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Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from Aerospatiale

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Assessing Sovereign Interests In Cross-Border Discovery Disputes: Lessons From Aérospatiale

HANNAH L. BUXBAUM†

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I. INTRODUCTION

The process of gathering evidence for use in international litigation often creates jurisdictional conflict. A demand for the production of evidence, whether issued by a court or by a litigant, is an exercise of jurisdiction by a state. When the evidence sought is located abroad, such an exercise of jurisdiction may conflict with the jurisdictional authority of the state in which that evidence is located, because—on a traditional view of sovereignty—each state has the sole and exclusive right to exercise governmental power within its own borders.¹ The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters² was designed to resolve this conflict in the area of civil litigation. It established certain procedures, including a “letter of request” procedure, intended to simplify and liberalize the process by which courts of one nation could obtain evidence located in another for use in civil cases.³ Its adoption was met with great optimism concerning its potential for reducing conflicts of sovereign authority.

Practice over the last twenty years demonstrates that the Convention’s promise has not yet been fulfilled. Evidence gathering in civil litigation today remains mired in an ongoing struggle for jurisdictional power. Cases often contain discussions about courts invading the sovereignty of other countries, seeking to deprive each other of jurisdiction, or attempting to foist their procedural systems on unwilling nations. Often, too, U.S. courts

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order discovery pursuant to U.S. rules rather than Convention procedures, generating criticism by other countries.\(^4\) Interestingly, however, this picture is less bleak in other areas. Evidence gathering abroad is not unique to civil litigation: it also takes place in connection with cross-border criminal investigations and regulatory proceedings. In those areas, the issuance of document production orders and the taking of testimony abroad create substantially less friction. Indeed, cooperative instruments now used in those areas were designed with the explicit goal of reducing the frequency with which sovereigns would feel compelled to assert their jurisdictional authority against other states.

The United States has ratified bilateral treaties providing for mutual assistance in criminal matters with over twenty-five countries.\(^5\) On the regulatory front, various U.S. agencies, including the Securities and Exchange Commission and the Internal Revenue Service, have entered into bilateral memoranda of understanding with their counterparts in other jurisdictions that call for information sharing and other assistance in cross-border enforcement proceedings.\(^6\) While early cooperation agreements of this type did not disturb the traditional allocation of sovereign power on the basis of territory, newer agreements deliberately move away from that model. They incorporate the concept of "positive comity," under which a state may take affirmative action to protect the regulatory or enforcement interests of an agreement partner.\(^7\) In developing the concept of positive comity, these agreements seek to overcome constraints imposed by, and jurisdictional conflicts created by, a system based on the territorial allocation of enforcement power.\(^8\)

The adoption of these measures facilitating evidence gathering in transnational regulatory and criminal proceedings suggests that the development of cooperative, coordinated discovery practices is possible. The question, then, is why evidence gathering remains such a source of conflict in the context of ordinary civil litigation. Some answers to this question surely turn on the differences between private litigation and public enforcement activity. Because government officials are "repeat players," for instance, they have an incentive to foster future cooperation by making reasonable demands; civil litigants, on the other hand, generally have little to lose by acting as aggressively as possible.\(^9\) This paper argues that another answer may be found in Société Nationale Industrielle Aérospatiale v. United States District Court.\(^10\) In that 1987 case, the U.S. Supreme Court considered the scope of the Convention’s application by addressing the interaction of Convention procedures and the Federal Rules of Civil Procedure. It suggests that the comity analysis developed in that decision has led lower courts improperly to assess foreign state interests in considering use of the Convention.

In addressing the comity question, I do not intend to re-open old debates.\(^11\) This paper revisits neither the (unanimous) decision of the Court that Convention procedures are

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\(^6\) See generally id. § 12-3-7. See also Hannah L. Buxbaum, Cooperative International Regulatory Enforcement and the Privilege Against Self-Incrimination in the United States, 43 German Yearbook Int'l L. 171, 174–79 (2000) for a discussion of such agreements.

\(^7\) Buxbaum, supra note 6, at 181 (citation omitted).

\(^8\) Id. at 181–82.

\(^9\) In addition, broad discovery demands are atypical in regulatory or criminal investigations. On the other hand, one might expect that enforcement acts within the territory of one state by officials of other nations would be viewed as even more intrusive than the discovery practices of individual litigants.


\(^11\) For criticism and discussion of the case around the time of its decision, see generally George A. Bermann, The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision, 63 Tul. L. Rev. 525 (1989); David J. Gerber, International Discovery After Aérospatiale: The Quest for an Analytical Framework,
optional rather than mandatory, nor the decision of the majority that there should be no presumption in favor of the Convention's application. Rather, starting where the majority starts—with the decision whether to use Convention procedures or U.S. rules resting on an ad hoc comity analysis—I examine the content of that analysis.

Part II of this paper addresses the Aérospatiale decision itself, examining the system concerns raised in that case and the way in which the majority's comity analysis shifted attention away from them. Part III then discusses particular doctrinal developments in post-Aérospatiale cases, identifying ways in which the Court's decision has affected lower-court analysis of selected issues. The paper concludes by suggesting that an evaluation of sovereign interests more sensitive to international system values would reduce the jurisdictional conflict that pervades evidence gathering in international civil litigation.

II. SOVEREIGN INTERESTS IN AÉROSPATIALE

The Aérospatiale case involved a products liability claim by three U.S. residents against a French-government-owned aircraft manufacturer and its wholly-owned French subsidiary. The foreign defendants did not challenge the jurisdiction of the federal district court in which the suit was brought, 12 and complied with initial discovery demands—made pursuant to the Federal Rules of Civil Procedure—relating to material located within the United States. 13 When the U.S. plaintiffs made an additional request for material located outside the United States, however, the defendants sought a protective order. 14 They argued that because the discovery was to take place in France, the exclusive procedures governing that discovery were those established by the Convention, to which both France and the United States were parties; in addition, they contended that French penal law prevented them from responding to the plaintiffs' requests. 15 Their motion was denied by the district court, whose decision was subsequently upheld by the Eighth Circuit Court of Appeals. 16 In that opinion, the Eighth Circuit held that the Convention did not apply at all to the production of evidence abroad when the request was made of a foreign litigant subject to the jurisdiction of the U.S. court, and therefore that discovery should proceed pursuant to U.S. rules. 17

The Supreme Court discussed four possible readings of the Convention: (1) that the terms of the Convention required mandatory and exclusive use of Convention procedures in the discovery of evidence abroad; (2) that the terms of the Convention required mandatory initial, but not exclusive, use of Convention procedures in such cases; (3) that Convention procedures are optional, but considerations of international comity require first resort to those procedures in such cases; and (4) that Convention procedures are optional and may be used where appropriate. 18 In the first part of the opinion, the Court analyzes the language and history of the Convention and concludes that they "unambiguously suppor[t] the conclusion that it was intended to establish optional [rather than mandatory] procedures." 19

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12. Aérospatiale, 482 U.S. at 525.
13. Id. at 525 n.4.
14. Id. at 525.
15. Id. at 525–26.
16. In re Société Nationale Industrielle Aérospatiale, 782 F.2d 120, 127 (8th Cir. 1986).
17. Id. at 124–25.
18. Aérospatiale, 482 U.S. at 533.
19. Id. at 538. The Court was unanimous on this point. Although many critics of the Aérospatiale decision note that this reading undermines the strength of the treaty, most have concluded that the language of the
The rest of the opinion considers the circumstances under which these optional rules should be applied. While the Court suggests, appropriately, that international comity should guide the choice between Convention and U.S. procedures, it establishes an analytical framework that serves few of the concerns underpinning traditional comity analysis.

The interpretive principles generally considered under the rubric of comity were developed to address the conflicts that arise in a world containing multiple sovereigns. The questions that we use comity to answer are “system” questions, relating to the resolution of jurisdictional conflicts caused by the acts of those sovereigns. In this sense, the purpose of comity is to maintain a functional international system by reconciling the general interest of states in territorial integrity with the need to recognize certain extraterritorial legislative, judicial, or enforcement acts in the service of particular sovereign interests. In analyzing how the Aérospatiale Court’s comity analysis fails to serve this purpose, it is helpful to compare the majority and minority opinions in the case.

Justice Blackmun’s opinion for the minority begins its discussion of this issue by noting that comity serves the “systemic value of reciprocal tolerance and goodwill.” It then frames the comity analysis as follows:

When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.

This articulation explicitly encompasses two different kinds of state interest: first, sovereign interests raised by the particular litigation, and second, interests in sovereignty—that is, the more system-oriented interest of states in maintaining a workable relationship with other states.

The opinion then goes on to state that the Convention itself “largely accommodated all three categories of interests relevant to a comity analysis.” On this basis, the minority opinion argues that ad hoc analysis is in most cases unnecessary; rather, trial courts should apply a “general presumption” of applicability of Convention procedures.

The majority opinion rejects this suggestion, “declin[ing] to hold as a blanket matter that comity requires” a rule (or presumption) of first resort. Instead, it states that “comity requires . . . a more particularized analysis of the respective interests of the foreign nation

20. The term “comity” is susceptible to many different definitions, the delineation of which is beyond the scope of this paper. See, e.g., Bermann, supra note 11, at 534; but see Heck, supra note 3, at 235–36.
22. The minority opinion, authored by Justice Blackmun and joined by Justices Brennan, Marshall, and O’Connor, concurred in part with the majority opinion but dissented from its comity analysis.
23. Aérospatiale, 482 U.S. at 555.
24. Id.
25. In a footnote discussing comity in choice-of-law jurisprudence, the minority opinion emphasizes this system value. Id. at 555–56 n.11.
26. Id. at 556. For further discussion of this point, see infra Part III.A.
27. Id. at 548–49. The minority opinion did not go so far, however, as to endorse a fixed rule of first resort.
28. Id. at 544.
and the requesting nation." \(^{29}\) At this point, the minority and majority opinions are not too far apart: the minority suggests a presumption in favor of Convention procedures but leaves room for a rebuttal of that presumption. Under the minority’s analysis, then, the particular interests raised in an individual case might in some circumstances permit even initial use of U.S. discovery rules. \(^{30}\) The majority, on the other hand, suggests that the analysis of interests in the individual case should take place free of any presumption—indicating that the system values served by the Convention should not presumptively outweigh those individual interests. \(^{31}\)

Having established that no presumption should be in place favoring application of Convention procedures, the Court confirms that it intends lower courts to analyze the interests presented in each case on an ad hoc basis. It notes that "[t]he exact line between reasonableness and unreasonableness in each case must be drawn by the trial court," and that it "do[es] not articulate specific rules to guide this delicate task of adjudication." \(^{32}\) However, although the Court indicated that it did not intend the Aérospatiale decision to create a test for applying comity, the opinion does contain a discussion of what comity might require. At the end of the opinion, for instance, the Court states that U.S. courts must exercise vigilance to protect foreign litigants from disadvantage as a result of unduly burdensome or unnecessary discovery. \(^{33}\) In addition, it notes, courts should demonstrate due respect for any special problem confronted by the foreign litigant on account of nationality or location, and for any sovereign interest expressed by a foreign state. \(^{34}\) It is in the body of the opinion, however, that the Court sets forth what appears to be more specific guidance. Here, it states that comity requires "scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to [Convention] procedures will prove effective," \(^{35}\) and then suggests as relevant to the comity analysis the following factors:

1. the importance to the... litigation of the documents or other information requested; 2. the degree of specificity of the request; 3. whether the information originated in the United States; 4. the availability of alternative means of securing the information; and 5. the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. \(^{36}\)

Not surprisingly, lower courts have come to view this as, in fact, a test. \(^{37}\) Unfortunately, it envisions a comity analysis that pays no particular attention to international system needs. The overall emphasis, as reflected in factors (1) through (4), is

\(^{29}\) Aérospatiale, 482 U.S. at 543–44.

\(^{30}\) Id. at 549–50.

\(^{31}\) Critics of the majority opinion suggest that it improperly adds another comity analysis to the one already completed at the legislative level through negotiation of the Convention. Cf. id. at 551 (Blackmun, J., dissenting); Russell J. Weintraub, The Need for Awareness of International Standards When Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions, 28 TEx. INT’L L.J. 441, 458 (1993).

\(^{32}\) Aérospatiale, 482 U.S. at 546.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id. at 544.

\(^{36}\) Id. at 544 n.28 (quoting RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 437(1)(c) (Tentative Draft No. 7, 1986) (now RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 422)).

\(^{37}\) See, e.g., Doster v. Schenk, A.G., 141 F.R.D. 50, 52 (M.D.N.C. 1991) (citing Aérospatiale for the "three-part test encompass[ing] the five factors... "); In re Perrier Bottled Water Litigation, 138 F.R.D. 348, 354 (D. Conn. 1991) (stating "the majority opinion in Société was unambiguous as to how lower courts are to analyze whether to require use of the Convention procedures" and setting forth the three prongs).
on particular aspects of the individual litigation. While sovereign interests are mentioned, they are included only as one (the last) of several relevant factors, and within the overall context of interests particular to the litigation. More importantly, explicit consideration of system needs is missing entirely: nowhere does the Court specifically account for the mutual interest of all states in maintaining a workable international system.

To clarify what I argue is missing in this articulation of comity analysis, I would like to sketch out a taxonomy of sovereign interests that might be implicated in Convention cases.

Level 1: **Particular sovereign interests embodied in law whose application will create a specific outcome in the individual litigation.** For example, the U.S. interest in protecting consumers that is embodied in our domestic products liability regime; the Swiss interest in privacy that is embodied in Switzerland’s bank secrecy laws.

Level 2: **General sovereign interests reflected in a government’s chosen system of adjudication.** For example, the U.S. interest in permitting extensive private discovery that is part of our adversarial system; the German interest in preserving discovery as a judicial function that is part of the German inquisitorial system.

Level 3: **Interests in recognizing competing sovereign power and developing a method to resolve conflicts of jurisdictional authority that will promote a functional international system.**

The first two levels are domestic interests—that is, they reflect policy choices made by the United States or the particular foreign country and embodied in domestic substantive and procedural law. The third is a purely international system interest, and it is this last interest that the majority’s comity approach overlooks.

This is not to say that the shared interest of states in a functional international regime could not be considered under the *Aérospatiale* comity approach. As mentioned, the majority opinion’s closing passage refers to sovereign interests expressed by foreign states; in addition, the “important interests of the state where the information is located,” described in factor (5), is included in the Court’s list of relevant elements. These interests could certainly be read to include a state’s interest in system needs. But by failing explicitly to instruct lower courts to consider system values, the *Aérospatiale* Court gave them no context in which to evaluate that category of sovereign interests in those terms. Unsurprisingly, lower courts have on the whole not only given particular (level 1) interests prominence, but have all but excluded system values from their comity analysis. The result has been that U.S. courts often consider foreign state interests in a manner insensitive to these different levels and, as a result, balance them improperly against U.S. interests.

38. *Aérospatiale*, 482 U.S. at 544 n.28.

39. For a discussion of the distinction between sovereign interests in domestic policy and sovereign interests in international values, see generally Jay Lawrence Westbrook, *Review Essay: Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 Tex. Int’l L.J. 71, 89–92 (1990); Maier, supra note 21, at 296–97 (on system concerns before the *Aérospatiale* decision). See also Gerber, supra note 11, at 531 ("The central concept in the Court’s comity analysis, for example, involves the 'sovereign interests' of foreign states and necessarily implies reference to the public international law concept of sovereignty to determine its content.").
III. DEVELOPMENTS AFTER AÉROSPATIALE

Enough lower court decisions have been rendered since Aéropatiale to reveal certain trends in the application of Convention procedures.40 This Part discusses the evaluation of sovereign interests with respect to three recurring issues in such litigation: (1) the assertion of judicial sovereignty as a factor favoring use of the Convention; (2) the adoption and implementation of blocking statutes to bar compliance with foreign discovery requests; and (3) the relevance of third-party status to compliance with discovery orders. In each case, it situates the particular sovereign interest within the system of classification set forth in Part II and explores the consequences of the Aéropatiale Court’s failure adequately to consider system needs.

A. Judicial Sovereignty

The term “judicial sovereignty” encompasses the right of civil-law nations to designate evidence gathering as a judicial function and, consequently, to preclude unauthorized persons (including private litigants and foreign courts) from performing or ordering evidence gathering within their territory.41 It may therefore be classified as a level 2 interest: it is an aspect of the chosen system of adjudication of particular countries.42 Discovery orders issued in connection with U.S. litigation that demand the production of evidence located in a judicial sovereignty nation, then, will inevitably involve a direct conflict of level 2 interests: judicial sovereignty on the one hand, and the U.S. interest in liberal discovery on the other.

The petitioners’ argument in Aéropatiale that the Convention represented “a negotiated balancing of divergent sovereign interests”43 was based on the premise that the United States, in negotiating and ratifying the Convention, had already balanced these two critical sovereign interests at stake in cross-border discovery disputes.44 On this reading, an additional comity analysis by courts in individual cases would be superfluous.45 When the Aéropatiale majority rejected this argument on the ground that the language of the Convention did not support mandatory application, it did not specifically reject judicial sovereignty as a valid interest—it held merely that a “more particularized analysis” of competing interests was necessary.46 The majority may simply have wished additional
interests, specific to the individual case, to be considered in conjunction with general procedural interests; in other words, to use the system of classification outlined above, it left room for the possibility that level 1 interests raised in the particular litigation might tip the balance away from its level 2 equilibrium and toward the use of U.S. rules. But because the Court's comity test encouraged lower courts to focus only on specific sovereign interests raised in the individual case, many lower courts have eliminated judicial sovereignty as a valid interest altogether.

Because judicial sovereignty is a level 2 interest—a general interest reflected in a chosen system of adjudication—it is present whenever evidence is sought within a state that reserves discovery as an official function. Many lower courts, however, have suggested that judicial sovereignty need not be recognized at the general level, requiring instead "proof" that the particular discovery sought in individual cases would intrude on the sovereignty of the foreign state involved. In Benton Graphics v. Uddeholm Corp., for instance, the court dismissed a proffered declaration of Sweden's interest in judicial sovereignty. It stated that "[t]hese 'critical sovereign interests' are merely general reasons why Sweden prefers civil law discovery procedures to the more liberal discovery permitted under the federal rules"—thus correctly recognizing the level 2 conflict between Swedish and U.S. approaches to discovery. Then, however, the court went on to dismiss the Swedish interest on the basis that it was not specific to the litigation at hand. In Doster v. Schenck AG, the court stated that even if it did recognize the interest in judicial sovereignty, the party seeking to compel use of Convention procedures "must show that the specific discovery in these cases would compromise those interests." One court indeed declined to consider judicial sovereignty as an important state interest on the very basis that "then there would be an automatic finding of an 'important sovereign interest' in every case," and that judicial sovereignty could not be an important interest if it would "automatically be present in every single case involving a German national." In sum, consistent with the Aérospatiale Court's focus on factors specific to the individual case, these courts seem to believe that the interest in judicial sovereignty must be weighed only if it is manifested as a specific, level 1 interest.

In part, this mischaracterization is detrimental as a matter of foreign relations, since U.S. courts often use dismissive language in rejecting claims of judicial sovereignty.
More importantly, it is problematic because U.S. courts, rejecting judicial sovereignty as a valid interest, find little to counterbalance U.S. interests and therefore tend to permit discovery under U.S. domestic rules. In *Moake v. Source International Corp.*, for instance, a New Jersey court found a “strong [U.S.] interest generally in assuring that product liability actions are given full attention to protect American consumers,” while dismissing the potential German interest for lack of “proof in [the] record that plaintiff’s discovery request generally would violate [Germany’s] sovereignty.” In *Doster*, the German interest was likewise dismissed, and the court therefore found no reason not to serve the “strong interest” of the United States in the personal injury actions by ordering discovery pursuant to U.S. rules. In another product liability case, a federal district court in Illinois found that “proof” of a violation of French sovereignty was lacking and concluded that the “concerns of the United States in protecting its citizens from unsafe products outweigh any of the aircraft defendants’ ‘sovereignty’ concerns . . . .”

It is important to recognize that accepting the validity of an interest in judicial sovereignty does not mean that U.S. interests will always be outweighed and Convention procedures found applicable. Some lower courts have properly recognized competing level 2 interests—between judicial sovereignty on the one hand and the U.S. interest in liberal discovery on the other—and nevertheless found that level 1 interests raised in the individual cases militated in favor of applying U.S. discovery rules. In *In re Perrier Bottled Water Litigation*, for instance, the court discussed at length the strong French interest in judicial sovereignty, concluding that they “weigh[ed] heavily” in favor of Convention procedures. But in *In re Asbestos Litigation*, the court, while noting Finland’s interest in judicial sovereignty, held that the trial court had not erred in finding that factor to be outweighed by other interests favoring the “more expedient and more thorough” discovery under U.S. rules in the particular litigation. Both courts therefore considered individual interests in addition to, not instead of, general system interests. Such an approach permits a more comprehensive view of the state interests involved; moreover, it renders attainable a specific goal of the Convention—establishing a bridge between civil law and common law regimes. Only if the different procedural regimes are recognized and their claims taken seriously is that possible.

### B. Blocking Statutes

In addition to arguing that principles of judicial sovereignty compelled first resort to Convention procedures, the petitioners in *Aérospatiale* offered a more narrow argument: that the French blocking statute prevented them from complying with discovery requests that were not issued pursuant to Convention procedures. The French statute is framed

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57. Id. at 265-66.
61. Id. at 355.
63. Id. at 550. (“[T]he Court can envision circumstances under which the sovereign interests of a foreign country might be disregarded because of competing interests . . . . The sovereign interest of foreign governments are important but not overriding considerations.”).
quite broadly, stating that “subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose . . . documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.”66 General blocking laws such as this one, as well as statutes intended to bar disclosure only of particular classes of materials, are often invoked in cross-border discovery disputes.67

In Aérospatiale, the French government had supported the petitioners’ argument, stating in its amicus brief that the blocking statute was an expression of territorial sovereignty by France and therefore was to be accorded weight in the U.S. court. The government argued that the blocking statute had been adopted in response to continued use by U.S. litigants, post-Convention, of U.S. discovery procedures, and was designed “to insure the respect of French sovereignty.”68 Other civil-law nations submitted amicus briefs in which they characterized blocking statutes similarly. Switzerland argued that

Swiss judicial sovereignty, and the laws that protect it, should not be viewed as “blocking statutes” designed to frustrate United States discovery procedures. Rather, they are a reflection of a national political tradition that places great value on the sovereign independence of the nation and the individual autonomy of its citizens.69

The United Kingdom likewise argued that it “is entitled to exercise its sovereign power within its jurisdiction, and it is entitled to protect that exercise by the sovereign act of promulgating defensive legislation. United States courts should not lightly reject such expressions of sovereign authority . . . .”70 Even Germany, which had not adopted blocking legislation, noted that its courts had the authority to issue injunctions prohibiting disclosure sought under procedures that violated its sovereignty.71

Although the Court did not address the French legislation in the body of its opinion, it noted in a footnote that “such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence . . . .”72 Having established that blocking statutes cannot operate to limit a court’s jurisdiction, the Court then went on to state that their existence would be relevant to a comity analysis in only a very narrow sense: “The blocking statute thus is relevant to the court’s particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.”73 While the Court thus stopped short of suggesting the complete irrelevance of blocking statutes to this analysis, it was to note only that specific sovereign interests in protecting particular kinds of material would continue to be considered in the comity analysis.


67. For a general discussion of the application of blocking statutes in cross-border discovery disputes, see David E. Teitelbaum, Strict Enforcement of Extraterritorial Discovery, 38 STAN. L. REV. 841, 847-49 (1986).


72. Aérospatiale, 482 U.S. at 544 n.29.

73. Id. (emphasis added).
Blocking statutes, in their adoption and in their application, can operate at any of the three levels of sovereign interest set forth above. Level 1 interests, for instance (sovereign interests embodied in law whose application will create a specific outcome in the individual litigation), might be reflected in legislation that bars the production of documents that contain trade secrets or in bank secrecy legislation. Level 2 interests (sovereign interests relating to systems of adjudication) might be embodied in blocking statutes intended to protect locals against “fishing expeditions” of the sort connected to U.S. discovery practice. And level 3 interests (interests in sovereignty as an element of the international system) are often expressed by countries in connection with the adoption of general blocking legislation, as they suggest that such statutes are enacted to protest disrespect of their own sovereignty. On this view, a blocking statute reflects the belief that under international law, and consistent with the right of a nation to bar within its territory actions that violate its sovereignty, the adopting state has the right to block evidence gathering to which it has not consented. In addition, the application of such legislation in response to perceived jurisdictional overreaching by another nation may implicate level 3 interests.

By restricting consideration of blocking statutes to situations in which the foreign sovereign seeks to protect “specific kinds of material,” the Court’s analysis effectively recognizes the interests embodied in blocking statutes only at level 1. Following this cue, lower courts addressing international discovery disputes have, in both Convention and non-Convention cases, recognized and given appropriate consideration to foreign statutes invoked to protect particular information in particular cases. In Reinsurance Company of America v. Administratia Asigurarilor de Stat, for instance, the court recognized the sovereign interest embodied in a Romanian law that classified certain information—whether sought in domestic or international litigation—to be “service secret[es]” and that punished the disclosure of such information with criminal sanctions. In another case, the court noted with approval that the bank secrecy laws in question had “the legitimate purpose of protecting commercial privacy inside and outside Switzerland” and could be distinguished from “anti-disclosure laws whose purposes [U.S.] courts have determined do not warrant deference.”

But where such specific interests are not identified, lower courts have simply dismissed blocking statutes entirely on the ground that they serve no legitimate interest whatsoever. In Rich v. KIS California, Inc., a district court held the French blocking statute to be irrelevant, stating that it was “solely designed to protect French businesses from foreign discovery” and contrasting it with “other foreign laws whose subject is a specifically identified, legitimate interest.” In another case, the court discounted the

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74. See supra notes 68–71 and accompanying text (discussing the submission by various civil-law countries in their amicus briefs).
76. See infra notes 89–90 and accompanying text.
77. Aérospatiale, 482 U.S. at 544–45 n.29.
78. 902 F.2d 1275 (7th Cir. 1990).
79. Id. at 1280 (“Unlike a blocking statute, Romania’s law appears to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests.”).
81. 121 F.R.D. 254 (M.D.N.C. 1988).
82. Id. at 258.
83. Id.
existence of the blocking statute by suggesting that it was intended only to provide French parties with "bargaining chips" in foreign courts. Similarly, in In re Aircrash Near Roselawn, Indiana, the court objected to a French blocking statute on the grounds that it was adopted only to prevent discovery in international antitrust cases and was not vigorously enforced.

By arguing that the comity analysis in Convention cases should leave room to consider the entire range of sovereign interests expressed in blocking statutes, I do not mean to suggest that in every case the interests of the state in that expression will outweigh all other relevant interests. This result would indeed be undesirable, as it would permit foreign states to circumvent the comity analysis altogether simply by invoking their sovereignty. In some cases, a particular discovery request might not in fact invade the sovereignty of the foreign state to an appreciable degree. In others, a foreign litigant might seek to use a blocking statute as a shield, improperly hiding documents abroad or attempting in bad faith to compel the issuance of a blocking order. In such cases, a full comity analysis—considering both system values and the particular interests raised in the litigation—might appropriately result in the use of U.S. domestic procedures even in the face of a blocking statute. But a sensitivity to the range of possible interests will aid judicial analysis by permitting a recognition that the use of blocking legislation at these different levels presents very different problems. If a blocking statute is invoked to bar a fishing expedition, for instance, it raises a level 2 concern: the U.S. need for liberal pretrial discovery conflicts with the adopting nation's countervailing interest in restricting the breadth of such discovery. This concern would be alleviated, however, if the request were extremely narrowly tailored. In that case, in other words, the sovereign interest expressed would be relatively weak. Where the application of blocking statutes raises level 3 interests, however, the sovereign interest may appear quite strong—for instance, where such legislation is invoked to protest perceived sovereign aggression. This might be the case if a U.S. court orders the use of domestic rules rather than Convention procedures to demand discovery of a non-party witness, for instance, or if discovery demands are made in litigation where the foreign nation protests the assertion of prescriptive jurisdiction by the United States.

The comity test set forth in Aérospatiale does not permit such a full analysis. By valuing only the interests raised in individual litigation, it ignores both the validity of competing procedural approaches and statements by other nations regarding the structure of the international legal system. The end result is that U.S. courts view blocking statutes quite narrowly, as illegitimate efforts to deprive them of jurisdiction, and adopting nations are further convinced that the United States has failed to respect their sovereign authority.

86. Id. at 310 (citing Aérospatiale, 482 U.S. at 525). See also Bodner v. Paribas, 202 F.R.D. 370, 374–75 (E.D.N.Y. 2000).
87. A number of cases have suggested, for instance, that a removal order is less intrusive than a request for the taking of a deposition on foreign soil. See, e.g., In re Honda Am. Motor Co. Dealership Relations Litigation, 168 F.R.D. 535, 538 (D. Md. 1996).
89. See cases cited in Part III.C infra.
90. In connection with the uranium cartel cases, for instance, several foreign nations protested the extraterritorial application of U.S. antitrust law. Resistance to discovery demands was therefore part of a larger resistance to the litigation. Indeed, Canada adopted specialized blocking regulations tailored for application in those cases alone. See, e.g., In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1143 (N.D. Ill. 1979).
C. Obtaining Evidence From Non-Parties

The Convention's legislative history suggests that its drafters were concerned primarily with establishing procedures for gathering evidence from witnesses who were neither parties to the action in the forum court nor otherwise subject to the jurisdiction of that court. Indeed, prior to the Supreme Court's decision in Aérospatiale, several courts had held that the Convention was applicable only in that context. In the Aérospatiale litigation itself, the Eighth Circuit Court of Appeals held that the Convention procedures were simply inapplicable "when the district court has jurisdiction over a foreign litigant." The Supreme Court, however, took the opposite position. It noted that "the text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves," and held that the Convention procedures were available in both situations. Having so concluded, the Court then set forth its comity test with no further attention to the distinction between party and non-party witnesses.

An order for the production of evidence by a non-party raises both questions of jurisdictional power (whether the U.S. court has the authority to compel production pursuant to U.S. rules) and system concerns (in that this type of order would seem particularly offensive to the host state involved). When the evidence sought is within the control of a party subject to the jurisdiction of a U.S. court, however, the jurisdictional power to order discovery pursuant to U.S. rules is not in doubt; and most third-party discovery disputes involve information controlled by a litigant. It is therefore unclear whether lower courts have analyzed non-party status as a system concern or simply as a matter of jurisdictional power.

In First American Corp. v. Price Waterhouse LLP, the court stated that the foreign parent of a U.S. party could not insist on the use of Convention procedures but was "on firmer ground in urging that its non-party status is a consideration in the comity analysis." The court eventually concluded, however, that comity did not require use of Convention

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91. See Oxman, supra note 41, at 757–58.
92. See, e.g., In re Anschuetz & Co., GmbH, 754 F.2d 602, 615 (5th Cir. 1985) ("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.").
93. In re Société Nationale Industrielle Aérospatiale, 782 F.2d 120, 124 (1986). Note that this speaks only to foreign litigants—parties to the litigation—and not to non-parties who may be subject to the jurisdiction of the U.S. court.
95. The Aérospatiale case involved evidence sought from a foreign party. Thus, the Court framed the question presented as whether the Convention procedures applied when evidence was sought "from a [foreign] adversary over whom the court has personal jurisdiction." Id. at 524 (emphasis added). Elsewhere in the opinion, the Court refers not to foreign parties in general but to "foreign litigants," id. at 546 (discussing the need to protect foreign litigants from unduly burdensome disclosure requirements).
96. In Bank of Tokyo-Mitsubishi v. Kvaerner, 671 N.Y.S.2d 902 (N.Y. Sup. Ct. 1988), the court discussed this factor, arguing that where the foreign third parties are within the control of the entity subject to the jurisdiction of the U.S. court, non-party status is less relevant. Id. at 905 (ordering party to action in New York, under U.S. rules, to produce documents held by its foreign subsidiaries). See also Great Lakes Dredge & Dock Co. v. Harnischfeger, No. 89C 1791, 1990 WL 147066 (N.D. Ill. Sept. 25, 1990), in which the court noted the pervasive involvement of the foreign entity from which evidence was sought in the transactions giving rise to the litigation.
97. For an example of judicial recognition of this difference, see In re Anschuetz & Co., GmbH, 754 F.2d 602, 614 (5th Cir. 1985) ("[T]o say what is proper and permitted as an exercise of power by an American court acting under the federal rules is not necessarily to say that such a power should always be employed. Particularly in the realm of international discovery, we believe the exercise of judicial power should be tempered by a healthy respect for the principles of comity.").
98. 154 F.3d 16 (2d Cir. 1998).
99. Id. at 21.
procedures. In *Orlich v. Helm Bros.*, the court went further, characterizing use of the Convention as "virtually compulsory" in cases where evidence is sought from a non-party. While the court in that case explicitly considered the question not merely as one of jurisdictional power but as one of comity—noting that it was "particularly offensive" to order production of evidence under U.S. rules in that circumstance—the case was one of the few that involved a demand for evidence that did not lie within the control of a foreign litigant. In the majority of third-party cases, then, the fact of party control over the evidence sought eliminates the need for additional comity analysis.

More suggestive of insufficient attention to system concerns are the mixed results in a related area. Several courts have addressed the question of discovery undertaken for the purpose of establishing whether a U.S. court has personal jurisdiction over the foreign party from whom evidence is sought. Viewed purely as a matter of authority, this question does not raise quite the same concern as discovery demands made of non-party witnesses: because U.S. courts have the jurisdiction to determine their own jurisdiction, they have the authority to order relevant discovery under U.S. rules. As a matter of sovereign relations, however, it presents a different concern. Should the party from whom discovery is sought turn out not to be within the jurisdiction of the U.S. court, then a decision to use U.S. rules rather than Convention procedures will seem offensive. While at least one court in the years immediately following *Aérospatiale* recognized this issue and considered it in connection with the comity analysis, subsequent courts have not. In *Fishel v. BASF Group*, for instance, the court noted that “[p]ersonal jurisdiction was not challenged in *Aérospatiale*, but the court’s reasoning is not consistent with a blanket rule requiring resort to the Convention” in cases where personal jurisdiction has not yet been established. *Rich v. KIS California, Inc.*, similarly, held simply that *Aérospatiale* “did not carve out any exception for disputes involving personal jurisdiction.” In this area as well, *Aérospatiale*’s inattention to system concerns has permitted results that exacerbate conflicts of sovereign authority.

**IV. CONCLUSION**

I have argued in this paper that the *Aérospatiale* decision improperly de-emphasized system values as compared to particular interests raised in individual cases, and that this de-emphasis has encouraged lower courts over the past fifteen years to ignore certain legitimate sovereign interests expressed by foreign states. This incomplete assessment of the range of interests involved in cross-border discovery disputes is one reason that the

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101.  Id. at 14.
102.  Id. at 15.
103. Although in that case the non-party from whom evidence was sought was affiliated with one of the defendants, the appellate court refused to consider agency as a basis for ordering discovery on the ground that it had not been raised before the lower court.  Id. at 14.
108.  Id. at 529.
110.  Id. at 260. *Accord In re* Bedford Computer Corp. v. Israel Aircraft Industries, 114 B.R. 2, 6 (Bankr. D.N.H. 1990) (with no discussion of possible offense to the host state, holding U.S. rules applicable because the U.S. litigant "only seeks discovery of personal jurisdiction matters and there has been no showing of any prejudice to any sovereign interests").
evidence-gathering process in civil litigation continues to create jurisdictional conflict. However, this state of affairs can be improved. Reforming practice in this area requires not the overruling of Aérospatiale, but merely a more thorough and expansive consideration—as herein suggested—of the sovereign interests mentioned in the Court’s comity analysis. The relative success of efforts to coordinate cross-border evidence gathering in criminal and regulatory investigations suggests that this reform is worth the attempt.