

2011

Rethinking Jurisdictional Discovery Under the Hague Evidence Convention

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Recommended Citation

Kathleen B. Gilchrist, Rethinking Jurisdictional Discovery Under the Hague Evidence Convention, 44 *Vanderbilt Law Review* 155 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol44/iss1/4>

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NOTES

Rethinking Jurisdictional Discovery Under the Hague Evidence Convention

ABSTRACT

*When a federal court in the United States compels the discovery of information located abroad to determine whether it has jurisdiction over the defendant, the court can apply the Federal Rules of Civil Procedure or the Hague Evidence Convention. This Note argues that the approach taken by most courts—applying the balancing test formulated by the Supreme Court in *Société Nationale Industrielle Aérospatiale v. U.S. District Court* and favoring application of the Federal Rules—is misguided. Courts should apply the Evidence Convention more often in jurisdictional discovery disputes. They can do so under the existing legal framework with one of three holdings: (1) the *Aérospatiale* test does not apply to jurisdictional discovery disputes and parties must use the Evidence Convention; (2) the *Aérospatiale* test does not apply and the Evidence Convention should be used as a first resort, turning to the Federal Rules only when the Convention’s procedures prove infeasible; or (3) the *Aérospatiale* test applies, but recognition that the court has not established personal jurisdiction weighs so heavily in favor of applying the Evidence Convention that it has a similar effect as the first-resort approach. Each of these alternatives is preferable to the current approach.*

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I. INTRODUCTION

Justice Blackmun, in the U.S. Supreme Court decision *Société Nationale Industrielle Aérospatiale v. U.S. District Court (Aérospatiale)*, explained that, "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 request for documents associated with investigation and litigation in the United States."¹ The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention), ratified by the United States in 1972, reflects an effort on behalf of the signatory countries to find common ground in light of significant differences in evidence-gathering procedures.² In 1987, the U.S. Supreme Court, in *Aérospatiale*, held that the Evidence Convention is an optional procedure that can be used in lieu of the Federal Rules of Civil

1. *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 549 (1987) (Blackmun, J., dissenting) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 reporters' note 1 (1987)) (internal quotation marks omitted).

2. Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 905 (1989).

Procedure (Federal Rules).³ The Court granted lower courts the discretion to employ the procedures of the Evidence Convention in a case after examining “the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.”⁴ Subsequent lower court cases generally have placed the burden of persuasion on the party requesting application of the Evidence Convention.⁵ Furthermore, these courts usually conclude that the party failed to meet that burden and apply the Federal Rules.⁶

In *Aérospatiale*, the defendant did not contest personal jurisdiction, and as a result, the Court did not address whether its holding applies to jurisdictional discovery. A number of district courts and one appellate court have addressed this issue, and most have held that (1) the *Aérospatiale* balancing test applies equally to jurisdictional discovery, and (2) the balancing test favors application of the Federal Rules.⁷ The arguments in support of these positions are misguided. They do not fully consider the scope of the *Aérospatiale* holding, do not adequately perform the comity analysis, and ultimately do not give sufficient regard to the Evidence Convention procedures. Courts can apply the Evidence Convention more frequently under the existing legal framework with one of three holdings: (1) the *Aérospatiale* test does not apply to jurisdictional discovery disputes and parties must use the Evidence Convention; (2)

3. *Aérospatiale*, 482 U.S. at 541.

4. *Id.* at 544.

5. 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).

6. Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT'L L.J. 73, 84 (2003). A significant amount of scholarly debate surrounds the prudence of the *Aérospatiale* decision and the manner in which lower courts have applied it. See George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TUL. L. REV. 525 (1989); Stephen F. Black, *United States Transnational Discovery: The Rise and Fall of the Hague Evidence Convention*, 40 INT'L & COMP. L.Q. 901 (1991); James Chalmers, *The Hague Evidence Convention and Discovery Inter Parties: Trial Court Decisions Post-Aérospatiale*, 8 TUL. J. INT'L & COMP. L. 189 (2000); Weis, *supra* note 2; Patricia J. Youngblood & John J. Welsh, *Obtaining Evidence Abroad: A Model for Defining and Resolving the Choice of Law Between the Federal Rules of Civil Procedure and the Hague Evidence Convention*, 10 U. PA. J. INT'L BUS. L. 1 (1988), [http://www.law.upenn.edu/journals/jil/articles/volume10/issue1/Welsh10U.Pa.J.Int'lBus.L.1\(1988\).pdf](http://www.law.upenn.edu/journals/jil/articles/volume10/issue1/Welsh10U.Pa.J.Int'lBus.L.1(1988).pdf); Matthew B. Kutac, Note, *Reallocating the Burden of Persuasion Under the Aérospatiale Approach to Transnational Discovery*, 24 REV. LITIG. 173 (2005); Diana Lloyd Muse, Note, *Discovery in France and the Hague Convention: The Search for a French Connection*, 64 N.Y.U. L. REV. 1073 (1989); John C. Plaster, Note, *The Hague Evidence Convention: The Need for Guidance on Procedures and Resolution of Conflicts in Transnational Discovery*, 27 VAND. J. TRANSNAT'L L. 185 (1994).

7. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288 (3d Cir. 2004); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45 (D.D.C. 2000); *Fishel v. BASF Grp.*, 175 F.R.D. 525 (S.D. Iowa 1997); *In re Bedford Computer Corp.*, 114 B.R. 2 (Bankr. D.N.H. 1990); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254 (M.D.N.C. 1988).

the *Aérospatiale* test does not apply and the Evidence Convention should be used as a first resort, turning to the Federal Rules only when the Convention's procedures prove infeasible; or (3) the *Aérospatiale* test applies, but recognition that the court has not established personal jurisdiction weighs so heavily in favor of applying the Evidence Convention that it has a similar effect as the first-resort approach.

This Note begins by explaining some of the differences in civil procedure in the United States and abroad; it then surveys the contours of the Evidence Convention, the *Aérospatiale* decision and its comity analysis, and lower court cases guided by that decision—focusing on those addressing jurisdictional discovery disputes. Next, it sets out the three alternative approaches, observing the benefits and drawbacks to each one.⁸

II. BACKGROUND

A. *Discovery and Jurisdiction in the United States*

Under the Federal Rules, parties have wide latitude to conduct pretrial discovery. A party can obtain information on “any nonprivileged matter that is relevant to any party’s claim or defense.”⁹ Further, “relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”¹⁰ Professor Stephen Yeazell observed that, “[l]awyers conduct discovery without any but the slightest judicial supervision unless something goes wrong. So long as things remain in this state, discovery has virtually disappeared from the judicial arena.”¹¹

Before a court in the United States can assess the merits of a case, it must establish both personal and subject matter jurisdiction. Parties can use discovery procedures to resolve factual disputes over

8. This Note analyzes jurisdictional discovery between countries that are contracting parties to the Evidence Convention. Members of the Hague Conference on Private International Law can choose either ratification, accession, continuation, succession, or denunciation. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Hague Evidence Convention]. Similar issues arise when one or both of the countries are not contracting parties, but this is beyond the scope of the Note.

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

10. *Id.*

11. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 651 (1994).

a court's jurisdiction.¹² Trial judges maintain significant discretion to grant or deny jurisdictional discovery.¹³ As a consequence, courts have construed the standard for granting jurisdictional discovery in slightly different terms. The Third Circuit, in *Metcalf v. Renaissance Marine, Inc.*, explained that, "if 'the plaintiff's claim is not clearly frivolous [as to the basis for personal jurisdiction], the district court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging that burden.'"¹⁴ The Eighth Circuit remanded a case for jurisdictional discovery even though it found that the plaintiff had not made a prima facie showing of personal jurisdiction over the defendant.¹⁵ Although not all courts agree that a prima facie showing of personal jurisdiction is an absolute prerequisite for permitting jurisdictional discovery, "[w]hen a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery."¹⁶ Courts have also considered whether the defendant has control of the jurisdictional facts, whether the defendant has provided evidence rebutting the assertion of jurisdiction, and other equitable factors.¹⁷

In *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, petitioners, fourteen foreign insurance companies,¹⁸ filed a motion for summary judgment in the district court alleging that the court lacked personal jurisdiction over them.¹⁹ After several unsuccessful attempts to obtain documents located abroad, the respondent filed a motion to compel production and the district court gave petitioners sixty days to produce the information.²⁰ When petitioners failed to produce the information, the district court held that it had personal jurisdiction over petitioners.²¹ The court invoked Federal Rule 37(b)(2)(A), which states that "[i]f a party . . . fails to obey an order to provide or permit discovery . . . the court . . . may

12. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.").

13. GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 992 (4th ed. 2007).

14. *Metcalf v. Renaissance Marine, Inc.*, 566 F.3d 324, 336 (3d Cir. 2009) (quoting *Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d. 357, 362 (3d Cir. 1983)).

15. *Steinbuch v. Cutler*, 518 F.3d 580, 589 (8th Cir. 2008).

16. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003).

17. BORN & RUTLEDGE, *supra* note 13, at 992–93.

18. *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 696 (1982).

19. *Id.* at 698.

20. *Id.* at 699.

21. *Id.*

issue further just orders.”²² The Third Circuit affirmed the district court’s jurisdictional holding²³ and the Supreme Court affirmed the Third Circuit’s decision.²⁴

The Court observed that petitioners failed to recognize the distinction between subject matter jurisdiction and personal jurisdiction.²⁵ It noted that subject matter jurisdiction is both a constitutional requirement, flowing from Article III, and a statutory requirement.²⁶ According to the Court, it “functions as a restriction on federal power, and contributes to the characterization of the federal sovereign.”²⁷ “[N]o action of the parties can confer subject-matter jurisdiction upon a federal court.”²⁸ Thus, the principles of estoppel and waiver do not apply.²⁹ In contrast, the Court explained that personal jurisdiction derives from the Due Process Clause of the Fifth Amendment rather than Article III.³⁰ Therefore, “[i]t represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”³¹ The Court then cited *International Shoe Co. v. Washington*, stating that the test for personal jurisdiction “requires that the maintenance of the suit not offend traditional notions of fair play and substantial justice.”³²

Ultimately, personal jurisdiction is “a legal right protecting the individual.”³³ Therefore, a party can waive a claim that personal jurisdiction is lacking and a defendant can be estopped from raising the issue.³⁴ The Court observed that “[t]he expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights.”³⁵ *Insurance Corp. of Ireland* is cited for the proposition that a trial court has jurisdiction to determine its jurisdiction,³⁶ or more specifically, that a court can compel jurisdictional discovery abroad to determine whether it has personal jurisdiction over the defendant.³⁷ As will be discussed later, the concern over individual liberty driving the personal jurisdiction standard does not justify allowing courts to

22. *Id.* (citing FED. R. CIV. P. 37(b)(2)(A)).

23. *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 700.

24. *Id.* at 709.

25. *Id.* at 701.

26. *Id.*

27. *Id.* at 702.

28. *Id.*

29. *Id.*

30. *Id.* (citing U.S. CONST. amend. V).

31. *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 702.

32. *Id.* at 703 (internal quotation marks omitted).

33. *Id.* at 704.

34. *Id.*

35. *Id.* at 705.

36. *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45, 49 (D.D.C. 2000).

37. BORN & RUTLEDGE, *supra* note 13, at 992.

conduct discovery to determine whether there is personal jurisdiction by any means they choose, because the method of discovery implicates similar concerns driving the subject matter jurisdiction requirement, namely, sovereignty.³⁸

B. Evidence Gathering Outside of the United States

In stark contrast to the American discovery process, in civil law countries the court conducts evidence gathering, rather than the parties.³⁹ The purpose of judicial control is to safeguard individuals from undue coercion and ensure that privileges are respected.⁴⁰ Further, it is rooted in the desire to protect litigants from the invasion of privacy that was prevalent in the fascist and communist governments of Europe during World War II.⁴¹

In civil law systems, the parties can typically only obtain material that is admissible at trial.⁴² Most importantly, in civil law countries litigation is not bifurcated between pretrial procedures and the trial itself.⁴³ Instead, once a suit has been filed all the proceedings are considered part of the trial.⁴⁴ As a result, “civil law systems . . . interpret United States discovery efforts as private trials. Furthermore, these attempts at discovery [are] viewed as being hostile to judicial sovereignty, because the taking of evidence in civil law countries is essentially a sovereign function.”⁴⁵ Foreign countries often equate the American discovery process to an unrestrained fishing expedition.⁴⁶ There are even differences between discovery in the United States and other common law countries. In the United Kingdom, the scope of disclosure broadened with the enactment of the Civil Procedure Rules 31 and 34 in 1998.⁴⁷ Nevertheless, the court may order disclosure from a nonparty only when the documents are likely to support the case of the applicant or adversely affect another party and “disclosure is necessary in order to dispose fairly of the

38. See *infra* Part III.A.

39. Youngblood & Welsh, *supra* note 6, at 7.

40. BORN & RUTLEDGE, *supra* note 13, at 911.

41. Jerry F. Barbanel & Daryk Rowland, *Navigating the Complexities of U.S.–E.U. Data Protection and Electronic Discovery Issues*, METRO. CORP. COUNSEL, Dec. 2007, at 23, <http://www.metrocorpcounsel.com/pdf/2007/December/23.pdf>.

42. Youngblood & Welsh, *supra* note 6, at 7.

43. *Id.* at 8.

44. *Id.*

45. *Id.*

46. Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 294 (2002).

47. Marat A. Massen, Note, *Discovery for Foreign Proceedings After Intel v. Advanced Micro Devices: A Critical Analysis of 28 U.S.C. §1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 890 (2010).

claim or to save costs.”⁴⁸ Additionally, the general rule on costs is that the loser pays for the costs of both parties, and this includes the costs of disclosure of documents.⁴⁹

Some nations instituted blocking statutes to prevent U.S. parties from conducting unilateral, extraterritorial discovery.⁵⁰ These statutes forbid individuals from disclosing information located in that country for discovery in a U.S. proceeding.⁵¹ For instance, the French blocking statute prohibits any disclosure unless the party seeking the information uses the procedures of the Evidence Convention.⁵² Historically, U.S. courts have not considered the French blocking statute to be a sufficient reason to compel parties to use the Evidence Convention, noting that it amounts to an empty threat.⁵³ Courts may have to reevaluate this stance, as France’s *Cour de cassation* (Supreme Court) recently upheld a fine against a French lawyer who violated the blocking statute.⁵⁴ In contrast, some blocking statutes do not bar foreign discovery across the board; instead, they grant an official the authority to forbid compliance with specific requests.⁵⁵ The United Kingdom Protection of Trading Interests Act authorizes the British Secretary of State to prohibit discovery of information in the United Kingdom for the purposes of foreign litigation when discovery would infringe on national sovereignty or security.⁵⁶ Australia and Canada have implemented similar laws.⁵⁷ Other statutes prohibit the disclosure of information regarding a particular industry, such as the 1979 Banking Statute of Australia, the Uranium Information Security Regulations of Canada, and the United Kingdom Shipping Contracts and Commercial Disputes Act.⁵⁸

48. SEDONA CONFERENCE, WORKING GRP. ON INT’L ELEC. INFO. MGMT., DISCOVERY & DISCLOSURE, INTERNATIONAL OVERVIEW OF DISCOVERY, DATA PRIVACY & DISCLOSURE 184 (2009).

49. *Id.* at 185 (noting that the court may also make a different order regarding costs).

50. BORN & RUTLEDGE, *supra* note 13, at 914.

51. *Id.*

52. Stephen R. Reynolds, *Management of International Litigation*, 826 PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES: LITIGATION 409, 412 (2010).

53. *Id.* at 412–13; *see, e.g., In re Global Power Equip. Grp., Inc.*, 418 B.R. 833, 849–50 (Bankr. D. Del. 2009) (noting that the “chance of prosecution under the French Blocking Statute is minimal” and that “France and the United States each ratified the Hague Evidence Convention over thirty-five years ago”).

54. *Id.*

55. BORN & RUTLEDGE, *supra* note 13, at 914.

56. *Id.*

57. *Id.*

58. *Id.* at 915.

*C. Hague Convention on the Taking of Evidence Abroad
in Civil or Commercial Matters*

In 1968, the United States initiated negotiations at a meeting of the Hague Conference on Private International Law that ultimately led to the creation of the Hague Evidence Convention.⁵⁹ The goal of the Evidence Convention was “to reconcile different, often conflicting, discovery procedures in civil and common law countries.”⁶⁰ It took effect in 1972, and there are forty-seven contracting states, including France, the United Kingdom, China, India, and Switzerland.⁶¹ Under the Evidence Convention, evidence located abroad can be obtained through letters of request or through diplomatic officers, consular agents, or commissioners.⁶² A judicial authority of one country may send a letter of request to the “central authority” of another country to obtain evidence or “to perform some other judicial act.”⁶³ The Evidence Convention provides that a letter of request shall be executed expeditiously.⁶⁴ Furthermore, the authority in the country receiving the letter applies that country’s law as to the methods and procedures followed in obtaining the evidence.⁶⁵ However, a country is compelled to follow a request for a special procedure, “unless this is incompatible with the internal law of the State of execution or is

59. Youngblood & Welsh, *supra* note 6, at 9.

60. Hague Evidence Convention, *supra* note 8; 28 U.S.C.A. § 1782 (West 2010) (empowering each district court to order persons in its jurisdiction to give testimony or produce documents for use in proceedings in foreign or international tribunals, in accordance with the Hague Evidence Convention). James Chalmers explained, “one might wonder whether the Hague Convention was intended for use in U.S.-style discovery proceedings at all.” Chalmers, *supra* note 6, at 192. The Evidence Convention, by its terms, deals solely with “evidence-gathering” and for the most part does not address discovery. *Id.* at 191–92. Whether or not the drafters intended the Evidence Convention to cover discovery depends in part on how the phrase “judicial proceedings” is interpreted and whether discovery conducted after the suit is filed but before trial is considered a judicial proceeding. *Id.* at 193. But this question is beyond the scope of the Note and courts presume, without question, that the Evidence Convention covers U.S.-style discovery proceedings. *See, e.g.*, *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 524 (1987) (“The question presented in this case concerns the extent to which a federal district court must employ the procedures set forth in the Convention when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court has personal jurisdiction.”).

61. *Hague Evidence Convention—Acceptances of Accessions*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <http://www.hcch.net/upload/overview20e.pdf> (last updated Jan. 5, 2011).

62. Hague Evidence Convention, *supra* note 8, arts. 1–22.

63. *Id.* arts. 1–2. “The function of the central authority is to receive the letters of request from foreign authorities and to transmit them to the appropriate tribunals within the executing state. This process is intended to eliminate uncertainty as to the proper recipient of letters of request.” Youngblood & Welsh, *supra* note 6, at 11.

64. Hague Evidence Convention, *supra* note 8, art. 9.

65. *Id.*

impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.”⁶⁶

There are several factors limiting the scope and effectiveness of these letters of request. First, “[i]n the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence under the law of the State of execution.”⁶⁷ Additionally, Article 12(b) permits a contracting state to refuse to execute a letter of request when the state “considers that its sovereignty or security would be prejudiced[.]”⁶⁸ Finally, 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 pre-trial discovery of documents as known in Common Law countries.”⁶⁹ With the exception of the United States, the Czech Republic, Israel, and the Slovak Republic, all of the parties to the Convention have some form of reservation under Article 23.⁷⁰ Some countries instituted Article 23 reservations because they incorrectly believe that “pre-trial” discovery is discovery conducted before a suit has been filed.⁷¹ The Hague Conference on Private International Law acknowledged that Article 23 is a “continued source of misunderstandings.”⁷² Attendees at the conference observed that Article 23 was originally intended to ensure that requests for documents are sufficiently substantiated and that one party does not utilize the procedure merely to find out what documents the other party possesses.⁷³ The Conference recommended that countries with general Article 23 declarations revisit them to conform to the original meaning of that Article.⁷⁴ Nevertheless, most countries have

66. *Id.*

67. *Id.* art. 11.

68. *Id.* art. 12.

69. *Id.* art. 23.

70. *Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, TRAVEL.STATE.GOV, http://travel.state.gov/law/judicial/judicial_689.html (last visited Jan. 10, 2011).

71. Gary A. Adler et al., *Electronic Discovery Guidance 2008: What Corporate and Outside Counsel Need to Know*, 783 PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES: LITIGATION 289, 294 (2008).

72. Hague Conference on Private Int'l Law, Oct. 4–Nov. 4, 2003, *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions*, ¶ 29, http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf.

73. *Id.*

74. *Id.* ¶ 34.

maintained these reservations, and they reduce the effectiveness of the Evidence Convention for discovery in the United States.⁷⁵

Under Chapter II of the Evidence Convention, “a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence . . . in aid of proceedings commenced in the courts of a State which he represents.”⁷⁶ However, a contracting state can stipulate that a diplomatic officer can take evidence only if the state receiving the request gives the officer permission to do so.⁷⁷ Additionally, an individual who has evidence that an officer wishes to obtain can refuse to turn it over if the laws of that country prohibit disclosure.⁷⁸

In 2003, a Special Commission reviewed the Evidence Convention.⁷⁹ It found that litigators in the United States prefer the Federal Rules to the Evidence Convention, primarily because of the amount of time discovery can take under the Evidence Convention.⁸⁰ Further, American lawyers expressed concern over their ability to identify desired documents with an adequate degree of specificity.⁸¹ Indicating that timeliness is still a concern when conducting discovery under the Convention, the 2009 Special Commission “encourage[d] State Parties to take measures to improve the effective operation of the Convention.”⁸² Moreover, the Commission suggested that state parties consider accepting letters of request in electronic form.⁸³ It also reiterated the 2003 Commission’s observation that states have different views regarding the mandatory or nonmandatory character of the Convention.⁸⁴

75. See LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* 184–85 (1996) (describing the problems created where “an executing country claims broader privileges than the requesting country”).

76. Hague Evidence Convention, *supra* note 8, art. 15.

77. *Id.*

78. *Id.* art. 21(e).

79. Erica M. Davila, *International E-Discovery: Navigating the Maze*, 8 U. PITT. J. TECH. L. & POL’Y 5, ¶ 36 (2008). The Special Commission met to review the operations of the Hague Apostille, Evidence, and Service Conventions. The Commission included 116 delegates from 57 member states. After meeting, the Commission published conclusions and recommendations for the three conventions. Hague Conference on Private Int’l Law, *supra* note 72, ¶ 1.

80. Davila, *supra* note 79, at ¶ 36.

81. *Id.*

82. Hague Conference on Private Int’l Law, Feb. 2–12, 2009, *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions*, ¶ 43.

83. *Id.* ¶ 49.

84. *Id.* ¶ 53.

D. *The Aérospatiale Decision*

In 1987, the Supreme Court, in *Aérospatiale*, addressed a federal district court's obligation to employ the Evidence Convention procedures "when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court has personal jurisdiction."⁸⁵ The Court held that the text and history of the Evidence Convention demonstrate that it was intended to be an optional procedure to facilitate the taking of evidence abroad.⁸⁶ It further rejected petitioners' argument that courts should first look to the Evidence Convention when a party requests discovery of information located abroad.⁸⁷ The Court noted that the opposite conclusion would create several unacceptable asymmetries.⁸⁸ First, requiring first resort to the Evidence Convention allows the foreign party to obtain information pursuant to the Federal Rules while the domestic party must use the Convention.⁸⁹ Second, a first-resort rule gives an unfair advantage to foreign companies because they would be subject to "less extensive discovery procedures" even though they decided to market their products in the United States.⁹⁰ Third, because the Evidence Convention applies only to parties from contracting states and not to parties that are nationals of other, non-contracting states, "the [first-resort] rule would confer an unwarranted advantage on some domestic litigants over others similarly situated."⁹¹

The Court explained that the concept of international comity should serve as a guide for lower courts when deciding which procedure to employ.⁹² Furthermore, the Court noted that the nature of the concerns that guide the comity analysis are contained in the Restatement of Foreign Relations Law of the United States § 436(1)(c). These factors include,

85. *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 524-25 (1987) ("Petitioners answered the complaints, apparently without questioning the jurisdiction of the District Court.").

86. *Id.* at 538.

87. *Id.* at 542.

88. *Id.* at 539-40 n.25.

89. *Id.*

90. *Id.* The Court proceeded to explain, "A general rule according foreign nationals a preferred position in pretrial proceedings in our courts would conflict with the principle of equal opportunity that governs the market they elected to enter." *Id.*

91. *Id.*

92. *Id.* at 543. Comity is defined as "[c]ourtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." BLACK'S LAW DICTIONARY 110 (2d pocket ed. 2001).

(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.⁹³

Using the Restatement as a guide, the Court established a three-part test, instructing lower courts to scrutinize the particular facts in each case, the sovereign interests involved, and the likelihood that resort to Evidence Convention procedures will prove effective.⁹⁴ Ultimately, the Court's balancing test gives considerable discretion to lower courts to determine whether to compel the parties to use the Evidence Convention.⁹⁵

Justice Blackmun, joined by Justice Brennan, Justice Marshall, and Justice O'Connor, concurred in part and dissented in part. He warned that "[e]xperience indicates . . . a large risk that the [majority's] case-by-case comity analysis . . . will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently."⁹⁶ Instead of giving lower courts this broad discretion, Justice Blackmun suggested that courts apply a general presumption of first resort to the Convention procedures.⁹⁷ Further, when it appears futile to employ the Convention or when its procedures are unhelpful, courts should analyze the particular circumstances of the case.⁹⁸ According to Justice Blackmun, the Convention can serve the long-term interests of the United States by "helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems."⁹⁹

93. *Id.* at 544 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 437(1)(c) (1987)).

94. *Id.* at 544. The Court merely required that the Evidence Convention "prove effective." One court explained, "The question is whether proceeding with jurisdictional discovery under Hague would allow these plaintiffs to obtain the necessary testimony, documents, and written answers . . . in a timely and effective manner." *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45, 54 (D.D.C. 2000). Another court found that the comparative effectiveness of the Evidence Convention to the Federal Rules was relevant. *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988) ("The final factor to take into account is whether use of the Convention procedures would be effective. Here, neither side has indicated that those procedures would not be effective. However, defendants also do not show they will be more effective than use of the Federal Rules." (internal citation omitted)).

95. Borchers, *supra* note 6, at 81 ("One unfortunate aspect of . . . *Aérospatiale* . . . is that [it] effectively delegate[s] to lower courts, with very little guidance, the interpretation of the Hague Convention.").

96. *Aérospatiale*, 482 U.S. at 548 (Blackmun, J., dissenting).

97. *Id.* at 548-49.

98. *Id.* at 549.

99. *Id.* at 550.

E. Lower Courts' Application of *Aérospatiale*

As Justice Blackmun predicted,¹⁰⁰ a majority of lower courts applying the *Aérospatiale* balancing test have determined that the appropriate procedural device is the Federal Rules rather than the Evidence Convention.¹⁰¹ In addition to the considerations set forth by the Restatement of Foreign Relations Law, courts have analyzed the hardship of compliance on the party or witness from whom discovery is sought, the good faith of the party resisting discovery,¹⁰² the extent to which the required conduct will take place outside the United States, and the nationality of the entity involved.¹⁰³ Courts generally place the burden of persuasion on the party seeking to invoke the Evidence Convention.¹⁰⁴ Professor Patrick Borchers noted that, “[b]usy trial courts, anxious to have the litigants meet discovery cut-offs and other case-management deadlines, are understandably drawn to the familiar, and often faster, local procedures.”¹⁰⁵

F. Comity

The Court in *Aérospatiale* explained that the concept of international comity should guide courts in determining which procedures to use.¹⁰⁶ The Court elaborated that a consideration of comity requires a particularized analysis of the interests of the foreign nation and the requesting nation.¹⁰⁷ Further, it stated that comity “refers to the spirit of cooperation in which a domestic tribunal

100. *Id.* at 548.

101. Borchers, *supra* note 6, at 82 (“Although I cannot warrant that I have found every case decided in the wake of *Aérospatiale*, the heavy preponderance of them simply authorizes discovery under local procedures with only a passing nod to the Evidence Convention.”). *But see* Motorola Credit Corp. v. Uzan, No. 02–Civ. 666 (JSR)(FM), 2003 U.S. Dist. LEXIS 1215, at *21 (S.D.N.Y. Jan. 29, 2003) (“In these circumstances, it is appropriate that the plaintiffs be required to secure the additional documents through the Hague Convention While the delay resulting from this procedure may be extensive, the plaintiffs have not shown an adequate basis for the Court to require otherwise.”); *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 356 (D. Conn. 1991) (ordering the parties to use the Evidence Convention).

102. *In re* Vivendi Universal, S.A. Sec. Litig., No. 02CIV5571RJHHBP, 2006 WL 3378115, at *2 (S.D.N.Y. Nov. 16, 2006); *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000).

103. *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 439 n.10 (E.D.N.Y. 2008); *Minpeco, S.A. v. ContiCommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987).

104. *Chalmers*, *supra* note 6, at 199. *But see* *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987) (“This court believes that the burden should be placed on the party opposing the use of Convention procedures to demonstrate that those procedures would frustrate these interests.”).

105. Borchers, *supra* note 6, at 74.

106. *Aérospatiale*, 482 U.S. at 543–44.

107. *Id.* at 543–44.

approaches the resolution of cases touching the laws and interests of other sovereign states.”¹⁰⁸ The Court then cited and quoted from *Emory v. Grenough* from 1797 and *Hilton v. Guyot* from 1895.¹⁰⁹ This constituted the full extent of the Court’s discussion of comity in *Aéropatiale* and, generally, lower courts do not flesh out the concept more extensively.¹¹⁰ The concept of comity is widely debated, and some scholars maintain that the confusion it creates outweighs its utility.¹¹¹ To fully unpack this debate is beyond the scope of this Note, but a brief explanation can guide the present analysis.

Comity has been described as “a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another.”¹¹² In *Somportex v. Philadelphia Chewing Gum Co.*, the Third Circuit explained that comity is more than a matter of courtesy, but it does not rise to an obligation or an imperative.¹¹³ Nevertheless, the court stated that it should not be withheld unless “its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.”¹¹⁴

A number of judges and scholars have developed the concept of judicial comity. Justice Scalia, in his dissent in *Hartford Fire Insurance v. California*, stated that “comity of courts” occurs when “judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.”¹¹⁵ He contrasted judicial comity with prescriptive comity, where nations demonstrate respect for one another by limiting the reach of their laws.¹¹⁶ Professor Anne-Marie Slaughter explained that the comity of courts is used to determine where a case should be heard, what procedures to use, and what discovery methods to employ.¹¹⁷ It is “the lubricant of transjudicial

108. *Id.* at 544 n.27.

109. *Id.*

110. *See, e.g.*, *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 447 (E.D.N.Y. 2008) (quoting *Hilton v. Guyot*, 159 U.S. 113, 143 (1895)); *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02CIV5571RJHHBP, 2006 WL 3378115, at *2 (S.D.N.Y. Nov. 16, 2006) (mentioning the factors that a court should consider in deciding whether to use the Federal Rules or Evidence Convention, but not explaining the concept of comity more generally); *In re Aircrash Disaster Near Roselawn*, 172 F.R.D. 295 (N.D. Ill. 1997) (failing to mention comity).

111. Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 593 (2001) (“[T]he prevalent confusion over [the] scope [of comity] has led some scholars to regard comity as either dead or moribund, and to pen eloquent and poetic eulogies to either celebrate or hasten its demise.”).

112. *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971).

113. *Id.*

114. *Id.*

115. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993).

116. *Id.*

117. Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT’L L. 708, 708 (1998).

relations.”¹¹⁸ Then-Judge Breyer stated that judges must determine how to “help the world’s legal systems work together, in harmony, rather than at cross purposes.”¹¹⁹ One theory of judicial comity is respect for foreign courts and their ability to resolve questions of fact and law competently.¹²⁰ Another recognizes that courts in different countries are entitled to their share of disputes, “both as coequals in the global task of judging and as the instruments of a strong ‘local interest having localized controversies decided at home.’”¹²¹ Professor Slaughter further noted that respect for foreign courts does not necessarily mean deference. Rather, it requires awareness of the interests of foreign courts and an effort to cooperate to resolve the dispute.¹²²

G. Jurisdictional Discovery Under the Hague Evidence Convention

The Supreme Court has not determined the applicability of its *Aérospatiale* decision to jurisdictional discovery, as opposed to “merits discovery.”¹²³ Several lower courts have addressed this issue and a substantial majority of them hold that (1) trial judges maintain the broad discretion provided in *Aérospatiale*, and (2) the *Aérospatiale* balancing test dictates that the Federal Rules, rather than the Evidence Convention, should be applied.¹²⁴ In *Rich v. KIS California*, an early district court case addressing this question, the defendants argued that until personal jurisdiction is established, discovery

118. *Id.*

119. *Id.* at 708–09 (quoting *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991)).

120. Slaughter, *supra* note 117, at 709.

121. *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

122. Slaughter, *supra* note 117, at 710.

123. “Merits discovery” is “[d]iscovery to uncover facts that support the claim or defense, or that might lead to other facts that will support the allegations of a legal proceeding.” BLACK’S LAW DICTIONARY 532 (9th ed. 2009). In contrast, “jurisdictional discovery” is “limited to finding facts relevant to whether the court has jurisdiction.” *Id.* Additionally, “[a] court may allow limited jurisdictional discovery before it rules on a motion to dismiss for lack of jurisdiction.” *Id.*

124. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 302–05 (3d Cir. 2004); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 49, 54–55 (D.D.C. 2000); *Fishel v. BASF Grp.*, 175 F.R.D. 525, 529 (S.D. Iowa 1997); *In re Bedford Computer Corp.*, 114 B.R. 2, 5–6 (Bankr. D.N.H. 1990); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 259–60 (M.D.N.C. 1988). *But see* *Jenco v. Martech Int’l, Inc.*, No. 86–4229, 1988 U.S. Dist. LEXIS 4727, at *1 (E.D. La. May 20, 1988) (applying the *Aérospatiale* balancing test, but finding in favor of the Hague Convention); *Geo-Culture, Inc. v. Siam Inv. Mgmt.*, 147 Ore. App. 536, 544 (Or. Ct. App. 1997) (upholding the trial court’s application of the Evidence Convention to conduct jurisdictional discovery); *Knight v. Ford Motor Co.*, 260 N.J. Super. 110, 119–20 (N.J. Super. Ct. Law Div. 1992) (finding that the Evidence Convention is the only procedure to use when conducting jurisdictional discovery).

should proceed through the Evidence Convention, as if the defendants were a nonparty. In the alternative, they argued that the Evidence Convention should be used first before resorting to the Federal Rules.¹²⁵ The court rejected both of these arguments and explained that

[t]he fact [that] defendant is a foreign litigant does not require deviation from the principle that discovery under the Federal Rules of Civil Procedure may be employed to establish personal jurisdiction over it. The limitations espoused in the concept of personal jurisdiction do not find their basis in Article III of the Constitution. Rather, they stem from the due process clause.¹²⁶

The Evidence Convention was not entitled to preference, and the court proceeded with an analysis of the facts and circumstances surrounding the case.¹²⁷ It first noted that the discovery request was not intrusive because it consisted of ten interrogatories.¹²⁸ Additionally, the court observed that the Federal Rules were considered more efficient, which was important in light of plaintiffs' need to establish personal jurisdiction before proceeding to the merits of the case.¹²⁹ The court also found that using the Federal Rules did not "impinge on an important sovereign interest of the French nation."¹³⁰ Finally, it mentioned that although the proponents of the Federal Rules did not demonstrate that Evidence Convention procedures to be ineffective, the defendants did not show these procedures to be more effective than the Federal Rules.¹³¹

For the individual defendant, the court found that the discovery requests amounted to a fishing expedition and did not permit discovery.¹³² However, the court permitted discovery pursuant to the Federal Rules for the corporate defendant.¹³³ The court highlighted that "[i]t may be tempting to prefer use of Convention procedures until questions of personal jurisdiction are established. Such solicitation towards foreign sensibilities is counterbalanced by the greater need to obtain prompt and thorough resolution of the normally non-sensitive preliminary issues so that matters of merit may be reached."¹³⁴

In a subsequent federal bankruptcy case, the court followed the reasoning of *Rich v. KIS California* and held that

125. *Rich*, 121 F.R.D. at 257.

126. *Id.* at 259.

127. *Id.* at 259–60.

128. *Id.* at 258.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 259.

133. *Id.* at 259–60.

134. *Id.* at 260.

[Plaintiff] only seeks discovery of personal jurisdiction matters and there has been no showing of any prejudice to any sovereign interests. Indeed, the only effect of using the Hague [Evidence] Convention rules would be to further delay this adversary proceeding. The solution is to limit the discovery sought, and still use the F.R.C.P.¹³⁵

In *Fishel v. BASF Group*, the District Court for the Southern District of Iowa proceeded with a similar analysis, concluding that the court should conduct jurisdictional discovery through the Federal Rules rather than the Evidence Convention.¹³⁶ Explaining first that the court has jurisdiction to establish its jurisdiction, the court then held that the *Aérospatiale* decision did not support defendants' argument that until personal jurisdiction has been established, the court is limited to using the Evidence Convention to proceed with discovery.¹³⁷ It engaged in the comity analysis and again required the parties to apply the Federal Rules.¹³⁸

In *In re Vitamins Antitrust Litigation*, the District Court for the District of Columbia concluded that *Aérospatiale* did not resolve the question of what procedures should be used in cases of jurisdictional discovery.¹³⁹ The court held that because it had "jurisdiction over the[] foreign defendants to the extent necessary to determine . . . personal jurisdiction," there was "no legal barrier to exercising the discretion given to trial courts by *Aérospatiale* in cases of jurisdictional discovery."¹⁴⁰ The court further noted that applying the *Aérospatiale* balancing test to jurisdictional discovery would not offend the sovereign interests of the countries affected anymore so than applying the balancing test to merits discovery.¹⁴¹ The court listed three considerations in support of its conclusion. First, the court stated that investigating an antitrust price-fixing conspiracy did not offend the sovereign interests of other nations because this conduct is prohibited by many of these nations.¹⁴² Second, although the plaintiffs' allegation of personal jurisdiction was not conclusive, the court determined that it was more than a mere fishing expedition.¹⁴³ Finally, the court observed that the discovery requests were narrowly tailored to jurisdictional questions.¹⁴⁴ After

135. *In re Bedford Computer Corp.*, 114 B.R. 2, 6 (Bankr. D.N.H. 1990).

136. *Fishel v. BASF Grp.*, 175 F.R.D. 525, 529 (S.D. Iowa 1997).

137. *Id.*

138. *Id.*

139. *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45, 49 (D.D.C. 2000) ("Therefore, it is clear that the Supreme Court in *Aerospatiale* never addressed the issue of what procedures to follow in cases of jurisdictional discovery; that issue was never before the Court and certainly was not resolved by the holding of *Aerospatiale*.").

140. *Id.*

141. *Id.* at 50.

142. *Id.*

143. *Id.*

144. *Id.* at 51.

conducting the *Aérospatiale* analysis, the court compelled discovery to proceed through the Federal Rules rather than the Evidence Convention.¹⁴⁵

The Third Circuit is the only circuit court that has addressed the applicability of the Hague Convention to transnational jurisdictional discovery. In *In re Automotive Refinishing Paint Antitrust Litigation*, the court followed the lead of most lower court decisions and declined to adopt a first-resort rule favoring the Evidence Convention procedures.¹⁴⁶ Furthermore, the court explained that the distinction between merits and jurisdictional discovery in this context is a false dichotomy; the presence of personal jurisdiction in *Aérospatiale* was tangential to its holding.¹⁴⁷ Therefore, the court found that the *Aérospatiale* holding applies equally to jurisdictional discovery.¹⁴⁸ The court further noted that the plaintiffs alleged a prima facie case of personal jurisdiction and the appellants voluntarily appeared in court to challenge jurisdiction.¹⁴⁹

The court provided several other reasons why *Aérospatiale* applies equally to jurisdictional discovery. First, the court explained that merits discovery is generally “more comprehensive or burdensome than jurisdictional discovery.”¹⁵⁰ Accordingly, “there is more justification to reject a first resort rule for the more limited and less intrusive jurisdictional discovery.”¹⁵¹

Second, *Aérospatiale* rejected a first-resort rule even though the French defendants faced possible sanctions under the blocking statute.¹⁵² In contrast, the German defendants in *Auto Refinishing* did not face any comparable sanction.¹⁵³ Finally, “where *Aérospatiale* has rejected the adoption of a blanket first resort rule based on the proffered reasons of respecting the ‘judicial sovereignty’ of the signatory host nation and preventing discovery abuse, the same reasons proffered by the appellants here must fail as well.”¹⁵⁴ After applying the balancing test to defendants, the court found that they failed to satisfy the burden of persuasion and applied the Federal Rules rather than the Evidence Convention procedures.¹⁵⁵

Judge Roth, in her concurrence, expressed concern that the Evidence Convention had been given “short shrift” since the

145. *Id.* at 54.

146. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 302 (3d Cir. 2004).

147. *Id.* at 303.

148. *Id.*

149. *Id.* at 302–03.

150. *Id.* at 303.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 304.

155. *Id.* at 305.

Aérospatiale decision.¹⁵⁶ She explained that although the Convention is an optional procedure, it was also not intended to be inferior to the Federal Rules.¹⁵⁷ Judge Roth suggested that the Supreme Court revisit the decision because many courts have not exercised the “special vigilance to protect foreign litigants” as the Supreme Court instructed in *Aérospatiale*.¹⁵⁸

There are several exceptions to the general trend of applying the Federal Rules (or the equivalent state procedural rules) to transnational jurisdictional discovery disputes. The Court of Appeals of Oregon upheld a trial court’s order directing jurisdictional discovery to be conducted using the Evidence Convention because the plaintiff’s complaint failed to allege a prima facie basis for asserting personal jurisdiction.¹⁵⁹ In *Jenco v. Martech International*, the District Court of the Eastern District of Louisiana stated that first resort to the Evidence Convention is not required and courts should conduct a balancing test.¹⁶⁰ Nevertheless, it held that although the Federal Rules may promote judicial economy, “the interests of protecting a foreign litigant in light of the jurisdictional problems are paramount.”¹⁶¹ The court found no reason to depart from the Evidence Convention procedures until jurisdiction was established.¹⁶² The Superior Court of New Jersey, in *Robert v. Knight*, took a more forceful approach when it stated in a footnote that

[i]f jurisdiction does not exist over a foreign party, obviously there can be no merits discovery under the rules of a court that lacks jurisdiction, and the Convention may provide the only recourse for obtaining evidence. Only when jurisdiction is found does the analysis even begin as to whether the Convention should be invoked.¹⁶³

156. *Id.* at 306.

157. *Id.* (“However the Hague Convention is only as ‘optional’ as deciding to use the Federal Rules is ‘optional’ in such a case. The Convention does not overwrite the Federal Rules of Civil Procedure, but it is in no way inferior to them.”).

158. *Id.*

159. *Geo-Culture, Inc. v. Siam Inv. Mgmt.*, 147 Ore. App. 536, 544 (Or. Ct. App. 1997).

160. *Jenco v. Martech Int’l, Inc.*, No. 86–4229, 1988 U.S. Dist. LEXIS 4727, at *1–2 (E.D. La. May 20, 1988).

161. *Id.* at *2.

162. *Id.*

163. *Knight v. Ford Motor Co.*, 260 N.J. Super. 110, 119 n.11 (N.J. Super. Ct. Law Div. 1992); *see also Husa v. Laboratoires Servier SA*, 326 N.J. Super. 150, 155–56 (N.J. Super. Ct. App. Div. 1999).

[W]e perceive no conflict with federal supremacy, if, in exercising the option to resort to the Convention, we are more generous in our use of the Convention’s procedures than the United States’ courts. . . . We are persuaded that the Convention should be utilized unless it is demonstrated that its use will substantially impair the search for truth . . . or will cause unduly prejudicial delay.

In sum, courts applying the Evidence Convention offer various grounds of support for their decision but do not provide extensive justifications for their outcomes.

III. PROPOSALS

As discussed above, the current trend among courts when faced with a jurisdictional discovery dispute over information located abroad is (1) to apply the *Aérospatiale* balancing test, and (2) as a result, require the parties to employ the Federal Rules rather than the Evidence Convention. Both of these steps are misguided. Courts have three alternatives: (1) reject the *Aérospatiale* test and apply the Evidence Convention, as in the case of discovery from nonparty foreign individuals;¹⁶⁴ (2) reject the *Aérospatiale* test and adopt a rule of first resort to the Evidence Convention, turning to the Federal Rules only when the Convention's procedures prove infeasible; or (3) apply the *Aérospatiale* test, but recognition that the court has not established personal jurisdiction weighs so heavily in favor of the Evidence Convention that it has a similar effect as the first-resort approach.¹⁶⁵

A. The Evidence Convention as the Exclusive Means for a Party to Obtain Jurisdictional Discovery Abroad

In order to assert that the Evidence Convention is the only means to obtain jurisdictional discovery abroad, it is necessary to explain why courts do not have authority to order discovery abroad pursuant to the Federal Rules before personal jurisdiction has been established. To do so, a court can argue that its authority to determine whether it has personal jurisdiction over a party does not also include authority to require discovery to be conducted by any *means* it chooses, because discovery abroad pursuant to the Federal Rules before a U.S. court has established personal jurisdiction over a party violates the sovereignty of that nation.

A court must call into question other courts' assertion that they can apply the *Aérospatiale* balancing test (and consequently require

Husa, 326 N.J. Super. at 155–56.

164. Cf. *Rich v. KIS Cal. Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988) (“Compulsory discovery of non-party foreigners may only be accomplished through use of the Hague Evidence Convention.”).

165. In the one piece found analyzing application of the Hague Convention to transnational jurisdictional discovery, Jenia Iontcheva argued, “The extension of *Aérospatiale* to jurisdictional discovery is plagued with inconsistency underlying all orders for discovery at the pre-jurisdiction stage.” Jenia Iontcheva, Case Note, *Sovereignty on Our Terms*, 110 YALE L.J. 885, 888 (2001).

the parties to proceed using the Federal Rules) to jurisdictional discovery because the court has jurisdiction over the foreign entity to determine whether there is personal jurisdiction.¹⁶⁶ This assertion conflates the means and ends of establishing personal jurisdiction. The Court in *Insurance Corp. of Ireland* explained that the requirement of personal jurisdiction “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”¹⁶⁷ Therefore, a party can waive a claim that personal jurisdiction is lacking and a defendant can be estopped from raising the issue.¹⁶⁸ In short, the court’s authority to determine whether it has personal jurisdiction is grounded in the fact that the requirement of personal jurisdiction reflects a concern for the protection of individual liberty. In contrast, the means of determining whether personal jurisdiction exists when the information sought is located abroad implicates foreign nations’ sovereignty. As discussed earlier, evidence gathering is part of the trial and is conducted by the judge in civil law countries, and therefore it is considered a judicial function.¹⁶⁹

Before personal jurisdiction is established, the court’s authority to determine *whether* personal jurisdiction exists (because personal jurisdiction is a matter of individual liberty) does not encompass the authority to determine *how* discovery is conducted (because the method of discovery is a matter of foreign sovereignty). Consequently, at this stage courts should employ the Evidence Convention. The foreign nation consented to this procedural mechanism, and therefore using it does not encroach upon its sovereignty. Courts have not recognized the distinction between the means and end of establishing personal jurisdiction, and how this affects the court’s authority to require parties to use the Federal Rules for jurisdictional discovery. Nevertheless, exclusive application of the Evidence Convention received support in *Knight v. Ford Motor Co.* (albeit without extended justification) when the court stated: “Only when [personal] jurisdiction is found does the analysis even

166. See *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 49 (D.D.C. 2000) (“Since the Court has jurisdiction over these foreign defendants to the extent necessary to determine whether or not they are subject to personal jurisdiction in this forum, the Court sees no legal barrier to exercising the discretion given to trial courts by *Aérospatiale* in cases of jurisdictional discovery.”); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 303 (3d Cir. 2004) (applying the *Aérospatiale* balancing approach to determine jurisdictional discovery).

167. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

168. *Id.* at 704.

169. See *supra* Part II.B.

begin as to whether the Convention should be invoked.”¹⁷⁰ Additionally, the Justice Blackmun in *Aérospatiale* noted that “[i]t is well established that a court has the *power* to impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the party.”¹⁷¹ This statement suggests that this power may not exist when a court does not have personal jurisdiction over the party.

Although this approach has analytical appeal, if the procedures of the Evidence Convention cannot produce the necessary information, then the U.S. court has no way of knowing whether it has personal jurisdiction over that party and therefore cannot proceed with the litigation. But, a few considerations demonstrate that this risk may not be as great as it initially appears. Justice Blackmun, in *Aérospatiale*, explained that “[e]xperience with the Convention suggests . . . [that] contracting parties have honored their obligation to execute letters of request expeditiously and to use compulsion if necessary.”¹⁷² Additionally, the Hague Conference on Private International Law recognized that Article 23 is a “continued source of misunderstandings”¹⁷³ and it encouraged countries to rethink their use of Article 23. Moreover, Justice Blackmun noted that even when the reservations are in place, Article 23 only affects letters of request for documents, and does not include the informal procedures through a consul or a commission, or formal requests for depositions or interrogatories.¹⁷⁴

As noted earlier, the terms of the Evidence Convention allow foreign governments, in responding to letters of request, to refuse to produce the information when they have the privilege or duty to do so under foreign law.¹⁷⁵ Countries often invoke this privilege or duty in areas like personal privacy, banking records, or information specific to an industry.¹⁷⁶ Jurisdictional discovery only requires enough information to establish minimum contacts between that party and the U.S. jurisdiction.¹⁷⁷ Therefore, because jurisdictional discovery typically requires less information than merits discovery, the information requested is less likely to be protected under foreign law and consequently less likely to be undiscoverable through Evidence Convention procedures.

170. *Knight v. Ford Motor Co.*, 260 N.J. Super. 110, 119 n.11 (N.J. Super. Ct. Law Div. 1992).

171. *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 554 n.4 (1987) (Blackmun, J., dissenting).

172. *Id.* at 562.

173. Hague Conference on Private Int’l Law, *supra* note 72, ¶ 29.

174. *Aérospatiale*, 482 U.S. at 563 (Blackmun, J., dissenting).

175. Hague Evidence Convention, *supra* note 8, art. 11.

176. BORN & RUTLEDGE, *supra* note 13, at 914–15.

177. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

B. *The Evidence Convention as a First Resort*

If the possibility of an insurmountable roadblock to obtaining the information necessary to determine personal jurisdiction is unacceptable to a court, it could instead adopt a first-resort approach, applying the Federal Rules only when the Evidence Convention proves unsuccessful. Unlike the first approach, this one does not assert that a court lacks authority to apply the Federal Rules. Instead it asserts that (1) the holding in *Aérospatiale* does not apply to jurisdictional discovery, and (2) the principle of comity supports a first-resort approach.

The Court in *Aérospatiale* stated: "The question presented in this case concerns the extent to which a federal district court must employ the procedures set forth in the Convention when litigants seek [discovery] . . . from a French adversary *over whom the court has personal jurisdiction*."¹⁷⁸ The question presented, assuming personal jurisdiction over petitioners, frames the court's analysis and holding. The court in *In re Vitamins Antitrust Litigation* held that the issue of jurisdictional discovery "was not resolved by the holding of *Aérospatiale*."¹⁷⁹ The Third Circuit is the only circuit to hold that *Aérospatiale* applies to jurisdictional discovery.¹⁸⁰ Courts outside of the Third Circuit can assert that because the *Aérospatiale* decision does not address jurisdictional discovery and the question presented is premised on established personal jurisdiction, courts should not extend the decision to cover jurisdictional discovery.

In *Aérospatiale*, the Court explained how resort to the Evidence Convention would create unacceptable asymmetries. These asymmetries do not apply as forcefully to jurisdictional discovery. First, the Court observed that it would allow the foreign party to obtain discovery pursuant to the Federal Rules while the domestic party would be required to use the Evidence Convention.¹⁸¹ With jurisdictional discovery, however, the domestic party filed suit and consented to personal jurisdiction by the court. Therefore, the foreign party is not conducting any discovery at this stage and not receiving any advantages from the Federal Rules. Second, the Court explained that the Evidence Convention gives an unfair advantage to foreign corporations because they would be subject to less extensive discovery even though they decided to market their products in the United States.¹⁸² As discussed above, in the case of jurisdictional discovery,

178. *Aérospatiale*, 482 U.S. at 524 (emphasis added).

179. *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45, 49 (D.D.C. 2000).

180. See *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 303 (3d Cir. 2004) (holding that *Aérospatiale* applies to jurisdictional discovery).

181. *Aérospatiale*, 482 U.S. at 540 n.25.

182. *Id.*

the foreign defendant is not receiving any advantages of the Federal Rules because merits discovery has not commenced. Moreover, when personal jurisdiction is contested, it has not been established that the foreign defendant marketed its products in the United States and consented to being hailed into U.S. courts.

Finally, the Court stated that because the Evidence Convention applies only to parties from contracting states and not to parties that are nationals of other, non-contracting states, “the [first resort] rule would confer an unwarranted advantage on some domestic litigants over others similarly situated.”¹⁸³ In the case of jurisdictional discovery, this advantage is not as pronounced because the Evidence Convention is only used to determine jurisdiction, rather than to conduct merits discovery. More importantly, courts should not accept the argument that applying the Evidence Convention is undesirable because its procedures are only applied to some foreign litigants.¹⁸⁴ Any instrument that is not universally agreed to will confer benefits on some and not others, but this is a necessary, although perhaps unfortunate, side effect to seeking cooperation among states through transnational agreements and treaties. Given that the asymmetries do not present intractable problems with respect to jurisdictional discovery, they do not support an extension of the *Aérospatiale* holding. Instead, they demonstrate that the decision was only meant to apply to cases where personal jurisdiction has been established—as noted in its question presented—and the parties are conducting merits discovery.

The Court’s reliance on the Restatement of Foreign Relations Law to guide the comity analysis further calls into question the applicability of the *Aérospatiale* decision to jurisdictional discovery. Section 442 of the Restatement begins in part (1)(a) with: “A court or agency in the United States, when authorized by statute or rule of court, may order a person *subject to its jurisdiction* to produce documents, objects, or other information relevant to an action or investigation.”¹⁸⁵ Part (c) lists the factors courts use to decide whether to order the production of information located abroad.¹⁸⁶ The Restatement contemplates application of these factors when the court has already established personal jurisdiction.

It is important to note that in setting out its three-part test (the particular facts in each case, the sovereign interests implicated, and

183. *Id.*

184. *See id.* at 566 (1987) (Blackmun, J., dissenting) (referring to the “unavoidable inequality inherent in the benefits conferred by any treaty that is less than universally ratified”).

185. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (1987) (emphasis added).

186. *Id.*

the likelihood that resort to those procedures will prove effective¹⁸⁷), it is unclear to what extent the *Aérospatiale* decision relied on the Restatement. But at the very least, the test and the Restatement are closely connected. The first part of the *Aérospatiale* test, the particular facts in each case, seems to encompass the Restatement's factor one, the importance to the investigation or litigation of the documents; factor two, the degree of specificity of the request; and factor three, whether the information originated in the United States. The second part of the *Aérospatiale* test, the sovereign interests, resembles factor five, the extent to which noncompliance with the request would undermine important interests of the United States. The court in *In re Vitamins Antitrust Litigation* recognized this connection when it cited factor five of the Restatement in part two of the *Aérospatiale* test.¹⁸⁸ Factor four of the Restatement, the availability of alternative means of securing the information, relates to factor three of the *Aérospatiale* test, the likelihood that resort to the Evidence Convention procedures will prove effective. Although factor four of the Restatement is likely referring to means outside of court-ordered discovery, it relates to factor three of the *Aérospatiale* test because both reflect a concern for ensuring that the party can obtain the necessary information. To the extent that the Court in *Aérospatiale* relied on the Restatement to formulate its three-part test, then this supports the argument that the *Aérospatiale* test should not apply to jurisdictional discovery, because it relies on a comity analysis that presumes that the court has personal jurisdiction over the parties.

Taking into account that, (1) the question presented in *Aérospatiale* explicitly notes the existence of personal jurisdiction; (2) the unacceptable asymmetries do not apply as forcefully to jurisdictional discovery; and (3) the Restatement's comity analysis is premised on personal jurisdiction; courts (with the exception of those in the Third Circuit, bound by *In re Automotive Refinishing Paint Antitrust Litigation*) can forcefully argue that the *Aérospatiale* balancing test should not be extended to jurisdictional discovery. Instead, the principle of comity dictates that a first resort rule is appropriate.

Justice Blackmun in *Aérospatiale* stated that "[t]here is . . . nothing inherent in the comity principle that requires case-by-case analysis."¹⁸⁹ The Supreme Court, guided by the principle of comity, has adopted general rules "in areas such as choice of forum,

187. *Aérospatiale*, 482 U.S. at 544.

188. *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45, 54 (D.D.C. 2000).

189. *Aérospatiale*, 482 U.S. at 554 (Blackmun, J., dissenting).

maritime law, and sovereign immunity.”¹⁹⁰ He further recognized that the comity principle guided the *creation* of the Evidence Convention, and thus when parties can obtain the necessary information pursuant to it, the court should not go through the comity considerations for a second time.¹⁹¹ Justice Blackmun explained that the conflicts usually mediated by comity “have been eliminated by the agreements expressed in the treaty.”¹⁹² Recognizing that the contracting states already considered the principle of comity in drafting and signing the Evidence Convention, courts should automatically defer to it.

Although the majority in *Aérospatiale* rejected this argument, that decision did not encompass jurisdictional discovery, and the case for first resort to the Evidence Convention is stronger for jurisdictional discovery than for merits discovery. Given that the foreign party may not have minimum contacts sufficient to establish personal jurisdiction by the U.S. court, courts should act with greater deference to foreign interests. As one scholar noted,

Fundamental considerations of fairness and due process demand that the court proceed with caution in imposing its rules upon a defendant who might not have reasonably foreseen being brought before it. Fairness considerations become even more central when the defendant is a foreign party who owes no allegiance to the forum and is unfamiliar with the mandates of the forum’s legal system.¹⁹³

Courts have observed that jurisdictional discovery is usually more limited than merits discovery.¹⁹⁴ Therefore, they conclude that the country’s sovereign interests should be less offended by application of the Federal Rules for narrower jurisdictional discovery than they would be for merits discovery. However, the observation that jurisdictional discovery is narrower could be used to argue that the Evidence Convention should be applied more often for jurisdictional discovery as compared to merits discovery. Because of the limited scope of jurisdictional discovery, the procedures of the Evidence Convention would be less onerous than for merits discovery. A first-resort rule for jurisdictional discovery could familiarize American judges and litigants with the Evidence Convention procedures. The unwillingness of courts to apply the Evidence Convention in the first place deprives courts of meaningful

190. *Id.* at 554–55.

191. *Id.* at 556.

192. *Id.*

193. Iontcheva, *supra* note 165, at 888.

194. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 303–04 (3d Cir. 2004) (“There is also no reason to believe that the sovereign interests of . . . foreign signatory nations would be any more offended by [the] narrower jurisdictional discovery than they would be by the broader, merits-related discovery allowed by *Aérospatiale*.”); see *Fishel v. BASF Grp.*, 175 F.R.D. 525, 529 (S.D. Iowa 1997) (noting that jurisdictional discovery is “not intrusive”).

information about how the Convention works in practice. If courts invoked the Convention more frequently with jurisdictional discovery, it may become more efficient and workable for all types of discovery.

Furthermore, the court in *Fishel* observed that "both sides want an expeditious and reliable determination of those issues."¹⁹⁵ Although the Federal Rules are generally considered more efficient than the Evidence Convention,¹⁹⁶ this is not sufficient to defeat a rule of first resort. The claim that both sides want an expeditious determination of whether the court has personal jurisdiction is misleading. In a case where the court is determining whether to use the Federal Rules or the Evidence Convention, it is probably because the defendant requested that the court require discovery to proceed through the Evidence Convention, a departure from the status quo. The party requesting the Evidence Convention's procedures also probably realizes that the Convention may be less efficient than the Federal Rules. But, its request to use the Convention reflects interests besides efficiency. Because the party is contesting personal jurisdiction, it believes that a plausible argument can be made that it does not have minimum contacts with the U.S. jurisdiction and, therefore, should not be haled into its court. It is probably for this reason that the foreign party also wants to conduct jurisdictional discovery pursuant to the Evidence Convention, rather than procedural rules that it may not have foreseen being subject to. Courts should recognize that the foreign party is more interested in contesting jurisdiction through procedures that it is more familiar with and do not offend that nation's sovereignty rather than proceeding in the most efficient way possible. A rule of first resort accommodates this concern by recognizing that when a court has not conclusively established a relationship between the U.S. court and the foreign party, respect for other nations' procedures should outweigh judicial efficiency.

The court in *Rich v. KIS* stated that the Court's admonishment in *Aérospatiale* for district courts to be sensitive to claims of abusive

195. *Fishel*, 175 F.R.D. at 529; see also *Rich v. KIS Cal. Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988) ("Another reason for using the Federal Rules instead of Convention procedures concerns the immediate need for plaintiffs to have preliminary information concerning the jurisdiction issue. Until jurisdiction is resolved, the lawsuit will stagnate. This favors using the generally more efficient, Federal Rules of Civil Procedure.").

196. See *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45, 54 (D.D.C. 2000) (invoking defendants' supposed interest in a quick resolution of the jurisdiction question to justify proceeding with discovery under the Federal Rules); *In re Bedford Computer Corp.*, 114 B.R. 2, 6 (Bankr. D.N.H. 1990); Muse, *supra* note 6, at 1114 ("While speedy and inexpensive disposition of litigation is obviously a valid and important goal, continually placing convenience above comity, cooperation, and Convention is a sad result indeed.").

discovery provides enough protection to foreign litigants.¹⁹⁷ But, as evidenced by courts' treatment of jurisdictional discovery thus far,¹⁹⁸ the *Aérospatiale* test in fact does not provide sufficient protection to foreign litigants in cases of jurisdictional discovery. Foreign litigants need more protection in cases of jurisdictional discovery because the court has not established whether it has the power to adjudicate the domestic party's claim.

A rule of first resort for jurisdictional discovery would elevate the reputation of the United States as a cooperative player in transnational litigation. It would also demonstrate that the United States takes seriously the treaty commitments it has entered into. One scholar hypothesized that,

[T]he antagonism incited by the extraterritorial application of U.S. discovery rules might result in unwillingness by foreign countries to compromise their values in other areas and hurt wider U.S. interests in the international arena. It might also jeopardize valuable efforts—often spearheaded by the United States—to reach international agreements on jurisdiction and procedure.¹⁹⁹

The creation of blocking statutes and invocation of Article 23 are evidence of the antagonism that U.S. court-ordered unilateral discovery abroad has incited.²⁰⁰ Another problem with the comity analysis, as it is currently applied under *Aérospatiale*, is that the individual facts of a case weigh heavily into the determination of which procedural device to employ. As a result, the aggregate benefits of applying the Evidence Convention more frequently in the U.S. judicial system as a whole are neglected. As Justice Blackmun in *Aérospatiale* pointed out, courts are used to examining the

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

198. *See In re Auto. Refinishing*, 358 F.3d at 306 (Roth, J., concurring) (“Many times, rather than wade through the mire of a complex set of foreign statutes and case law, judges marginalize the Convention as an unnecessary ‘option.’”); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. at 54 (applying the *Aérospatiale* test and finding the “Hague would be extremely unlikely to provide efficient and effective discovery”); *Fishel*, 175 F.R.D. at 529 (enforcing civil discovery rules and noting that the Convention’s “effectiveness in the present circumstances is directly in doubt”); *In re Bedford Computer Corp.*, 114 B.R. at 6 (utilizing the Federal Rules and stating “the only effect of using the Hague Convention rules would be to further delay this adversary proceeding”); *Rich*, 121 F.R.D. at 258 (finding the use of the “generally more efficient” Federal Rules of Civil Procedure to be preferable to the Hague Evidence Convention).

199. *Iontcheva*, *supra* note 165, at 891.

200. *See Weis*, *supra* note 2, at 930.

The enactment of blocking statutes in some of the signatory countries is evidence of dissatisfaction with what they perceive as pervasive intrusions of American discovery. The casual American approach to what some countries regard as essential attributes of sovereignty does little to inspire confidence by those countries in American courts.

Id.

interests of the parties before them in individual cases.²⁰¹ When foreign legal systems and interests are implicated, “[t]he presence of these interests creates a tension between the broad discretion our courts normally exercise in managing pretrial discovery and the discretion usually allotted to the Executive in foreign matters.”²⁰² Because courts tend to focus on the parties before it, rather than the potential aggregate benefits of applying the Evidence Convention for U.S. foreign relations, a first-resort rule for jurisdictional discovery would ensure that the broader interests of the United States are accounted for.

A court can advance a rule of first resort by asserting that the *Aérospatiale* test does not apply to jurisdictional discovery and that the first-resort rule assures that due respect is paid to foreign nations and parties at this stage of litigation where the U.S. court does not know whether it has the authority to adjudicate a claim against a foreign party. It provides clear guidance to lower courts by instructing them to look to the Evidence Convention and depart from it only if they are unable to produce information necessary to determine personal jurisdiction.

C. Applying the Evidence Convention as a Result of the *Aérospatiale* Balancing Test

The final approach to invoking the Evidence Convention with greater frequency is to apply the *Aérospatiale* balancing test, but insist that the factors generally support application of the Evidence Convention. This approach was taken in *Jenco v. Martech International*, and the court held that although the Federal Rules may promote judicial economy, “the interests of protecting a foreign litigant in light of the jurisdictional problems are paramount.”²⁰³ Many of the same factors that a court could use to adopt a first-resort approach above can be applied as part of the balancing test. Working within the *Aérospatiale* framework, this approach invokes the discretion given to trial courts and provides reasons for applying the Evidence Convention. This approach fits the most comfortably with existing case law. In applying the *Aérospatiale* balancing test, courts should recognize the missteps of previous courts. As discussed above, courts place too much emphasis on efficiency concerns and not enough on fairness considerations at this stage of litigation. Additionally, courts can take into account, in the comity analysis, the

201. *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 551 (1987) (Blackmun, J., dissenting).

202. *Id.* at 551–52.

203. *Jenco v. Martech Int'l, Inc.*, No. 86–4229, 1988 U.S. Dist. LEXIS 4727, at *2 (E.D. La. May 20, 1988).

fact that the United States ratified the Evidence Convention, while the other country did not consent to application of the Federal Rules.

Another error made by courts in the comity analysis is their assertion that the foreign nation's sovereign interests would not be offended by proceeding with discovery using the Federal Rules in adjudicating the subject matter at issue (e.g., antitrust, products liability, etc.).²⁰⁴ This argument conflates the means and ends of a dispute. The comity analysis determines whether the court should use the Federal Rules or the Evidence Convention—what discovery procedures the parties will use. Therefore, the comity analysis should balance competing interests in procedures, rather than competing interests in substantive law.

Where a plaintiff alleges that a defendant acted in a manner that violates U.S. law, often the country where the defendant is from will also have a general interest in preventing those same alleged actions. Consequently, this argument almost always favors application of the Federal Rules. The foreign nation's concern in the dispute between the Evidence Convention and the Federal Rules is not about the substantive legal issue, but about the means of adjudicating it, or in the case of jurisdictional discovery, the means of determining whether the U.S. court can even adjudicate the matter against the defendant. Asserting that both countries have an interest in preventing some act by the defendant should not be used to inform the decision of whether to use the Evidence Convention or Federal Rules to conduct jurisdictional discovery.

The court in *In re Vitamins Antitrust Litigation* recognized the importance of respect for procedures in explaining that, "those nations retain a separate and important sovereign interest in ensuring that discovery involving their citizens be taken in accord with their traditions and accepted practices. This interest of foreign nations in the sanctity and respect of their laws is both important and deserving of significant respect."²⁰⁵ Courts should not focus on the nation's interest in enforcing their substantive law; rather the analysis should focus on the nation's interest in what procedures to use to conduct jurisdictional discovery.

204. Cf. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 304 (3d Cir. 2004).

As observed by the court in *In re Vitamins* there is no reason to assume that discovery under the Federal Rules would inevitably offend Germany's sovereign interest because presumably Germany, like the United States, would prohibit the alleged price-fixing conspiracy and would welcome investigation of such antitrust violation to the fullest extent.

Id. (citation omitted).

205. *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45, 53–54 (D.D.C. 2000).

IV. CONCLUSION

As Judge Roth stated in her concurrence in *In re Automotive Refinishing Paint Antitrust Litigation*, the Hague Convention has been given “short shrift” since the *Aérospatiale* decision.²⁰⁶ She pointed to Judge Blackmun’s opinion in *Aérospatiale* where he noted that, “relatively few judges are experienced in the area [of international law] and the procedures of foreign legal systems are often poorly understood.”²⁰⁷ Plausible arguments can be made for each of the three approaches for applying the Evidence Convention more often to jurisdictional discovery disputes. In whatever way courts do so, they should apply the Evidence Convention more frequently to demonstrate their willingness to accord with international obligations.

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206. *In re Auto Refinishing*, 358 F.3d at 306 (Roth, J., concurring).

207. *Id.*

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