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Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa: The Supreme Court of the United States Adopts a Case-by-Case Standard in Applying the Hague Convention on the Taking of Evidence Abroad

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Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa: The Supreme Court of the United States Adopts a Case-by-Case Standard in Applying the Hague Convention on the Taking of Evidence Abroad.

In *Societe Nationale Industrielle Aerospatiale (Aerospatiale)*,[1] the Supreme Court of the United States for the first time took occasion to interpret the multilateral Hague Evidence Convention[2] treaty vis-à-vis the Federal Rules of Civil Procedure (Federal Rules).[3] The Supreme Court has not interpreted an international treaty since 1985.[4] In addition, *Aerospatiale* may be the first attempt by the Supreme Court to resolve a conflict between any international treaty and American federal legislation.

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1. Société Nationale Industrielle Aerospatiale v. United States Dist. Court for the So. Dist. of Iowa, 107 S. Ct. 2542 (1987) [hereinafter Aerospatiale].

2. Hague Evidence Convention, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C. § 1781 (Supp. 1987)) [hereinafter Hague Evidence Convention]. *See infra* notes 5-18 and accompanying text (outlining the treaty's background and provisions).

3. The Federal Rules of Civil Procedure serve as the procedural rules governing all actions brought in United States federal district courts. Pursuant to authority granted by Congress in 1938, the U.S. Supreme Court has promulgated these rules as originally enacted and as amended. *See* 28 U.S.C.A. § 2072. The Federal Rules of Civil Procedure, the Notes of the Advisory Committee, Law Review Commentaries, and the judicial constructions of the Rules, are published at the end of Title 28.

4. Air France v. Saks, 470 U.S. 392 (1985) (holding an international air carrier not liable under Article 17 of the Warsaw Convention).

Aerospatiale gave the Supreme Court an opportunity to provide a resolution to conflicts over which procedures and methods litigants in American courts should use to secure evidence from abroad. Given the differences which exist between common law and civil law legal systems, as will be discussed, problems inevitably arise when evidence sought in American lawsuits is physically located in a foreign sovereign's territory. The Hague Evidence Convention resulted from a desire to accommodate the competing interests of the signatory nations.[5] In *Aerospatiale*, the Supreme Court provided its view as to the extent to which the treaty's drafters achieved their goal.

I. The Hague Evidence Convention

Treaty delegates to the Hague Evidence Convention adopted a final draft as a result of the 11th Session's comprehensive revision of the 1954 Hague Convention Chapter II rules governing letters rogatory and the taking of evidence in foreign countries.[6] The U.S. Senate gave its advice and consent on February 1, 1972.[7] The Hague Evidence Convention became effective in the United States as positive law on October 7, 1972.[8] France joined as a signatory to the treaty on October 6, 1974.[9]

The Hague Evidence Convention establishes three avenues by which to obtain evidence located in foreign countries:

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5. Aerospatiale, *supra* note 1, at 2549.

6. Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 Am. J. Int'l L. 104, 105 (1973). Philip W. Amram represented the United States at the Convention, was appointed rapporteur of the Special Commission and co-chaired the drafting committee. *Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law*, 8 Int'l Legal Materials 785, 805 (1969) [hereinafter *Report of the U.S. Delegation*]. As "rapporteur" (reporter), Amram prepared the Conference's official report on the Hague Evidence Convention. *The Secretary of State's Letter of Submittal to the President* (1972), *reprinted in* 12 Int'l Legal Materials 323, 326 (1973) [hereinafter *Letter of Submittal*].

7. 118 Cong. Rec. 20623 (1972). Many legal organizations expressed support for ratification of the Convention, including: the Judicial Conference of the United States; the American Bar Association (at its 1969 Annual meeting, passing a resolution to that effect); the Consular Law Society, the National Conference of Commissioners on Uniform State Laws, and several local American bar associations. *Letter of Submittal*, *supra* note 6, at 326 (cited in Aerospatiale, *supra* note 1, at 2549).

8. 8 Martindale-Hubbell, Law Directory (pt. 7), 13, 15 (1987) [hereinafter Martindale-Hubbell].

9. Boyd & Borel, *Opportunity for and Obstacles to Obtaining Evidence from France for Use in Litigation in the United States*, 13 Int'l Law. 35, 36 (1979) [hereinafter Boyd]. The Hague Evidence Convention is currently in force in 20 signatory countries: Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, United Kingdom, and United States. Martindale-Hubbell, *supra* note 8, at 15.

1. Letters of Request;[10]
2. Commissioners;[11] and
3. Diplomatic, or consular officials.[12]

The most controversial provisions to date, and to which United States courts have directed most attention, are Articles 23 and 27, which allow signatory countries to declare their own exceptions to the Hague Evidence Convention procedures. Article 23 permits a signatory to refuse to issue letters of request for purposes of obtaining "common law-style" pretrial discovery.[13] Article 27 allows signatories, subject to international agreements, to permit by internal law or practice, alternative methods of obtaining evidence.[14]

II. Comparison of the Hague Evidence Convention and the Federal Rules of Civil Procedure

Both the Hague Evidence Convention and the Federal Rules provide for issuance of letters of request. The Federal Rules call them "letters rogatory".[15] This method has become a primary means of obtaining foreign evidence from recalcitrant witnesses.[16]

The Hague Evidence Convention is the first multilateral agreement to codify methods for taking evidence via commissioners.[17] By way of declaration, the individual signatory nations may limit use of commissioners to a "prior permission" requirement.[18]

The Hague Evidence Convention, however, does not provide for the taking of evidence by an officer of the signatory nation where

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10. Martindale-Hubbell, *supra* note 8, pts. 13-14.
11. *Id.* pt. 14.
12. *Id.*
13. *Id.*; *see infra* note 67 (text of Article 23).
14. *Id.*; *see infra* note 68 (text of Article 27).
15. Fed. R. Civ. P. 28(b). A letter rogatory is: "A formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken and transmitted to the first court for use in the pending action." Black's Law Dictionary 815 (5th ed. 1979). *See generally* Comment, *The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: A Comparison with Federal Rules Procedures*, 7 Brooklyn J. Int'l L. 366 (1981) (describing function of letters rogatory).
16. Comment, *supra* note 15, at 384, n.82. *But see* Hague Evidence Convention, arts. 12, 23 (In its declarations made pursuant to these articles, France has declared it will refuse to issue Letters of Request for pretrial discovery "common law-style").
17. *Id.* at 381. Commissioners are persons appointed by the court of the state where the action is pending, and before whom depositions can be taken in a foreign country. *Report of the U.S. Delegation, supra* note 6, at 806. *See also* Fed. R. Civ. P. 28(b)(2) (providing for depositions to be taken outside of U.S. for use in U.S. cases).
18. Comment, *supra* note 15, at 382.

the evidence is located. Because consular and diplomatic officials in most civil law signatory countries already have authority to obtain evidence,[19] to so provide in the treaty would be superfluous. As amended, the Federal Rules, however, authorize consular officials in the country in which depositions are to be taken to administer oaths.[20] Thus, in at least one respect, the Federal Rules honor foreign judicial sovereignty.[21]

III. Common Law Versus Civil Law Approaches to Obtaining Evidence in International Litigation

The significance of the various procedures becomes apparent upon examination of the differences between common law and civil law approaches to the discovery of trial evidence. Evidence sought through discovery methods in the United States (a common law country), for example, need not be admissible at trial, so long as "the information sought appears reasonably to lead to the discovery of admissible evidence."[22] The wide scope afforded American discovery, however, has been described by foreign tribunals as allowing "fishing proceedings."[23]

In contrast, most civil law countries put discovery oversight in the hands of judges. For example, France "reject[s] the suggestion that such a critical function of the court be entrusted to the parties themselves."[24] Moreover, many countries, including France, have reacted to the broad United States discovery efforts by enacting "blocking statutes"[25] to impose criminal as well as civil penalties upon citizens who allow the removal of evidence from the country.[26] These statutes "are designed to take advantage of the foreign government compulsion defense . . . by prohibiting the disclosure, cop-

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19. *Id.* at 375.
20. *Id.* at 374-75; Fed. R. Civ. P. 28(b)(1).
21. Comment, *supra* note 15, at 374-75.
22. Fed. R. Civ. P. 28(b)(1).
23. Radio Corporation of America v. Rauland Corporation, [1956] 1 Q.B. 618, 649 (C.A.). *See also* Boyd, *supra* note 9, at 35-36; Carter, *Existing Rules and Procedures*, 13 Int'l Law. 5, 5 (1979).
24. Comment, *Strict Enforcement of Extraterritorial Discovery*, 38 Stan. L. Rev. 841-46 (1986). *See also* Boyd, *supra* note 9, at 35-36.
25. *See* F.T.C. v. Compagnie de Saint-Gobain-Point-A-Mousson, 636 F.2d 1300, 1326 n. 145 (D.C. Cir. 1980) (description of types of blocking statutes).
26. *See* Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation*, 17 Int'l Law. 61, 62 (1983); Restatement of Foreign Relations Law of the United States (Revised) § 437 reporter's note 4 (Tent. Draft. No. 7, 1986) [hereinafter Restatement (Revised)].

ying, inspection or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities."[27]

Given these differences between various foreign judicial systems, "[f]ew issues have engendered more friction in the international legal community than the extension of the United States legal system beyond its borders during pretrial discovery."[28] This international tension heightens the need for American courts to give due deference to the Hague Evidence Convention. Applying the Federal Rules to extraterritorial evidence requests means extending American judicial authority beyond the borders of the United States, without respect for foreign sovereignty interests, and disregards the roles of judges and other officials in civil law countries.

IV. Lower Court Decisions at American Common Law

Generally, state courts within the United States have held that the Hague Evidence Convention procedures do not preempt all other means of obtaining evidence from abroad.[29] A majority of federal district courts addressing the issue of obtaining evidence from abroad have held the Hague Evidence Convention to be only one way of securing extraterritorial evidence.[30] State and federal district courts, however, generally have upheld the "first resort" doctrine,[31] ruling that litigants must enlist the treaty's procedures before turning to the Federal Rules discovery methods.

In contrast, recent Circuit Courts of Appeal decisions consistently have held that the Hague Evidence Convention procedures must be subordinated to those of the Federal Rules in actions brought in this country,[32] reasoning that the exercise of personal jurisdiction over

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27. Restatement (Revised) § 437 reporter's note 4; *see id.* § 436 (foreign compulsion defense).

28. Comment, *Extraterritorial Discovery Under the Hague Evidence Convention*, 31 Villanova L. Rev. 253 (1986). *See also* Restatement (Revised) § 437 reporter's note 1.

29. *See, e.g.*, Pierburg & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 244, 186 Cal. Rptr. 876, 880 (1982); Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874, 885-86 (1981); Vincent v. Ateliers de la Motobecane, S.A., 475 A.2d 686, 690, 193 N.J. Super. 716, 723 (1984); Gebr. Eickhoff Maschinenfabrik v. Starcher, 328 S.E.2d 492, 497, 506 (W.Va. 1985) (Hague Evidence Convention not exclusive, but first resort must be made to those procedures, in furtherance of international comity principles).

30. *See, e.g.*, Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983); *But c.f.* Lasky v. Continental Products Corp., 569 F. Supp. 1227 (E.D. Pa. 1983) (requiring litigants to utilize the Hague Evidence Convention procedures).

31. *See supra*, notes 29-30.

32. *See infra* note 64. *In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729 (5th Cir. 1985); *In re* Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985) *cert granted*, 107 S. Ct. 3223 (1987) (judgment vacated and case remanded to the Fifth Circuit for further consideration in light of *Areospatiale*).

foreign defendants justifies the exclusive authority of the Federal Rules, including the authority to compel discovery.[33] Thus, the stage had been set for the Supreme Court in *Aerospatiale* to settle the splits of lower court authority.

V. The Case

A. Facts

The French defendants, petitioners to the Supreme Court of the United States, are corporations owned by the Republic of France.[34] They design, manufacture, and market aircraft.[35] In the instant case, one of defendants' planes crashed in Iowa, injuring the pilot and a passenger.[36]

B. Procedure

After the air crash, three people brought separate suits in the U.S. District Court for the Southern District of Iowa.[37] Plaintiffs based their actions on product defect liability, negligence, and breach of warranty theories.[38] The parties consented to the consolidation of the actions, which were then heard by a magistrate.[39]

Without protesting the District Court's exercise of personal jurisdiction, the French corporate defendants answered the complaints.[40] They also responded to initial discovery requests made pursuant to the Federal Rules.[41] Later, however, the French defendants moved for a protective order when the plaintiffs served a second request for production of documents, a set of interrogatories, and requests for admission made pursuant to Federal Rules 34, 33, and 36, respectively.[42]

In moving for a protective order, the defendants asked the District Court to recognize the Hague Evidence Convention provisions as the exclusive procedure by which pretrial discovery could be conducted,

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33. *See supra* note 32.
34. Aerospatiale, *supra* note 1, at 2546.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 2546 n. 4.
41. *Id.*
42. *Id.*

due to the presence of the French corporations and the physical location of the evidence in France.

In addition, defendants argued they were unable to respond to non-treaty discovery requests, alleging to do so would subject them to criminal penalties under French law.[43] The French blocking statute prohibits, *inter alia*, any French party from disclosing commercial documents "with a view to foreign judicial or administrative proceedings . . . ."[44]

The Magistrate denied the defendants' motion on the ground that allowing the Hague Evidence Convention to supersede the Federal Rules would "frustrate the courts' interests" in enforcing American discovery rules.[45] According to the Magistrate, granting a motion for a protective order would interfere with protecting United States citizens who suffer injury from harmful products.[46] The Magistrate noted that the strong United States interest in protecting its citizens outweighed any "burden" placed on a foreign corporation which might be required to produce documents.[47]

The Court of Appeals for the Eighth Circuit denied the defendants' petition for a writ of mandamus on the ground that the U.S. District Court's personal jurisdiction foreclosed the possibility of requiring the Hague Evidence Convention procedures to govern the pretrial discovery.[48] The Eighth Circuit court held that personal jurisdiction conferred upon the court the authority to require the litigants to pursue discovery through the Federal Rules only, despite the evidence requested being physically within the foreign signatory nation's territory.[49]

C. *The Supreme Court's Holdings*

The Supreme Court of the United States granted certiorari,[50] and in a five-to-four decision held that the Hague Evidence Convention

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43. *But see*, Batista, *supra* note 26, at 66-67 (the legislative history of this "blocking statute," indicates the French legislature never intended actually to impose criminal sanctions).

44. Aerospatiale, *supra* note 1, at 2546 n. 6. *But see id.* at 2556 n. 29 (the blocking statute does not change the Court's ruling).

45. *Id.* at 2547.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 2542. The Court heard oral arguments on January 14, 1987 and announced its decision on June 15, 1987. Justice Stevens delivered the opinion of the Court, with Rehnquist, C.J. and Justices White, Powell, and Scalia joining. Justice Blackmun wrote a separate opinion, concurring in part and dissenting in part, joined by Justices Brennan, Marshall and O'Connor (the separate opinion is cited as the dissent, and Justices Blackmun, Brennan, Marshall, and O'Connor are cited as the dissenters).

does apply to requests for information from foreign corporate parties in litigation.[51] The Court, however, ruled the Hague Evidence Convention does not provide exclusive or mandatory procedures by which evidence located within the territory of foreign signatory nations may be obtained.[52] Further, the Court held that litigants need not even make "first resort" to the Hague Evidence Convention procedures before enlisting those authorized by the Federal Rules.[53] Finally, the Court found the Hague Evidence Convention does not deprive a district court from exercising its authority over foreign defendants to produce evidence physically located within the foreign party's nation.[54] The Supreme Court vacated the Eighth Circuit's decision and remanded the case for further proceedings consistent with its opinion.[55]

VI. The Extent to Which the Hague Evidence Convention Governs Extraterritorial Discovery: The Court's Four Options

The Supreme Court noted in *Aerospatiale* that at least four possible interpretations could be made in determining the interaction between the Hague Evidence Convention and the Federal Rules.[56] The majority broke down the four options into two groups. The first group presumes the Hague Evidence Convention *by its own terms* governs extraterritorial discovery,[57] without considering foreign sovereignty interests. At one extreme, the text of the treaty could be interpreted so as to supersede all other methods of discovery requests.[58] At a lesser extreme, the treaty's language could be interpreted to require litigants make first use of the Hague Evidence Convention[59] before utilizing the Federal Rules on discovery.

The second couplet of possible interpretations considers principles of international comity[60] as a guide to judicial enforcement of the

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51. *Id.* at 2554.
52. *Id.* at 2550.
53. *Id.* at 2552.
54. *Id.* at 2554.
55. *Id.* at 2557.
56. *Id.* at 2550.
57. *Id.*
58. *Id.*
59. *Id.*
60. "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895), *cited with approval in* Aerospatiale, *supra* note 1, at 2555 n.27.

Hague Evidence Convention's procedures.[61] International comity then dictates "first resort" be made to the Hague Evidence Convention procedures in *all* cases (despite the provisions being strictly optional pursuant to the terms of the treaty). Lastly, the treaty could be viewed as an undertaking among sovereigns to facilitate discovery, thus protecting litigants' interests in fully preparing cases. As such, an American court should resort to the Hague Evidence Convention when the court deems that course of action to be the most just, after considering the situations of the parties as well as the interests of the concerned foreign state.[62] The majority in *Aerospatiale* adopted this case-by-case approach option.

Discussing all four interpretations of the relationship between the Hague Evidence Convention and the Federal Rules, the Court conceded that the Convention, even by the treaty's own provisions, must at least *apply* to the taking of evidence abroad. The majority overruled the Eighth Circuit Court of Appeals on this point and stated "the Hague Evidence Convention does 'apply' to the production of evidence in a litigant's possession in the sense that it is one method of seeking evidence that a court may elect to employ"[63] in cases involving evidence located abroad.

A. Textual Arguments

With respect to the two options based on textual interpretations, the Court examined the specific wording of the Hague Evidence Convention.

1. Hague Evidence Convention as providing the exclusive means for obtaining extraterritorial evidence.

In a recent case similar to *Aerospatiale*, the Fifth Circuit Court of Appeals in *In Re Anschuetz* reasoned that any intention by the treaty drafters to establish the Hague Evidence Convention procedures as the exclusive means of discovery would have been explicitly stated in the treaty's language.[64] The Supreme Court majority adopted the

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61. Aerospatiale, *supra* note 1, at 2550.
62. *Id.*
63. *Id.* at 2554.
64. *Id.* at 2553, (citing *In Re* Anschuetz & Co., GmbH, 754 F.2d 602, 612 (5th Cir. 1985) *cert. granted*, 107 S. Ct. 3223 (1987) (judgment vacated and case remanded to the Fifth Circuit for further consideration in light of *Aerospatiale*)); *see also* RESTATEMENT (REVISED) § 473 comment b.

Fifth Circuit Court of Appeals' analysis and dismissed petitioners' argument in *Aerospatiale* that plaintiffs must pursue discovery through the Hague Evidence Convention procedures to the exclusion of the Federal Rules.[65] Instead, the Supreme Court found that the permissive rather than mandatory language in the text of the treaty demonstrated the Hague Evidence Convention was intended to provide optional procedures to be used only under certain circumstances.[66] The majority stressed the permissive language of Articles 23[67] and 27.[68]

Additionally, the majority found the Hague Evidence Convention Preamble's permissive language "particularly significant in light of the same body's use of mandatory language in the Preamble to the Hague Service Convention."[69] The Service Convention[70] predates, and serves as a model for,[71] the Evidence Convention; therefore, the Court reasoned, the Evidence Convention drafters could have followed the Service Convention's "shall apply" language if they so intended.[72]

The dissent agreed with the majority opinion in two respects.[73] One, the dissenters found the majority to be correct in rejecting the Hague Evidence Convention as the exclusive means of procuring evidence from abroad. Two, the dissenters agreed that the treaty at least applies to most discovery requests.[74]

Interpretation of a multilateral treaty lies at the heart of *Aerospatiale.* Interestingly, however, the Court did not refer to the Vienna

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65. Aerospatiale, *supra* note 1, at 2553.
66. *See id.* at 2552-53.
67. "A contracting state *may* . . . declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Hague Evidence Convention, *supra* note 2, art. 23 (emphasis added).
68. The provisions of the present Convention shall not prevent a Contracting State from-
(a) declaring that Letters of Request *may* be transmitted to its judicial authorities through [other] channels;
(b) *permitting*, by internal law or practice, any act provided for in this Convention to be performed on less restrictive conditions;
(c) *permitting*, by internal law or practice, methods of taking evidence *other than* those provided for in this Convention.
Id. art. 27 (emphasis added).
69. Aerospatiale, 107 S. Ct. at 2550 n.15.
70. Convention on the Service Abroad of Judicial and Extraterritorial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (codified as FED. R. CIV. P. 4(1)).
71. Amram, *U.S. Ratification*, *supra* note 6, at 104.
72. *Id.*
73. Aerospatiale, *supra* note 1, at 2558.
74. *Id.*

Convention on the Law of Treaties.[75] During 1969, the delegates to the Vienna Convention unanimously voted to adopt the proposed articles relating to treaty interpretation.[76] These Vienna Convention articles establish a hierarchy of considerations to be taken into account in interpreting treaties,[77] and lend support to the Court's primary focus on treaty text. According to the Vienna Convention, tribunals interpreting treaties must give foremost deference to the ordinary meaning of the terms of the agreement.[78] Only after looking to the text of a treaty can interpretations take into account the parties' subsequent agreements, application practices, and any relevant rules of international law.[79]

Legal Counsel for the British Foreign and Commonwealth Office has noted the unanimous vote to adopt the textual approach to treaty interpretation "represents a clear affirmation by the international community that, for purposes of treaty interpretation, prime emphasis must be placed on the text of the treaty as representing the authentic expression of the will of the parties."[80] Yet, to wholly accept the British officer's view of the Vienna Convention's terms as the determinative rules regarding treaty interpretation merely continues a merry-go-round analysis. By what standards does a court interpret the Vienna Convention on treaties? By *that* treaty's own terms? Nonetheless, both the Vienna Convention and the Supreme Court in *Aerospatiale* recognized the text of a treaty must not be taken as the *sole* consideration in determining the extent to which a treaty governs international affairs. Thus, the Supreme Court's focus on the language of the text of the Hague Evidence Convention in *Aerospatiale* generally accords with one aspect of the Vienna Convention.

Nonetheless, in *Factor v. Laubenheimer*, the Supreme Court earlier noted that "in resolving doubts [as to the meaning of a treaty] the

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75. The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, AT 289 (1969), *reprinted in* 8 INT'L. LEGAL MATERIALS 679 (1969), *and in* HENKIN, BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS 264 (1980) [hereinafter The Vienna Convention]. The U.S. joined as the forty-second signatory to the Vienna Convention on April 24, 1974. 9 INT'L LEGAL MATERIALS 654 (1970).

76. Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47, 48 (1970). The Vienna Convention has been described as expressing "in written form the main body of international law relating to treaties." *Id.* at 65. Part III of the Vienna Convention pertains to the observation, application and interpretation of treaties. The Vienna Convention, *supra* note 75, arts. 26-38.

77. *Id.*

78. *Id.*

79. Sinclair, *supra* note 76, at 61.

80. *Id.* at 65.

construction of a treaty by the political department, while not conclusive upon courts called upon to construe it, is nevertheless of weight."[81] Thus, the Court in *Aerospatiale* could have cited its own precedent to support its current approach to treaty interpretation, but the Court did not do so.

While foreseeing that the Hague Evidence Convention would make radical changes in civil law countries, the United States delegate Philip Amram hoped these changes would move the civil law countries closer to resembling "our generous system of judicial assistance . . . [and would be] a great boon to United States courts and litigants."[82] He also declared, "[a]ny changes in the details of internal United States practice will be minimal, while the assistance to United States courts and litigants in other nations will be enlarged."[83]

In *Aerospatiale*, the Court acknowledged the view propounded by the United States delegation that the Hague Evidence Convention sought "to establish a system for obtaining evidence abroad that would be 'tolerable' to the state executing the request and would produce evidence 'utilizable' in the requesting state."[84] In addition, according to the State Department, the Hague Evidence Convention "provides a set of minimum standards with which contracting states agree to comply."[85] Yet, neither the *Aerospatiale* opinion nor the Hague Evidence Convention reports indicate the degree to which the United States government's interpretation accurately reflects a consensus view of the intent among the signatory states. The *Aerospatiale* opinion failed to respect what the delegations from other countries intended the treaty to be. As parties to the agreement, the signatories and their intent prove relevant to the interpretation analysis as a fundamental element of contract law.

The *Aerospatiale* Court had notice of competing concerns among the signatories regarding their intent in adopting the Hague Evidence Convention. Four of the nine amicus curiae briefs in *Aerospatiale* were filed by governments of signatory nations. Three of these countries, France, Germany, and Switzerland, expressed the view that the Hague Evidence Convention was designed to be the exclusive

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81. Factor v. Laubenheimer, 290 U.S. 276, 295 (1933).

82. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 652 (1969).

83. *Id.* at 652 n. 8.

84. Aerospatiale, *supra* note 1, at 2549 (citing Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, S. EXEC. REP. No. 92-95, *reprinted in* 12 INT'L LEGAL MATERIALS 327, 327 (1973).

85. *Letter of Submittal*, *supra* note 6, at 324.

means by which signatory nationals could obtain extraterritorial evidence.[86] The United Kingdom argued that the Hague Evidence Convention only required "first resort" to its provisions.[87] Despite signatory views to the contrary, the Court persisted in placing primary emphasis on the literal language of the Hague Evidence Convention, buttressed only by considerations of the United States government's intent. By ignoring the intent of the other parties to the Hague Evidence Convention, the Court violated a fundamental principle of international contract law,[88] while treating lightly the sovereignty interests of the signatory countries.

Although briefly acknowledging the general international law principle that a treaty's history, including negotiations, and final adopted construction may be relevant to treaty interpretation,[89] the majority did not analyze *Aerospatiale* pursuant to these generally accepted rules. With its analysis of the treaty's text, the majority again also disregarded Supreme Court precedent.[90] The *Aerospatiale* majority offered little explanation for discounting non-textual considerations in interpreting the treaty.

2. *Hague Evidence Convention as requiring first, but not exclusive, use of its procedures.*

The majority opinion in *Aerospatiale* left unclear its reasons for rejecting the position that the Hague Evidence Convention, by the treaty's terms, requires that at least "first resort" be made to the document's procedures. Departing from its four-interpretation analysis, the majority simply voiced disagreement with the Eighth Circuit Court of Appeals' ground for rejecting petitioners' "first resort" argument.[91] Convinced that American courts ordering discovery which

86. *See* Brief for the Republic of France as amicus curiae, Aerospatiale, 107 S. Ct. 2542 (1987) (No. 85-1695) (LEXIS, Genfed library, Brief file); Brief for the Federal Republic of Germany as amicus curiae, Aerospatiale, *supra* note 1, at 2542 (No. 85-1695) (LEXIS, Genfed library, Brief file); Brief for the Government of Switzerland as amicus curiae, Aerospatiale, *supra* note 1, at 2542 (No. 85-1695) (LEXIS, Genfed library, Brief file).

87. *See* Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as amicus curiae, Aerospatiale, *supra* note 2542 (No. 85-1695) (LEXIS, Genfed library, Brief file).

88. According to the long-standing rule of *pacta sunt servanda*, agreements of parties to a contract must be observed. HENKIN, INTERNATIONAL LAW: CASES AND MATERIALS 4 (1980 [hereinafter HENKIN]). *See also* The Vienna Convention, *supra* note 75, art. 26.

89. Aerospatiale, *supra* note 1, at 2550.

90. *See* Arizona v. California, 292 U.S. 341, 359-60 (1934) (noting that "[W]hen the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning.").

91. Aerospatiale, *supra* note 1, at 2554.

a foreign court had refused to produce under the treaty provisions would greatly violate the foreign tribunal's sovereignty, the Court of Appeals refused to require litigants to employ first the Hague Evidence Convention procedures.[92] Providing little explanation for its conclusion, the Supreme Court majority expressed confidence that foreign tribunals will recognize that the final decisions, regarding evidence to be used in American court cases, must be made by American courts.[93] Just as summarily, the majority ruled concern over the potential need to order the production of evidence from abroad should not affect American court's decisions.[94]

The dissenting opinion, on the other hand, did briefly address the second text-based argument initially listed but not discussed by the majority. According to the dissent, litigants should utilize the Hague Evidence Convention as a favored method. Although the dissenters stopped short of adopting a per se rule of "first resort,"[95] they would require a trial court to refrain from requiring the use of the treaty's procedures only when no evidence located in a foreign country would be produced.[96] The dissenters maintained the treaty provisions themselves in most cases serve to resolve conflicts between the Hague Evidence Convention and the Federal Rules.[97] Thus, reasoned the minority, American courts usually need not resort at all to comity principles.[98] Moreover, the dissenters observed that had the parties to the Hague Evidence Convention expected the treaty would not be utilized as the normal means of requesting extraterritorial evidence, the signatories would have had no incentive to ratify it.[99] Although neither the dissenters nor the majority acknowledged the Vienna Convention, that treaty clearly recognized this expectation of parties to an international agreement.[100]

B. International Comity Concerns

1. International comity principles as requiring automatic "first resort" to the Hague Evidence Convention.

Principles of international law regarding treaty interpretation notwithstanding, the majority also rejected, on comity grounds, peti-

92. *Id.*
93. *Id.*
94. *Id.* at 2555.
95. *Id.* at 2568.
96. *Id.* at 2567.
97. *Id.* at 2559.
98. *Id.*
99. *Id.*
100. *See* The Vienna Convention, *supra* note 75, art. 26.

tioners' argument that the Court uphold an automatic "first resort" rule in extraterritorial discovery request cases. Citing Federal Rule 1, which mandates procedures be enforced to ensure *inter alia* the speedy resolution of legal disputes, the Court declared requiring first use of the Hague Evidence Convention's letter of request procedures would be "unduly time consuming and expensive."[101] The dissent, however, rejected the majority's assumption as being mere speculation unsupported by the record.[102] Furthermore, Justice Blackmun wrote: "Unless the costs become prohibitive, saving time and money is not such a high priority in discovery that some additional burden cannot be tolerated in the interest of international goodwill. Certainly discovery controlled by litigants under the Federal Rules of Civil Procedure is not known for placing a high premium on either speed or cost-effectiveness."[103] The dissent, however, did not provide examples of what *would* constitute "prohibitive" costs, nor did it elucidate what recourse may be taken against a party attempting to make cost-prohibitive discovery requests.

Despite declaring a comity analysis unnecessary absent a conflict of laws left unresolved by the terms of the treaty,[104] the dissenting opinion discussed at length the importance of honoring the sovereignty interests of signatory countries.[105] Requiring use of the Hague Evidence Convention provisions serves to uphold these sovereignty interests, according to the dissent, because the signatory nations' ratification of the treaty signifies their consent to be governed by it.

Moreover, Justice Blackmun wrote: "The [Hague Evidence] Convention serves the long-term interests of the United States in helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems."[106] According to the dissent, use of the Hague Evidence Convention meets the United States interest in providing litigants with effective procedures by which to obtain extraterritorial evidence,[107] while at the same time respects the differences between common law and civil law-style discovery methods.[108] More broadly, the dissent maintained enforcement of the use of the Hague Evidence Convention procedures "will avoid foreign perceptions of unfairness

101. Aerospatiale, *supra* note 1, at 2555.
102. *Id.* at 2565.
103. *Id.*
104. *Id.* at 2562.
105. *Id.* at 2562-64.
106. *Id.* at 2559.
107. *Id.* at 2564.
108. *Id.* at 2563-64.

that result when United States courts show insensitivity to the interests safeguarded by foreign legal regimes."[109]

Nowhere in *Aerospatiale* did the Supreme Court consider its holding in an earlier case, that "[c]onsiderations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them."[110] International law imposes, on parties to international agreements, a positive duty of good faith, regardless of the exact language of the text.[111] The United Nations has declared every nation "has a duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law."[112] Similarly, the American Law Institute has stated "[a]n international agreement is binding in accordance with its terms and each party has a duty to give them effect . . . . "[113] The Vienna Convention also expressly recognized a duty of good faith to be exercised in upholding international agreements.[114] The Supreme Court in *Aerospatiale* simply failed to honor these fundamental and widely respected principles of international law.

2. *International comity principles as requiring "first resort" to the Hague Evidence Convention only in certain circumstances.*

In declining the petitioners' "proposed general rule" that "first resort" must always be made to the Hague Evidence Convention procedures, the Supreme Court, however, did recognize notions of international comity require in each case, "a more particularized

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109. *Id.* at 2568.

110. Factor v. Laubenheimer, 290 U.S. 276, 293 (1933).

111. HENKIN, *supra* note 88, at 615 (quoting the International Law Commission 1966 commentary stating that "good faith" is an integral component of the *pacta sunt servanda* rule.); *see id.* at 4 (discussion of *pacta sunt servanda* rule); The Vienna Convention, *supra* note 75, art. 26.

112. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States With the Charter of the United Nations* (Resolution 2625 (XXV), adopted on October 24, 1970), *reprinted in* 9 INT'L LEGAL MATERIALS 1292, 1297 (1970).

113. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES SECOND § 138 (1965). "If an orderly system of international legal relations is going to be effective it must have as a postulate that the parties to an international agreement commit themselves in good faith to carry out its terms. This has been recognized from the beginning of the development of international law." *Id.* comment a.

114. *See* The Vienna Convention, *supra* note 75, art. 26.

analysis of the interests of the foreign nation and the requesting nation."[115] Surely, to proceed otherwise would render the treaty practically meaningless. For guidance, the majority relied on the Restatement on Foreign Relations Law. According to the majority, although the Restatement "may not represent a consensus of international views," it nonetheless provides in Section 437 relevant criteria by which to analyze comity considerations.[116] Yet, the Court never directly matched its analysis against the very criteria it cited from the Restatement.

Section 437, with regard to conflicts of jurisdiction, serves to illustrate the general "reasonableness" principle adopted by the Restatement in sections 402 and 403.[117] The reporters for the Restatement noted,

> [t]he degree of friction created by discovery requests . . . and the differing perceptions of the acceptability of American-style discovery under national and international law, suggest some efforts to moderate the application abroad of U.S. procedural techniques, consistent with the *overall* principle of reasonableness in the exercise of jurisdiction.[118]

Thus, the five criteria of Section 437 cited by the Court[119] should not necessarily be considered without regard for other Restatement sections.

In addition to the criteria given in Section 437, the Restatement also includes among the considerations to be weighed in the "reasonableness" balancing process:

- the existence of justified expectations that might be protected or hurt by the regulation in question;
- the importance of regulation to the international political, legal or economic system; (. . .) and

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115. Aerospatiale, *supra* note 1, at 2555.
116. *Id.*
117. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 403 comment h (Tent. Draft. No. 6, 1985).
118. *Aerospatiale*, 107 S. Ct. at 2556 n.29 (citing RESTATEMENT (REVISED) § 437 reporter's note 5) (emphasis added).
119. (1) the importance to the . . . litigation of the documents or other information requested;
(2) the degree of specificity of the request;
(3) whether the information originated in the United States;
(4) the availability of the alternative means of securing the information; and
(5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.
Aerospatiale, *supra* note 1, at 2556 (quoting RESTATEMENT (REVISED) § 437).

- the likelihood of conflict with regulation by other [international] states.[120]

Illustrations of Restatement "reasonableness" include those pertaining to the jurisdiction to tax and the jurisdiction to apply antitrust laws. "[F]or instance, a tax on a nonresident alien only temporarily present within a state, measured by his world-wide income, would be a violation of international law."[121] Similarly, in the antitrust context, effect on United States commerce, demonstrated by "participation in an activity or agreement by U.S. nationals or corporations" goes toward a showing of reasonableness in exercising jurisdiction.[122]

Having acknowledged the Restatement Section 437 factors, the Court in *Aerospatiale* failed to analyze the case with any direct comparison of the *Aerospatiale* facts and these or any other Restatement factors pertaining to reasonableness. The Court concluded that deciding whether resort must be made to the Hague Evidence Convention remains "a matter of prior scrutiny [by the trial court] in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will be effective."[123] The Court's list of factors, albeit not discordant with those enumerated in the Restatement, remain considerably more general. With this case-by-case standard, the majority offered little enlightenment as to whether the Court intended to adopt or reconstrue the Restatement principles. According to the dissent, when a treaty has been negotiated to accommodate the differences between legal systems, the comity analysis set forth in the Restatement, merely adds an unnecessary layer of analysis.[124] Even if a lower court is to be guided by the Restatement in applying the majority's case-by-case analysis, the opinion does not explain to what extent the comity factors apply. As the dissent asserted, the majority's opinion failed to direct lower courts in this regard.[125] The majority opinion thus leaves lower court judges with rather unbridled discretion in extraterritorial discovery cases.

The majority concluded that "[s]ome discovery procedures are much more 'intrusive' than others".[126] Yet, the opinion rather con-

120. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 403(2)(d), (e), (f), (h) (Tent. Draft No. 6, 1985).
121. *Id.* § 411 comment c at 215.
122. *Id.* § 415 comment a at 247.
123. Aerospatiale, *supra* note 1, at 2556.
124. *Id.* at 2562.
125. *Id.* at 2558.
126. *Id.* at 2556.

fused the intrusiveness of procedures with the intrusiveness of the particular requests made pursuant to the procedures (be these procedures those of the Federal Rules or of the Hague Evidence Convention). The majority suggested a discovery request for production of all design specifications, drawings, and engineering plans concerning defendants' aircraft parts would be unreasonable in scope.[127] The Court, however, intimated that a request for responses to "simple" interrogatories or requests for admissions would not be impermissibly intrusive.[128] The illustrations given by the Court thus appear to go to the reasonableness of the extensiveness of the request, not of the procedures by which the requests are made. The amount of evidentiary information which a litigant attempts to retrieve by way of discovery requests differs from the means by which the requesting party seeks that evidence. Moreover, the majority left unresolved whether the Hague Evidence Convention procedures or the Federal Rules best protect litigants from unreasonable requests, however defined. The Court merely concluded:

> The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.[129]

A trial court's job will include exercising "special vigilance" in protecting foreign litigants from unnecessary, overly burdensome, or invidiously motivated discovery requests.[130] As an example of a potential means of abusive extraterritorial discovery, the majority referred to the additional monetary costs attendant to transporting witnesses or documents as a possible source of abusive extraterritorial discovery requests.[131] Again, however, this goes to the scope of the request more than to the means by which litigants make the request. More importantly, these types of considerations practically mirror those stated in Federal Rule 26(b)(1).[132] To suggest that the very limits on scope of discovery contained within the Federal Rules are to direct a trial court's analysis, threatens to render the Hague Evidence Convention simply meaningless.

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127. *Id.* at 2558.
128. *Id.*
129. *Id.*
130. *Id.* at 2557.
131. *Id.*
132. A court may limit discovery which is unreasonably cumulative, inconvenient, burdensome, or expensive to produce. FED. R. CIV. P. 26(b)(1).

In adopting this case-by-case approach with regard to such discovery processes, the majority noted: "[We] do not articulate specific rules to guide this delicate task of adjudication."[133] Recognizing the task as "delicate," however, does little to resolve the issue of the tension between the two competing sets of procedures.

In viewing the Hague Evidence Convention as representing the result of effort by the United States executive and legislative branches to advance international cooperation among sovereigns, the dissent asserted that the adopted treaty stands in the United States as "a political determination—one that, consistent with the [constitutional] principle of separation of powers, courts should not attempt to second guess."[134] Furthermore, even assuming the majority's case-by-case test passes constitutional muster, the dissent expressed the view that the Court placed undeserved trust in courts' abilities to weigh properly the competing interests at stake in international litigation. Claiming courts suffer from a "pro-forum bias,"[135] the dissent found trial court judges to be "ill equipped to assume the role of balancing the interests of foreign nations with that of their own."[136]

Concerned with ensuring the preservation of sovereignty interests, the dissenters apparently feared the potentially excessive exercise of American judicial supervision of discovery requests in international law$uits. Justice Blackmun expressed hope "that courts faced with discovery requests for materials in foreign countries will avoid the parochial views that too often have characterized the decisions to date."[137] Unfortunately, particularly in light of the opinion having ignored the Vienna Convention, the Supreme Court's endorsement of a case-by-case standard in *Aerospatiale* perpetuated rather than rejected these parochial views.

VII. Impact on American State Court Cases

The majority directed its case-by-case standard to "American Courts" generally.[138] Yet, the plaintiffs in *Aerospatiale* brought their actions in a U.S. federal district court. Hence, the Court faced the task of reconciling the Hague Evidence Convention with the Federal

133. Aerospatiale, *supra* note 1, at 2557.
134. *Id.* at 2560.
135. *See id.* at 2560 n.4.
136. *Id.* at 2560.
137. *Id.* at 2568.
138. *Id.* at 2557.

Rules. Technically, any other discussion would be dictum. The question therefore remains as to what extent the *Aerospatiale* decision will influence state courts in the determination of the applicability of the Hague Evidence Convention procedures. The United States Constitution expressly puts international treaties on equal footing with federal laws.[139] Treaties are "the Supreme law of the land."[140] State statutes and state court decisions do not enjoy this status.[141] "States do not make treaties and cannot by legislative act interfere with the proper observation of treaties nor destroy rights created thereby."[142] It would thus appear any state rules of procedure would be superceded by the Hague Evidence Convention to the extent of any conflict.

Thus, even a state which has adopted the federal rules verbatim may find itself without authority to impose its procedural rules in lieu of the Hague Evidence Convention provisions. This situation leaves an anomalous result in states which adopt the Federal Rules as their own rules of procedure. *Aerospatiale* did not address this possibility; nonetheless, this potentiality leaves plaintiffs with a precarious choice. A plaintiff seeking evidence from a party located abroad may have a better chance of succeeding in using the Federal Rules rather than the Hague Evidence Convention as the discovery means, if the action has been brought in a federal district court. Plaintiffs in state court actions run the risk of being forced to utilize the less familiar Hague Evidence Convention procedures. Time will tell whether the *Aerospatiale* decision will result in increased filings of extraterritorial actions in federal rather than state courts.

CONCLUSION

In *Aerospatiale*, the Supreme Court of the United States rejected an interpretation recognizing the Hague Evidence Convention to be the exclusive authority governing extraterritorial discovery requests. The Court also declined to require litigants always make "first resort" to the Hague Evidence Convention procedures. In so holding, the Court has departed from the view of most state courts and federal district courts in the United States. The Supreme Court adopted a

139. U.S. CONST. art. VI.
140. *Id.*
141. Gibbons v. Ogden, 22 U.S. 1 (9 Wheat. 1) (1824).
142. Clark v. Pigeon River Improvement Slide & Boom Co., 52 F.2d 550, 556 (8th Cir. 1931).

case-by-case "reasonableness" test to restrict the applicability of the Hague Evidence Convention. The *Aerospatiale* opinion has directed trial courts to limit applicability of the treaty to those instances when the judges find the Hague Evidence Convention would be more effective than the Federal Rules in securing evidence from abroad.

Concededly, the drafters of the Hague Evidence Convention did not unanimously agree that the treaty should preclude all other discovery rules.[143] By failing to state the treaty in express, mandatory terms, the drafters left room for judicial interpretation which may not coincide with the signatories' intentions. Evidenced by the treaty's preamble, the delegates to the Hague Evidence Convention aimed to prescribe procedures which would facilitate obtaining evidence located in foreign countries for use in litigation in the United States.[144]

With *Aerospatiale*, the Supreme Court has not entirely precluded use of the Hague Evidence Convention, nor has the Court completely disregarded notions of international comity. The Court instead has attempted to strike a balance between a litigant's interest in obtaining evidence located in a foreign country, and the sovereignty interests of signatory nations.

To say the Hague Evidence Convention procedures "apply" to cases in which a United States court has personal jurisdiction, however, does little to assist American practitioners in determining to what extent the treaty provisions govern extraterritorial discovery requests. The Court's case-by-case test only provides some broad general guidelines, and the opinion offers but a few illustrations of reasonable and unreasonable discovery attempts.

The case-by-case standard grants lower court judges the discretion to invoke the Hague Evidence Convention provisions only to the extent they mirror those of the Federal Rules of Civil Procedure. The Supreme Court's grant of substantial discretion thus leaves open the potential of the Hague Evidence Convention being rendered completely superfluous in cases brought in American courts. The United States, as a signatory nation to the treaty, should not disregard the Hague Evidence Convention provisions, because to do so greatly increases the risk of an already prevalent friction between the United States and other signatories. *Aerospatiale* to some degree at least has settled the controversy as to the current American judicial view. Yet, the Supreme Court's adoption of a case-by-case standard necessitates

143. *See supra* notes 82-87 and accompanying text.
144. Hague Evidence Convention, *supra* note 2.

further common law development to provide litigants who bring actions in American courts with a clearer conception of which set of discovery procedures to utilize in obtaining evidence from abroad.

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