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**TAKING EVIDENCE AND BREAKING TREATIES:
AEROSPATIALE AND THE NEED
FOR COMMON SENSE**

JAMES G. DWYER*
Lois A. Yurow**

I. INTRODUCTION

The 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention or Convention)¹ provides procedures by which litigants in United States courts may obtain documents and other information located in foreign states that are signatories to the Convention. The United States Supreme Court, in its 1987 decision *Societe Nationale Industrielle Aerospatiale v. United States District Court*,² held that the Convention represents neither an exclusive nor a mandatory means of obtaining evidence from abroad. The Convention, the Court ruled, imposes no restrictions on the powers of a trial court under the Federal Rules of Civil Procedure (Federal Rules) to compel discovery from foreign litigants and to impose sanctions for non-compliance. Rather, it simply provides optional procedures which a U.S. trial court may elect to employ after balancing the interests of the sovereign states and the litigants involved in a particular case.

This article challenges the rule of law which *Aerospatiale* established as violative of U.S. obligations under the Evidence Convention and likely to produce ill-reasoned trial court decisions disfavoring use of Convention procedures. The authors advocate a rule requiring trial courts to honor requests by litigants that the Convention procedures be followed, while preserving the powers of the courts under the Federal Rules to award costs

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1. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 744 [hereinafter Evidence Convention].

2. 107 S. Ct. 2542 (1987) [hereinafter *Aerospatiale*].

and draw adverse inferences from insufficient compliance with discovery orders. Such a rule would satisfy U.S. obligations under the Convention, promote efficiency and fairness, and initiate a new era of rational and consistent decision-making in resolution of transnational disputes.

This article begins by identifying what the Evidence Convention added to the discovery process. For this purpose, it considers how discovery would proceed in international litigation in a hypothetical no-Convention environment. The article then examines specific provisions of the Evidence Convention and reviews the divergent ways in which lower courts applied these provisions prior to the Supreme Court's decision in *Aerospatiale*.

The authors propose a pragmatic contractual construction of the Convention which focuses on its structure and the implicit and explicit obligations it contains. This approach contrasts sharply with the Supreme Court's reasoning in *Aerospatiale*. The authors argue that the Supreme Court reached the wrong conclusion in *Aerospatiale* because it based its analysis on two faulty premises: 1) that the silence of the Convention concerning its effect on domestic law precludes the existence of a commitment to use Convention procedures in the first instance, and 2) that to require use of Convention procedures would create inequities between U.S. and foreign litigants.

Finally, this article examines the lower court opinions that have followed *Aerospatiale* and concludes that, by creating a presumption against use of the Convention and leaving lower courts otherwise without guidance in exercising their discretion, the Supreme Court has fostered decisions which inadequately analyze the interests at stake in individual cases and improperly reject use of Convention procedures. The *Aerospatiale* opinion does not appear to be susceptible of a narrowing interpretation, insofar as it categorically rejects a presumption in favor of using the treaty. The authors therefore conclude that if the original objectives of the Convention are ever to be realized, it will be necessary either to enact corrective domestic legislation or to renegotiate the Convention so as to make its mandatory quality more explicit.

II. INTERNATIONAL DISCOVERY IN A NO-CONVENTION ENVIRONMENT

To understand the effect which the Evidence Convention should have on domestic U.S. law, it is helpful to consider how a

U.S. court would supervise discovery in transnational litigation in the absence of the Convention. In such a hypothetical regime, a U.S. district court supervising discovery of documents or testamentary evidence located in a foreign state would be required to operate within the bounds created by generally accepted principles of international law and by other law of the United States.³ In defining these bounds, the court would begin with the principle of state territorial sovereignty, which is fundamental to customary international law.⁴ The Supreme Court enunciated this principle in *The Schooner Exchange v. McFaddon*:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.⁵

The principle of territorial sovereignty both creates and limits the lawful powers of a nation's government, including its judiciary. This principle forms the basis for the authority of a U.S. court to fully exercise its constitutional and statutory powers within the United States, including its power to compel defendants over whom it has personal jurisdiction to comply with U.S. statutory procedures for litigation.⁶ At the same time, the principle of territorial sovereignty precludes a U.S. court from usurping the jurisdiction of a foreign sovereign state over persons,

3. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that customary international law is the law of the land of the United States).

4. See T. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY* 5 (1970).

5. 11 U.S. (7 Cranch) 116, 136 (1812), cited with approval in *Verlinder B. V. v. Central Banke of Nigeria*, 461 U.S. 480, 486 (1983).

6. Pursuant to the Federal Rules of Civil Procedure, the court may compel the production of documents, FED. R. CIV. P. 37, answers to interrogatories, *id.*, admissions, FED. R. CIV. P. 36, and the appearance for questioning of parties and persons under the legal control of a party. FED. R. CIV. P. 37. The court has exclusive jurisdiction over the conduct of litigation. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116. Because the obligations rest in the United States, the parties are bound to comply fully or suffer the consequences, even if compliance would necessitate violation of another nation's law. See *Societe Internationale Pour Participations Industrielles Et Commerciales v. Rogers*, 357 U.S. 197 (1958).

property, or activities within that state's territory.⁷ It bars any assumption of jurisdiction to compel conduct in a foreign state without that state's permission, particularly where the conduct in question is prohibited by the law of the foreign state.⁸ Thus, the

7. In practice, the exercise of jurisdiction by American courts affects foreign persons, property located abroad, and activities occurring abroad when a tangible link connects them to the U.S. forum. For example, U.S. courts may exercise jurisdiction over persons who are citizens of foreign states when they have certain "minimum contacts" with the forum in which the court resides. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This jurisdictional rule is justified because such persons have purposely availed themselves of the privilege of conducting activities within that forum. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The exercise of jurisdiction by a U.S. court may also affect property located in a foreign state to the extent that a party chooses to satisfy a money judgment out of its assets located abroad. Finally, U.S. courts have extended their jurisdiction to cover local effects of foreign conduct when U.S. law prohibits those activities, so long as a foreign state has not compelled that conduct. See, e.g., *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) (holding defendants subject to liability under the Sherman Act, even though the prohibited conduct occurred in Canada, because the Canadian government did not compel that conduct and it produced effects within the United States). The facts of the *Aerospatiale* case were the mirror image of the facts in *Continental Ore*. The district court issued an order to compel conduct in the United States which required the defendant to engage in an activity in France which that state prohibits. See *Aerospatiale*, 107 S. Ct. at 2544.

8. U.S. courts have issued injunctions to prohibit conduct abroad which has a domestic effect, even though the conduct was consistent with the laws of the foreign state where it took place. See *Continental Ore*, 370 U.S. 690. However, the principle of territorial sovereignty suggests that the power of a U.S. court over foreign conduct should extend only as far as its authority to order payment of damages for the domestic effects produced by the defendant's foreign conduct, and to enforce such an award by exercising jurisdiction over the defendant's property located in the United States. See *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527, 543-46 (S.D.N.Y. 1972) (permitting U.S. importers to recover monies erroneously paid to exporters—who seized a cigar business pursuant to a confiscatory decree by the Cuban government—by exercising set-off against future accounts, but not challenging the validity of the confiscation in Cuba), modified *sub nom.* *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom.* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (agreeing with the district court on this issue). U.S. courts have respected the sovereignty of foreign states to the extent of declining to order conduct which would be inconsistent with the law or public policy of the state in which the conduct would occur. See *United States v. General Electric Co.*, 115 F. Supp. 835, 871-77 (D.N.J. 1953) (ordering the defendant to cease anticompetitive activity affecting the United States, but declining to interfere with the company's other activities and operations abroad).

U.S. courts have refrained from sitting in judgment of acts of foreign sovereigns within their own territories. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). They have also refused to recognize any right of foreign states to act or compel conduct within the United States that would be contrary to U.S. law or public policy. See *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) (refusing to enforce an Iraqi ordinance that would affect property of an Iraqi citizen held by a U.S. bank). For U.S. courts to claim a right to act or compel conduct contrary to the law of a foreign state would be inconsistent, and an unjustified incursion into the foreign sovereign's jurisdiction. See A. NEALE & M. STEPHENS, *INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION* 94-98 (1988).

authority of U.S. district courts extends to compelling or prohibiting behavior of litigants within the forum territory, but not to compelling conduct which a litigant may need to carry out in a foreign state prior to satisfying the court's order that certain behavior — such as production of evidence — take place in the forum territory. Correspondingly, the foreign state in which a litigant must carry out acts preparatory to compliance with discovery in U.S. litigation may exercise complete dominion over those acts, by controlling the manner of evidence-gathering behavior, or even prohibiting such behavior altogether. The effect of the two states exercising their bona fide authority may be to create incompatible obligations for the requested litigant.

By applying these general principles to international litigation occurring in a hypothetical no-Convention environment, we gain insight into the practical and legal effect of the Evidence Convention. Assume Party A, a U.S. citizen, makes a discovery request of Party B, a national of civil law Country X,⁹ and that the law of Country X prohibits private parties from gathering evidence within its borders for production in litigation abroad.¹⁰ Party B

9. This is the most common scenario in transnational litigation before U.S. courts, and the one which the Supreme Court considered in *Aerospatiale*. It is important to note, however, that the Evidence Convention also applies to situations in which a litigant who is a U.S. citizen must produce evidence located in a foreign state. Cf. Evidence Convention, *supra* note 1, art. 15 (authorizing a diplomatic or consular officer to take evidence from a fellow national within the officer's station country). This situation is not uncommon in light of the multinational character of many U.S. firms.

10. Common law nations, such as the United States, permit parties to a litigation to conduct their own discovery — securing evidence and presenting a selected portion at trial. See FED. R. CIV. P. 26. In contrast, in civil law countries, such as France, the gathering of evidence is a judicial function. The courts conduct discovery, requesting the parties before them to produce evidence to the court during hearings. A party does not request information directly from an opponent. J. MERRYMAN, *THE CIVIL LAW TRADITION* 111-23 (1985); Brief for the Republic of France as Amicus Curiae at 5-7, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695); REPORT OF THE UNITED STATES DELEGATION TO THE HAGUE CONFERENCE (April, 1969), reprinted in 8 I.L.M. 785, 806 [hereinafter REPORT OF THE UNITED STATES DELEGATION].

Many civil law countries seek to preserve the official nature of evidence gathering by prohibiting private parties from removing documents and information from the country for production in foreign litigation. By enacting such "blocking laws," see *infra* note 87, these countries may also be striving to protect their nationals from the burdens of discovery in a foreign court. Countries with blocking laws likely view them more as shields than as affirmative restrictions, and permit their nationals to voluntarily comply with foreign discovery requests. See *Adidas (Canada) Ltd. v. S.S. Seatrain Bennington*, No. 80 Civ. 1911 (S.D.N.Y. May 30, 1984) (LEXIS, Genfed library, Dist file) (speculating on the intent of France to enforce its blocking statute). Absent such flexible application of their laws, these countries would be limiting the ability of their citizens to effectively prosecute claims in foreign courts. *Id.* Countries are less likely to accede to requests by their nationals for a waiver when the blocking law reflects a substantive and fundamental

objects to the U.S. court that it is legally prevented from gathering the evidence and requests that the court use its discretionary statutory power to execute a letter rogatory (or letter of request)¹¹ seeking the assistance of Country X in gathering the evidence.¹²

In this hypothetical situation, the court would have two options. The court may refuse to execute a letter rogatory and simply issue an order for production.¹³ If Party B fails to comply with this order, the court may: 1) draw inferences adverse to Party B with respect to any issue which the court cannot resolve because of Party B's failure to produce evidence,¹⁴ 2) limit or defer Party B's own discovery so as to put A and B at an equal disadvantage,¹⁵ or 3) award to Party A the costs which Party A

public policy of the foreign state. *See Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) (Swiss bank unable to get permission from the Swiss government to produce evidence needed to reclaim its property that the United States seized under the Trading with the Enemy Act).

In a properly operating legal regime, the threat of sanctions and costs for non-cooperation will render this "shield" ineffectual and actually harmful to the requested party in U.S. litigation. The forum court will not waive a discovery order to accommodate a blocking law, *see id.*, so the litigant ultimately must choose either to comply with the order or sustain the financial and procedural burdens that the forum court will impose. Therefore, it is in the best interests of the producing party to seek a waiver of a foreign blocking law or to comply fully with an initial discovery request when no blocking law exists, and to request that the court issue a letter rogatory only when the foreign state's law actually prevents it from gathering evidence. Thus, courts have no need to make a factual determination as to what the foreign law actually proscribes or as to the likelihood of its enforcement.

11. A letter rogatory (or letter of request) is a formal written communication sent by a court where an action is pending to a court or judge in a foreign country. The letter requests that the foreign court formally take the testimony of a witness who resides within the jurisdiction of the foreign court, and transmit it to the requesting court for use in the pending action. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2083 (1970). Letters rogatory are issued through diplomatic channels pursuant to bilateral arrangements. Letters of request are issued pursuant to treaties. *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 473, reporter's note 1 (1986).

12. 28 U.S.C. §§ 1781(a)(2), (b)(2) (1982) (providing that courts *may* transmit letters rogatory either directly to foreign tribunals or with the assistance of the State Department) (emphasis added); *FED. R. CIV. P.* 28(b) ("In a foreign country, depositions *may* be taken . . . pursuant to a letter rogatory.") (emphasis added).

13. *FED. R. CIV. P.* 37(a).

14. *FED. R. CIV. P.* 37(b)(2)(A). *Cf. Rogers*, 357 U.S. at 207 (holding that federal district courts may draw adverse inferences from a foreign plaintiff's non-compliance with a production order, regardless of the party's good faith attempt to circumvent its country's blocking statute).

15. *FED. R. CIV. P.* 34(b) (the district court may allow either party a time longer than the normal 30 days to respond to a discovery request); *FED. R. CIV. P.* 26(b), (c) (the district court may limit the scope of either party's discovery).

incurs in obtaining the evidence by other means.¹⁶ The U.S. court has no authority to order Party B to gather and remove evidence from Country X.¹⁷

Alternatively, the U.S. court may choose to honor Party B's request by delivering a letter rogatory to judicial officers of Country X.¹⁸ If Country X cooperates and the resulting evidence is sufficient, the matter ends. If this avenue of discovery requires more time or expense than the usual methods of gathering evidence located in the United States, the court may impose this cost on the producing party.¹⁹ Should the evidence which the letter rogatory elicits prove insufficient because the laws of Country X regarding the methods or permissible scope of discovery are more restrictive than those of the United States,²⁰ the U.S. court would have the same sanctions available to it as in a case where it does not employ a letter rogatory: The court may draw inferences adverse to Party B with respect to the issues that the unproduced evidence would have resolved, limit Party B's own discovery, or order Party B to compensate Party A for costs Party A incurs in obtaining needed evidence by other means.²¹

Either of these approaches would trigger adjustments in the behavior of both individuals and governments. At the individual level, Party B would exhaust every means available for compliance with a discovery request — including seeking a waiver of the foreign state's blocking law²² — before it petitions the court to employ letters rogatory, in order to avoid paying for that procedure or incurring sanctions for its failure to produce evidence.²³

16. FED. R. CIV. P. 37(b)(2).

17. See *supra* note 8 and accompanying text.

18. 28 U.S.C. §§ 1781(a)(2), (b)(2) (1982). See *Danisch v. Guardian Life Ins. Co. of America*, 19 F.R.D. 235 (S.D.N.Y. 1956); *Uebersee Finanz-Korporation v. Brownell*, 121 F. Supp. 420 (D.D.C. 1954).

19. FED. R. CIV. P. 26(f); see *Uebersee*, 121 F. Supp. at 426 (requiring the foreign party to post security for potential costs and expenses); *infra* note 128. The court may also review the need for discovery requests to ensure that they are not designed only to harass the requested party. FED. R. CIV. P. 26(b)(1).

20. In the United States, under the Federal Rules, parties can obtain any information likely to lead to admissible evidence. FED. R. CIV. P. 26(b). In contrast, courts in civil law countries may restrict discovery to admissible evidence. See J. MERRYMAN, *supra* note 10, at 115-19.

21. See *supra* notes 14-16 and accompanying text.

22. *Supra* note 10.

23. A party who is faced with choosing between inconsistent sovereign commands cannot justify inadequate compliance or non-production of evidence by invoking the defense of foreign sovereign compulsion; this doctrine protects only behavior occurring within the state that compels it. See A. NEALE & M. STEPHENS, *supra* note 8, at 94-98. Thus, although the requested party may be prohibited from gathering evidence in

Whatever the outcome, Party B — who willfully interjected itself into U.S. territory — would rightfully shoulder the burdens which U.S. law imposes by requiring compliance with discovery requests, and which Country X imposes by its restrictions on evidence gathering. If foreign persons engaged in commerce with U.S. entities regarded these burdens as too great, they would restrict or cease their activities in the United States, or petition the governments of the United States and other countries where they operate to modify their laws and practices so as to remove obstacles to international discovery. If foreign persons threatened to restrict their activities to such a degree that U.S. concerns would suffer from the loss of business, the latter might offer more favorable contract terms, or join in petitioning the governments concerned for more workable international discovery procedures.²⁴

At the government level, as a result of the petitioning of concerned private parties, either the United States or the foreign state might unilaterally change its domestic discovery law to require greater cooperation with the courts of other countries. Sovereign states are generally unwilling to make such concessions to the preferred practices of other nations without receiving some concessions in return. Consequently, the governments of the United States and of concerned foreign states would be more likely to negotiate a treaty for the taking of evidence in their countries by litigants before foreign courts. By creating reciprocal commitments and concessions, such a treaty would improve cooperation between countries in transnational litigation and create greater uniformity in the rules for international discovery.

In the real world, prior to the 1970 Evidence Convention, U.S. courts frequently refused to issue letters rogatory and simply penalized parties for their failure to produce evidence when a

another country, he is not excused from producing the evidence in the U.S. court. If litigants know that U.S. courts will exercise their full authority to order production and impose sanctions such that a letter rogatory and assertion of blocking statutes will not protect them from the requirement of full compliance, they will be discouraged from making unnecessary requests.

24. The authors presume to attribute to actors in the international arena a greater degree of sophistication than one might attribute to persons acting only locally. We therefore place greater faith in the ability of the market to adjust to changes in the international legal climate than we might in a domestic context. *See infra* note 81.

foreign state's laws prevented them from complying with a discovery request.²⁵ The result was to leave unreconciled conflicting demands on producing parties and to frustrate the needs of requesting parties when evidence located abroad was not forthcoming. Some courts expressed concern for the interests of the foreign state involved and crafted discovery orders to minimize the burden on the producing party and the affront to the foreign sovereign.²⁶ Those courts that did employ letters rogatory recognized that, although use of the letters was optional, it was the only means by which the producing litigant could legally obtain the requested evidence from the foreign state involved.²⁷ On the whole, the practice of U.S. courts was sufficiently unsatisfactory that pressure mounted for negotiation of a treaty to govern the taking of evidence located outside a forum state, as predicted in the hypothetical situation above.

III. THE HAGUE EVIDENCE CONVENTION

The 1968 Hague Conference on Private International Law launched the discussion that culminated in the Evidence Convention.²⁸ The United States was a key proponent of the treaty, because American litigants involved in actions requiring the discovery of evidence located abroad had long been frustrated by

25. See, e.g., *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

26. See *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (requiring a bank to produce documents held by its Panamanian office only if the United States government could obtain a waiver of Panamanian secrecy laws on the bank's behalf).

27. E.g., *Ings v. Ferguson*, 282 F.2d 149, 152-53 (2d Cir. 1960) (holding that witnesses would prevail in their motion to quash if, in response to letters rogatory, Canadian courts found that the production of the requested documents would violate Canadian law); *United States v. Paraffin Wax*, 2255 Bags, 23 F.R.D. 289, 290 (E.D.N.Y. 1959); *Danisch v. Guardian Life Ins. Co. of America*, 19 F.R.D. 235, 237 (S.D.N.Y. 1956) ("Letters rogatory constitute the only procedure available to obtain plaintiff's testimony [in Poland]."); *Uebersee Finanz-Korporation v. Brownell*, 121 F. Supp. 420, 425-26 (D.D.C. 1954) (granting, over the defendant's objections regarding expense and delay, the intervening plaintiff's motion to issue letters rogatory for depositions in Switzerland); *Volkswagenwerk Aktiengesellschaft v. Superior Court for the County of Sacramento*, 33 Cal. App. 3d 503, 507-08, 109 Cal. Rptr. 219, 221-22 (1973).

28. See REPORT OF THE UNITED STATES DELEGATION, *supra* note 10, at 785. Twenty nations have since signed the Evidence Convention. The signatories are Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States. 8 MARTINDALE-HUBBELL LAW DIRECTORY, pt. 7, at 15 (1988).

the differences in attitudes and procedures between U.S. and foreign courts, especially courts of civil law countries.²⁹ The primary purposes identified for the Convention were to "bridge the gap" between different discovery procedures in civil and common law states, and to facilitate discovery in a manner "'tolerable' to the authorities of the State where it is taken and . . . 'utilizable' in the forum where the action will be tried."³⁰

The Convention provides essentially two procedures for obtaining evidence from a signatory state. The first is the use of "letters of request," a traditional method by which the court hearing a case transmits to a court of the foreign state where evidence is located a request for assistance in gathering that evidence.³¹ All signatories must comply with letters of request that relate to "commenced or contemplated" civil or commercial proceedings,³² and that are specific as to the parties, the nature and source of evidence requested, and any preferred procedure for the taking of that evidence.³³ Execution of the request must be expeditious and in the manner requested, unless that method is incompatible with the internal law of the requested state³⁴ or is impossible to perform.³⁵ This commitment represents a major concession on the part of civil law countries, whose procedures for taking evidence in litigation are more restrictive than those of common law countries.³⁶

The Convention provides that a state receiving a letter of request may refuse full compliance if execution of that request is not within the competence of the judiciary of the receiving state or if execution would threaten the sovereignty or security of that

29. REPORT OF THE UNITED STATES DELEGATION, *supra* note 10, at 804-06.

30. *Id.* at 806.

31. Evidence Convention, *supra* note 1, art. 1, 23 U.S.T. at 2557, T.I.A.S. No. 744.

32. *Id.*

33. *Id.* art. 3, 23 U.S.T. at 2558, T.I.A.S. No. 744. A United States court can, for example, request a verbatim transcript of a deposition, even though the usual practice in the executing state may call for only a judicially prepared summary of the evidence. See, e.g., Brief for the Republic of France as Amicus Curiae at 20, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695) (discussing modifications to French law to accommodate U.S.-style discovery).

34. Incompatibility requires a direct conflict with the constitution or legislation of the state. States may not claim incompatibility merely because a requested method is different from the usual internal procedure of the state. REPORT OF THE UNITED STATES DELEGATION, *supra* note 10, at 810.

35. Evidence Convention, *supra* note 1, art. 9, 23 U.S.T. at 2561, T.I.A.S. No. 744.

36. See *supra* note 10.

state.³⁷ In addition, the drafters of the Convention provided that states may condition ratification of, or accession to, the treaty on a rule that they will not execute letters of request for "pre-trial" discovery of documents.³⁸ The record of Convention negotiations indicates that this option was to be simply a safeguard against American-style "fishing expeditions," and not a means for civil law countries to avoid their commitments under the treaty.³⁹

The Convention also introduced a second method for

37. Evidence Convention, *supra* note 1, art. 12, 23 U.S.T. at 2562-63, T.I.A.S. No. 744.

38. *Id.* art. 23, 23 U.S.T. at 2568, T.I.A.S. No. 744. "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute a Letter of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law Countries." *Id.*

39. Use of the term "pre-trial" in article 23 generated confusion due to the absence of a shared understanding of the term. Many delegates to the Special Commission on the Operation of the Evidence Convention "were of the view that 'pre-trial discovery' meant some sort of a proceeding permitted under American law prior to the institution of a lawsuit . . . 'to determine whether there might be some evidence somewhere which would support a lawsuit.'" REPORT OF THE UNITED STATES DELEGATION TO THE SPECIAL COMMISSION ON THE OPERATION OF THE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, reprinted in 17 I.L.M. 1417, 1421 (1978) [hereinafter REPORT OF THE SPECIAL COMMISSION]. Delegates further pointed out that the breadth of American discovery requests (*e.g.*, "all notes related to . . .") seemed abusive. *Id.* at 1422-23.

To date, sixteen of the twenty Convention signatories have made reservations under Article 23. See 8 MARTINDALE-HUBBELL LAW DIRECTORY, pt. 7, at 13-26 (1988). However, many states have qualified these reservations so that requests for specific documents will be honored. *Id.* Nine reservations are now expressed in a variation of the following:

[The Contracting State] understand[s] 'Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' . . . as including any Letter of Request which requires a person:

- (a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
- (b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or be likely to be, in his possession, custody or powers.

Id. at 21 (reservation of the United Kingdom). This language permits the requested court to decide whether particular documents are relevant. Some states require only that the requesting court certify that the documents are in the "possession, custody or power" of the requested party. See *id.* at 19 (reservation of the Kingdom of the Netherlands).

This qualification obviates the concerns expressed in *Aerospatiale*, 107 S. Ct. at 2552, that civil law countries would uniformly and arbitrarily refuse to execute American discovery requests. If letters rogatory enumerate the desired material with reasonable specificity and explain the relevance of the requested evidence, other nations are bound to assist. See Brief for the Federal Republic of Germany as Amicus Curiae at 8-10, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695) (stating that in the period from 1980-85, the FRG executed 154 of the 181 letters of request it received; the balance were rejected as too general or premature); Brief for the Republic of France as Amicus Curiae at 24-

obtaining evidence located in foreign states. Diplomatic or consular officers of the state hearing the case may take depositions or receive documents in the foreign state in which they are stationed.⁴⁰ The treaty permits diplomatic or consular officers to take evidence from nationals of their own state,⁴¹ or from nationals of the state they serve, with permission from the government of that state.⁴² A related option allows the court hearing a case to appoint a commissioner to travel abroad and take evidence from parties or witnesses.⁴³ The drafters of the Convention made these provisions entirely optional on the part of signatory states⁴⁴ in deference to the policy of civil law countries that evidence gathering is an exclusively judicial function.⁴⁵

IV. APPLICATION OF THE CONVENTION IN UNITED STATES COURTS

For seventeen years following ratification of the Evidence Convention by the United States, U.S. courts were unable to agree on whether, and under which circumstances, they were required to use Convention procedures for obtaining evidence located in the territory of another signatory state. Some courts viewed the Convention as the preferred means for securing evidence when the law of the foreign state prohibited the party producing evidence from gathering and removing documents or information from its territory. These courts required that discovery requests issue pursuant to the Convention before they would execute a Rule 37 order compelling production.⁴⁶

25, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695) (discussing the lenient procedures for obtaining discovery in France).

40. Evidence Convention, *supra* note 1, arts. 15-16, 18-21, 23 U.S.T. at 2564-67, T.I.A.S. No. 744.

41. *Id.* art. 15, 23 U.S.T. at 2564, T.I.A.S. No. 744. A signatory state may nevertheless require such officers to obtain permission from a designated official of that state before taking evidence from their fellow nationals. *Id.*; see REPORT OF THE UNITED STATES DELEGATION, *supra* note 10, at 816.

42. Evidence Convention, *supra* note 1, art. 16, 23 U.S.T. at 2564-65, T.I.A.S. No. 744.

43. *Id.* arts. 17-21, 23 U.S.T. at 2565-67, T.I.A.S. No. 744.

44. *Id.* art. 33, 23 U.S.T. at 2571, T.I.A.S. No. 744. Only two states, Argentina and Singapore, have completely prohibited depositions by diplomatic and consular officers. See 8 MARTINDALE-HUBBELL LAW DIRECTORY, pt. 7, at 15-16, 20 (1988). Several other states have agreed to limited use of this method; they require reciprocity and refuse to assist with government compulsion or to allow depositions of locals. See *id.* at 13-26.

45. See *supra* note 10.

46. E.g., *Schroeder v. Lufthansa German Airlines*, 39 Fed. R. Serv. 2d (Callaghan) 211, 213 (N.D. Ill. 1983) ("The Hague Convention, signed by West Germany, provides an obvious and preferable means of obtaining evidence within that country."); *Pierburg*

Courts deciding in favor of Convention procedures generally focused less on the ultimate responsibility of the litigants to produce evidence in the United States than on the interests of the state in which the evidence was located.⁴⁷ This approach suggests that the interests of the foreign state limit the constitutional authority and obligation⁴⁸ of U.S. courts to prosecute the cases before them. However, no court offered constitutional or statutory support for such a proposition.

Although these courts reached a result which accords with the spirit and intent of the Convention, their rationale for its application was flawed. By signing the Convention, the United States made a commitment to other signatories to adhere to its terms. As with all nations, the sovereignty of the United States is compromised only to the extent of its willful agreement.⁴⁹ By predicated their analyses upon unnecessary consideration of foreign state interests and the amorphous concept of "comity,"⁵⁰ rather than focusing on these U.S. commitments, the courts obfuscated the issue most pertinent to a determination of when the Convention applies — interpretation of U.S. contractual obligations under the Convention.

GmbH & Co. v. Superior Court, 137 Cal. App. 3d 238, 241, 186 Cal. Rptr. 876, 878 (1982) ("California courts must compel the litigants to first attempt . . . discovery in conformity with th[e] Convention.").

47. Two arguments are common in opinions of courts that, prior to *Aerospatiale*, mandated use of the Convention or other procedures known to be acceptable to the requested state. The first focuses on judicial sovereignty — the notion in civil law countries that the gathering of evidence is solely a judicial function. See *General Electric v. North Star Int'l Inc.*, 39 Fed. R. Serv. 2d (Callaghan) 207, 210 (N.D. Ill. 1984) (citations omitted) ("The whole point of requiring (as opposed to permitting) a litigant to seek discovery through the procedures established by the Hague Convention is to avoid infringing the judicial sovereignty of the foreign nation involved; that is the primary purpose of the treaty."); *Pierburg*, 137 Cal. App. 3d at 244-45, 186 Cal. Rptr. at 881 ("The foundation of the Convention is to avoid international friction where a domestic state court orders civil discovery to be conducted within the territory of a civil law nation that views such unilateral conduct as an intrusion upon its judicial sovereignty."); *Volkswagenwerk Aktiengesellschaft v. Superior Court, Alameda County*, 123 Cal. App. 3d 840, 852-55, 176 Cal. Rptr. 874, 881-83 (1981).

The second argument rests on comity — "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation . . ." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Courts advocating a comity analysis contend that "courts of one sovereign state should not . . . require acts or forbearances within the territory, and inconsistent with the internal law, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that the order is justified." *Volkswagenwerk Aktiengesellschaft*, 123 Cal. App. 3d at 857, 176 Cal. Rptr. at 884.

48. U.S. CONST. art. III, § 2.

49. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

50. See *supra* note 47.

While some courts reached the right result for the wrong reason, other courts did not require that Convention procedures be used at all. These courts concluded that adherence to the treaty would displace the Federal Rules⁵¹ and would engender greater delay and expense in litigation.⁵² These opinions reveal a basic misunderstanding of the impact of the Convention on the discovery process in U.S. courts.

The proposition that use of Convention procedures would displace the Federal Rules erroneously assumes that construing the Convention to require a U.S. court to comply with a litigant's request for assistance in obtaining evidence from a foreign signatory state would preclude the court from exercising ultimate control over the discovery process. Specifically, it assumes that after the court employs Convention procedures, it could not issue a Rule 37 order for production or impose sanctions for incomplete discovery, as it would do in a no-Convention environment. However, neither the structure of the treaty nor its history compels the conclusion that Convention procedures would abrogate or suspend any of the Federal Rules.⁵³

Some courts, concerned about the displacement of the Federal

51. See *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 788 F.2d 1408, 1410 (9th Cir. 1986) (citations omitted) ("The Federal Rules of Civil Procedure, not the Hague Convention, normally govern discovery . . . [in] United States courts even when the documents are located abroad."), *vacated*, 823 F.2d 382 (9th Cir. 1987); *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 615 (5th Cir. 1985), *cert. vacated*, 107 S. Ct. 3223 (1987) (for reconsideration in light of *Aerospatiale*); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227, 1228 (E.D. Pa. 1983).

52. See *In re Anschuetz*, 754 F.2d at 612 ("Requiring that . . . discovery be processed through foreign authorities would work a drastic and very costly change in the handling of this type of litigation."); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 523-24 (N.D. Ill. 1984) (equating international judicial cooperation and the use of Convention procedures with pre-litigation of discovery disputes in two different judicial systems).

The irony of the objection as to time and expense is the implication that use of Convention procedures actually contravenes the treaty's underlying goal. In *Societe Nationale*, the court noted that the purpose of the Convention is to facilitate discovery and make needed information more accessible to litigants, but implied that because the Federal Rules permit access to more information more expeditiously than the Convention, they provide the preferable procedures. 788 F.2d at 1411. See also *In re Anschuetz*, 754 F.2d at 606 ("We believe that requiring domestic litigants to resort to the Hague Convention to compel discovery . . . encourages the concealment of information . . . a result directly antithetical to the express goals of the Federal Rules and the Hague Convention.").

53. The Convention procedures in no way conflict with the Federal Rules. After unsuccessfully assisting a party to obtain evidence from one foreign source which that party has identified, a court need not refrain from ordering the party to produce the evidence by any other means possible, and from using sanctions to enforce that order. See *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983); *Schroeder v. Lufthansa German Airlines*, 39 Fed. R. Serv. 2d (Callaghan) 211,

Rules, pointed out correctly that they have no duty to modify their procedures for litigants who must produce evidence in the United States and who encounter difficulty in gathering that evidence.⁵⁴ However, many of these courts wrongly concluded from that fact that the Convention has no application to the production of evidence by a party subject to the in personam jurisdiction of the court.⁵⁵ In fact, several advanced the theory that the Convention governs only the taking of evidence from foreign non-party witnesses who are beyond the jurisdiction of the forum court and who are willing to be deposed only at home, or are not willing to be deposed at all.⁵⁶ However, the fact that a state has

212-14 (N.D. Ill. 1988) (holding that discovery should proceed pursuant to the Convention, but that the court would use available sanctions if compliance with discovery orders was incomplete); *infra* note 81 and accompanying text.

Several courts that declined to utilize Convention procedures argued that to do so and to then order production, pursuant to Rule 37, of any remaining evidence would constitute a great insult to the receiving state. *E.g.*, *Graco*, 101 F.R.D. at 523. As Justice Stevens rightly pointed out in his *Aerospatiale* opinion, there is no reason to think that the other signatories believed the United States was relinquishing its ultimate control over litigation in its courts. *See* 107 S. Ct. at 2553-55.

54. *See, e.g.*, *Societe Nationale*, 788 F.2d at 1411; *In re Anschuetz*, 754 F.2d at 611; *Adidas (Canada) Ltd. v. S.S. Seatrain Bennington*, No. 80 Civ. 1911 (S.D.N.Y. May 30, 1984) (LEXIS, Genfed library, Dist file). These courts reason that since "preparatory acts" such as selecting deponents and documents do not require the participation (in the form of oath-taking or compulsion) of a foreign judicial entity, or the presence of an adverse party on foreign soil, they do not intrude on judicial sovereignty or custom. However, this argument refutes a non-issue. Regardless of whether preparatory acts in another country intrude on that nation's judicial sovereignty, U.S. courts have no jurisdiction to compel such acts. *See supra* note 8 and accompanying text.

Nevertheless, it is true that United States' courts need not alter their discovery orders to accommodate foreign laws. Fairness and expedience dictate that courts place on the requested litigant the burden of exhausting all possible sources and means of collecting the requested evidence, rather than having courts entertain proofs that one foreign state's blocking laws foreclose all possibilities for the litigant to comply with discovery orders.

55. *In re Anschuetz*, 754 F.2d at 615 ("The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court . . ."); *Lasky*, 569 F. Supp. at 1228. *See also* *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 258-60 (M.D.N.C. 1988) (holding that the Federal Rules and not the Evidence Convention are appropriately used for discovery to determine whether the foreign party is subject to the court's jurisdiction).

56. *See In re Anschuetz*, 754 F.2d at 615; *Graco*, 101 F.R.D. at 520. The Eighth Circuit in *Aerospatiale* agreed with this analysis, *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 125 (8th Cir. 1986), *vacated*, 107 S. Ct. 2542 (1987), but the Supreme Court expressly rejected it, holding that "the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves" 107 S. Ct. at 2554. The United States government rejects this interpretation as well. *See* Brief for the United States and the Securities and Exchange Commission as Amicus Curiae at 9-10, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695) ("Neither the United States nor foreign signatories to the Convention have ever subscribed to the interpretation adopted by the court below.").

absolute authority over matters within its territory does not preclude the possibility that the United States chose to bind itself by international agreement to act in a way that it would not otherwise be required to, in order to make it easier for both foreign and U.S. nationals to comply with its sovereign commands.⁵⁷ While U.S. courts had no constitutional or statutory obligation prior to 1970 to employ letters of request at the behest of parties before them,⁵⁸ the Hague Evidence Convention did create such an obligation.⁵⁹

The objection of some courts that Convention procedures would add time and expense to litigation ignores a court's authority, undiminished by the Convention, to allocate costs in an equitable fashion.⁶⁰ The objection presumes that when foreign state law actually prevents a party from gathering and removing evidence from that state, there are other means by which the requesting party can obtain such evidence. However, even in a no-Convention environment, courts would find it necessary to use letters rogatory to enable litigants to lawfully comply with requests for evidence located in such countries.⁶¹ In such a case, the only alternative to letters rogatory and the additional methods provided by the Convention is non-production and the imposition of sanctions against the producing party, including the drawing of adverse inferences from the lack of evidence.⁶² While a requesting party may prefer to win by default

57. The drafting history of the Convention indicates that the contracting states clearly intended to address discovery from parties and non-parties alike. See Brief for the Motor Vehicle Manufacturer's Association as Amicus Curiae at 14, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695) (citations omitted) (noting that the drafters of the Convention considered specifying the treaty's applicability to "witnesses, parties or experts" and deemed the language superfluous); Brief for Petitioners at 18-19, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695) (citations omitted) (noting that if the parties intended for jurisdiction to control the scope of the Convention, that would have been mentioned in the document or its negotiation history, and the civil law countries would not have amended their civil codes to facilitate compliance); Brief for the Republic of France as Amicus Curiae at 18, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695) (noting that the drafters of the Convention would not fail to address one of the principal sources of conflict in transnational litigation — that of discovery from the parties).

58. See *supra* note 12 and accompanying text.

59. See *infra* text accompanying notes 63-82.

60. FED. R. CIV. P. 26(f). As discussed above, persons operating in international commerce can account for the potential costs of litigation when ordering their private affairs. They can refrain from dealings with U.S. citizens, petition their own and the U.S. government for changes in the rules under which they must operate, or continue to trade with the United States, knowing the risks involved, and bargain for contracts which protect their interests. *Supra* note 10; notes 23-24 and accompanying text.

61. See *supra* notes 3-27 and accompanying text; *infra* note 98.

62. See *supra* notes 3-27 and accompanying text.

rather than to litigate the case, this outcome conflicts with values of due process and accurate decision-making, as well as the United States' contractual obligations under the Convention, all of which far outweigh such a preference.

V. A COMMON SENSE INTERPRETATION OF THE EVIDENCE CONVENTION⁶³

The Evidence Convention does not by its terms express what effect it is to have on the domestic laws of the signatory states. This is appropriate in light of the variety of domestic rules that exist among the signatory nations. The record of the Convention negotiations is also silent on this issue.⁶⁴ Nevertheless, the Convention contains reciprocal commitments which by their nature indicate what relationship the treaty bears to the domestic law of each state. As discussed below, a contractual interpretation of these terms⁶⁵ reveals that the United States made commitments concerning its role as a state issuing letters of request. In the United States, these treaty commitments are the law of the land.⁶⁶

When nations receive requests to assist in the taking of evidence for litigation in another country, the Convention commitments are clear: all signatory nations must comply with properly

63. "[T]he construction of a contract as to its operation and effect will, after all, depend less on artificial rules than on the application of good sense and sound equity to the object and spirit of the contract in the given case." 17 AM. JUR. 2D *Contracts* § 243 (1964).

64. Several courts have pointed to language in the reports of the U.S. delegation to the drafting conference to the effect that the Convention requires no change in U.S. law or practice. *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 610 n.19 (5th Cir. 1985); *International Society for Krishna Consciousness v. Lee*, 105 F.R.D. 435, 443 (S.D.N.Y. 1984). However, this language appears in the context of discussions about the obligations of receiving states, not sending states, and refers to the already generous provisions in U.S. law for cooperation with requests from foreign courts for assistance with discovery in cases before them. One of the United States delegates to the conference stated: the very liberal and open practice in the United States under 28 U.S.C. § 1782 [Assistance for foreign and international tribunals and to litigants before such tribunals], under § 3.02 of the Uniform Interstate and International Procedure Act [Assistance to Tribunals and Litigants Outside the State], and under the practice of most of the fifty States, means that the convention requires minimal internal changes in United States practice, while at the same time it will greatly enlarge the assistance given to United States courts and litigants in many other states.

Amram, *Report on the Eleventh Session of the Hague Conference on Private International Law*, 63 AM. J. INT'L L. 521, 526 (1969).

65. "A treaty is in the nature of a contract between nations." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984).

66. U.S. CONST. art. VI.

executed letters of request except under very limited circumstances.⁶⁷ This commitment did not constitute consideration in the contractual sense on the part of the United States. Since 1964, U.S. law has permitted private parties in foreign litigation to gather evidence independently in the United States or to solicit personally the assistance of a U.S. court when compulsion of persons in the United States is necessary.⁶⁸ Accordingly, foreign courts rarely have reason to transmit letters of request to U.S. courts. Rather, these provisions constitute the consideration given by those signatories whose laws prohibit litigants before foreign courts from culling evidence within their territory, who were previously unwilling to comply with discovery requests from foreign courts, or who characteristically objected to the type of discovery that the Convention permits.⁶⁹

To identify the commitments and consideration that the United States tendered in this arrangement, it is therefore necessary to determine what the Convention might add to litigation in the United States, when the United States is the state issuing, rather than receiving a letter of request. The focus should be on the beneficiaries of the treaty and the manner in which each nation's concessions serve their particular needs.

The only actor in the litigation who benefits directly from the Convention is the party asked to produce evidence that lies in a

67. See *supra* notes 31-39 and accompanying text.

68. 28 U.S.C. § 1782 (1982). In addition, there is no evidence in the Convention history that any signatory nation had difficulty in securing the cooperation of U.S. courts with letters of request when help was needed. U.S. courts may not deny a request for assistance from a foreign tribunal or litigant because of a lack of reciprocity on the part of the foreign state. *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985).

One could argue that the United States' consideration was a promise not to modify its generous law and practice. In a contract between private parties, one party's agreement not to amend its practices in the future might serve as consideration for another's promise. See 17 AM. JUR. 2d *Contracts* § 124 (1964). This is not possible in a treaty context: Absent a constitutional amendment, the President and Senate may not bind the United States to refrain from passing legislation that is inconsistent with a treaty. In any case, there is no evidence that any signatory to the Convention was concerned that the United States might reverse its practice.

69. These countries have, since ratifying the Convention, modified their internal laws to effectuate their obligations under it. For example, France amended its code of civil procedure to add provisions that "radically depart from traditional French rules by opening the Republic of France's borders to United States-style discovery." Brief for the Republic of France as Amicus Curiae at 19, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695). These provisions permit, *inter alia*, a full transcript of depositions rather than the standard civil law summary, and direct and cross examination by the parties' attorneys rather than a judge. *Id.* at 18-27; see *supra* note 10.

foreign country which has an effective blocking statute.⁷⁰ As discussed earlier, the failure of a party to comply with discovery in no way infringes on the sovereign authority of the U.S. court itself; it has the power simply to sanction the party for its non-compliance.⁷¹ The Convention, therefore, does not protect any sovereign interest of the United States. Nor does the Convention protect or assist a party making discovery demands of its adversary in a U.S. court, as the court has ample authority to do that without Convention procedures.⁷² Finally, the Convention provides no direct benefit to a foreign state in whose territory requested evidence lies; fundamental principles of international law⁷³ already protect the territorial sovereignty of that state and U.S. courts have never had authority to threaten it.⁷⁴

How, specifically, does the requested party benefit from the

70. The state of which this party is a national does benefit indirectly from its citizen's greater success in U.S. litigation, and the state which is the situs of the evidence benefits from not having to prosecute the producing party for violation of its blocking law. In addition, all affected states benefit indirectly by the removal of obstacles to trade and by the ability of U.S. courts to make more accurate and equitable judgments in transnational litigation. But the immediate beneficiary of the Convention is clearly the producing party, for whom the Convention mitigates the hardship of satisfying the incompatible demands of two sovereign nations.

71. See *supra* text accompanying note 53.

72. See *supra* text accompanying notes 60, 62. The one area in which the Convention might directly assist a requesting party is in the taking of testimony from a witness who is neither a party nor under the legal control of a party, and who prefers to be deposed in his or her own country or refuses to testify at all. Such persons are not subject to compulsion by the district court, and thus can only be reached by the Convention if they will not voluntarily enter the forum. Some courts, before the *Aerospatiale* decision, concluded that the Convention only applies to the taking of evidence from such recalcitrant third party witnesses. See *supra* note 56. This interpretation would render the Convention completely one-sided, incorporating commitments only by the civil law signatories, since procedures were already in place in the United States to assist parties before foreign courts in the taking of such depositions. See 28 U.S.C. § 1782 (1982). The language of the Convention and its history make clear that the Convention applies to the taking of all types of evidence in a foreign state. See Evidence Convention, *supra* note 1, art. 3(f), (g) (providing for examination of persons and inspection of documents and real and personal property); *supra* note 56.

73. E.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

74. To understand this point, it is necessary to keep in mind the distinction between gathering and producing evidence. The sovereignty of a foreign state does not extend to control of litigation in the United States — the production of evidence—just as the sovereignty of the United States does not extend to activities abroad which are incident to that litigation — the gathering of evidence. See *id.* While the gathering of evidence abroad may offend the sovereignty of a foreign state, it is not the U.S. court that causes that offense, but the producing party who must take action abroad to comply with a production order.

Convention? U.S. law already made use of letters of request permissive by U.S. courts.⁷⁵ The requested party benefits by the commitment of the receiving state to comply with letters of request but, as stated above,⁷⁶ this commitment was the consideration given by countries other than the United States — the civil law countries in particular. These countries could have obligated themselves unilaterally to assist U.S. courts,⁷⁷ or signed a treaty only among themselves, if the United States had offered nothing in return for this commitment. Similarly, the provision allowing diplomatic officials or court-appointed commissioners to take evidence in their territory was a unilateral concession on the part of signatory nations other than the United States; U.S. law already permitted such evidence-gathering procedures.⁷⁸

Therefore, the only possible commitment which the United States brought to the Convention, and the one that courts must ascribe to it,⁷⁹ was to require its courts to honor the requests of parties before them to employ the Convention procedures to assist the parties in complying with discovery requests.⁸⁰ A conclusion that the United States made a greater commitment to

75. 28 U.S.C. § 1781 (1982).

76. *Supra* text accompanying note 69.

77. The United States in 1964 made such a unilateral offer of broad judicial assistance in the taking of evidence in the United States for foreign judicial proceedings. *See* Act of Oct. 3, 1964, Pub. L. No. 88-619, § 8(a), 78 Stat. 996 (1964) (codified at 28 U.S.C. § 1781 (1982)).

78. *See* 28 U.S.C. § 1782 (1982) (district courts may order persons within their jurisdiction to provide testimonial or documentary evidence requested for use in a foreign proceeding).

79. Where . . . a contract . . . is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a fair, rational, and probable contract must be preferred.

17 AM. JUR. 2D *Contracts* § 252 (1964) (footnote omitted). "It is necessary to consider the situation of the parties at that time, the necessities for which they naturally provided, the advantages each probably sought to secure." *Pritchard v. Wick*, 178 A.2d 725, 727 (Pa. 1962).

80. [I]f the convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful quid pro quo for their concessions to the United States While there is no requirement of "consideration" in international treaty law, unilateral concession is not the most probable explanation for the behavior of governments in international negotiations.

Oxman, *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, 760-61 (1983). *See* Brief for the Republic of France as Amicus Curiae at 11-12, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695).

Naturally, this obligation does not arise until the producing party demonstrates that the requested evidence is, in fact, located in a foreign state. U.S. courts might also

prohibit its courts from issuing orders and imposing sanctions under the Federal Rules after exhausting Convention procedures — *i.e.*, to make the Convention exclusive — would be nonsensical. Trial court judges are neither required nor able to determine conclusively all potential sources of evidence. Therefore, even after tapping one source identified by the producing party by directing a request under the Convention to a foreign state, the court must continue to place the burden on the producing party to locate and produce requested evidence by whatever means possible. The court must also retain the authority to sanction a party who does not satisfy this obligation.⁸¹

Thus, a common sense look at the language and history of the Convention — what it adds to a no-Convention regime, and what commitments it embodies in the context of an international contractual arrangement — compels the conclusion that U.S. law requires U.S. courts to employ Convention procedures to assist a party who requests use of those procedures to comply with a discovery request. Invocation of the Convention procedures does not detract from the requested party's ultimate obligation to produce all properly requested evidence; nor does it affect the court's authority under the Federal Rules to order full compliance with the initial discovery request and to draw adverse inferences from, and assess costs occasioned by, any whole or partial noncompliance with this order.⁸²

require, consistent with the purposes of the Convention, that the producing party demonstrate that the law of the foreign state, at least on its face, prohibits it from gathering the requested evidence on its own as it would in the United States. Imposing the costs of the Convention procedures on the requested party and holding that party ultimately responsible for full production of requested evidence will be sufficient disincentive to invocation of the Convention when it is not necessary.

81. For this same reason, the courts are not obligated to initiate Convention procedures absent a request from the producing party. Further, and consistent with the notion of holding a party ultimately responsible for the production of evidence which it controls and of which it has the best knowledge, courts should impose sanctions on a producing party who does not satisfactorily comply with a discovery order regardless of that party's good faith or bad faith in attempting to comply. See *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 213 (1958) (district court is justified in drawing adverse inferences from gaps in plaintiff's evidence even though the plaintiff made a good faith attempt to produce all requested documents). The courts may justifiably attribute to actors in the international arena a level of sophistication sufficiently high that they may be said to have knowingly assumed the risk of litigation and the costs such litigation would entail. Again, a uniform rule will permit these actors to adjust their behavior in the direction of greater efficiency and rationality.

82. The Convention limits the scope of discovery to evidence "intended for use in judicial proceedings, commenced or contemplated." Evidence Convention, *supra* note 1, art. 1. Many of the signatory nations have registered reservations under Article 23

VI. THE *AEROSPATIALE* DECISION

In 1986,⁸³ the Supreme Court accepted the task of defining conclusively the circumstances in which U.S. courts must adhere to the Evidence Convention in domestic litigation. The Court's putative goal was to introduce uniformity and predictability into decisions regarding the taking of evidence abroad. However, the Court failed in this task, and instead established a rule of law that conflicts with U.S. obligations under the Convention. The decision requires U.S. trial courts to reassess in each case the very state interests which the Hague Conference negotiators fully considered and carefully balanced in drafting the Evidence Convention.

The *Aerospatiale* case involved a personal injury claim by three American citizens against Societe Nationale Industrielle Aerospatiale (Aerospatiale) and another French corporation in a U.S. district court in Iowa.⁸⁴ The plaintiffs sought damages for injuries arising out of the crash in Iowa of an airplane that the French companies had designed, manufactured, and sold. The American plaintiffs pursued discovery under the Federal Rules of Civil Procedure. Aerospatiale, an enterprise owned by the French government, requested an order that would limit the plaintiffs to use of Convention discovery procedures to collect evidence located in France.⁸⁵ The French defendants argued that the Convention provided the exclusive means for obtaining evidence abroad⁸⁶ because a French criminal law, a so-called "blocking

regarding requests for pre-trial discovery. See *supra* notes 38-39 and accompanying text. Therefore, the evidence produced by Convention procedures may sometimes be less than that requested by U.S. litigants, as U.S. law permits parties to request any evidence, whether it will prove admissible or not, which "appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). A judge may have difficulty determining the incremental damage done by a failure to produce evidence which would not be used in the proceeding but which might have led to the discovery of admissible evidence. However, this problem is not created by the Evidence Convention, but rather, would exist even in a no-Convention environment. See *supra* note 20 (comparing the scope of discovery that civil and common law states permit). The Convention may even expand the scope of discovery which receiving states are willing to allow. Cf. Brief for the Republic of France as Amicus Curiae at 18-22, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695) (noting the liberalizing changes that the French government made in discovery procedures after ratification of the Convention).

83. *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), cert. granted, 106 S. Ct. 2888 (1986).

84. *Jones v. Societe Nationale Industrielle Aerospatiale*, Civ. No. 82-453-C (S.D. Iowa July 31, 1985).

85. *Aerospatiale*, 107 S. Ct. at 2546.

86. *Id.*

statute," precluded them from complying with any discovery request not made in accordance with the treaty.⁸⁷ The magistrate denied the order.⁸⁸ Aerospatiale appealed unsuccessfully to the Court of Appeals for the Eighth Circuit,⁸⁹ and then sought relief from the Supreme Court.

In a five to four decision, the Supreme Court affirmed the circuit court ruling.⁹⁰ The Court held that the Convention is a "permissive supplement," rather than a "pre-emptive replacement," for other means of obtaining evidence located abroad.⁹¹ The Court directed district courts to decide on a case-by-case basis whether Convention procedures are appropriate, just as they would decide any other discovery issue.⁹² Writing for the majority, Justice Stevens admonished trial courts, in the interest of comity, to "exercise special vigilance to protect foreign litigants from . . . unnecessary . . . or unduly burdensome discovery" and to "demonstrate due respect" for the problems of foreign litigants and the concerns of their countries.⁹³ District courts should decide whether to use the Convention procedures by conducting a "particularized analysis of the respective interests of the foreign nation and the requesting nation" and should

87. C. PEN. 80-538, art. 1A., reprinted in *Aerospatiale*, 107 S. Ct. at 2546 n.6. This section of the French Penal Code provides:

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

France is not alone in promulgating a "blocking statute" that prohibits the gathering of evidence for use in foreign judicial proceedings. States having such laws intend them to advance one or more of the following purposes: 1) to protect the state's legitimate interests in non-disclosure, 2) to attract questionable but lucrative business enterprises in need of secrecy, and 3) to limit the reach of American investigations into foreign economic activity. Rosdeitcher, *Foreign Blocking Statutes and United States Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061, 1063-65 (1983). France promulgated its blocking statute primarily for the third purpose. Toms, *The French Response to Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585, 586 (1981).

88. See 107 S. Ct. at 2544.

89. *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986), vacated, 107 S. Ct. 2542 (1987). The court of appeals held that the Convention applies only to the taking of depositions from non-parties in a foreign state, and not to the production of evidence by persons over whom the district court has jurisdiction. *Id.* at 125. The Supreme Court, while affirming the Eighth Circuit's ruling, summarily rejected this finding. 107 S. Ct. at 2554.

90. 107 S. Ct. 2542 (1987).

91. *Id.* at 2551.

92. See *id.* at 2557.

93. *Id.*

assess the "likelihood that resort to [the] procedures will prove effective."⁹⁴ Justice Stevens cited the existence of a blocking law as one factor to consider in this analysis, because a blocking statute is indicative of the sovereign interests of the foreign state.⁹⁵ Nevertheless, the opinion made clear that courts should not accord dispositive weight to these statutes.⁹⁶ The majority provided no further guidance with respect to the method district courts should use to perform this comity analysis.

An examination of Justice Stevens' majority opinion from the perspective of our common sense understanding of the Convention's place in domestic law reveals that the opinion is both analytically and practically unsound. Justice Blackmun, in his

94. *Id.* at 2555-56. The Court noted that the drafters of the Restatement of Foreign Relations Law of the United States approved this type of analysis. *Id.* at 2556. That body recommends that an American court consider five factors when issuing an order for discovery from abroad:

[1] the importance to the investigation or litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] whether the information originated in the United States; [4] the availability of alternative means of securing the information; and [5] the extent to which non-compliance with the request would undermine important interests of the United States, or compliance . . . would undermine important interests of the state where the information is located.

RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437(1)(c) (Tent. Draft No. 7, 1986) (*approved* May 14, 1986) (current version at RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1986)). However, in adopting the test suggested by the American Law Institute, the Court omitted any mention of the prerequisite for reaching the test at all; specifically it failed to mention that requests for discovery from abroad should come through court order, not private parties as permitted in usual domestic litigation. Courts should only issue such orders after careful scrutiny of the party's request to ensure that the information sought is "directly relevant and material." It is at this stage that the comity analysis is triggered. *Id.* comment a and reporter's note 2. Moreover, the fourth element of the test, regarding alternative means, contemplates that a court will consider resorting to the Evidence Convention procedures before issuing an order under the Federal Rules. *See* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 473 (Tent. Draft No. 6, 1985) (*approved* Apr. 12, 1985), reporter's note 6 (current version at RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 473, reporter's note 6 (1986)).

95. 107 S. Ct. at 2556, n.29.

96. *Id.* Indeed, the Court bristled at the "extraordinary exercise of legislative jurisdiction" by France over U.S. judges which the broad language of the French statute implies. *Id.* It is true that the French blocking statute appears to reach activity which will take place both within and outside France by prohibiting requests for evidence as well as the gathering of such evidence. *See supra* note 87. However, that blocking statute also reinforces France's commitment to the Convention; "[t]he French statute's prohibitions are expressly 'subject to' international agreements and applicable laws and it does not affect the taking of evidence under the Convention." 107 S. Ct. at 2566 (Blackmun, J., dissenting in part).

dissent, identified some of the practical weaknesses of the majority opinion. However, while the dissent accurately predicted the quagmire of inconsistent discovery rulings into which the majority's opinion would plunge U.S. district courts, it does not adequately address the opinion's analytical shortcomings.

The bulk of the majority opinion is directed toward refuting the contention that the Convention is the "exclusive" means for obtaining evidence abroad in cases where the party obligated to produce evidence confronts a foreign blocking law. Both the majority opinion and the argument it purports to refute interpret "exclusivity" to mean the displacement of procedures available under the Federal Rules for obtaining evidence located abroad.⁹⁷ However, this interpretation is illogical. The Evidence Convention contains the only procedures available for extracting evidence from a foreign signatory state which prohibits the requested party from removing the evidence itself; there are no other procedures for it to pre-empt.⁹⁸ The only proper question, then, is whether the Convention procedures are mandatory. Must signatories to the Convention use the Convention procedures to assist parties before their courts who are faced with such a conflict, or may they instead leave litigants to their own devices and simply punish them for the inadequacy of their efforts?

In considering whether the Convention procedures are mandatory, the Court first observed that the Preamble to the Convention states as its purposes facilitating the transmission and execution of letters of request and improving mutual judicial cooperation,⁹⁹ but concluded from the absence of any mandatory terms that adherence to the Convention is not required.¹⁰⁰ However, the absence of an explicit statement that the contracting

97. See *id.* at 2550 ("The Hague Convention might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court.").

98. Absent the Convention, requested parties in that situation could retrieve evidence from abroad only pursuant to letters rogatory. See *supra* notes 3-27, 61-62 and accompanying text. The Convention incorporates this procedure and adds to it the option of taking evidence through diplomatic or consular officers, or commissioners. See *supra* notes 31-45 and accompanying text. See also *supra* note 53 and accompanying text (noting that the Evidence Convention does not pre-empt the Federal Rules).

99. Evidence Convention, *supra* note 1, Preamble, 23 U.S.T. at 2557, T.I.A.S. No. 744.

100. 107 S. Ct. at 2550 n.15. The Court compared the Evidence Convention to the Multilateral Convention on the Service Abroad of Judicial and Extrajudicial Documents, entered into force, February 10, 1969, 20 U.S.T. 361, T.I.A.S. No. 6638 [hereinafter Service Convention]. The former provides that "a Contracting State may . . . request the competent authority of another Contracting State . . . to obtain evidence, or to perform

states must instruct their courts to honor all proper¹⁰¹ requests by litigants that Convention procedures be used certainly does not preclude the possibility that the signatories agreed to do just that.¹⁰²

The majority also concluded from the absence of any explicit language to the contrary, that "the Evidence Convention itself does not modify the law of any contracting State . . . or compel any contracting State to change its own evidence-gathering procedures."¹⁰³ This conclusion is unwarranted. The Convention is necessarily silent regarding the effect it will have on the laws of each nation. Treaty implementation is a matter of domestic law for each signatory,¹⁰⁴ and the laws of each signatory will mesh uniquely with an international agreement. For civil law states, the Convention clearly does modify law and procedures, insofar as these states are now required to comply with letters of request and to use the procedures that the sending state directs.¹⁰⁵ This raises the question, left unanswered by the majority, as to what consideration the United States gave to the civil law countries in return for their agreement to modify their law and practices.

Justice Stevens drew similarly unsupportable conclusions from the permissive language that precedes the enumeration of each of the Convention procedures.¹⁰⁶ The Court failed to consider that if more than one set of discovery procedures is available under the Convention, it would be illogical to use mandatory language for any one of them. The fact that a requesting state *may* use letters rogatory or *may* use a consul or commissioner for taking evidence in a signatory state under the Convention does not

some other judicial act." Evidence Convention, *supra* note 1, art. 1. In contrast, the Service Convention mandates that "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." Service Convention, *supra*, art. I, 20 U.S.T. at 362, T.I.A.S. No. 6638, at 2 (emphasis added).

101. See *supra* note 80 (noting that parties should demonstrate that the evidence is in another state and that the state has an effective blocking statute before Convention-based requests should issue).

102. "Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed." 17 AM. JUR. 2D *Contracts* § 255 (1964) (citations omitted).

103. 107 S. Ct. at 2550-51.

104. See generally UNITED NATIONS, REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS 36, 148-49 (1985) (noting that, following agreement on the text of a treaty, each state must take domestic action to bind itself); A. MCNAIR, LAW OF TREATIES 58-77 (1961) (discussing the authority that various states grant to their treaty negotiators).

105. See *supra* notes 31-39, 69 and accompanying text.

106. See 107 S. Ct. at 2551.

preclude the inference that a forum state *must* select one of these options.¹⁰⁷ Once again, a common sense contractual interpretation of the treaty reveals the degree to which Convention procedures are "mandatory." By identifying the consideration each signatory gave and by understanding how the document affects their behavior, one can determine the effect that the treaty has on U.S. law. The majority neglected to undertake such an analysis.

In a footnote, Justice Stevens asserted that the current position of the executive branch on this issue supported the Court's interpretation of the Convention procedures as nonmandatory.¹⁰⁸ However, the government's view suffered from the same erroneous assumption as that of the majority — that there are procedures other than those contained in the Convention "by which American plaintiffs might obtain foreign evidence" when, as in the *Aerospatiale* case, the law of a foreign state prevents the requested party from complying with a discovery order.¹⁰⁹ Even if the administration's views were well-founded, the interpretations that the executive branch accords to a treaty from year to year¹¹⁰ are irrelevant to a court's determination of treaty obligations. General principles of contract law dictate that where an obligation arises by necessary implication from the stated terms of the contract, it is binding on the parties in the same way that explicit promises are binding, and must be interpreted in light of the overall structure and purpose of the contract and the understanding of the parties at the time of its execution.¹¹¹ A party cannot unilaterally amend its obligations by announcing a new and different interpretation of the contract terms.

107. Ballentine's Law Dictionary defines "may" as "[d]iscretionary in its grammatical sense but subject to construction as mandatory where the sense of the entire context impels such construction." *BALLENTINE'S LAW DICTIONARY* 785 (3d ed. 1969). State courts have construed the word "may" as mandatory where a permissive construction would render a contract without consideration on the part of one party, and therefore nugatory. *See, e.g., Girard Trust Bank v. Life Ins. Co. of North America*, 364 A.2d 495, 498-99 (Pa. Super. Ct. 1976).

108. *See* 107 S. Ct. at 2551 n.19.

109. *Id.* (quoting Brief for the United States and the Securities and Exchange Commission as Amicus Curiae at 9).

110. In 1983, the Justice Department submitted an amicus brief to the Supreme Court in which it took an opposite position — that the Convention "must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it." Brief for the United States as Amicus Curiae at 6, *Volkswagenwerk Aktiengesellschaft v. Falzon*, 464 U.S. 811 (1983) (No. 82-1888), *reprinted in* 23 I.L.M. 412, 415 (1983), *appeal dismissed*, 465 U.S. 1014 (1984).

111. 17 AM. JUR. 2D *Contracts* § 255 (1964).

Justice Stevens found further support for his conclusions in Article 23 of the Convention,¹¹² which allows a contracting state to declare that it will not execute any letter of request for the purpose of obtaining pre-trial discovery. He believed it inconceivable that the common law signatories would agree to cede their courts' broad powers of discovery when other signatories would be entitled to prohibit the taking of pre-trial evidence.¹¹³ However, by committing its courts to use Convention procedures to assist litigants in complying with discovery requests, a nation does not waive its authority to control litigation. Its courts retain their power to order further production and to impose costs and other sanctions for non-compliance.¹¹⁴ Correspondingly, the commitment of all signatory states to use Convention procedures does not bestow added power upon receiving states to control the course of evidence gathering or production for foreign litigation.¹¹⁵ Were there no Convention at all, foreign states would have absolute control over evidence-gathering activities within their borders, and the production aspect of discovery would remain entirely within the control of the forum court.¹¹⁶

The only sovereignty which the Convention compromises is that of the civil law signatories as states receiving letters of request, who agreed to modify their law and practices.¹¹⁷ Article 23 simply permits these countries to limit the extent to which they will compromise their sovereignty in this fashion.¹¹⁸ Even after the making of an Article 23 reservation, civil law states have made a substantial sacrifice in agreeing to comply with discovery requests from U.S. courts. This concession is certainly adequate consideration for the United States' reciprocal promise simply to make such discovery requests on behalf of parties to litigation. Moreover, as Justice Blackmun pointed out, the meaning of the term "pre-trial discovery" in Article 23 differs from the meaning in American courts.¹¹⁹ The civil law countries did not hope to

112. Evidence Convention, *supra* note 1, art. 23, 23 U.S.T. at 2568, T.I.A.S. No. 744.

113. 107 S. Ct. at 2551-52.

114. See *supra* note 53 and accompanying text.

115. See 107 S. Ct. at 2553 ("An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting State to the internal laws of that State.").

116. See *supra* text accompanying notes 6-8.

117. See *supra* note 69 and accompanying text.

118. See *supra* note 39.

119. 107 S. Ct. at 2565-66 n.21 (Blackmun, J., dissenting in part); see *supra* note 39.

prevent discovery after the filing of a complaint and before commencement of the trial; they merely sought to prohibit "fishing expeditions" prior to the initiation of judicial proceedings.¹²⁰ As noted above, many of the countries that registered Article 23 declarations have since qualified them by stating that they will comply with discovery requests that are specific and that seek relevant evidence.¹²¹

The majority also invoked the language of Article 27 as evidence that the Convention is not mandatory.¹²² Article 27 states that the Convention shall not prevent a contracting state from "permitting, by internal law or practice," the performance of any act provided for in the Convention on "less restrictive conditions," or from permitting "methods of taking evidence other than those provided for" in the Convention.¹²³ However, this option clearly applies only to receiving states and not to sending states. A provision permitting a signatory to define any procedure it wished for extracting evidence from another state would render the rest of the Convention meaningless and constitute an unprecedented relinquishment of sovereign authority.¹²⁴

The majority's final argument against "exclusivity" was that "exclusivity" would put certain U.S. litigants in a disadvantageous position. First, the Court argued, because foreign parties would be able to obtain discovery from U.S. parties under the Federal Rules, while U.S. parties would have to use the Convention procedures, the former would have access to more information than would the latter.¹²⁵ Second, a foreign corporation would have an advantage in the United States over a U.S. competitor, because a third party suing both would be able to extract

120. See REPORT OF THE SPECIAL COMMISSION, *supra* note 39, at 1421-23.

121. *Supra* note 39. See *In re Asbestos Insurance Coverage Cases*, 1 All E.R. 716, 720-22 (1985) (explaining the United Kingdom's standard of specificity as requiring that requested documents must be "actual" — defined as documents that definitely exist or did exist, and are likely to be in the respondent's possession); *In re Westinghouse Electric Corp. Uranium Contract Litigation*, reprinted in 16 I.L.M. 784, 788 (1977) (holding that a document request directed to the United Kingdom should be as specific as would be required for a subpoena duces tecum).

122. 107 S. Ct. at 2552-53 n.24.

123. Evidence Convention, *supra* note 1, art. 27, 23 U.S.T. at 2569, T.I.A.S. No. 744.

124. See 107 S. Ct. at 2559 n.2 (Blackmun, J., dissenting in part). See also Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 107 (1973) ("If the domestic law of the requested state is more beneficial and more flexible in favor of the foreign litigant than the Convention techniques, those more liberal rules of the domestic law will remain available to the foreign litigant and the requesting authority.") (emphasis added).

125. 107 S. Ct. at 2553 n.25.

more information from the U.S. corporation than from the foreign corporation.¹²⁶ Third, one U.S. litigant suing a citizen of a non-signatory state would have an advantage over another U.S. litigant suing a citizen of a signatory state, because the former would be permitted to use the Federal Rules.¹²⁷

While some inequity might arise from a rule specifying that use of Convention procedures precludes subsequent invocation of the Federal Rules, no such inequity arises from simply making use of Convention procedures mandatory when properly requested. The majority failed to recognize that a rule requiring adherence to the Convention in the first instance would not diminish the authority of federal courts to correct for any unfairness by limiting the discovery of either party, drawing adverse inferences, or allocating costs. Thus, the proper result in *Aerospatiale* would have been to require the district court to honor the French defendant's petition for use of Convention procedures, to impose on the defendant the costs of using those procedures,¹²⁸ to subsequently issue a Rule 37 order for production if Convention methods elicited incomplete evidence, and to sanction *Aerospatiale* for any non-compliance with that order.¹²⁹

The "inequity" argument suffers from additional infirmities. The majority assumed incorrectly that the nationality of the litigants triggers the Convention when, in fact, it is the situs of the evidence that controls.¹³⁰ While it may be likely that more of the evidence in the control of a foreign party is in a foreign state than is the evidence in the control of a party who is a U.S. citizen, this

126. *Id.*

127. *Id.*

128. These costs might include fees paid to translators, experts, interpreters, and other costs paid in connection with the procurement of evidence under the Convention. See Evidence Convention, *supra* note 1, arts. 4, 14, 26, 23 U.S.T. at 2559-60, 2563-64, 2569, T.I.A.S. No. 744. Costs may also include the loss experienced by a requested party because of any incremental delay created by the use of Convention procedures. See FED. R. CIV. P. 37(a)(4).

129. FED. R. CIV. P. 37(b)(2). The court should limit these sanctions to redressing the actual harm caused by non-compliance. For example, the district court should draw adverse inferences only as to the specific issues left unresolved, and impose only actual costs incurred by the requesting party in securing the evidence by other means. See *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 213 (1958). After it has been established that failure to comply has been due to legal inability, the good or bad faith of the party should be irrelevant. Punitive sanctions are unnecessary to encourage compliance, and would further no due process objective. At the same time, good faith efforts do not diminish the strength of the argument that any party acting in the United States assumes the risks attendant upon such conduct, including the possibility of U.S.-style litigation. See *supra* note 81.

130. 107 S. Ct. at 2567 (Blackmun, J., dissenting in part).

is not necessarily so.¹³¹ Perhaps the most important defect in the majority opinion, as Justice Blackmun noted in his dissent, is that it "completely ignores the very purpose of the Convention . . . to *facilitate* discovery, not to hamper litigants."¹³² Having advance knowledge that foreign states would accommodate their discovery requests under the Convention, litigants in the United States would be in a much better position than they were prior to the Convention when they could not be certain that even a letter from the court would yield the desired evidence.

After dismissing the notion of exclusivity, the majority directly addressed the possibility that the Convention requires requesting parties to resort to its procedures before "initiating any discovery pursuant to the normal methods of the Federal Rules."¹³³ The way the Court posed the question is another indication of its misunderstanding of what the Convention adds to a no-Convention world. As noted above,¹³⁴ the Convention procedures would exhaust the "normal methods" available under the Federal Rules for obtaining evidence in such a case. The majority's answer to the question is germane nonetheless. It consists of an objection to the supposed additional expense which Convention procedures entail,¹³⁵ coupled with the contention that international comity precludes the establishment of such a uniform rule of "first use".¹³⁶

Justice Stevens alleged that letters of request are time-consuming and expensive, and claimed that direct use of the Federal Rules is more certain to produce needed evidence.¹³⁷ Once again, the opinion betrays a failure to comprehend that the only means available under the Federal Rules for extracting evidence from a country which prohibits parties to U.S. litigation from gathering evidence within its borders is a letter of request.¹³⁸

131. See *supra* note 9 (noting that the Convention would apply to the taking of evidence from the foreign branch or subsidiary of a U.S. corporation as well as from U.S. citizens abroad).

132. 107 S. Ct. at 2567 (emphasis in the original).

133. *Id.* at 2554.

134. See *supra* note 98 and accompanying text.

135. 107 S. Ct. at 2555.

136. *Id.*

137. *Id.*

138. FED. R. CIV. P. 28(b). While this same rule authorizes the taking of depositions abroad by a person commissioned by a court, a U.S. court has no power to order this method where the foreign state objects to it as an intrusion on its judicial sovereignty. See *id.* advisory committee's note. Cf. *United States v. Paraffin Wax*, 2255 Bags, 23 F.R.D. 289, 290 (E.D.N.Y. 1959) (noting that a commission was inappropriate because the requested state would only permit letters rogatory).

The Convention incorporates this method and adds less formal procedures,¹³⁹ thereby facilitating discovery which is less expensive and more useful than discovery under the Federal Rules, and making it easier for the United States to live up to its treaty obligations.¹⁴⁰ Regular employment of Convention procedures would make their use increasingly more efficient, and obviate the majority's concerns as to cost.

Finally, the majority held that "the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule would generate."¹⁴¹ This conclusion must derive from the Court's earlier arguments relating to potential inequities — its belief that mandatory use of the Convention procedures would prejudice U.S. citizens.¹⁴² Under the Court's theory, a general rule requiring use of the Convention would always be more satisfactory to foreign states than it would to U.S. litigants. Therefore, although courts typically engage in a comity analysis to ensure proper consideration of foreign state interests and those of the international legal community,¹⁴³ the only conceivable goal of requiring a time-consuming and potentially expensive comity analysis at this juncture would be to enable district courts to correct any seeming unfairness to U.S. citizens. This article has already addressed the weaknesses in the inequity argument.¹⁴⁴ A comity analysis is inappropriate in Convention cases for additional reasons as well.

A comity analysis in individual cases may be appropriate when there is no general rule and when a true conflict of laws exists.¹⁴⁵ However, as explained above,¹⁴⁶ there is no legal conflict between the Federal Rules and foreign blocking laws as each is

139. See Evidence Convention, *supra* note 1, ch. II, 23 U.S.T. at 2564-68, T.I.A.S. No. 744 (providing for the taking of evidence by diplomatic officers, consular agents and commissioners).

140. The Court acknowledged that in some instances, use of the Convention would be the more fruitful avenue of discovery, 107 S. Ct. at 2555 n.26, but it did not offer examples of appropriate circumstances.

141. *Id.* at 2555 (footnotes omitted).

142. See *supra* notes 125-27 and accompanying text.

143. See *Pierburg GmbH v. Superior Court*, 137 Cal. App. 3d 238, 243-44, 186 Cal. Rptr. 876, 880 (1982) (citations omitted).

144. See *supra* notes 128-32 and accompanying text.

145. See 107 S. Ct. at 2561-62 (Blackmun, J., dissenting in part); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437(1)(c) (Tent. Draft No. 7), *supra* note 94, comment a and reporter's note 2, § 473 (Tent. Draft No. 6), *supra* note 94, reporter's note 6.

146. See *supra* note 8 and accompanying text.

properly understood and applied. Each pertains only to activity within the respective state's territory. The only conflict is the practical one experienced by the producing party who is unable to satisfy the law of both countries. The Evidence Convention supplies a general rule to resolve this situation. In negotiating and drafting the treaty, officials and experts from various sovereign states considered the factors that are relevant to a comity analysis, and represented the sovereign interests of the signatory states better than individual litigants possibly could in the hundreds of cases to be brought in U.S. district courts.¹⁴⁷ The Convention represents a compromise of those sovereign interests and the interests of each state's citizens.

The majority imputes to district court judges a knowledge of the laws, policies, and interests of foreign governments. Justice Blackmun recognized that this confidence is unfounded, and concluded that courts are ill-equipped to balance the interests of foreign nations with those of their own.¹⁴⁸ Justice Blackmun further suggested that district court judges are inexperienced in the area of transnational litigation and unfamiliar with the procedures of foreign legal systems. Consequently, they are likely to be biased in favor of U.S. procedures and against foreign litigants.¹⁴⁹ Thus, the inevitable result of the individualized comity analysis which the *Aerospatiale* decision requires will be inconsistent, inaccurate, and inequitable decisions at the trial court level¹⁵⁰ — an outcome inimical to the interests of all nations and all private actors in international markets.

Justice Blackmun's principal criticism of the majority opinion was that it provides insufficient guidance to district courts faced with international discovery disputes.¹⁵¹ However, the dissent stopped short of finding a "first use" requirement in U.S. law

147. See 107 S. Ct. at 2561-62 (Blackmun, J., dissenting in part); Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239, 255 (1986) ("[T]he best evidence of an effective balancing of competing national interests is the content of an international agreement . . . not a judicial opinion reflecting the unilateral speculation of a court.").

148. 107 S. Ct. at 2560 (Blackmun, J., dissenting in part) (quoting *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983), in which the Supreme Court itself stated that it has "little competence in determining precisely when foreign nations will be offended by particular acts") (other citations omitted).

149. *Id.*

150. See A. NEALE & M. STEPHENS, *supra* note 8, at 94-98; *infra* notes 155-87 and accompanying text.

151. "The majority fails to offer guidance in this endeavor, and thus it has missed its opportunity to provide predictable and effective procedures for international litigation in United States courts." 107 S. Ct. at 2568 (Blackmun, J., dissenting in part).

because it believed that a comity analysis might be required when the foreign state has made an Article 23 reservation, or when resort to the Convention would be futile.¹⁵² At the same time, Justice Blackmun admitted that concerns about Article 23 may be unjustified and that it may be impossible to tell if resort to the Convention procedures would be futile until a court actually tried them.¹⁵³ It should take little time to learn whether a foreign state will reject outright a request pursuant to the Convention, and courts can thereafter tailor their letters of request to satisfy the foreign state or, if the foreign state indicated that no request would satisfy it, immediately issue a Rule 37 order for production. Thus, although Justice Blackmun advocated only "a general presumption favoring use of the Convention,"¹⁵⁴ his reasoning should lead to the conclusion that U.S. law requires courts to use the Convention whenever requested.

VII. POST-AEROSPATIALE CASES

Justice Blackmun's predictions of future unsatisfactory district court decisions¹⁵⁵ have quickly become reality. Lower court opinions following *Aerospatiale* have been parochial in their analysis, inconsistent in their conclusions, and given to unsubstantiated generalizations.¹⁵⁶ The opinions demonstrate the defects of the case-by-case comity analysis which the *Aerospatiale* majority mandated.

A. Applying the Blackmun Analysis

Only one post-*Aerospatiale* court to date has required use of Convention procedures. In *Hudson v. Hermann Pfauter*,¹⁵⁷ a case involving discovery of evidence located in West Germany, the district court noted Justice Stevens' explicit failure to offer guidance¹⁵⁸ and so applied the three-part analysis which Justice Blackmun offered. Justice Blackmun proposed that courts balance "the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime," but recognize that, in most cases, the

152. *Id.* at 2567 (Blackmun, J., dissenting in part).

153. *Id.*

154. *Id.* at 2558 (Blackmun, J., dissenting in part).

155. *See id.* at 2558, 2559 (Blackmun, J., dissenting in part).

156. *See infra* notes 171, 172, 175, 178-183 and accompanying text.

157. 117 F.R.D. 22 (N.D.N.Y. 1987).

158. *Id.* at 36.

Convention has already "accommodated all three categories of interests."¹⁵⁹ The *Hudson* court concluded under this framework that it was appropriate to grant the request of a foreign party that it use the Convention procedures.¹⁶⁰

The *Hudson* court's assessment of the foreign sovereign's interests was consistent with our common sense interpretation of the Evidence Convention. West Germany's constitution contains a "principle of proportionality" that necessarily subjects the scope of discovery to judicial control. Therefore, the gathering of evidence by private parties on West German soil would constitute "nothing less than a violation of West Germany's internal laws by outsiders with the approval and support of American courts."¹⁶¹ The court concluded that the requesting party and the American courts could avoid this affront by acting in accordance with the Convention. Because West Germany is a signatory to the Evidence Convention,¹⁶² the terms of the treaty are essentially a manifestation of the extent to which West Germany is willing to compromise its sovereign interests.¹⁶³

After determining that the interests of the foreign sovereign dictated use of the Convention, the court found that such compliance would not jeopardize the interests of the United States in achieving effective discovery procedures, just resolution of disputes, and accountability of foreign entities conducting business in the States.¹⁶⁴ There was no certainty that West Germany would deny any requests,¹⁶⁵ and the court had the power under the Federal Rules to compel discovery from, and limit discovery for, the foreign party should the Convention procedures prove inadequate.¹⁶⁶

Finally, the court noted the interests of the international legal community in the use of procedures that are both effective and non-violative of another sovereign's laws. The court stated that such accommodation would have a positive effect on international cooperation, promote "predictability and stability

159. *Aerospatiale*, 107 S. Ct. at 2562 (Blackmun, J., dissenting in part) (footnote omitted).

160. 117 F.R.D. at 40.

161. *Id.* at 38.

162. 8 MARTINDALE-HUBBELL LAW DIRECTORY, pt. 7, at 15, 17-18 (1988).

163. 117 F.R.D. at 38.

164. *Id.* at 38-39.

165. *See id.* at 39 (citation omitted) (noting that West Germany was considering new regulations to permit pre-trial production of "'specified and relevant documents'").

166. *Id.*

through satisfaction of mutual expectation,' " and encourage international commercial activity.¹⁶⁷

Among post-*Aerospatiale* cases, the *Hudson* court stands alone in concluding from an independent comity analysis that it must employ the Evidence Convention in the first instance to obtain evidence located abroad.¹⁶⁸ A review of cases in which courts have concluded that they should not use Convention procedures demonstrates the inadequacy of the *Aerospatiale* approach.

B. *Applying The Analysis of the Aerospatiale Majority*

The courts following *Aerospatiale* that have ruled that Convention procedures were inapplicable have expressed due concern for the interests of foreign states and the purposes of the Convention.¹⁶⁹ However, the rulings and rationale of their decisions reveal that this professed deference is mere lip service.

In applying the *Aerospatiale* rule, the lower courts have gone even further than the Supreme Court in narrowing the range of situations in which they will employ Evidence Convention procedures. This has been accomplished by imposing on the party invoking the Convention the burden of proving that use of Convention procedures is appropriate.¹⁷⁰ This rule creates a presumption against compliance with the Convention, and amounts to an abdication of the courts' own authority to require adherence to its procedures.

In considering whether parties have met their burden of proof,

167. *Id.* at 39-40 (quoting *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984)).

168. Some of the later district court opinions criticize *Hudson* for being too reliant on Justice Blackmun's analysis and not attentive enough to the narrower considerations put forth by the majority — namely, the need to decide cases on an individual basis by focusing on the particular facts and the likely effectiveness of Convention procedures. See *Haynes v. Kleinwebers and Lembo Corp.*, 119 F.R.D. 335, 338 n.2 (E.D.N.Y. 1988); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 389 n.2 (D.N.J. 1987).

169. *In re Anschuetz & Co., GmbH*, 838 F.2d 1362, 1365 (5th Cir. 1988) ("[I]t would be a serious mistake for the district court not to respect properly [sensitive interests of a sovereign power]."); *Benton Graphics*, 118 F.R.D. at 388 ("Due respect must be accorded special problems encountered by a foreign litigant because of its nationality, location or any sovereign interest expressed by a foreign state.").

170. *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 257-58 (M.D.N.C. 1988) (the proponent of using the Evidence Convention must prove that the discovery requests are intrusive, that the requests implicate important interests of a foreign sovereign, and that use of the Convention would be effective); *Haynes*, 119 F.R.D. at 341; *Benton Graphics*, 118 F.R.D. at 388-89. *Contra*, *Hudson v. Hermann Pfauter*, 117 F.R.D. at 38 ("[T]he burden should be placed on the party opposing the use of Convention procedures to demonstrate that those procedures would frustrate [the United State's] interests.").

these courts have summarily rejected evidence of foreign state interests that would support the use of Convention procedures. For example, one court confronted with the French blocking statute concluded that it did not "warrant much deference" because it was "overly broad and vague."¹⁷¹ Similarly, another court dismissed as "too general" a letter from the Swedish Ministry for Foreign Affairs reciting that country's interests in use of the Convention.¹⁷² This latter court's complaint illustrates a critical flaw in the *Aerospatiale* case-by-case analysis. The court found the asserted interests of Sweden to be unconvincing because the government's letter failed to relate "*specific* sovereign interests" to the "*specific* discovery sought."¹⁷³ The authors submit that the interests of any one nation will rarely vary with the particular discovery demands in individual cases. To require district courts to analyze — and foreign parties and their governments to defend — sovereign interests in every case is truly "duplicative analysis for which courts are not well designed."¹⁷⁴

Finally, the various lower court opinions rejecting use of Convention procedures are circular and nonsensical. First, in an echo of the pre-*Aerospatiale* cases that refused to order compliance with the treaty, the courts continue to speculate about the time, expense, and difficulty involved in Convention procedures without having actually tried to use them to see if they are indeed more unwieldy.¹⁷⁵ Moreover, they offer conflicting and conclusory statements that fail to accord any continued vitality to the Convention.¹⁷⁶

One source of confusion appears to be Justice Stevens' suggestion that only the more burdensome discovery requests need conform to the Convention.¹⁷⁷ For example, the court in *Haynes v. Kleinwefers and Lembo Corp.* concluded that since the discovery requests at issue were relatively narrow, there was no need to risk using Convention procedures to obtain evidence from a state that has made an Article 23 reservation.¹⁷⁸ However, the court

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

172. *Benton Graphics*, 118 F.R.D. at 391.

173. *Id.* (emphasis in original).

174. *Aerospatiale*, 107 S. Ct. at 2559 (Blackmun, J., dissenting in part).

175. See *Haynes v. Kleinwefers and Lembo Corp.*, 119 F.R.D. 335, 339 (E.D.N.Y. 1988) (concluding that discovery pursuant to the Convention from the Federal Republic of Germany would be "of necessity more costly and time consuming" and possibly incomplete).

176. See *infra* notes 178-183 and accompanying text.

177. *Aerospatiale*, 107 S. Ct. at 2557.

178. 119 F.R.D. at 339. See also *Rich v. KIS California, Inc.* 121 F.R.D. 254, 258

failed to acknowledge West Germany's record of accommodating specific discovery requests notwithstanding its reservation.¹⁷⁹ There was simply no reason to believe that Germany would fail to execute the "circumscribed" requests at issue. Conversely, the court in *Benton Graphics v. Uddeholm Corp.* acknowledged that discovery would be extensive, but still held the Convention inapplicable because the discovery was vital to the plaintiff's case.¹⁸⁰

The courts have also manifested confusion about how to weigh foreign interests and incompatible sovereign demands in deciding whether to use the treaty procedures. For example, after noting that Sweden had expressed a direct interest in the forthcoming discovery, the *Benton Graphics* court still held that the Convention was unnecessary because the defendants failed to identify any "special problem" which responding to the plaintiff's discovery requests would entail.¹⁸¹ One would think that a blocking statute presents such a "special problem." Yet, the *Rich v. KIS California, Inc.* court held that employment of Convention procedures was unnecessary for discovery to occur in France because the requests at issue did not impinge on any "important" sovereign interests.¹⁸² The court ignored France's explicit statutory prohibition against the production of evidence for litigation abroad when not requested in accordance with the Evidence Convention.¹⁸³

These cases suggest that courts will invoke the Convention only when discovery is abusive,¹⁸⁴ the evidence will not be dispositive of the major issues,¹⁸⁵ the foreign sovereign has a particularized complaint about the requests and expresses an interest that the district court is willing to respect,¹⁸⁶ and there is no risk that the foreign government will refuse to comply in full.¹⁸⁷ Neither the language of the treaty nor the expressed intentions

(M.D.N.C. 1988) (holding that use of the Convention procedures was unnecessary because the discovery was not abusive).

179. See Brief for the Federal Republic of Germany as Amicus Curiae at 8-10, *Aerospatiale*, 107 S. Ct. 2542 (1987) (No. 85-1695).

180. 118 F.R.D. at 391. The court declined to use the Convention even after acknowledging that virtually all the requested evidence and witnesses were located in Sweden. *Id.*

181. *Id.*

182. 121 F.R.D. at 258.

183. *Id.* See *supra* note 87 (providing text of French blocking statute).

184. See *supra* note 178 and accompanying text.

185. See *supra* note 180 and accompanying text.

186. See *supra* notes 181-183 and accompanying text.

187. See *supra* note 178 and accompanying text.

of the signatory nations support this interpretation. Yet, the Supreme Court in *Aerospatiale* failed to set forth principles that would temper this unprincipled exercise of district court discretion. Consequently, the progeny of *Aerospatiale* threaten to render the Evidence Convention an ineffectual relic.

VIII. CONCLUSION

The Supreme Court's explicit rejection of both the "exclusivity" and "mandatory" positions which some lower courts had adopted prior to *Aerospatiale* operates as a significant constraint on future decisions. The *Aerospatiale* decision will preclude trial courts from honoring proper requests for the use of Convention procedures unless the courts are able to discern that the Supreme Court's premises were erroneous — i.e. unless they realize, after arriving at a common sense understanding of the Convention, that the interests of the parties and sovereign states concerned always counsel in favor of its use. To date, such an understanding has eluded the courts. Consequently, parties to transnational litigation continue to suffer the burdens and frustrations of thwarted foreign discovery. Thus, the great promise of the Evidence Convention remains unfulfilled.

The Supreme Court has squandered an opportunity to infuse much needed efficiency into the process of international discovery by its failure to appreciate the bounds which international law places on the powers of United States courts and foreign sovereigns, and to interpret the Convention in clear contractual terms. The parochial and arbitrary decisions that follow *Aerospatiale* are likely to heighten objections from foreign states regarding U.S. treatment of foreign nationals. These states may, as a consequence, become unwilling to continue to honor their own obligation under the Convention to execute discovery requests from U.S. courts.¹⁸⁸

In the wake of *Aerospatiale*, hope for a regime of fair and efficient discovery rules appears to reside in the possibility that signatory nations will renegotiate the Convention to make its mandatory nature more explicit, or that Congress will enact a federal statute directing U.S. courts to use Convention procedures whenever requested. Such a statute would foster stability and predictability in transnational litigation and would enable actors involved in international commerce to order their affairs

188. See Oxman, *supra* note 80, at 769.

more rationally. Foreign companies would be better able to measure accurately the costs of doing business in the United States, and to allocate those costs in a more efficient manner by private contract.¹⁸⁹ Greater certainty concerning discovery procedures would likely reduce the number of pre-trial evidentiary disputes. When litigation arises, a statute mandating use of the Convention would induce parties to make the most effective use of the treaty's procedures: The powers U.S. courts retain under the Federal Rules to sanction non-production would encourage producing parties to cooperate with discovery requests, and the knowledge that the Convention procedures are likely to yield more complete discovery, and therefore, a more accurate and just result, would prompt requesting parties to conform their discovery to its terms. Finally, requiring courts to use Convention procedures would foster more reasonable treatment of foreign litigants and greater cooperation with foreign states. The resulting improvement in international relations would engender a more hospitable climate for persons living, travelling, and transacting business outside their home state — the as yet unrealized hope of the Hague Evidence Convention.

189. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-18 (1974) (noting the practical need in international business contracts to resolve imminent uncertainties in advance).