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EXTRATERRITORIAL DISCOVERY: COOPERATION, COERCION AND THE HAGUE EVIDENCE CONVENTION

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I. INTRODUCTION

In the spring of 1987, the Supreme Court of the United States will have the opportunity to clarify the relationship between the Hague Convention on the Taking of Evidence Abroad in Civil or

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Commercial Matters (Hague Evidence Convention)[1] and the authority of the United States federal courts to order discovery of foreign-situs evidence under the Federal Rules of Civil Procedure.[2] This is one of the most difficult and important issues in international civil litigation in United States courts. Lower court cases during the past few years have reached confusing and sometimes contradictory results.[3] These cases reflect the continuing

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1. *Opened for signature,* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention].

2. FED. R. CIV. P. 26-37.

3. Courts in the United States have reached three different conclusions about the relationship between the Hague Evidence Convention and the United States Federal Rules of Civil Procedure [hereinafter FRCP]. Many courts, especially in earlier cases, concluded that parties seeking to discover foreign-situs evidence were required first to attempt the Hague Evidence Convention procedures. General Electric Co. v. North Star Int'l , Inc., No. 83-C-0838, slip op. (N.D. Ill. Feb. 21, 1984); Schroeder v. Lufthansa German Airlines, No. 83-C-1928, slip op. (N.D. Ill. Sept. 15, 1983); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983); Pierburg, GmbH & Co. KG v. Superior Court, 186 Cal. Rptr. 876, 877 (1982); Volkswagenwerk, A.G. v. Superior Court, 109 Cal. Rptr. 219 (1973); T.H. Goldschmidt, A.G., v. Smith, 676 S.W.2d 443, 445 (Tex. Ct. App. 1984).

Courts in most later cases, however, have concluded that the Hague Evidence Convention procedures were merely alternative to the particular FRCP procedures involved in these cases. Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petroleum Co., 105 F.R.D. 16, 26-27 (S.D.N.Y. 1984); Adidas, Ltd. v. S.S. Seatmain Bennington, No. 80 Civ. 1922, slip op. at 5 (S.D.N.Y. May 29, 1984); Laker Airways Ltd. v. Sabena, 103 F.R.D. 42, 51 (D.D.C. 1984); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 522 (N.D. Ill. 1984); Murphy v. Reifenhausen KG Maschinenfabrik, 101 F.R.D. 360, 363 (D. Vt. 1984); Lasky v. Continental Products Corp., 569 F. Supp. 1227, 1228 (E.D. Pa. 1983); Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher, 328 S.E.2d 492 (W. Va. 1985).

The emerging practice in United States courts is to determine the applicability of the Hague Convention by looking to the type of evidence to be produced and the status of the person from whom discovery is sought. Société Nationale Industrielle Aérospatiale v. United States District Court For the District of Alaska, 788 F.2d 1408, 1410 (9th Cir. 1986); In re Société Nationale Industrielle Aérospatiale, 782 F.2d 120, 124-25 (8th Cir. 1986); In re Anschuetz & Co., 754 F.2d 602, 615 (5th Cir. 1985); In re Messerschmitt Bolkow Blohn GmbH, 757 F.2d 729, 731 (5th Cir. 1985); Lowrance v. Michael Weinig, GmbH & Co., 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985); Wilson v. Lufthansa German Airlines, 489 N.Y.S.2d 575, 577 (1985); Slauenwhite v. Bekum Maschinenfabriken, GmbH, 104 F.R.D. 616, 618-19 (D. Mass. 1985); McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 958 (E.D. Pa. 1984); International Society for Krishna Consciousness v. Lee, 105 F.R.D. 435, 442-45 (S.D.N.Y. 1984).

struggle of United States courts to use their authority to coerce the production of evidence essential to the court's task of achieving justice, while at the same time maintaining sensitivity to the interests and attitudes of foreign nations where the needed evidence may be located. These cases also provide an opportunity for the Supreme Court to coordinate the Convention's policy of international cooperation with the full disclosure principles of the Federal Rules while taking a step toward harmonizing fundamental conceptual conflicts about the role of courts in different national systems.[4] The United States Government's changing position in these cases reflects an evolutionary process energized by continuing interagency debate about the appropriate relationship between the international interests addressed by the Hague Evidence Convention and the importance to domestic courts of having access to relevant information.

This Article reviews the most recent case law on this issue and examines the results of those cases in the light of existing principles of comity and of the newly promulgated *Restatement of Foreign Relations Law of the United States (Revised).*[5] The analysis focuses on three important appellate court decisions, all of which

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The Hague Evidence Convention has been ruled inapplicable when documents controlled by foreign parties are ordered to be produced in the United States or when a deposition is taken of a foreign person within the United States. *See, e.g. McLaughlin*, 102 F.R.D. at 958; *Anschuetz*, 754 F.2d at 615. The courts have reasoned that when a district court has proper in personam jurisdiction over a party, the discovery effectively occurs in the United States when that party is ordered to produce evidence there, regardless of where the documents were located before being brought to this country or the nationality of the party being deposed. *See, e.g., Société Nationale Industrielle Aérospatiale*, 788 F.2d at 1410.

The Hague Evidence Convention procedures must be used to take depositions of or to interrogate persons located in the foreign country, and for the compulsory production of documents or other evidence held by persons not parties to the litigation. *See, e.g., McLaughlin*, 102 F.R.D. at 958. *Contra International Society for Krishna Consciousness*, 105 F.R.D. at 444. (The Hague Convention is inapplicable to evidence located in the United States and is only an alternative means of discovery for evidence situated abroad.)

4. Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 761-65 (1983). *See* SCHLESINGER, COMPARATIVE LAW 387, 389 (4th ed. 1980); NOTES FROM SENATE EXECUTIVE A, 92d Cong., 2d sess. (Feb. 1, 1972), *reprinted in* 121 INT'L LEGAL MATERIALS 323, 324 (1973).

5. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Drafts Nos. 1-7 1980-1986).

are or have been before the United States Supreme Court, and examines the contents and origins of the United States Government's position on these issues as found in amicus briefs submitted in these cases. The article concludes with an evaluation of the dilemma evidenced by the need to give Hague Evidence Convention member-states the greatest possible access to foreign-situs evidence while maintaining the mutual respect for conflicting national interests that is essential to an effective system for international cooperation.

II. THE HAGUE EVIDENCE CONVENTION

The Hague Evidence Convention was designed to permit cooperation among legal systems that in many situations reflect fundamentally different views about the role of courts in achieving justice and applying law. A principal goal was to ease the burden on litigants in common-law countries in procuring evidence located abroad.[6] The Convention sought to establish a system for transnational evidence-gathering which was acceptable to the states parties and which would harmonize conflicting views about sovereignty and jurisdiction reflected in differing systems of civil procedure used by the members. The problems which the Convention addresses often flow from fundamentally different assumptions about the role of courts in the legal systems of many of its signatories.

Even a superficial review of the differences between the assumptions and attitudes reflected in the adversary system of litigation in common-law countries and those reflected in the inquisitorial approach to trials in civil-law countries makes clear that mutual recognition of and respect for these differences is essential to achieving any effective cooperative solution. For example, the civil-law trial, unlike the common-law trial, begins with the active search for evidence by the judge to prepare a dossier of facts on the basis of which the court will reach its decision. A civilian trial is not normally a distinct temporal or conceptual unit. A judge may be "trying" several cases during the same time period, seeking to build a dossier in each from which he can ultimately arrive at a decision that reflects the law and achieves justice. Thus,

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6. Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 INT'L LEGAL MATERIALS 785, 806-08 (1969).

gathering evidence is part of the civilian trial, not a preliminary step toward it. Consequently, the evidence gathering is characterized as a governmental act, not solely because the judge carries it out in his official capacity but because, in discharging this duty, he effectuates both the public policies of fairness and efficiency embodied in the procedural mechanisms which enable the trial *and* the societal interests reflected in the relevant substantive legal rules promulgated by the legislature.[7]

The Hague Evidence Convention was designed to accommodate the differences inherent in the two systems and their variations by providing three agreed-upon mechanisms for procuring evidence needed in one country but located in another:[8] by means of a letter of request, by diplomatic or consular agents, or by commissioners specially appointed for the purpose. The letter of request method permits the judicial authorities of the forum state to submit a formal request to the Central Authority of another state, asking for that Authority's assistance in procuring the evidence by deposing witnesses, procuring documents, and the like.[9] Subject to certain limitations, the Central Authority is obligated to comply with the letter of request.[10] In addition, the evidence-gathering may be carried out pursuant to procedures specified by the requesting authority including a requirement that the testimony be given under oath and that a verbatim transcript of testimony be prepared.[11] Members of the requesting court (including United States lawyers) may be present during the evidence-taking.[12]

The Convention also permits diplomatic officers or consular agents[13] or special commissioners of the requesting state[14] to take evidence in the territory of any contracting state. These two methods were included specifically to address the problems between common-law and civil-law countries while, in effect, permitting direct control of the evidence-gathering proceeding by of-

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7. *Accord* H. ABRAHAM, THE JUDICIAL PROCESS 101-02 (5th ed. 1986).

8. *See* NOTES FROM SENATE EXECUTIVE A, 92nd Cong., 2d Sess. (Feb. 1, 1972), *reprinted in* 12 INT'L LEGAL MATERIALS 323, 324 (1973).

9. Hague Evidence Convention, *supra* note 1, art. 1.

10. *Id.*, art. 12.

11. *Id.*, art. 9.

12. *Id.*, art. 7.

13. *Id.*, arts. 15-16.

14. *Id.*, art. 17.

ficials of the requesting nation.[15] Many nations, including France and Germany, deemed this process to be a much greater interference with national sovereignty than the letter of request procedures.[16] Therefore, article 33 permits contracting states to exclude various provisions in this chapter from their Convention obligations.[17]

The Convention provisions represent significant improvements over pre-Convention conditions for United States lawyers seeking foreign-situs evidence. Before the Convention, United States lawyers, seeking testimony or documents from persons not subject to the jurisdiction of United States courts, had to rely solely on principles of comity and customary international law to support requests for foreign-situs evidence.[18]

When evidence is sought from persons already parties, the majority of United States courts have held that the Hague Evidence Convention procedures are not the exclusive means for discovery of foreign-situs evidence. The court is free to use its power over parties to order discovery under the Federal Rules of Civil Procedure, subject to considerations of comity in the individual case.[19]

III. Cases in the Circuit Courts

Three appellate court cases for which the United States Supreme Court has granted certiorari illustrate the nature and scope of the problem. The first of these is *In re Anschuetz & Co.*[20] Anschuetz, a German corporation, was the manufacturer of an allegedly faulty steering device whose failure had resulted in a collision between plaintiff's ferry boat and a third-party's ship in the lower Mississipi River. Acting under the Federal Rules of Civil Procedure, the court ordered Anschuetz to produce several employees for depositions to be taken in Kiel, Germany, to produce documents located in Germany for use at trial in New Orleans,

15. Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 Int'l Law. 465, 475 (1983).

16. Oxman, *supra* note 4, at 757.

17. "A State may . . . exclude, in whole or in part, the application of the provisions of . . . Chapter II." Hague Evidence Convention, *supra*, note 1, art. 33.

18. Oxman, *supra* note 4, at 747-48.

19. *See* cases cited *supra* note 3, para. 3.

20. 754 F.2d 602 (5th Cir. 1985).

and to pay plaintiff's attorneys' travel expenses to Kiel to take the depositions. Arguing that the order violated the Hague Evidence Convention, Anschuetz sought to have it vacated. The German Government filed an amicus brief in the Fifth Circuit Court of Appeals. In the brief the Germans argued that taking oral depositions in Germany and requiring the production of documents located in Kiel would violate German sovereignty unless Hague Convention procedures were used.[21] The United States Department of Justice (with the concurrence of the Department of State), also by amicus brief, agreed that ordering depositions in Germany violated international law and contended that Hague Convention procedures, while not exclusive, should be departed from only after a careful comity analysis had indicated that ordering production under the Federal Rules was appropriate.[22]

The Fifth Circuit concluded that the Evidence Convention's text made it clear that the Convention did not provide the exclusive means of procuring evidence, even among its signatories. Convention procedures had to be used when taking a party's involuntary deposition in a foreign country and to procure foreign-situs documents or other evidence from persons not subject to the court's jurisdiction. As to other matters, however, the court was explicit: "The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."[23]

The court relied heavily upon a reciprocity analysis to find that first resort to the Convention was not required. The court reasoned that because United States discovery procedures were much more liberal than those of most foreign countries, United States litigants against foreigners in United States courts would be disadvantaged. The foreign defendants could carry out discovery under liberal United States rules against the United States parties but the more restrictive foreign procedures would limit the United States parties when they sought discovery against their foreign opponents.[24]

The Fifth Circuit's opinion, by its terms, virtually reads the Evidence Convention out of the law whenever discovery from parties (as distinguished from third persons not subject to the court's ju-

21. *Id.* at 605.
22. *See id.* at 605.
23. *Id.* at 615.
24.. *Id.* at 606.

risdiction) is at issue. Although the court claimed to accept a comity analysis, it reasoned that orders directed to parties to produce evidence in the United States forum did not require either the court or the parties to "do" anything in the situs country. Thus, if Anschuetz did not voluntarily produce the evidence in Germany, ordering examination of witnesses and production of documents in the United States would avoid any infringement of German sovereignty.[25]

The Fifth Circuit followed its *Anschuetz* opinion in *In re Messerschmitt Bolkow Blohm, GmbH.*[26] Plaintiffs sued Messerschmitt for wrongful death resulting from the crash of a helicopter manufactured by the defendant. The trial court ordered Messerschmitt to produce German-situs documents in the United States and to bring its expert witnesses to the United States so that plaintiffs could take their depositions. The court did not attempt to subpoena the witnesses directly. To the question whether comity required a first resort to Evidence Convention procedures, the court responded:

> "Comity" requires us to weigh Germany's interest in maintaining control over its judicial system against the American interest in obtaining full pretrial discovery of information relevant to pending litigation in the United States . . . .
>
> The American litigants' interest in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court must also be considered.[27]

The Fifth Circuit said that Germany's interests had been adequately balanced because the trial court's order required no governmental action in Germany.[28] The same reasoning applied to the order to produce the expert witnesses. The court concluded that the Hague Convention procedures would be appropriate if the experts were deposed on foreign soil but the order to bring those experts to the United States raised no comity considerations.[29] The United States Supreme Court agreed to hear both *Anschuetz* and *Messerschmitt* despite the United States Government's urging to the contrary.[30]

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25. *Id.* at 615.
26. 757 F.2d 729 (5th Cir. 1985).
27. *Id.* at 732.
28. *Id.* at 733.
29. *Id.*
30. The Court may have been responding, in part, to the contents of a

Both *Messerschmitt* and *Anschuetz* are currently pending before the United States Supreme Court in a kind of legal limbo. The Court has not acted on the petition for certiorari in *Anschuetz*. The Court had granted certiorari in *Messerschmitt*, then vacated that grant after the jury returned a verdict in the trial court. The Court has, however, granted certiorari in a third case, *In re Société Nationale Industrielle Aérospatiale*,[31] which involves not only a conflict between the Hague Evidence Convention and a discovery order under the Federal Rules but also a foreign blocking statute.

In *Aérospatiale*, plaintiffs sued a French airplane manufacturer and others for damages as a result of personal injuries caused by the crash of a plane sold by defendant. When plaintiffs served defendants with written interrogatories, requests for factual admissions and requests for production of documents under the United States Federal Rules of Civil Procedure, defendants asked for a ruling that the Hague Evidence Convention procedures were mandatory because the evidence sought was located in France. Also, Aerospatiale argued that because it would be subject to criminal penalities under a French blocking statute that prohibited disclosure for security reasons of the information demanded, it should not be forced to comply with the production order. The court denied the motion. Defendants then sought a writ of mandamus to compel the trial court to prevent plaintiffs from carrying out discovery. The Eighth Circuit refused to grant the writ. Following the Fifth Circuit in *Anschuetz*, the court wrote:

> [W]hen the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may be physically located within the territory of a for-

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French diplomatic note of November 23, 1985, asking the Court to hear the cases and to rule that the Hague Convention is "the obligatory channel for obtaining evidence between States parties in civil or commercial matters for purposes of legal procedures" ("le seul moyen juridique pour obtenir des preuves en matière civile ou commerciale pour les nécessités d'une procédure judiciaire"). Diplomatic Note from the Embassy of the Republic of France to the Government of the United States, November 23, 1985, in Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, Société Nationale Industrielle Aérospatiale v. United States District Court for the District of Iowa, No. 85-1695, Appendix F (1986).

31. 782 F.2d 120 (8th Cir. 1986).

eign signatory of the Convention.[32]

The court said that there was no interference with French judicial sovereignty because neither the United States court nor any private person was acting in France to usurp a French judicial function. Therefore, resort to the Hague Convention was not required because to use it would needlessly frustrate discovery.

The court went on to conclude that international comity did not require even an initial attempt to use Hague Convention procedures before ordering discovery under the United States Federal Rules. It adopted the Fifth Circuit Court of Appeals' position in *Anschuetz* that a first resort under the Convention, subject to later override under the Federal Rules, would be a greater insult to a convention state than would initial use of the Federal Rules procedures without first resort to the Convention and would defeat rather than promote international comity.[33]

IV. *Aerospatiale* IN THE SUPREME COURT

The United States Government's amicus brief in the *Aerospatiale* case is the most recent statement of an evolving policy developed by debate on these issues among several United States government agencies. An examination of that evolution and of the series of conflicting agency perceptions and compromises that energized it is instructive.

In *Volkswagenwerk A.G. v. Falzon*,[34] the United States Government, acting as amicus curiae, successfully urged dismissal of an appeal for lack of "ripeness" from the Supreme Court of the State of Michigan to the Supreme Court of the United States. *Falzon* was a products liability suit in which a Michigan trial court, acting under Michigan's General Court Rules, directed that depositions be taken of defendant's employees (German nationals) in the Federal Republic of Germany. When the Michigan Supreme Court refused to reverse the trial court's order,[35] defendants sought review in the United States Supreme Court on the

32. *Id.* at 124.

33. *Id.* at 125-26.

34. *Appeals dismissed*, 465 U.S. 1014 (1984).

35. The Michigan Supreme Court refused leave to appeal "because the Court is not persuaded that the questions presented should be reviewed by this Court." Brief for the United States as Amicus Curiae, at Appendix, Volkswagenwerk A.G. v. Falzon (U.S. Supreme Ct. No. 82-1888) (1983). *Cf.* Falzon v. Volkswagen Manufacturing Corp., 417 Mich. 889 (1983).

grounds that the trial court's orders violated both the Hague Evidence Convention and the requirements set forth in an exchange of notes between the Federal Republic of Germany and the United States.[36] In the amicus brief the United States Government argued:

> The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted. The Convention accordingly must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it. . . . [I]n the absence of an additional international agreement. . ., the Evidence Convention precludes proceedings to take evidence from German nationals in the FRG in aid of United States litigation, with the exception of the letters of request procedure.[37]

The United States Supreme Court did not rule on this issue when it refused to hear the *Falzon* case.

It was thought that the Court might accept and resolve the issues in a similar later case, *Club Méditerranée, S.A. v. Doria (Club Med)*.[38] An interagency squabble over the position to be taken in the *Club Med* brief occurred among the Departments of State, Justice and Treasury and the Securities and Exchange Commission. This dispute, ultimately refereed by the Solicitor General of the United States himself,[39] resulted in a substantial modification[40] of the position taken in the *Falzon* brief,[41] a position that had reflected strongly the views of the State Department. The United States Government, acting as amicus curiae,

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36. Exchange of Notes Between The Federal Republic of Germany and the United States of America, February 11, 1955; January 13, 1956; October 8, 1956; October 17, 1979; February 1, 1980, T.I.A.S. No. 9938.

37. Brief for the United States as Amicus Curiae at 6, Volkswagenwerk A.G. v. Falzon (U.S. Supreme Ct. No. 82-1888) (1983).

38. 93 A.D.2d 1007, 462 N.Y.S.2d 524 (1983), *appeal dismissed, cert. denied,* 105 S.Ct. 286 (1984).

39. This writer attended that meeting as a representative of the U.S. Department of State.

40. *See* Brief for the United States as Amicus Curiae at 6-9, Club Méditerraneé, S.A. v. Dorin (U.S. Supreme Ct. No. 82-461) (Oct. 15, 1984). The clearest reflection of that compromise is found in the United States Government position in the amicus brief in the Fifth Circuit in *Anschuetz. See supra* text accompanying note 22.

41. *See supra* text accompanying note 37.

opposed review of *Anschuetz* and *Messerschmitt* by the United States Supreme Court. In its amicus brief, the United States Government argued that, although the opinions in those cases contained "some troublesome language," their results were correct and, therefore, no further review was needed.[42] Harking back to its brief opposing certiorari in *Club Med*,[43] the Government concluded that Hague Convention procedures were neither exclusive nor required as a first resort in all cases. The *Anschuetz-Messerschmitt* amicus brief generally endorsed the approach taken in the lower courts. The Government wrote:

> An American court has the power to demand the production of evidence in the United States from foreign nationals who are subject to the court's personal jurisdiction. Nevertheless, . . . the exercise of that power is subject to principles of international comity. American courts should utilize the procedures established by the Hague Evidence Convention in appropriate cases to avoid unnecessary international friction resulting from American procedures for pretrial discovery.[44]

The brief specifically addressed petitioners' argument that Germany would not have entered the Convention except in exchange for limitations on United States discovery. The United States pointed out that the Convention benefited Germany, even under the Government's interpretation, because the agreement made available procedures for use in appropriate cases to prevent international friction, thus reducing the likelihood of objectionable discovery requests in Germany. Furthermore, Germany's Convention participation enhanced its evidence-gathering opportunities in signatory countries other than the United States.[45] Therefore, it could not be inferred solely from the fact that Germany had signed the Evidence Convention, that interpreting the Convention to impose limitations on United States discovery procedures had been a *sine qua non* for German participation. The United States Government, in effect, argued that its brief in *Anschuetz-Messerschmitt* should be treated as a general statement of the

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42. Brief for the United States as Amicus Curiae at 6, Anschuetz & Co. v. Mississippi Bridge Authority and Messerschmitt Bolkow Blohm v. Virginia Walker (U.S. Supreme Ct. Nos. 85-98 & 85-99) (March 1986) [hereinafter U.S. Amicus Brief in *Anschuetz-Messerschmi tt*].

43. 93 A.D.2d 1007, 462 N.Y.S.2d 524 (1983).

44. U.S. Amicus Brief in *Anschuetz-Messerschmitt*, *supra* note 42, at 8.

45. *Id.* at 10, n.11.

United States Government position in all relevant later cases to provide clear guidance for lower court judicial decisions in the future.[46]

Having lost its effort to prevent Supreme Court review in *Anschuetz* and *Messerschmitt*, the Government now squarely addresses the merits issues in its amicus brief in *Aérospatiale*. This is a somewhat more difficult task in terms of interagency politics because the option of criticizing the lower court opinion while accepting its result and thus satisfying both opponents and supporters of Hague Evidence Convention procedures is no longer open.

In its *Aérospatiale* brief, the Government argues that the decision below should be vacated and the case remanded because the Eighth Circuit's rejection of Hague Evidence Convention procedures without "a particularized comity analysis" was improper.[47] While recognizing that resort to the Convention is not mandatory, the Government characterized Convention procedures as "a promising mechanism for reducing international friction resulting from transnational application of American discovery techniques" and argued that Convention procedures should be given serious consideration in those circumstances in which their use would not prejudice United States' interests or those of its litigants.[48] The Government rejected both a mandatory "first use" requirement and the lower court's conclusion that the Convention never applies when the court has jurisdiction over a foreign litigant who has the evidence in his possession. The United States concept of international comity favors an individualized case-by-case weighing of domestic and foreign interests, the Government argued, not per se rules.[49]

V. Reciprocal Tolerance: Comity and Interest-Balancing

It is clear that the United States Supreme Court's decision in *Aérospatiale* will address comity's appropriate role in determin-

46. *Id.* at 18.

47. Brief for the United States and the Securities Exchange Comm'n as Amicus Curiae at 7, Société Nationale Industrielle Aérospatiale and Société de Construction d'Avions de Tourisme v. United States Distict Court For the District of Iowa (U.S. Supreme Ct. No. 85-1695) (August, 1986) [hereinafter U.S. Amicus Brief in *Aérospatiale*].

48. *Id.* at 10.

49. *Id.* at 12.

ing the status of Hague Convention procedures in United States foreign discovery cases. The Government brief argues that both a balancing of the domestic and foreign interests of the nations involved and an attempt to accommodate legitimate foreign concerns are essential elements of any comity analysis.[50] The principal United States interest identified in the Government's brief is the need for effective disclosure of evidence to help assure justice for litigants. Legitimate foreign interests, represented by foreign nations' claims of "judicial sovereignty," include both the desire to prevent litigants in foreign courts from invading borders to seize evidence and a reluctance to expose citizens to unsupervised and perhaps abusive foreign evidentiary demands.[51] On the other hand, foreign parties cannot claim all the privileges of doing business in United States markets and expect to be free from the burdens of United States judicial procedures.[52]

Both the Fifth Circuit's opinion in *Anschuetz* and the Eighth Circuit's opinion in *Aérospatiale* are fundamentally in error to the extent that they treat comity as a principle emphasizing primarily political considerations — namely, avoiding insults to foreign governments — in decisions determining whether the Hague Evidence Convention should be given priority in cases of this type. Rather, comity is a concept whose application is informed by principles of national self-interest in maintaining a climate of reciprocal tolerance and goodwill. A decision based on considerations of comity may, as a by-product, avoid annoying a foreign nation, but preventing international tension is not the comity

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50. *Id.* at 21.

51. *Id.* at 23.

52. Here the Government appears to argue that the existence of contacts sufficient to support the exercise of judicial jurisdiction in the United States necessarily makes it fair for the court having jurisdiction over the parties to order them to participate in discovery abroad. That argument makes considerably more sense in situations in which jurisdiction is based on the foreign party's doing business in the United States than it does in cases in which jurisdiction is based on a single forum-affecting act as under a long-arm statute. In this latter situation, it is not at all clear that the sale of a product that finds its way into the court's jurisdiction necessarily makes it fair for that court to order discovery to be carried out in the manufacturer's home country. The failure to distinguish between general and specific jurisdiction in this argument makes it far too broad. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-16 (1984); Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177-78 (9th Cir. 1980); Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1327-29 (E.D.N.Y. 1981).

principle's main juridical role.[53] In this same sense, the Government's brief in *Aérospatiale* overstates the case when it says, "The chief goal of the comity process is, of course, to prevent international friction."[54] Confusing international political concerns with the need to reach objective judicial decisions that reflect the systemic value of reciprocal goodwill characterized by the term "comity" necessarily leads to confusion and permits courts to invoke comity as a substitute for analysis.[55]

This fundamental misunderstanding characterizes much of the discussion of comity by United States courts. When a case is decided employing principles of "comity," many United States courts treat the decision solely as a political one. But grounding a judicial decision on the comity principle does not make the decision any more political than a decision based on any other principle of conduct, not yet reduced to a rule of law. In other words, deciding a case on considerations of comity does not engage an arbitrary power of the court or substitute the United States judge for more appropriate political decision-makers. Employing the comity concept merely calls into play the fundamentally pragmatic principle that nations need to treat each other as they themselves would be treated in the same or similar circumstances. Cooperation and reciprocal acts of goodwill not only prevent international friction in specific instances but, more importantly, are essential to the long-term functioning of the international legal system. That system is a consensual system whose principal energizing force must necessarily be the self-interest of its members in nurturing and preserving a legal framework for effective interaction. A judicial decision reflecting *that* reality *is* a decision based on comity.[56] The Seventeenth Century Dutch scholar Ulrich Huber, who developed the concept, recognized this truth[57]

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53. *See* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281-285 (1982).

54. U.S. Amicus Brief in *Aérospatiale*, *supra* note 47, at 26.

55. *See* Maier, *Resolving Extraterritorial Conflicts or "There and Back Again,"*,25 VA. J. INT'L L. 7, 15 (1984).

56. *Id.* at 14-15.

57. Huber summarized three principles:

1. The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.

2. Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily.

— the same truth reflected in the work of those modern judges and scholars who understand the concept's true utility as a juridical tool.

The value of reciprocal interaction embodied in the comity principle justifies the process of interest-balancing as a means of reaching accommodation among conflicting national interests.[58] Ample authority supports this proposition in United States law. The production of evidence cases are classic instances in which the courts must recognize differing local policies, practices and mores in decisions that reflect local sensitivities and needs while limiting the impact of these decisions on the equally valid local concerns of other nations to promote the smooth functioning of the international system.

The American Law Institute's *Restatement (Second) of Foreign Relations Law of the United States*[59] recognizes the importance of reciprocal tolerance in making these decisions. Section 40 of the *Restatement (Second)* sets forth a list of considerations to be used in identifying the relative interests of states having concurrent jurisdiction over persons or events.[60] These elements were

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3. Those who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state, or its subjects.

Huber, *De Conflictu Legum, reprinted in English in* Davies, *The Influence of Huber's de Conflictu Legum on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 56-57 (1937).

58. *See* Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 584 (1983).

59. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW].

60. *Id.*, § 40 (Limitations on Exercise of Enforcement Jurisdiction).

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule pre-

to be taken into account in resolving jurisdictional conflicts. Two important cases, *Timberlane Lumber Co. v. Bank of America*[61] and *Mannington Mills, Inc. v. Congoleum Corp.*,[62] adopted and expanded these considerations under the label "interest-balancing."[63] This characterization was, in fact, merely another name for giving effect to the principle of comity as properly understood and applied.[64]

The *Mannington Mills* opinion makes it clear that when an international treaty addresses the point at issue, the existence of that treaty must be considered in determining whether considerations of comity indicate that the state should not apply its own law to govern a situation or party when concurrent jurisdiction with another state exists. This is true not only when the treaty directly controls the point at issue, but also when the treaty evidences results preferred but not mandated by its parties. It seems patently clear that the best evidence of an effective balancing of competing national interests is the content of an international agreement, bargained for and openly arrived at, not a judicial opinion reflecting the unilateral speculation of a court. The treaty negotiation process must necessarily reflect, in the final document, the results of the give and take, demand and response, that are the esssence of a true interest-balancing process.[65]

The resources of the Judiciary are inherently limited when faced

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scribed by that state.

61. 549 F.2d 597 (9th Cir. 1976).

62. 595 F.2d 1287 (3d Cir. 1979).

63. The *Timberlane* court wrote:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614.

To this list, the *Mannington Mills* court added two considerations: "Whether an order for relief would be acceptable in this country [U.S.A.] if made by the foreign nation under similar circumstances; and whether a treaty with the affected nations has addressed the issue." 595 F.2d at 1298.

64. *See* Maier, *supra* note 55, at 10, 40-41.

65. *Id.* at 25-28.

> with an affirmative decision by the political branches of the government to prescribe specific policies. . . . In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association.[66]

Because the court in *Mannington Mills* equates considerations of comity with those policies that inform "interest-balancing," it seems very clear that courts in Hague Convention cases like *Aérospatiale* should at least indulge a presumption in favor of using Hague Evidence Convention procedures, those most likely to reflect the balanced interests of the states parties, unless the facts of a case make it self-evident that those procedures will be fruitless. Not only would such a result recognize the importance of interpreting international agreements in a cooperative mode, but the results would derive from the principle of interest-balancing already adopted by United States courts in other extraterritoriality cases and by the new *Restatement (Revised)* as well.[67]

To indulge such a presumption is not the same as requiring first use of the Convention. Rather, it requires first *consideration* of the Convention, subject to any additional governmental interests present in the specific case before the court. Considered in this light, the arguments posed by the United States in *Aérospatiale* are not antithetical to a presumption that the Convention applies. Rather, they indicate an appropriate approach for case-by-case evaluation of that presumption.

In fact, in those situations where a governmental enforcement agency such as the SEC or the Antitrust Division seeks the evidence, it seems even more appropriate that a strong presumption in favor of first use of the Convention be given effect. In precisely these cases United States Government intervention against foreign parties before the court is clearest, and efforts to procure foreign-situs evidence are most likely to create international tension by legitimizing claims that foreign sovereignty is being treated cavalierly, or worse. This result is even more likely when the evidence is solicited from foreign nonparties who are not subject to United States judicial jurisdiction at the time when the evidence

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66. Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 955 (D.C. Cir. 1984); *see* Maier, *supra* note 58, at 584-85.

67. *See supra* note 57 and accompanying text.

is sought.[68]

Adopting a presumption in favor of Hague Evidence Convention procedures would be consistent with the policy announced by the United States Supreme Court in a series of cases during the past decade involving forum selection in international contracts. In those cases, the Court has emphasized the importance of avoiding parochialism in situations having international elements when the automatic application of United States law would inhibit effective transnational intercourse. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[69] the Court ruled that a compulsory arbitration clause in an international contract would be given effect to preclude suit in a United States court for treble-antitrust damages arising out of the contractual relationship. The Court wrote:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[70]

Referring to earlier similar decisions,[71] the Court concluded that it had "clearly eschewed a provincial solicitude for the jurisdiction of domestic fora."[72] The United States Government's argument that doing business in the United States automatically makes requiring foreign parties to accept all the burdens of United States judicial procedures "reasonable"[73] appears to conflict with the Supreme Court's analysis in these cases. When a truly international relationship is involved, all nations concerned must make every effort to avoid any undue parochialism in attempting to resolve the problem in the light of competing national needs.

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68. *Cf.* U.S. Amicus Brief in *Aérospatiale*, *supra* note 47, at 18.

69. 105 S. Ct. 3346 (1985).

70. *Id.* at 3355.

71. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

72. 105 S. Ct. at 3356. The Government's argument that doing business in the United States automatically makes it "reasonable" to require foreign parties to accept all the burdens of United States judicial procedures, *see, e.g.*, U.S. Amicus Brief in *Aérospatiale*, *supra* note 47, at 23, appears to conflict with the Supreme Court's analysis in these cases.

73. *See, e.g.*, U.S. Amicus Brief, in *Aérospatiale*, *supra* note 47, at 23.

Although issues arising from the procurement of foreign-situs evidence do not usually implicate the enforceability of agreements between parties, most of the other concerns raised by the Court in the forum selection cases are relevant in Hague Evidence Convention cases as well. Because a principal purpose of that Convention was to ease international tension over evidence-production issues while providing easier access to that evidence for foreign tribunals of all procedural persuasions,[74] the systemic considerations raised in the choice of forum decisions necessarily have important applications in the evidence cases as well. Especially since World War II, the Supreme Court has regularly emphasized the importance of international system considerations in cases with international elements.[75] Indulging at least a presumption in favor of resort to the Hague Evidence Convention, except in cases where it would clearly be unworkable, would merely be one more application of that important policy.

VI. THE RESTATEMENT (REVISED)

Section 403(2) of the final draft (Tentative Draft No. 7) of the *Restatement of Foreign Relations Law (Revised)*,[76] approved by the American Law Institute (ALI) in May 1986,[77] contains a list of elements to be considered to determine whether the exercise of jurisdiction in a given situation is reasonable or unreasonable.[78]

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74. *See supra* text accompanying note 6.

75. *See* Maier, *supra* note 53, at 303-16.

76. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Draft No. 7 1986) [hereinafter Tent. Draft No. 7].

77. 8 A.L.I. REP., July 1986, at 1.

78. Section 403(2), Limitations on Exercise of Jurisdiction to Prescribe, provides that:

> (2) Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate,
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> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

That section notes specifically the relevance of existing international agreements in determining the appropriate relative interests of states having concurrent jurisdiction.[79] Although the Reporters refused to use the term "comity" to describe the interest analysis required by section 403,[80] it is quite clear that that section's final form is more directly informed by the comity principle than by the international law-formation process.[81]

Section 437 of the *Restatement (Revised)* applies this interest-balancing principle to production of evidence cases. Section 437(1)(c) provides that when issuing orders to produce foreign-situs information, courts should take into account both the "extent to which non-compliance with the request would undermine important interests of the United States [and whether] compliance with the request would undermine important interests of the state where the information is located."[82]

In Comment c to section 437, the ALI writes:

> In making the necessary determination of the interests of the United States under Subsection (1)(c), the court or agency should take into account not merely the interest of the prosecuting or investigating agency in the particular case, but the interests of the United States generally in international cooperation in law enforcement and judicial assistance, in the joint approach to problems of common concern, *in the applicability of formal or informal international agreements,* and in effective international relations.[83]

Comity and the means toward its achievement, interest balancing, require at least consideration in these cases of whether employing Hague Evidence Convention procedures instead of those

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(d) the existence of justified expectations that might be protected or hurt by the regulation in question;
(e) the importance of the regulation in question to the international political, legal or economic system;
(f) the extent to which such regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by other states.

79. Tent. Draft No. 7, *supra* note 76, § 403 reporter's note 6.
80. *Id.*, § 403 comment a.
81. *See* Maier, *supra* note 55, at 40-41.
82. Tent. Draft No. 7, *supra* note 76, § 437(1)(c).
83. *Id.*, § 437 comment c (emphasis added).

in the Federal Rules will best reflect the balanced interests of the United States and the nation that is the situs of the evidence. Comity also requires deference to the Convention's procedures when that is the case. In most instances, this is likely to be true because the Convention's terms, arrived at through the negotiation process, are necessarily the best evidence of the balanced interests of its signatories.

It also seems clear, however, that United States courts are not required by comity to employ Hague Evidence Convention procedures when it is evident from the outset that to do so would be fruitless. The Convention was not designed, after all, to serve as a prophylactic against foreign discovery. Rather, it was intended to facilitate extraterritorial discovery while giving due recognition to national sensitivities and differing conceptions of law and process.

All interest-balancing involves an element of compromise, and compromise is the essence of the treaty negotiation process. No nation is likely to be completely satisfied with the Evidence Convention's approach in every instance. Nonetheless, requiring at least first consideration of Convention procedures with a rebuttable presumption in the procedures' favor is the most effective formula to achieve results that reflect the balanced interests of both the situs and the forum state and, thus, to give effect to the Convention's purpose.

This was precisely the approach taken in the most recent case, at this writing, to attempt to accommodate Hague Convention discovery procedures with those of the Federal Rules. In *S & S Screw Machine Co. v. Cosa Corp.*,[84] decided on October 16, 1986, a United States plaintiff sued a German supplier for breach of a sales contract, alleging the delivery of nonconforming goods. The district court granted a protective order to the defendant, requiring that the plaintiff first attempt discovery under the Hague Convention procedures. The court found that no national interests of the United States were at stake and that there was a reasonable likelihood that both the documentary evidence and the oral testimony needed could be procured under Convention procedures. The court concluded that the "plaintiff's need to secure information necessary to the vindication of its claim [could] be accommodated without any unnecessary infringement of the sovereign interests of the Federal Republic [of Germany]."[85] Thus,

84. No. 2-85-0036 (M.D. Tenn. Oct. 16, 1986).
85. *Id.* at 35.

balancing national interests indicated that Convention procedures should be used first. There was no blocking statute involved in the case.

Having concluded its comity analysis, the court went on to suggest that "international civil litigants might benefit from the formulation of standards more reproducible in their application than the necessarily fact-laden comity inquiry."[86] Requiring first resort to the Convention in all cases where its use would not be prima facie futile

> would recognize both the policy of international cooperation and comity embodied in the Convention and the policy of full disclosure embodied in the federal rules. A first-resort approach, furthermore, would leave undisturbed judicial power over parties subject to *in personam* jurisdiction, yet temper the liberality of discovery with the court's inherent supervisory power under rule 26(c). . . . A party seeking foreign discovery would know from the outset whether Convention procedures likely would be required and could plan accordingly.[87]

VII. CONCLUSION

It may well be that elements within the United States Department of Justice really prefer the reasoning in *Anschuetz* as articulated by the court,[88] even though the decision is much more restrictive of the applicability of the Convention procedures than the compromise government position in the United States' *Anschuetz* amicus brief. The Department of Justice as well as some other United States agencies could fear a "spill-over" effect. If the Court requires a first resort to the Convention, or even a presumption in its favor, this same principle might come to be applied to bilateral agreements or to special foreign statutes or judicial cooperation [89] with a concomitant inhibiting effect on the enforcement efforts of governmental agencies. The Justice Department may also fear that private treble-damage antitrust actions could be discouraged if first resort to Convention procedures

86. *Id.* at 39.

87. *Id.* at 40.

88. *See supra* text accompanying note 23.

89. *See, e.g.*, Swiss Federal Act on International Mutual Assistance in Criminal Matters (IMAC), March 20, 1981. *See* Loi fédérale relative au traité conclu avec les Etats-Unis d'Amerique sur l'entraide judiciaire en matière penale du 3 octobre 1975.

were required for evidence gathering in such cases. The Antitrust Division believes that the threat of these actions serves as a significant ancillary deterrent in antitrust enforcement.[90] The SEC, for its part, clearly fears that a first resort requirement would inhibit its investigation of securities fraud violations having foreign-situs elements.[91] These fears are not necessarily well-founded. Interest-balancing under a comity analysis would reflect that increased governmental interest present when the United States is itself a party and lead to the conclusion that Convention procedures need not be employed when to do so would frustrate an important governmental interest.

On the other hand, a requirement of first resort to the Convention may be peculiarly appropriate when the United States Government itself seeks to discover foreign situs evidence. Law enforcement activities by the Government are much more likely to create actual interference with a foreign government's sovereignty and to ruffle its sensitivities than are similar efforts by private parties. Therefore, requiring first resort to the Convention by, for example, the Securities and Exchange Commission or a division of the Department of Justice (subject, of course, to a showing that such resort would be ineffective) makes a good deal of sense. This is certainly the case where the evidence sought is controlled by third parties abroad who are not subject to the personal jurisdiction of the United States courts.

A principal goal of the Hague Evidence Convention was to reduce international tensions caused by efforts to gather evidence extraterritorially when that was done without seeking the cooperation of the situs state. In fact, such evidence can only be ob-

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90. Brief for the United States as Amicus Curiae on Petition and Cross-Petition for a Writ of Certiorari at 5-6, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S.Ct. 3346 (1985).

91. The SEC's concern probably led to a rather strange passage in the amicus brief in which the SEC's position is described but given a luke-warm endorsement by the Solicitor General. After pointing out that the Commission has had difficulties in the past in procuring foreign-situs evidence needed for investigations, the brief goes on:

> The Commission's experience with Hague Convention procedures, which has not been entirely positive, may well be atypical. The Commission is a government enforcement agency, whereas requests for discovery under the Convention are more commonly made by private parties. . . . The State Department informs us that private plaintiffs in the latter sorts of litigation have found resort to the Convention more successful.

U.S. Amicus Brief in *Aérospatiale*, *supra* note 47, at 18

tained with the situs state's cooperation since it, by definition, has territorial jurisdiction and, therefore, actual control over the evidence sought. Attempts to coerce the production of such evidence by punishing parties before the United States court for non-compliance often results only in substituting contempt fines for the needed information, not in achieving more evidence for use by the court in deciding the case.

Requiring a first resort to the Convention would be the optimum means of achieving all legitimate United States Government goals. Judicial oversight in the United States of the evidence gathering process with due regard to the interests of the United States Government in enforcing its regulatory laws appears sufficient both to protect those United States interests represented by the laws sought to be enforced and to respond to the appropriate comity and political considerations embodied in the mutually bargained for Hague Evidence Convention.

Once the Supreme Court has clarified the relative roles of the Hague Evidence Convention and the Federal Rules of Civil Procedure in *Aérospatiale*, it is likely to remand *Anschuetz* and *Messerschmitt* for proceedings in accordance with that opinion without actually hearing argument in these cases at all. Therefore, it seems absolutely clear that foreign governments have a substantial interest in the outcome of the *Aérospatiale* case. If the viewpoints suggested in this article are to come before the Supreme Court, they will most likely be advanced in amicus briefs filed by foreign governments. The Department of State, bound by the interagency agreement described earlier, could not return to the position that it supported in the amicus brief in *Falzon*,[92] even if it should believe that those conclusions represented the most rational and effective policy. It is essential that the United States Supreme Court make it clear that in these cases, United States courts sit as transnational decision-makers engaged in a transnational legal process.[93] Thus, those courts should avoid any undue parochialism by recognizing the importance of the comity principle as a means to accommodate competing national interests. Requiring first resort to the Convention unless those procedures would be obviously futile while maintaining full judicial control over the discovery process to intervene in the event of dilatory tactics by either the private litigant or for-

92. *See supra* text accompanying note 37.

93. *See, e.g.*, P. JESSUP, TRANSNATIONAL LAW (1956).

eign government officials would give maximum correlative effect both to the Convention principle of international cooperation and the full disclosure principles of the Federal Rules. Such a decision by the Supreme Court would recognize the needs of the international commercial system while providing predictable and workable procedures for both foreign and domestic international civil litigants in United States courts.