circumstances. See Restatement of the Foreign Relations Law of the United States (Revised), § 436 comments a, c (Tent. Draft No. 6, 1985). According to the Restatement, in order for the foreign government compulsion defense to be effective, the other state's requirements must be embodied in binding laws or regulations, violation of which would subject the litigant to penal or other severe sanctions. Id. § 436 comment c.

645. See supra text accompanying notes 615-28.

646. Under Article 11 of the Convention, a responding party is entitled to claim any privilege which exists under the law of the state of execution. Hague Evidence Convention, supra note 13, at art. 11. Under the express terms of the Convention, a witness is unconditionally entitled to take advantage of this provision. Nevertheless, the drafters of the Convention recognized that no compromise could be fashioned to fully protect a foreign party and avoid frustrating the execution of letters of request at the same time. See P. Amram, Explanatory Report, supra note 126, at 25-27; see also Oxman, supra note 12, at 767-69.

647. See Restatement (Revised), supra note 1, § 437 reporters' note 6; see supra note 645.
inability to comply because of foreign law.\textsuperscript{648}  
If the trial court is satisfied that a foreign party is acting in bad faith by attempting to conceal relevant and essential evidence, then the trial court is justified in imposing sanctions, including sanctions of contempt, dismissal, default or findings of fact adverse to the foreign party.\textsuperscript{649} Once a court complies with United States’ obligations under the Convention, it should not hesitate to impose sanctions on those foreign nationals who rely on the Convention in bad faith to avoid liability in United States courts.

\textbf{IX. CONCLUSION}

In 	extit{Societé Nationale Industrielle Aérospatiale v. United States District Court},\textsuperscript{650} the Supreme Court missed the first opportunity since 1958\textsuperscript{651} to address the complex problems that have plagued domestic and foreign litigants in transnational discovery disputes. After engaging in a cursory investigation into the history and operation of the Hague Evidence Convention, the Court concluded that the Convention serves as an optional supplement to the Federal Rules of Civil Procedure, to be used when it will facilitate evidence gathering abroad.\textsuperscript{652} The Court’s position on the Hague Evidence Convention may produce short-term benefits for domestic litigants, who may now believe that proceeding under the Federal Rules will provide them with broader and more powerful procedures. Nevertheless, evidence gathering abroad under the Federal Rules will continue to be thwarted by the existence of foreign blocking statutes, so that in many cases, discovery attempts will not be fruitful. Many litigants who proceed under the Federal Rules will end up with nothing more than an unenforceable discovery order in view of the widespread reluctance of the courts to assess sanctions subsequent to \textit{Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers}.\textsuperscript{653}  
The Court, swayed by its overriding concern with halting foreign manipulation of domestic judicial proceedings, failed to carefully consider the long-term implications of undermining the utility of the Convention. International judicial cooperation is likely to be adversely

\textsuperscript{648} Rogers, 357 U.S. at 211-12 (emphasis in original).
\textsuperscript{649} See Fed. R. Civ. P. 26(c).
\textsuperscript{650} 107 S. Ct. 2542 (1987).
\textsuperscript{652} \textit{Aérospatiale}, 107 S. Ct. at 2555-56.
\textsuperscript{653} 357 U.S. 197 (1958).
affected by the Court's decision. Repeated failure to take advantage of the Convention will inevitably affect its continued viability. Domestic litigants may soon find themselves subject to reciprocal foreign orders, which might detrimentally affect domestic commercial interests.

By diminishing the importance of the Convention in international litigation, the Court has effectively forced domestic litigants to rely on the complex, obstacle-laden procedures that existed prior to its ratification. Furthermore, reliance on a case-by-case comity approach in the trial courts can only undermine predictability and uniformity for domestic litigants. The Court's unwillingness to provide concrete guidelines for the lower courts will encourage parochialism and result-oriented decisions. The unanswered questions regarding the Convention's supremacy over state rules of civil procedure, coupled with varying standards of judicial sensitivity to foreign interests, will once again produce conflicting lines of decisions in both the state and federal court systems.

The Supreme Court's isolationist position might be more acceptable.

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654. As Justice Blackmun pointed out, the international interests implicated in transnational discovery disputes must be viewed in a broader context than just the immediate interests of the parties to each case. *Aérospatiale*, 107 S. Ct. at 2567 (Blackmun, J., concurring in part and dissenting in part).

655. *Id.* at 2560 n.3 (Blackmun, J., concurring in part and dissenting in part). In fact, the Motor Vehicle Manufacturers Association of the United States, Inc. and the Product Liability Advisory Council, Inc. urged that maintaining the status of the Hague Evidence Convention was imperative:

Since many MVMA and PLAC member companies are potential defendants abroad, the specter of a world-wide "tit for tat" approach to increased "longarm" jurisdiction followed by unbridled discovery orders calling for production overseas of tons of documents, innumerable persons for deposition under foreign procedures and thousands of burdensome interrogatory answers is certainly not welcome. Yet, that threat is the potential end result when foreign sovereigns repeatedly see that American treaty commitments are easily bypassed via assertions of raw jurisdictional power. For obvious reasons, Amici's American companies have a vital stake in seeing to it that the integrity of international treaties is upheld.


656. In fact, the decisions that have emerged from the lower courts subsequent to *Aérospatiale* demonstrate that the trial courts are emphasizing different aspects of the Supreme Court's analysis, thus leading to different applications of the Convention. *See* Hudson v. Hermann Pflauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987) (holding that under "tripartite analysis" outlined by Justice Blackmun, Hague Evidence Convention should be used first in present case because it furthers national and international interests and will be as effective as Federal Rules); Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386 (D.N.J. 1987) (holding that Convention procedures ineffective unless foreign party can demonstrate existence of specific sovereign interests of Sweden which indicate Convention should be used); Sandsend Financial Consultants, Ltd. v. Wood, 743 S.W.2d 364 (Tex. App. 1988) (holding that trial court determination that discovery should proceed under Texas state rules of civil procedure rather than Hague Evidence Convention is proper).
if the United States was still in a strong economic position relative to its trading partners; however, the United States economy is rapidly changing. In view of our increased dependence on foreign trade and investment, the Court’s insular views are no longer tenable. The Hague Evidence Convention is more important now than ever before.

The United States must acknowledge that participating in the international marketplace subjects domestic consumers to both the benefits and burdens associated with those transactions. There are inherent obstacles associated with litigating transnational disputes that cannot be alleviated in all instances. The influx of foreign investment and goods is now essential to the prosperity of the United States economy. Therefore, our courts must begin to promote international legal cooperation by exercising restraint in the extraterritorial assertion of jurisdiction in transnational discovery disputes.

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* Thanks to Professor John McDermott for taking the time to read and comment on a draft of this Note. Special thanks to my dearest friend Steven Moss for his insights, invaluable contributions, and encouragement, and to my parents, William and Gloria, for their love and support.