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International Discovery after Aerospatiale: The Quest for an Analytical Framework

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INTERNATIONAL DISCOVERY AFTER AEROSPATIALE: THE QUEST FOR AN ANALYTICAL FRAMEWORK

*By David J. Gerber**

When a United States court orders the discovery of information located outside United States territory, it is employing state power "extraterritorially"[1]—i.e., to coerce conduct within foreign territory.[2] Such extraterritorial applications of U.S. discovery rules often conflict with basic principles of justice in the state where the information is located, and they may also harm legally protected interests of that state.[3] As a result, extraterritorial discovery has led in recent years to conflicts between the United States and foreign countries that have impaired the effectiveness of U.S. litigation,[4] imposed unnecessary costs and unfairness on litigants in U.S. courts and interfered with the policies of both the United States and foreign states.[5]

To reduce these conflicts and their concomitant harms, a legal framework must be developed that can effectively accommodate the various public and private interests involved. Both the structure and the substance of this framework must respond to fundamentally new legal problems created by U.S. extraterritorial discovery practices.[6]

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[1] The term "extraterritorial" refers to the location of the required conduct. References to "foreign" or "international" discovery are imprecise, because they do not specify the nature of the nondomestic element. For example, "foreign" discovery may refer to conduct on foreign territory or to some other foreign element such as the nationality of a witness.

[2] The coercive effect of such an order derives from the expectation that failure to obey the order will lead to the imposition of sanctions. The fact that the order does not itself contain such sanctions does not make it any less coercive.

[3] The central conflicts arise from two facts. First, the United States permits the use of state power to *search* for information rather than merely to secure identified information. Second, it authorizes private attorneys to direct this power with minimal judicial supervision. For detailed discussion, see Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986). For a penetrating comparative analysis of procedural systems, see M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986).

[4] For discussion of the development of the problem, see Gerber, *supra* note 3, at 746–47.

[5] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §442 Reporters' Note 1 (1988) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States") [hereinafter RESTATEMENT (THIRD)].

[6] Developing such a framework is made particularly difficult by the fact that disputes concerning U.S. discovery procedures generally arise in U.S. courts, and therefore U.S. courts must develop and apply legal principles to resolve international conflicts caused by U.S. policies.

In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court (S.D. Iowa),*[7] the United States Supreme Court directly addressed extraterritorial discovery issues for the first time in some 30 years.[8] Recognizing the need for an accommodation of U.S. and foreign interests, the Court mandated that lower courts permit extraterritorial discovery only after a "particularized analysis" of those interests based on principles of fairness and mutual cooperation. The Court failed, however, to provide an analytical framework that could be used to achieve the goals it established. As a result, the opinion threatens to lead to conceptual chaos and may exacerbate rather than reduce current conflicts.

This article develops an analytical framework designed to achieve the goals established in *Aerospatiale.* It first reviews the *Aerospatiale* opinion, focusing on its decisional mandate to lower courts. It then examines the prerequisites for the effective evaluation of extraterritorial discovery and constructs from the *Aerospatiale* case, as well as from other principles of domestic and international law, a framework for analyzing extraterritorial discovery requests.

I. *AEROSPATIALE* AND EXTRATERRITORIAL DISCOVERY

The specific issue in *Aerospatiale* was whether litigants in United States courts were required, at least under certain circumstances, to use the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention)[9] to obtain evidence located within signatory states.[10] In resolving this issue, however, the Supreme Court established certain general principles to be applied to all requests for extraterritorial discovery. The specific issue was thus imbedded in fundamental issues involving the relationships between the U.S. legal system and most other legal systems.[11]

[7] Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa, 107 S.Ct. 2542 (1987) [hereinafter *Aerospatiale*].

[8] The last major Supreme Court case on this issue was Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

[9] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *done* Mar. 18, 1970, 23 UST 2555, TIAS No. 7444, 847 UNTS 231. This treaty was expressly intended to "bridge the gap" between U.S. and foreign procedures by providing mechanisms through which United States courts could acquire evidence located in foreign countries without resorting to U.S. discovery rules.

The most important procedure created by the Convention permits a signatory state to request information from a court in another signatory state, and it establishes an international legal obligation on the requested state to provide the requested information. For discussion, see 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) 192–257 (1986).

[10] States that are currently parties to the Convention include: Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom and the United States. *See* 8 MARTINDALE-HUBBELL LAW DIRECTORY 12–21 (1987).

[11] Numerous nonparty organizations and countries filed amicus curiae briefs, including the Italy-America Chamber of Commerce, Inc.; the Motor Vehicle Manufacturers Association of

THE FACTS AND OPINIONS

The plaintiffs in *Aerospatiale* were United States citizens who had been injured in a plane crash in Iowa. They sued the manufacturer of the airplane, Société Nationale Industrielle Aérospatiale[12] (Aérospatiale) for injuries resulting from the crash and allegedly attributable to defects in the airplane. Aérospatiale is a French corporation wholly owned by the Government of France.[13]

After initial discovery by both sides pursuant to the Federal Rules of Civil Procedure,[14] a second set of discovery requests by the plaintiff was rejected by defendants, who sought a protective order on the grounds that they were "French corporations, and the discovery sought can only be found in a foreign state, namely France."[15] Defendants argued that any discovery within the territory of France had to be conducted, at least initially, according to the procedures of the Hague Evidence Convention.

Denial of defendants' motion was appealed to the U.S. Court of Appeals for the Eighth Circuit,[16] which affirmed the decision of the lower court.[17] The court of appeals held that the Convention not only was not mandatory, but also was not applicable to persons subject to the jurisdiction of the court.[18]

In a five-to-four opinion, the Supreme Court agreed with the lower courts that the Convention was not mandatory and that, therefore, U.S. discovery rules could be used to obtain information located outside the United States.[19] The Court held that the Convention itself neither stated nor implied that it was the exclusive means of obtaining foreign information; nor was there any other basis for finding such an obligation.[20] On this issue the

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the United States, Inc.; the Product Liability Advisory Council, Inc.; Volkswagen AG; the Federal Republic of Germany; Switzerland; France; the United Kingdom; the United States; and the Securities and Exchange Commission.

[12] A second defendant was the Société de Construction d'Avions de Tourism[e].

[13] Defendants apparently did not argue that they were immune from jurisdiction under the doctrine of foreign sovereign immunity. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602–1611 (1982).

[14] Delay in raising the Hague Evidence Convention issue may have caused that argument to appear as something of an afterthought. Moreover, the possibility of cutting off discovery already begun obviously entails potential unfairness to one of the litigants. This also happened in another case on the same issue that had reached the Supreme Court the preceding year. *See In re* Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985), *remanded,* 107 S.Ct. 3223 (1987).

[15] *Aerospatiale,* 107 S.Ct. at 2546.

[16] The magistrate denied the motion with respect to all discovery requests, except the request for oral depositions to be taken on French territory. Jones v. Societe Nationale Industrielle Aerospatiale, Civ. 82-435 C, App. to Pet. for Cert. 25a (July 31, 1985) (LEXIS, Genfed library, Briefs file).

[17] *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120 (8th Cir. 1986).

[18] *Id.* at 125.

[19] *Aerospatiale,* 107 S.Ct. at 2554.

[20] *Id.* at 2553.

Court was unanimous,[21] and its conclusion reflected the weight of opinion of lower courts[22] as well as scholars.[23]

The Supreme Court disagreed with the court of appeals, however, on the scope of application of the Convention. The Court held that application of the Convention was not affected by the jurisdictional status of the person from whom information was sought. The Convention was thus applicable both to persons subject to the jurisdiction of the court and to those who were not.[24]

The remaining issue was whether, and under what conditions, there was an obligation to use the Convention. In answering this question, the Court established the fundamental principle that the use of U.S. discovery procedures to obtain information outside the United States was subject to considerations of comity and fairness.[25] Again, the Court was unanimous on this point.[26]

The Court divided, however, over whether the principle of comity required that the procedures of the Convention be used *before* discovery could be ordered under U.S. law. According to the majority, comity did not require a presumption in favor of first resort to the Convention.[27] The Court found no basis for such a requirement, and it expressed concern that such a presumption might "be unduly time-consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules."[28] The majority opinion held, therefore, that the use of U.S. discovery rules must be subjected to "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures [of the Convention] will prove effective."[29]

The dissent vigorously disagreed. Justice Blackmun argued that international comity required that the Convention be used prior to resort to U.S.

[21] *Id.* at 2558 (Blackmun, J., dissenting).

[22] *See, e.g.,* Work v. Bier, 106 F.R.D. 45 (D.D.C. 1985); International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984); Slauenwhite v. Bekum Maschinenfabriken GmbH, 104 F.R.D. 616 (D. Mass. 1985); and Graco Inc. v. Kremlin, Inc. & SKM, 101 F.R.D. 503 (N.D. Ill. 1984). *But see, e.g.,* Schroeder v. Lufthansa German Airlines, 19 Fed. R. Serv. 2d 211 (N.D. Ill. 1983); and Pierburg v. Superior Court of Los Angeles County, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

[23] *See, e.g.,* Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,* 12 ILM 327 (1973); 1 B. RISTAU, *supra* note 9, at 253–55; and McLean, *The Hague Evidence Convention: Its Impact on American Civil Procedure,* 9 LOY. L.A. INT'L & COMP. L.J. 17, 62 (1986). *But see* Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning Its Scope, Methods and Compulsion,* 16 N.Y.U. J. INT'L L. & POL. 1031 (1984); and Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad,* 132 U. PA. L. REV. 1461 (1984).

For a summary of the foreign and domestic commentary on the exclusivity of the Convention, see McLean, *supra,* at 42–47.

[24] *Aerospatiale,* 107 S.Ct. at 2554.

[25] *Id.* at 2554–57.

[26] *Id.* at 2561–62, 2567 (Blackmun, J., dissenting).

[27] *Id.* at 2555–56.

[28] *Id.* at 2555.

[29] *Id.* at 2556.

discovery rules, except where fairness dictated otherwise.[30] He contended that such a presumption was necessary to achieve some degree of predictability about requests for extraterritorial discovery and that an open-ended, unstructured balancing test would lead to unfairness to litigants and harm to the international legal system.[31]

THE COURT'S DECISIONAL MANDATE

The *Aerospatiale* decision requires that trial courts apply a "particularized analysis" of all the facts to requests for extraterritorial discovery. This analysis is to be based on several general principles mentioned in the opinion that identify decision-making objectives.

Comity

The focal point of the mandated analysis is the principle of comity.[32] According to the Court, "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[33] Comity thus requires U.S. courts to evaluate requested extraterritorial discovery in relation to the legitimate interests of foreign states that would be affected.

The Court provided little guidance, however, as to how content is to be ascribed to the principle of comity. The only references in this regard in *Aerospatiale* are to the *Restatement of Foreign Relations Law of the United States (Revised).*[34] The Court stated that the types of factors to be considered in a comity analysis are "suggested" by section 437 of that document,[35] which represents the application of the standard of jurisdictional reasonableness to extraterritorial discovery. The list of factors includes items as diverse as "whether the information originated in the United States" and "the extent to which . . . compliance with the request would undermine important interests of the state where the information is located."[36]

[30] *Id.* at 2561–62, 2567–68 (Blackmun, J., dissenting).

[31] *Id.* at 2569 (Blackmun, J., dissenting).

[32] *See generally* Yntema, *The Comity Doctrine,* 65 MICH. L. REV. 9 (1966). The Supreme Court case most often cited for the concept of comity is Hilton v. Guyot, 159 U.S. 113 (1895).

[33] *Aerospatiale,* 107 S.Ct. at 2555 n.27.

[34] RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 7, 1986). Although the latter version was used by the Court, references below will be to the recently published *Restatement (Third), supra* note 5. For an evaluation of the new provisions concerning extraterritoriality, see Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?,* 19 N.Y.U. J. INT'L L. & POL. 565 (1987).

[35] *Aerospatiale,* 107 S.Ct. at 2555 n.28 (§437 is §442 of the RESTATEMENT (THIRD), *supra* note 5).

[36] Section 442 of the RESTATEMENT (THIRD), *supra* note 5, provides, in relevant part:

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the

When used in conjunction with the Reporters' Notes and in the context of the conceptual framework of the *Restatement,* this section provides useful guidance in analyzing requests for extraterritorial discovery. Without this framework, however, reference to the listed factors is of little value, and the opinion does not indicate that courts should follow the approach of the new *Restatement.*

Fairness to Litigants

The *Aerospatiale* decision also requires courts to consider fairness to litigants in ruling on extraterritorial discovery requests. In particular, the Court required close scrutiny of discovery requests to prevent "abuses" of the discovery rules.[37] For example, according to the Court, "American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position."[38] The Court did not, however, indicate the relationship of fairness considerations to the comity test, and it gave no guidance as to how fairness was to be analyzed.

Evidentiary Necessity and Procedural Efficiency

While comity and fairness to litigants were presented as factors that might lead a court to restrict the application of U.S. discovery rules, the Court also identified two factors—evidentiary necessity and procedural efficiency—that tend to support application of those rules. In concluding that comity did not require first resort to the Convention, the Court stated that use of the Convention could be rejected where it was likely to be unnecessarily costly and time-consuming and where it might not yield information necessary to the litigation.[39] Again, however, the Court did not provide any guidance as to how these concepts were to be applied.

The "particularized analysis" called for by the Supreme Court is thus largely unstructured and exceptionally vague. The Court not only refused to "articulate specific rules to guide this delicate test of adjudication,"[40] but also failed to provide significant conceptual guidance for the analysis. Although several concepts are mentioned as relevant, they are not presented as part of a coherent framework of analysis. They represent goals of analysis but provide little guidance for courts seeking to achieve them.

> information; and 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.

The version used by the Court was substantially the same.

[37] *Aerospatiale,* 107 S.Ct. at 2556.

[38] *Id.* at 2557.

[39] *Id.* at 2555–57.

[40] *Id.* at 2557.

II. Criteria for an Effective Analytical Framework

The Supreme Court's laconic treatment of the analysis to be applied by lower courts to extraterritorial discovery requests might suggest to some that those courts may consider any interests of any state or party and "balance" them on whatever basis they choose. Such an interpretation of the Court's mandate, however, is likely to preclude attainment of the Court's goals. To achieve them, an analytical framework must be developed that meets two principal criteria. First, it must be sufficiently structured to provide effective guidelines for decision making and thus afford a reasonable degree of predictability. Second, it must be sufficiently comprehensive to include all relevant international as well as domestic law principles and relate to the full range of interests affected by extraterritorial discovery.[41]

STRUCTURE AND PREDICTABILITY

The degree of structure in an analytical framework depends on the extent to which there is general agreement among judicial decision makers concerning (1) the content of the legal concepts included in the framework and (2) the relationships among those concepts.[42] A structured analytical framework thus provides the decision maker with reasonable clarity regarding both of these factors.

As used here, the term "structure" does not imply fixed rules specifying the legal consequences of particular conduct. It refers to the analytical principles that are to be used in making judicial decisions.[43] Moreover, owing to the large number of competing interests involved in extraterritorial discovery, fixed rules are not likely to be appropriate for use in that context.

The degree of structure in an analytical framework has three consequences that largely determine its effectiveness regarding extraterritorial discovery orders:[44] first, it provides guidance for the judge and thus affects

[41] The Court's failure in the opinion to provide a structured framework of analysis does not mean that the Court intended that it be unstructured; the opinion simply does not provide guidance on the issue.

[42] The assumption here is not that legal concepts have inherent or logically discernible content, or that such concepts can be given fixed and unambiguous content. I do assume, however, that legal processes can and regularly do ascribe content to individual concepts and that this content reasonably can be ascertained by using the methods and conventions of the social institutions in which those processes operate. The so-called deconstructionist critique of legal reasoning does not, therefore, undermine the assumptions on which my analysis is based. For discussion of one version of the deconstructionist view, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725–37 (1976).

[43] For discussion of the distinction between rules and principles, see R. DWORKIN, *The Model of Rules I*, in TAKING RIGHTS SERIOUSLY 14 (1981).

[44] This assertion does not assume a passive judicial decision maker who is somehow "bound" by the content of the principles. It does assume, however, that conscious application by a judge of a particular set of concepts to a given fact situation will significantly influence the outcome of the decision.

the predictability of judicial decision making;[45] second, it affects the way lawyers present arguments to courts and the characteristics of those arguments; and third, it influences the conduct of those who may be affected by the court's decision. The higher the degree of decisional predictability, the greater the probable effect on that conduct.[46]

Reducing State-Level Conflict

A structured framework of analysis is likely to reduce incentives for foreign states to obstruct the policy objectives of the United States by enacting or strengthening blocking legislation and by refusing to enforce judgments of U.S. courts. Such measures often stem from fear that foreign interests will not be fully and fairly considered in U.S. courts;[47] lack of a structured framework is likely to enhance that fear because it suggests that the judge may decide on the basis of subjective and/or possibly biased criteria.

A structured framework not only reduces this perceived subjectivity but also furnishes foreign states with a significant amount of information about the factors that are likely to influence judicial decisions and how those factors will be evaluated. Where the framework requires consideration of foreign interests, for example, the foreign state can be confident that they will be considered, and it can anticipate the analysis that will be applied. This confidence is likely to reduce pressure to enact countermeasures.

Conceptual structure also tends to narrow the range of conflict. It reduces the incentives for foreign states to make broad claims of sovereignty in the hope that a judge may consider some of them convincing. Instead, it encourages states to concentrate their efforts in support of interests that are identified as relevant by the analytical framework, and this, in turn, will tend to clarify and narrow the issues involved in the controversy. Moreover, without such a structure, foreign states may believe that confrontational tactics

[45] The role of structure in cases involving transnational legal claims must be assessed differently from its role in purely domestic disputes. In the domestic context, those affected by a judicial decision are subject to the authority of the state and cannot take legal action to interfere with the state's regulatory objectives. Moreover, they are presumed to have consented to the authority of the judge, and as members of the polity in which the judge acts they are presumed to be in a position to respond effectively to improper use of judicial discretion. Consequently, the potential adverse impact of ad hoc decision making is minimized.

In the extraterritorial discovery context, however, foreign states can and do take legal measures (e.g., blocking legislation) that obstruct the ability of the United States to accomplish its objectives. Moreover, those states have not consented to the authority of the U.S. judge. As a result, the degree of structure in the applicable analytical framework becomes a critical determinant of the response of foreign states to extraterritorial discovery practices, because it is the central source of information concerning the probable actions of the judge.

[46] For discussion of the need for predictability in applying comity principles, see Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310 (1985).

[47] *See, e.g.*, Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 278 (1986); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 611 (2d ed. 1976); and Wilkey, *Transnational Adjudication: A View from the Bench*, 18 INT'L LAW. 541, 542–43 (1984).

will be viewed as indicia of seriousness, which could lead them to *demonstrate* their objections to discovery through protests, blocking legislation and related measures.[48]

Increasing Fairness to Litigants

Conceptual structure is also likely to correlate with fairness to litigants. Blocking legislation and related confrontational measures increase the costs and risks of litigation, reduce the predictability of outcomes and often place litigants in the position of having to choose between violating United States law and violating foreign law. Consequently, reducing incentives for foreign states to obstruct U.S. discovery tends to improve fairness to litigants.

Increased structure also tends to reduce both unintentional and intentional judicial bias. A judge acting without a structured analytical framework may be more responsive to the demands of domestic litigants and U.S. interests merely because he understands them better than he does foreign interests.[49] Conceptual structure counteracts this unintentional bias by identifying relevant issues and relating them to a coherent framework of analysis. A structured framework also tends to counteract pressure on the judge to protect domestic interests and litigants, because it provides authority to which the judge can refer in support of potentially unpopular decisions.

Furthermore, a structured framework of analysis increases the information available to litigants. Where litigants can reasonably predict judicial responses to discovery requests, they can make informed evaluations of whether to incur the costs and risks involved in the proceedings.

Increasing the Effectiveness of U.S. Litigation

Finally, a structured framework of analysis should improve the efficiency and effectiveness of U.S. litigation involving extraterritorial discovery. In an amorphous decision-making context, litigants on both sides have an incentive to make as many and as varied arguments as possible because they cannot predict what will influence the judge's decision.[50] The result is often inefficient litigation encumbered by marginally relevant arguments and burdened by attendant delays and elevated costs. The problem is particularly severe in the context of extraterritorial discovery, for there are few limits on the variety of arguments that might conceivably relate to the general goals of comity and fairness. Where guiding principles are well articulated, there is less incentive for overargument, and the delays and costs of litigation are correspondingly contained.

[48] *See infra* text accompanying notes 145–50.

[49] *See Aerospatiale*, 107 S.Ct. at 2560 (Blackmun, J., dissenting); Heck, *supra* note 47, at 279; H. STEINER & D. VAGTS, *supra* note 47, at 611; and Wilkey, *supra* note 47, at 542–44.

[50] *See* Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 830–32 (1985).

COMPREHENSIVENESS

To be effective, the analytical framework for evaluating extraterritorial discovery must also be comprehensive. Such discovery may involve many principles from international as well as from domestic law. Because of the many uncertainties in the law on this subject, the applicability of these principles is frequently unclear, and they often appear to conflict. Potentially applicable principles must therefore be identified and integrated into a framework that provides guidance in resolving these conflicts.

In *Aerospatiale* the Supreme Court failed to locate the principles it discussed in either a conceptual or a factual context.[51] It did not make clear the relationship between the principles announced in the case and other potentially applicable legal principles. As a result, some may mistakenly assume that *Aerospatiale* is the sole source of authority on extraterritorial discovery and that factors not identified in the case are not relevant to the analysis. The opinion, however, refers only to some of the applicable legal principles.

The most egregious omission is the Court's failure to discuss the role of customary international law.[52] Customary international law establishes the rights or entitlements of states, and thus it provides the necessary framework for evaluating the justifiable expectations of states about the conduct of other states.[53] Clearly, therefore, customary international law must play a central role in effectively analyzing issues regarding extraterritorial discovery. Moreover, customary international law is part of United States law;[54] consequently, U.S. courts are required to apply it, unless otherwise directed by Congress or, in some cases, the Executive.[55]

The comity analysis required by *Aerospatiale* is implicitly based on concepts of customary international law, but the opinion fails to identify them as

[51] Such a discussion was not necessary to resolve the case, and the Court therefore cannot be faulted for failing to include it. Considering the paucity of guidance concerning the principles of analysis to be used in such cases, however, one must regret the Court's failure to clarify the situation.

[52] The Court also failed adequately to identify the relationship between the principles it was enunciating and existing case law. Although many of the issues in previous cases have either been resolved or rendered irrelevant by *Aerospatiale,* those cases remain an important source of guidance on, e.g., the application of international law to discovery and the evaluation of fairness in extraterritorial discovery. For a digest of such cases, see Note, *Hague Evidence Convention: A Practical Guide to the Convention, United States Case Law, Convention-Sponsored Review Commission (1978 & 1985), and Responses of Other Signatory Nations: With Digest of Cases and Bibliography,* 16 GA. J. INT'L & COMP. L. 73, 99, App. A (1986).

[53] For discussion of the entitlement concept, see D'Amato, *The Concept of Human Rights in International Law,* 82 COLUM. L. REV. 1100, 1113 (1982).

[54] *See, e.g.,* The Paquete Habana, 175 U.S. 677, 700 (1900); The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925); and Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 252–53 (1983). For discussion of the relations between national and international law, see, e.g., 2 E. NEREP, EXTRATERRITORIAL CONTROL OF COMPETITION UNDER INTERNATIONAL LAW, ch. VII (1983); and Dickinson, *The Law of Nations as Part of the National Law of the United States,* 101 U. PA. L. REV. 26, 792, pts. I & II (1952–53).

[55] *See generally* Henkin, *International Law as Law in the United States,* 82 MICH. L. REV. 1555, 1567 (1984).

such. The central concept in the Court's comity analysis, for example, involves the "sovereign interests" of foreign states[56] and necessarily implies reference to the public international law concept of sovereignty to determine its content.[57] Similarly, according to *Aerospatiale,* U.S. courts must limit discovery that is unjustifiably "intrusive" on the interests of foreign states.[58] To assess whether particular action is intrusive, however, one must determine the sphere of protection to which the state is entitled, and this sphere of protection is established by international law.

III. Toward an Analytical Framework

Given the Supreme Court's failure to provide a structured and comprehensive framework for analyzing requests for extraterritorial discovery, this section attempts to do so through the use of elements provided by the *Aerospatiale* case, as well as other relevant principles of domestic and international law.

The basic framework can be stated succinctly. Where an order for extraterritorial discovery would violate either United States standards of procedural fairness or established norms of international law, it must be modified to avoid such violations. Where the United States Government reasonably requests that discovery be modified to avoid serious harm to U.S. foreign relations interests, the court must so limit discovery. In all other cases, the court must weigh the need for the requested information against the harm to the sovereign interests of foreign states that may result, and it must limit discovery to the extent necessary to avoid unjustified harm to those interests.

PRIVATE INTERESTS: FAIRNESS AND THE LITIGANT

The Separation of Public and Private Interests

Effective analysis of extraterritorial discovery requests requires that a fundamental distinction be made between private and public interests. The *Aerospatiale* decision considers both sets of interests,[59] but it fails to identify their distinct roles; as a result, some might mistakenly suppose that they can be mixed together in the decisional process.

The private interests of litigants in U.S. courts are protected by a standard of procedural fairness that is applicable to all discovery requests, regardless of where the information is located.[60] Application of this fairness stand-

[56] *Aerospatiale,* 107 S.Ct. at 2555–56.

[57] An argument that sovereign interests can be determined without reference to international law would be hard to sustain, because without reference to international law there would be no basis for ascribing content to the concept.

[58] *Aerospatiale,* 107 S.Ct. at 2556. [59] *Id.* at 2542, 2555.

[60] This requirement of fairness derives from the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See generally* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980);

ard is required by United States law, and a court has no authority to compromise it by reference to international or state interests.

Even if there were authority to "balance" private and state interests, there would be no principled basis on which to do so. Protection of a litigant's right to fair treatment is based on values that are not related to state and international interests, and therefore cannot be balanced against them. Moreover, any attempt to balance the fairness interests of a particular litigant against international and state interests on a general scale of "importance" not only would be unprincipled, but also would necessarily be biased in favor of state interests.[61]

Consequently, application of the fairness standard must be an independent element of the analysis, and a request for discovery abroad must be denied or modified where it would violate fairness standards under U.S. law.

Application of the Fairness Standard

Where information is located outside the United States, the fairness standard may require consideration of factors that generally would not be present in the domestic context.[62] The most important such factor relates to the ability of a foreign state to control sources of information within its territory. For example, a U.S. court must decide whether it would be fair to penalize a litigant for failure to comply with a discovery order where, under the law of the foreign state, such compliance would lead to the imposition of sanctions.[63]

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See also* Maier, *Interest Balancing and Extraterritorial Jurisdiction,* 31 AM. J. COMP. L. 579, 582 (1983); and Newman, *Rethinking Fairness: Perspectives on the Litigation Process,* 94 YALE L.J. 1643 (1985).

Fairness is also specifically called for in the discovery context in Fed. R. Civ. P. 26(c), which states, in relevant part, that a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *See generally* Kerschbaumer v. Bell, 112 F.R.D. 426, 427 (D.D.C. 1986).

[61] A court applying an unstructured "balancing" analysis based on an undefined standard of "importance" to a conflict between the interests of a state and those of an individual would in most cases presumably find that the interests of the state were more "important," because a state's conduct typically has more numerous and significant effects on persons and institutions than an individual's.

[62] *See, e.g.,* Heck, *supra* note 47, at 252 ("U.S. law recognizes that discovery abroad is different from domestic proceedings and therefore may have to be exercised more restrictively"); Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A. V. Lowe,* 75 AJIL 629, 634 (1981); and R. von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues,* 3 DICK. J. INT'L L. 43, 50 (1984).

[63] In some cases, the fairness doctrine may be applied after a discovery order has been entered. The Supreme Court indicated in Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958), that this may be a more appropriate procedural context for evaluating certain issues.

Evaluation of fairness issues need not, however, be confined to this procedural context, and there may be significant waste and unfairness in doing so. Where a court reasonably believes, for example, that foreign blocking legislation would be applied to prevent compliance with its

In analyzing fairness, a court must consider the actual impact of the foreign blocking legislation on the particular litigant. Consequently, the court must consider factors such as whether the statute is regularly enforced[64] and, in some cases, whether the litigant has made a good faith effort to avoid the impact of the legislation.[65] It must also consider the penalties for violation of the legislation.[66] Where the foreign litigant cannot reasonably comply with an order of a U.S. court, it would generally be unfair to impose a penalty for noncompliance.[67]

The fairness analysis must include, in addition, the increased costs, risks and compliance burdens that may result from the foreign location of persons or documents. For example, the costs and risks incurred by sending large numbers of documents all the way to the United States to be examined for long periods may substantially disadvantage a foreign litigant.[68] Moreover, the foreign location of persons or documents may expose the litigant to unfair manipulation by an opponent in the U.S. litigation; the Supreme Court, however, has specifically directed lower courts to protect litigants against such manipulation.[69]

Fairness is necessarily a relational concept. It requires evaluation of the needs of those seeking extraterritorial discovery as well as of those resisting it. Where the fairness analysis involves burdens on the requested party rather than ability to comply, those burdens must be evaluated in light of the requesting party's need for the discovery. A demonstrated need for specific information justifies greater burdens on the requested party than the pursuit of unspecified information that might merely lead to usable evidence.[70]

The relational aspect of the fairness test also requires consideration of the actions of the requesting party. For example, attempts by a litigant to use the foreign location of information to gain an advantage over an opponent should constitute a waiver of fairness protections. This aspect of the fairness test is likely to be particularly important in two contexts. Fairness protections should not be available to a litigant that has attempted to avoid obligations under U.S. law by intentionally placing documents in foreign terri-

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order, requiring the litigant to attempt to evade its application is likely to be both wasteful and useless.

[64] *See, e.g.*, Garpeg, Ltd. v. United States, 583 F.Supp. 789, 797 (S.D.N.Y. 1984); Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 30 (S.D.N.Y. 1984); and Graco Inc. v. Kremlin, Inc. & SKM, 101 F.R.D. 503, 514 (N.D. Ill. 1984).

[65] *See, e.g*, United States v. Vetco, Inc., 644 F.2d 1324, 1332 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981); and United States v. First Nat'l City Bank, 396 F.2d 897, 905 (1968).

[66] Where the penalty involves a fine, ability to pay may also be a factor. A $5,000 fine, for example, may be a significant factor for a small firm but a bagatelle for a large firm.

[67] The foreign party presumably cannot comply where the situs state uses force to prevent compliance, as well as where the penalties for violating the statute would involve loss of personal freedom or significant financial burdens.

[68] *Aerospatiale*, 107 S.Ct. at 2567. [69] *Id.*

[70] The degree of specificity in requesting information is critical. Requests for specific information—e.g., documents relating to a particular conversation—generally also entail fewer burdens on the requested party than broader discovery requests.

tory.[71] Moreover, they should not be available to a party that utilizes U.S. discovery rules but resists their application to itself.[72]

United States courts consistently have required that fairness considerations be part of the analysis of extraterritorial discovery.[73] They have held, for example, that the effect of foreign blocking legislation on a litigant's ability to comply with a discovery order must be considered in assessing the propriety of sanctions against that party for failure to comply.[74] Moreover, the foreign location of documents has led courts to order the use of alternative means of obtaining information where the burdens of complying with the discovery request were excessive.[75] Consequently, there is not only ample case law to support the consideration of such issues, but also guidance concerning the factors to be evaluated.

THE APPLICATION OF PUBLIC INTERNATIONAL LAW NORMS

A second component of the analysis asks whether the requested extraterritorial discovery would violate an established norm of public international law.[76]

Claims that U.S. extraterritorial discovery violates customary international law are based on a fundamental postulate of international law, which provides that a state may not "interfere" with the "sovereignty" of another state—i.e., its control over conduct within its territory.[77] The principle of noninterference is thus central to the controversy over extraterritorial discovery.

At issue here is the extent to which specific applications of this principle have been established as norms of state conduct under international law. Several such norms are well established. For example, an agent of a state may not act on its behalf within foreign territory without the consent of the

[71] *See, e.g., In re* Anschuetz & Co., 754 F.2d 602, 607 (5th Cir. 1985), *remanded,* 55 U.S.L.W. 3852 (1987); and Cooper Indus. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984). *See generally* Sadoff, *The Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence,* 20 INT'L LAW. 659, 664–65 (1986).

[72] *See, e.g.,* International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435, 446 (S.D.N.Y. 1984).

[73] *See, e.g.,* McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956 (E.D. Mo. 1984). *See generally* Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies,* 16 N.Y.U. J. INT'L L. & POL. 1061 (1984).

[74] *See, e.g.,* Graco Inc. v. Kremlin, Inc. & SKM, 101 F.R.D. 503, 513 (1984); and *In re* Uranium Antitrust Litigation, 480 F.Supp. 1138, 1147 (N.D. Ill. 1979).

[75] *See, e.g.,* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 61 (E.D. Pa. 1983); and Laker Airways v. Pan American World Airways, 103 F.R.D. 42 (D.D.C. 1984).

[76] The Court's failure to discuss this issue in *Aerospatiale* may have been based on the assumption that no such customary law norms were involved in the case, and therefore that there was no need to address the point.

[77] For discussion of the noninterference principle, see Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws,* 10 YALE J. INT'L L. 185, 209–20 (1985). *See generally* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310 (3d ed. 1979); and T. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 120 (P. Winfield 7th rev. ed. 1923).

foreign sovereign.[78] Consequently, a U.S. court may not send police or military forces onto foreign territory to enforce a U.S. judgment.[79] Similarly, it is well established that a state may not send its agents onto foreign territory to seize documents for review,[80] nor may it order depositions within a foreign state.[81]

The current controversy relates primarily to whether existing norms of conduct prohibit U.S. courts from requiring (1) that documents located within a foreign state be made available for inspection within foreign territory (extraterritorial document inspection), and (2) that persons or materials located in foreign territory be made available for inspection in the United States (information removal). Many foreign governments consider that both actions violate international law.[82] While United States courts have divided over the legality of extraterritorial document inspection orders,[83] they generally have not considered removal orders to be violations.[84]

[78] *See, e.g.*, I. BROWNLIE, *supra* note 77, at 306–07. According to Hans Kelsen:

> That the territory enclosed by the boundaries of a state legally belongs to this state or—as it is usually characterized—that it is under the territorial supremacy or sovereignty of this state means that all individuals staying on this territory are, in principle, subjected to the legal power of that state and only of that state.

H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 317–18 (R. W. Tucker 2d rev. ed. 1966).

[79] *See, e.g.*, 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 225 (1963); Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 127–58 (1964 I); and 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, 751 (1983).

[80] *See, e.g.*, 6 M. WHITEMAN, *supra* note 79, at 160–83 (1968); and Ings v. Ferguson, 282 F.2d 149, 151 (2d Cir. 1960).

[81] *See generally* 1 B. RISTAU, *supra* note 9, at 90–93; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Oxman, *supra* note 79, at 749–52; and Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 COLUM. L. REV. 1441 (1963). *See also, e.g.*, Work v. Bier, 106 F.R.D. 45, 48 (D.D.C. 1985); and Graco Inc. v. Kremlin, Inc. & SKM, 101 F.R.D. 503, 513 (N.D. Ill. 1984).

[82] *See, e.g.*, Brief for the Republic of France at 16, *Aerospatiale*, 107 S.Ct. 2542 (1987); Brief for the Federal Republic of Germany at 13, *id.*; and Brief for the Government of Switzerland at 8, *id.*

[83] For cases refusing orders for extraterritorial document inspection on sovereignty grounds, see, e.g., Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 35 (S.D.N.Y. 1984); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983); TH. Goldschmidt A.G. v. Smith, 676 S.W. 2d 443, 445 (Tex. App. 1984) ("[discovery orders] that conflict with West German reservations under the Convention . . . impinge upon the sovereignty of the Federal Republic of Germany and should not be issued in ordinary circumstances"); and Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 850, 176 Cal. Rptr. 874, 883 (Ct. App. 1981) (discovery orders executed in West Germany "would violate West German judicial sovereignty").

For cases holding that such orders would not violate foreign sovereignty, see, e.g., International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435, 449 (S.D.N.Y. 1984); and Graco Inc. v. Kremlin, Inc. & SKM, 101 F.R.D. 503, 520 (N.D. Ill. 1984).

[84] *See, e.g., In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987); *In re* Anschuetz & Co., 754 F.2d 602, 615 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987) ("If Anschuetz is not voluntarily forthcoming in Germany, the court can order documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty"); and International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435, 449 (S.D.N.Y. 1984).

Not unexpectedly, these differences in result depend on the analysis applied. Three basic theories have been used to determine whether extraterritorial discovery orders violate international law.

The Concept of Judicial Sovereignty

United States courts generally have analyzed the role of international law by reference to the concept of judicial sovereignty.[85] According to this view, an order by a U.S. court relating to information within a foreign state interferes with the rights of that state by usurping a governmental function that is there reserved to the judiciary.[86]

The notion of judicial sovereignty was developed to conceptualize foreign opposition to U.S. extraterritorial discovery practices.[87] It is an aspect of the general concept of sovereignty, and thus quintessentially part of international law. However, because courts and commentators often have failed explicitly to recognize this fact, the concept is often used with little or no international law analysis to support its application.[88]

The concept consistently has been held to prohibit the ordering of depositions on foreign soil.[89] Cases on extraterritorial document inspection, however, are less clear. Some courts have held that orders for such inspection violate foreign judicial sovereignty,[90] while others have distinguished depositions from document inspection on the ground that the latter is only

[85] *See, e.g., In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 123–24 (8th Cir. 1986); Boreri v. Fiat S.p.A., 763 F.2d 17, 19 (1st Cir. 1985); Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 26 (S.D.N.Y. 1984); and Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 852, 176 Cal. Rptr. 874, 881 (1981).

[86] *See, e.g., Report of United States Delegation to Eleventh Session of Hague Convention on Private International Law,* 8 ILM 785, 806 (1969) [hereinafter *1969 Delegation Report*].

[87] For description of the development of this concept, see Gerber, *supra* note 3, at 775–79. *See also* Oxman, *supra* note 79, at 761–65; and *Report of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (July 1985),* 24 ILM 1668, 1678 (1985) [hereinafter *1985 Special Commission Report*]. In drafting the Convention, this concept of judicial sovereignty was "constantly borne in mind." *1969 Delegation Report, supra* note 86, at 806.

[88] *See, e.g.,* Lowrance v. Michael Weining, GmbH, 107 F.R.D. 386, 388–89 (W.D. Tenn. 1985); and Cooper Indus. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984).

[89] *See, e.g.,* Work v. Bier, 106 F.R.D. 45, 56–57 (D.D.C. 1985); International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 503, 520 (N.D. Ill. 1984); Cooper Indus. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984); and Volkswagenwerk Aktiengesellschaft v. Superior Court, 33 Cal. App. 3d 508, 509, 109 Cal. Rptr. 219, 220 (1973). For discussion of the difficulties of taking depositions in a foreign state, see Smit, *International Aspects of Federal Civil Procedure,* 61 COLUM. L. REV. 1031, 1053–59 (1961); and Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform,* 62 YALE L.J. 515, 522–34 (1953).

[90] *See, e.g.,* McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956, 959 (E.D. Pa. 1984) (court declined to order compliance because "some of the requests for production of documents, because of their sweeping character, may very well require of persons located in West Germany, efforts which would be substantially equivalent to producing evidence in that country"); and Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983).

ancillary to the judicial process.[91] Nevertheless, this distinction is difficult to maintain, and U.S. courts recently have tended to avoid ordering document inspection and to order instead that documents be produced in the United States.

The reason is that the concept of judicial sovereignty does not prohibit removal orders. Orders requiring that persons be deposed or documents produced in the United States consistently have been held not to represent the exercise of judicial functions on foreign territory.[92] As a result, reliance on the concept of judicial sovereignty has led U.S. courts to assume that objections to discovery under international law can be avoided by ordering that discovery take place in the United States.[93] The question remains whether this concept of usurpation properly defines the scope of the principle of noninterference.

The Locus of State Conduct

Judicial sovereignty may also be viewed as merely one application of the broader principle of international law that proscribes conduct by one state within the territory of another without the latter's consent.[94] This principle is a fundamental postulate of international law,[95] and it is based directly on state practice.

If this broader standard is applied to extraterritorial discovery, the issue is whether a U.S. attorney acting under authority of a U.S. court order is acting as an agent of the United States, and there can be little doubt that he is. Consequently, under this analysis, orders for extraterritorial document inspection are prohibited. Removal orders are permitted, however, because they do not involve conduct by agents of the United States on foreign territory.

[91] *See, e.g., In re* Anschuetz & Co., 754 F.2d 602, 611 (5th Cir. 1985), *remanded,* 107 S.Ct. 3223 (1987); and *In re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124–25 (8th Cir. 1986).

[92] *See, e.g., In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729, 732 (5th Cir. 1985), *remanded,* 107 S.Ct. 3223 (1987); *In re* Anschuetz & Co., 754 F.2d 602, 615 (5th Cir. 1985), *remanded,* 107 S.Ct. 3223 (1987); International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 503, 521 (N.D. Ill. 1984); Lowrance v. Michael Weining, GmbH, 107 F.R.D. 386, 388 (W.D. Tenn. 1985); and Cooper Indus. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984).

[93] *See, e.g., In re* Anschuetz & Co., 754 F.2d 602, 615 (5th Cir. 1985), *remanded,* 107 S.Ct. 3223 (1987); *In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729, 732 (5th Cir. 1985), *remanded,* 107 S.Ct. 3223 (1987); and Graco Inc. v. Kremlin, Inc. & SKM, 101 F.R.D. 503, 521 (N.D. Ill. 1984) ("Nor does the court agree that the Convention requires deference to a country's judicial sovereignty over documents, people, and information—if this really is how judicial sovereignty is to be understood—when they are to be produced in this country").

[94] For discussion of this principle, see G. VON GLAHN, LAW AMONG NATIONS 119–21 (5th ed. 1986); 1 L. OPPENHEIM, INTERNATIONAL LAW 265–70 (Lauterpacht 5th ed. 1937); H. KELSEN, *supra* note 78, at 357; E. DE VATTEL, LE DROIT DES GENS 138–43 (1758) (G. Gregory trans. 1964); and Maier, *supra* note 60, at 582–86.

[95] *See, e.g.,* S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10 (Judgment of Sept. 7), 2 M. O. HUDSON, WORLD CT. REP. 20, 35 (1935).

Coercing Foreign Conduct: The Extension of State Power

A third theory used to ascribe content to the principle of noninterference asserts that a state may not coerce conduct within another state without the latter's consent,[96] at least where such conduct violates basic principles of the latter state's legal system. Here the concern is not with the locus of the state's conduct, but with the extension of its power to cover private conduct occurring in foreign territory.

The broadest extension of this analysis would find a violation of the principle of noninterference wherever a state attaches significant sanctions to conduct on foreign territory.[97] This argument is undermined, however, by the fact that some foreign states also attach legal consequences to the failure of a party to produce information located abroad, and such practices generally have not been considered to violate the noninterference principle.[98]

According to a narrower version of this analysis, a violation occurs only where the required conduct violates fundamental principles of the foreign legal system.[99] The rationale is that where a state requires conduct on foreign territory that is substantially consistent with fundamental principles and procedures of the situs state, there can be no interference with that state's legal order because the protections established by that state continue to be applied. Interference occurs only where those protections are denied.

In the context of discovery, the argument has been advanced that U.S. procedures violate international law because they deny fundamental protections to which persons are entitled under the laws of the situs state.[100] In particular, it has been argued that a violation may occur where U.S. procedures coerce the production of information without a prior determination by a judge that the information is directly relevant to the litigation.[101]

[96] According to Kelsen:

> That the legal power of the state is limited to its own territory does not mean that no act of the state may legally be carried out outside this state's territory. The limitation refers in principle to coercive acts in the wider sense of the term, including also the preparation of coercive acts. These acts must not be executed on the territory of another state without the latter's consent. Without such consent they constitute a violation of international law.

H. KELSEN, *supra* note 78, at 310–11.

[97] *See, e.g.,* Brief for the Government of Switzerland at 3, *Aerospatiale,* 107 S.Ct. 2542 (1987); and Brief for the Government of the United Kingdom of Great Britain and Northern Ireland at 17, *id.*

[98] *See, e.g.,* P. SCHLOSSER, DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN 17–22 (1985).

[99] *See, e.g.,* Stiefel, *"Discovery"-Probleme und Erfahrungen im Deutsch-Amerikanischen Rechtshilfeverkehr,* 25 RECHT DER INTERNATIONALEN WIRTSCHAFT 509, 514–20 (1979); and Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434, 448, [1978] 2 W.L.R. 81, *reprinted in* 17 ILM 38, 43 (1978).

[100] This argument is sometimes based on the private international law concept of *ordre public.* For discussion of *ordre public,* see, e.g., O. KAHN-FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW 282–85 (1980); Forde, *Ordre Public,* 29 INT'L & COMP. L.Q. 259 (1980); and Paulsen & Sovern, *Public Policy and the Conflict of Laws,* 56 COLUM. L. REV. 969 (1956).

[101] *See, e.g.,* Corning Glass Works v. ITT, 20 ILM 1025, 1029 (1981) (Munich Ct. App. 1980).

The primary significance of applying the coercion analysis is that under that analysis removal orders may violate the principle of noninterference, whereas removal orders do not violate international law under the other theories. It is generally agreed that under international law there are limits on the extent to which a state may coerce conduct within the territory of a foreign state.[102] The content of these limits has not been defined, however, and their application to extraterritorial discovery remains unclear.

Analysis of extraterritorial discovery orders under international law thus yields the following conclusions: a U.S. court would violate a norm of customary international law by ordering depositions on foreign territory and probably by ordering extraterritorial document inspection, but there are no established norms that specifically prohibit removal orders. Substantial uncertainty remains, however, over the application of the principle of noninterference to extraterritorial discovery, largely because recent changes in U.S. discovery procedures and the expanded application of those procedures to foreign information have created a new factual situation,[103] and settled principles of law have not yet developed in response to that situation.

COMITY AND BALANCING

United States courts have long recognized that the exercise of U.S. jurisdiction may infringe on legally protected interests of foreign states, and they have employed the concept of comity as a mechanism for minimizing such conflicts.[104] The function of this third element of the analytical framework is thus to provide a means of regulating conflicts between states over extraterritorial discovery.[105] Comity balancing is often viewed as an essentially unstructured, hence discretionary, process,[106] but a decision-making process of this type is not appropriate for accommodating state interests.[107] Consequently, comity is used here as an analytical tool for resolving conflicts in the international legal system.

The Objectives of Comity Balancing

To develop analytical content in a balancing framework, the objectives must be clearly identified, because they provide the basis for evaluating

[102] *See, e.g.*, Mann, *supra* note 79, at 137.

[103] For discussion of this development, see Gerber, *supra* note 3, at 746–47.

[104] *See generally* Yntema, *supra* note 32; and Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AJIL 280 (1982). For judicial treatment of the concept, see, e.g., First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972); Laker Airways v. Sabena, Belgium World Airways, 731 F.2d 909, 937 (D.C. Cir. 1984); United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968); and Ings v. Ferguson, 282 F.2d 149, 151–52 (2d Cir. 1960).

[105] According to one commentator: "The weighing of state interests, including the interests of the individual, is thus a process compelled by international customary law. Whether the weighing of state interests standard in and of itself is a rule of international law, is immaterial." 2 E. NEREP, *supra* note 54, at 558.

[106] For discussion, see Gerber, *supra* note 77, at 204–06.

[107] *See supra* text accompanying notes 47–48.

competing interests and the mechanism for comparing those evaluations. With respect to extraterritorial discovery, the objective of comity balancing should be to accommodate the legally protected interests of the United States, on the one hand, and of foreign states affected by the discovery, on the other. Extraterritorial discovery creates conflicts between these two sets of interests, and comity thus requires that each state accept limits on its own entitlements so as not unnecessarily or unreasonably to harm the entitlements of the other.[108]

The comity analysis should aim to achieve compromises among conflicting interests. In an individual case, the standard should be whether the harm caused to the legal interests of a foreign state by a particular discovery order is justified by the need to protect an equal or greater U.S. interest that cannot be protected with reasonable cost by less harmful means.

The frame of reference for the comity analysis is systemic.[109] No state can secure evidence abroad without at least the tacit cooperation of the situs state. States are therefore dependent on each other to accomplish the purely domestic function of providing a fair and reasonable procedure for resolving civil disputes. Where the legal principles governing extraterritorial discovery reflect a reasonable accommodation of the legal interests of all states involved, cooperative state relationships will continue effectively to furnish access to information abroad. Where there is no such accommodation, the necessary cooperation between states will be impaired, and litigation involving evidence abroad will be rendered either unjust or ineffective or both.[110] The system of state relationships performs a function that no state could achieve by itself, and this function justifies limitations on the policies of individual states.

The Interests to Be Balanced

Effective balancing also requires standards for determining which interests are to be balanced. The starting point for analyzing this issue must be the recognition that the "interests" in question cannot refer to the subjective interests of states—i.e., states cannot have whatever protections they

[108] *See generally* Maier, *supra* note 104, at 303–20; and Meessen, The International Law on Taking Evidence from, Not in, a Foreign State: The *Anschuetz* and *Messerschmidt* Opinions of the United States Court of Appeals for the Fifth Circuit, Petitioners' Brief in Response to the Solicitor General's Brief for the United States, Anschuetz & Co. v. Mississippi River Bridge Auth., 107 S.Ct. 3223, App. 4 (1987) (cert. granted and case remanded in light of *Aerospatiale*).

[109] In recent years, the systemic aspects of the comity doctrine have been developed primarily by Professor Harold Maier. *See, e.g.*, Maier, *supra* note 104, at 281–85. *See also* Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Convention*, 19 VAND. J. TRANSNAT'L L. 239, 252–55 (1986).

[110] Where a foreign state prohibits compliance with U.S. procedures, it may render those proceedings unfair by making it unreasonable to expect litigants to comply with the court's order. A foreign state may also physically prevent information—e.g., documents—from leaving its territory and thus render ineffective the procedures of the requesting state. In both cases the actions of the situs state prevent the requesting state from achieving the objective of providing fair and effective procedures.

choose. A state may have a wide range of general "interests" in the outcome of any litigation. For example, it may wish to protect persons or enterprises from costs, inconvenience or the necessity of disclosing valuable information,[111] but legal analysis is possible only where there is a standard for evaluating these interests.

Lack of analysis of this issue has allowed room for the assumption that the interests to be balanced are somehow determined or at least influenced by the desires of the states themselves, but the fallacy of this reasoning is obvious. There is no objective means of measuring the subjective interests of states; consequently, a balancing test that attempted to measure them would have no content and would necessarily be discretionary.[112]

The standards for determining which interests are relevant to the comity analysis must therefore be objective; that is, the determination of whether an interest is to be included must be based on objectively ascertainable criteria. This means, first, that the only interests that should be relevant to the comity analysis are the legal interests of the states involved, because only legal interests are objectively ascertainable. Second, only public international law provides a reference framework for applying the comity test, because it alone defines the legal interests of states vis-à-vis each other.[113]

International law is not only the sole means of achieving objectivity in the comity analysis, but also the sole source of generally accepted principles defining the rights, obligations and legitimate expectations of states. If the objective of comity balancing is to accommodate the legitimate interests and expectations of states, it must be guided by international law principles. The issue here is not whether existing norms of conduct under international law have been violated.[114] Rather, a court is asked to look to the principles and processes of international law to determine which interests of states are legally protected. International law is thus used to render guidance in achieving domestic legal objectives.[115]

[111] *See, e.g.*, Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AJIL 756, 776–79 (1983).

[112] Foreign subjective interests may be relevant to the analysis of extraterritorial discovery, but only in a separate context. *See infra* text accompanying notes 151–53. On the problems of trying to combine objective and subjective elements in the same analysis, see Maier, *supra* note 60, at 582–88.

[113] National legal systems cannot provide objectivity in the international context, because they do not regulate the relationships among states and because each is subject to alteration by the state in which it operates.

[114] For discussion of that issue, see text at notes 76–103 *supra*.

[115] Such uses of international law have long been neglected, perhaps as a result of the positivist focus on the existence or nonexistence of specific norms, as well as on the separation of international law analysis from domestic legal analysis. Recently, attention has begun to be paid to the related issue of the role of "international soft law"—i.e., international principles that do not have the force of norms. *See, e.g.*, Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549 (1980); and G. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 179–91 (1983). *See also* Weil, *Vers une normativité relative en droit international?*, 86 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5 (1982), *modified, expanded and translated in* 73 AJIL 413 (1983).

United States regulatory interests. A state is entitled under international law to regulate its system of civil procedure as it wishes, provided that in so doing it does not unjustifiably harm the protected interests of foreign states.[116] The interests protected are what may be called "regulatory interests"—the right of a state to control its own domestic policies. For purposes of the comity analysis, therefore, the United States has a legally protected interest in applying its own discovery rules, and it is this interest that is to be balanced against any protected interests of other states.

The U.S. regulatory interest in applying discovery procedures extraterritorially derives from the role of discovery in the U.S. procedural system, which is to secure information for civil litigation.[117] Consequently, the U.S. regulatory interest in any requested discovery is a function of the importance of that information to the litigation; the more important the information is in a given case, the greater the interest of the United States in acquiring it.

Further analysis reveals that discovery actually performs two distinct functions in the U.S. system. One is to obtain reasonably identified evidence for use in proving contested facts (evidence gathering); the other is to *search* for information that may be used to identify such evidence (evidence seeking).[118] These functions represent different degrees of regulatory interest. Where information has been reasonably identified as directly relevant to the outcome of the litigation—i.e., where the source of the information (witness or document) is needed as evidence[119]—the U.S. interest is higher than where it is sought merely to determine whether it might eventually yield admissible evidence.[120]

The distinction between these two functions is important, because one is in accord with the practice of other states, while the other is not. Most states use state power to coerce persons subject to their jurisdiction into producing reasonably identified evidence.[121] Foreign states generally do not, however, allow state power to be used to search for evidence, at least not to the extent that this is done in the United States.[122]

[116] *See, e.g.,* I. BROWNLIE, *supra* note 77, at 298–99.

[117] *See generally* Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 VAND. L. REV. 1295, 1298–1303 (1978).

[118] *See generally* Hickman v. Taylor, 329 U.S. 495, 507 (1947); Lyell Theatre Corp. v. Loews Corp., 91 F.R.D. 97, 99 (W.D.N.Y. 1981) ("The purpose of discovery has been succinctly stated as 1) to narrow the issues; 2) to obtain evidence for use at trial; and 3) to secure information about the existence of evidence"); and Nutt v. Black Hills Stage Lines, Inc., 452 F.2d 480 (8th Cir. 1971). *See also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §2001 (1970).

[119] The concept of relevance used in the United States often differs dramatically from similar concepts employed in other legal systems. For discussion, see, e.g., Gerber, *supra* note 3, at 761–63.

[120] This is also the position of the new *Restatement. See* RESTATEMENT (THIRD), *supra* note 5, §442 comment *a.*

[121] *See, e.g.,* R. SCHLESINGER, H. BAADE, M. DAMASKA & P. HERZOG, COMPARATIVE LAW 425–33 (5th ed. 1987).

[122] For extensive discussion of the differences between the permissible scope of U.S. discovery and acceptable use of coercive power in the United Kingdom, see, e.g., Rio Tinto Zinc

The interests of foreign states. The interests of foreign states that are to be included in the comity analysis are identified in the *Aerospatiale* decision as "*sovereign* interests."[123] The language specifies that not all interests of a foreign state are to be considered in the analysis, but only those that relate to its sovereignty—i.e., those as to which it is entitled to protection under international law. The opinion thus implicitly requires the use of international law to determine whether interests are sovereign for purposes of the comity analysis.

Claims that U.S. extraterritorial discovery practices impinge on the sovereign interests of foreign states are based on the principle of noninterference.[124] In this context, however, that principle is not used as a source of accepted norms that prohibit defined conduct. Instead, it identifies state interests that may be harmed by particular conduct, thus requiring a balancing of those interests against the interests of the state causing the interference.

Consequently, the principle of noninterference performs two separate, but related, functions in analyzing extraterritorial discovery. It identifies certain state conduct as interference with the rights of a foreign state. In some cases, norms of customary international law have developed that prohibit such conduct, regardless of the interests of the regulating state. With regard to other types of conduct, no such norms have emerged, and a balancing analysis is necessary to determine whether the interference is justified.[125]

Where a U.S. court orders conduct within foreign territory, such an order necessarily interferes with that state's control over its own territory. Where the interference does not violate an existing norm of customary law, the issue is the *degree* of "interference" or "intrusion" that results. This point was made by the Supreme Court in *Aerospatiale* when it said that some orders are "more intrusive" than others.[126] The more the conduct interferes with the situs state's right to control information and persons within its territory, the more serious is the resulting harm for purposes of the comity analysis.

Examples drawn from the opinion illustrate the point.[127] Where the requested discovery merely consists of requests for admissions or interroga-

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Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434, [1978] 2 W.L.R. 81, *reprinted in* 17 ILM 38 (1978). For further discussion, see Gerber, *supra* note 3, at 757–69.

[123] *See, e.g., Aerospatiale,* 107 S.Ct. at 2556 (emphasis added).

[124] *See* text at notes 77–103 *supra.*

[125] Although the use of international law that I here advocate—namely, as the central informing principle for domestic comity analysis—is in many ways new, it is clearly supported by modern trends in international law scholarship, particularly by the writings of Professors Myres McDougal, Michael Reisman and other associated scholars of the "Yale school of international law." McDougal and his colleagues have focused attention on the breadth of the international law process and on the interrelatedness of legal and other social processes, and the analysis I am here proposing draws on those insights. *See, e.g.,* McDougal & Reisman, *The Prescribing Function: How International Law Is Made,* 6 YALE STUD. WORLD PUB. ORD. 249 (1980).

[126] *Aerospatiale,* 107 S.Ct. at 2556.

[127] *Id.* at 2555–56.

tories, there would typically be minimal harm to the protected interests of the foreign state.[128] An order to respond in writing to questions generally has little, if any, impact on a state's territorial prerogatives, and therefore such requests typically will encounter little difficulty in a comity analysis.[129]

In contrast, where private documents are required to be made available for inspection within the state or to be removed from the state, there may be considerable interference with the control that the foreign state is entitled to exercise over its territory, depending on the nature of the documents, the number of documents sought and the degree of specificity with which they are identified. As indicated by the Supreme Court,[130] such extensive interference may not be justified by the importance of the documents to the litigation. In each case, therefore, the degree of harm to the legally protected interests of a foreign state must be weighed against the importance of the requested information to the litigation.

Alternative Means of Discovery: The Hague Evidence Convention

The comity analysis also requires consideration of alternative means of obtaining information. Where information can be obtained with reasonable cost and convenience by means that would entail significantly less harm to foreign sovereign interests than discovery procedures, the objective of minimizing harm to protected state interests requires that the former means be used instead of or prior to the latter.

The only significant potential alternative to discovery is the Hague Evidence Convention.[131] Because the United States is a party to the Convention, the procedures it prescribes must be evaluated in the comity analysis if the situs state is also a party. As the Supreme Court held in *Aerospatiale,* a court may require those procedures to be used before resort is had to U.S. discovery rules where the Convention provides a reasonably efficient and convenient means of acquiring the information sought.[132]

Use of the Convention entails no harm to protected interests of a state party because, by definition, that state has agreed to it.[133] Consequently, where these procedures can reasonably be expected to perform the functions otherwise performed by discovery procedures without undue inconvenience to the requesting party, the harm to foreign interests that would result from using discovery procedures cannot be justified. In each case, two issues require analysis: (1) how effective and convenient the procedures of

[128] The degree of harm will depend primarily on the scope of the interrogatories and the type of information requested. The broader the range of the interrogatories and the more politically or economically sensitive the information, the greater the degree of interference.

[129] Interrogatories may, of course, also raise issues of fairness to the litigant that must be analyzed separately. *See* text at notes 62–75 *supra.*

[130] *Aerospatiale,* 107 S.Ct. at 2557.

[131] Information may be obtained from foreign territory through use of letters rogatory, but they do not oblige the situs state to provide the requested information and therefore cannot be viewed as a reasonable alternative to U.S. discovery procedures.

[132] *Aerospatiale,* 107 S.Ct. at 2555. [133] *Id.* at 2563 (Blackmun, J., dissenting).

the Convention would be in providing the requested information, and (2) how important the requested information is to the litigation.

For many purposes, the Convention clearly does offer a convenient and effective alternative to United States discovery.[134] Where a U.S. court properly requests information, the foreign court generally is required to supply it. In most cases, therefore, the litigant can reasonably rely on production. Moreover, the procedures, for the most part, are easily understood and their effectiveness in a particular case can reasonably be predicted. Finally, the costs of using them are minimal,[135] and compliance burdens are generally limited.[136]

Nevertheless, two potentially significant limitations detract from the utility of the Convention as an alternative to U.S. discovery procedures. First, under the Convention, parties may not search for information to the extent possible under the U.S. rules. Most states take the position that its procedures may only be used to acquire information that a judge has determined to be directly related to issues involved in the litigation.[137]

While this requirement may limit the scope of investigation in some cases, this reduction in scope may be offset by an increase in the ability of the foreign judge to acquire relevant information.[138] Moreover, such limitations in scope are often more apparent than real, because they merely require the United States attorney to specify and identify the requested information more clearly than would be necessary under U.S. rules.[139]

The second limitation concerns the examination of documents under the Convention. Although by its terms the Convention applies to the examination of documents, most states have filed reservations under Article 23 declaring that they "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common

[134] For general discussions of the practical advantages of using the Convention, see, e.g., Augustine, *Obtaining International Judicial Assistance under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and a Practical Example: In re Westinghouse Uranium Contract Litigation*, 10 GA. J. INT'L & COMP. L. 101 (1980); Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 INT'L LAW. 575 (1982); and *1969 Delegation Report, supra* note 86, at 806–07. For discussions of the practical aspects of using the Convention to obtain information in particular states, see Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 37 (1979); Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States, id.* at 27; and Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation, 17 id.* at 465 (1983).

[135] *See* 1 B. RISTAU, *supra* note 9, at 225–28. *See also* Note, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—A Comparison with Federal Rules Procedures*, 7 BROOKLYN J. INT'L L. 365, 396–97 (1981).

[136] Technical problems, e.g., translation, associated with gathering information from foreign sources may arise in using the Convention, but such problems are not necessarily greater or lesser than they would be if discovery procedures were used.

[137] *See, e.g.*, 1 B. RISTAU, *supra* note 9, at 229–35.

[138] For discussion of the advantages of having a civil law judge do the questioning, see Langbein, *supra* note 50, at 826–30.

[139] *See, e.g.*, Heck, *supra* note 47, at 234–35; and Shemanski, *supra* note 134, at 470.

Law countries," at least under certain circumstances.[140] This restricts the utility of the Convention, but only to a limited extent. First, not all parties have filed such reservations.[141] Second, many of the reservations are limited in scope, often allowing documents to be acquired where they can be shown to be directly relevant to issues in the litigation.[142] Finally, information about the contents of documents generally can be acquired through oral examination.[143] This oral information can often serve to establish the relevance—hence the accessibility—of the documents themselves.

The comity analysis requires that use of the Convention as an alternative to U.S. discovery procedures be assessed in the context of specific informational needs. Consequently, where particular information is not likely to be obtainable with reasonable convenience through the procedures of the Convention, an additional level of analysis is required.[144] Here the test would be whether the need for the requested information outweighs any harm to the sovereign interests of the situs state that would result from the use of U.S. discovery procedures.

The Expression of Sovereign Interests and the Subjectivism Fallacy

The majority opinion in *Aerospatiale* refers on two occasions to "sovereign interests *expressed* by foreign states."[145] These references implicate an ele-

[140] Art. 23, Hague Evidence Convention, *supra* note 9. *See generally* Note, *supra* note 52, at 73, 84–87.

[141] States that have made reservations include Denmark, Finland, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden and the United Kingdom. 8 MARTINDALE-HUBBELL LAW DIRECTORY 15–21 (1987).

[142] According to the reservation of the United Kingdom, for example:

> In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letter of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:
>
> a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody, or power; or
> b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the request court to be, or to be likely to be, in his possession, custody or powers.

Declarations and Reservations of the United Kingdom, *id.* at 19.

For other reservations with similar provisions, see those of France, Luxembourg, the Netherlands, Norway, Portugal, Singapore and Sweden. *Id.* at 15–21.

[143] There are typically few limits on the right to question witnesses about the contents of documents. In Germany, for example, a witness is required to refresh his recollection about the content of documents, if necessary to have them with him, and to answer fully about their contents. *See generally* Martens, *German Civil Procedure and the Implementation of the Hague Evidence Convention,* 1 INT'L LITIGATION Q. 115, 120 (1985). For discussion of similar procedures in the United Kingdom, see J. LEVINE, DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS 61–67 (1982).

[144] For information that is not reasonably and conveniently available under the Convention, the analysis is essentially the same as in cases where the situs state is not a party to the Convention.

[145] *Aerospatiale,* 107 S.Ct. at 2555, 2557 (emphasis added).

ment of subjectivism in the analysis that is not only misplaced and misleading, but also inconsistent with an effective analytical framework. As discussed above,[146] a comity analysis can only be effective where it is based on the objective evaluation of legally protected interests; the manner in which they are expressed should not be relevant.

Although "expression" is not explained by the Court, there are two ways that it can come into play. A state may "express" its interests by enacting blocking legislation and by attempting to influence U.S. litigation, whether through appeals to the Department of State[147] or through appearance as amicus curiae.[148] Since an unstructured analysis does not differentiate between objective and subjective issues, one might argue that such actions indicate the intensity of the state's concern and should be accorded weight in the balancing process.

The Supreme Court appears to have envisioned that the expression of interests could be used as a convenient and easily applicable filter to reduce the number of situations in which foreign interests must be considered, which, in turn, would reduce both burdens on the courts and the number of cases in which foreign sovereign interests could "block" the application of U.S. discovery rules. A court can readily determine whether a foreign state has "expressed" its interests and thus can easily filter out many cases.

A structured analytical framework, however, obviates the need for this type of artificial and easily avoidable conceptual filter.[149] In particular, an objective comity analysis gives weight to foreign interests according to readily ascertainable standards and only in a balancing context. The inclusion of subjective elements in the comity analysis would destroy its integrity by requiring courts to attempt to evaluate subjective interests and relate them to objective interests. Moreover, there is no basis for judicial evaluation of such subjective factors, and there is no basis for comparing them or relating them to objective factors.[150]

In addition to rendering judicial decision making discretionary, the inclusion of subjective factors in the analysis of discovery requests would create incentives for foreign states to "express" their interests through blocking legislation and attempts to influence U.S. litigation. Any such response would further impede U.S. policy and interfere with the effectiveness of U.S. litigation.

[146] *See* text at notes 111–15 *supra*.

[147] For discussion, see Oxman, *supra* note 79, at 148 n.39; and Contemporary Practice of the United States, 73 AJIL 669, 678 (1979).

[148] On the use of statements by foreign governments, see Comment, *The Sovereign Compulsion Defense in Antitrust Actions and the Role of Statements by Foreign Governments*, 62 WASH. L. REV. 129, 146–49 (1987).

[149] These references appear to be part of the Court's response to the previous practice of utilizing the foreign sovereign compulsion defense to analyze blocking legislation. For discussion, see text at notes 156–172 *infra*.

[150] A state's position may, of course, be relevant to the analysis of state practice under customary international law, because customary international law develops through the responses of states to the actions of other states. A state's actions, however, are only relevant under certain circumstances and only when related to the actions of other states. For a leading discussion of the formation of customary international law, see, e.g., A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

FOREIGN RELATIONS INTERESTS OF THE UNITED STATES

While the degree of importance attached by a foreign state to particular conduct or litigation should not be a factor in the comity analysis, a foreign state's subjective concerns may affect the foreign relations of the United States. Consequently, where the U.S. Government considers that an extraterritorial discovery order would harm important foreign relations objectives and asks the court to limit discovery accordingly, the court should normally accede to the request. This treatment of foreign relations issues accords with U.S. law, which requires that the courts generally defer to the executive branch in matters relating to U.S. foreign relations.[151]

In contrast to the comity analysis, this component of the proposed analytical framework does not involve the accommodation of conflicting state interests. It is based on the recognition, however, that at times discovery practices will affect the foreign relations interests of the United States, and it provides a means of considering such political issues. The subjective concerns of a foreign state are taken into account, if at all, by the responsible political officials of the United States Government.[152]

When the analysis is structured in this way, the courts are not placed in the position of having to make political judgments. Political issues are relevant only if the U.S. Government has determined that a particular discovery order should be modified. In those presumably rare cases, the court has only two functions. It must assure that the Government has reasonable grounds for its request, and it must fashion discovery orders that minimize any harm to the fairness rights of individual litigants.[153]

ANALYSIS OF FOREIGN BLOCKING STATUTES

Because foreign states can easily impede U.S. policy by enacting and enforcing blocking legislation,[154] the treatment of such legislation is central to effective analysis of extraterritorial discovery practices. Unfortunately,

[151] *See, e.g.*, United States v. Belmont, 301 U.S. 324, 330 (1937); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801–08 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); and United States v. First Nat'l City Bank, 396 F.2d 897, 901 (2d Cir. 1968) ("[C]ourts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs"). *See generally* Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

[152] For a discussion of government decision making involving these issues, see Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7, 25–33 (1985).

[153] In effect, this will require judges to keep discovery orders as narrow as is consistent with legitimate government purposes.

[154] According to one court, "A blocking statute is a law passed by the foreign government imposing a penalty upon a national for complying with a foreign court's discovery request." *In re* Anschuetz & Co., 754 F.2d 602, 614 n.29 (5th Cir. 1985). For discussion of blocking legislation, see, e.g., 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §4.17 (1981). As of 1986, 15 states had enacted legislation designed to counter U.S. efforts to secure the production of documents within their territories. *See* RESTATEMENT (THIRD), *supra* note 5, §442 Reporters' Note 1. For a list of such legislation, see *Bibliography—International Discovery*, 16 N.Y.U. J. INT'L L. & POL. 1217, 1223–26 (1984).

however, judicial analysis of blocking legislation has been fundamentally flawed,[155] and the *Aerospatiale* decision did not significantly improve the situation. The Supreme Court's misguided analysis of this issue can be understood only in light of the conceptual framework to which the Court was responding.

Prior to *Aerospatiale,* blocking legislation was analyzed primarily by application of the so-called foreign sovereign compulsion defense.[156] Originally developed in the context of antitrust enforcement, this doctrine provides that conduct compelled by a foreign sovereign is immune from prosecution in the United States.[157] The defense has been viewed as an extension of the act of state doctrine,[158] and it also has been supported on grounds of fairness and comity.[159]

Applying the basic idea behind this doctrine to extraterritorial discovery,[160] the courts have held that discovery orders must be modified so as not to require a national or resident of a foreign state to engage in conduct on foreign territory that is prohibited by that state.[161] The foreign sovereign compulsion defense thus has served as a convenient conceptual device to limit the reach of U.S. discovery jurisdiction.

Use of the defense to analyze discovery issues, however, suffers from a fundamental conceptual flaw because it does not provide a mechanism for

[155] *See, e.g.*, Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation,* 88 YALE L.J. 612 (1979); Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law,* 63 COLUM. L. REV. 1441 (1963); Comment, *Ordering Production of Documents from Abroad in Violation of Foreign Law,* 31 U. CHI. L. REV. 791 (1964); and Note, *Compelling Production of Documents from Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production,* 14 VA. J. INT'L L. 747 (1974). *See also 1985 Special Commission Report, supra* note 87, at 1675.

[156] For discussion of this defense, see Meal, *Governmental Compulsion as a Defense under United States and European Community Antitrust Laws,* 20 COLUM. J. TRANSNAT'L L. 51 (1981); Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies,* 16 N.Y.U. J. INT'L L. & POL. 1061 (1984); Timberg, *Sovereign Immunity and Act of State Defenses, Traditional Boycotts and Economic Coercion,* 55 TEX. L. REV. 1, 20–27 (1976); and Note, *International Law—Extraterritoriality—Antitrust Law—Development of the Defense of Sovereign Compulsion,* 69 MICH. L. REV. 888 (1971).

[157] *See, e.g.*, Interamerican Refining Corp. v. Texaco Maracaibo, 307 F.Supp. 1291, 1296–99 (D. Del. 1970) (proof of compulsion by Venezuelan regulatory authorities served as a defense to U.S. antitrust action).

[158] *See, e.g.*, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976); and United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. (CCH) 70,600, 77,456 (S.D.N.Y. 1963). For discussion, see Meal, *supra* note 156, at 77–82.

[159] *See, e.g.*, United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir.), *cert. denied,* 454 U.S. 1098 (1981) (on fairness); United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968); and Application of Chase Nat'l Bank, 297 F.2d 611, 613 (2d Cir. 1962) (on comity).

[160] The same basic justifications have been used regarding discovery. *See, e.g.,* Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 35 (S.D.N.Y. 1984); and Schroeder v. Lufthansa German Airlines, 39 Fed. R. Serv. 2d 211, 212 (N.D. Ill. 1983).

[161] *See, e.g.*, United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 345 (7th Cir. 1983); United States v. Vetco, Inc., 691 F.2d 1281, 1287–88 (9th Cir.), *cert. denied,* 454 U.S. 1098 (1981); and FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980).

accommodating conflicting interests. By merely prohibiting discovery where foreign legislation satisfies certain conditions, the doctrine refers only to the interests of the situs state and does not reflect those of the requesting state. Even more importantly, it does not consider the effects of such legislation on individual litigants.

Indeed, use of this analysis encourages foreign states to enact blocking legislation; it appears to have played a significant role in the increase of such statutes.[162] Consequently, use of the doctrine not only has been analytically flawed, but also has tended to increase the harm that it should have diminished.

To minimize the consequences of using this flawed analysis, United States courts have severely restricted the scope of application of the doctrine.[163] For example, it has been held that the defense applies only if the defendant can show that it has in good faith taken all reasonable steps to avoid application of the foreign statute.[164] Moreover, the defense has been held to apply only where compliance with the discovery request would require violation of a penal statute[165] that is regularly enforced.[166]

In *Aerospatiale* the Supreme Court implicitly rejected use of the foreign sovereign compulsion defense to analyze blocking legislation. Arguing that "blind obedience" to blocking legislation would subject U.S. courts to "control" by foreign states,[167] the Court held that such legislation did not automatically block U.S. discovery orders. Instead, the Court included blocking legislation within the "particularized analysis" of discovery requests.

In rejecting foreign sovereign compulsion as the conceptual tool for analyzing blocking legislation, the Court eliminated a major obstacle to effective analysis of this issue. The Court went on, however, to undermine much of the improvement this step entailed and to create new uncertainty. Apparently still responding to the conceptual framework it was rejecting,[168] the

[162] For discussion, see 1 E. NEREP, *supra* note 54, at 589–603 (1983).

[163] On the limitations of the defense, see Timberg, *supra* note 156, at 23–27; and Comment, *supra* note 148, at 134–44.

[164] *See* United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 346 (7th Cir. 1983); United States v. Vetco, Inc., 644 F.2d 1324, 1332 (9th Cir. 1981); and Graco Inc. v. Kremlin, Inc. & SKM, 101 F.R.D. 503, 516 (N.D. Ill. 1984). *See also* Timberg, *supra* note 156, at 23.

[165] *See, e.g.*, Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 211 (1958) ("It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction"). *But see* RESTATEMENT (THIRD), *supra* note 5, §441 comment *c* (which indicates that the foreign sovereign compulsion defense applies where "the requirement or prohibition by the first state is backed by criminal or civil liability or both").

[166] *See, e.g.*, Application of Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir 1962); and Remington Products, Inc. v. North Am. Phillips Corp., 107 F.R.D. 642, 643 (D. Conn. 1985).

[167] *Aerospatiale*, 107 S.Ct. at 2556 n.29.

[168] One part of the Court's analysis involved a fundamental misunderstanding of the international jurisdictional issue. According to the Court, "[T]he language of the statute, if taken literally, would appear to represent an extraordinary exercise of *legislative jurisdiction* by the Republic of France over a United States District Judge . . ." (emphasis added). *Id.* The

Court stated that blocking legislation could only be considered "to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material."[169] The Court apparently intended to use this interest-specification requirement to distinguish between "substantive rules of law" and legislation designed to frustrate U.S. discovery efforts.[170] But the Court failed to recognize that such a requirement is unnecessary where blocking legislation is subsumed in a particularized analysis of all the facts of a given situation.

The Court also failed to perceive a basic inconsistency in its reasoning. At the same time that the *Aerospatiale* opinion established a restrictive and formalistic interest-specification requirement virtually eliminating blocking legislation from consideration in the comity analysis,[171] it required courts to consider fairness to litigants. Yet blocking legislation often has a direct impact on the fairness of discovery orders, and thus the interest-specification requirement may be inconsistent with the objective the Court intended to promote. The lack of conceptual structure in the *Aerospatiale* analysis appears to have concealed from the Court this fundamental flaw in its approach to blocking legislation.

Where, as proposed here, blocking legislation is treated primarily as an issue of fairness to litigants,[172] such inconsistency and confusion are eliminated. The analysis focuses instead on the point of impact of blocking legislation on a particular fact situation—namely, its effect on the fairness of the proceedings—and it reduces incentives for foreign states to use blocking legislation to impede U.S. policy.

IV. Concluding Perspectives

Extraterritorial Discovery and American Law

Where a U.S. court applies discovery procedures to information located in a foreign state, domestic policy objectives can be achieved only with the cooperation of that state. In addition to being able to prohibit compliance with extraterritorial discovery orders, foreign states have every right to

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concept of legislative jurisdiction refers, however, to the legal capacity of a state to attach legal consequences to particular conduct. The French blocking statute merely attaches legal consequences to the actions of individuals subject to its jurisdiction. It does not purport to attach legal consequences to the conduct of a U.S. judge.

[169] *Id.*

[170] This distinction derives from the new *Restatement. See* Restatement (Third), *supra* note 5, §442 Reporters' Note 5.

[171] Existing blocking statutes do not typically meet the interest-specification requirements. *See, e.g.*, Law Concerning the Communication of Documents or Information of an Economic, Commercial, Industrial, Financial or Technical Nature to Aliens, Whether Natural or Juristic Persons, No. 80-538, 1980 J.O. 1799 (France); and Protection of Trading Interests Act, 1980, ch. 11 (United Kingdom). For discussion, see Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AJIL 257 (1981); Herzog, *The 1980 French Law on Documents and Information, id.* at 382; and Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585 (1981).

[172] *See* text at notes 62–75 *supra.*

prevent it. This interdependence of states fundamentally alters the legal context in which U.S. courts must operate; to achieve procedural fairness, U.S. courts must exercise their power to order extraterritorial discovery on the basis of principles that effectively accommodate the interests of foreign states.

In its *Aerospatiale* decision, the United States Supreme Court recognized the need to establish principles of restraint that would reflect both the international context of extraterritorial discovery and the interests of foreign states and litigants. It also generally recognized that achieving its goals would require reference to the legitimate expectations of states under international law. The Court failed, however, to provide a conceptual framework within which these goals could be pursued effectively. Moreover, the Court failed to recognize that achieving U.S. goals regarding extraterritorial discovery requires not only appropriate substantive principles, but also appropriate analytical methods.

The analytical framework proposed in this article is designed to achieve the goals of accommodation and effective justice that were identified in *Aerospatiale.* Both the structure and the substance of the proposed framework are specifically adapted to the new legal context created by U.S. extraterritorial discovery practices.

The proposed framework responds to the methodological requirements of this context by providing sufficient conceptual structure to allow analytical clarity as well as reasonable predictability and flexibility in decision making. It provides for analytical clarity by identifying the interests, policies and principles involved in the often complex legal and factual situations created by extraterritorial discovery requests and by relating them to a coherent decision-making framework. It thus separates issues that tend to be mixed together. The foreign relations interests of the United States, the need for accommodation with foreign states, fairness concerns and international law norms—all involve distinct policy goals and thus require separate analysis related to the ends to be served. Where these complexes of issues are not separately identified and courts are asked merely to balance interests on an undefined and unstructured basis, the underlying objectives are unlikely to be given consistently adequate consideration.

The framework of analysis proposed here responds to the need to accommodate foreign interests by providing information to foreign states concerning the factors that courts will consider in reaching decisions on extraterritorial discovery. It assures those states that their interests will be evaluated according to a particular set of principles and allows them reasonably to assess probable judicial responses to particular situations and to actions they might take—e.g., the enactment of blocking legislation.

The substantive principles that inform the analysis are also specifically adapted to the legal context of extraterritorial discovery. The issue of blocking legislation is analyzed, for example, at its specific point of impact on those affected, namely, by reference to its effect on the ability of a litigant to comply with a U.S. discovery order.

Of particular importance is the analysis of comity. Whereas comity is frequently either applied without conceptual structure or given content by reference to vague "general interests," here its content is derived from the only set of principles whose use can make it effective—i.e., principles of international law. This use of international law is unfamiliar because it treats international law not as a source of specific norms of conduct that either are or are not violated, but as an informing principle for domestic decision making. It recognizes that international legal processes determine the expectations of states regarding the activities of other states and therefore must be the cornerstone of any domestic legal analysis that attempts to accommodate those expectations.

ACHIEVING AN EFFECTIVE FRAMEWORK OF ANALYSIS

Achieving widespread acceptance of an analytical framework such as the one proposed here may be as difficult as it is important. The sheer range of factors that may be affected by judicial decisions involving extraterritorial discovery may be an obstacle to the rapid development of a cohesive framework of analysis by the lower courts. An order applying U.S. discovery rules to information located abroad may affect several types of state interests of the United States, a variety of foreign state interests and the interests of actual and potential foreign and domestic litigants. Courts operating without a structured and comprehensive framework of analysis may be inclined to make ad hoc decisions based on factors that appear important in the particular case. Judicial development of a principled analysis may therefore be quite slow.

Judicial structuring will also be impeded by the general lack of opportunity for appellate review of discovery orders. Appellate court opinions are the primary means of developing legal principles in the U.S. system, but lower court rulings relating to extraterritorial discovery will typically be subject to review only where they are without reasonable foundation.[173] As a consequence, appellate opinions may not perform their normal role in developing conceptual structure.[174]

Under these circumstances, inductive generalizations based on limited trial court experience may be particularly misleading. For example, factors not considered or misunderstood in a series of trial court decisions may erroneously be omitted from general principles based on those decisions. Similarly, erroneous interpretations of factual situations by lower courts may be perpetuated in future cases.

[173] *See* 8 C. WRIGHT & A. MILLER, *supra* note 118, §2006; and 15 *id.* §3914 (1976). *See also* Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 143 (8th Cir. 1968).

[174] Legal scholarship may aid in the development of structure. Because legal commentators are not subject to the constraints imposed by particular fact situations, they can more easily focus on the development of the principles of analysis. Legal literature may thus be a central source of information about what lower courts are doing, as well as a means of identifying patterns in the resulting data.

Given these obstacles to developing an effective analytical framework through adjudication alone, achieving the goals of *Aerospatiale* may require that elements of structure be prescribed through legislation and/or international cooperation. It must be emphasized that the objective is not to provide fixed rules, but to establish general principles that can guide the adjudicative process.

The most direct and effective means of establishing such principles would be to include them in the Federal Rules of Civil Procedure and in analogous state procedural codes. Many of the relevant principles—e.g., the requirement of procedural fairness—are not open to serious question. Consequently, the main effect of prescribing a framework of analysis would be to clarify the applicability of the principles, to establish their interrelationships and, in so doing, to facilitate their effective use.[175]

Analytical principles may also be established through international cooperation. For example, the United States could make agreements with foreign governments on either a bilateral or a multilateral basis concerning principles to be applied to the evaluation of discovery requests.[176] The agreements could designate the framework for analyzing discovery requests involving particular countries or identify the state interests to be considered.

REDUCING CONFLICTS: RESTRAINTS AND ALTERNATIVES

Under the current international legal system, the development of effective legal principles to accommodate the interests affected by the extraterritorial application of U.S. discovery procedures must occur, if at all, in the courts of the United States, because they are virtually the only judicial forums for evaluating these issues. The effort to develop an effective framework of analysis under U.S. law thus becomes particularly critical. Nevertheless, accommodation by means of U.S. litigation is likely to be difficult, costly and time-consuming, owing to the extent and variety of conflicting interests and the inherent limitations on the effective adjudication of such issues by national courts. Consequently, the need to fashion an analytical framework that can perform this function effectively should not obscure the importance of efforts to reduce the need for such litigation.

Through bilateral and/or multilateral agreements states themselves can provide or improve alternatives to U.S. discovery procedures and thus re-

[175] An additional benefit of the process of prescribing general principles is that it may be combined with policy analysis of the importance of pursuing particular objectives. Congress and/or the Supreme Court can face the full range of issues and ask how U.S. state power should be employed in the context of extraterritorial discovery.

[176] For example, foreign governments could provide information on their own interests and procedural systems, and thus make U.S. proceedings less burdensome, less costly and more effective. In addition, foreign states could enter into agreements with the United States about procedures and principles they would apply to U.S. letters of request, and thus allow U.S. courts more effectively to evaluate the consequences of requiring use of the Hague Evidence Convention.

duce incentives for the extraterritorial application of those procedures and perhaps even limit its permissible scope.[177] In particular, the Hague Evidence Convention could be revised to improve its attractiveness to U.S. litigants, and its use could even be required under specified circumstances.[178]

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The United States has chosen to utilize procedures to obtain information located abroad for use in civil litigation that most foreign countries consider unacceptable, at least under some circumstances. Nevertheless, because the United States depends on the cooperation of foreign states to achieve its domestic objectives, the analysis applied by its courts must reflect this interdependence.

To the extent, therefore, that the U.S. legal system develops an effective mechanism for accommodating the interests affected by the extraterritorial application of U.S. discovery procedures, the system of international relationships on which the United States depends for achieving its policy goals will be improved and impediments to its policies will be reduced. To the extent, however, that U.S. courts treat decisions on extraterritorial discovery as exercises in discretionary justice and/or consistently favor U.S. litigants or interests, United States extraterritorial discovery practices will continue to be a source of unfairness, conflict, uncertainty and waste.

[177] For discussion of different interpretations of the Hague Evidence Convention and suggestions for possible improvements, see Gerber, *supra* note 3, at 779–88.

[178] For example, the signatory states could narrow the scope of permissible reservations under Article 23, which would clarify a source of conflict, eliminate confusion and uncertainty, and increase the usefulness of the Convention for American litigators.