The Hague Evidence Convention in U.S. Courts: *Aerospatiale* and the Path Not Taken, *Société Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 107 S. Ct. 2542 (1987)

FACTS

Defendants, Société Nationale Industrielle Aerospatiale and Société de Construction d'Avions de Tourism (Aerospatiale), corporations wholly owned by the French government, were engaged in the business of designing, manufacturing, and marketing aircraft.[1] Plaintiffs, a United States pilot and a passenger in a plane manufactured by Aerospatiale which crashed in Iowa on August 19, 1980, sued Aerospatiale in the United States District Court for the Southern District of Iowa for injuries received in the crash, alleging negligence and breach of warranty.[2]

When Plaintiffs requested documents, interrogatories, and admissions under the Federal Rules of Civil Procedure, Aerospatiale sought a protective order from the Magistrate preventing this discovery.[3] Aerospatiale contended the requested information was located in a foreign country (France), and therefore the Hague Evidence Convention[4] provided the exclusive means of obtaining its discovery.[5] Aerospatiale further contended that French law prevented them from complying with the discovery request because the request did not

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[1] Société de Construction d'Avions de Tourism was a wholly-owned subsidiary of Société Nationale Industrielle Aerospatiale. Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 107 S. Ct. 2542.

[2] *Id.* at 2546.

[3] *Id.*

[4] *See* Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention]. The treaty entered into force between the United States and France on October 6, 1974. It is also in force in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom. OFFICE OF THE LEGAL ADVISOR, UNITED STATES DEPT. OF STATE, TREATIES IN FORCE 261-262 (1986).

[5] *Aerospatiale,* 107 S. Ct. at 2546.

conform with the Convention procedures.[6] The Magistrate concluded the interests of the United States in ensuring discovery outweighed the French interests in preventing it, based upon a determination that compliance would not be greatly intrusive and would not take place in France; accordingly, he denied the petition for a protective order.[7]

On interlocutory appeal, the Court of Appeals for the Eighth Circuit affirmed the decision, holding that the Convention has no application in a United States court when litigants seek the discovery of evidence in the possession of a foreign party subject to the court's jurisdiction, even when the evidence is located in a foreign country.[8] The Court of Appeals further rejected the contention that international comity require first resort to the Convention before use of the Federal Rules.[9] The court stated that when a foreign statute prevents compliance with a discovery order issued under the Federal Rules, a two-step analysis is required. A court must first determine whether the propriety of a discovery order regardless of any conflict with the foreign law, and if the order is proper and the requested party fails to comply, the court should then determine what sanctions, if any, should be im-

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[6] *Id.* at 2546. Article 1A of the French Penal Code Law No. 80-358 stipulates that "[s]ubject 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." C. PR. PEN., Law No. 80-358, Article 1A. For Convention procedures, *see infra* notes 12-18 and accompanying text.

[7] *Aerospatiale,* 107 S. Ct. at 2547. The magistrate, however, stated that he would require compliance with the Convention if oral depositions were to be taken in France. *Id.* at n.7.

[8] In re Société Nationale Industrielle Aerospatiale, 782 F.2d 120 (8th Cir. 1986).

[9] *Id.* at 125-26. Comity refers to the practice whereby one country's tribunals grant deference within that country to laws and other official acts of another country in the interests of maintaining an amicable and cooperative international system. "Comity, in the legal sense is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64, (1985).

"[Comity] is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accomodation, comity does not achieve the focus of an imperative or obligation. Rather, it is a nation's expression of understanding, which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws." Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

posed. Since the Magistrate answered only the first question, the Eighth Circuit panel found it premature to consider the second, and upheld the refusal of a protective order.[10]

On appeal, *held*, affirmed in part, reversed in part; vacated and remanded for further proceedings. In a United States court proceeding, when litigants seek discovery of foreign evidence from a party subject to the court's jurisdiction, the Hague Evidence Convention does not provide the exclusive or mandatory means for this discovery. Furthermore, there is no requirement that first resort be made to Convention procedures in all cases before non-Convention discovery methods may be pursued. Nevertheless, the Convention is not inapplicable in such cases; rather, it is one alternative vehicle for foreign discovery, along with the Federal Rules of Civil Procedure and other relevant United States statutes. Which discovery methods are permissible in a particular case will depend upon the specific circumstances of that case, analyzed in a balancing test of competing interests. *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa,* 482 U.S. ___, 107 S.Ct. 2542 (1987).

LAW

Subsequent to the entry into force of the Hague Evidence Convention, questions arose as to its application and relationship to the Federal Rules in American courts, in particular whether there existed a requirement of exclusive or first use of the Convention procedures for discovery of foreign evidence. The law in this area consisted primarily of the Convention itself, the Restatement of Foreign Relations Law of the United States (Revised),[11] and a series of lower court decisions.[12]

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[10] In Re Société Industrielle Aerospatiale, 782 F.2d 120, 127 (8th Cir. 1986).

[11] RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Draft No. 7, 1986); *see also* Draft No. 6, Vol. I, § 473 (1985).

[12] *See infra* notes 30-40 and accompanying text. For a more extensive list of cases, see Hague Conference on Private International Law, *Practical Handbook on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence abroad in Civil or Commercial Matters,* pt. IV (1984).

The Supreme Court previously considered problems of foreign discovery in a pre-Convention case, Société Internationale Pour Participations Industrielle Et Commercials, S.A. v. Rogers, 357 U.S. 197 (1958). In this case, the petitioner, a Swiss holding company (also known as Interhandel) sought recovery of assets seized by the United States government in 1941 under the Trading With the Enemy Act. The Government requested documents from Interhandel under the Federal Rules to

The Convention provides, with certain restrictions,[13] three primary methods for the discovery of foreign evidence:[14] through letters of request to the foreign authorities,[15] by diplomatic or consular agents of the requesting State,[16] and by commissioners appointed by the

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substantiate the Government's claim that Petitioner was intimately linked with an enemy German corporation and therefore not entitled to recover its assets. Interhandel asserted it's inability to comply with the court-ordered discovery because Swiss law prevented production of the documents, under threat of imprisonment. *Id.* at 200. The U.S. district court dismissed the case because of Interhandel's failure to comply, accepting the government's allegations as established. *Id.* at 202.

The Supreme Court reversed and remanded, holding that dismissal with prejudice was unjustified on the facts at that time. The Court emphasized the fact that foreign law prevented Interhandel from complying with the request. *Id.* at 211. The Court pointed out that the foreign law was not a matter within Interhandel's control and that there existed no showing of bad faith on Interhandel's part in its attempts to obtain the release of the documents. *Id.*

This case was not concerned with the specific question of the proper role in American courts of the Hague Evidence Convention. This decision came before the Convention was contemplated, and involved the deprivation of property under the Fifth Admendment, which somewhat narrows the scope of the holding to its particular facts. Nevertheless, the case can be read generally as requiring at least the consideration by courts of any foreign laws preventing compliance with discovery orders, as well as the good faith of the party in attempting to produce the evidence, before extreme sanctions such as dismissal are applied.

[13] *See infra* notes 14-16.

[14] *See,* Hague Evidence Convention, *supra* note 4, at arts. 9, 15 & 21. Contracting States may also permit methods of taking evidence in their territory other than those provided in the Convention. *See id.* at arts. 27(c) & 32. Moreover, States may also modify Convention procedures. *Id.* at art. 8.

[15] Chapter I of the Convention provides that a judicial authority of a Contracting State may, by a Letter of Request, ask the designated Central Authority of another Contracting State to "obtain evidence or to perform some other judicial act" in the latter State for use in judicial proceedings in the former. Hague Evidence Convention, *supra* note 4, at art. 1. Requests will be executed under the methods and procedures of the foreign State, but requests for special methods or procedures will be followed unless impracticable or inconsistent with the laws of the executing State. *Id.* at art. 9.

States may refuse requests only if: (a) the person in possession of the evidence has a privilege or duty to refuse to disclose it under the laws of the requesting or requested State, (*id.* at art. 11); (b) the execution does not fall within the functions of the judiciary of the requested State, (*id.* at art. 12); (c) the requested State considers that execution of the request would prejudice its sovereignty or security (*id.*); or (d) a State may declare, at or before its accession, that it will not execute requests "issued for the purpose of obtaining pre-trial discovery of documents." (*id.* at art. 23).

Any necessary compulsion must be applied by the requested State, in the same instances and to the same extent as for similar orders under its internal laws. *Id.* at art. 10.

[16] Under Chapter II of the Convention a diplomatic or consular officer of a

requesting court.[17] Specific problems have arisen when litigants in American courts have sought discovery of foreign evidence by domestic non-Convention methods which conflicted with procedural or substantive rules of another State, party to the Convention, where the evidence was located.[18]

The Restatement (Revised) contains a broad, if partially normative, description of United States law regarding such conflicts. Countries have jurisdiction to prescribe[19] their laws with respect to conduct within their territory or to conduct outside their territory causing effects within their territory;[20] with respect to their nationals[21] and with respect to acts directed against State security or interests. They may not prescribe laws applicable to persons or things connected with another State when to do so would be unreasonable.[22] Generally, a State cannot require a person to perform, or refrain from performing, an act in another country when the act is prohibited, or required, by the latter country or by the country of which the person is a

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Contracting State may, without compulsion, take evidence from nationals of his State, in the territory of another Contracting State. States may require that permission be requested from and granted by them before this method is used in their territory. *Id.* at art. 15. A diplomatic or consular officer may also take evidence within another Contracting State from nationals of that other State or of a third State if the officer receives, and complies with the terms of, permission from the State where the evidence is to be taken. *Id.* at art. 16.

[17] Chapter II of the Convention allows commissioners appointed by a Contracting State to take evidence from that State's nationals, without compulsion, in another Contracting State. The commissioner must also receive, and comply with the terms of permission of the latter State. *Id.* at art. 21.

Diplomatic and consular officers of, and commissioners appointed by, a Contracting State (*see supra* notes 16 and 17) may be refused evidence if the State where the evidence is located feels that disclosure would be incompatible with that state's laws. *Id.* at art. 21.

[18] Such conflicts typically stem from the different concepts of discovery, and the judiciary's role in the process, in civil law and common law countries. The former generally view discovery as a judicial function to be carried out by the courts. Consequently, such countries frequently consider discovery by foreigners within their territory to be an infringement on their sovereignty. *See generally*, Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems,* 34 AM. J. COMP. L. 745 (1986).

[19] Section 401 defines "prescribe": "[for a country] to apply its law to the activities, relations, status, or interests of persons, or to things, by legislation, executive act or order, administrative rule or regulation or judgment of a court." RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED), *supra* note 11, at § 401 (1986).

[20] *Id.* at § 402(1).

[21] *Id.*.

[22] *Id.* at § 403(1).

national.[23] The State can, however, require or prohibit such an act within its own territory.[24]

For discovery specifically, an American court may, when authorized by a statute or rule, order a person subject to its jurisdiction to produce evidence "relevant to an action or investigation, even if located outside the United States."[25] Before issuing such an order, however, the court should first consider several factors: whether the evidence originated in the United States; the importance of the evidence to the litigation; the specificity of the request; the extent to which noncompliance would undermine important United States interests; the extent to which compliance would undermine important interests of the State where the evidence is located; and the availability of alternative means of acquiring the evidence.[26] If disclosure is prohibited by another government, the person in possession of the evidence may be required to make a good faith effort to secure permission for its disclosure from that government.[27]

Three general positions have been identified[28] in the lower courts regarding the relationship between Convention procedures and non-Convention domestic procedures for foreign discovery in American courts.[29] Some courts, from considerations of comity, have required parties seeking foreign evidence to make at least first resort to Convention procedures.[30] Others have decided that Convention procedures are simply an alternative in such cases, to the Federal Rules of Civil Procedure.[31] The third approach is a determination of the status or

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[23] *Id.* at § 436(1).

[24] *Id.* at § 436(2).

[25] *Id.* at § 437(1)(a).

[26] *Id.* at § 437(1)(c).

[27] *Id.* at § 437(2)(a).

[28] *See* Maier, *Extraterritorial Discovery: Cooperation Coercion and the Hague Evidence Convention,* 19 VAND. J. TRANSNAT'L L. 239, 240 (1986).

[29] While the exclusivity theory is advocated by some commentators, such an interpretation has not been accepted by the federal courts as a general proposition. *See* Heck, *U.S. Misinterpretation of the Hague Evidence Convention,* 24 COLUM. J. TRANSNAT'L L. 231 (1986); Gerber, *supra* note 18, at 780. Convention procedures *have* been required, however, for such discovery as depositions to be taken within the territory of another country. *See, e.g.,* McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958 (E.D. Pa. 1984).

[30] *See, e.g.,* Volkswagenwerk, A.G. v. Superior Court, 109 Cal. Rptr. 219, 221 (1973), holding that depositions in Germany of employees of defendant German corporation and inspection of defendant's facilities there must be sought in conformity with channels and procedures established by the foreign country, in this case through letters rogatory under the Evidence Convention. *Id.*

[31] *See, e.g.,* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 103 F.R.D.

applicability of the Convention procedures by analyzing the particular circumstances of each case. For instance, courts have stated that Convention procedures must be used when particularly intrusive types of discovery, such as depositions, are sought within the territory of another country.[32] Other courts have found the Convention to have no applicability to production orders for foreign evidence directed to parties which are subject to a court's jurisdiction.[33]

The Supreme Court recently granted certiorari for three appellate cases involving the Convention, including *Aerospatiale.* In the first of these, *In re Anschuetz & Co.,*[34] the district court, using the Federal Rules of Civil Procedure, ordered a German corporate defendant to produce in the United States several deponents and various documents then located in Germany for use in the American court preceedings. On appeal, the German government argued in an amicus brief that such depositions would violate German sovereignty unless carried out through Convention procedures.[35]

The Fifth Circuit Court of Appeals held that the Convention is not the sole method for foreign discovery in American courts.[36] The court stated while the Convention is to be employed for involuntary depositions of parties conducted in foreign countries, and for discovery from foreign persons not subject to the court's *in personam* jurisdiction, the Convention "has no application at all" to the production of evidence in the United States by a foreign party subject

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42, 51 (D.D.C. 1984). The court rejected the contention of defendant German airline that the Evidence Convention provided the exclusive means for obtaining depositions and documents abroad. *Id.* Judge Greene concluded that "Congress did not intend to deprive litigants of their right to a fair trial in the courts of the United States in accordance with the Federal Rules of Civil Procedure when it ratified the [Evidence] Convention." *Id.* at 50. The judge went on to note, "[t]he goal of the Hague Convention was to facilitate and increase the exchange of information between nations; it would not serve that goal to transform its provisions into a means to frustrate the discovery process in United States courts." *Id.* at 49.

[32] *See, e.g., McLaughlin,* 102 F.R.D. at 956.

[33] *See, e.g.,* In re Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985).

[34] In re Anschuetz & Co., 107 S. Ct. 3223 (1987). The Court granted certiorari and vacated the judgment, remanding the case to the Fifth Circuit for further consideration in light of Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa. *Id.*

[35] *In re Anschuetz,* 754 F.2d at 605. The United States Departments of Justice and State agreed with the German government in an amicus brief, and stated that Convention procedures should be used for such discovery unless a comity analysis suggests otherwise. For a discussion of the United States governments' position on these issues, see *supra* note 25 at 248-53.

[36] *See In re Anschuetz,* 754 F.2d at 614.

to the court's jurisdiction.[37] The court felt that matters preparatory to compliance with United States discovery orders (for example, gathering and organizing requested documents and mailing them to the United States for production in the United States court), even when undertaken in a foreign country, do not constitute discovery in a foreign nation as addressed by the Hague Convention.[38]

The Supreme Court also granted certiorari to another Fifth Circuit case, *In re Messerschmit Boklow Blohm GmbH*.[39] In this case, the trial court used the Federal Rules to order the defendant German corporation to produce in the United States evidence and expert witnesses located in Germany. On appeal, the Fifth Circuit refused the defendant's argument for a comity requirement of first use of the Convention. The court concluded German sovereignty was not violated because the discovery order required no governmental action in Germany. A comity balancing of respective interests, therefore, did not indicate that the Convention should be used rather than Federal Rules procedures.[40]

DECISION

In *Aerospatiale*, the Supreme Court addressed the question of whether a Federal District Court must use Convention procedures to seek admissions, production of documents, and answers to interrogatories from a French defendant over whom the court has personal jurisdiction.[41] In its answer, the 5-4 majority, speaking through Justice Stevens, rejected opinions from opposite ends of the spectrum and adopted a position under which courts must determine the Convention's applicability by analyzing the circumstances of each case.

The Court began its analysis by rejecting any requirement of exclusive or first resort to the the Convention as inconsistent with the Convention's language and its negotiating history.[42] The Court noted that the Convention's Preamble does not speak in mandatory terms; rather, it declares the purposes of the Convention as facilitating

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[37] *Id.* at 615.

[38] *Id.* at 611.

[39] In re Messerschmitt Boklow Blohm *GmbH*, 757 F.2d 729 (5th Cir. 1985) *cert. granted*, Messerschmitt Boklow Blohm, GmbH. v. Walker, 106 S. Ct. 1633 (1986), *order vacated by* Messerschmitt Boklow Blohm, Gmbh v. Mississippi River Bridge Authority, 107 S. Ct. 3223.

[40] *Messerschmitt*, 757 F.2d at 732-33.

[41] *Aerospatiale,* 107 S. Ct. at 2546.

[42] *Id.* at 2550.

discovery and improving cooperation among members.[43] The Court further stated that the Convention text itself does not *require* any State to use Convention procedures or to change its own evidence gathering procedures.[44] Specifically, the Court emphasized the words "may" in Articles 1, 15, 16 and 17, which set out the Convention's discovery procedures.[45] These permissive provisions contrast sharply with the mandatory terms of the Hague Service Convention,[46] drafted several years earlier by the same body that produced the Evidence Convention.[47] The Service Convention conspicuously states its procedures "shall" be used for serving specified judicial documents abroad;[48] in contrast, the permissive wording of the Evidence Convention appears to be intentional. Finally, the Court felt the negotiating history of the Evidence Convention forecloses an exclusive interpretation, and instead suggests the United States sought the Convention's adoption as a means of facilitating, not restricting foreign discovery.[49]

The Court also rejected a comity-based first resort requirement. Prior to reaching this conclusion however, the Court dismissed the Eighth Circuit's contention that courts should actually forego first use of the Convention to avoid possible affronts to foreign governments. The Eighth Circuit felt that such affronts would result from orders, under the Federal Rules, for discovery previously refused by

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[43] *Id.*

[44] *Aerospatiale,* 107 S. Ct. at 2551.

[45] *Id.; see supra* notes 15-17 and accompanying text. Moreover, Article 23 permits a Contracting State to refuse to execute Letters of Request for pre-trial discovery, a daunting prospect were the Convention the sole means for discovery in all cases. *See* Hague Evidence Convention, *supra* note 4, at art. 23.

[46] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 103 [hereinafter Hague Service Convention]. (Entered into force for the United States Feb. 10, 1969).

[47] The drafting body was the Hague Conference on Private International Law. *See* SEN. EXEC. DOC. A, 92d Cong., 2d Sess. v (1972).

[48] Hague Service Convention, *supra* note 46, at arts. 2, 3, 5 & 6.

[49] *Aerospatiale,* 107 S. Ct. at 2549. In particular, the Court emphasized the statement of Steven Amram, a principal American participant in the negotiations, as the Convention's purpose: "to establish a system for obtaining evidence located abroad that would be 'tolerable' to the state executing the request and would produce evidence 'utilizable' in the requesting state." *Id.* The Court also noted the U.S. Secretary of State's report explaining that the promptness of agreement on the Convention was in large measure due to the participants' desire to eliminate the difficulties encountered by courts and lawyers in obtaining foreign evidence. *Id.*

the foreign government when requested under the Convention.[50] The Supreme Court nevertheless refused to declare a general rule of law requiring first resort to Convention procedures in all cases. After questioning whether it had the "lawmaking" power to declare such a rule,[51] the Court decided that it would be unwise to do so in any event, since Convention procedures might in some cases be unduly time consuming and expensive, and less certain to produce the needed evidence than the Federal Rules.[52] Unpersuaded by the contention that a first use requirement served as a necessary protection to the sovereignty of foreign countries, the Court refused to fashion a general rule based upon comity considerations. In so deciding, the Court stated that comity requires a more particularized analysis of the respective interests of the foreign nation and the requesting nation than could be achieved under a general generic rule fashioned by the Court. Furthermore, the Court set forth as relevent considerations in any comity-based determination the factors listed in Section 437 of the Restatement.[53]

While refusing to adopt a mandatory interpretation, the Court also rejected the Court of Appeals' contention that the Convention simply "does not apply" to foreign discovery from a litigant subject to a court's jurisdiction.[54] The Court noted that the text of the Convention makes no distinction between parties which are subject to a court's jurisdiction and those which are not. Moreover, it found no textual support for the contention that evidence is not "abroad," and therefore excluded from the Convention's scope, if the evidence is in the possesion of a party subject to a United States court's jurisdiction.[55] In sum, the Court held that the Convention procedures are "optional" for foreign discovery in and by American courts, serving as one method a court may employ to facilitate such discovery. The efficacy and necessity of requiring the use of these procedures depends upon the facts and sovereign interests involved in a particular case, and the likelihood that resort to the procedures will prove effective.[56]

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[50] The Court of Appeals stated that an American courts' order ultimately requiring discovery that a foreign court had already refused under Convention procedures would be "the greatest insult" to the sovereignty of that tribunal, greater than a failure to use the Convention at all. *In re Aerospatiale*, 782 F.2d at 125-26.

[51] *Aerospatiale,* 107 S. Ct. at 2555.

[52] *Id.*

[53] *See supra* note 27 and accompanying text.

[54] *In re Aerospatiale,* 782 F.2d at 124.

[55] *Aerospatiale,* 107 S. Ct. at 2554.

[56] *Id.* at 2555-56.

COMMENT

In *Aerospatiale,* the Supreme Court in effect adopted the approach of Section 437(1) of the Foreign Relations Restatement[57] to determine permissible methods of foreign discovery in each case. While a court should consider the sovereign interests of the countries involved, through the comity factors listed in that section, it may order discovery by whatever methods it deems appropriate and likely to be productive. The Supreme Court commendably refused to render the Convention either omnipotent or irrelevant; nevertheless, the majority missed an opportunity to avoid these extremes and at the same time interpret the Convention broadly enough to better protect the interests and expectations of the other states party to the Convention.

The majority is correct in refusing an exclusive interpretation. Such an interpretation is clearly contradicted by the text and negotiations. It has been argued that because American courts already permitted liberal discovery, the other States Party would be denied a *quid pro quo* for further opening their systems to foreign discovery unless the procedures formalized and agreed to in the Convention served as the sole methods for such discovery.[58] This argument is unconvincing, for any such dramatic limitation on the Federal Rules would undoubtedly have been explicitly stated in the treaty text. Moreover, each State Party also gained this same access to the systems of other parties in addition to that of the United States.[59]

An interpretation requiring first resort to the Convention procedures in all cases is suspect for these same reasons. Additionally, either an exclusive or a first use requirement would make the discovery process needlessly rigid, eliminating along with the other discovery methods a measure of flexibility which is essential in effectively responding to the diverse facts and divergent interests often present in transnational litigation. Although the other States parties cannot reasonably forward an exclusive interpretation, it is nevertheless unlikely that they engaged in the lengthy negotiations and agreed to formalize the substantial procedures of the Convention in the expectation that these procedures would be merely one "option" for American litigants to use for discovery in their territories. While a major impetus behind the Convention was the desire to facilitate the transnational flow of

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[57] *See* RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED), *supra* note 11, at § 437(1).

[58] *See, e.g.,* Heck, *supra* note 29.

[59] *See* Maier, *supra* note 28, at 260.

information, the parties were equally eager, according to a principal American participant, "to establish [discovery mechanisms] that would be 'tolerable' to the State executing the request,"[60] (i.e. in whose territory the evidence is located); the Convention was meant to provide "a bridge between civil law and common law practices."[61] The best evidence of what would be tolerable to the various parties is the mechanisms which they agreed to in the Convention. The United States courts should, where at all possible, give effect to the provisions agreed upon by all the States parties and thereby protect their expectations and interests.

While rejecting a first use requirement, the Supreme Court bypassed a less rigid alternative and unnecessarily diminished the Convention's stature in American courts: a requirement of first *consideration* of the Convention for foreign discovery. This alternative, proposed by the dissent[62] and some commentators,[63] would preserve the availability of the Federal Rules in appropriate cases, and at the same time more effectively assuage the concerns of other parties about unbridled foreign discovery expeditions. The first *consideration* requirement would consist of "a general presumption that, in most cases, courts should resort first to the Convention procedures [for foreign discovery]."[64] This presumption could be overcome, and the Federal Rules used, only if the circumstances of the particular case strongly indicated that the Convention procedures would be unproductive. Such a presumption would in effect be the equivalent of a first use requirement with an exception for situations in which the Convention mechanisms appeared clearly unlikely to produce the needed evidence.

A first consideration requirement would more effectively incorporate foreign expectations. In a case where resort to the Federal Rules is necessary, the non-use of the Convention would arguably not frustrate foreign expectations since the Convention (as a condition precedent to the use of the Federal Rules) would not have facilitated effective discovery, thereby failing to serve one of its two main purposes.

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[60] Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commerical Matters, in S. EXEC. REP. No. 25, 92nd Cong., 2d Sess. 11 (1972), quoted in *Aerospatiale,* 107 S. Ct. at 2549.

[61] Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad,* 67 AM. J. INT'L L. 104, 105 (1973).

[62] *Aerospatiale,* 107 S. Ct. at 2558. Justice Blackmun wrote the dissenting opinion, joined by Brennan, Marshall, and O'Connor.

[63] *See, e.g.* Maier, *supra* note 28, at 262-64.

[64] *Aerospatiale,* 107 S. Ct. at 258.

Another benefit of a general presumption in favor of Convetion procedures is that such a presumption would obviate the need for an expenditure of judicial resources in every case on a complex and problematic balancing of United States and foreign sovereign interests. It has been argued that the courts are a particularly inappropriate forum, both practically and constitutionally, for the amorphous political analysis necessary in such a balancing.[65] The majority approach requires "scrutiny in each case of . . . sovereign interests."[66]

Such a scrutiny would not be necessary in each case under the first consideration approach. The basic inquiry here would be whether the Convention procedures appeared clearly unlikely to produce the requested evidence. This may be suggested by, for example, a foreign blocking statute unequivocally prohibiting release of the evidence. In such a case, for the reasons discussed above, the Convention does not provide the exclusive means of discovery. At this point the court may, to the extent possible, balance interests. If the United States interests appear predominant, the court could, and should, order the production of the evidence and issue any appropriate sanctions for non-compliance under the Federal Rules. The Convention would be justifiably circumvented because it failed to meet one of its primary goals. More importantly, a first consideration requirement would avoid a balancing of sovereign interests in all of the more numerous cases which do not involve a showdown of conflicting fundamental sovereign interests. As the dissent in *Aerospatiale* noted in regard to the additional expenses which may be incurred through Convention procedures, "[c]ertainly discovery controlled by litigants under the Federal Rules of Civil Procedure is not known for placing a high premium on either speed or cost-effectiveness."[67]

It is possible that American courts, using the approach of the *Aerospatiale* majority, will effectively balance interests and avoid unnecessary affronts to foreign governments by using Convention procedures when appropriate. Surely an involuntary deposition abroad must in all cases be sought first through the Convention.[68] It is unlikely, however, that every situation will be so clear-cut. Furthermore, there appears to be a sound basis for the concern that pro-

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[65] *See, e.g.*, Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-50 (D.C. Cir. 1984); *see also Aerospatiale*, 107 S. Ct. at 2559-60.

[66] *Aerospatiale*, 107 S. Ct. at 2556.

[67] *Id.* at 2565.

[68] *See supra* note 7.

vinciality and a pro-forum bias will frequently infect the balancing process by American courts.[69]

The origins of the controversy over the proper role of the Convention in United States courts lie within the executive branch as well as within the lack of clarity in the Convention itself. Perhaps the United States and the European States Parties failed to realize the true extent of each others' interests and concerns in formulating the Convention.[70] Given the amount of controversy at the time of the negotiations, however, a more likely possibility is that the various parties, unable to bridge their differences completely, finally signed an agreement setting forth their common ground and circumventing other areas, such as the Convention's relationship to the Federal Rules.

While the judiciary bears no blame for the uncertainty, it is the judiciary which nevertheless must deal with the daily problems of transational litigation. To the extent that *Aerospatiale* represents a triumph for the Federal Rules, it may be a pyrrhic victory in the long-run. Judicial insensitivity by United States courts has caused hostility abroad[71] which may lead to unnecessary obstacles for efficient international litigation in United States courts, as well as problems for American litigants in foreign tribunals. Such concerns should not coerce American courts to forego their considerable powers under the Federal Rules to enforce United States laws when the exercise of such powers is appropriate. These concerns do, however, suggest the necessity of an approach which will protect United States laws and policies, while at the same time causing the least possible offense to foreign sensibilites. The dissent's first consideration requirement is such an approach.

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[69] *See Aerospatiale,* 107 S. Ct. at 2560.

[70] *See, e.g.,* Gerber, *supra* note 18, at 781.

[71] *See* von Mehren, *Discovery Abroad: The Perspective of the U.S. Private Practitioner,* 16 N.Y.U. J. INT'L L. & POL. 985, 990 (1984).