The Hague Evidence Convention and Discovery *Inter Partes*: Trial Court Decisions Post-*Aérospatiale*

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This Article examines the approach that U.S. trial courts have taken to the question of obtaining evidence located in a foreign jurisdiction as part of the discovery process since the decision of the Supreme Court in Aérospatiale, *482 U.S. 522 (1987). It outlines the background to the decision in* Aérospatiale *and the decision itself, highlighting some of the unresolved questions that have been of importance in the treatment of the Hague Evidence Convention by U.S. courts. It then turns to examine the decisions of trial courts since 1987, analyzing how the approach of trial courts could be modified to better protect the foreign sovereign interest implicated in extraterritorial discovery. The large measure of discretion accorded to the trial court by the* Aérospatiale *decision has meant that post-1987 decisions have not significantly refined the applicable test. Courts have focused on the question of whether the discovery requested is unduly burdensome—incorrectly, as the Convention is not a device designed to limit the scope of discovery requests—and have failed to address properly the international law issues raised by extraterritorial discovery. Those issues, however, are unclear and not best suited for resolution by domestic courts. A long-term solution will require review and amendment of the Convention, but unless and until that happens, trial courts must focus properly on balancing the sovereign interests implicated in extraterritorial discovery in order to minimize conflicts.*

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I. INTRODUCTION AND BACKGROUND

A. Introduction

This Article examines the approach of trial courts to the question of obtaining evidence from parties located in a foreign jurisdiction as part of the discovery process since the 1987 Supreme Court decision in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*.[1] It outlines the background to the decision in *Aérospatiale* and the decision itself, highlighting some of the unresolved questions which have been important in the treatment of the Hague Evidence Convention by United States courts. It then turns to examine the decisions of trial courts since 1987, analyzing how the approach of trial courts could be modified to better protect the foreign sovereign interests implicated in extraterritorial discovery.

B. The Hague Evidence Convention

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[2] (Hague Convention), drafted in 1968 and opened for signature on March 18, 1970, is considered to be one of the most successful of the Hague Conventions.[3]

The Hague Convention was borne out of dissatisfaction with the use of the traditional system of letters rogatory for gathering evidence abroad.[4] Problems included the expense of translations, the fact that the requested State's procedures could make it difficult to get the

1. 482 U.S. 522 (1987).

2. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 846 U.N.T.S. 231 [hereinafter Hague Convention]; 28 U.S.C.A. § 1781 note (West 1998) (Treaties and Conventions: Convention on the Taking of Evidence Abroad in Civil or Commercial Matters).

3. *See* DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 86 (1992).

4. *See* Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, *in* ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS 289, 299 (1994).

evidence admitted in the courts of the requesting State, and difficulties in ensuring that, where examination was by a judge, the evidence elicited was actually of use to the party seeking it.[5]

These principal concerns motivated the United States to initiate the drafting of the Hague Convention, and they were met in part by the rule that the judicial authority executing a "letter of request" (the terminology used under the Hague Convention[6]) should generally follow a request that a special procedure (as opposed to that State's own procedure) be used for gathering the evidence required.[7] Evidence-gathering abroad, however, is necessarily complex and it is important not to overstate the advances made by the Hague Convention. Problems may arise due to foreign laws that prohibit the removal of documents or the taking of depositions, practical difficulties of translation, and cultural resistance to U.S.-style discovery requests.[8] One should not assume, for example, that the problem of translation expense was "resolved" by the Hague Convention's allowing for letters of request to be in English or French.[9] That is true only if the contracting State has not made a reservation to the effect that it will not accept letters of request in either or both of these languages. A majority of States have made such a reservation.[10]

It is important to note that the Hague Convention is concerned in its terms solely with the issue of evidence-gathering and, save for one

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5. *See id.* at 299-300; Philip W. Anram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 106 (1973); *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law*, 8 I.L.M. 785, 806-07 [hereinafter U.S. Delegation Report].

6. *See* Hague Convention, *supra* note 2, art. 1, 23 U.S.T. at 2557, 846 U.N.T.S. at 241.

7. *See* Hague Convention, *supra* note 2, art. 9, 23 U.S.T. at 2561, 846 U.N.T.S. at 243.

8. For an overview of some of these problems, see generally Mark R. Anderson, *Stranger in a Strange Land: Discovery Abroad*, 24 LITIG. 41, 41-44 (1998). The problems which one paralegal encountered with scorpions in a Peruvian warehouse, *see id.* at 41, while unusual, illustrate how foreign evidence-gathering can raise problems unthinkable in the domestic arena.

9. Professor Collins apparently thinks that the Hague Convention resolved the problem. *See* Collins, *supra* note 5, at 300; Hague Convention, *supra* note 2, art. 4, 23 U.S.T. at 2559, 846 U.N.T.S. at 242.

10. Namely, Argentina, Cyprus, Denmark, Finland, France, Germany, Monaco, Norway, Portugal, Singapore, Spain, and the United Kingdom. *See* 28 U.S.C.A. § 1781 (Treaties and Conventions: Convention on the Taking of Evidence Abroad in Civil or Commercial Matters) (West 1998), for the reproduced texts of the ratifications. It would appear that bad translations present a problem in the practical application of the Hague Convention, although it is not clear to what extent. *See Hague Conference on Private International Law: Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 24 I.L.M. 1668, 1673 (1985) [hereinafter *Special Commission Report*]. Translation of evidence obtained may also present a problem, particularly where large quantities of documents are involved. *See* Anderson, *supra* note 8, at 61.

article (to be discussed later), does not explicitly advert to the issue of discovery. Peculiarly, there has been a persistent trend in United States courts of asserting that the Hague Convention was intended to regulate foreign discovery.[11] Whatever the impact of the Hague Convention in this area may be, the regulation of foreign discovery should in no way be regarded as its primary goal.[12]

C. Discovery and the Convention

Indeed, one might wonder whether the Hague Convention was intended for use in U.S.-style discovery proceedings at all. The Hague Convention lays down procedures for the taking of "evidence,"[13] but does not define "evidence." It is questionable whether discovery requests can properly be termed requests for "evidence" within the meaning of the Hague Convention. In this context, one might note a line of decisions by English courts on the Foreign Tribunals Evidence Act 1856, which authorized English courts to order examination under oath or production of documents when requested to do so by a foreign court of competent jurisdiction which desired to obtain "testimony" in a civil or commercial matter. The English courts held that the use of the word "testimony" meant that the statute only allowed such an order to be made if the evidence was sought for direct use at trial.[14] Undoubtedly, one might argue that "evidence" is a broader term than "testimony"—and, in any case, decisions of the English courts on the meaning of an 1856 statute are of little value in interpreting the Hague Convention. However, one should also note Article 1 of the Hague Convention, which clearly states that a letter of request "shall not be used to obtain evidence which is not intended for use in judicial proceedings." No such limitation exists in relation to discovery under the Federal Rules of Civil Procedure, which allow for materials to be sought even if they would be inadmissible at trial, provided that the information sought is

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11. *See, e.g.*, Boreri v. Fiat S.p.A., 763 F.2d 17, 19 (1st Cir. 1985); *In re* Anschuetz & Co., 754 F.2d 602, 604 n.1 (5th Cir. 1985), *cert. granted, vacated and remanded*, 483 U.S. 1002 (1987); Rich v. KIS California, Inc., 121 F.R.D. 254, 257 (M.D.N.C. 1988); Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 361 (D. Vt. 1984); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 59 (E.D. Pa. 1983).

12. *See* Collins, *supra* note 5, at 293-94.

13. Hague Convention, *supra* note 2, art. 1, 23 U.S.T. at 2557, 846 U.N.T.S. at 241.

14. *See* Radio Corp. of Am. v. Rauland Corp., [1956] 1 Q.B. 618, 644-45 (Eng.) (Devlin, J.) ("The distinction is not whether what is to be obtained is documentary material or oral material. The distinction is whether it is a process by way of discovery and testimony for that purpose or whether it is testimony for the trial itself."); *see also* Eccles & Co. v. Louisville & Nashville R.R. Co., [1911] 1 K.B. 135, 142 (Eng.).

"reasonably calculated to lead to admissible evidence."[15] Perhaps more importantly, it might be argued that much evidence sought in discovery is really only *intended* for use in pre-trial preparation, even if its use at trial is not ruled out.

In light of all this, Professor Lowenfeld's assumption that one can simply seek discovery via the Hague Convention and "worry later" about what will be introduced or admissible as evidence[16] seems somewhat suspect given the express language of Article 1. Of course, much of this depends on how the phrase "judicial proceedings" is to be interpreted, and whether discovery after the initiation of a suit can be considered to be such a proceeding.[17] Discovery is, after all, part of the litigation process, despite frequent European misunderstandings to the contrary.[18] However, the question does not appear to have been adverted to in the drafting process and, as a result, U.S. and continental commentators may well take completely different views on the point.[19]

It may not be entirely necessary to properly resolve the question, as Article 27(b) makes it clear that contracting states are entitled to permit letters of request to be executed upon "less restrictive conditions" than those set out in the Hague Convention. Consequently, even if discovery requests were viewed as falling outside the strict scope of the Hague Convention, that would not mean that a request for discovery via the procedures set out in the Hague Convention would necessarily be unsuccessful.

Nevertheless, foreign misunderstanding of the nature of the U.S. judicial process may well be hampering the effectiveness of utilizing Hague Convention procedures in the discovery process.[20] Matters are

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15. FED. R. CIV. P. 26(b)(1).

16. Andreas F. Lowenfeld, *More on Discovery: The Hague Evidence Convention*, *in* INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 180, 183 (1996).

17. *Cf.* Société Nationale Industrielle Aérospatiale v. United States Dist. Ct., 482 U.S. 522, 563 n.21 (1987) (Blackmun, J., concurring in part and dissenting in part).

18. *See* Stephen F. Black, *United States Transnational Discovery: The Rise and Fall of the Hague Evidence Convention*, 40 INT'L & COMP. L.Q. 901, 903 (1991); David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 750 (1986) [hereinafter Gerber, *Extraterritorial Discovery*]. *But see* Federal Republic of Germany: Court of Appeals (Munich) Decision with Regard to a U.S. Court Request for Judicial Assistance and the Taking of Evidence, 20 I.L.M. 1025, 1039 (1981) (dismissing an argument that a request for judicial assistance issued as part of the discovery process was necessarily incompetent).

19. *See* Gerber, *Extraterritorial Discovery*, *supra* note 18, at 781-82.

20. *See* Dirk-Reiner Martens, *Germany*, *in* OBTAINING EVIDENCE IN ANOTHER JURISDICTION IN BUSINESS DISPUTES 93, 100 (Charles Platto & Michael Lee eds., 2d ed. 1993) (arguing that problems with Germany executing discovery requests under the Hague Convention

confused further by the sole reference to discovery in the Hague Convention, found in Article 23, the result of a late proposal by the United Kingdom delegation to the Hague Conference.[21] Article 23 states that "[a] Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries."

Article 23 is somewhat problematic. "[D]iscovery of documents as known in Common Law countries" is a rather peculiar phrase given the gulf between U.S. and English concepts of "discovery."[22] And why are oral depositions not mentioned in Article 23? Professor Collins has suggested that the United Kingdom delegation was seeking to address the problem of the Hague Convention being used for third party discovery, but (deliberately) ignored the question of *inter partes* discovery and (accidentally) ignored the question of oral depositions.[23] Whether or not this is the case, and notwithstanding the difficulties in interpreting Article 23, virtually all States which ratified the Hague Convention made an Article 23 declaration.[24] This demonstration of hostility towards the use of the Hague Convention for U.S.-style discovery has been an important factor in the reluctance of United States courts to utilize Hague Convention procedures.[25]

D. Discovery Inter Partes*: Disapplying the Federal Rules?*

What role does the Hague Convention play in a lawsuit in the United States where one party seeks to discover evidence in the possession of another party and that evidence is located abroad?

Initially, in two cases, California courts indicated that the Hague Convention's procedures should be used to obtain the evidence requested.[26] Later cases, however, moved away from that view towards preferential or even exclusive use of the Federal Rules.[27] The

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stem "in general from a failure to understand U.S. procedure and specifically from a failure to realize that pre-trial discovery, a process involving both witness examination and document production, is a *conditio sine qua non* to United States procedure").

21. *See* Lowenfeld, *supra* note 16, at 182-83.

22. *See id.* at 183.

23. *See* Collins, *supra* note 5, at 301-02.

24. *See* Lowenfeld, *supra* note 16, at 183.

25. *See, e.g.*, Doster v. Schenk, 141 F.R.D. 50, 52 (M.D.N.C. 1991); Murphy v. Reifenhauser KG Maschinenfabrik, 101 F.R.D. 360, 361 (D. Vt. 1984).

26. Pierburg GmbH & Co. KG v. Superior Ct., 137 Cal. App. 3d 238, 240 (Cal. Ct. App. 1982); Volkswagenwerk Aktiengesellschaft v. Superior Ct., 123 Cal. App. 3d 840, 859 (Cal. Ct. App. 1981).

27. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 473 reporters' note 6; *e.g.*, Compagnie Française d'Assurance pour le Commerce Extérieur v. Phillips Petroleum

Supreme Court subsequently ruled on the issue in the *Aérospatiale* case.[28]

In *Aérospatiale*, the plaintiffs sued two corporations owned by the Republic of France in a United States district court, alleging negligence and breach of warranty, following the crash of a plane in Iowa.[29] The defendants did not question the jurisdiction of the court and did not object to initial discovery by both sides being conducted under the Federal Rules of Civil Procedure.[30]

However, the defendants did object to the plaintiffs' second request for discovery, and filed a motion for a protective order, arguing that, because the material sought was held by French corporations in France, use of the Hague Convention procedures was mandatory.[31] Furthermore, they alleged that they were prohibited by French penal law from complying with non-Hague Convention discovery requests.[32]

The Magistrate denied the motion for a protective order, and the defendants petitioned the Court of Appeals for the Eighth Circuit for a writ of mandamus.[33] This was also denied.[34] The court held that the Hague Convention does not apply to evidence in the possession of a foreign litigant over whom the district court has jurisdiction.[35] While the French "blocking statute" was certainly something to take into account when deciding whether discovery was proper, it was not determinative.[36] The defendants appealed again, and certiorari was granted.[37]

Co., 105 F.R.D. 16, 27 (S.D.N.Y. 1984) (rejecting exclusivity); *In re* Anschuetz & Co., 754 F.2d 602, 615 (5th Cir. 1985), *cert. granted, vacated and remanded*, 483 U.S. 1002 (1987) (holding that the Hague Convention was inapplicable where the court had personal jurisdiction over the party concerned).

28. Société Nationale Industrielle Aérospatiale v. United States Dist. Ct., 482 U.S. 522 (1987) [hereinafter *Aérospatiale*].

29. *See id.* at 524-25.

30. *See id.* at 525.

31. *See id.* at 525-26.

32. *See id.* at 526; Law No. 80-538 of July 16, 1980, J.O., July 17, 1980; JCP 1980, III, No. 50160.

33. *See Aérospatiale*, 482 U.S. at 526-27.

34. *See id.* at 528-29.

35. *See Aérospatiale*, 482 U.S. at 528.

36. *See id.* It was already well established as a matter of U.S. law that a foreign law prohibiting disclosure of certain information did not necessarily preclude a U.S. court from making a discovery order in respect of such information. *See* Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 205 (1958); Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976).

37. Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the S. Dist. of Iowa, 476 U.S. 1168 (1986).

The Court rejected the view that the Hague Convention by its terms required either exclusive or "first use" of its procedures whenever evidence located abroad was sought.[38] That left two options: first, that although the Hague Convention was not mandatory in its terms, considerations of international comity should require first resort to Hague Convention procedures; and second, that the Hague Convention was simply an alternative procedure which a United States court could choose to follow or not depending on the circumstances of the case.[39]

The Court rejected the view of the Court of Appeals that the Hague Convention simply did not apply to discovery sought from a party over whom the court had personal jurisdiction, noting that the Hague Convention drew no distinction between evidence to be obtained from third parties and from parties themselves.[40] Consequently, Hague Convention procedures were available and could be used by the court to seek evidence from a party.[41]

Although the "did not apply" position had been taken in a number of appellate decisions,[42] and has been strongly supported by Professor Collins, who argued that the position was "so plainly correct that it comes as a matter of considerable surprise . . . that the Supreme Court has agreed to review [it],"[43] it seems hardly defensible. The Hague Convention simply provides a mechanism by which one State may request another to obtain evidence abroad.[44] Once the argument that the Hague Convention is mandatory by its terms has been rejected,[45] there seems to be no good reason why

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38. *See Aérospatiale*, 482 U.S. at 533-34.

39. *See id.* at 533.

40. *See id.* at 540-41.

41. *See id.* at 541.

42. *See* Daimler-Benz Aktiengesellschaft v. United States Dist. Ct., 805 F.2d 340, 341 (10th Cir. 1986); *In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729, 731 (5th Cir. 1985); *In re* Anschuetz & Co., 754 F.2d 602, 611 (5th Cir. 1985), *cert. granted, vacated and remanded*, 483 U.S. 1002 (1987).

43. Collins, *supra* note 5, at 292. Professor Bermann's views provide interesting contrast and illustrate the sharp divisions in this area: "In rejecting this view, the Court fortunately averted what might have been an extremely serious error in judgment." George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TUL. L. REV. 525, 530 (1989).

44. *See* Hague Convention, *supra* note 2, art. 1, 23 U.S.T. at 2557, 846 U.N.T.S. at 241. Interestingly, beyond the title of the Hague Convention, there is no explicit reference to the geographical location of the evidence which is to be requested.

45. *See Aérospatiale*, 482 U.S. at 534-38. Much is made here of the use of the word "may" in Article 1 of the Hague Convention, in contrast to the word "shall," which appears in Article 1 of the Hague Service Convention, as indicating that the Hague Convention is not mandatory. *See, e.g.*, Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher, 328 S.E.2d 492, 500-01 (W. Va. 1985). Although space does not permit a full examination of this

courts should read words into the Hague Convention in order to justify not applying a procedure which is only optional in the first instance. One can hardly argue that the drafters intended that the Hague Convention be inapplicable *inter partes* when the evidence tends to suggest that they simply never adverted to the issue.[46] That does not mean that Hague Convention procedures *should* be used; indeed, one could consistently argue that they were necessarily *inappropriate inter partes*. However, they clearly remain available.

The Court then turned to the question of whether there should be a rule that would "require first resort to Convention procedures whenever discovery is sought from a foreign litigant."[47] The Court rejected such an approach, arguing that there were many situations in which Hague Convention procedures would be unduly time-consuming and expensive.[48] Although international comity might militate in favor of the Hague Convention's use in particular cases, this was a matter to be determined on the facts of each individual case rather than by way of a blanket rule.[49]

Having concluded that the Hague Convention was simply an option "to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the concerned foreign state"[50] one might have hoped that the Court would lay down some guidance as to how an "appropriate" case was to be identified. The Court, however, explicitly declined to "articulate specific rules to guide this delicate task of adjudication."[51] Beyond some vague hints that sovereign interests of foreign states should be given weight,[52] and

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issue here, the constant emphasis placed on the use of the word "may" means that Axel Heck's somewhat neglected analysis of the point should be highlighted. Heck convincingly argues that the use of "may" is irrelevant, as the Hague Convention provides for more than one means of taking evidence abroad. *See* Axel Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 267-68 (1986). As the Service Convention does not have this dual structure, the usual comparison is invalid. *See id.* Consequently, "may" can be taken to indicate only that the court may choose between Hague Convention Chapters I and II procedures, and does not resolve the issue of whether the court may ignore the Hague Convention altogether. *See id*.

46. *Cf.* Black, *supra* note 18, at 904 (arguing that the U.S. negotiators were thinking solely about the issue of nonparty witnesses).

47. *Aérospatiale*, 482 U.S. at 542.

48. *See id.*

49. *See id.* at 543-44. As Justice Blackmun pointed out in his dissent, however, the Court has frequently invoked comity to justify blanket rules in other areas of law. *See id.* at 554-55 (Blackmun, J., concurring in part and dissenting in part); *see also* Bermann, *supra* note 43, at 536.

50. *Aérospatiale*, 482 U.S. at 533.

51. *Id.* at 546.

52. *See id.* at 543-44.

that United States courts should "exercise special vigilance" to protect foreign litigants against "unnecessary, or unduly burdensome, discovery,"[53] no guidance was given to lower courts as to how the issue should be dealt with. Even the case at hand was given scant attention; the Court blandly stated that "the Magistrate and the Court of Appeals correctly refused to grant the broad protective order . . . requested."[54]

This lack of guidance was one of the concerns underlying Justice Blackmun's dissent.[55] Justice Blackmun favored the application of "a general presumption that, in most cases, courts should resort first to the Convention procedures."[56] Doubting the ability of domestic courts to properly evaluate the interests of foreign states in this area, he feared a "pro-forum bias . . . creep[ing] into the supposedly neutral balancing process."[57]

While Justice Blackmun sought to avoid a *per se* rule that would force courts to resort to Hague Convention procedures even where it was clear that they were unlikely to be fruitful, he argued that courts have too often simply engaged in unsupported speculation about the effectiveness of such procedures in order to justify avoiding use of the Hague Convention.[58] He also suggested that increased use of the Hague Convention as opposed to direct discovery under the Federal Rules would avoid creating resentment of the United States judicial process in foreign states.[59]

Clearly, *Aérospatiale*'s failure to provide a framework for lower courts to utilize in deciding whether to employ Hague Convention procedures is regrettable. There is a certain irony in the Court's concern about costs and delay, given that the lack of guidance makes lower court decisions less predictable and more complex.[60]

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53. *Id.* at 546.

54. *Id.* at 547.

55. *See Aérospatiale*, 482 U.S. at 568 (Blackmun, J., concurring in part and dissenting in part). The dissent was joined by Brennan, Marshall, and O'Connor, JJ. *See id.* at 547.

56. *Id.* at 548-49 (Blackmun, J., concurring in part and dissenting in part).

57. *Id.* at 553 (Blackmun, J., concurring in part and dissenting in part).

58. *See id.* at 566-67 (Blackmun, J., concurring in part and dissenting in part).

59. *See Aérospatiale*, 482 U.S. at 567-68.

60. *See* David J. Gerber, *International Discovery After Aérospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521, 527-28 (1988) [hereinafter Gerber, *International Discovery*]; *see also* Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-*Aérospatiale *Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393, 401 (1990) (noting that "lower courts appear to have found the *Aérospatiale* comity analysis cumbersome and unhelpful").

II. POST-*AÉROSPATIALE*: UNRESOLVED QUESTIONS

A. The Burden of Proof: Creating a Pro-Federal Rules Presumption

The Supreme Court left a threshold question wide open in *Aérospatiale*: If a court has the choice of deciding whether to use Hague Convention procedures or the Federal Rules in the discovery process, who bears the burden of showing which procedure is appropriate? The question is a crucial one because it involves identifying the means which is presumed to be the appropriate one. It would seem self-evident that placing the burden on the party arguing for the use of such procedures would result in more widespread use of the Hague Convention than would a rule that places the burden on the party opposing the use of Hague Convention procedures.

In *Hudson v. Hermann Pfauter GmbH & Co.*,[61] one of the first decisions dealing with the Hague Convention after *Aérospatiale*, Judge Munson asserted that "the burden should be placed on the party opposing the use of Convention procedures to demonstrate that those procedures would frustrate [the interests of United States courts in ensuring effective discovery and accountability of foreign citizens and corporations doing business in the U.S.]."[62] However, Judge Munson made no attempt to justify that view, and courts since have generally taken the view that the burden of proof lies on the party seeking to show that use of the Hague Convention is appropriate.[63]

The implications of such a rule are demonstrated in *Knight v. Ford Motor Co.*, which followed *Hudson*. In that case, the court used Hague Convention procedures because "no reason appear[ed] why resort to [those] procedures would not prove effective."[64] It is surely no coincidence that the *Hudson* and *Knight* courts found that Hague Convention procedures should be used in the first instance,[65] while other trial courts, having taken the opposite view on the proper

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61. 117 F.R.D. 33 (N.D.N.Y. 1987).

62. *Id.* at 38.

63. *See* Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344, 346 (D. Conn. 1997); Doster v. Schenk, 141 F.R.D. 50, 51, 51 & n.3 (M.D.N.C. 1991); *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 354 (D. Conn. 1991); Rich v. KIS California, Inc., 121 F.R.D. 254, 257 (M.D.N.C. 1988); Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 388-89 (D.N.J. 1987); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 190 (N.Y. Sup. Ct. 1988). *But see* Knight v. Ford Motor Co., 615 A.2d 297, 300-01 (N.J. Super. Ct. Law Div. 1992) (agreeing with the *Hudson* court that the burden should be placed on the party opposing the use of Hague Convention procedures).

64. *Knight*, 615 A.2d at 301.

65. *See id.* at 301-02; *Hudson*, 117 F.R.D. at 38.

incidence of the burden of proof, have invariably found that Federal Rules procedure is appropriate.[66]

Much of this preference for the Federal Rules is based on the oft-repeated assertion that Hague Convention procedures are "time consuming and expensive."[67] Such comments are usually bolstered by a citation or two to give them the requisite air of authority,[68] but closer examination reveals that these citations prove very little.

For example, the quote in the previous paragraph comes from *Scarminach v. Goldwell GmbH*,[69] citing to the earlier decision in *Haynes v. Kleinwefers*.[70] The *Haynes* court stated that "[o]ne court has observed that the procedure of executing letters of request in Germany can be a very time-consuming and expensive effort."[71] That statement would hardly justify drawing general conclusions about the Hague Convention's effectiveness, but we can let that pass for the moment as the defendant in *Scarminach* was a German corporation.[72]

What is more interesting is the decision cited by the *Haynes* court, *Murphy v. Reifenhauser, KG Maschinenfabrik*.[73] The relevant passage is telling: "At least one previous letter of request executed in Germany required many months of effort involving translation of materials, transmittal through local counsel, review by the German

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66. *See* Vincent Mercier & Drake D. McKenney, *Obtaining Evidence in France for Use in United States Litigation*, 2 TUL. J. INT'L & COMP. L. 91, 98-99 (1994); Born & Hoing, *supra* note 60, at 403; *Valois*, 183 F.R.D. at 346; *Doster*, 141 F.R.D. at 51 & n.3; *Perrier*, 138 F.R.D. at 354; *Rich*, 121 F.R.D. at 257; *Benton Graphics*, 118 F.R.D. at 388-89; *Scarminach*, 531 N.Y.S.2d at 190. For the purposes of this article, no distinction will be drawn between the Federal Rules and their state equivalents. For discussion of how the balancing process might differ in state and federal court, see generally David Westin & Gary B. Born, *Applying the* Aérospatiale *Decision in State Court Proceedings*, 26 COLUM. J. TRANSNAT'L L. 297 (1988).

67. *Scarminach*, 531 N.Y.S.2d at 191; *see also, e.g.*, Pain v. United Technologies Corp., 637 F.2d 775, 790 (D.C. Cir. 1980); Fishel v. BASF Group, 175 F.R.D. 525, 529 (S.D. Iowa 1997); *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 310 (N.D. Ill. 1997); Moake v. Source Int'l Corp., 623 A.2d 263, 266 (N.J. Super. Ct. App. Div. 1993); *Doster*, 141 F.R.D. at 54; *Benton Graphics*, 118 F.R.D. at 391; Int'l Society for Krishna Consciousness, Inc., v. Lee, 105 F.R.D. 435, 450 (S.D.N.Y. 1984).

68. This is not always true. No authority is cited for the claimed ineffectiveness of Hague Convention procedures in either *Anglo-American Ins. Group, P.L.C. v. Calfed, Inc.*, 940 F. Supp. 554, 565 (S.D.N.Y. 1996), or *Rich*, 121 F.R.D. at 256. Similarly, "American" discovery procedures are described as "more expedient" in *In re* Asbestos Litig., 623 A.2d 546, 550 (Del. Super. Ct. 1992), but no justification is offered for the assertion.

69. *See Scarminach*, 531 N.Y.S.2d at 191.

70. 119 F.R.D. 335, 338 (E.D.N.Y. 1988)).

71. *Haynes*, 119 F.R.D. at 338.

72. Or, more accurately, a West German corporation. *See Scarminach*, 531 N.Y.S.2d at 189.

73. 101 F.R.D. 360 (D. Vt. 1984).

Ministry of Justice and then by German courts, and other procedural maneuvering."[74]

Consequently, it becomes clear that what appears initially to be an assessment of Hague Convention procedures based on experience is simply a reference to the facts of one solitary case. This problem of unsupported assertions can be traced back to *Aérospatiale* itself, in which the majority stated that: "In many situations the Letter of Request procedure authorized by the Convention would be unduly time-consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules."[75]

Although Bermann has accused the *Aérospatiale* majority of giving the Hague Convention an "unflattering and even caricatural" profile,[76] this may be somewhat unfair (at least in this respect). It is more significant that courts since *Aérospatiale* have ignored the fact that the majority qualified its statement with the observation that "in other instances," use of the Hague Convention might yield more evidence more promptly than discovery under the Federal Rules.[77] More crucially, however, as Justice Blackmun pointed out, no support was offered for either claim "and until the Convention is used extensively enough for courts to develop experience with it, such statements can be nothing other than speculation."[78] Nevertheless, such speculation is widespread and self-reinforcing, as courts justify one *ipse dixit* with citation of another in seemingly endless chains.[79] Indeed, sometimes the cases cited do not support the point at all, as was the case in *Valois*, where it was claimed to be "generally recognized" that Hague Convention procedures "are far more cumbersome than under the Federal Rules of Civil Procedure."[80] In one of the cases cited in support of this claim, the court actually

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74. *Id.* at 361 (citing Charles Platto, *Taking Evidence Abroad for Use in the United States-A Practical Guide*, 16 INT'L L.J. 575 (1982)).

75. Société Nationale Industrielle Aérospatiale v. United States Dist. Ct., 482 U.S. 522, 542 (1987).

76. Bermann, *supra* note 43, at 542.

77. *Aérospatiale*, 482 U.S. at 542 n.26.

78. *Id.* at 561 (Blackmun, J., concurring in part and dissenting in part). It is notable that it is very rare to find statements (speculative or otherwise) to the effect that the Hague Convention *is* effective. *But see* Born & Hoing, *supra* note 60, at 398 ("On the whole, the Convention's procedures function in an adequate fashion for U.S. litigants.").

79. *Aérospatiale* itself is sometimes cited for the proposition that Hague Convention procedures are more inefficient than the Federal Rules, although, as indicated in the text, the *Aérospatiale* majority did qualify its claim. Courts tend to overlook this fact. *See, e.g.*, Fishel v. BASF Group, 175 F.R.D. 525, 529 (S.D. Iowa. 1997) (citing *Aérospatiale*, 482 U.S. at 542); *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 310 (N.D. Ill. 1997) (citing *Aérospatiale*, 482 U.S. at 542-43).

80. Valois of Am., Inc., v. Risdon Corp., 183 F.R.D. 344, 349 (D. Conn. 1997).

dismissed the plaintiffs' claim that Hague Convention procedures might prove "amazingly cumbersome and enervating" as "unsupported speculation."[81]

Nevertheless, while it is easy to criticize trial courts for engaging in unsupported speculation, there are probably good reasons for expecting use of the Hague Convention to be generally more time-consuming than use of the Federal Rules. One such reason is the fact that the Hague Convention brings an additional actor—the foreign State—into the proceedings. In that sense, it would be wrong to argue that the concerns of trial courts in this regard are entirely unfounded, although they enjoy much less of a foundation than some of the relevant judgments would suggest.[82] Problematically, the infrequent use of the Hague Convention by trial courts makes it difficult to build up a body of experience which would allow for a more accurate assessment of the advantages and disadvantages of employing Hague Convention procedures. Consequently, courts have no option at the present but to engage in speculation when evaluating the merits of Hague Convention procedures.[83]

B. The Question of Equity

Courts have sometimes opposed use of Hague Convention procedures to obtain discovery on the basis that it would be inequitable if one party could use the Federal Rules to obtain discovery while the other party had to use the Hague Convention.[84] Even accepting the implicit assumption that the Federal Rules are more liberal than the Hague Convention, it is incorrect to assume that

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81. *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 355 (D. Conn. 1991).

82. It appears that the average delay in executing letters of request under the Hague Convention ranges from one to six months. *See Special Commission Report*, *supra* note 10, at 1674.

83. In one case where past experience was available to assist the court in evaluating the effectiveness of Hague Convention procedures, the court refused to consider it. *See* Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 391 (D.N.J. 1987) (A Swedish declaration that a letter of request would be executed in "approximately two months" was rejected as "an approximation based upon past history; there are certainly no guarantees."). The *Benton Graphics* court may well be right, but one might point out that there are no guarantees under the Federal Rules either.

84. *See, e.g.*, *In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729, 731 (5th Cir. 1985); *In re* Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985), *cert. granted, vacated and remanded*, 483 U.S. 1002 (1987); *Valois*, 183 F.R.D. at 349; Doster v. Schenk, 141 F.R.D. 50, 51-52 n.3 (M.D.N.C. 1991); Haynes v. Kleinwefers, 119 F.R.D. 335, 338 (E.D.N.Y. 1988); Int'l Society for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 446 (S.D.N.Y. 1984); Adidas (Canada) Ltd. v. S/S Seatrain Bennington, 1984 AMC 2629 (S.D.N.Y. 1984); *see also* Moake v. Source Int'l Corp., 623 A.2d 263, 264-65 (N.J. Super. Ct. App. Div. 1993).

this creates an inequity which must be overcome by favoring the Federal Rules over the Hague Convention.

First, the assumption that the use of the Hague Convention in a case involving a U.S. litigant and a non-U.S. litigant automatically creates an inequity is unfounded.[85] Whether or not the Hague Convention applies depends on the *locus* of the evidence sought, not the nationality of the requested party.[86] While an imbalance may exist depending on the location of the evidence which is being sought by the different parties, it does not exist—as courts have tended to assume—as a necessary concomitant of use of the Hague Convention.

Second, even where an inequity does exist, the court has tools at its disposal to correct that problem. In *Hudson*, the court held that if the party which was in a position to use the Federal Rules sought to gain a tactical advantage through this, "the court reserves the power to utilize all tools at its disposal to correct any inequity."[87] None of the courts which have invoked the argument from equity to justify favoring the Federal Rules over the Hague Convention has made any attempt to explain why the *Hudson* court's strategy for dealing with inequity would be inadequate or ineffective.

These two factors—the burden of proof and considerations of equity—indicate a clear bias in favor of using the Federal Rules. It is in this context that the analytical structure used by courts in applying *Aérospatiale* must be considered, and it is that structure to which this article now turns.

III. DEVELOPING A FRAMEWORK: THE THREE-PRONG TEST

Despite the explicit refusal of the *Aérospatiale* majority to lay down explicit guidance, it was not long before courts began referring to the "*Aérospatiale* test."[88] In *Doster v. Schenk*, the court claimed that the *Aérospatiale* majority had indicated that courts should

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85. A more bizarre variant of the argument from equity can be found in *Moake*, 623 A.2d at 265, where it is argued that a rule requiring exclusive use of the Hague Convention "would confer an unwarranted advantage on some domestic litigants over others similarly situated." As Professor Bermann has pointed out, this kind of inequity is a common and intended result of international agreements. *See* Bermann, *supra* note 43, at 545.

86. *See* Bermann, *supra* note 43, at 543.

87. Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 39 (N.D.N.Y. 1987); *see also* Bermann, *supra* note 43, at 544.

88. The phrase "*Aérospatiale* test" is used as a shorthand for a variety of phrases that have been employed. *See In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 309 (N.D. Ill. 1997) ("*Aérospatiale* has been interpreted by lower courts to contain a three-part test."); Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344, 346 (D. Conn. 1997) ("the three-pronged inquiry set forth in Société Nationale"); Doster v. Schenk, 141 F.R.D. 50, 52 (M.D.N.C. 1991) ("three-part test").

consider three factors in deciding whether Hague Convention procedures should be used: "(1) the particular facts of each case, (2) the sovereign interests involved, and (3) whether the use of the Convention would provide effective discovery."[89] While this test was not explicitly adumbrated in *Aérospatiale*,[90] it has been accepted by a number of courts as an appropriate formulation.[91] It certainly provides a useful framework for analyzing the approaches taken by the courts in individual cases. Each of the factors identified in *Doster* will be analyzed in turn here.

A. The Particular Facts of the Case

Examination of the "particular facts" of the case appears to be largely confined to an assessment of the discovery requested.[92] Consequently, a party will not be aided in its argument that Hague Convention procedures should be used if the court finds that the discovery requested is not "intrusive, unnecessary, or unduly burdensome."[93]

One might wonder what relevance this question has as to whether the Hague Convention or the Federal Rules should be employed. If "intrusive, unnecessary, or unduly burdensome" discovery is requested, the court can always issue a protective order under Rule 26(c) of the Federal Rules, which entitles a court to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." In other words, it is not necessary to resort to the Hague Convention as some kind of safeguard against unduly burdensome discovery.

Despite this, courts have taken the view that a failure to show that the discovery sought would be unduly burdensome weighs against the application of Hague Convention procedures.[94]

In *Doster*, it was stated that where a party fails to take advantage of the discovery conference procedure to narrow discovery requests, the right to urge use of Hague Convention procedures "based on the

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89. *Doster*, 141 F.R.D. at 52 (citing *Aérospatiale*, 482 U.S. at 544).

90. However, the portion of the *Aérospatiale* majority judgment cited in *Doster* might be seen as offering *some* support for it. *See Aérospatiale*, 482 U.S. at 544.

91. *See* Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344, 346 (D. Conn. 1997); *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 309 (N.D. Ill. 1997); *see also In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 354 (D. Conn. 1991).

92. In particular, see *Valois*, 183 F.R.D. at 346.

93. *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. at 309.

94. *See* Haynes v. Kleinwerfers, 119 F.R.D. 335, 337 (E.D.N.Y. 1988); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 191 (N.Y. Sup. Ct. 1988).

nature or alleged burden of the discovery requests" would be lost.[95] There are two objections to this reasoning. First, requiring a party who argues in favor of the use of Hague Convention procedures to at least initially cooperate in discovery under the Federal Rules means that when the time comes for a court to determine whether the Hague Convention guidelines or the Federal Rules are appropriate, it may, for reasons of expediency, simply choose to continue with the course which has already been set. Second, and more importantly, it is far from clear that the case for preferring use of the Hague Convention is or should be based on the nature of the discovery requests involved. As indicated above, the Federal Rules already contain devices for dealing with this issue.

It was also suggested in *Doster* that the court should take into account the fact that a party, by establishing itself in the United States, should have expected litigation in the United States.[96] Not too much should be made of this point, however. It is certainly arguable that a person who establishes sufficient "minimum contacts"[97] with the United States so as to fall within the jurisdiction of United States courts has voluntarily subjected himself to the risk of suit in those courts. But even though this may be seen as conferring *power* on the courts to order direct discovery, it does not bear on the question of whether such an order is *appropriate* given the foreign sovereign interests implicated in such cases.[98]

B. The Foreign Sovereign Interests in Issue

It is sometimes suggested that the foreign sovereign interests in *Aérospatiale* were particularly strong, as both of the defendants were state-owned corporations.[99] While that is true, it should not be taken

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95. Doster v. Schenk, 141 F.R.D. 50, 53 (M.D.N.C. 1991).

96. *See id.* at 52. It may be noted that the *Doster* court appears quite clear in its statement that a person who conducts business in the United States should expect to be sued. *See id*. at 52. One wonders whether this is a slip of the pen or an accurate reflection of the costs of doing business in the United States today. *Cf.* Gavin Esler, *The Rule of Law and the Rule of Lawyers*, *in* THE UNITED STATES OF ANGER 84, 90-91 (1997) (noting exponential growth in the number of lawyers and lawsuits in the United States).

97. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

98. *Cf.* F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 1 RECUEIL DES COURS 1, 139-40 (1964) (discussing the question of state officials taking statements abroad and observing that it does not "matter whether the taxpayer or witness consents to the investigation. The right to object, as well as the right to consent, belongs to the State concerned.") [hereinafter Mann, *Jurisdiction*].

99. *See* Mississippi Poultry Ass'n, Inc. v. Madigan, 992 F.2d 1359, 1367 (5th Cir. 1993).

to mean that there are no sovereign interests at issue where the parties seeking use of the Hague Convention are private individuals.[100]

The major difficulty here is in identifying and evaluating the foreign sovereign interests at issue. In *Doster*, the court expressed doubt that the German constitutional principle of proportionality, which would only allow a judge to interfere with the rights of personal and business privacy if necessary to protect other litigants' rights, could be considered a "significant sovereign interest[]."[101] With all due respect to the *Doster* court, a principle which a State has chosen to enumerate in its constitution would generally appear to indicate a significant sovereign interest in the matter at issue.

One important value of Hague Convention procedures in protecting sovereign interests is that they provide a role for the foreign state in the evidence-gathering process, and allow that state to refuse to accede to requests if it feels that such interests would be violated. Bypassing the Hague Convention in favor of the Federal Rules eliminates such a role for the foreign state.

United States courts favoring use of the Federal Rules have tended to give little weight to foreign sovereign interests.[102] Balancing foreign sovereign interests against U.S. interests, they invariably find that U.S. interests take precedence.[103] Indeed, they are generally reluctant to even acknowledge the existence of foreign sovereign interests.[104] The *Scarminach* court ignored the argument that pursuing direct discovery against a German corporation might be "deemed an affront to judicial sovereignty,"[105] arguing that this was no more than an unsupported assertion in a U.S. attorney's affidavit.[106]

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100. *See In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 355 (D. Conn. 1991).

101. Doster v. Schenk, 141 F.R.D. 50, 54 (M.D.N.C. 1991).

102. *See, e.g.*, Compagnie Française d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co., 105 F.R.D. 16, 31 (S.D.N.Y. 1984); *In re* Asbestos Litig., 623 A.2d 546, 550 (Sup. Ct. Del. 1992); *cf.* Garpeg, Ltd. v. United States, 583 F. Supp. 789, 796 (S.D.N.Y. 1984) ("[T]he interest of the United States in enforcing its tax laws significantly outweighs Hong Kong's interest in preserving bank secrecy.").

103. In particular, see *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 309 (N.D. Ill. 1997) (holding that the U.S. interest in protecting its citizens comes "first and foremost"). *See also, e.g.*, Soletanche and Rodio, Inc. v. Brown and Lambrecht Earth Movers, Inc., 99 F.R.D. 269, 271-72 (N.D. Ill. 1983); *In re* Asbestos Litig., 623 A.2d 546, 550 (Del. Super. Ct. 1992).

104. *See, e.g.*, Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984) (request for production of documents located in Britain held not to infringe on British sovereignty); McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958 (E.D. Pa. 1984); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 190 (N.Y. Sup. 1988); *infra* notes 105-107 and accompanying text.

105. Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 191 (N.Y. Sup. Ct. 1988).

106. *See id.*

The court's concern for unsupported assertions would be more credible had it not proceeded to assert on the same page that it was "doubtful" that the German authorities would execute the letter of request for the production of documents, and that the Hague Convention procedures were "time consuming and expensive."[107]

It is far from clear that domestic courts are suited for carrying out the balancing exercise required, and it has been suggested that trial courts may have an "inherent institutional inability . . . to perform such a function."[108] As the D.C. Circuit stated in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, "[w]hen push comes to shove, the domestic forum is rarely unseated."[109] Nor are domestic courts in a position to properly evaluate the significance of foreign sovereign interests, which may be based on highly unfamiliar policies and culture.[110] Take, for example, the view of one trial court that Hong Kong's bank secrecy laws could not be taken to represent a particularly important sovereign interest, as "bank secrecy is not even required by statute."[111] It is doubtful that many trial judges—in the United States or elsewhere—possess a sufficient appreciation of the legal culture of another jurisdiction to properly assess whether the fact that a rule is one of common law (in the sense of uncodified law) rather than statutory means that the rule does not represent an important sovereign interest. An English lawyer would no doubt be unimpressed to be told that English law's prohibition of murder cannot be taken to represent a significant sovereign interest simply because that prohibition is uncodified.[112]

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107. *See id.* The court did cite Haynes v. Kleinwefers, 119 F.R.D. 335, 338 (E.D.N.Y. 1988), for the proposition that Hague Convention procedures were inexpedient. However, as demonstrated earlier, *Haynes* provides very little support, if any, for that proposition.

108. Born & Hoing, *supra* note 60, at 404.

109. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 951 (D.C. Cir. 1984). It is also arguable that domestic courts are not properly equipped to evaluate the possible foreign relations implications of their decisions in this context. *See* Bermann, *supra* note 43, at 542.

110. *See In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("[T]he judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country[.]").

111. Garpeg, Ltd. v. United States, 583 F. Supp. 789, 796 (S.D.N.Y. 1984).

112. To be sure, there are statutes relevant to the crime of murder, such as the Homicide Act 1957 (Eng.). But both murder and manslaughter lack any statutory definition under English law. *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 5 (3d ed. 1999). Curiously, one renowned criminal law scholar has recently claimed that "[c]riminal law has become codified law. Everyplace you go in the Western world, you will find a criminal code that lays out the definitions of offenses in the code's 'special part' and prescribes general principles of responsibility in the code's 'general part.'" GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 3 (1998). Lawyers in the various jurisdictions of the United Kingdom, where criminal law remains largely uncodified, are likely to be somewhat baffled by this statement. *See* ASHWORTH,

C. The Likelihood of Hague Convention Procedures Proving Effective

It has occasionally been argued that the major barrier to effective use of Hague Convention procedures is U.S. litigants' lack of familiarity with them.[113] Regardless of whether this is in fact the case, the lack of use of Hague Convention procedures by United States courts, as discussed above, means that assessment of the effectiveness of Hague Convention procedures is inevitably speculative. In this context, the majority of courts have simply taken the position discussed earlier in relation to the burden of proof, that is, assuming that Hague Convention procedures are more time-consuming, expensive and generally inefficient.[114] Because the assessment is a speculative one and there is relatively little knowledge as to the effectiveness of the Hague Convention, it is not surprising that trial courts have invariably ruled against use of the Hague Convention,[115] except where they have first decided that the burden of proof should be placed on the party opposing such use.[116]

IV. A SIDE ISSUE: DISCOVERY TO ESTABLISH PERSONAL JURISDICTION

In cases where it is not clear that the court has personal jurisdiction over a defendant, it is permissible to conduct discovery to determine the jurisdictional question.[117] This follows from the principle that the court has jurisdiction to rule on its own

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supra; Gerald H. Gordon, *Judicial Creativity in a Common Law System*, 27 ISRAEL L. REV. 118, 118 (1993) ("The most remarkable feature of Scots criminal law is that it is still a common law system . . . . There are very few of what might be regarded as basic crimes which are statutory."). Professor Fletcher's error only serves to exemplify how differences in legal cultures make it difficult to appreciate the subtleties of foreign systems.

113. *See In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 355 (D. Conn. 1991); Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 38 (N.D.N.Y. 1987).

114. *See* Pain v. United Technologies Corp., 637 F.2d 775, 790 (D.C. Cir. 1980); Fishel v. BASF Group, 175 F.R.D. 525, 529 (S.D. Iowa. 1997); *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 308 (N.D. Ill. 1997); Anglo-American Ins. Group, P.L.C. v. Calfed, Inc., 940 F. Supp. 554, 564 (S.D.N.Y. 1996); Doster v. Schenk, 141 F.R.D. 50, 54 (M.D.N.C. 1991); Rich v. KIS California, Inc., 121 F.R.D. 254, 256 (M.D.N.C. 1988); Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 391 (D.N.J. 1987); Int'l Society for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 450 (S.D.N.Y. 1984); *In re* Asbestos Litig., 623 A.2d 546, 550 (Del. Super. Ct. 1992); Moake v. Source Int'l Corp., 623 A.2d 263, 266 (N.J. Super. Ct. App. Div. 1993); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 191 (N.Y. Sup. Ct. 1988).

115. *See id.*

116. *See Hudson*, 117 F.R.D. at 38-39; Knight v. Ford Motor Co., 615 A.2d 297, 300 (N.J. Super. Ct. Law Div. 1992).

117. *See, e.g.*, *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1151 (N.D. Ill. 1979); *see also, e.g.*, United States v. United Mine Workers, 330 U.S. 258, 292 n.57 (1947).

jurisdiction.[118] Where a plaintiff seeks discovery of evidence located abroad to establish personal jurisdiction over a defendant, the question of whether Hague Convention procedures or the Federal Rules should be used arises again.

One might think that, in this situation, there would be a tendency to prefer use of the Hague Convention. However, this has proved not to be the case. In *Rich v. KIS California*, the court held that the *Aérospatiale* decision "did not carve out any exception for disputes involving personal jurisdiction."[119] The *Rich* court concluded that there was no reason to prefer Hague Convention procedures in such a case, arguing that while increased sensitivity to "foreign sensibilities" might be called for, this was counterbalanced by the need to promptly resolve preliminary issues in order that the merits of the case could be dealt with.[120] In subsequent cases, courts have employed almost identical reasoning to prefer use of the Federal Rules over Hague Convention procedures.[121]

V. ANALYSIS

It is clear from trial court decisions on extraterritorial discovery after *Aérospatiale* that the failure of the Court to lay down specific rules to aid in the determination of whether Hague Convention procedures should be used has had a negative effect on the subsequent case law.

The *Aérospatiale* majority's lack of guidance, while not quite giving trial courts *carte blanche* on the matter, effectively leaves first instance decisions unreviewable, given the large measure of discretion accorded to the trial court.[122] As a result, subsequent decisions have not refined the *Aérospatiale* test significantly and are unlikely to do so in the future.[123] Because the trial court is given such broad discretion in performing the "balancing" exercise, it is always open to a court faced with a factor weighing in favor of use of Hague Convention

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118. *See In re Uranium Antitrust Litig.*, 480 F. Supp. at 1151; *see also, e.g.*, *United Mine Workers*, 330 U.S. at 292 n.57.

119. *Rich*, 121 F.R.D. at 260.

120. *See id.*

121. *See Fischel*, 175 F.R.D. at 529; Bedford Computer Corp. v. Israel Aircraft Indus., Ltd., 114 B.R. 2, 5-6 (Bankr. D.N.H. 1990); *see also* Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628, 644 (D.S.C. 1992); Geo-Culture, Inc. v. Siam Inv. Management S.A., 936 P.2d 1063, 1067 (Or. Ct. App. 1997). *But see* Jenco v. Martech Int'l, Inc., CIV. A. No. 86-4229, 1988 WL 54733, at *1 (E.D. La. May 19, 1988) (holding that discovery on this issue should take place pursuant to the Hague Convention but without justifying this conclusion).

122. *See* Born & Hoing, *supra* note 60, at 403; Black, *supra* note 18, at 906.

123. *See* Bermann, *supra* note 43, at 542.

procedures to plead counterbalancing factors such as urgency or the need for prompt resolution of an issue—as the *Rich* court did—despite the lack of evidence as to the purported inefficiency of Hague Convention procedures.[124]

Much of the focus of the post-*Aérospatiale* case law has been on the question of whether the discovery sought is unduly burdensome. This has led one commentator to suggest that "[t]he only real benefit of *Aérospatiale* has been that the courts rejecting use of the Convention have tended to narrow the discovery requests in a way they probably would not have for domestic discovery."[125]

However, the problem with this approach is that the burdensome nature of discovery requests is simply not relevant to the issue of whether the Hague Convention should be employed. The Hague Convention is not a device designed to limit the scope of discovery requests (even if it can have that effect in practice). Courts do not need to resort to the Hague Convention to limit the scope of unduly burdensome discovery requests.[126] Courts which consider the extent of the discovery requested before deciding whether to apply the Hague Convention are simply rationalizing the result which they arrive at, and not properly analyzing the issue.[127]

The most important aspect of *inter partes* application of the Hague Convention concerns the international law issues raised by extraterritorial discovery. Unfortunately, it is simply far from clear what these are. This may well be one reason why courts tend to avoid them to a significant extent.

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124. *See, e.g.*, Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344, 359 (D. Conn. 1997); *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 308-09 (N.D. Ill. 1997); Doster v. Schenk, 141 F.R.D. 50, 53 (M.D.N.C. 1991); *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 355 (D. Conn. 1991); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 190-91 (N.Y. Sup. 1988).

125. Andrew N. Vollmer, *Revive The Hague Evidence Convention*, 4 ILSA J. INT'L & COMP. L. 475, 479 (1998).

126. *See* FED. R. CIV. P. 26(c); *Bedford Computer*, 114 B.R. at 6; *cf. In re* Anschuetz & Co., 754 F.2d 602, 615 (5th Cir. 1985), *cert. granted, vacated and remanded*, 483 U.S. 1002 (1987) (pre-*Aérospatiale* decision holding that the Hague Convention did not apply to *inter partes* discovery but that the court might still narrow discovery because of foreign concerns).

127. For cases that favor employing the Federal Rules, see, for example, *Fishel*, 175 F.R.D. at 529; *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 308 (N.D. Ill. 1997); Doster v. Schenk, 141 F.R.D. 50, 53 (M.D.N.C. 1991); Rich v. KIS California, Inc., 121 F.R.D. 254, 258 (M.D.N.C. 1988) (suggesting that a party must show the discovery requested is "intrusive" before a court should resort to the Hague Convention, which is clearly incorrect); Haynes v. Kleinwefers, 119 F.R.D. 335, 337 (E.D.N.Y. 1988); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 191 (N.Y. Sup. Ct. 1988). For cases that favor employing the Hague Convention, see, for example, *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 355 (D. Conn. 1991); Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 39-40 (N.D.N.Y. 1987).

According to F.A. Mann, "it should be obvious that if a party starts or defends proceedings in a country which has adopted the process of discovery, it accepts the implications, of the procedural rules of the forum and has to afford discovery in accordance with them."[128]

Unfortunately, the issue has not proved so simple. Civilian jurisdictions (which form a large proportion of the contracting states to the Hague Convention) tend to view the gathering of evidence as a public rather than a private function.[129] Consequently, the gathering of evidence in the territory of a foreign state by a person other than a judicial officer may well be a violation of domestic law.[130] In a 1949 case, three lawyers working for the Dutch government were arrested and jailed after they interviewed (with the interviewee's consent) a Dutch citizen, residing in Switzerland, who had filed suit against the Dutch government.[131] Although such a case differs under international law from litigation between two private parties (which will generally not involve an issue of public law such as taxation),[132] it illustrates the offence which may be caused by extraterritorial evidence-gathering.

There is no consensus on the exact rules of international law to be applied in this sphere, although there appears to be a consensus that ordering oral depositions abroad does violate customary international law, and that orders for extraterritorial document inspections probably do likewise.[133] The principal issue running through the reported cases, however, appears to concern U.S. parties' orders for the production of information located abroad, whether in

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128. F.A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 3 RECUEIL DES COURS 9, 49 (1984); *cf.* Mann, *Jurisdiction*, *supra* note 98, at 157 (asserting this principle only in respect to a party who starts proceedings).

129. *See* U.S. Delegation Report, *supra* note 4, at 806.

130. *See* Société Nationale Industrielle Aérospatiale v. United States Dist. Ct., 482 U.S. 522, 558 n.13 (1987) (Blackmun, J., concurring in part and dissenting in part); Philip W. Anram, Note, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 107 (1973).

131. *See* Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 520 (1953); *see also* Montgomery B. Angell, *The Nonresident Alien: A Problem in Federal Taxation of Income*, 36 COLUM L. REV. 908, 910 (1936) (noting a 1934 attempt by the United States to collect taxes from nonresident aliens and stating that "[r]umor has it that a Federal Agent who undertook to proceed to France to make an investigation was turned back at the port of entry by governmental authority and refused admittance").

132. *See* Mann, *Jurisdiction*, *supra* note 98, at 138. The Dutch-Swiss case involved a violation of the principle that one state may not carry out investigations on another's territory. *See* OPPENHEIM'S INTERNATIONAL LAW 386 (Robert Jennings & Arthur Watts eds., 9th ed. 1993).

133. *See* Gerber, *International Discovery*, *supra* note 60, at 539.

the form of orders to produce documents, answer interrogatories, or even travel to the United States to give an oral deposition.[134] Here, the consensus amongst U.S. courts is that such orders do not infringe on the territorial sovereignty of the foreign state, as all that is required on foreign soil are acts preparatory to the taking of evidence.[135] However, other parties to the Hague Convention tend to disagree. Germany made it clear in an *amicus* brief in the *Anschuetz* case that it would view removal orders as a violation of German sovereignty.[136] French law purports to make it illegal to transmit business information abroad for use in foreign judicial or administrative proceedings.[137]

Much of this division is a result of a fundamentally different perspective on the evidence-gathering process. In civilian jurisdictions, evidence-gathering is seen as the responsibility of the judge rather than the parties.[138] Also, and just as significantly, there is a fundamental division as to the duty of parties to disclose information adverse to their case. Just as the United States Supreme Court is adamant that parties to litigation may be compelled to "disgorge whatever facts" they have in their possession,[139] the German *Bundesgerichtshof* is adamant that a party need not assist its

134. *See, e.g.*, *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 302 (N.D. Ill. 1997); Fishel v. BASF Group, 175 F.R.D. 525, 528 (S.D. Iowa 1997); Doster v. Schenk, 141 F.R.D. 50, 51 (M.D.N.C. 1991); Rich v. KIS Calif., Inc., 121 F.R.D. 254, 256 (M.D.N.C. 1988); Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 387 (D.N.J. 1987); Lowrance v. Michael Wenig, GmbH and Co., 107 F.R.D. 386, 389 (W.D. Tenn. 1985); Campagnie Française d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co., 105 F.R.D. 16, 31 (S.D.N.Y. 1984); Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 513 (N.D. Ill. 1984); International Soc'y for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 438 (S.D.N.Y. 1984); McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958 (E.D. Pa. 1984); *In re* Asbestos Litig., 623 A.2d 546, 547 (Sup. Ct. Del. 1992); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 189 (N.Y. Sup. 1988).

135. *See* Lowrance v. Michael Weinig, GmbH and Co., 107 F.R.D. 386, 388 (W. Tenn. 1985); Compagnie Française d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co., 105 F.R.D. 16, 31 (S.D.N.Y 1984); Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984); Graco, Inc. v. Kremlin Inc., 101 F.R.D. 503, 519 (N.D. Ill. 1984); Adidas (Canada) Ltd. v. S/S Seatrain Bennington, 1984 AMC 2629 (S.D.N.Y. 1984).

136. *See In re* Anschuetz & Co., 754 F.2d 602, 605 (5th Cir. 1985); *see also* Gerber, *Extraterritorial Discovery*, *supra* note 18, at 778.

137. Law No. 80-538 of July 16, 1980, J.O., July 17, 1980, p1799; JCP 1980, III, No. 60160. A translation can be found appended to Soletanche & Robio, Inc. v. Brown and Lambrecht Earth Movers, Inc., 99 F.R.D. 269 (N.D. Ill. 1983). *See also generally* Brigitte Ecolivet Herzog, *The 1980 French Law on Documents and Information*, 75 AM. J. INT'L L. 382 (1981).

138. *See* Gerber, *Extraterritorial Discovery*, *supra* note 18, at 752-55.

139. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

opponent by making available to him information that he does not already possess.[140]

These differences aside, however, the argument for prohibiting all extraterritorial discovery by U.S. courts is unconvincing. It is difficult to take the French "blocking statute" at face value given that, taken literally, it appears to prevent French nationals doing business abroad from taking court action in foreign tribunals.[141] Instead, it appears that the statute was intended to assist French nationals involved in litigation abroad by providing them with a reason for refusing to disclose information.[142]

Therein, however, lies the problem. States, not individuals, are the guardians of sovereign interests. It is unlikely that foreign states have any real interest in the vast majority of cases which might involve extraterritorial discovery in their territory. Foreign governments frequently fail to intervene in litigation involving extraterritorial discovery.[143] Although it is true that it may be impractical for foreign states to intervene in every case which might involve extraterritorial discovery,[144] a state's allocation of resources is indicative of its perceived priorities. The lack of intervention by foreign states may well be indicative of the fact that the issue is simply not, in the scheme of things, of great importance.

Leaving individuals as the guardians of state interests places the courts in a paradoxical position. Unless a party attempts to invoke the Hague Convention, it is likely that the court will simply assume that direct discovery rules apply.[145] But if the interest to be protected is a state interest, why should an individual be capable of implicitly waiving it? Conversely, a party who has accepted the rules of the forum, as F.A. Mann indicates, should not be permitted *itself* to "rely on" foreign blocking legislation.[146] An examination of the reported cases reveals that defendants have frequently failed to establish any

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140. *See* Heck, *supra* note 45, at 240.

141. *See* Compagnie Française, 105 F.R.D. at 30; Adidas (Canada) Ltd., 1984 AMC 2629. The statute does not appear to be actually enforced. *See* Heck, *supra* note 45, at 274.

142. *See* Herzog, *supra* note 137, at 385-86.

143. *See, e.g.*, United States v. Vetco Inc., 691 F.2d 1281, 1287 (9th Cir. 1981); United States v. First National City Bank, 396 F.2d 897, 904 (2d Cir. 1968); Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 525 (S.D.N.Y. 1987); Slauenwhite v. Bekum Maschinenfabriken, GmbH, 104 F.R.D. 616, 619 (D. Mass. 1985); Securities and Exchange Comm'n v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-18 (S.D.N.Y. 1981).

144. *See* Bermann, *supra* note 43, at 542.

145. *See* Anderson, *supra* note 8, at 43.

146. As the defendant did in Lyons v. Bell Asbestos Mines, Ltd., 119 F.R.D. 384, 386 (D.S.C. 1988), arguing that it "must rely on the Quebec Business Concerns Records Act and cannot voluntarily produce any other documents whatsoever."

actual impediment to discovery beyond a desire on their own part to avoid the process.[147]

As indicated above, one advantage of Hague Convention procedures is that they give a participatory role to the foreign state in the evidence-gathering process, enabling it to ensure that its sovereign interests are not violated. It is doubtful, however, that this process is necessary in all cases of *inter partes* discovery, as (assuming the court has both personal and subject-matter jurisdiction) a discovery order goes no further than is necessary to enforce proper legislative jurisdiction.[148] However, where personal jurisdiction has not been established, it is submitted that it is doubtful that a proper balancing exercise can conclude that direct discovery, rather than the Hague Convention procedures, is appropriate.[149]

It must be recognized that the nature of the discovery requested is a nonissue. The sole issue is one of balancing the sovereign interests of the state in whose territory the evidence is located against those of the United States. But the lack of attention paid to foreign sovereign interests in recent case law clearly indicates that domestic courts are not well-suited to this balancing task. Consequently, because the Hague Convention brings with it the advantage of involving the foreign state in the process, courts should be more ready to make first resort to the Hague Convention where it appears that particular foreign sovereign interests are at issue.[150]

The difficulty here is that because the *Aérospatiale* test places so much discretion in the hands of the court of first instance, the changes necessary to bring about this result are attitudinal and, hence, extremely difficult to achieve. Therefore, while this result might be desirable, the hope of its achievement is an optimistic one. Moreover, it does nothing to bridge the sharp divide between U.S. and civilian approaches to evidence-gathering, which will inevitably continue to cause friction.

All of the evidence suggests that the Hague Convention was never intended to deal with the issue of *inter partes* discovery. Even if it were, it does not provide a solution to the problem. A long-term solution, it is hoped, would involve review and amendment of the

147. *See, e.g.*, Boreri v. Fiat S.p.A., 763 F.2d 17, 23 (1st Cir. 1985); Fishel v. BASF Group, 175 F.R.D. 525, 529 (S.D. Iowa 1997); *In re* Aircrash Disaster Near Roselawn, Ind., 172 F.R.D. 295, 309 (N.D. Ill. 1997); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 190 (N.Y. Sup. 1988); Great Am. Boat Co. v. Alsthom Atlantic, Inc., 1987 WL 4766, at *2 (E.D. La.).

148. *See* Mann, *Jurisdiction*, *supra* note 98, at 156-57.

149. *See* Born & Hoing, *supra* note 60, at 406.

150. *See* Vollmer, *supra* note 125, at 482-83.

Hague Convention to specifically deal with this problem.[151] Until that happens, conflicts will inevitably persist. All that trial courts can do is hope to minimize them as much as possible.

151. *See* Gerber, *Extraterritorial Discovery*, *supra* note 18, at 787.