FIVE YEARS AFTER AÉROSpatiale:
RETHINKING DISCOVERY ABROAD IN CIVIL AND
COMMERCIAL LITIGATION UNDER THE
HAGUE EVIDENCE CONVENTION AND THE
FEDERAL RULES OF CIVIL PROCEDURE

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1. INTRODUCTION

In 1987, the United States Supreme Court in Société Nationale Industrielle Aérospatiale v. United States District Court1 considered whether U.S. courts should apply the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,2 rather than the discovery provisions

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The Convention’s principal method for obtaining evidence is the “Letter of Request.” See Convention, art. 1. The Convention also permits the taking of evidence by commissioners or consular agents. See Convention, art. 15. For discussion of the Convention and its procedures, see infra notes 78-95 and accompanying text.

The following twenty-one nations have entered into the Convention: Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, Mexico, Monaco, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, the United Kingdom, and the United States. MARTINDALE-HUBBELL LAW DIRECTORY (1992).
of the Federal Rules of Civil Procedure, when discovery is sought from a party subject to a U.S. court's jurisdiction and needed evidence, though located abroad, will be produced in the United States. Academic commentary on the subject at the time often reflected the belief that the Convention provided the exclusive or mandatory means of obtaining evidence.

3 Methods of obtaining evidence under the Federal Rules of Civil Procedure [hereinafter "Federal Rules" or "Rules"] include FED. R. CIV. P. 30 (Depositions Upon Oral Examination); FED. R. CIV. P. 31 (Depositions Upon Written Questions); FED. R. CIV. P. 33 (Interrogatories to Parties); FED. R. CIV. P. 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes); FED. R. CIV. P. 35 (Physical and Mental Examination of Persons); and FED. R. CIV. P. 36 (Requests for Admissions).

4 The Aérospatiale Court did not address whether litigants would be required to take evidence under the Federal Rules of Civil Procedure or the Hague Evidence Convention when the needed evidence will be taken in, as opposed to from, a signatory nation. See GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 329 (1989) (noting that although "[t]he Aérospatiale Court left [this] question open [, m]ost authorities have concluded that the Convention must be used when the physical act of discovery occurs abroad”). For an example of a lower court decision reaching precisely this conclusion, see Jenco v. Martech Int'l, Inc. 1988 U.S. Dist. LEXIS 4727 (E.D. La. May 19, 1988) (Convention used for depositions taken in Norway). When evidence is sought from foreign non-parties, lower courts have required that discovery proceed under the Convention. See, e.g., Rich v. KIS California, Inc., 121 F.R.D. 254, 257 (M.D.N.C. 1988).

5 See Comment, The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad, 132 U. PA. L. REV. 1461, 1463 (1984) (contending that because “the Convention takes precedence over federal and state rules of civil procedure, American courts may only order discovery pursuant to the terms of the Hague Evidence Convention”). Several Evidence Convention signatory nations took a similar position in the Aérospatiale case. See, e.g., Aérospatiale, 482 U.S. at 529 n.11 (quoting Brief for Republic of France as Amicus Curiae at 4) (“THE HAGUE CONVENTION IS THE EXCLUSIVE MEANS OF DISCOVERY IN TRANSTHERRAL LITIGATION AMONG THE CONVENTION'S SIGNATORIES UNLESS THE SOVEREIGN ON WHOSE TERRITORY DISCOVERY IS TO OCCUR CHOOSES OTHERWISE.”). Use of the word “unless” in France's amicus brief refers to Article 27 of the Convention. For a discussion of Article 27, see infra notes 104-05, 119-121 and accompanying text.

located within the territory of another signatory nation. U.S. courts, however, often differed regarding the Convention's proper role in civil and commercial litigation in the United States.\(^7\)

Evidence Convention, 69 B.U. L. Rev. 1011, 1064 (1989) (arguing that the Convention "provides mandatory procedures for obtaining evidence abroad").


At the appellate level, at least one court recognized the difficulty of balancing competing sovereign interests. See, e.g., Daimler-Benz Aktiengesellschaft v. United States District Court, 805 F.2d 340 (10th Cir. 1986); Société Nationale Industrielle Aérospatiale v. United States District Court, 788 F.2d 1408 (9th Cir. 1986), vacated as settled, 823 F.2d 382 (9th Cir. 1987); Société Nationale Industrielle Aérospatiale v. United States District Court, 782 F.2d 120 (8th Cir. 1986), vacated, 482 U.S. 522 (1987); In re Anschuetz & Co. GmbH, 754 F.2d 602 (5th Cir. 1985), vacated and remanded for further consideration, 483 U.S. 1002 (1987); In re Messerschmitt Bolkow Blohm, GmbH, 757 F.2d 729 (5th Cir. 1985).


\(^8\) Confusion about the Hague Evidence Convention's proper role in U.S. civil and commercial litigation is not surprising. The Convention is a treaty, see Message from the President of the United States Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 12 I.L.M. 323 (1973), and thus, under the Supremacy
Aérospatiale was an action for damages based on negligence, breach of warranty, and products liability resulting from the crash of a French manufactured airplane in Iowa, in which the pilot and a passenger were injured. Upon the parties' consent, the District Court for the Southern District of Iowa consolidated the actions and referred the case to a Magistrate. Petitioners, two French corporations, responded to plaintiffs' first discovery request, which sought admissions and production of documents located in the United States, and also made discovery requests of their own under the Federal Rules of Civil Procedure. However, when plaintiffs served petitioners with a second discovery request, this time seeking admissions, answers to interrogatories, and production of documents located in France, petitioners filed a

Clause, is "the supreme Law of the Land." U.S. CONST., art. VI, cl. 2. However, the Federal Rules of Civil Procedure, like the Convention, also have the force of federal law. See Rules Enabling Act, 28 U.S.C. § 2072 (1988). When two federal laws conflict, the "last in time" rule normally determines which law is paramount. See BORN & WESTIN, supra note 4, at 14. Under the "last in time" rule, "a treaty supersedes prior federal statutes." Id. at 14. The United States acceded to the Convention in 1972, long after enactment of the original Federal Rules of Civil Procedure in 1934. However, the U.S. Supreme Court approved an amendment to Rule 26 in 1983. Although the amended rule should supersede the Convention under the "last in time" rule, "the Supreme Court has held that 'a treaty will not be deemed to have been abrogated or modified by a latter statute unless such purpose on the part of Congress has been clearly expressed.' " Comment, supra note 5, at 1484 (citation omitted). Congress, however, did not indicate whether the amended Rule 26 was to supersede the Convention.

Whether the Hague Evidence Convention supersedes the Federal Rules of Civil Procedure is further complicated by the ambiguous nature of the Convention. The Convention is unclear about whether it is exclusive, mandatory, or optional; whether it applies to parties and to non-parties; and whether it is applicable when evidence is to be taken from, as opposed to in, a signatory nation. See generally Joseph F. Weis, Jr., The Federal Rules and The Hague Conventions: Concerns of Conformity and Comity, 50 U. PITT. L. REV. 903 (1989).

8 Brief for Respondent, No. 85-1695.
9 Aérospatiale, 482 U.S. at 525.
10 Id.
11 Id.
12 Société Nationale Industrielle Aérospatiale is a corporation owned by the French government. Société de Construction d'Avions de Tourisme is a wholly owned subsidiary of Société Nationale Industrielle Aérospatiale. Id. at n.2.
13 See Aérospatiale, 482 U.S. at 525 n.4.
14 Id. Petitioners deposed witnesses and parties, served interrogatories, and requested documents.
motion for a protective order, contending that requests for evidence located within French territory must be made in accordance with the Hague Evidence Convention. Petitioners further asserted that responding to plaintiffs' request under the Federal Rules of Civil Procedure would subject them to fines under French penal law.

After the Magistrate denied the motion for a protective order and ordered petitioners to comply with the discovery requests, petitioners sought a writ of mandamus from the Court of Appeals for the Eighth Circuit. The Court of Appeals held that the Evidence Convention is inapplicable when a U.S. court has personal jurisdiction over a party from whom discovery is sought and needed evidence, though located abroad, will be produced in the United States. The Court of Appeals also denied petitioners' application for a writ of mandamus against the Magistrate. Petitioners then appealed to the Supreme Court.

Id.

The French statute provides in pertinent part:

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

Id. at 526 n.6 (quoting French Penal Code Law No. 80-538, art. 1A).

The French "blocking statute," which provides for fines for its violation, was enacted because the French government was "[a]ngered by the fact that 'the terms of the Hague [Evidence] Convention ... were frequently disregarded by American litigants ...' " Comment, supra note 5, at 1481 (quoting Brigitte E. Herzog, The 1980 French Law on Documents and Information, 75 AM. J. INT'L L. 382, 382 (1981)).

See Aérospatiale, 482 U.S. at 526-27. The Magistrate "balanced the interests in the 'protection of United States citizens from harmful foreign products and compensation for injuries caused by such products' against France's interest in protecting its citizens 'from intrusive foreign discovery procedures' [and] concluded that the former interests were stronger, particularly because compliance with the requested discovery will 'not have to take place in France' and will not be greatly intrusive or abusive." Id. at 527 (citations omitted).

Id.

Despite a 5-4 decision, the Aérospatiale Court unanimously agreed that the Hague Evidence Convention does not provide the exclusive or mandatory means of taking evidence located abroad. However, as reflected by the 5-4 vote, the Justices differed regarding when the Convention should be applied. Justice Stevens, writing for the majority, held that the Convention "appl[ies] 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." Accordingly, Justice Stevens instructed lower courts faced with foreign discovery requests to conduct a "particularized" comity analysis on a case-by-case basis to determine whether resort to the Convention is appropriate. In a separate opinion, Justice Blackmun, concerned that the majority's approach would too frequently result in use of the Federal Rules of Civil Procedure instead of the Convention, recommended a presumptive "first resort" rule requiring courts to employ the Convention unless its procedures would clearly fail

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20 Justice Stevens delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, Powell, and Scalia. Justice Blackmun filed an opinion concurring in part and dissenting in part, in which Justices Brennan, Marshall, and O'Connor joined.

21 Aérospatiale, 482 U.S. at 541.

22 This Comment employs the terms "foreign discovery requests" and "foreign evidence" to refer to evidence sought from, or located in, a signatory nation.

23 Aérospatiale, 482 U.S. at 543.

24 For descriptions of comity and a discussion of the factors the Aérospatiale majority suggested should be used in conducting a comity analysis, see infra notes 128-33 and accompanying text.

25 The Court also noted that the existence of a foreign blocking statute does not, by itself, preclude discovery under the Federal Rules of Civil Procedure. See Aérospatiale, 482 U.S. at 544 n.29. Indeed, U.S. courts have long held that they have the power to order production of evidence located abroad, despite the existence of such statutes. See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-05 (1958).

26 For discussion of the Aérospatiale majority opinion, see infra notes 98-111, 115-39 and accompanying text.

27 Aérospatiale, 482 U.S. at 549. For discussion of the Aérospatiale minority opinion, see infra notes 112-14 and accompanying text.

https://scholarship.law.upenn.edu/jil/vol13/iss3/3
to produce the needed evidence. 28

In the five years since Aérospatiale, scholars, 29 student commentators, 30 and practitioners 31 have questioned the reasoning and result of the majority opinion. As some have noted, the Supreme Court's failure to give the Evidence Convention greater effect in U.S. litigation raises serious questions about the United States' respect for foreign judicial sovereignty, 32 its interest in improving international judicial

28 On remand, the District Court required the plaintiffs to conduct discovery under the Convention. However, the District Court set a limit on the amount of time petitioners and French authorities would have to comply with plaintiffs' discovery request. The needed evidence was produced within this allotted time period. See Lawrence N. Minch, U.S. Obligations Under the Hague Evidence Convention: More Than Mere Good Will?, 22 INT'L LAW. 511, 527 n.68 (1988).

29 See, e.g., Edwin R. Alley & Darrell Prescott, Recent Developments in the United States Under the Hague Evidence Convention, 2 LEIDEN J. INT'L L. 19, 34 (1989) (expressing the "hope[] that the Aérospatiale decision will not tend to erode existing cooperative relationships"); George A. Bermann, The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision, 63 TUL. L. REV. 525, 526 (1989) (describing the Aérospatiale Court's decision as "a disappointment"); Weis, supra note 8, at 928 (contending that "[t]he current state of the law in the courts of this country [after the Aérospatiale decision] is not satisfactory").


31 See BORN & WESTIN, supra note 4, at 331 (describing the Aérospatiale majority opinion as "loosely-reasoned"); Joseph P. Griffin & Mark N. Bravin, Beyond Aérospatiale: A Commentary on Foreign Discovery Provisions of the Restatement (Third) and the Proposed Amendments to the Federal Rules of Civil Procedure, 25 INT'L LAW. 331 (1991) (contending that "[t]he majority opinion... creates an undesirable and unworkable framework" for taking evidence located in signatory nations); see Minch, supra note 28, at 527 (concluding that "increased friction with our principal European trading partners over U.S. demands for documents and information located abroad appears inevitable" as a result of the Aérospatiale decision).

32 See, e.g., Weis, supra note 8, at 930 (contending that "[t]he casual American approach to what [other] countries regard as essential attributes of [their judicial] sovereignty does little to inspire confidence by those
cooperation, and its willingness to honor treaty obligations.

The general discovery provision of the Federal Rules of Civil Procedure has never specifically addressed the taking of evidence abroad. However, soon after Aérospatiale, the Advisory Committee on Civil Rules began considering whether to amend the general discovery provision to provide U.S. courts with guidance in this area. As a result of these deliberations, an amendment to Rule 26(a) largely adopting the "first resort" approach proposed by Justice Blackmun in his concurring and dissenting opinion in Aérospatiale was published for public comment. The amendment was later revised to provide that "discovery shall be conducted by methods authorized by the [Evidence Convention] unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the [Convention]."

See Letter from Edwin R. Alley, Esq., Carpenter, Bennett & Morrissey to Judge Joseph F. Weis, Jr., Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit (Apr. 11, 1990) (noting that at least one nation contemplated acceding to the Evidence Convention before deciding otherwise because it viewed the Court's Aérospatiale decision "as a message that the U.S. does not take its treaty obligations seriously").

Most relevant to the issue in Aérospatiale, Rule 26(a) provides no guidance on how U.S. courts should respond when confronted with requests to take evidence from, or in, nations whose governments have signed a treaty with the United States governing such matters. See, e.g., Weis, supra note 8, at 930 (noting the "silence" of the Federal Rules of Civil Procedure regarding the Hague Evidence Convention).

See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 127 F.R.D. 237, 318 (1989) [hereinafter Preliminary Draft]. This amendment was published and released for public comment in the fall of 1989. However, the amendment was later withdrawn. See Gary Born, Fishing for Trouble In Foreign Depths, LEGAL TIMES, Apr. 8, 1991, at 29. The amendment is set forth infra note 145.

This Comment examines the Aérospatiale decision and considers whether the Federal Rules of Civil Procedure should be amended to provide the Hague Evidence Convention with a greater role in U.S. civil and commercial litigation. Section 2 of this Comment provides background information for reconsidering the role of the Convention by briefly comparing evidence gathering techniques employed in the United States with techniques employed in civil law countries, such as Germany, so as to underscore the firmly entrenched institutional differences that the Evidence Convention attempts to bridge. Section 2 will also describe the Letter of Request, the principal method of taking evidence abroad both before and in the absence of the Hague Evidence Convention. Section 2 will then review events prior to the adoption of the Convention, consider the Convention's scope, and review the

Court. See infra note 170 and accompanying text. However, the proposed amendment was ultimately returned to the Advisory Committee for further study. Telephone Interview with Joseph F. Spaniol, Jr., Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Dec. 31, 1991). The amendment is set forth in the text accompanying infra note 169.

It should be noted that there are also significant differences between evidence gathering procedures employed in the United States and procedures employed in other common law countries. However, because the Evidence Convention was principally designed to bridge the gap between civil and common law practices of taking evidence, this Comment does not discuss procedures employed in other common law nations. For a discussion of taking evidence in other common law countries, see Lawrence Collins, Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States, 13 INT'L LAW. 27 (1979). For an account of one U.S. practitioner's experience taking evidence in England under the Hague Evidence Convention, see Charles Platto, Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide, 16 INT'L LAW. 575 (1982).


The exact scope of the Hague Evidence Convention has been the subject of substantial debate. See infra note 78.
Convention's procedures for taking evidence located in other signatory nations.

Section 3 of this Comment will examine the U.S. Supreme Court's decision in Société Nationale Industrielle Aérospatiale v. United States District Court, which held that the Hague Evidence Convention is not the exclusive or mandatory means of obtaining evidence located abroad. Section 4 will examine recent efforts of the Advisory Committee on Civil Rules to amend Rule 26(a) to address the role of the Convention and other international agreements in U.S. courts. This Comment in conclusion proposes modifications to Justice Blackmun's "first resort" rule and suggests that incorporating such an approach into the Federal Rules of Civil Procedure would serve the interests of the United States in its relations with present and potential signatory nations, while still protecting litigants proceeding with discovery under the Hague Evidence Convention from unfair disadvantage and unreasonable cost or delay.

2. BACKGROUND

2.1. Taking Evidence in the United States

Discovery under the Federal Rules of Civil Procedure is conducted by the parties prior to trial and is intended to occur with relatively limited judicial supervision. The scope of permissible discovery is quite broad. Parties may obtain information that will be admissible as evidence at trial and even inadmissible information, provided that such information "appears reasonably calculated to lead to the discovery of admissible evidence." Permitting such extensive pre-trial discovery provides the parties with "[m]utual knowledge of all the relevant facts gathered by both parties and is essential to

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42 See, e.g., Jack H. Friedenthal et al., Civil Procedure § 7.2 (1985).
44 See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.").
45 Id.
proper litigation. If the parties are fully informed of all relevant facts, there is a greater likelihood, at least in theory, that the matter will be settled by the parties before trial. Alternatively, when a case goes to trial, broad discovery may ensure a more effective and just resolution of the litigation than if relevant evidence first comes to the attention of a party at trial. Failure to respond to discovery requests can result in sanctions, which may include a default judgment against the disobedient party.

Despite its lofty goals, the extensive scope of U.S. discovery has often been criticized as overly "costly, time-consuming, and wasteful." As some commentators have noted, the scope of discovery is almost so broad as to allow "fishing expeditions" because parties may, in some cases, attempt to use discovery to determine whether a claim can successfully be brought against an opponent. Moreover, the broad scope of discovery also renders U.S. evidence taking procedures susceptible to other forms of abuse, such as when a party serves an opponent with a large number of discovery requests in an attempt to force the opponent into prematurely settling or abandoning a claim because of the time and expense involved in responding to the requests.

2.2. Taking Evidence in Civil Law Countries

Unlike the United States, civil law countries do not have
pre-trial discovery,\(^5\) juries, nor even U.S.-style trials.\(^6\) Moreover, the judge in civil law countries plays a somewhat different role in civil and commercial matters than her U.S. counterpart.\(^5\) In particular, unlike a U.S. judge, who may have little if any part in the process of gathering evidence, judges in civil law countries generally have exclusive control over the taking of evidence.\(^5\)

The central role of civil law judges in evidence gathering reflects three fundamental concerns of civil law nations. First, civil law countries place great importance on protecting the privacy of parties and non-parties to litigation.\(^5\) Second, there is a tradition in civil law countries of largely using an "inquisitorial" system, under which the judge, not the representatives of the parties, generally questions witnesses\(^5\) and determines whether additional evidence is necessary to properly decide the case.\(^5\) Third, there is a belief, illustrated by German law, that a party should not be required to assist an opponent in building his or her case.\(^5\) Thus, when a


\(^{52}\) See Langbein, supra note 40; Heck, supra note 40, at 240. Another significant distinction between the German and American legal systems is that, in Germany, "the losing party . . . bear[s] court costs and reimburse[s] its opponent's attorneys' fees." Id. at 240 n.49 (citations omitted).

\(^{53}\) See, e.g., Langbein, supra note 40, at 826-27 (discussing the role of the judge in German civil and commercial litigation).

\(^{54}\) Id.

\(^{55}\) See Heck, supra note 40, at 241 n.52 (citation omitted).

\(^{56}\) See Langbein, supra note 40, at 247.

\(^{57}\) See Heck, supra note 40, at 243. Additionally, the testimony of witnesses is not transcribed by a reporter, as normally occurs in a U.S. court. Instead, the record contains the judge's summarization of the witness's testimony. See Letter of Submittal from Secretary of State William P. Rogers to President Nixon (Nov. 9, 1971), S. EXEC. DOC. A, 92d Cong., 2d Sess. (Feb. 1, 1972), reprinted in 12 I.L.M. 324 (1973) [hereinafter Letter of Submittal] (stating that "the civil law technique results normally in a resume of the evidence, prepared by the executing judge and signed by the witness, while the common law technique results normally in a verbatim transcript of the witness's testimony certified by the reporter").

\(^{58}\) See Heck, supra note 40, at 242.

\(^{59}\) Under German law, "a party is not required to help its opponent to victory by making available material that [the opponent] does not have at its disposal." See Heck, supra note 40, at 240 (citation omitted).
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foreign court or litigant attempts to collect evidence from an opponent in a civil law nation, the role of the civil law judge is often thought to have been usurped.

2.3. Customary Methods of Taking Evidence Abroad

The principal customary method of taking evidence located abroad is the Letter Rogatory. A Letter Rogatory is "a formal request by the court of one nation to the courts of another country for assistance in performing judicial acts, [including the taking of evidence]." In addition to the fact that the Letter Rogatory is unlikely to offend the judicial sovereignty of a foreign nation, the letter is often the only means of obtaining evidence from an uncooperative witness. The Letter Rogatory also provides a method of taking evidence from a witness who is unable to appear at trial in the United States.

The Letter Rogatory, while sometimes helpful, is often time-consuming and expensive. Moreover, there is often no guarantee that the foreign country in which the required evidence is located will honor the letter by providing the requested evidence. The existence of these flaws and the increase in the amount of international litigation motivated German courts may require production of additional evidence from the parties, cases are decided, unless the judge decides otherwise, based solely on the facts and evidence the parties have in their possession and present to the court on their own. Id. at 242.

This Comment focuses on the Letter Rogatory and its Hague Evidence Convention analog, the Letter of Request. Other methods of obtaining evidence are not discussed.

BORN & WESTIN, supra note 4, at 306.

Id.

Under Article 10, the receiving state is required to apply compulsion to obtain needed evidence, provided such compulsion is permitted under the receiving state's internal law. See EXPLANATORY REPORT ON THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, reproduced from S. Exec. Doc. A, 92d Cong., 2d Sess. (Feb. 1, 1972), reprinted in 12 I.L.M. 334 (1973) [hereinafter EXPLANATORY REPORT].

Id.

Id. at 307.

Id. at 306-07. There is no obligation to respond to a Letter Rogatory. Some countries may honor the request in full, while other countries may only honor the request in part, or not at all.
the United States to recommend that the Hague Conference on Private International Law promulgate a treaty to improve international judicial cooperation in taking evidence abroad. 67

2.4. The Hague Evidence Convention

2.4.1. Background

The First Conference at the Hague on Private International Law to address problems associated with international litigation was held in 1893.68 However, it was not until 1964 that the United States participated in the Conference for the first time.69 In that same year, the United States enacted legislation permitting foreign nations and their citizens to serve papers and take testimony in this country without first obtaining permission from the U.S. government.70

The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,71 which was drafted at the 1970 Hague Conference, is intended to “facilitate”72 the taking of evidence abroad by bridging the gap between civil law and common law practices.73 By facilitating the trans-
mission of evidence that will be "utilizable" in the requesting country, but which is not procured by methods which will offend the "judicial sovereignty" of civil law nations, the Convention manages to exhibit great respect for both common and civil law traditions. Indeed, according a member of the United States delegation to the Hague Conference, the Evidence Convention "fully respects the judicial sovereignty" of civil law nations while providing a "great boon to United States courts and litigants."

2.4.2. Taking Evidence Under the Hague Convention

The Hague Evidence Convention provides a method for parties to obtain evidence located within another signatory

with the taking of evidence abroad." Amram, supra note 67, at 652.

74 See Amram, supra note 67, at 652.

75 Id. The Hague Evidence Convention "establish[ed] a system for obtaining evidence located abroad that would be 'tolerable' to the state executing the request and would produce evidence 'utilizable' in the requesting state." This system ensures that "[civil law countries'] concepts of 'judicial sovereignty' are fully respected." Id. at 655.

76 Id. at 655.

77 Id. at 652.

78 Whether the term 'evidence' as used in the Convention was intended to encompass pre-trial discovery has been the subject of some dispute. See Collins, supra note 51 (contending that the Evidence Convention is not intended to apply to pre-trial discovery). But see Heck, supra note 40, at 235 (stating that "the Convention . . . contemplates the use of U.S.-style [pre-trial] discovery") (citations omitted).

At first glance, Heck seems to have the better of this argument because Collins's position appears to be negated by the language of the Convention itself (judicial proceedings "commenced or contemplated") and the ability of foreign countries to limit pre-trial discovery of documents under Article 23. Indeed, Collins's reading of the Convention was also implicitly rejected by the Aérospatiale Court.

However, Collins's argument may have some merit. The language in the Convention providing that letters of request must relate to "proceedings, commenced or contemplated" was "designed specifically to authorize the use of a letter for the purpose of 'perpetuation of testimony' of an aged, dying or departing witness." See Amram, supra note 67, at 653. Furthermore, the Convention could not have had as its main purpose the goal of providing for pre-trial discovery of documents because signatory nations may limit such requests under Article 23. Moreover, Philip W. Amram, a member of the United States delegation, whose interpretation of the convention should be given great weight, has indicated that the Convention "give[s] United States courts . . . an international agreement for the taking of testimony. . . ." See Amram, supra note 67, at 655 (emphasis added). Because testimony is used at trial, and document discovery can be limited by signatory nations
nation for use in preparing and conducting "civil or commercial" litigation. Under the Convention, a judicial authority in a contracting state "may" seek evidence by forwarding a Letter of Request to the "Central Authority" in the signatory nation in which the needed evidence is located. If requested, the receiving nation is generally required to collect the evidence using a "special method or procedure" specified by the requesting state. Once the evidence is collected, it is then provided to the requesting state for use in the judicial proceeding.

The Convention provides that a Letter of Request "shall be executed expeditiously" and requires the receiving nation to comply with the request for evidence. There are, however, two situations in which receiving nations are not required by the Convention to honor requests for evidence: (1) when a request for a "special method or procedure" is "incompatible" with the law of the requestor, and (2) when the request is "incompatible" with the law of the signatory nation in which the evidence is located. Pursuant to Article 23, it is not unreasonable to conclude that the Convention was designed only to apply to "evidence" needed for trial.

This Comment assumes that the Hague Evidence Convention was intended to apply to both the acquisition of information for pre-trial discovery and the taking of evidence for trial.

The Convention applies only to "civil or commercial" matters. However, the drafters expressly declined to define the meaning of "civil" or "commercial," instead preferring that any disputes over these terms be resolved by diplomatic efforts. Nevertheless, the meaning of these terms has been the subject of litigation. See, e.g., In re State of Norway, 2 W.L.R. 458, reprinted in 28 I.L.M. 693 (1989) (considering whether a proceeding to collect taxes from the estate of a Norwegian shipowner is a "civil" or "commercial" matter within the meaning of the Convention). The Convention, supra note 2, art. 1. The Aérospatiale Court noted that the use of the word "may" in Article 1, and the permissive language of the preamble, see infra notes 98-100 and accompanying text, are evidence of the Convention's permissive nature.

Although this Comment treats the Letter of Request as the principal means of obtaining evidence under the Convention, the Convention also provides for taking evidence by diplomatic officers, consular agents, and commissioners. For a detailed explanation of the Convention's procedures, including obtaining evidence by diplomatic officers, consular agents, and commissioners, see Darrell Prescott & Edwin R. Alley, Effective Evidence-Taking Under the Hague Convention, 22 INT'L LAW. 939 (1988).

Every signatory nation must designate a "Central Authority" to receive and process letters of request. Convention, supra note 2, art. 9.

Id.; see also Amram, supra note 67, at 654 ("[I]ncompatible' does not mean 'different' or 'strange' or 'unfamiliar.' It means that the 'law' of the
the receiving nation's law; or (2) when a request is "impossible" to execute. In addition, a nation may make a declaration under Article 23 of the Convention "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."

Because foreign nations and their citizens have often resisted U.S. efforts to discover documents, it is not surprising that many nations have registered Article 23 declarations to at least partly limit discovery in this area. The aversion some nations have to providing documents may be based largely on privacy concerns or the belief that a party should not assist an adversary in building its case. However, some Article 23 reservations may also be attributable to a "gross misunderstanding" among representatives to the Convention. Evidently, some representatives incorrectly believed that U.S. courts would seek discovery of documents on behalf of potential litigants before litigation is initiated. This misperception has apparently been corrected, however, and as a result, several nations have modified their original Article 23 state of execution interposes a barrier—some constitutional or statutory inhibition.

Requests for testimony and discovery of documents may be "incompatible" with German law if, for instance, they seek to discover "business secrets." See, e.g., Heck, supra note 40, at 243 (citation omitted).

Convention, supra note 2, art. 9; see also Amram, supra note 67 at 654 (" 'Impossible' was deliberately used; it does not mean 'difficult' or 'inconvenient.' ").

Convention, supra note 2, art. 23.

See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 reporter's note 1 (1987) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."); see also BORN & WESTIN, supra note 4, at 261 (noting that "unilateral extraterritorial U.S. discovery efforts have produced some of the most contentious disputes ... in international civil litigation").

Most Convention signatories have entered Article 23 declarations at least partly limiting pre-trial discovery of documents.

See supra note 55 and accompanying text.

See supra note 59 and accompanying text.

Aéropatiale, 482 U.S. at 563 n.21 (Blackmun, J., concurring in part and dissenting in part) (citation omitted).

Id.
reservations to allow for a greater degree of document discovery.\textsuperscript{95}

3. \textsc{Aérospatiale}

Prior to 1987, U.S. courts reached different conclusions about the Hague Evidence Convention's role in U.S. civil and commercial litigation.\textsuperscript{96} The United States Supreme Court addressed this conflict in \textit{Société Nationale Industrielle Aérospatiale v. United States District Court}.\textsuperscript{97} However, while the \textsc{Aérospatiale} Court unanimously agreed that the Hague Evidence Convention provides neither the exclusive nor mandatory means of taking evidence located in a signatory nation, the arguments advanced in support of this conclusion were somewhat flawed. Moreover, the Court was deeply divided regarding the best method for determining when U.S. courts should employ the Convention.

3.1. \textit{Justice Stevens' Majority Opinion}

Justice Stevens' opinion provided five arguments in support of the conclusion that the Convention is not exclusive or mandatory. First, Justice Stevens noted that the procedures for taking evidence under the Convention are set forth using discretionary rather than mandatory language.\textsuperscript{98} In particular, Justice Stevens pointed to the Convention's preamble, which states that the Convention is intended "to facilitate the transmission" of evidence and "to improve mutual judicial cooperation."\textsuperscript{99} In addition, Article 1 of the Convention indicates that Contracting States "may" use the Letter of Request method to obtain foreign evidence.\textsuperscript{100} Moreover, as Justice

\textsuperscript{95} See, e.g., \textit{Aérospatiale}, 482 U.S. at 564 n.22 (noting that France has modified its reservation). Denmark will also now allow discovery of documents requested with specificity. \textit{Id.} Germany has also modified its Article 23 reservation. \textit{Id.} Germany has also modified its Article 23 reservation. \textit{Id.; see also Griffin & Bravin, supra} note 31, at 345 n.101 (noting that "Germany [has] promulgated new regulations permitting some pretrial discovery" of documents).

\textsuperscript{96} See supra note 7.

\textsuperscript{97} 482 U.S. 522.

\textsuperscript{98} \textit{Id.} at 534.

\textsuperscript{99} \textit{Id.; see also Convention, supra} note 2, pmbl.

\textsuperscript{100} \textit{Aérospatiale}, 482 U.S. at 535 (citation omitted).
Stevens noted, the Hague Service Convention\textsuperscript{101} speaks in mandatory terms. This nearly contemporaneous agreement provided the Hague Evidence Convention's drafters with a "model exclusivity provision" had they wished to make the Convention exclusive or mandatory.\textsuperscript{102}

Second, the majority viewed the right of signatory nations to deny pretrial discovery under Article 23 as precluding the possibility that the Convention could be exclusive or mandatory.\textsuperscript{103}

Third, Article 27 of the Convention,\textsuperscript{104} as interpreted by the majority, "plainly" permits requesting nations to employ their own traditional methods of discovery in place of the Convention's procedures.\textsuperscript{105}

Fourth, requiring exclusive use of the Convention would result in some parties using the Convention while opponents in the same litigation proceed with discovery under the Federal Rules of Civil Procedure. This, Justice Stevens wrote, "create[s] three unacceptable asymmetries" which would place U.S. litigants at an unfair advantage in relation to their foreign opponents:

First, within any lawsuit between a national of the United States and a national of another contracting party, the foreign party could obtain discovery under the Federal Rules of Civil Procedure, while the domestic party would be required to resort first to the proce-
dures of the Hague Convention. This imbalance would run counter to the fundamental maxim of discovery that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation...."

Second, a rule of exclusivity would enable a company which is a citizen of another contracting state to compete with a domestic company on uneven terms, since the foreign company would be subject to less extensive discovery procedures in the that event both companies were sued in an American court....

Third, since a rule of first use of the Hague Convention would apply to cases in which a foreign party is a national of a contracting state, but not to cases in which a foreign party is a national of any other foreign state, the rule would confer an unwarranted advantage on some domestic litigants over others similarly situated.16

Finally, the majority's fifth argument in support of its conclusion that the Convention is not exclusive or mandatory is that the interest of U.S. courts in a "just, speedy, and inexpensive determination of every action,"17 combined with the cost and delay associated with the Convention's procedures, requires that the Convention be used only in certain circumstances.18

According to Justice Stevens, lower courts faced with requests for evidence located abroad should engage in a "particularized" comity analysis to determine whether resort to the treaty is necessary.19 A comity analysis is required, Justice Stevens instructed, even if the court has personal jurisdiction over the party from whom discovery is sought and the evidence will be produced in the United States. If the result of comity balancing favors use of the Federal Rules of Civil Procedure, the Convention need not be employed.20

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16 Id. at 540 n.25 (alteration in original) (citations omitted).
17 FED. R. CIV. P. 1.
18 Aérospatiale, 482 U.S. at 542-43.
19 Id. at 543-44.
20 Under the majority opinion, a party asserting that evidence should be taken under the Convention has the burden of proving that the Hague Evidence Convention's procedures would be more effective than the Federal
However, Justice Stevens was careful to emphasize that the comity analysis should be conducted with extreme care so that any direct discovery under the Federal Rules of Civil Procedure is not "abusive" and does not offend "any sovereign interest expressed by a foreign state."\textsuperscript{111}

3.2. Justice Blackmun's Concurring and Dissenting Opinion

Justice Blackmun, writing for the minority, concurred with Justice Stevens' finding that the Hague Evidence Convention does not provide the exclusive means for obtaining evidence located abroad.\textsuperscript{112} Unlike Justice Stevens and the majority, however, Justice Blackmun did not believe a comity analysis would give the Convention sufficient effect in U.S. litigation.\textsuperscript{113} Accordingly, Justice Blackmun would generally require "first resort" to the Convention, allowing for direct discovery under the Federal Rules of Civil Procedure only when the Convention's procedures "prove to be unhelpful" or when resort to the Convention would clearly be futile.\textsuperscript{114}

3.3. Critique of Justice Stevens' Majority Opinion

The \textit{Aérospatiale} majority opinion is, at times, "loosely-reasoned."\textsuperscript{115} For instance, although Article 1 of the Convention states that contracting states "may" use the Letter of Request to obtain evidence, this language was not necessarily intended to indicate that the Convention is permissive in nature, as the majority determined. Indeed, this "permissive" language is equally susceptible to a different interpretation, namely that among the methods for obtaining evidence under the Convention, the Letter of Request is merely one of several potential options. As one commentator has noted:

Rules of Civil Procedure in obtaining the needed evidence.

\textsuperscript{111} \textit{Aérospatiale}, 482 U.S. at 546. The \textit{Aérospatiale} majority cited interrogatories as one example of so-called "non-intrusive" discovery procedures. \textit{Id.} at 545.

\textsuperscript{112} \textit{Id.} at 548 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{113} \textit{Id.} According to Justice Blackmun, "there is a large risk that the case-by-case comity analysis ... permitted by the Court will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently." \textit{Id.}

\textsuperscript{114} \textit{Id.} at 548-49.

\textsuperscript{115} BORN & WESTIN, \textit{supra} note 4, at 331.
The Court reads too much into the use of the term 'may' in the Evidence Convention...[in] the chapter[s] on letters of request and evidence taking by diplomatic officers, consular agents, and commissioners.... Essentially the Court... read[s] the permissive 'may' as negating the Convention's exclusive character. But even if the Convention procedures were truly mandatory, the term 'may' would still be used to indicate what courts and officers of signatory states are permitted to do, or request be done, with respect to evidence located in other signatory states.116

Nevertheless, language contained in the Evidence Convention's preamble,117 compared with the language of the Service Convention,118 supports the notion that the drafters intended that the Convention not be viewed as providing the exclusive or mandatory means of taking evidence located abroad.

The second basis for the majority's decision—that the plain language of Article 27 permits nations to use their own, more liberal procedures of discovery instead of the Convention—clearly misinterprets the Convention. As Justice Blackmun suggested in his separate opinion in Aérospatiale, Article 27 is not designed to permit a requesting nation to use its own procedures when seeking evidence located within another signatory nation.119 Rather, the purpose of Article 27 was to indicate that a receiving nation is not precluded from permitting the taking of evidence within its own territory by methods not specified in the Convention.

The writings of Philip W. Amram, a member of the United States delegation to the Hague Conference and the Reporter for the Hague Evidence Convention, amply support this interpretation of Article 27. Shortly after collaborating in the drafting of the Convention, Mr. Amram wrote that "[i]f the domestic law of the requested state is more beneficial and more

116 Bermann, supra note 29, at 531.
117 See supra note 72.
118 See supra note 101.
119 See Aérospatiale, 482 U.S. at 551 n.2 (Blackmun, J., concurring in part and dissenting in part) ("The only logical interpretation of this Article [27] is that a state receiving a discovery request may permit less restrictive procedures than those designated in the Convention.") (emphasis added).
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." Mr. Amram also noted in an explanatory report prepared prior to U.S. ratification of the Convention that additional methods of taking evidence are permitted under Article 27 of the Convention "if the internal law or practice of the State of execution so permits."

The majority's contention that the Convention creates certain asymmetries has merit. However, to combat these asymmetries, U.S. courts can control discovery so that a party required to seek evidence under the Convention will not be disadvantaged.

The majority was also concerned that discovery under the Convention will result in less than a "just, speedy, and inexpensive determination of every action." This is not an appropriate concern, however, because even if taking evidence under the Convention results in a less efficient adjudication, this is the price paid by the United States and its citizens for the benefits provided by the Convention. Furthermore, the Convention requires that receiving states shall respond "expeditiously" to a Letter of Request. Indeed, many letters of request are apparently not as time-consuming or

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121 EXPLANATORY REPORT, supra note 63, at 323. It may be asked why the Convention's drafters would find it necessary to indicate that a receiving state, in providing evidence to other signatory nations, is permitted to use more liberal procedures than those set forth in the Convention. There are two possible explanations: First, because the United States had recently enacted a law permitting virtually unlimited access to evidence located in this country, the drafters perhaps wanted to assure other nations that the Convention did not eliminate use of these more liberal procedures. Second, the Convention may have addressed this issue so that other countries, if requested to liberalize their own internal procedures, would be unable to respond that the Convention limits the available methods of taking evidence located within signatory nations.

122 See, e.g., Aérospatiale, 482 U.S. at 566 (Blackmun, J., concurring in part and dissenting in part) (advocating management of discovery to prevent unfair disadvantage to a party required to use the Convention).

123 See supra note 107-08 and accompanying text.

124 See Convention, supra note 2, art. 9.
expensive to process as the *Aérospatiale* majority suggests.\(^\text{125}\)

Perhaps the strongest argument advanced by the majority in support of its conclusion that the Convention is not exclusive or mandatory is that the Convention permits signatory nations to shield documents from pre-trial discovery under Article 23. The consequences of reading the Convention as exclusive, and accepting that U.S. courts, in some cases, would be completely forbidden from ordering production of documents located abroad, would mean that foreign litigants could immunize themselves from document discovery by storing documents in foreign depositories.\(^\text{126}\) It seems most unlikely that U.S. representatives to the Hague Conference would have accepted such a result. Therefore, on the basis of Article 23 alone, the result of the Court's interpretation appears wise, at least from a U.S. perspective: the Evidence Convention should not be viewed as providing the exclusive or mandatory means of collecting evidence located within another signatory nation.

Unfortunately, the majority's particularized comity analysis fails to provide lower courts with sufficient guidance regarding when resort to the Convention is appropriate. Part of the

\(^{125}\) While the *Aérospatiale* majority and subsequent lower court decisions have cited the Evidence Convention's alleged additional cost and delay to justify resort to the Federal Rules of Civil Procedure, there are no empirical studies demonstrating that use of the Convention is, in fact, significantly more costly or time-consuming. Indeed, as some commentators have noted, the cost of using the Convention may be "minimal, and [the] compliance burdens . . . generally limited." See, e.g., David J. Gerber, *International Discovery After Aérospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521, 545 (1988) (citations omitted). However, one practitioner, Gary B. Born, states that barring litigation on the matter, a Letter of Request may require three to six months to fulfill. See Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aérospatiale Applications of the Hague Evidence Convention* 24 INT'L LAW. 393, 398 n.24 (1990). Yet even if the Letter of Request procedure is more time-consuming or costly, the Convention in some cases also provides for the taking of evidence by consuls or commissioners, which will often be more efficient than the Letter of Request procedure.

\(^{126}\) See David E. Teitelbaum, Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 856 (1986) (noting that use of the Convention is "particularly unfair when the nonproducing party has, in bad faith, secreted information . . . with the specific intent of frustrating the litigation at hand"); see also Cooper Industries, Inc. v. British Aerospace, 102 F.R.D. 918 (S.D.N.Y. 1984) (noting that if such a construction were adopted, even U.S. companies might be encouraged to establish overseas subsidiaries for the purpose of storing documents).
problem is that international comity can be an "amorphous" concept. Mindful of this, Justice Stevens’ opinion goes to some length to provide courts with an explanation of the comity principle and the factors involved in comity balancing. The opinion describes comity as “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.” However, as some commentators have noted, the opinion also defines comity according to the factors suggested by the Restatement of Foreign Relations Law. Elsewhere, the opinion mentions other considerations and cites earlier descriptions of comity by the Supreme Court and a description of comity formulated by

127 BORN & WESTIN, supra note 4, at 3.
128 Aérospatiale, 482 U.S. at 543 n.27.
129 See, e.g., BORN & WESTIN, supra note 4, at 330.
130 The Court said that a comity analysis may be guided by the following factors:
(1) the importance to the . . . litigation of the documents or other information requested;
(2) the degree of specificity of the request;
(3) whether the information originated in the United States;
(4) the availability of alternative means of securing the information; and
(5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.
Aérospatiale, 482 U.S. at 544 n.28 (citing RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986) (now RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES)).
131 See BORN & WESTIN, supra note 4, at 330 (citing the Aérospatiale Court’s references to “sovereign interests”; “likelihood that resort . . . will prove effective”; and “respective interests of the foreign nation and [the United States”].
132 On one occasion, the U.S. Supreme Court defined comity as follows: “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.
Aérospatiale, 482 U.S. at 543 n.27 (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)).
Ulrich Huber, a seventeenth-century Dutch jurist.\footnote{Dutch jurist Ulrich Huber was cited by the Court for his description of international comity: By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens. [N]othing would be more convenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law. \textit{Aérospatiale}, 482 U.S. at 543 n.27 (citations omitted).}

Because of the majority’s unwillingness to adopt a firm rule indicating when resort to the Convention is necessary, lower courts are left with the important and often politically sensitive task of determining when to apply the Convention’s procedures. This is particularly troublesome because parties may not always inform courts of the various interests that must be considered if a complete and proper comity analysis is to be conducted.\footnote{See Weis, supra note 8, at 929 (citation omitted). Moreover, Judge Weis notes that “[t]he substantial volume of ... transnational [litigation] makes it unrealistic to expect the affected government agencies to have actual knowledge ... that treaty obligations are at stake in a particular case.” \textit{Id}.} Moreover, in many cases, lower court decisions on discovery, based on the \textit{Aérospatiale} majority’s highly malleable comity approach, will not be reviewed by an appellate court.\footnote{See \textit{Aérospatiale}, 482 U.S. at 527 (citations omitted) (recognizing that “immediate appellate review of an interlocutory discovery order is not ordinarily available”); see also Weis, supra note 8, at 928 (noting “that most of the rulings on discovery will never come to the attention of the courts of appeals [because such] rulings are almost always interlocutory and the discretion now entrusted to the district judge make those orders unlikely candidates for mandamus in most instances.”) (citation omitted).}

Because the outcome of the analysis may vary from court to court, the \textit{Aérospatiale} majority’s balancing approach may also encourage forum shopping.\footnote{Martikan, supra note 30, at 1019 (citation omitted) (contending that the “unpredictability [of the comity analysis] encourages forum shopping”).} Plaintiffs favoring use of the Federal Rules of Civil Procedure will likely attempt to bring suit in forums where comity balancing in earlier cases often resulted in resort to the Federal Rules of Civil Procedure.\footnote{Id.} On the other hand, if a case is brought in state
court, defendants seeking to use the Convention will seek to remove to a federal district court where comity balancing has often favored use of the Convention.\textsuperscript{138} In light of the desire for procedural uniformity among federal courts, the possibility of differences in procedure based on choice of forum is unsatisfactory.\textsuperscript{139}

\section*{4. Amending Rule 26(a)}

\subsection*{4.1. The Effort to Amend Rule 26(a)}

Presently, the general discovery provision of the Federal Rules of Civil Procedure is silent regarding the proper role of the Hague Evidence Convention in U.S. civil procedure.\textsuperscript{140} However, shortly after the \textit{Aérospatiale} decision, the Advisory Committee on the Federal Rules\textsuperscript{141} began drafting a proposed amendment to Rule 26(a) to provide U.S. courts with guidance in determining whether to apply the Convention or the Federal Rules of Civil Procedure when evidence is located within another signatory nation.\textsuperscript{142}

\begin{flushleft}
\textsuperscript{138} Id.


\textsuperscript{142} See Minutes, Civil Rules Advisory Committee, Meeting of November 19-20, 1987 (on file at the Administrative Office of the United States Courts [hereinafter \textit{"AO"}]).
4.2. Tentative Draft of Proposed Amendment to Rule 26(a)

One of the Advisory Committee's earliest attempts at developing an amendment to Rule 26(a) produced a tentative draft that would have largely adopted the reasoning of Justice Blackmun's opinion in *Aérospatiale*. The draft provided:

If an applicable treaty or convention provides for discovery in another country, the discovery methods agreed to in such treaty or convention *shall* be employed; but if such methods afford discovery that is less effective than the discovery afforded under these rules, and additional discovery is not prohibited by the treaty or convention, a party may fully employ the methods here provided in addition to those provided by such convention or treaty.\(^\text{143}\)

In addition to its command that the Convention "shall be employed," the amendment's use of the terms "less effective" and "additional," read together, indicate that discovery should occur under the Federal Rules of Civil Procedure only if the Evidence Convention's procedures have been employed and have failed to produce the needed evidence because the Convention, in that particular situation, was "inadequate."

The Committee Note accompanying the tentative draft of the amendment provided:


International litigants should not be placed in a favored position as compared to American litigants similarly situated, especially in commercial matters with respect to which the similar American litigants may be their economic competitors. For this reason, full discovery should be available equally against all who litigate in the federal courts.

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On the other hand, if certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that other methods should be employed only if the approved methods are inadequate to meet the need of the litigant for the information.\(^{144}\)

By indicating that the Evidence Convention should be the strongly preferred means of obtaining evidence located abroad, and permitting resort to the Federal Rules of Civil Procedure only when the Convention is employed, but proves to be "inadequate," the Committee Note demonstrated that the Advisory Committee wished to incorporate Justice Blackmun's "first resort" approach into Rule 26(a).

### 4.3. Preliminary Draft of Proposed Amendment to Rule 26(a)

In the Fall of 1989, a Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure containing an amendment to Rule 26(a) was released for public comment.\(^{145}\) The proposed amendment differed in one important respect from the reporter's tentative draft\(^{146}\) formulated several years earlier. While both versions of the amendment indicated that the procedures in a treaty or Convention "shall be employed," the proposed rule released for public comment stated that "if discovery conducted [under the Convention] is inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the methods provided in addition to those provided by such convention or treaty."\(^{147}\) Under the earlier, tentative draft, resort to the Federal Rules of Civil Procedure

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\(^{144}\) Id. (Committee Note) (emphasis added).

\(^{145}\) The Preliminary Draft of the Proposed Amendment provided:

If an applicable treaty or convention provides for discovery in another country, the discovery methods agreed to in such treaty or convention shall be employed; but if discovery conducted by such methods is inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the methods here provided in addition to those provided by such convention or treaty.

**Preliminary Draft, 127 F.R.D. at 318.**

\(^{146}\) See Reporter's Drafts, supra note 143.

\(^{147}\) See Preliminary Draft, 127 F.R.D. at 318 (emphasis added).
had been permitted when discovery under the Convention had proven to be "less effective."\textsuperscript{148}

The change in language from "less effective" to "inadequate or inequitable" signals a shift by the Advisory Committee away from some of the reasoning contained in Justice Blackmun's opinion. The term "inequitable," on its face, suggests that the Federal Rules of Civil Procedure may be used, without resorting to the Convention, when the Convention may result in unfair disadvantage to a party. Indeed, the Advisory Committee Note\textsuperscript{149} to the proposed rule provides that "[i]nternational litigants should not be placed in a favored position as compared to U.S. litigants similarly situated, especially in commercial matters with respect to which similar U.S. litigants may be their economic competitors. Especially, an international litigant using the provisions of Rule[s] 26-37 should not be permitted to use the Hague [Evidence] Conven-

\textsuperscript{148} See Reporter's Drafts, supra note 143.

\textsuperscript{149} The Advisory Committee Note provided:

Language is added . . . to reflect the policy of accommodation to internationally agreed methods of discovery expressed in the concurring opinion in In re Société Nationale Industrielle Aérospatiale, [107 S. Ct.] 2542, 2557-2568 (1987). Attorneys and judges should be cognizant of the adverse consequence for international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that other methods should not be employed if the approved methods are adequate to meet the need of the litigant for timely access to the information.

On the other hand, the language added to the rule also requires that discovery proceed in a manner that is not 'inequitable.' International litigants should not be placed in a favored position as compared to American litigants similarly situated, especially in commercial matters with respect to which the similar American litigants may be their economic competitors. Especially, an international litigant using the provisions of Rule[s] 26-37 should not be permitted to use the Hague [Evidence] Convention or a similar international agreement to create obstacles to discovery by an adversary. In general, full discovery should be available equally against all who litigate in the federal courts. Where the impediment to discovery is imposed by public authority not at the request of the international litigant, accommodation may be necessary to reconcile the requirement of this rule that discovery be equitable to the obligations imposed by the treaty.

Preliminary Draft, 127 F.R.D. at 320-21 (citation omitted).
tion or a similar international agreement to create obstacles to discovery by an adversary.\footnote{150}

Though there is the possibility that foreign litigants with extensive U.S. operations may store documents abroad or take other measures in a deliberate attempt to impede discovery under the Federal Rules of Civil Procedure, Justice Blackmun’s solution when one party is disadvantaged by the Convention is to have the court manage discovery to prevent such disadvantage from occurring.\footnote{151} Indeed, it was partly because of the possibility of disadvantaging some litigants that Justice Stevens, writing for the Aérospatiale majority, instructed courts to apply a comity analysis on a case-by-case basis.\footnote{152} If the drafters intended to be faithful to Justice Blackmun’s first resort approach, inclusion of an “inequitable” exception to discovery under the Convention is unfortunate.

4.3.1. Public Response

Reaction to the preliminary draft of the proposed amendment was divided. A number of practitioners\footnote{153} and foreign governments\footnote{154} applauded the Advisory Committee’s decision

\footnote{150}See Aérospatiale, 482 U.S. at 565-66 (Blackmun, J., concurring in part and dissenting in part).

\footnote{151}See id. at 543-44 (Stevens, J.).

\footnote{152}See, e.g., Letter from Charles Platto, Chairman, International Litigation Committee, to James E. Macklin, Jr., Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Mar. 14, 1990) [hereinafter Platto Letter] (on file at AO) (stating that “the members of the International Litigation Committee [of the International Bar Association] respectfully offer their support for the proposed Rule 26, which would give greater effect to the Evidence Convention’s procedures for obtaining evidence abroad”).

The Philadelphia Bar Association also recommended adoption of the preliminary draft of the proposed amendment. See Letter from Bonnie Brigance Leadbetter, Chair, Federal Courts Committee of the Philadelphia Bar Association, to Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Mar. 13, 1990) (on file at AO).

\footnote{153}For example, the British government, in a communication from its Embassy, expressed its belief that the preliminary draft of the proposed amendment to Rule 26 moved the United States in line with prevailing views of the Hague Evidence Convention’s proper role in modern international litigation.

The British Government welcome[s] the addition of language to proposed rule 26(a) . . . to reflect the policy of accommodation to
to move away from Justice Stevens’ opinion. Others argued that the Advisory Committee should not set aside the majority’s comity balancing approach. Moreover, if a new rule were enacted to overrule the \textit{Aérospatiale} Court’s holding, such a rule must come from Congress, not the Advisory Committee.

Internationally agreed methods of discovery. We suggest however that consideration be given to strengthening the language . . . by making clear that agreed methods of discovery should not be set aside without the most careful consideration.

Letter from Edmund Hosker, First Secretary (Trade Policy), British Embassy, Commercial Department, to The Judicial Conference of the United States (Aug. 21, 1990)-(on file at AO).

See, e.g., Statement of Thomas L. Riesenberg, Assistant General Counsel, U.S. Securities and Exchange Commission, Washington, D.C. Before the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Chicago, Ill. (Feb. 2, 1990) (stating that the “proposal departs from existing law . . . It is surprising that this Committee would . . . give effect to the treaty in a fashion which, according to the Supreme Court, was not intended by the treaty’s authors.”).

See also Letter from Stuart M. Gerson, Assistant Attorney General, U.S. Department of Justice, Civil Division, to the Honorable Joseph F. Weis, Jr., Chairman, Committee on Rules of Practice and Procedure (Mar. 15, 1990) (claiming that the “first use” policy requiring exhaustion of the procedures of the Hague Evidence Convention does not take into account . . . the Supreme Court’s decision in . . . \textit{Aérospatiale} [and] create[s] a double standard [giving the foreign litigant an unfair advantage over their domestic counterpart in conducting] discovery under the existing rules”).

See also Memorandum, Hague Evidence Convention: Proposed Amendment to Rule 26 of the Federal Rules of Civil Procedure, from Lawrence Collins, Esq., Herbert Smith, to Charles Platto, Esq., Cahill Gordon & Reindel (Apr. 2, 1990) (contending that “the proposed amendment . . . is not only unnecessary, but would [create] a charter for foreign based defendants to delay and impede meritorious litigation by United States plaintiffs. There is no reason in principle why discovery as between the parties should not take place in the United States according to United States procedure.”). Mr. Collins also renewed his argument that the Convention applies only to “evidence” and not pre-trial discovery (“The Hague Evidence Convention was intended to apply to the taking of \textit{evidence}, in the sense of material required to prove or disprove allegations at trial. It was not intended to apply to discovery in the sense of the search for material which might lead to the discovery of admissible evidence, and there is no reason at all to believe it was intended to apply to discovery \textit{between the parties}. . . . The main purpose of the Convention is to allow the parties to litigation to obtain oral and documentary evidence from third parties.”) (emphasis in original).

Although the majority of the comments primarily focused on whether to adopt the proposed amendment, several comments offered suggestions relating to other aspects of the proposal. One comment suggested that the proposed amendment should reflect the Aérospatiale Court's holding that the Convention is applicable regardless of whether the needed evidence will be taken in a signatory nation, or from a signatory nation, to be produced at trial in the United States.\footnote{157} Including such language in the rule would require first resort to an applicable treaty "when documents or deponents are being brought from abroad, and not just when they are being examined there."\footnote{158} Although it was unclear from the proposed amendment and accompanying Note, the Advisory Committee had already rejected this position.\footnote{159}

The public comments also expressed concern about the meaning of "inadequate" as used in the proposed amendment.\footnote{160} In particular, it was suggested that a change should be made to the Notes "specifying that a 'partial Article 23 reservation' to the Hague Evidence Convention should not deny presumptive adequacy of the Convention[s] methods, whereas a blanket Article 23 reservation should be regarded as making the Convention presumptively inadequate."\footnote{161}

and the President." \textit{Id.}

Some commentators, however, contend that the rule-making process can be used to enact Justice Blackmun's first resort rule. These commentators assert that an amendment by the Advisory Committee to Rule 26 giving greater effect to the Convention would not overrule the Aérospatiale Court because the Court interpreted the Convention in light of the "then-existing" Rule 26, not the amended Rule 26. \textit{See} Letter from Edwin R. Alley, Esq., Carpenter, Bennett & Morrissey, to James E. Macklin, Jr., Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Mar. 14, 1990) [hereinafter Alley Letter]; \textit{see also} Platto Letter, \textit{supra} note 154.

\footnote{157} \textit{See} Rule 26, General Provisions Governing Discovery, \textit{Reporter's Draft Not Intended for Public Comment} (Mar. 15, 1990) [hereinafter \textit{Reporter's Draft}] (on file at AO) (noting that "Mr. Born proposes that 'from' be substituted for 'in' ").

\footnote{158} \textit{Id.}

\footnote{159} \textit{Id.} (stating that "[i]t is the Reporter's impression that it was the situations involving depositions and production of documents abroad that the first-resort provision was intended to reach").

\footnote{160} \textit{Id.} (noting "Mr. Born is troubled by the meaning of 'inadequate' ").

\footnote{161} \textit{Id.}
4.3.2. Additional Revisions

In March of 1990, approximately six months after releasing the proposed rule for public comment, the Advisory Committee was still refining the amendment. A draft conceived at this time provided:

If a party seeks to obtain discovery at a place within a country having a treaty with the United States applicable to the securing of evidence abroad, the party shall proceed in conformity with the treaty or by leave of court upon a showing that the internationally agreed methods are inadequate or inequitable.162

This draft of the amendment differed in several important respects from the proposal which had been published for public comment. First, in response to an earlier public comment, the Advisory Committee Note163 provided courts with guidance

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162 Id.
163 The Advisory Committee Note provided:

Language is added... to reflect the policy of accommodation to internationally agreed methods of discovery expressed in the concurring opinion in In re Société Nationale Industrielle Aérospatiale, [107 S. Ct.] 2542-2568 (1987). Attorneys and judges should be cognizant of the adverse consequence for international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that other methods should not be employed if the approved methods are adequate to meet the need of the litigant for timely access to the information.

The rule does not require comity where the internationally agreed means is 'inadequate.' This allows the court to make a discreet judgment on the facts as to the sufficiency of those means. Illustratively, a party should be required to make first resort under the Hague Convention despite a partial Article 23 reservation by the country in which discovery is sought, but not if that country has imposed a blanket reservation as an obstacle to discovery.

The language added also requires that discovery proceed in a manner that is not 'inequitable.' International litigants should not be placed in a favored position as compared to American litigants similarly situated, especially in commercial matters with respect to which the similar American litigants may be their economic competitors. Especially, an international litigant using the provisions of Rule[s] 26-37 should not be permitted to use the Hague [Evidence] Convention or a similar international agreement to create obstacles to discovery by an adversary. In general, full
on whether the Convention is "inadequate" by noting that "[i]llustratively, a party should be required to make first report under the Hague Convention despite a partial Article 23 reservation by the country in which discovery is sought, but not if that country has imposed a blanket reservation as an obstacle to discovery."164

The draft also indicated that the first resort rule would apply only when discovery will occur "at a place within [a signatory nation] having a treaty ... applicable to the securing of evidence abroad."165 As the Advisory Committee Note indicated, "[t]he rule of comity stated in this rule does not apply to discovery of documents and things from parties who are subject to the court's personal jurisdiction, and who may be required to produce such materials at the place of trial."166

The Note thus confirms that the Advisory Committee wished to set aside that part of the Aérospatiale decision that had made the Evidence Convention applicable when a court has jurisdiction over a party and the needed evidence, though located abroad, will be produced in the United States. In support of this change, the Advisory Committee Note cited Insurance Corp. of Ireland v. Compagnie des Bauxite.167 However, the Bauxite case is probably better known for holding that U.S. courts may compel discovery for the purpose of determining whether individuals or entities are subject to their jurisdiction. Under Bauxite, once jurisdiction is estab-
lished, U.S. courts have the power to compel the production of evidence located abroad. However, the *Bauxite* Court did not consider whether the exercise of this power is proper in light of the Hague Evidence Convention or another international agreement governing discovery of evidence located abroad. Conversely, the *Aérospatiale* Court clearly held that in some cases U.S. courts should refrain from exercising their power to order evidence under the Federal Rules of Civil Procedure and instead take evidence under the Convention.

4.4. The Proposed Amendment

In the summer of 1990, the proposed amendment to Rule 26(a) was again revised. The newly revised amendment provided: “Discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the treaty.” This version of the amendment and the accompanying Advisory Committee Note were forwarded to the Standing Committee on Rules of Practice and Procedure with the recommendation that “the Supreme Court of the United States be advised to promulgate” the newly revised Rule 26. The Advisory Committee Note to the amendment provided:


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168 The change in language was authorized at a meeting of the Advisory Committee on Civil Rules, June 6-8, 1990. *See* Minutes of Civil Rules Committee Meeting, in New York City (June 6-8, 1990) (on file at AO).


170 Memorandum from John F. Grady, Chair, Advisory Committee on Civil Rules, to the Honorable Joseph F. Weis, Jr., Chair, Standing Committee on Rules of Practice and Procedure (June 19, 1990) (on file at AO).
of those governing other countries. If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that other methods should not be employed in discovery at places in foreign countries, at least if the approved methods are adequate to meet the need of the litigant for timely access to the information.

The rule of comity stated in this rule does not apply to discovery of documents and things from parties who are subject to the court's personal jurisdiction, and who may be required to produce such materials at the place of trial. E.g., Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982). The rule also does not apply to the taking of depositions of parties or persons controlled by parties who may be deposed within the United States. However, comity may be employed in matters to which the requirement of the rule does not apply. Cf. Société Nationale v. U.S. Dist. Ct., S.D. Iowa, 107 S. Ct. 2543 (1987).

Nor does the rule require comity where the discovery methods available by treaty are 'inadequate or inequitable.' This provision allows the court to make a discreet judgment on the facts as to the sufficiency of the internationally agreed discovery methods. Illustratively, a party should be required to make first resort under the Hague Convention despite a partial Article 23 reservation by the country in which discovery is sought, but not if that country has imposed a blanket reservation as an obstacle to discovery.

The rule also directs the court to authorize the use of other discovery methods as may be needed to assure that discovery is not 'inequitable.' International litigants should not be placed in a favored position as compared to U.S. litigants similarly situated, especially in commercial matters with respect to which the similar U.S. litigants may be their economic competitors. Especially, an international litigant using the provisions of Rule[s] 26-37 should not be permitted to use the Hague Evidence Convention or a similar interna-
tional agreement or even the law of the party's own country to create obstacles to equivalent discovery by an adversary.

Indeed, the court is not precluded by the rule from authorizing, to assure that discovery is adequate and equitable, the use of discovery methods that may violate the laws of another country. *Cf. Societe Internationale v. Rogers*, 357 U.S. 197 (1958). Where the impediment to discovery is imposed by public authority not at the request of the international litigant or the non-party from whom information is sought, accommodation may be necessary to reconcile the requirement of this rule that discovery be equitable to foreign law. But in no circumstance can the court authorize discovery methods that violate the mandate of a treaty that is the law of the United States.\(^{171}\)

This Advisory Committee Note expanded on previous Notes by addressing the question whether foreign blocking statutes prevent discovery under the Federal Rules of Civil Procedure. In support of the proposition that such statutes do not automatically bar discovery, the Note cited *Societe Internationale v. Rogers*.\(^{172}\) As some commentators have noted, however, the Advisory Committee Note's language is so broad that it could also be interpreted as authorizing violations of other internal laws of signatory nations, even if such violations occur within the signatory's territory.\(^{173}\) Clearly, such an action should not be undertaken lightly.

### 4.4.1. Public Response

Public reaction to the amendment in its new form reflected several concerns. In particular, the determination that the amendment would apply only to discovery "at a place within a country having a treaty . . . applicable to such discovery," led to criticism of the Advisory Committee for departing from the

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\(^{171}\) *Proposed Amendments*, 134 F.R.D. at 642-43 (citation omitted).

\(^{172}\) 357 U.S. 197 (1958).

\(^{173}\) See, e.g., Born, supra note 37.
judgment of the Aérospatiale Court. There was also concern expressed about the Advisory Committee Note, which appeared to authorize discovery on foreign territory even when such discovery would violate the internal law of the nation in which the needed evidence is sought. In addition, according to some practitioners, the proposed amendment, unlike the preliminary draft, permitted comity balancing instead of first resort to the treaty. In late 1991, however, the proposed amendment was returned by the United States Supreme Court to the Advisory Committee for further study.

4.5. Proposal: Modify and Enact the “First Resort” Rule

The Advisory Committee’s effort to amend the general discovery provision to address foreign discovery is commendable. The choice between the Hague Evidence Convention and the Federal Rules of Civil Procedure in the context of discovery abroad is largely a choice between two different procedural methods. The proper method for making such a choice should be included in Rule 26(a).

The principal advantage to Justice Stevens’ comity analysis

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174 See, e.g., Letter from Adair Dyer, First Secretary, Hague Conference on Private International Law, to Edwin R. Alley, Esq., Carpenter, Bennett & Morrissey (Aug. 29, 1990) (on file at AO) (stating that he was “troubled by . . . changes made from the Committee’s earlier draft [because the revised proposed amendment] appears to reverse the unanimous decision of the nine [Justices] in the Aérospatiale case” that the Hague Evidence Convention may apply when discovery is sought from a party subject to a U.S. court’s jurisdiction and the needed evidence, though located abroad, will be produced in the United States).

175 See id.; see also Burbank, supra note 156, at 1495 (suggesting that the Advisory Committee is “out of [its] depth when dealing with international civil procedure”).

176 Some practitioners and government agencies preferred the proposed amendment for precisely this reason. See, e.g., Thomas Riesenberg & Joseph Franco, The (New) Discovery of America: New Procedures Cause a Ripple, Not a Wave, LEGAL TIMES, Week of Apr. 8, 1991, at 32 (stating that the newly revised “draft of Rule 26(a) is a major improvement over the [earlier] proposal [because] it would be inappropriate to use the Federal Rules amendment process to overturn a Supreme Court precedent on a question of treaty interpretation, particularly where that precedent reflects a position urged upon the Court by the executive branch [in an amicus brief]”) (Mr. Riesenberg and Mr. Franco are attorneys in the General Counsel’s Office of the Securities and Exchange Commission).

is that in some situations resort to the Convention may be more time-consuming or expensive than seeking evidence under the Federal Rules of Civil Procedure. Additionally, some might argue that there are simply cases in which the amount of interference with the judicial sovereignty of a signatory nation by proceeding under the Federal Rules of Civil Procedure is so minimal as to make resort to the Convention unnecessary.\(^{178}\)

However, the disadvantages of a comity analysis are significant. Lower courts, often unfamiliar with other nations’ concerns and interests, will be called upon to make sensitive decisions with possible international ramifications. In addition, litigants may be unable to determine in advance whether the Federal Rules of Civil Procedure or the Hague Evidence Convention will govern the evidence collecting process. Moreover, certain courts may develop strong biases toward one method of collecting evidence, resulting in forum shopping and improper administration of the Convention or the Federal Rules of Civil Procedure.\(^{179}\)

Despite these flaws, the \textit{Aérospatiale} Court adopted the comity balancing approach. Nevertheless, as the Advisory Committee recognized when it first began drafting an amendment to Rule 26(a), the presumptive first resort rule proposed by Justice Blackmun may provide the better approach to discovery abroad. Under this approach, financial and judicial resources are saved because parties generally need not make arguments concerning the applicability of the Convention, and judges need not engage in “wasteful” comity balancing.\(^{180}\) The first resort approach also provides predictability by

\(^{178}\) Indeed, this possibility was advanced by the \textit{Aérospatiale} majority, which suggested that less “intrusive” discovery methods such as interrogatories may not require resort to the Convention. \textit{See} \textit{Aérospatiale}, 482 U.S. at 545.

Applying somewhat similar reasoning, at least one commentator has suggested completely exempting tort cases and “[s]imple commercial contract disputes” from the first resort rule because of the likelihood that discovery in such cases will frequently be less extensive and less intrusive. \textit{See} Martikan, \textit{supra} note 30, at 1025-26. However, although the Evidence Convention is ambiguous in several respects, it clearly applies to tort and commercial cases.

\(^{179}\) \textit{See supra} notes 136-39 and accompanying text.

\(^{180}\) \textit{See} Platto Letter, \textit{supra} note 153 (describing case-by-case comity balancing as “wasteful”); \textit{see also} Alley Letter, \textit{supra} note 156.
establishing that the Convention's procedures will normally be employed in collecting evidence abroad; yet the first resort rule still preserves the ability of litigants in certain situations to take evidence under the Federal Rules of Civil Procedure. Moreover, by giving greater effect to the Convention, the first resort rule demonstrates that the United States remains interested in fostering increased international judicial cooperation, which may lead other nations to accede to the Hague Evidence Convention and other international agreements.

4.5.1. Modifications to the "First Resort" Rule

Justice Blackmun's first resort rule is in some respects, however, incomplete. For instance, the first resort rule does not adequately protect against the possible extra cost and delay of using the Evidence Convention. Moreover, a party seeking discovery may be unfairly disadvantaged by resort to the Evidence Convention if an opponent is simultaneously permitted discovery under the Federal Rules of Civil Procedure.

The Advisory Committee was cognizant of these flaws and attempted to correct them, partly by indicating that the Federal Rules of Civil Procedure may be used if discovery under the Evidence Convention is "inadequate" or "inequitable." However, these terms are too open to interpretation. For this reason, the Committee might be well advised, if it continues its effort to amend Rule 26(a), to instead employ different language in the rule and to use the Advisory Committee Note to delineate several specific situations in which use of the Federal Rules of Civil Procedure in seeking foreign evidence is proper.

The new proposed amendment to Rule 26(a) should clearly indicate that it is adopting the reasoning of Justice Blackmun's separate opinion in Aérospatiale. The rule should also state that it is applicable both when evidence is sought in a signatory nation, and from a signatory nation. Additionally,

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181 See Preliminary Draft, 127 F.R.D. at 318.
182 At least one commentator, however, believes that the Advisory Committee may not amend Rule 26 to incorporate Justice Blackmun's first resort rule. See Burbank, supra note 156, at 1495.
the rule should emphasize that the Federal Rules of Civil Procedure may be used only after the Convention’s procedures have been exhausted without success or when the Convention clearly would fail to produce the needed evidence. Such a rule might provide:

When evidence is sought from or in a signatory nation to an applicable Convention, the methods of discovery provided by such a Convention shall first be used in seeking the needed evidence. If, however, the Convention’s procedures are employed but fail to produce the needed evidence, discovery may proceed under the Federal Rules of Civil Procedure. Furthermore, it is not necessary to use the applicable Convention when first resort to such a Convention would clearly fail to produce the needed evidence.

4.5.2. The Advisory Committee Note

The Advisory Committee Note to this rule should reiterate that an applicable Convention or treaty should normally be used in seeking evidence located abroad before resorting to discovery under the Federal Rules of Civil Procedure. The Committee Note should also re-emphasize that the first resort rule applies regardless of whether the evidence will be taken in or from another signatory nation. Moreover, the Committee Note should clearly describe the limited circumstances in which resort to the Federal Rules of Civil Procedure is proper. Illustrations should be included in the Advisory Committee Note to assist litigants and courts in correctly applying the rule. Such an Advisory Committee Note might provide:

First Resort Rule Applicable Whether Evidence Is Sought In or From a Signatory Nation: This rule is intended to clarify the role of the Hague Evidence Convention, and other Conventions and treaties, in U.S. civil procedure. Ordinarily, the taking of evidence in U.S. courts proceeds under the Federal Rules of Civil Procedure. However, unless explicitly indicated otherwise by a Convention or this rule, an applicable Convention will supplant the Federal Rules of Civil Procedure as the appropriate method of obtaining evidence from or in another signatory nation. For example, a
Convention will be the first approach to obtaining discovery both when a deposition is conducted in a foreign nation's territory and when seeking specific documents from within a foreign nation for use in the United States.

 Exceptions: When Evidence May Be Taken In or From a Signatory Nation Under the Federal Rules of Civil Procedure: Under this rule, the Federal Rules of Civil Procedure may be used to take discovery in or from a foreign nation in the following two situations:

(1) when the Convention has already been employed and failed to produce the needed evidence. Illustratively, if a request for evidence is not fulfilled because the authority responsible for obtaining the evidence was unable to do so, discovery under the Federal Rules of Civil Procedure is permitted. However, discovery under the Federal Rules of Civil Procedure is not permitted in a foreign nation if it will violate the internal laws of that nation. Alternatively, where the evidence is to be taken from a signatory nation, courts may order that such evidence be produced in the United States, even if such an act would violate the signatory nation's internal laws, see Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958), provided that the Convention's procedures have been exhausted without successfully obtaining the needed evidence and that such additional procedures do not violate the Convention.

(2) when it is clear that use of the Convention's procedures will fail to produce the required evidence. Illustratively, if a signatory nation has made a declaration under Article 23 of the Hague Evidence Convention that it will not respond to any requests for discovery of documents and has not either formally or informally modified this declaration, resort to the Convention is unnecessary and discovery may proceed under the Federal Rules of Civil Procedure. If, however, the signatory nation has made a declaration only partly limiting document discovery under the Convention, the Convention's procedures shall be employed in an effort
to obtain the needed documents. Should such procedures fail to produce the needed documents, discovery under the Federal Rules of Civil Procedure may be proper provided that the taking of such evidence in a signatory nation does not violate the internal laws of that country.

In the event a signatory nation refuses to respond to a request for discovery under the Convention for reasons not authorized by the Convention, discovery may proceed under the Federal Rules of Civil Procedure subject to the limitation that discovery in a foreign nation may not violate the internal laws of that nation.

Judicial Management of Discovery In or From a Signatory Nation: Although this rule requires that parties generally first resort to an applicable Convention when seeking evidence in or from a signatory nation, courts must manage discovery so that parties required to use the Convention are not unfairly disadvantaged. Thus, for example, a court may grant an unfairly disadvantaged party additional time in which to conduct discovery, or the court may delay discovery of a party proceeding under the Federal Rules of Civil Procedure, if justice so requires.

This amendment to Rule 26(a) and the accompanying Advisory Committee Note would have the effect of largely implementing Justice Blackmun's opinion in Aérospatiale. Courts, litigants, and foreign nations will know prior to litigation that the Evidence Convention's procedures will generally be used to obtain evidence located abroad.

The amendment requires that discovery proceed under the Convention regardless of where the evidence will be produced, even when the party from whom evidence is sought is subject to the jurisdiction of a U.S. court. The amendment also contemplates that the taking of evidence located within a signatory nation for the purposes of "jurisdictional" discovery will normally occur under the Evidence Convention. Judicial management of discovery can be used to prevent discovery abuses and unfair disadvantage to a party required to use the
Evidence Convention.\textsuperscript{183}

\textbf{4.5.3. The Residual Exception}

There is, however, at least one important issue that this proposal has thus far failed to address: whether the Hague Evidence Convention should apply even when its procedures are significantly more time-consuming or costly than the methods of discovery available under the Federal Rules of Civil Procedure. If litigants will be severely injured by resort to the Evidence Convention because of additional cost or delay, U.S. courts should have some discretion to instead proceed with discovery under the Federal Rules of Civil Procedure. The Advisory Committee Note to Rule 26(a) could address these situations as follows:

\textit{Residual Exception Under Which the Federal Rules of Civil Procedure May Be Used To Obtain Evidence Located Abroad:} Where the need for evidence is immediate, and failure to obtain the evidence in a timely manner would result in severe hardship to a party, courts should clearly indicate to the nation in which the needed evidence is located that the request must be fulfilled "expeditiously." If, despite indicating that the request for evidence should be expedited, the request is not fulfilled in this manner, courts may, in appropriate circumstances, proceed with discovery under the Federal Rules of Civil Procedure.

Although there are no firm guidelines to assist courts in determining when discovery requests are not expeditiously handled or when the failure to obtain evidence would result in severe hardship to a party,

\textsuperscript{183} For example, courts can prevent some discovery abuses by issuing protective orders under Rule 26(c), which states that "the court in the district where [a] deposition is to be taken may ... protect a party or person from annoyance, embarrassment, oppression, or \textit{undue burden or expense}, including ... (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including ... designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; ... (7) that a trade secret or other confidential ... information not be disclosed or be disclosed only in a designated way." \textit{Fed. R. Civ. P. 26(c)} (emphasis added).
courts may in their discretion proceed under the Federal Rules of Civil Procedure if there is a strong, demonstrated need to do so.

Because of the general need to use the Convention whenever possible, the court shall exercise extreme caution in determining that severe hardship will result from the failure to immediately obtain the needed evidence, and that it is, thus, necessary to proceed with discovery under the Federal Rules of Civil Procedure.

The Residual Exception will permit U.S. courts to use the Federal Rules of Civil Procedure in circumstances where a request for discovery under the Hague Evidence Convention has been made, but where discovery is proceeding in an unacceptable fashion and the delay or additional expense will result in severe hardship to a party. Courts will no doubt differ in determining whether the need for evidence is "immediate" and whether the receiving nation has failed to respond in an "expeditious" manner. Moreover, courts may also differ regarding whether a party will experience "severe hardship" if the Federal Rules of Civil Procedure are not employed. However, the tenor of the Advisory Committee Note proposed here provides notice that a court shall carefully consider these factors, along with the need to use the Convention whenever possible, before permitting discovery under the Federal Rules of Civil Procedure.

5. CONCLUSION

Although the Aérospatiale Court adopted a comity balancing approach to guide lower courts in determining when to apply the Hague Evidence Convention in U.S. civil and commercial litigation, this Comment proposes largely incorporating Justice Blackmun's presumptive first resort approach into the Federal Rules of Civil Procedure. Modifications can be made to Justice Blackmun's approach to ensure that first resort to an applicable Convention or treaty will not significantly disadvantage litigants in relation to their opponents or in their efforts to secure evidence located abroad. While some efficiency in the form of additional cost or delay may be sacrificed in certain cases by giving the Convention greater effect in U.S. civil procedure, the benefit of such a rule will be procedural uniformity and, it is hoped, increased judicial
cooperation between the United States and other present and future signatory nations to the Hague Evidence Convention and other international agreements.