The Hague Evidence Convention in the Supreme Court: A Critique of the *Aérospatiale* Decision

George A. Bermann
*Columbia Law School, gbermann@law.columbia.edu*

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Comparative and Foreign Law Commons, International Law Commons, and the Supreme Court of the United States Commons

**Recommended Citation**


This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.
THE HAGUE EVIDENCE CONVENTION IN THE SUPREME COURT: A CRITIQUE OF THE AÉROSPATIALE DECISION

GEORGE A. BERMANN*

With its decision in Société Nationale Industrielle Aérospatiale v. United States District Court, the United States Supreme Court resolved what had been widely regarded as "one of the most difficult and important issues in international civil litigation in United States courts." This opportunity arose out of the divergence of views among American courts on the proper way to reconcile the need for full disclosure of evidence with respect for the sensitivities of foreign states where that evidence might be located. The case before the Supreme Court, like many lower court cases, dealt specifically with the impact of the Hague Evidence Convention on the resolution of this tension. As formulated at the outset of Justice Stevens' majority opinion, the question was whether and to what extent a federal court must resort to the procedures set out in the Convention when litigants seek discovery of information located abroad from a party over whom the court has personal jurisdiction.

The underlying issues in Aérospatiale and similar Hague Convention cases have aroused strong reactions among the bar both here and abroad, among governments, and even among distinct departments of our own government. The issues freely

* Professor of Law, Columbia University; Eason-Weinmann Visiting Professor of Comparative Law, Tulane University; B.A. 1967, J.D. 1971, Yale University; LL.M. 1975, Columbia University.
4. The range of views is well illustrated by the various contributions to a special law review issue devoted to extraterritorial discovery. Compelling Discovery in Transnational Litigation Symposium, 16 N.Y.U. J. INT'L L. & POL. 957 (1984).
6. For an account of interagency differences of view, see Maier, supra note 2, at 241, 248-51; see also Comment, The Hague Convention on the Taking of Evidence Abroad in
straddle any frontier one might hope to trace between public and private international law, between comparative and international law, between law and politics, or between theory and practice. Although the *Aérospatiale* case accordingly offered the Supreme Court the opportunity to make an important contribution in these domains, the Court's decision itself must be counted a disappointment.

The case arose out of the August 1980 crash in Iowa of a Rallye plane. The plane was designed, manufactured, and marketed by the Société Nationale Industrielle Aérospatiale (an entity wholly owned by the government of France) and its wholly-owned French subsidiary, Société de Construction d'Avions de Tourisme. Suit was brought in an Iowa federal court by the pilot who was injured in the crash, and by an injured passenger and his wife, on grounds of negligence and breach of warranty arising out of the manufacture and sale of a defective plane.

Uncharacteristically for transnational litigation, the defendants did not question the personal jurisdiction of the district court over them, doubtless due to the extensive advertising and marketing of Rallye planes in the United States. However, a characteristic discovery impasse arose when the plaintiffs sought the production of certain documents under Federal Rule of Civil Procedure 34, answers to interrogatories under Rule 33, and admissions under Rule 36. The defendant companies claimed that discovery would necessarily occur in France and therefore required exclusive resort to the procedures of the Convention, an agreement to which both France and the United States are parties. In moving for a protective order, the defendants argued that the Convention had mandatory application not only by its own terms, but also by virtue of a 1980 French blocking statute incorporated into the French Penal Code. This blocking statute provided that, subject to existing treaties and international agreements, no one may disclose documents of an "economic, commercial, industrial, financial or technical nature intended to

---

7. The Supreme Court's still fresh and thus far largely uncommented opinion is just the sort of material that would have excited my teacher, colleague, and friend Henry deVries, in whose memory we gather, and elicited from him the insightful and far-ranging commentary for which he is known.

8. The defendants emphasized not only the apparent locus of discovery abroad, but also their own status as French corporations.
serve as evidence in foreign judicial or administrative proceedings.\textsuperscript{9}

The Convention itself provides several means for gathering evidence in one contracting state for use in another state. First, the Convention provides for letters of request (or letters rogatory) addressed by the court of the requesting state to a central authority designated by the requested state with a view to procuring documents, deposing witnesses, or otherwise obtaining information, and in principle subject to the same forms of compulsion that are customary in the latter state. Second, the Convention provides for commissions issued by the court to consular officers of the requesting state, or to persons specially appointed by the court, to take evidence in a foreign state, generally without compulsory process. Subject to certain limitations, the Convention requires signatory states to execute proper letters of request and to observe the procedures specified by the requesting court. At the same time, states are free upon signing the Convention to decline to permit execution of commissions in their territories, or to make their consent to that practice subject to certain conditions. This option reflects the view of some civil-law countries that commissions are basically more intrusive of judicial sovereignty than are the conventional letters of request.

The defendants' motion in \textit{Aérospatiale} for a protective order against the allegedly extraterritorial discovery did not meet with success. The magistrate to whom the cases had been referred ruled that the Convention could not be allowed to displace the normal operation of the Federal Rules of Civil Procedure on discovery.\textsuperscript{10} According to the magistrate, the special interest of American courts in ensuring the full and proper litigation of products liability cases involving personal injury prevailed over the argument that complying with the discovery request would necessarily entail violating French penal law. The special interest of American courts prevailed because France's motivation in enacting the law was to impede antitrust law enforcement in American courts, because production might be regarded as taking place other than in France, and because com-


pliance would not actually be particularly intrusive. Thus, even with the penal implications in the balance, American interests in compensating American products liability victims were held to outweigh French interests in averting intrusive foreign discovery.

In an unusual exercise of appellate review of an interlocutory discovery order, the Eighth Circuit affirmed the district court ruling, but in considerably more sweeping terms. Rather than engaging in a balancing test—even a modified one weighted in favor of disclosure in the interest of American litigants—the court declared the Convention wholly inapplicable to discovery against parties over whom an American court has an independent basis of jurisdiction, even when the documents or information sought are physically located abroad. With the Convention confined to evidence gathering against nonparties over whom the court lacks personal jurisdiction, resort to the federal rules became entirely proper. The only issue remaining was whether production actually should be ordered in light of the apparent dilemma in which French and American law placed the defendants. The court held that the competing national interests would have to be balanced in order to make that determination and that the lower court had properly accomplished that task. Concerning the sanctions, if any, that should be imposed on the defendants should they ultimately choose not to comply with a valid discovery order, the court deemed any such judgment to be premature.

In reviewing the Eighth Circuit's decision, the Supreme Court recognized that American courts had taken a variety of positions on the exclusivity or nonexclusivity of the Convention. It had considered for review no fewer than two other court of appeals decisions on the matter that had adopted somewhat different reasoning than that of the Eighth Circuit. Although I


12. For this purpose, the appeals court invoked a balancing test derived from section 40 of the Restatement (Second) of Foreign Relations Law of the United States, which considers not only the vital national interests of each state, but also the hardship on the foreign party, the nationality of the party, and the extent to which discovery would take place abroad. Id. at 126-27.

13. A relevant factor for the court was that the order only required the French corporations to bring documents and information from France rather than have acts performed by French judicial officials. Id. at 124-25.

14. Id. at 127. A decision on sanctions would turn in part on the foreign party's good faith in attempting to comply with the order. Id.
believe the Supreme Court seriously erred on the merits, Justice Stevens' majority opinion has the refreshing merit of plainly setting out and then criticizing the various positions that might tenably be taken on the proper relationship of the Federal Rules to the Convention.

The first position advanced by the French defendants in *Aérospatiale* was essentially that the Convention by its own terms mandates that it be used to the exclusion of any otherwise applicable discovery procedure whenever evidence that is located abroad is sought for use in an American court. This view had previously been embraced by a number of American state courts. A second position would require that Convention procedures be used initially, although not necessarily exclusively. In other words, litigants in American courts would not have to consider themselves limited to the Convention when seeking evidence, but they would be bound to use it first and, in some situations, be content with what it yields. A third position assumes that the Convention does not of its own force require either the exclusive or prior use of its procedures, thus leaving such use strictly optional as a matter of treaty law. Under this view, however, general and overriding considerations of international comity nevertheless should lead courts to insist that litigants use the Convention before resorting to any other means. The fourth position would continue to draw inspiration from international comity, but in a much diluted way. According to this view, comity does not mandate prior Convention use as a general rule, but simply suggests that courts consider the interests of the foreign state involved, among other factors, in making the discretionary decision whether to require prior resort to the Convention as the "appropriate" course of action.

15. *E.g.*, Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (Ct. App. 1982); Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (Ct. App. 1981). However, these courts appear to have been influenced by the supremacy of federal law, including treaty law, over state court procedures.


17. This has been a prominent view among lower federal courts. *See, e.g.*, Compagnie Francaise d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co., 105 F.R.D.
Quite clearly, the more extreme position actually taken by the Eighth Circuit in *Aérospatiale* was not among the interpretations the Court thought tenable. Both the majority and separate opinions of the Supreme Court squarely rule out any notion that application of the Convention might be confined to situations in which evidence is sought from persons not before the court and not otherwise subject to the court's jurisdiction. The Court properly rejected this limitation of the Convention to evidence gathering from third parties, as opposed to the litigants themselves, as simply too drastic a narrowing of the treaty's scope. The Court could not accept this narrow interpretation in the absence of specific indications in the text or history of the Convention that such was its intent. In rejecting this view, the Court fortunately averted what might have been an extremely serious error in judgment.

Among the four options, the Court unanimously rejected both the pure and the modified "mandatory" reading of the

---


19. In this connection, the Court also rejected the attempts of certain parties and lower federal courts to confine the scope of the Convention to discovery that could only be conducted in the foreign state, and therefore to exclude from the Convention's reach evidence that actually could be brought from abroad to the court and "produced" in the United States, for example, in the form of documents or the appearance of witnesses. For earlier cases advancing that view, see Laker Airways v. Pan Am. World Airways, 103 F.R.D. 42 (D.D.C. 1984); Graco v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984); Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360 (D. Vt. 1984); Lasky v. Continental Pros. Corp., 569 F. Supp. 1227 (E.D. Pa. 1983). The Eighth Circuit in *Aérospatiale* held that discovery does not take place within a state's borders merely because documents to be produced somewhere else are located there. *Aérospatiale*, 782 F.2d at 124. In the Fifth Circuit's leading cases, Anschuetz and Messerschmitt, the Court indicated that orders directed to parties to produce evidence in an American forum do not require the parties to do anything in the situs country, do not require any governmental action to take place abroad, and therefore do not seriously infringe foreign sovereignty.
Convention, and held that the Convention does not require resort to its procedures for discovery directed to parties before the court. Although the Court reached a reasonable conclusion regarding these two options, it nevertheless advanced some embarrassingly weak arguments in support. First, it contrasted the preamble to the Evidence Convention with that of the earlier Hague Service Convention, which was characterized as containing "mandatory language." The Service Convention stated: "The 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."\(^\text{20}\) There is good reason to doubt that even the quoted language of the Service Convention amounts to a requirement of exclusive or mandatory prior use. It reads more plausibly as a simple statement of the field to which the Convention applies, that is, as a statement of scope. True, the Evidence Convention—whose preamble identifies a purpose merely to "facilitate" use of letters of request, to "further" the accommodation of different national procedures, and to "improve" international cooperation in evidence gathering\(^\text{21}\)—lacks even this slender linguistic basis for being read as somehow mandatory in application.\(^\text{22}\) The contrast, however, is not significant.

Similarly, the Court reads too much into the use of the term "may" in the Evidence Convention. The term "may" is used in connection with the chapter on letters of request (a judicial authority "may" forward a letter of request) and on evidence taking by diplomatic officers, consular agents, and commissioners (persons who "may" take evidence under stated conditions). Essentially the Court would have us read the permissive "may" as negating the Convention's exclusive character. But even if the Convention procedures were truly mandatory, the term "may" would still be used to indicate what courts and officers of signatory states are permitted to do, or request be done, with respect to evidence located in other signatory states. Clearly, the word "may" should not have been as strenuously pressed into service in support of the Court's reading as it was. A fairer conclusion


\(^{21}\) Hague Evidence Convention, supra note 3, preamble, 23 U.S.T. at 2557.

\(^{22}\) RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 473 comment b (1987) flatly declares, "Nothing in the Convention expressly obligates courts of a contracting state to resort to Convention procedures as the exclusive means to obtain evidence abroad."
is that it does not markedly strengthen anyone's case, including, I readily concede, the proponents of exclusivity.

A second and even shakier argument by the Court draws upon article 27 of the Convention, which provides that contracting states may continue to use more liberal methods of rendering evidence than those expressly authorized by the Convention. The argument is that such language permits a contracting state, at its pleasure, to use or not to use Convention procedures. The terms of article 27 alone, however, plainly show that this provision makes the Convention nonexclusive in an altogether different sense from that argued by the Aérospatiale defendants. Under article 27, a state may place its courts more broadly at the service of foreign tribunals and show themselves more hospitable to the taking of evidence on their territory in aid of foreign litigation than the Convention itself requires. In other words, the Convention sets only a minimum standard of international cooperation. Article 27 simply does not address the question whether signatory states may impose on foreign states and foreign parties in ways other than those that the Convention expressly mentions and as to which it ensures cooperation. If anything, article 27 seems to carry a negative implication, for while it invites states to be more compliant than the Convention requires, it does not invite them to be more demanding. For an advocate to marshal an argument based on article 27 in support of the nonexclusivity thesis is understandable; for the Supreme Court to rely upon it, however, is not.

The Court's third argument, and its only convincing one, was that treating the Convention as the exclusive framework for international discovery among signatory states would have very far-reaching and improbable consequences, certainly from the American point of view. For example, the Convention leaves signatory states free to declare that they will not execute any

23. Article 27 provides that the Convention's provisions do 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.

Hague Evidence Convention, supra note 3, 23 U.S.T. at 2569.
24. For prior cases supporting this view, see supra note 17.
25. The Aérospatiale majority was nevertheless "unpersuaded" that any such negative inference could be drawn. Aérospatiale, 107 S. Ct. at 2552-53 n.24.
letter of request in aid of common-law pretrial discovery of documents.\textsuperscript{26} If the Convention were indeed exclusive, then to the extent such declarations are made,\textsuperscript{27} the United States would appear to have forsworn access by its courts and litigants to that kind of foreign discovery. The improbability of this result strongly counsels against giving the Convention the mandatory effect argued for by foreign interests and governments.

Moreover, whatever the assumptions of the other signatory states may have been,\textsuperscript{28} the United States showed very little evidence of an actual intent that Convention procedures should displace the standard practices of extraterritorial discovery customarily permitted by American courts.\textsuperscript{29} The Senate Report simply characterizes the Convention as setting up a system to overcome certain difficulties encountered in obtaining evidence abroad, and thereby help secure evidence in a form that is both useful to the requesting state and acceptable to the state executing the request.\textsuperscript{30}

According to a leading member of the United States delegation to the Hague Conference, the Convention "makes no major changes in United States procedure and requires no major changes in United States legislation or rules," even though it does provide certain internationally agreed-upon

\begin{itemize}
\item \textsuperscript{26} Hague Evidence Convention, supra note 3, art. 23, 23 U.S.T. at 2568. Article 23 permits contracting states to declare that they will "not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." It cannot, however, be invoked to preclude pretrial examination of witnesses.
\item \textsuperscript{27} Sixteen of the Convention's twenty signatory states have issued such a declaration. See 8 MARTINDALE-HUBBELL LAW DIRECTORY pt. VII, at 15-19 (1988).
\item \textsuperscript{29} Oxman, \textit{The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention}, 37 U. MIAMI L. REV. 733, 760 (1983). \textit{But see} Heck, supra note 28, at 255-57 (taking the view that even under American law the Convention can properly only be viewed as constituting the exclusive legal regime for extraterritorial production in signatory states and, in that sense only, a complement to the Federal Rules of Civil Procedure).
\end{itemize}
procedures for international discovery.31 Regarding the issue of exclusivity, the legislative history is unclear. Apart from describing letters of request as "a principal means of obtaining evidence abroad," the Senate Report merely restates the import of article 27, namely that the Convention "[p]reserve[s] all more favorable and less restrictive practices arising from internal law."32 Similarly, the Report of the United States Delegation to the Hague Conference that prepared the Evidence Convention confines itself to observing that, while the text "provides a substantial number of improvements over existing practice, it is . . . designed to set minimum standards for international assistance."33 All in all, the evidence that the United States positively committed itself to using Convention procedures alone for obtaining evidence located within the territory of other signatory states is quite meager.

The French defendants in Aérospatiale, as well as commentators writing in support of their position, urged that unless the signatory states intended Convention procedures to be followed exclusively, most of those states would have had no incentive to enter into the Convention. Because the United States had already liberalized its practices on international cooperation in evidence gathering, largely on a unilateral basis,34 its European treaty partners apparently stood to gain nothing from the Convention if it did not signify a commitment by the United States to content itself with the procedures that the Convention specifically contemplates. In the absence of firmer support in the language and history of the Convention, this argument seems to be the strongest one to support reading the Convention as embodying such a commitment, and it did apparently win a measure of support from Justice Blackmun writing for the Aérospatiale minority.35

33. Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 I.L.M. 785, 808 (1969) (emphasis in original); see also Amram, supra note 30, at 655 ("What the convention has done is to provide a set of minimum standards to which all countries may subscribe").
35. Aérospatiale, 107 S. Ct. at 2559 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun's opinion was joined by Justices Brennan, Marshall, and O'Connor.
For all its appeal, this approach to the Convention is nevertheless deeply flawed. First, the signatory states did not enter into this treaty with United States relations alone in mind. They stood to gain from normalizing their channels of international judicial assistance with as many other states as possible. But even regarding the United States, the liberalization of federal procedures on international judicial assistance that occurred in 1964 had gone no further than to authorize federal courts, with or without a showing of reciprocity by the requesting country, to cooperate in the execution of foreign letters rogatory. Under the liberalized procedures, the courts might still withhold their cooperation. So far as extraterritorial discovery performed in the United States is concerned, if the Convention only served to elevate international judicial assistance from a discretionary to a mandatory matter, it still had evident utility.

Ultimately, however, the argument rests not only on flawed logic, but also on a deeply troubling premise about the proper interpretation of international treaties. It may be fair and reasonable, though still questionable, for courts to read into private agreements undertakings that the parties did not expressly make when those undertakings seem plausible and even mildly probable, given the parties' assumed bargaining positions and apparent incentives. But it should not be considered excessively old-fashioned to restrain those impulses when the prerogatives of sovereign states are involved. Quite apart from the serious separation of powers concerns that are raised by the expansive judicial interpretation of international engagements, the sound working of treaty arrangements calls for a measure of reserve in determining the extent to which states have engaged themselves by treaty to abandon their traditional practices. Powerful considerations such as these probably explain why the Supreme Court was unanimous in rejecting the notion that the Convention by its own terms had become the exclusive means for obtaining discovery in signatory countries in aid of American litigation. In truth, the Court would have done well to rest its case on arguments of this sort and to resist the other intellectually flimsy arguments that advocates of the unbridled use of the Federal Rules had advanced.

36. Justice Stevens aptly quoted his own dissenting opinion in Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 262 (1984), for the position that international agreements should be read with a view to delineating with care the common ground upon which state parties have come to agreement. "Aérospatiale", 107 S. Ct. at 2552 n.23.
The heart of my difficulty with the Aérospatiale decision, therefore, does not lie in the Court's refusal to treat the Convention as displacing the ordinarily applicable procedures or as requiring by its own terms prior resort to Convention procedures. It lies rather in the Court's rejection of what it identified as the third option, namely requiring prior resort to Convention procedures as a general rule in furtherance of traditional comity considerations. That solution had won favor not only among academic writers, but also among the lower federal courts. And in the end, it persuaded four members of the Court.

A rule of prior resort does present the advantage of injecting a measure of certainty into an otherwise unguided exercise of discretion. Relying on comity to develop strong presumptions in international legal relations is, as the minority opinion notes, an established practice, whether in choice of forum, choice of law, sovereign immunity, or other matters not mentioned in the opinion. Each of these areas is now marked by a general rule chosen because it tends most to promote a cooperative international regime. There is no reason to suppose that the Convention could not serve as a useful signpost in the same direction so far as extraterritorial discovery is concerned.

A comity-driven rule of prior resort is not of course without its difficulties. One such difficulty lies in determining the cir-

37. E.g., Oxman, supra note 29, at 761; Maier, supra note 2, at 255-60.
39. See supra note 35; Aérospatiale, 107 S. Ct. at 2557 (Blackmun, J., concurring in part and dissenting in part).
44. See Maier, supra note 2, at 253.
cumstances under which a party may be excused from application of the general rule, or under which a party who is disappointed with the result of an initial Convention-based request may then proceed to non-Convention alternatives. No single formula possibly can provide a solution to all cases that might raise one or both of these questions. According to Justice Blackmun, whose separate opinion advocates a rule of prior Convention resort, such a rule can legitimately be avoided "when it appears that it would be futile to employ the Convention or when its procedures prove to be unhelpful." This test is necessarily uncertain in application. Moreover, even if it is met, a party seeking non-Convention discovery probably must present "[a]n individualized analysis of the circumstances of [the] particular case" in hopes of establishing that such further discovery on balance is warranted.

Although these difficulties are considerable, they are not insurmountable. They are much less severe in my judgment than those that would result from giving the Convention no particular weight at all from a comity point of view, or from assuming that resort to the Convention probably would yield little, if any, evidence of value. A final consideration is that Convention procedures may actually work in some cases, in the sense that they do satisfy the requesting party and thereby obviate the need to engage in an essentially unstructured balancing of interests to decide whether additional non-Convention discovery is appropriate. Even if the procedures do not fully satisfy the requesting party, they may produce enough material to focus the conflict on a more limited and ultimately more manageable body of evidence. In this way, the Convention would help clarify the basis for the foreign state’s unwillingness to cooperate and thereby point the way to some accommodation.

Notwithstanding the powerful policy arguments for a comity-based presumption of prior Convention use, a majority of the

---

45. *Aérospatiale*, 107 S. Ct. at 2558 (Blackmun, J., concurring in part and dissenting in part). Conceivably, resort to the Convention would be considered fruitless if the evidence sought were documentary and were located in a state making an article 23 declaration. *Restatement (Third) of Foreign Relations Law of the United States* § 473 comment i (1987).

46. *Aérospatiale*, 107 S. Ct. at 2558.

47. For thoughtful suggestions on how a court might go about making these assessments, see Oxman, *supra* note 29, at 784-85.

48. See generally id. at 782 (cautioning against speculation on whether a requested state will withhold cooperation).
Supreme Court in \textit{Aérospatiale} rejected this solution as purely and simply "unwise." In reaching its conclusion, the Court cited several factors: (1) a supposed delay and expense associated with Convention procedures, (2) an assumption that resort to those procedures will prove unavailing in any event, and (3) an unsupported and palpably wrong insistence that international comity can operate only on a strict case by case basis rather than through presumptions of general application. As the majority stated, "We do not articulate specific rules to guide this delicate task of adjudication.\footnote{49. \textit{Aérospatiale}, 107 S. Ct. at 2557.} For these reasons, the Court concluded that the Convention, when applicable, only represents an option for litigants and courts—an option which they should exercise as and when a Restatement of Foreign Relations-style balancing analysis so suggests. This balancing will turn on the "respective interests of the foreign nation and the requesting nation,\footnote{50. \textit{Id.} at 2555. See generally Griffin, \textit{Procedures for Civil Discovery Outside the United States After Aérospatiale}, 15 \textit{Int'l Bus. Law.} 350 (1987). For a characterization of the test as essentially a "comparative impairment" analysis, see Note, \textit{The Interplay Between the Discovery Provisions of the Hague Evidence Convention and the Federal Rules of Civil Procedure: Société Nationale Industrielle Aérospatiale}, 9 \textit{Hous. J. Int'l L.} 333 (1987).} the importance of and need for the information sought and its availability through other channels, the specificity of the demand, the likelihood that resort to Convention procedures will prove effective, and the intrusiveness of the particular discovery requested.\footnote{51. In a footnote, the majority refers to the five factors mentioned in § 437(1)(c) of the then latest draft revision (Tentative Draft No. 7, 1986) of the \textit{RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES} as "relevant to any comity analysis." \textit{Aérospatiale}, 107 S. Ct. at 2555-56 n.28. These factors are: (1) the importance to the . . . 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 noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. \textit{Id.}}

Admittedly, one can easily exaggerate the distance between the majority and minority positions in \textit{Aérospatiale}. For its part, the majority is not wholly insensitive to the special considerations governing transnational litigation. Although it ultimately left the matter to the discretion of the lower courts, the majority admonished those courts to demonstrate "special vigilance to
protect foreign litigants from the danger that unnecessary or unduly burdensome discovery may place them in a disadvantageous position."  

Trial judges "must supervise pretrial proceedings particularly closely to prevent discovery abuses." The objections voiced by foreign litigants deserve "the most careful consideration," and in giving them that consideration courts must "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 [the] foreign state." All in all, lower courts presumably should take seriously the claims of foreign parties that bypassing the Convention would subject them to intrusive or otherwise unreasonable evidence gathering. Conversely, the minority in Aérospatiale cannot be described as categorical in its views either. Significantly, it would subject the presumption of prior resort to the Convention to a proviso allowing for the Convention to be bypassed in cases in which its procedures are bound to prove inadequate for the production of necessary evidence. Thus, all the Justices acknowledged in some way the importance of international comity and its potential advancement through resort to the Convention. None of the Justices would impose the Convention's mechanism regardless of all else. Where they divide is over the comparative advantages of a general rule favoring the Convention, on one hand, and the more usual case-by-case approach to the conduct and supervision of discovery practice, on the other.

While fully acknowledging the common ground shared by all members of the Court, I believe that the majority chose the wrong course. First, the majority's position unnecessarily reduces the Convention to modest legal significance. Second, it leaves the lower courts without meaningful guidance about when and where the Convention deserves priority and under what circumstances, once it has been invoked, its proven inadequacies justify subsequent resort to traditional evidence-gathering methods. Finally, the Court belittles the Convention through what can be described without exaggeration as ridicule and caricature. My reasons for making these three claims follow.

52. Aérospatiale, 107 S. Ct. at 2557.
53. Id.
54. Id.
First, the Court has severely deprived the Convention of practical effect, even though a less drastic alternative presented itself. The majority's devotion to pure ad hoc balancing would be more appropriate if the United States had never entered into an international cooperation regime such as the Convention. Under such circumstances, it would be entirely proper for district courts to inquire into

the importance to the . . . litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; [or] 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.6

A wholly open-ended and discretionary response to the interests of foreign states in regulating the disclosure of information within their territory seems unsatisfactory, however, in light of the Convention's fundamental purpose of easing international tensions over the extraterritorial production of evidence. Admittedly the Convention should not be transformed into the exclusive vehicle for international evidence taking on the mere ground that many or even a majority of the European signatory states imagined they had entered into such an agreement when they in fact did not. Nevertheless, the Convention does represent important and valuable concessions on the part of these nations. The most notable concessions are the commitment to allow evidence taking by diplomatic or consular officers and by commissioners appointed by the foreign court, and to follow the procedures that a foreign court specifically requests.7 Again, these concessions cannot by their own force convert the Conven-

56. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986), cited approvingly by the majority. See supra note 51 and accompanying text.

57. According to sources relied upon by Justice Blackmun, evidence taking abroad by American diplomatic or consular officials and by commissioners named by American courts greatly exceeds in frequency the use abroad of foreign letters rogatory or letters of request. Aérospatiale, 107 S. Ct. at 2564 n.16 (Blackmun, J., concurring in part and dissenting in part). Hague Convention signatory states also have agreed to use, and under most circumstances compel, procedures of proof—discovery of third parties, administering of oaths, preparation of verbatim transcripts, attorney examination and cross-examination—that are different from and generally more onerous than their own customary procedures. Hague Evidence Convention, supra note 3, arts. 3, 9, & 10, 23 U.S.T. at 2558-62.
tion into something that it is not. But they can powerfully influence American courts, out of comity, to make prior resort to the Convention a presumptive obligation of those litigants seeking to perform discovery abroad in a contracting state, at least whenever it is probable that the foreign state would be offended by not doing so.\footnote{58}{Professor Oxman, writing some years ago and upon a careful weighing of all the considerations, reached much the same conclusion:}

That courts adopt such a practice as a matter of sound judgment, rather than legal obligation, is of secondary importance.

In this regard, international discovery impasses need to be placed in a somewhat larger context. Recent years have produced conflicts between national legal orders over various aspects of international litigation, including the assertion of extraterritorial jurisdiction to prescribe, the deference owing to mandatory rules of law of a nonforum state, the proper application of the forum non conveniens doctrine, and the authority of one state to enjoin its nationals from litigating in the courts of another state, among others. A mostly one-sided interpretation of the Convention—under which Americans win access to foreign discovery under the Convention but accord it no particular weight in deciding whether to permit foreign discovery to proceed as usual under the Federal Rules of Civil Procedure—neither reflects nor promotes the spirit of accommodation that can best defuse these multiple points of conflict. The arguments for making prior resort to the Convention the normal and presumptive route to extraterritorial discovery are not weakened by the other signatory states' failure to extract a specific concession from the United States (for example, by inserting appropriately mandatory language into the Convention). A rule of first resort is simply a suitable way for the United States to demonstrate its

\footnote{58}{Professor Oxman, writing some years ago and upon a careful weighing of all the considerations, reached much the same conclusion:}

As a matter of the orderly administration of justice, when trial courts have reasonable alternatives available under the Hague Evidence Convention or other agreed procedures, it is undesirable to press either the international law or constitutional law issues surrounding discovery abroad to definitive resolution, to expose the courts to unseemly controversy and ridicule, or even to escalate the controversy. The agreed procedures should be used. If the response of a foreign court to a letter of request is satisfactory, or foreign permission is granted to a United States consul or court-appointed commissioner to take evidence, the problems are avoided. If all or part of a letter of request is not executed, the trial court will be “informed immediately” and “advised of the reasons.” It could then, in light of its knowledge of the case and the communications received, weigh the various factors [involved].

Oxman, supra note 29, at 795 (citations omitted).
respect for foreign-country sensibilities, for orderly international relations, and for a general spirit of international cooperation in litigation.59

Second, the majority's legal reduction of the Convention leaves lower courts, and therefore litigants, quite adrift in deciding what weight to assign the Convention in the overall assessments of reasonableness in discovery that Aérospatiale now requires. In the absence of a presumption, very difficult and sensitive judgment calls necessarily will abound.60 Whether this will result, as Justice Blackmun fears, in a pro-forum bias is of course speculative; but the risk is not one to which our courts should be exposed, particularly given the availability of the Convention. With the inevitable increase in international litigation, a routine reliance on courts to make these difficult assessments case by case is not an attractive prospect.61 Foreign states experience practical constraints in intervening to express their perceived interests in each piece of transnational litigation that takes place in the United States. In addition, the limited scope of appellate review of interlocutory discovery decisions will tend both to retard the development of useful standards for making these decisions and to render correction of error less likely.62 Most fundamentally though, individual adjudications in American courts are simply not an appropriate setting for balancing the interests of foreign states against our own, or even for assessing the obviously important foreign policy implications of such determinations.63

Finally, the Aérospatiale majority has given the Convention a profile that is extremely unflattering and even caricatural, and probably will only cause practitioners and lower courts to pay less attention to it than they otherwise might. The caricature lies first in a distorted picture of the basic Convention framework. According to the majority, treating the Convention as the exclusive vehicle for extraterritorial discovery would "subject

59. Id. at 761.
62. See Alley & Plato, supra note 55, at 355.
63. This is especially the case in a comparative impairment analysis involving national interests that are in irreconcilable conflict on the same point of public policy. See Note, supra note 50, at 334-35, 350-51.
every American court hearing a case involving a national of a contracting State to the internal laws of that State." That, of course, wildly exaggerates the Convention's effect. Quite to the contrary, the Convention seeks to ensure cooperation by all signatory states in a minimum set of mutually agreeable procedures, whatever the normal and usual practices of these states under purely domestic law happen to be. The most obvious beneficiary of the Convention is, of course, the United States, which previously could not demand that other countries lend assistance to extraterritorial discovery in American litigation. Indeed, the United States still cannot do so with respect to cases or countries not covered by this or some other convention. The Court's characterization of the opportunity that article 23 gives signatory states to decline to execute letters of request for pretrial documentary discovery as the right unilaterally to abrogate the Convention's procedures is likewise much exaggerated.

The opinion also conjures up a distorted picture, mercifully relegated to a footnote, of the consequences of mandatory resort to the Convention. Essentially, the argument is that treating Convention procedures as exclusive would generate a number of "unacceptable asymmetries." The first asymmetry allegedly discriminates unfairly within the framework of American litigation between a United States national and an opposing party from another signatory state. The foreign party, the argument goes, could take full advantage of the liberal domestic discovery practices that prevail in the United States, while the American party would have to content itself with whatever evidence its resort to the Convention's exclusive procedures might yield. But this asymmetry is embarrassingly inapposite, because application of the Convention, whatever its interpretation, does not turn on the nationality of the litigant, but rather on the site of the evidence sought. Quite plausibly, the foreign litigant would be the one prejudiced by the Convention's assumed deficiencies.


67. *Id.* at 2553-54 n.25.

68. The alleged discriminatory impact was apparently an important element in the Fifth Circuit's determination that the Convention has no application to discovery from parties, as opposed to third persons not within the court's jurisdiction. *In re Anschuetz & Co. GmbH*, 754 F.2d 602, 606 (5th Cir. 1985), judgment vacated and case remanded, 107 S. Ct. 3223 (1987).
because the evidence it seeks is located abroad, either in its home state or in a third contracting state, and the American litigant is the one who, because the evidence it seeks is situated in the United States, enjoys the liberality of domestic American discovery procedures. In any event, and as the *Aérospatiale* minority also aptly observed, any injustice of this sort can be avoided by a district court through the exercise of its express authority under the Federal Rules to control discovery in the interest of fairness to the parties.

The second cited asymmetry is even more perplexing. According to this argument, foreign companies allegedly will derive an unfair business advantage over their American counterparts when both parties are in an American court because the foreign company may enjoy untrammeled discovery privileges under usual American practices. The United States company, on the other hand, may receive only the scraps that Convention practices afford it. This argument, of course, suffers from the same peculiar assumption that the evidence sought by each party to a piece of international litigation is to be found in the place of nationality of its adversary. However, the argument also seeks to elevate what at most is a litigation advantage of one party to an international suit over the other into a structural business advantage of foreign firms over American ones. But just how much weight does this factor honestly deserve in an obviously much larger and vastly more complex picture of relative business advantages? And why continue, somewhat myopically, to assume that transnational litigation necessarily will take place in an American forum?

The third putative asymmetry truly should have been left unmentioned. The argument suggests that American litigants who square off in American court against nationals of foreign signatory states will not be treated as well in their efforts at foreign discovery as those American litigants who face nationals of foreign *non-*signatory states. This consequence is somehow supposed to be unfair, even though these two classes of Americans, unlike the opposing litigants in the majority's first asymmetry and the competing enterprises in its second, are in no meaningful sense competing with one another. More importantly, one simply cannot complain that the Convention (under the exclusivity hypothesis) would cause the nationals of foreign signatory states to be treated differently in American litigation from nationals of foreign nonsignatory states. This advantage is precisely the kind
that the signatory states might have negotiated and bargained for under the Convention in exchange for the advantages extended to foreign nationals wishing to obtain discovery abroad. To dismiss the legitimately disparate effect on nationals of signatory as against nonsignatory states as an "unacceptable asymmetry," because the particular Americans against whom they eventually litigate necessarily feel a correspondingly disparate impact, is to launch a truly unprecedented attack on the basic mechanism of international treaties. Many international agreements place nationals of signatory states in a privileged position compared to the nationals of nonparty states. The disparate impact of those concessions on persons dealing with these two classes of foreign nationals, far from being an anomaly, is the intended and desired result.

What the Court basically overlooks in its search for disturbing inequities is the one overriding equity that the Convention arguably sought to achieve and, if interpreted as mandatory and exclusive, probably would achieve: that courts of all signatory states could order the production of foreign evidence only by following the same common evidence-gathering procedures. This interpretation would effect precisely the sort of mutuality of obligation among contracting states that international treaties traditionally aim to secure. As I have already suggested, the Convention states did not enter into an arrangement that of its own force confined them to uniform procedures for obtaining evidence abroad. But there would have been nothing anomalous in doing so. Furthermore, assuming they have not done so, American courts nevertheless could and should give the Convention preferred status as a matter of international comity.

Lastly, the majority denigrates the Convention procedures themselves. Suggestions abound that the Convention is a recipe for frustration. Once made exclusive, it allegedly would subject American proceedings "to the actions or, equally, to the inactions of foreign judicial authorities."\(^7\) "In many situations," the opinion further warns, "the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence\(^6\).

\(^6\) The majority fails to mention that, although American litigants would lose their rights to untrammelled direct discovery when their adversaries are nationals of Convention states, those same American litigants would also derive the countervailing advantage of protection against non-Convention attempts at foreign discovery by their opponents.

\(^7\) \textit{Aérospatiale}, 107 S. Ct. at 2553.
than direct use of the Federal Rules." Even without questioning whether litigant-controlled discovery under the Federal Rules of Civil Procedure presents any advantage in these respects, or examining the extent to which Convention alternatives to the letter of request procedure adequately compensate for the latter's deficiencies, a marginal preference for the usual American procedures would not justify elevating them over Convention procedures if comity is to be given serious consideration in this matter.

Leaving aside its unfortunate rhetoric, the Aérospatiale majority was probably also influenced by certain unhappy prospects associated with treating Convention procedures as exclusive. Among such prospects was the possibility that foreign states would make unprincipled use of the Convention's broad national sovereignty or security exception, invoke an article 23 declaration to block a pretrial discovery request that in all material respects is quite reasonable, or simply fail to perform clear obligations of assistance under the Convention.

Had the Convention proved unfruitful over the years, that would be sufficient reason to deny it any greater force or effect than its terms require, whether in the name of comity or otherwise. But the Convention's record is positive. The article 23 declarations filed by a large majority of contracting states, declining to "execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries," are a source of legitimate concern. Ini-

71. Id. at 2555. Other courts have volunteered similarly unflattering characterizations of the Convention. See In re Anschuetz & Co. GmbH, 754 F.2d 602, 606 (5th Cir. 1985), judgment vacated and case remanded, 107 S. Ct. 3223 (1987).
72. Concededly, only a few states have given general permission to consuls and commissioners appointed by foreign courts to take evidence in their territories. Most states are more restrictive, requiring that permission be sought in particular cases and withholding measures of compulsion in such situations.
73. Hague Evidence Convention, supra note 3, art. 12, 23 U.S.T. at 2562-63. This exception was successfully invoked in a British court to avoid production of documents in connection with American antitrust investigations into certain activities of British companies outside the United States. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 App. Cas. 547. Presumably, it also may come into play when a foreign blocking statute is applicable, except to the extent that such a statute is expressly made subject to international treaties or agreements such as the Hague Evidence Convention. See infra note 82 and accompanying text.
75. Hague Evidence Convention, supra note 3, art. 23; see supra notes 26-27 and accompanying text.
tially, courts in the declaring states did tend categorically to
deny requests that they took to constitute common-law style
pretrial discovery.\(^7^6\) However, as Justice Blackmun's separate
opinion indicates, those states more recently have undertaken to
narrow substantially their view of "pre-trial discovery" within
the meaning of article 23. This result is largely due to the efforts
of Americans to dispel certain misconceptions about what such
discovery necessarily entails.\(^7^7\) To judge by the emerging pattern
of amended declarations, the declaring states, most notably the
United Kingdom whose efforts led to the exception in the first
place, now object primarily to documentary requests that are
overly generalized or that seek evidence which is irrelevant to
the case or otherwise unlikely to be used at trial.\(^7^8\) In any event,
article 23 declarations pertain only to letters of request for docu-
ments, and not to the Convention's other procedures and forms
of discovery. Should it happen that a state's invocation of article
23 effectively blocks access to needed documents, the court will
face precisely the exceptional situation in which, under Justice
Blackmun's view, avoidance of the Convention might be
justified.

Another reason for not exaggerating the risk of impasse
under the Convention is that American courts have independent
reason to examine discovery demands closely for their overall
reasonableness whenever the evidence sought is located abroad.
The amended Federal Rules of Civil Procedure call for a more
active role by trial judges in averting discovery abuse by private
litigants in all categories of cases,\(^7^9\) including those that entail


\(^7^7\) According to the United States delegation to the Special Commission on the
Operation of the Evidence Convention, see supra note 74, at 1431, civil-law representatives
entertained some serious misunderstandings about the nature of American pretrial
discovery, assuming, for example, that it was employed prior to institution of a suit to elicit
evidence that might provide the basis for bringing such a suit.

\(^7^8\) See, e.g., Declaration of Denmark of July 23, 1980, 8 MARTINDALE-HUBBELL
LAW DIRECTORY pt. VII, at 16 (1988). The Danish declaration is typical of several that
confine their objections to requests that either fail to specify with particularity the
documents to be produced or call upon a person to state all the documents relevant to the
proceeding that are or were in his possession or custody. France recently has amended its
declaration so as not to cover "requested documents [that] are enumerated limitatively in
the Letter of Request and have a direct and precise link with the object of the procedure."

\(^7^9\) FED. R. CIV. P. 26(b), (g). Rule 26(b) specifically authorizes the court on its own
initiative to limit the scope of discovery to avoid discovery that may be duplicative,
needlessly burdensome, dilatory, or otherwise unreasonable or abusive. Rule 26(g)
authorizes the court to impose "an appropriate sanction" upon an attorney who, by signing
the production of evidence abroad. The newly revised Restatement of Foreign Relations reinforces that expectation, particularly with respect to foreign discovery. The Restatement conditions such discovery, even as against a party over whom the court enjoys personal jurisdiction, on a court order whose issuance in turn would depend on a specific showing of both relevance and necessity.\(^8_0\) Thus, the prospects for convergence between the views of our courts and those of the relevant authorities in other Convention states are ample; they share a common appreciation for relevance, specificity, and judicial supervision in the discovery context.\(^8_1\)

“Blocking legislation” in a number of contracting states represents the other potential stumbling block to production under the Convention. To be sure, legislation of this sort generally should be read as subject to the enacting state’s international engagements,\(^8_2\) a point Justice Blackmun made in minimizing the impact of blocking statutes on the Convention. Nevertheless, such statutes conceivably can re-enter through the Convention’s back door, the global exception in article 12 for discovery requests whose satisfaction would offend the requested state’s public policy or otherwise threaten its sovereignty or security. That compliance with otherwise proper requests may be avoided

---

80. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 comment a, reporters’ note 2 (1987). According to reporters’ note 2, the Restatement provision actually “is designed... to achieve greater control of the scope of discovery than is common in wholly domestic litigation.” Id.; see also Oxman, supra note 29, at 740-44 (persuasively arguing against confusing the circumstances in which a court asserts jurisdiction to adjudicate with those in which it acts to compel discovery). The conventional rule in the United States has been that a court having personal jurisdiction over a person also has the power to compel that person to submit to discovery. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée, 456 U.S. 694 (1982); see also In re Marc Rich & Co. A.G., 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); Federal Trade Comm’n v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1309 n.37 (D.C. Cir. 1980).

81. The Restatement properly calls attention to the special importance of early court supervision of discovery in the case of information located in a state party to the Hague Evidence Convention. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 reporters’ note 2 (1987).

82. France’s Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, supra note 9, for example, applies “except when international treaties or agreements provide otherwise.” Thus, requests for evidence made under the Hague Convention ought not be subject to the French statutory prohibition on furnishing evidence for use in a foreign legal proceeding. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 473 reporters’ note 8 (1987).
through the combined effect of a blocking statute and article 12 can readily be imagined. Still, this situation should not be assumed. If it occurs, the forum, again by way of exception, can conduct the kind of individual comity analysis that the Aérospatiale majority broadly favors. In appropriate circumstances, that comity analysis will justify discovery outside the Convention. Moreover, if foreign nationals are unlikely to produce evidence in violation of their own state's blocking legislation, that will be the case irrespective of whether the demand has been made through Convention channels or through direct discovery. The difficult questions will still remain: whether production should be ordered notwithstanding the foreign blocking legislation, and whether a party that fails to comply on grounds of such legislation should suffer adverse consequences in the forum. The answers to these questions should not turn on the channels through which the discovery request initially was made, and

---

83. The Restatement of Foreign Relations Law of the United States, in conformity with prior tentative drafts, makes the threshold question whether a court or agency should order the production of evidence located abroad depend upon a number of considerations including:

- the importance to the investigation or litigation of the documents or other information requested;
- the degree of specificity of the request;
- whether the information originated in the United States;
- the availability of alternative means of securing the information;
- and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c), at 348.

The comments and reporters' notes offer guidance on how such analysis should be made. For example, comment c enjoins courts and agencies neither simply to defer to foreign state claims of intrusion upon their sovereign interests nor routinely to satisfy the immediate interests of the prosecuting or investigating agency irrespective of "the long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance, ... in giving effect to formal or informal international agreements, and in orderly international relations." Id. comment c.

84. The Résumé generally bars a court or agency from imposing sanctions of contempt, dismissal, or default on a party failing to comply with an order for production in the absence of deliberate concealment or removal of information or failure to make a good faith effort to secure permission from foreign authorities to make the information available. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(2)(b). Section 442(2)(c), however, expressly allows a court or agency, even in such circumstances, to make findings of fact adverse to the party failing to comply with a production order.

85. However, for the view that in discovery subject to the Convention, the imposition of sanctions for nonproduction would constitute a breach of the Convention, see Heck, supra note 28, at 273-74 ("[B]ecause the Convention requires the requested court to exercise its jurisdiction, the requesting forum court loses its power to impose sanctions...").
difficulties in resolving them should not therefore deter American courts from giving Convention procedures priority over direct discovery as an expression of international comity. In fact, most courts rightly assume that the flexible standards developed over the last twenty-five years for dealing with the nonproduction of evidence located abroad are no less appropriate for Convention than non-Convention cases. 86

In sum, while the doctrinal divergence between the Aérospatiale majority and minority is not vast, it is important in substance and tone. Misgivings expressed over the majority opinion are already apparent from Hudson v. Hermann Pfauter GmbH & Co., 87 an early reported opinion of a federal court giving effect to the ruling. In Hudson, a West German manufacturer named as defendant in a negligence and product liability action sought a protective order requiring that any interrogatories propounded by the plaintiff be served in accordance with Convention procedures rather than Federal Rule of Civil Procedure 33. The district court granted the order, although curiously not as a result of the ad hoc comity inquiry that the Aérospatiale majority emphatically held to govern whether Convention procedures take priority over the Federal Rules. Rather, the district court specifically relied on the minority analysis espoused by Justice Blackmun in justifying a general rule of prior resort. In other words, the court respected Justice Stevens' formal insistence that the choice between Convention and non-Convention procedures be made on a case-by-case basis, 88 but it exercised that choice by pointedly using Justice Blackmun's framework of analysis 89—one that not only balances the competing interests of the United States and the foreign state but takes specific account of "the mutual interests of all nations in a smoothly functioning international legal regime." 90

regarding the same factual circumstances. . . . Rather, [it] . . . would have to seek the assistance of its own government under Article 36 of the Convention.").

86. See, e.g., Compagnie Francaise d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co., 105 F.R.D. 16, 24-25 (S.D.N.Y. 1984). For the view that when execution of a letter of request is refused by a foreign state, the requesting court is free under the Convention to issue appropriate orders and draw appropriate inferences, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 473 reporters' note 6.
88. Id. at 36.
89. The district court characterized Justice Blackmun's approach as "persuasive." Id. at 37.
90. Société Nationale Industrielle Aérospatiale v. United States District Court, 107 S.
Not surprisingly, the outcome was a requirement that the plaintiff use Convention procedures first. The *Hudson* court's preference for the views of the *Aérospatiale* minority is not lessened because it presented its result as an individual application of comity principles rather than as the product of a general prior resort rule. In fact, its ostensible ad hoc analysis strongly resembles a thinly disguised resurrection of Justice Blackmun's generic preference for such a rule. In the first place, the court found the foreign interests at hand to be "particularly compelling" for no more specific reason than that West Germany is a civil-law country (as well as a Hague Convention party) and therefore "necessarily" apt to find common-law discovery devices offensive to "sovereign integrity." As for the United States, the court conceded that it had an interest in facilitating the just resolution of disputes and in ensuring that foreigners who do business here are answerable in American courts. However, the court effectively blunted the force of this argument by requiring any party invoking national interests in order to bypass the Convention to demonstrate that use of the Convention actually would frustrate those interests. Moreover, the court's reasons for doubting the alleged shortcomings of the Convention seem practically universal in application and hardly unique to the case at hand. First, the court found that the Convention's inconvenience and expense have been exaggerated, will probably diminish over time, and do not outweigh the Convention's virtues. Second, it observed that American courts have sufficient inherent authority to control discovery so as to prevent

---

91. The court reached this result notwithstanding its admission that Convention procedures "appear to be more cumbersome" than the Federal Rules. *Hudson*, 117 F.R.D. at 35.

92. *Id.* at 37.

93. *Id.* at 37-38 (quoting extensively Justice Blackmun's discussion of the affront of direct discovery to civil-law notions of judicial sovereignty).

94. *Id.* at 38-39.
either party from securing an unfair advantage over the other. 95 Given the court's assessment of the relative national interests, its third consideration, the mutual interest of all nations in a smoothly functioning international legal regime, could point in only one direction. 96 In sum, the court's ostensible ad hoc inquiry represents a powerful repudiation of Justice Stevens' opinion in Aérospatiale in favor of Justice Blackmun's.

A comity-driven approach to the Convention should not be mistaken for indulgence toward foreign litigants who resist extraterritorial discovery in American courts. As I have argued, and as the latest Restatement emphasizes, 97 there is no inconsistency in according priority to Convention procedures and at the same time taking a dim view of foreign-country blocking legislation. Such statutes simply should not constitute an automatic bar to discovery under the Federal Rules, at least as concerns foreign interests that have brought themselves, by their own conduct, within the jurisdiction of American courts. These statutes justify at most a balancing of competing interests, a balance that more often than not ends up favoring foreign discovery. Similarly, I maintain, as does the Restatement, 98 that parties who refuse discovery in reliance on blocking legislation do not necessarily deserve to avoid all of the adverse effects that ordinarily flow from noncompliance with a court's production order. However, they generally should escape the harshest of those effects, such as contempt, dismissal, or default, if they have made good-faith efforts to comply. The fact remains that American courts would actually be aided in making proper claims for cooperation from those in control of evidence abroad if the courts adopted a more gracious, indeed more honest, reception of the Convention than the Supreme Court has accorded it. Both by its substance and its rhetoric, the Aérospatiale ruling unfortunately misses an important opportunity to promote the spirit of accommodation essential to the internationalization of law and legal practice.

95. In effect, the court would require parties first to see how useful Convention procedures are in any given case before assuming the superiority of the Federal Rules. Id.

96. "Use of Hague Convention procedures in lieu of the Federal Rules when discovery is sought in a civil law country like West Germany will in nearly every instance promote 'the development of an ordered international system.'" Id. at 40 (citing Aérospatiale, 107 S. Ct. at 2567 (Blackmun, J., concurring in part and dissenting in part)).


98. Id. reporters' note 5.