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A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery

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ABSTRACT

No feature of U.S. law has rankled foreign nations more than the supposed "legal imperialism" of discovery requests for information located abroad to be used in U.S. litigation or investigations. China, France, Germany, and Switzerland have threatened the stability of bilateral relations with the United States due to overbroad transnational discovery requests. For three decades, when faced with concerns of international comity in the discovery context, U.S. courts ruled overwhelmingly in favor of discovery through the Federal Rules, rendering international comity a dead concept.

Recent case law, however, shows that this paradigm is coming to an end. In a trilogy of cases decided, respectively, by the United States Supreme Court (*Daimler*), the Second Circuit (*Gucci*), and the New York State Court of Appeals (*Motorola*), each court rejected attempts by plaintiffs to subject foreign entities to jurisdiction in the United States or otherwise impose on them overbroad duties, including those in conflict with foreign laws. Prominently relying on "international comity," each decision limited the reach of U.S. courts and emphasized the need for harmony in the international legal system. These three cases are groundbreaking and should lead to changes in U.S. transnational discovery.

The Article analyzes this recent revival of international comity. First, it explores the history of international comity and its interaction with broad U.S. discovery rules. Second, it briefly reviews the Supreme Court case *Aérospatiale*, which dealt a blow to international comity. Third, this Article analyzes how

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Daimler, *Gucci*, and *Motorola* relied on comity to reach their holdings and argues that international comity has been revived in the context of discovery. Finally, this Article takes a normative approach and argues that U.S. courts should engage in a qualitative limitation of the kinds of U.S. interests that are significant in the transnational discovery context.

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INTRODUCTION

It has been widely noted that no feature of U.S. law has rankled foreign nations more than discovery requests for information located abroad to be used in U.S. litigation or investigations.[1] For example, Chinese regulators recently threatened the stability of bilateral relations with the United States due to overbroad transnational discovery requests against the Bank of China stemming from litigation in New York.[2] France and Switzerland have enacted statutes criminalizing the production of documents to U.S. authorities,[3] and Germany has called it "an intrusion into its sovereignty."[4] Not only do U.S. discovery procedures affect international relations, they also deter foreign companies from doing business in the United States due to fears of overbroad jurisdiction assertions.[5] Precisely for this reason, the New York Court of Appeals recently intimated that New York's place as the commercial and financial center of the world is endangered by uninhibited personal jurisdiction and the judiciary's overbroad exercise of extraterritorial power over foreign matters and parties.[6]

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1. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, Reporters' Notes ¶ 1 (1987); Bate C. Toms III, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L L. 585, 585 n.1 (1981).

2. *See* Letter from Huai Peng Mu, Director-General of the Legal Affairs Department of the People's Bank of China, and Yi Huang, the Director-General of the Supervisory Rules and Regulations Department of the China Banking Regulatory Commission, to Catherine O'Hagan Wolfe, Clerk of Court, United States Court of Appeals for the Second Circuit (Dec. 19, 2013) (writing with respect to the pending appeals in Gucci America, Inc. v. Bank of China, Nos. 11-3934(L)).

3. Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes ou morales étrangères [Law 80-538 of July 16, 1980 on Communication of Documents and Information for Economic, Commercial, or Technical Persons or Foreign Legal Entities], Journal Officiel de la République Française [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1980, p. 1799; Brief for Government of Switzerland as Amicus Curiae Supporting Respondents at 1–2, 13–15, United States v. UBS AG, No. 09–20423–CIV, 2009 WL 2241122 (S.D. Fla. July 7, 2009).

4. *See* Brief for Federal Republic of Germany as Amicus Curiae Supporting Appellants at 1, *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3rd Cir. 2004) (No. 02-4272), 2003 WL 24136399. In many instances, foreign nations are interested in resolving these disputes domestically, rather than allowing U.S. courts to sanction their corporations or order turnover of local citizens' accounts.

5. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008); Brief for the United States as Amicus Curiae Supporting Petitioners at *12, Goodyear Luxembourg Tires, S.A. v. Brown, 561 U.S. 1058 (2010) (No. 10-76), 2010 WL 4735597 (noting that overbroad assertions of general jurisdiction "may dissuade foreign companies from doing business in the United States, thereby depriving United States consumers of the full benefits of foreign trade."); Memorandum of Law by Chamber of Commerce of the United States of America as Amicus Curiae in Opposition to Plaintiff's Motion to Compel at 8, Quinn v. Altria Group, Inc., No. 07 Civ. 8783(LTS)(RLE), 2008 WL 3518462 (S.D.N.Y. Aug. 1, 2008) ("The prospect of U.S. discovery is a harrowing one for most foreigners and provides a significant disincentive to doing business in this country, and that disincentive increases to the extent compliance with U.S. procedures would incur liability under foreign law.").

6. Motorola Credit Corp. v. Standard Chartered Bank, 21 N.E.3d 223, 228 (N.Y. 2014).

Without a doubt, the repercussions of developments in this area of law are increasingly important in the modern global economy.[7]

In the United States, discovery is a routine procedural issue that courts, armed with broad jurisdiction and subpoena powers, are well equipped to supervise.[8] However, when a lawsuit involves foreign parties and documents located in foreign nations, discovery can generate complex and difficult conflicts between U.S. procedures and foreign laws.[9] This kind of transnational discovery has seen much activity recently because foreign corporations with affiliates in the United States are faced with an increasing barrage of lawsuits, subpoenas, and turnover actions from litigants seeking judgment in U.S. courts. Confronted with these conflicts between U.S. discovery rules and foreign laws, courts seek to promote international harmony by giving deference to the sovereign interests of the affected nations, a principle called "international comity."

This Article identifies and explains a recent trend in U.S. case law towards renewed respect for international comity and foreign laws in the particular context of transnational discovery. In an era of austere U.S. foreign and domestic policy, courts are following the executive's lead in refurbishing their international comity bona fides when faced with overbroad discovery requests. This judicial development is of particular importance for foreign relations and the global economy because it will alter the operations of thousands of multinationals, the international trade system, and data protection laws.

For three decades, when faced with concerns of international comity and discovery requests, U.S. courts applied a balancing test to weigh the interests of foreign countries against U.S. interests, and ruled almost unanimously in favor of U.S. interests and the judiciary's power to reach foreign documents or assets.[10] Due to the unjustified emphasis on U.S. interests in patent laws, antitrust laws, criminal laws, and other broad categories, foreign defendants could hardly use international comity as a shield. Instead, comity became a frivolous argument raised by foreign litigants as a last, and ultimately unsuccessful, resort.

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7. *See supra* note 5. Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 795 (S.D.N.Y. 2012) ("[It] may well be correct that transnational discovery requests are increasing due to the global nature of 'international commerce'"). *See generally* STEPHEN BREYER, THE COURT AND THE WORLD (2015) (describing the growing international aspect of the Supreme Court's docket).

8. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 551 (1987) (Blackmun, J., concurring in part and dissenting in part) ("The discovery process usually concerns discrete interests that a court is well equipped to accommodate—the interests of the parties before the court coupled with the interest of the judicial system in resolving the conflict on the basis of the best available information. When a lawsuit requires discovery of materials located in a foreign nation, however, foreign legal systems and foreign interests are implicated as well.").

9. *See id*.

10. *See infra* notes 253–62.

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But, as this Article will show, this thirty-year paradigm seems to be coming to an end. In a trilogy of recent cases decided, respectively, by the United States Supreme Court (*Daimler AG v. Bauman*), the Second Circuit Court of Appeals (*Gucci America, Inc. v. Weixing Li*), and the New York State Court of Appeals (*Motorola Credit Corp. v. Standard Chartered Bank*), each court prominently relied on "international comity" in refusing to subject foreign entities to jurisdiction in the United States or otherwise impose on them overbroad duties, thereby limiting the reach of U.S. courts. In the context of *Motorola* and *Gucci*, the courts protected non-party foreign banks from discovery or turnover of documents and funds located abroad. These three cases are groundbreaking. They may significantly affect the development of transnational discovery and strengthen alternative avenues to such discovery.

This Article analyzes this recent revival of international comity. First, it explores the recent history of international comity and its interaction with broad U.S. discovery rules. Second, it reviews the Supreme Court case *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, which dealt a blow to international comity. Third, this Article analyzes how *Daimler*, *Gucci*, and *Motorola* relied on comity to reach their holdings and argues that international comity has been revived in the context of discovery. Finally, this Article takes a normative approach and argues that U.S. courts should engage in a qualitative limitation on the kinds of U.S. interests that are significant in the transnational discovery context.

I.
THE HISTORY OF INTERNATIONAL COMITY & DISCOVERY

A. What is International Comity?

At its simplest, international comity is the concept of judicial respect for the sovereignty of foreign nations.[11] Courts have long recognized that international comity "is neither a matter of absolute obligation . . . nor of mere courtesy and good will."[12] Instead, comity involves "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[13] Thus, even where a court is within its powers to hear a

11. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

12. *Id.*; *see also* SEC v. Banner Fund. Int'l, 211 F.3d 602, 612 (D.C. Cir. 2000) (noting that comity in the context of discovery means "the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum."); Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966) (indicating that the concept of comity was developed in the late 17th century).

13. Hilton, 159 U.S. at 164. *See also* Van Den Biggelaar v. Wagner, 978 F. Supp. 848, 857 (N.D. Ind. 1997) ("In the United States, the comity concept was imported by Joseph Story but later modified into a discretionary principle with an ambiguous status between law and policy.").

case or force a foreign corporation to comply with an order, international comity compels courts to consider the interests of foreign nations in the dispute.

Comity could be considered the judicial way of conducting diplomacy.[14] Although not a political branch, the judiciary is often involved in issues of great international consequence.[15] Whether addressing treaties, foreign wars, historical claims, or other important global issues, U.S. courts at times act in the name of the country, and as such must consider the repercussions of their decisions on foreign relations.[16] Justice Breyer recently affirmed the growing need for "coordination with other jurisdictions . . . for the smooth functioning of our economy and our various institutions."[17] Because of this need for coordination, Justice Blackmun once noted that "[c]omity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill."[18]

Commentators typically marshal four major arguments in support of the continued existence of international comity in the civil context: (1) the danger of double liability that a person or corporation may face at home and abroad when there are conflicting laws; (2) the promotion of international commerce; (3) the high burden and cost of requiring a foreign party to appear in front of U.S. courts; and (4) the interest of U.S. courts in having their rulings recognized abroad.[19] These arguments can only become more pertinent in the face of globalization, where modern corporations have branches and affiliates in dozens of countries.[20] Ultimately, as described by the Second Circuit Court of Appeals,

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14. Justice Breyer refers to American judges who travel abroad to participate in exchanges with foreign judges as "Constitutional Diplomats." BREYER, *supra* note 7, at 5.

15. *See, e.g.*, Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88 (2d Cir. 2000) (involving foreign plaintiffs alleging violations of the Alien Tort Claims Act—torture, imprisonment, and murder—in Nigeria by the Nigerian government at the urging of English and Dutch oil companies); Bodner v. Paribas, 202 F.R.D. 370 (E.D.N.Y. 2000) (hearing claims from Holocaust survivors and their families against French Banks for alleged wrongful taking of money and assets from Jews during World War II).

16. *See* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 12 (1991); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 551–52 (1987) (Blackmun, J., concurring in part and dissenting in part) ("The discovery process usually concerns discrete interests that a court is well equipped to accommodate—the interests of the parties before the court coupled with the interest of the judicial system in resolving the conflict on the basis of the best available information. When a lawsuit requires discovery of materials located in a foreign nation, however, foreign legal systems and foreign interests are implicated as well. The presence of these interests creates a tension between the broad discretion our courts normally exercise in managing pretrial discovery and the discretion usually allotted to the Executive in foreign matters.").

17. BREYER, *supra* note 7, at 4.

18. Société Nationale Industrielle Aérospatiale, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part).

19. *See, e.g.*, Motorola Credit Corp. v. Standard Chartered Bank, 21 N.E.3d 223 (N.Y. 2014) (noting the traditional justifications for the separate entity rule which is itself a creature of international comity); *see generally* Paul, *supra* note 16.

20. Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 795 (S.D.N.Y.

"international comity is clearly concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards."[21]

Before undertaking a historical analysis of international comity, two points of clarification are in order. First, this Article deals with a particular type of international comity analysis that arises in the civil law context of transnational discovery. Although international comity plays an important role in criminal, bankruptcy, tax, antitrust,[22] and other areas of law,[23] *Daimler* and its progeny have only addressed international comity in the context of civil lawsuits. Second, this Article will rely, partially but not entirely, on cases in the Second Circuit and Southern District of New York. As the financial capital of the world, New York is the nerve center for multinational corporations and banks with branches in the United States.[24] Because of their status as garnishees, banks are popular targets for transnational discovery and turnover requests.[25] Therefore, decisions in the Second Circuit, and even the New York State Court of Appeals, have an outsized influence on transnational discovery and international comity.

2012) ("[It] may well be correct that transnational discovery requests are increasing due to the global nature of 'international commerce . . . .'").

21. JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (internal quotation marks and citations omitted).

22. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (finding that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement" to arbitrate antitrust claims); Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 126 (2d Cir. 2001) (analyzing international comity's relationship to the enforcement of foreign tax laws); United States v. Baramdyka, 95 F.3d 840, 847 (9th Cir. 1996) (O'Scannlain J., concurring in part and dissenting in part) (noting the impact of international comity on a criminal law question); *In re* Bd. of Directors Compania Gen. de Combustibles S.A., 269 B.R. 104, 112 (Bankr. S.D.N.Y. 2001) (holding that comity should be granted to Argentine bankruptcy proceedings); *In re* Davis, 191 B.R. 577, 587 (Bankr. S.D.N.Y. 1996) (evaluating whether to accord comity to a foreign bankruptcy case). *See also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004) (referring to certain extra-territorial applications of U.S. law as "legal imperialism").

23. *See generally* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015).

24. *See generally* Motorola Credit Corp. v. Standard Chartered Bank, 21 N.E.3d 223 (N.Y. 2014).

25. *See* Dietrich v. Bauer, No. 95 Civ. 7051(RWS), 2000 WL 1171132, at *2 (S.D.N.Y. Aug. 16, 2000), *on reconsideration in part*, 198 F.R.D. 397 (S.D.N.Y. 2001). *See, e.g.*, Motorola Credit Corp. v. Uzan, 293 F.R.D. 595 (S.D.N.Y. 2013), *rev'd on reconsideration*, 77 F. Supp. 397 (S.D.N.Y. 2014), *on reconsideration*, No. 02 Civ. 666(JSR), 2015 WL 5613077 (S.D.N.Y. Sept. 9, 2015); Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143 (S.D.N.Y. 2011); Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009); *In re* Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571(RJH) (HBP), 2009 WL 8588405, at *3 (S.D.N.Y. July 10, 2009).

B. International Comity and U.S. Discovery: A Half-Century of Interaction

Permissive discovery rules have characterized U.S. federal courts since 1938, when the Federal Rules of Civil Procedure were adopted.[26] At the urging of Roscoe Pound,[27] American procedural reforms beginning in 1906 culminated with the adoption of rules that allowed "increased relaxation and expansion of procedure."[28] Federal Rule of Civil Procedure 34 provided parties with the power to inspect documents and things "material to any matter involved in the action."[29] The rule allowed parties to "examine" any person who might have assets belonging to the defendant or, in post-judgment actions, the judgment debtor.[30] In 1948, an amendment to the Federal Rules expanded the scope of discovery to the more permissive language of Rule 26,[31] allowing the court to order the production of documents "relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control."[32] At that time, the only vehicle available for courts to request help from a foreign government or party was the Letter Rogatory—a formal request for discovery assistance.[33]

By the 1960s, courts had determined they had the power to order the production of documents located abroad.[34] This conclusion came as the logical consequence of an expanding personal jurisdiction and discovery jurisprudence. It is axiomatic that without personal jurisdiction a court cannot order a party to produce documents because it has no power over that party.[35] However, once a court finds it has personal jurisdiction, there are few limits on what it can order a party to produce. Further, courts concluded that possession, custody, or control over the documents or assets being sought is necessary, because without it a party has no practical ability to obtain the documents and thus cannot be required to do so.[36] These two ingredients became what can be called the

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26. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C.L. REV. 691, 698 (1998).

27. Roscoe Pound was one of the most influential legal figures of the twentieth century. As Dean of Harvard Law School, he was a prolific scholar and noted legal realist. Pound was a towering legal figure at a crucial time for American law.

28. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C.L. REV. 747, 748 (1998).

29. History of Rule, 8B FED. PRAC. & PROC. CIV. § 2201 (3d ed.).

30. Discovery in Aid of Execution, 12 FED. PRAC. & PROC. CIV. § 3014 (3d ed.).

31. 8B FED. PRAC. & PROC. CIV. § 2201, *supra* note 29.

32. 5 F.R.D. 433, 463 (1946).

33. 22 C.F.R. § 92.54.

34. United States v. First Nat'l City Bank, 396 F.2d 897, 900–01 (2d Cir. 1968).

35. *Id.*; Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 141 (2d Cir. 2014) ("A district court, however, must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request under Federal Rule of Civil Procedure 45."); *In re* Sealed Case, 141 F.3d 337, 341 (D.C. Cir. 1998) (finding it "elementary" that "courts lacking jurisdiction over litigants cannot adjudicate their rights"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (1987) ("A court . . . may order a person subject to its jurisdiction to produce documents").

36. *In re* Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft

"personal jurisdiction plus control" test that underlies the discovery of documents located abroad: U.S. courts need only find personal jurisdiction over the party and possession, custody, or control of the requested documents by the target of the subpoena.[37] Because of these simple requirements, and the permissive nature of the Federal Rules, it is typical for judgment creditors to demand transnational asset discovery from parties and non-parties alike—and courts usually oblige.[38] This reach extends to non-party banks that may have information about a debtor's assets.[39]

To complement the "personal jurisdiction plus control" test, courts recognized early on the importance of balancing foreign interests when foreign laws or parties were involved. It was this recognition that created judicial concerns with what courts began to call "international comity." These concerns came into play, however, only when there was a "true conflict" between domestic and foreign law.[40] The Supreme Court has recognized this initial inquiry:

> The threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law. When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.[41]

Corp., 15 F. Supp. 3d 466, 472 (S.D.N.Y 2014) ("It has long been the law that a subpoena requires the recipient to produce information in its possession, custody, or control regardless of the location of that information . . . [a witness may not] resist the production of documents on the ground that the documents are located abroad. The test for production of documents is control, not location.") (internal quotation marks and citations omitted).

37. *See, e.g.*, Gucci Am., Inc., 768 F.3d at 141; *In re* Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571(RJH)(HBP), 2009 WL 8588405, at *3 (S.D.N.Y. July 10, 2009); Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009); Estate of Yaron Ungar v. Palestinian Auth., 400 F. Supp. 2d 541, 549 (S.D.N.Y. 2005) ("Service of a subpoena, even if properly effected, is only *valid* if served on a party who is subject to personal jurisdiction within this district."); *see* Dietrich v. Bauer, No. 95 Civ. 7051(RWS), 2000 WL 1171132, at *2 (S.D.N.Y. Aug. 16, 2000).

38. *See, e.g.*, EM Ltd. v. Republic of Arg., 695 F.3d 201, 207–08 (2d Cir. 2012), *aff'd sub nom.* Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250, 2254 (2014). *But see* Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960) (refusing to compel production of documents located in Canada because, among other reasons, "[u]pon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures. Whether removal of records from Canada is prohibited is a question of Canadian law and is best resolved by Canadian courts.").

39. "It is not uncommon to seek asset discovery from third parties, including banks, that possess information pertaining to the judgment debtor's assets." *EM Ltd.*, 695 F.3d at 207. "[I]n a run-of-the-mill execution proceeding, we have no doubt that the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States." *Id.* at 208; *see also* Eitzen Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 238–39 (S.D.N.Y. 2011).

40. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 555 (1987).

41. *Id.* This Article will only deal with cases where there is a "true conflict." Cases falling

Recognizing the problems presented by these instances of "true conflict," the 1965 Restatement Second of Foreign Relations Law highlighted that conflict with foreign laws did not deprive a U.S. court of jurisdiction but nonetheless required balancing the interests of the relevant sovereigns.[42] The balancing test announced by the Restatement Second of Foreign Relations urged courts to weigh five factors: (1) the "vital national interests of each of the states," (2) the "hardship" imposed on the person, (3) the "extent" to which "required conduct is to take place" in the foreign country, (4) the nationality of the person, and (5) the extent to which enforcement can "be expected to achieve compliance."[43] Although courts began to weigh these interests in the 1960s, they continued to routinely exercise their jurisdiction over documents located abroad, finding that U.S. interests generally prevailed over foreign interests.[44]

Exemplifying the three-part test that had developed by the late 1960s—(1) personal jurisdiction, (2) control, and (3) balancing of foreign interests—the Second Circuit in 1968 compelled a bank to produce documents located in its branch in Frankfurt, Germany, noting:

> The basic legal question confronting us is not a total stranger to this Court. With the growing interdependence of world trade and the increased mobility of persons and companies, the need arises not infrequently, whether related to civil or criminal proceedings, for the production of evidence located in foreign jurisdictions. It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has in personam jurisdiction of the person in possession or control of the material.[45]

The court noted that difficulties arose where "the country in which the documents are located has its own rules and policies dealing with the production and disclosure of business information—a circumstance not uncommon."[46] Recognizing that it involved an "extremely sensitive and delicate area of foreign affairs,"[47] the court noted that a rule that ignores foreign laws except when a party shows it will suffer criminal liability would "show scant respect for international comity."[48] Despite this, the court analyzed the different interests

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before this threshold question present comity concerns but are generally less relevant because they do not involve an analysis of conflicting laws.

42. *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 39(1) (1965) ("A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.").

43. *Id*. § 40.

44. *See, e.g*., Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958); Application of Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960); First Nat'l City Bank of N.Y. v. IRS, 271 F.2d 616 (2d Cir. 1959).

45. United States v. First Nat'l City Bank, 396 F.2d 897, 900–01 (2d Cir. 1968).

46. *Id*. at 901.

47. *Id*.

48. *Id*. at 902.

and upheld the district court's decision holding the bank in contempt for failure to produce the documents.[49]

Court decisions ordering the production of documents held abroad contributed to the broadening of the Federal Rules, which in turn have cemented the development of transnational discovery, even over non-parties, in four Rules: 26, 34, 45, and 69. Rule 26 allows broad discovery of "any nonprivileged matter that is relevant."[50] This language applies in the context of Rule 34, which provides that, in general, "a party may serve on *any other party* a request within the scope of Rule 26(b)."[51] This can include a request to produce any designated document or electronically-stored information.[52] Rule 45 specifically allows litigants to issue document subpoenas to non-parties, limiting this power only to the extent that it imposes an "undue burden," it fails to provide a reasonable time to comply, or it requests privileged materials.[53] Finally, Rule 69 allows litigants in the post-judgment context to "obtain discovery from any person . . . as provided in these rules or by the procedure of the state where the court is located."[54]

Notably absent from these rules is any limitation on the geographical scope of information discovery requests, unlike the limitations imposed on deposition subpoenas.[55] Therefore, these rules provide a potent weapon for U.S. litigants seeking transnational discovery. In the post-judgment context, for example, the Second Circuit has interpreted these rules to mean that a judgment creditor is "entitled to discover the identity and location of any of the judgment debtor's assets, *wherever located*."[56] Given such broad language, it is easy to see how conflicts between domestic and foreign law became commonplace.

C. Conflicts Between U.S. Discovery and Foreign Laws

The contrast between U.S. and foreign discovery practices is stark. As explained above, American courts have long been comfortable exercising their broad discovery and jurisdictional powers over parties wherever located. Discovery in civil law countries is drastically different from U.S. methods. Because the inquisitorial system predominates in civil law countries, it is judges, not the parties themselves, who have the exclusive power to gather facts.[57] After

49. *Id.* at 902–05.

50. FED. R. CIV. P. 26.

51. FED. R. CIV. P. 34(a) (emphasis added).

52. FED. R. CIV. P. 34(a)(1)(A).

53. FED. R. CIV. P. 45.

54. FED. R. CIV. P. 69(a)(2).

55. *See* FED. R. CIV. P. 45.

56. First City, Tex.-Hous., N.A. v. Rafidain Bank, 281 F.3d 48, 54 (2d Cir. 2002) (quoting Nat'l Serv. Indus., Inc. v. Vafla Corp., 694 F.2d 246, 250 (11th Cir. 1982)) (emphasis added); *see also* FED. R. CIV. P. 69(a)(2).

57. Randall D. Roth, Comment, *Five Years After* Aérospatiale*: Rethinking Discovery Abroad*

compiling evidence, civil law judges produce an official summary, or dossier, that is used at trial.[58] With regards to document production, some foreign countries provide severe restrictions.[59] In France, for example, there is no U.S. concept of "blanket" requests for documents. Instead, parties can make specific requests to the judge, who can then order the production of identified documents.[60] In Germany, parties are not obligated to conduct a search for information that is not readily available.[61] Scholars suggest that Europeans' respect for privacy rights explains their overarching anxiety with broad discovery.[62] As an extension of this general narrowing of discovery, in civil law countries there is no concept of pretrial discovery.[63] In the United Kingdom,

in Civil and Commercial Litigation Under the Hague Evidence Convention and the Federal Rules of Civil Procedure, 13 U. PA. J. INT'L BUS. L. 425, 435–36 (1992); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 827 (1985) ("Digging for facts is primarily the work of the judge.").

58. Message from the President Transmitting to the Senate the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. A, 92d Cong., 2d Sess. (Feb. 1, 1972), reprinted in 12 I.L.M. 323, 326 (1973) ("[C]ivil law technique results in a resume of the evidence . . . .").

59. NML Capital, Ltd. v. Republic of Arg., No. 03 Civ. 8845(TPG), 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013) (reviewing the data secrecy laws of Brazil, Spain, Bolivia, Chile, Panama, Paraguay, Argentina, and Uruguay); Diana Lloyd Muse, *Discovery in France and the Hague Convention: The Search for a French Connection*, 64 N.Y.U. L. REV. 1073, 1075 n.8 (1989) (discussing French limitations and noting that other civil law countries are similar); Langbein, *supra* note 57 (discussing German law).

60. Muse, *supra* note 59, at 1080–81 ("In France, the current Code of Civil Procedure (the Code) vests all fact-finding authority in the judge. For example, each party, through its attorney (*avocat*), must make any request for written evidence to the judge, who then has the discretion to order an opposing party to produce the evidence. Even though the Code authorizes the *avocat* to ask a judge to order document production, judges do not always grant such requests. Thus, although the current Code appears to give the judge broad powers to require the production of evidence, commentators agree that in practice, the fact-finding process in civil cases has, to a large extent, retained its traditionally limited scope.").

61. Langbein, *supra* note 57, at 827 ("The defendant's answer follows the same pattern. It should be emphasized, however, that neither plaintiff's nor defendant's lawyer will have conducted any significant search for witnesses or for other evidence unknown to his client. Digging for facts is primarily the work of the judge.").

62. *See*, *e.g.*, Muse, *supra* note 59, at 1087 ("Perhaps the most important explanation for the historically restricted access of French litigants to documents of adversaries stems from a larger sociological perspective: in general, the French consider privacy to be of paramount importance."); Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31; Benjamin L. Klein, *Trust, Respect, and Cooperation May Keep Us Out of Jail: A Practical Guide to Navigating the European Union Privacy Directive's Restrictions on American Discovery Procedure*, 25 GEO. J. LEGAL ETHICS 623 (2012).

63. Muse, *supra* note 59, at 1075 ("Moreover, France, like most civil law countries, does not have any form of pretrial discovery as it exists in the United States."). It is also somewhat limited in the United Kingdom. First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 22 (2d Cir. 1998) (noting an English court's rejection of a discovery request because the particular discovery in that case was not "provided for under the Hague Convention or British law").

procedural rules limit discovery of non-parties.[64] In other countries, there is no post-judgment discovery either, making it difficult for judgment creditors to find assets.[65] Because of these strict limits on discovery, it is no surprise that Europeans worried not only about expansive U.S. judicial power, but also expansive discovery in general.[66]

Given the unrestricted exercise of U.S. discovery allowed by the "personal jurisdiction plus control" test, conflicts with foreign law were a common occurrence in the middle and later part of the twentieth century. Courts routinely ordered production of documents held by bank branches in Panama[67] and Canada,[68] banking records in Switzerland[69] and Germany,[70] foreign shipping lines' documents "wherever located,"[71] and oil company documents in "foreign countries."[72] Some of the most offensive practices in the eyes of foreign sovereigns included the taking of depositions by American lawyers in foreign countries without the consent of local authorities.[73] Not surprisingly, foreign laws imposed strict restraints to prevent these abuses. If an American lawyer sought to take evidence in France, for example, where discovery is a judicial task, the French considered it an "unlawful usurpation of the public judicial function and an illegal intrusion on the nation's judicial sovereignty."[74] This stance holds sway in many other civil law countries, including Japan, where

64. South Carolina Ins. v. Assurantie Maatschappij "de Zeven Provincien" N.V., [1986] 3 W.L.R. 398 (HL) (statement of Lord Brandon) (noting that because of certain limitations, "there is no way in which a party to an action in the High Court in England can compel pre-trial discovery as against a person who is not a party to such action").

65. For example, in France there are only self-help attachment procedures. CODE DE PROCÉDURE CIVILE [C.P.C.] art. L111-1 (Fr.).

66. *See* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 519 (N.D. Ill. 1984) ("It cannot be denied that foreign displeasure with American discovery procedures played some part in shaping the Convention . . . .").

67. First Nat'l City Bank of N.Y. v. IRS, 271 F.2d 616, 620 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960); Application of Chase Manhattan Bank, 191 F. Supp. 206, 210 (S.D.N.Y.), *aff'd*, 297 F.2d 611 (2d Cir. 1962).

68. *In re* Equitable Plan Co., 185 F. Supp. 57, 60–61 (S.D.N.Y.), *modified*, Ings v. Ferguson, 282 F.2d 149, 153 (2d Cir. 1960).

69. Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 202 (1958); Trade Dev. Bank v. Cont'l Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972); Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. McGranery, 111 F. Supp. 435, 440–42 (D.D.C. 1953).

70. United States v. First Nat'l City Bank, 396 F.2d 897, 901–03 (2d Cir. 1968).

71. Fed. Mar. Comm'n v. DeSmedt, 366 F.2d 464, 468 (2d Cir. 1966).

72. *In re* Investigation of World Arrangements with Relation to Prod., Transp., Ref. & Distrib. of Petrol., 13 F.R.D. 280, 286 (D.D.C. 1952) (noting willingness to grant the government access to documents located in foreign offices).

73. *See* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 520 (N.D. Ill. 1984); *see also* Muse, *supra* note 59, at 1073 (discussing U.S. "legal tourists" who went to France in search of evidence).

74. Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petrol. Co., 105 F.R.D. 16, 26 (S.D.N.Y. 1984); *see also* Muse, *supra* note 59, at 1084 (discussing judicial sovereignty in France).

regulations place strenuous requirements on the taking of a deposition therein, authorizing it "only if (1) the witness or party is willing to be deposed, (2) the deposition takes place on U.S. consular premises, (3) a consular officer presides over that deposition . . . and each participant traveling from the United States to Japan to participate in the deposition obtains a 'deposition visa.'"[75] In Brazil, a deposition can be a criminal violation given that "Brazilian law subjects foreign attorneys who conduct depositions of Brazilian nationals in Brazil to potential arrest, detention, expulsion or deportation."[76] In Switzerland, there have been criminal penalties for such "intrusive" discovery since 1937.[77]

It is worth highlighting that antitrust investigations by the U.S. government fueled much of the backlash from European countries.[78] In response to antitrust investigations in the shipping industry, France passed a blocking statute in 1968 prohibiting the production of information to foreign judicial authorities "related to maritime transport."[79] In 1980, with the French Assembly complaining about U.S. "fishing expeditions" and "legal tourism," France expanded the blocking statute to prohibit the production to foreign legal authorities of any "economic, commercial, industrial, financial or technical" information "which is capable of harming [the] . . . interests of France."[80] Even the United Kingdom took part in this backlash, enacting its own limitations on the gathering of evidence therein for use in other countries.[81] This backlash was evidence of a broad failure of international comity. Years later, this reaction against U.S. discovery practices prompted the following comment from the reporter to the Restatement of Foreign Relations Law:

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75. *In re* Application for Order Quashing Deposition Subpoenas, dated July 16, 2002, No. M8–85, 2002 WL 1870084, at *5 (S.D.N.Y. Aug. 14, 2002).

76. Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. De Equip. Medico, No. 07-CV-309-L(AJB), 2008 WL 81111, at *6-7 (S.D. Cal. Jan. 8, 2008) ("The Ministry also cited as an implicit principle of Brazilian Constitutional Law that only Brazilian judicial authorities are competent to perform acts of a judicial nature in Brazil.").

77. *See generally* Brief for Government of Switzerland as Amicus Curiae Supporting Respondents at 1–2, 13–15, United States v. UBS AG, No. 09–20423–CIV, 2009 WL 2241122 (S.D. Fla. July 7, 2009).

78. Laker Airways Ltd. v. Pan Am. World Airways, 607 F. Supp. 324, 327 (S.D.N.Y. 1985) ("The failure to use the Hague Convention is more than a mere technicality. The extraterritorial jurisdiction asserted over foreign interests by the American antitrust laws has long been a sore point with many foreign governments, including that of the United Kingdom.").

79. Pierre Grosdidier, *The French Blocking Statute, the Hague Evidence Convention, and the Case Law: Lessons for French Parties Responding to American Discovery*, 50 TEX. INT'L. L.J. 11, 16 (2014) ("The French blocking statute owes its existence to French government resistance to post-World War II American antitrust law enforcement against international shipping cartels.").

80. Toms, *supra* note 1, at 596 n.41, 611.

81. Protection of Trading Interests Act 1980, c. 11 (U.K.); *see also Laker Airways Ltd.*, 607 F. Supp. at 327 ("The English Protection of Trading Interests Act of 1980 . . . authorizes and empowers the Secretary of State for Trade and Industry to interpose the official power of the British Government so as to prevent persons conducting business in the United Kingdom from complying with foreign judicial or regulatory provisions designated by the Secretary of State as intrusive upon the sovereignty of that nation.").

> 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. As of 1986, some 15 states had adopted legislation expressly designed to counter United States efforts to secure production of documents situated outside the United States.[82]

There is no doubting the strength of hostility against U.S. courts in international circles. Many countries view transnational discovery as judicial usurpation, a wasteful exercise, and a direct threat to their sovereignty.[83] By the late 1960s there was a clear conflict between the civil law world and the U.S. discovery system. A treaty designed to bridge the gap between U.S. discovery and civil law countries seemed necessary.[84] Both parties had interests at stake: the United States in creating a system that would facilitate the production of evidence, and foreign countries in moderating liberal U.S. discovery practices.[85]

D. The Hague Convention

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was signed on October 26, 1968, by all the present delegations (the "Hague Convention" or the "Convention").[86] The primary goal of the Convention was to "bridge differences between the common law and civil law approaches to the taking of evidence abroad."[87] As the Letter of Submittal to the President of the United States noted, the signatories were willing "to proceed promptly for work on the evidence convention" because of "the difficulties encountered by courts and lawyers in obtaining evidence abroad from countries with markedly different legal systems."[88] The United States led

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82. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, Reporters' Notes ¶ 1 (1987).

83. *See generally* James S. McLean, *The Hague Evidence Convention: Its Impact on American Civil Procedure*, 9 LOY. L.A. INT'L & COMP. L. REV. 17 (1986); Douglas E. Rosenthal & Stephen W. Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery*, 16 N.Y.U. J. INT'L L. & POL. 1075 (1984); *see also* Letter from Huai Peng Mu, *supra* note 2.

84. *See* Message from the President, *supra* note 58; *see also* Rapport de la Commission spéciale, 4 Conférence de La Haye de droit international privé: Actes et documents de la Onzième session 55 (1970) (Actes et documents).

85. 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, 1465 (1984) ("Whereas United States participation in drafting the Convention was prompted by the frustration American lawyers had long experienced in their efforts to obtain evidence in foreign nations"); *see* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 519 (N.D. Ill. 1984) ("It cannot be denied that foreign displeasure with American discovery procedures played some part in shaping the Convention . . . .").

86. Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 I.L.M. 785, 787 (1969); The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241, reprinted at 28 U.S.C. § 1781.

87. Comment, *The Hague Convention*, *supra* note 85, at 1464; *see also* Message from the President, *supra* note 58.

88. Message from the President, *supra* note 58, at 324.

the negotiations, represented by Philip W. Amram, who was appointed rapporteur of the commission and co-chairman of the drafting committee.[89] The Report of the U.S. delegation highlighted that as a matter of international comity, the convention sought to construct a process that was "tolerable" to the authorities of the country where the evidence was located.[90] Further, the Report emphasized that "the doctrine of 'judicial sovereignty' had to be constantly borne in mind."[91] That is, in civil law countries the courts take evidence, unlike in the United States where litigants conduct discovery and depositions. International comity influenced the thinking of the U.S. drafters and the Convention as a whole, and it energized the negotiations.[92]

The Convention created the system of Letters of Request as the primary vehicle for the production of information abroad, allowing parties to seek evidence in a more regulated manner. The system placed national authorities of both the requesting country and the target country as gatekeepers. For example, if an American litigant sought evidence located in France, he would have to adhere to the following procedure: (1) litigant files a proposed Letter of Request with the American court describing the information sought and the parties involved; (2) the court reviews and approves or rejects the letter; (3) litigant obtains a translation and sends the letter, with judicial approval, to the French Justice Ministry; (4) French Justice Ministry refers the request to the District Attorney for the particular location in France; and (5) internal French evidence procedures take effect.[93] As described, the procedure gives French authorities a gatekeeping role where they can evaluate evidence requests and decide whether to comply with them. Moreover, in deference to local law, the evidence is actually obtained through the host country's evidentiary procedures.

Although the Convention delegates did not explicitly agree to the primacy of the Hague Convention over transnational discovery procedures offered by local courts, a Commission gathered in 1989 to review the functioning of the Convention stated that "the [Special Commission Report on the Operation of the Hague Service Convention] thought that in all Contracting States, whatever their

89. *See* Report of the United States Delegation, *supra* note 86, at 805.

90. *Id*. at 806.

91. *Id*.

92. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 568 (1987) (Blackmun, J., concurring in part and dissenting in part) ("[T]he needs of the international commercial system and the accommodation of those needs. . . [are] embodied in the Convention.").

93. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555 (codified at 28 U.S.C. § 1781); *see also* Jennifer S. Bales, *Initiating and Responding to Discovery in Transnational Litigation: Procedures and Challenges*, 66 TENN. L. REV. 765 (1999); 3 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 17:18.

There is a separate procedure for the use of depositions pursuant to the Hague Convention that requires the appointment of an examiner. This Article will not address this deposition mechanism in-depth because the focus of recent cases has been on the production of documents held abroad.

views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought."[94]

The United States ratified the Hague Convention in 1972.[95] Despite its apparent potential, litigants hardly used its procedures over the next decade.[96] Federal courts split over whether the Hague Convention provided a mandatory or an optional alternative to the Federal Rules. For example, in *Compagnie Francaise*, the court noted that "[e]xtraterritorial discovery has been standard for some time and there is no evidence that the United States, in agreeing to comply with the Hague Convention, intended to abandon this practice."[97] On the other hand, some U.S. courts enforced the Hague Convention, seeing it as the "preferable" means for international discovery,[98] and even instituted a rule of "first resort" to the Convention.[99] By 1988, transnational discovery through the Hague Convention was a developing area of the law.[100] There was much promise that Hague Convention procedures could be a method for redeeming

94. *See* Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, 28 I.L.M. 1556, 1564, 1569 (1989).

95. 118 CONG. REC. 20,623 (daily ed. June 13, 1972). There are currently 58 signatories. *See Status Table*, HCCH, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last updated Nov. 17, 2015).

96. Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 520 (N.D. Ill. 1984) ("The first-time participation of the United States, in particular, presented problems because of liberal American discovery practices. One response to the American presence was Article 23, which allows signatory states to declare that their compulsory process may not be invoked, via a Letter of Request, for the purpose of obtaining pre-trial discovery as known in Common Law countries. At the same time, the participation of the United States offered an opportunity for the other participants to attempt to limit American discovery practices which they believed infringed upon their sovereignty."). This may have occurred because only a few other nations had also ratified it. *See* Comment, *The Hague Convention*, *supra* note 85, at 1470.

97. Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petrol. Co., 105 F.R.D. 16, 28 (S.D.N.Y. 1984) (citing *Graco*, 101 F.R.D. at 522). *See also, e.g.*, *In re* Messerschmitt Bolkow Blohm GmbH, 757 F.2d 729, 731 (5th Cir. 1985), *vacated*, 483 U.S. 1002 (1987); *In re* Anschuetz & Co., GmbH, 754 F.2d 602, 606–15, 606 n.7 (5th Cir. 1985), *vacated sub nom*. Anshuetz & Co., GmbH. v. Miss. River Bridge Auth., 483 U.S. 1002 (1987); Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 497–501 (W. Va. 1985); Adidas Ltd. v. S.S. Seatrain Bennington, No. 80 Civ. 1922, 1984 WL 423, at *3 (S.D.N.Y. May 29, 1984) (Hague Convention does not apply to French defendant resisting document production); Lasky v. Cont'l Prods. Corp., 569 F. Supp. 1227 (E.D. Pa. 1983); *see* Comment, *The Hague Convention*, *supra* note 85, at 1473 n.61.

98. Schroeder v. Lufthansa Ger. Airlines, 18 Av. Cas. (CCH) 17,222 (N.D. Ill. Sept. 15, 1983).

99. Phila. Gear Corp. v. Am. Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983); *see also* Laker Airways Ltd. v. Pan Am. World Airways, 607 F. Supp. 324, 326–27 (S.D.N.Y. 1985); Gen. Elec. Co. v. N. Star Int'l Inc., No. 83 C 0838, 1983 U.S. Dist. LEXIS 13681 (N.D. Ill. Feb. 21, 1984); Schroeder v. Lufthansa Ger. Airlines, No. 83 C 1928 (N.D. Ill. Sept. 15, 1983); Pierburg GmbH & Co. KG v. Superior Court, 186 Cal. Rptr. 876 (1982); Volkswagenwerk Aktiengesellschaft v. Superior Court, 176 Cal. Rptr. 874 (1981); Comment, *The Hague Convention*, *supra* note 85, at 1474 n.61 (1984).

100. *See* Roth, *supra* note 57, at 427 n.7.

international comity, but in 1988 the Supreme Court ended any hope that the Convention might displace the Federal Rules as the primary method of transnational discovery.

II.
COMITY IN RETREAT: *AÉROSPATIALE* AND THE DEFEAT OF THE HAGUE CONVENTION

On August 19, 1980, a French-made Rallye fixed-wing aircraft crashed in Iowa. Three separate plaintiffs brought suit against the French airplane manufacturing company, Société Nationale Industrielle Aérospatiale ("SNIA"), who claimed the Rallye was "the World's safest and most economical STOL [(short takeoff and landing)] plane."[101] During initial discovery, SNIA refused to produce documents located in France absent plaintiffs' compliance with Hague Convention procedures. The magistrate judge disagreed with SNIA's position and rejected a proposed protective order that would allow "the Hague Evidence Convention to override the Federal Rules of Civil Procedure."[102] Defendants appealed and the Eighth Circuit affirmed, finding that if the defendant had possession of the documents, it could be ordered to produce them pursuant to the Federal Rules.[103] The ruling essentially affirmed the "personal jurisdiction plus control" test as if the Hague Convention had never been signed. The Supreme Court granted Defendant's petition for *certiorari*.

Writing for a 5-4 majority but with a unanimous holding, Justice Stevens held that the Hague Convention did not provide the exclusive means for obtaining information located in a foreign signatory state.[104] The Court interpreted the treaty as providing optional procedures for discovery and refused to create a "rule of first resort" to the Hague Convention before the Federal Rules.[105] The Court relied on four major findings for its decision. First, the Court emphasized that the treaty did not speak in mandatory terms that would exclude other practices (like the Federal Rules). Second, Justice Stevens noted that Article 23 of the Convention authorized a State to refuse execution of a letter of request for pre-trial discovery, and that this was evidence the signatories did not intend to demote their local discovery rules. Third, the Court noted that Article 27 of the Convention allowed more liberal methods for rendering evidence, which was also an indication that the Federal Rules were still a vehicle for obtaining documents abroad. Finally, the Court emphasized that the treaty's

101. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 524–25 (1987).

102. *Id*. at 526.

103. *In re* Société Nationale Industrielle Aérospatiale, 782 F.2d 120 (8th Cir. 1986), *vacated sub nom*. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522 (1987).

104. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 547.

105. *Id*. at 542–43.

lack of an exclusivity provision likely indicated signatory countries had not intended to make it exclusive.[106]

In general, the Court displayed a dismissive view of the Hague Convention and was comfortable cabining it to rare instances. The majority viewed the Hague Convention not as a replacement of the Federal Rules but more as an optional procedure that could complement the Rules in instances where a court lacks personal jurisdiction.

On the question of international comity, the Court reasoned that "the concept of international comity requires in this context a . . . particularized analysis of the respective interests of the foreign nation."[107] Crucially, in footnote twenty-eight, the Court endorsed a revised version of the Restatement balancing test focusing on the interests of the countries at issue, the importance of the documents, the specificity of the request, the place of origin of the documents, and the availability of alternative means of obtaining the information.[108] The Court otherwise noted that objections to discovery "that foreign litigants advance should . . . receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation."[109] Although it rejected the Hague Convention and confined it to an optional procedure, the Supreme Court was careful to pay lip-service to international comity—a feature that became common in the cases that followed *Aérospatiale*.

The Court's holding represented a victory for broad U.S. discovery and a momentous defeat for international comity. The decision peremptorily dismissed the arguments in favor of the Convention put forth by the United Kingdom, France, and Germany as amici, leading a prominent commentator to declare it "loosely-reasoned."[110] As Justice Blackmun wrote in dissent, "the needs of the international commercial system and the accommodation of those needs . . . [are] embodied in the Convention,"[111] and yet the Court seemed content to reject it. The decision was suffused with a kind of judicial chest-thumping because, as some have put it, the Court was concerned with "reaffirming the sovereignty of our judicial system."[112]

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106. *Id*. at 534–39.

107. *Id*. at 543–44.

108. *See id*. at 544 n.28.

109. *Id*. at 546.

110. *See* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 329, 331 (1989).

111. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 568 (Blackmun, J., concurring in part and dissenting in part).

112. *See* Lori A. Fields, *Société Nationale Industrielle Aérospatiale v. United States District Court: The Supreme Court Undermines the Hague Evidence Convention and Confounds the International Discovery Process*, 22 LOY. L.A. L. REV. 217, 264 (1988).

Aérospatiale unleashed a new wave of expansive foreign discovery under the Federal Rules.[113] Most courts considering requests for discovery paid lip service to the Convention, just like *Aérospatiale* had, cautioning that foreign sovereign interests had to be taken into account. But despite this false deference, the vast majority of cases involving requests for discovery of documents or assets located abroad rejected proceeding through the Convention.[114] *Aérospatiale* damaged the Convention to such an extent that even in circumstances where the Federal Rules seemed inappropriate, such as ordering discovery from foreign non-parties, courts nonetheless rejected the Convention.[115] The Third Circuit went as far in *In re Automotive Refinishing Paint Antitrust Litigation* as refusing to carve out a rule of first resort to the Convention for jurisdictional discovery.[116] Similarly, the Ninth Circuit refused to honor the Convention even in clear instances of foreign criminal laws prohibiting discovery.[117]

Despite courts ostensibly evaluating foreign interests during this period, the Restatement standard seemed muddled, unworkable, and purely for show. Some criticized the *Aérospatiale* model as misguided because U.S. courts could not accurately take into account foreign interests due to U.S. judges' lack of experience with foreign laws.[118] Others criticized the broad discovery powers given to district courts, which consequently did not allow for proper oversight by appellate courts.[119] Perhaps most importantly, the balancing test allowed courts to discount international comity in favor of domestic interests without

113. *See generally* Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT'L L.J. 73 (2003).

114. *See, e.g.*, Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988) (Convention does not apply unless law of the forum state "defines the applicable method of serving process as requiring the transmittal of documents abroad"); First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 21 (2d Cir. 1998); *In re* Maxwell Commc'n Corp., 93 F.3d 1036, 1049 (2d Cir. 1996); N. Mariana Islands v. Millard, 287 F.R.D. 204, 214 n.75 (S.D.N.Y. 2012) ("[T]he modern trend holds that the mere existence of foreign blocking statutes does not prevent a U.S. court from ordering discovery . . . ."); Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 208 (E.D.N.Y. 2007); *see also* Reino de Espana v. Am. Bureau of Shipping, No. 03CIV3573LTSRLE, 2005 WL 1813017, at *3 (S.D.N.Y. Aug. 1, 2005); *In re* Vivendi Universal, S.A. Sec. Litig., No. 02 Civ.5571 RJH, 2004 WL 3019766, at *1 (S.D.N.Y. Dec. 30, 2004); Madanes v. Madanes, 199 F.R.D. 135, 139–40 (S.D.N.Y. 2001); British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A., No. 90Civ.2370 (JFK)(FM), 2000 WL 713057, at *8–9 (S.D.N.Y. June 2, 2000) (refusing to defer to Mexican bank secrecy law); Bodner v. Paribas, 202 F.R.D. 370, 375 (E.D.N.Y. 2000); SEC v. Euro Sec. Fund, 98 Civ. 7347(DLC), 1999 WL 182598, at *3 (S.D.N.Y. Apr. 2, 1999); First Am. Corp. v. Price Waterhouse LLP, 988 F. Supp. 353, 365 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 16 (2d Cir. 1998) ("To the extent that English or Cayman law is not truly implicated, those countries do not have any interest in preventing the disputed discovery."); *First Am. Corp.*, 988 F. Supp. at 364 (citing Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 523 (S.D.N.Y. 1987)). *See also infra* notes 253–59.

115. First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 21 (2d Cir. 1998).

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

117. Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1478 (9th Cir. 1992).

118. Fields, *supra* note 112, at 308.

119. *Id.*

proper scrutiny. In the words of one court, "regrettably, the [*Aérospatiale*] Court declined to set forth specific rules" for the international comity analysis.[120]

The lack of guidance and apparent overriding concern with U.S. judicial sovereignty allowed lower courts to find tenuous U.S. interests that outweighed those of other nations, even where the foreign interests were substantial. For example, some courts found compelling U.S. interests merely because "the United States has a substantial interest in fully and fairly adjudicating matters before its courts."[121] In other cases courts were content to override the Hague Convention and foreign criminal laws only because a U.S. plaintiff was involved.[122] In the Southern District of New York, courts routinely dismissed concerns with foreign laws and international comity, including in *NML Capital Ltd. v. Republic of Argentina*, where the court rejected possible conflicts with the laws of nine countries and ordered the production of documents located therein.[123] Not only did U.S. courts refuse to comply with the Hague Convention, they also made it increasingly difficult for the targets of discovery requests to invoke it—placing on them the burden of demonstrating "that it is more appropriate for the Court to follow the Hague Convention" than the Federal Rules.[124]

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120. Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188, 189 (Sup. Ct. 1988).

121. Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petrol. Co., 105 F.R.D. 16, 30 (S.D.N.Y. 1984) ("The United States also has an important interest in protecting its own nationals . . . ."). *See also, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y 2010) (U.S. litigants and antitrust laws are "essential to the country's interests"); *In re* Global Power Equip. Grp. Inc., 418 B.R. 833, 848–49 (Bankr. D. Del. 2009) (U.S. company, bankruptcy laws, and U.S. courts); Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 214 (E.D.N.Y. 2007) (U.S. plaintiffs and interest in "combating terrorism"); *In re* Vivendi Universal, S.A. Sec. Litig., No. 02CIV5571RJHHBP, 2006 WL 3378115, at *3 (S.D.N.Y. Nov. 16, 2006) (U.S. plaintiffs, U.S. witness, and securities laws); Bodner v. Paribas, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) (U.S. plaintiffs, "significant interest in assuring restitution to Holocaust victims," alien tort claims act, and tort law); Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc., 99 F.R.D. 269 (N.D. Ill. 1983) (U.S. plaintiff and patent law). *See also infra* notes 253–59.

122. *See*, *e.g.*, *In re* Aircrash Disaster near Roselawn, Ind. Oct. 31, 1994, 172 F.R.D. 295, 309 (N.D. Ill. 1997) ("[S]overeign interest in protecting [U.S.] citizens," plaintiffs, and state products liability laws).

123. NML Capital, Ltd. v. Republic of Arg., No. 03 Civ. 8845(TPG), 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013) (ordering production of documents located abroad and dismissing concerns with Brazilian, Spanish, Bolivian, Chilean, Panamanian, Paraguayan, Argentine, and Uruguayan secrecy laws). *See also supra* note 115 and *infra* notes 253–59.

124. *In re* Vivendi Universal, S.A. Sec. Litig., No. 02CIV5571RJHHBP, 2006 WL 3378115, at *2. *See In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 305 (3d Cir. 2004); Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548 (S.D.N.Y. 2012); *In re* Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 51 (D.D.C. 2000); Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344, 346 (D. Conn. 1997); *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 354 (D. Conn. 1991); *see also* Matthew B. Kutac, *Reallocating the Burden of Persuasion Under the* Aérospatiale *Approach to Transnational Discovery*, 24 REV. LITIG. 173, 203–04 (2005) ("District courts within the Second Circuit, Third Circuit, Fourth Circuit, and D.C. Circuit have all embraced this rule regarding the burden of persuasion under *Aérospatiale*.").

These cases became exemplary of the trend of *Aérospatiale*-inspired cases, followed almost unanimously in lower courts, that can be described as nothing less than a wholesale and total rejection of both international comity and the Hague Convention. This rejection of the Hague Convention after *Aérospatiale* presents an odd denial of a treaty that the United States sponsored.[125] Courts have ruled against discovery through the Federal Rules in relatively few cases since *Aérospatiale* and have invoked the Hague Convention in even fewer cases.[126] Instead, courts have typically relied on the Federal Rules paradigm defined since the 1960s.

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125. *See* Report of the United States Delegation, *supra* note 86, at 786. As Justice Blackman wrote in his *Aérospatiale* dissent, the "Convention was drafted at the request and with the enthusiastic participation of the United States, which sought to broaden the techniques available for the taking of evidence abroad." Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 549 (1987) (Blackmun, J., concurring in part and dissenting in part).

126. *See*, *e.g.*, Cascade Yarns, Inc. v. Knitting Fever, Inc., No. C10–861 RSM, 2014 WL 202102, at *2 (W.D. Wash. Jan. 17, 2014) ("Use of Hague Convention procedures is particularly relevant where, as here, discovery is sought from a non-party in a foreign jurisdiction."); CE Int'l Res. Holdings, LLC v. S.A. Minerals Ltd. P'ship, No. 12–CV–08087 (CM)(SN), 2013 WL 2661037, at *8–16 (S.D.N.Y. June 12, 2013) (denying motion to compel production of documents abroad and ordering use of Hague Convention); Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 160 (S.D.N.Y. 2011), *aff'd*, No. 10 Civ. 9471(WHP), 2011 WL 11562419 (S.D.N.Y. Nov. 14, 2011) (ordering parties to proceed through Hague Convention for discovery of non-party banks); SEC v. Stanford Int'l Bank, Ltd., 776 F. Supp. 2d 323, 341 (N.D. Tex. 2011) (directing party to proceed with discovery of foreign non-party through the Hague Convention); Pronova BioPharma Norge AS v. Teva Pharm. USA, Inc., 708 F. Supp. 2d 450, 453 (D. Del. 2010) (issuing letters of request through the Hague Convention); *In re* Rubber Chemicals Antitrust Litig., 486 F. Supp. 2d 1078, 1084 (N.D. Cal. 2007) (denying motion to compel discovery on grounds of international comity); Abbott Labs. v. Impax Labs., Inc., No. Civ.A 03–120–KAJ, 2004 WL 1622223 (D. Del. July 15, 2004); Tulip Computers Int'l B.V. v. Dell Computer Corp., 254 F. Supp. 2d 469, 474 (D. Del. 2003) ("Resort to the Hague Evidence Convention in this instance is appropriate since both Mr. Duynisveld and Mr. Dietz are not parties to the lawsuit, have not voluntarily subjected themselves to discovery, are citizens of the Netherlands, and are not otherwise subject to the jurisdiction of the Court."); Motorola Credit Corp. v. Uzan, No. 02 Civ. 666(JSR)(FM), 2003 WL 203011, at *7 (S.D.N.Y. Jan. 29, 2003) ("In these circumstances, it is appropriate that the plaintiffs be required to secure the additional documents through the Hague Convention . . . ."); *In re* Application for Order Quashing Deposition Subpoenas, dated July 16, 2002, No. M8–85, 2002 WL 1870084, at *6 (S.D.N.Y. Aug. 14, 2002) ("[I]nternational comity-based considerations counsel that the Court refrain under the circumstances of this case."); *In re* Perrier Bottled Water Litig., 138 F.R.D. 348 (D. Conn. 1991); Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 523 (S.D.N.Y. 1987) (denying motion to compel discovery from a Swiss bank on grounds of international comity where producing the requested information would violate Swiss bank secrecy laws); Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33, 40 (N.D.N.Y 1987); Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petrol. Co., 105 F.R.D. 16 (S.D.N.Y. 1984). *Cf.* Blagman v. Apple, Inc., No. 12 Civ. 5453(ALC)(JCF), 2014 U.S. Dist. LEXIS 45401, at *13 (S.D.N.Y. Mar. 31, 2014) (issuing letters rogatory through the Hague Convention).

A few state court cases have ordered discovery through the Hague Convention as well. *See*, *e.g.*, *In re* Activision Blizzard, Inc., 86 A.3d 531, 539 (Del. Ch. 2014) (ordering discovery to proceed in part through the Hague Convention); Husa v. Laboratoires Servier S.A., 740 A.2d 1092, 1094 (N.J. Super. Ct. App. Div. 1999); Knight v. Ford Motor Co., 615 A.2d 297, 302 (N.J. Super. Ct. Law Div. 1992); Matter of Estate of Agusta, 567 N.Y.S.2d 664, 664 (App. Div. 1991) ("The Principality of Monaco is a civil law Nation, and a signatory of the Hague Convention. We accordingly conclude

It is important to emphasize that various countries entered into the Hague Convention in the hope of limiting U.S. discovery and safeguarding their judicial sovereignty.[127] Broad U.S. discovery continues to challenge this hope. For that reason, civil law countries have been vociferous about their rejection of *Aérospatiale* and its progeny.[128] France has been among the most emphatic in its rejection of the Federal Rules as a legitimate avenue for foreign discovery.[129] Germany and Switzerland have emphasized in amici, after *Aérospatiale*, that "discovery of [their] nationals pursuant to the Federal Rules of Civil Procedure constitutes an intrusion into [their] sovereignty."[130] China has threatened the stability of its bilateral relations with the United States over the issue of discovery.[131] Other nations have similarly voiced their concern with U.S. discovery.[132] The effects of *Aérospatiale* were clear: the comity system built by the Hague Convention was destroyed.

In sum, the *Aérospatiale*-era consisted of a feeble tripartite arrangement to accommodate international comity. Whenever difficulties between U.S. discovery procedures and foreign laws surfaced, courts had to first determine whether there was a "true conflict" between domestic and foreign law.[133] This

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that the order compelling Riccardo to testify at a deposition in New York constituted an improper assertion of power beyond the Surrogate's Court's jurisdiction."); Intercontinental Credit Corp., Div. of Pan Am. Trade Dev. Corp. v. Roth, 595 N.Y.S.2d 602, 603 (Sup. Ct. 1991) (vacating subpoena served on the New York office of a non-party bank seeking disclosure of assets held in Israeli branches, and noting that the Hague Convention is "virtually compulsory" where disclosure is sought from foreign non-parties); Orlich v. Helm Bros., Inc., 560 N.Y.S.2d 10, 14 (App. Div. 1990) ("When discovery is sought from a non-party in a foreign jurisdiction, application of the Hague Convention, which encompasses principles of international comity, is virtually compulsory.").

127. *See infra* Part I (c); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 519 (N.D. Ill. 1984) ("It cannot be denied that foreign displeasure with American discovery procedures played some part in shaping the Convention").

128. Roth, *supra* note 57 at n.33 (citing "Letter from Edwin R. Alley, Esq., Carpenter, Bennett & Morrissey to Judge Joseph F. Weis, Jr., Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit (Apr. 11, 1990) (noting that at least one nation contemplated acceding to the Evidence Convention before deciding otherwise because it viewed the Court's *Aérospatiale* decision 'as a message that the U.S. does not take its treaty obligations seriously')").

129. *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 355 (1991) ("Although not all civil-law countries have expressed their disfavor of private litigants' use of the Federal Rules' procedures within its borders, of those which have, France has been among the most emphatic.").

130. Brief for Federal Republic of Germany as Amicus Curiae Supporting Appellants at 1, *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3rd Cir. 2004) (No. 02-4272), 2003 WL 24136399. *See* Brief for Government of Switzerland as Amicus Curiae Supporting Respondents at 1–2, 13–15, United States v. UBS AG, No. 09–20423–CIV, 2009 WL 2241122 (S.D. Fla. July 7, 2009).

131. *See* Brief for Government of Switzerland as Amicus Curiae Supporting Respondents at 1–2, 13–15, United States v. UBS AG, No. 09–20423–CIV, 2009 WL 2241122 (S.D. Fla. July 7, 2009).

132. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, Reporters' Notes ¶ 1 (1987).

133. *See* CE Int'l Res. Holdings, LLC v. S.A. Minerals Ltd. P'ship, No. 12-CV-08087 (CM)(SN), 2013 WL 2661037, at *5 (S.D.N.Y. June 12, 2013).

was usually a low bar that could be met through expert submissions.[134] Once that threshold was met, courts only needed (1) personal jurisdiction over a foreign party; (2) a finding that the party had possession, custody, or control over the documents; and (3) an analysis of the countries' interests through the *Aérospatiale*-endorsed Restatement balancing test. It was this *Aérospatiale* arrangement that unleashed a wholesale repudiation of international comity by circuit and lower courts. It ended the promise of the Convention as a way to redeem international comity, and created difficulty for countries that saw broad U.S. discovery and exercise of U.S. jurisdiction as a threat to their sovereignty.

III.
THE RETURN OF INTERNATIONAL COMITY: *DAIMLER*, *GUCCI*, AND *MOTOROLA* ESTABLISH A NEW PARADIGM

Three recent cases have altered the landscape of transnational discovery and call into question the *Aérospatiale* paradigm. It appears as if, in the span of a few years, international comity is experiencing a revival. These cases prominently featured the interests of foreign nations, and courts responded by refusing to subject foreign entities to jurisdiction in the United States or otherwise impose on them overbroad duties, including those in conflict with foreign laws. These cases open the door to renewed respect for international comity.

Daimler, *Gucci*, and *Motorola* are significant for several reasons, including their concern for foreign retaliatory laws, overbroad application of U.S. discovery procedures, and the possible effects of such broad jurisdiction on the international economy. Although previous courts have voiced similar concerns, these three decisions are notable because they espouse a consistent rejection of *Aérospatiale*-era jurisprudence and come from the Supreme Court, the Second Circuit, and the New York Court of Appeals.

Before undertaking an analysis of these cases, one point of clarification is in order: *Daimler*, *Gucci*, and *Motorola* have not come out of thin air. There has been a movement in the past few years towards cabining the extraterritorial application of U.S. law, and this Article argues that *Daimler*, *Gucci*, and *Motorola* extend this movement into the realm of discovery. In 2004, the Supreme Court referred to certain hypothetical extraterritorial applications of U.S. law as "legal imperialism" that did not align with principles of comity.[135] The movement to cabin U.S. law has been reinforced by the post-financial crisis era of austere U.S. domestic and foreign policy. Two cases signaled the beginnings of renewed respect for international comity: *Kiobel v. Royal Dutch*

134. *See id*.

135. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004) (some extraterritorial application of U.S. law can constitute "legal imperialism").

Petroleum Co. (Kiobel) and *Morrison v. National Australia Bank Ltd. (Morrison)*.[136]

In *Morrison*, the Court found that certain provisions of the Securities Exchange Act did not apply extraterritorially, chiding the Second Circuit for "excis[ing]" the presumption against extraterritoriality of U.S. laws.[137] The Court noted the incompatibility of the Act with foreign laws, including foreign rules about "what discovery is available in litigation," and concluded the Act did not apply to conduct that occurred outside the United States.[138] Likewise, in *Kiobel*, the Court rejected the application of the Alien Tort Statute to events in Nigeria, reasoning that the presumption against the extraterritorial application of U.S. laws prevented such overbroad use of the statute and "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[139] The Court specifically warned against the "danger of unwarranted judicial interference in the conduct of foreign policy."[140] Most importantly, the Court emphasized the deleterious foreign policy consequences of "impos[ing] the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign."[141] The concerns voiced in *Kiobel* and *Morrison* are precisely the kinds of concerns involved in international discovery.

Daimler, *Gucci*, and *Motorola* are an extension of *Kiobel* and *Morrison* because they voice concerns with international comity in the context of personal jurisdiction and discovery—areas previously dominated by the narrow focus of the *Aérospatiale* paradigm. These three cases are animated by several factors that will be discussed below, including (1) changes brought by the modern globalized economy and (2) the danger of retaliatory laws in international relations.[142]

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136. Other cases around this time also emphasized similar concerns. *See*, *e.g.*, Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 392–93 (2d Cir. 2011) (dismissing on forum non conveniens grounds foreign party's action for recognition of arbitral award in connection with foreign controversy).

137. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 257 (2010).

138. *Id.* at 269.

139. Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1661 (2013) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

140. *Id.*

141. *Id.* at 1667.

142. Although not a topic discussed in this paper, the rise of e-discovery has certainly affected and increased instances of conflict of laws. *See generally* William R. Maguire, *Current Issues in Federal Civil E-Discovery, Proportionality, International Discovery and Deposition Practice and Changes to the Federal Rules of Civil Procedure*, *in* CURRENT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE 2012 (William P. Frank & Jonathan L. Frank eds., 2012).

A. Daimler: The Supreme Court Revives International Comity

In *Daimler*, plaintiffs filed various claims under the Alien Tort Statute and the Torture Victims Protection Act against the Daimler Corporation in the Northern District of California.[143] The claims alleged that Daimler's Argentine subsidiary "collaborated" with the Argentine government in perpetrating murder, kidnappings, torture, and other crimes against plaintiffs' relatives.[144] The action had no connection to the United States, as plaintiffs were foreign parties, the defendant was a foreign corporation, and the situs was Argentina. The case had deep implications, however, for Germany and Argentina, as Daimler is headquartered and registered in Germany, and Argentine officials were implicated in the claims. Nevertheless, plaintiffs asserted that the court had general personal jurisdiction because Daimler's subsidiary, Mercedes-Benz USA, LLC, distributed Daimler vehicles to dealerships in California and maintained an office and other facilities in the state. The district court refused to find jurisdiction, holding that Daimler's "affiliations with California" were insufficient.[145] The Ninth Circuit reversed based on its finding that Mercedes was Daimler's agent and as such provided continuous activity in California sufficient for general jurisdiction.[146]

In reversing the Ninth Circuit, a unanimous Supreme Court fundamentally altered the traditional test for general personal jurisdiction and announced that a court could exercise general jurisdiction over a corporation only when it is "essentially at home" in the forum state.[147] This new "at home" test replaced the previous "continuous and systematic general business contacts" test, which the Court called "unacceptably grasping."[148] Discarding the idea that a large corporation can be "at home" in all of the different places where it operates, *Daimler* pointed to the place of incorporation and principal place of business as the "paradigm[atic] . . . bases for general jurisdiction" because they "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable."[149] Both of these places for Daimler were located in Germany. Applying its new rule to the case, the Court held that there was no jurisdiction because "neither Daimler nor [Mercedes] is incorporated in California, nor does either entity have its principal place of business there."[150] Moreover, it found that this was not a case of "exceptional" circumstances that would warrant finding general jurisdiction.

143. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).
144. *Id*. at 751.
145. *Id*. at 752.
146. *Id*. at 753.
147. *Id*. at 769.
148. *Id*. at 761.
149. *Id*. at 760 (internal citations and quotes omitted).
150. *Id*. at 761.

Daimler fundamentally changed the corporate personal jurisdiction analysis, and it did so based partly on grounds of international comity. In a decisive sentence, the Court reproached the Ninth Circuit for "pa[ying] little heed to the risks to international comity its expansive view of general jurisdiction posed."[151] Rather than expressing mere generalities about foreign laws, the Court cited specific European Union rules, noting that, "[i]n the European Union, for example, a corporation may generally be sued in the nation in which it is 'domiciled,' a term defined to refer only to the location of the corporation's 'statutory seat,' 'central administration,' or 'principal place of business.'"[152] Additionally, to show that its reasoning was based on concrete concerns, the Court cited the Solicitor General's opinion that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[153] The Court concluded that such comity concerns guided its decision regarding personal jurisdiction.

Emphasizing the import of international comity in the decision, amici submitted to the Supreme Court in *Daimler* persuasively highlighted the dangers to the economy posed by broad U.S. jurisdiction and weakened international harmony. Various foreign corporations, including German banks and the Swiss Chamber of Commerce, argued as amici that "[t]he extraterritorial reach of U.S. laws—including U.S. courts' exercise of personal jurisdiction over non-U.S. businesses with respect to those companies' activities outside the United States—creates tremendous uncertainty that deters investment in and trade with the United States."[154] Moreover, they highlighted that a rule granting general jurisdiction over foreign corporations with affiliates in the United States "has significant implications for international comity."[155] The amici pointed specifically to problems with broad U.S. discovery, arguing that "given the uniquely expansive procedural rules governing civil litigation in the United States—including broad discovery . . . there is no doubt that foreign enterprises would revamp their operations to avoid subjecting themselves to general jurisdiction in U.S. courts, even if that would require relocating or significantly

151. *Id*. at 763.

152. *Id*.

153. Brief for the United States as Amicus Curiae Supporting Petitioner, DaimlerChrysler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3377321, at *2 (citing Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 161–62) (expressing concern that unpredictable applications of general jurisdiction based on activities of U.S.-based subsidiaries could discourage foreign investors). *See also* Brief for the Respondents, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 4495139, at *35 (acknowledging that the "doing business" basis for general jurisdiction has led to "international friction").

154. Brief for Economiesuisse et al. as Amicus Curiae Supporting Petitioner, DaimlerChrysler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3421893, at *1.

155. *Id*. at *3.

reducing their U.S. operations."[156] The amici also recognized that broad assertions of extraterritorial jurisdiction "will inevitably injure . . . international comity."[157] Finally, the amici concluded that withdrawal of foreign companies "would inflict significant harm upon the U.S. economy [and] would decrease foreign direct investment, which contributes significantly to [the U.S.] economy."[158] Undoubtedly, according to the amici, the economic and international comity effects of personal jurisdiction and discovery are closely linked.

Defendants in *Daimler* also highlighted the effects on the international system of America's uninhibited judicial power, noting that Judge O'Scannlain had sought a rehearing of the Ninth Circuit's decision en banc because the decision could "have unpredictable effects on foreign policy and international comity . . . as well as on our nation's economy."[159] Defendants warned that foreign corporations would withdraw their investments from the United States and the possible damage this could cause to "U.S. consumers and the U.S. economy."[160] Justice Sotomayor explicitly recognized these arguments, noting in her concurrence that "[w]hat has changed since *International Shoe* is not the due process principle of fundamental fairness but rather the nature of the global economy."[161]

In sum, *Daimler*'s significance for transnational discovery rests on its direct attack on the foundations of the *Aérospatiale* paradigm: broad personal jurisdiction and disregard for international comity. Without these two fundamentals, the *Aérospatiale* paradigm is weakened, and the Hague Convention remains the only alternative for transnational discovery. *Daimler* also shows that the Supreme Court has begun to grapple with international trade and comity in a new way. The decision intimates that the *Aérospatiale* paradigm is outdated. *Daimler* threw down the gauntlet for future courts, urging them to consider international comity as a crucial concern, rather than as a formality that should be dismissed through a contrived balancing test.

B. Gucci: The Second Circuit Takes International Comity a Step Further

Gucci America Inc. v. Weixing Li, decided in September of 2014, followed directly in the footsteps of *Daimler*. In *Gucci*, defendants sold counterfeit luxury goods over the Internet, labeled as Gucci and other brands, and wired the proceeds of their sales to Bank of China accounts.[162] Plaintiffs, manufacturers of

156. *Id*. at *10.

157. *Id*. at *4.

158. *Id*. at *11.

159. Brief for Petitioner, DaimlerChrysler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3362080, at *10 (internal quotation marks omitted).

160. *Id*. at *35.

161. Daimler AG v. Bauman, 134 S. Ct. 746, 771 (2014).

162. Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 126 (2d Cir. 2014).

the real luxury products, filed an action in the Southern District of New York seeking to protect their intellectual property from the alleged counterfeiters.[163] During pre-trial discovery, plaintiffs sought to freeze defendants' assets to ensure recovery and safeguard evidence of the unlawful conduct.[164] Accordingly, plaintiffs served Bank of China ("BOC") with an asset freeze injunction and a subpoena for documents at its New York City branch, seeking an asset freeze and information from "any and all Bank of China accounts associated with [defendants]."[165] In response to the subpoena and asset freeze, the BOC, a bank that is majority owned by the Chinese government, produced documents from its New York City branch but stated that it could not search for records located in China.[166] The district court held BOC in contempt, and the bank appealed.[167]

Applying *Daimler*, the Second Circuit concluded that there was no general jurisdiction over BOC because the bank was not "at home" in New York.[168] The court dismissed plaintiffs' arguments that *Daimler* did not apply to non-parties, stating:

> BOC's nonparty status does not alter the applicability of these cases to the question presented here. The essence of general personal jurisdiction is the ability to entertain 'any and all claims' against an entity based solely on the entity's activities in the forum, rather than on the particulars of the case before the court.[169]

The Second Circuit further held that BOC did not waive its personal jurisdiction defense because *Daimler* had created an entirely new test.[170] Therefore, the Second Circuit found general jurisdiction was lacking because BOC "has branch offices in the forum, but is incorporated and headquartered elsewhere," and it "has only four branch offices in the United States and only a small portion of its worldwide business is conducted in New York."[171]

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163. *Id*.

164. *Id*.

165. *Id*.

166. *Id*. at 127.

167. *Id*. at 128.

168. *Id*. at 134–35.

169. *Id*. at 134 n.13.

170. *Id*. at 135.

171. *Id*. *Gucci* also intimated that personal jurisdiction might be found where an entity has "consented to personal jurisdiction in New York by applying for authorization to conduct business in New York and designating the New York Secretary of State as its agent for service of process." *Id*. at 136 n.15. However, this seems unlikely to develop into a feasible jurisdiction avenue because foreign banks register with state banking authorities under Section 200 of the New York Banking Law, which grants only specific jurisdiction. *See* Gliklad v. Bank Hapoalim B.M., No. 155195/2014, 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014). In addition, the New York State Senate recently rejected a bill (S. 7078) that would have made consent to do business a grant of general jurisdiction. *But see* Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 78 F. Supp. 3d 572, 587 (D. Del. 2015) (finding that registration to do business in Delaware conferred the court with general jurisdiction).

Crucially, the court emphasized the importance of international comity, remanding with specific instructions for the district court to consider "whether, assuming the necessary [specific] jurisdiction is present, such an order is consistent with principles of international comity."[172] The court stressed that its decision was wholly based on *Daimler*, and noted that the Supreme Court had "expressly warned against the 'risks to international comity' of an overly expansive view of general jurisdiction inconsistent with the fair play and substantial justice due process demands."[173] The court found important a BOC declaration from a Chinese law expert showing a direct conflict between plaintiffs' demands and Chinese banking laws.[174] Emphasizing its overriding concern with international comity, the court cited *Aérospatiale* for the principle that "[t]he doctrine of international 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.'"[175] Moreover, the court held that an international comity analysis under the Restatement (Third) of Foreign Relations[176] is appropriate even in the context of asset freeze injunctions, a

172. *Gucci Am., Inc*., 768 F.3d at 129.

173. *Id*. at 135 (quotation marks omitted).

174. *Id*. at 138.

175. *Id*. at 139.

176. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987). The Restatement provides the following:

> (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable. (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating state, *i.e*., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state. (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

situation that did not previously require such an analysis.[177] Simply stated, the court made international comity a central consideration in the case.

To further emphasize the renewed importance of international comity, the Second Circuit peremptorily dismissed plaintiffs' waiver argument in the asset freeze context, ruling that international comity arguments cannot be waived.[178] The court stated: "given the important role that comity plays in ensuring the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, we do not deem the issue forfeited."[179] Finally, the court instructed the district court to conduct a comity analysis and give "due regard to the various interests at stake, including: (1) the Chinese Government's sovereign interests in its banking laws; [and] (2) the Bank's expectations, as a nonparty, regarding the regulation to which it is subject in its home state *and* also in the United States."[180]

In renewing the importance of international comity, *Gucci* follows directly from *Daimler*. Both courts found it vital to highlight the important interests of foreign countries and the necessary limits that international relations impose on U.S. courts. Several issues of foreign relations came to the forefront in *Gucci* that became imperative to the case and raised the issue of international comity.

First, the Bank of China introduced a letter written by an official from the China Banking Regulatory Commission, raising concerns about the impact the case could have on China-U.S. relations.[181] The letter argued that Chinese bank privacy and secrecy laws were essential to the country's sovereignty, and that a conflicting order from a U.S. court would place the bank in an untenable position.[182] Further, the letter highlighted the importance of the U.S.-China economic relationship and the resulting harmful impact on trade of a conflicting U.S. court order.

Second, the High People's Court of Beijing Municipality ordered the BOC to resume regular services to the defendants, in effect overturning the asset freeze imposed by the district court. This conflicting ruling gave international comity more than a speculative role in the case. The Chinese government and its courts were serious about protecting their interests, which should have been expected given the BOC's status as a state-owned entity of vital importance to the Chinese government.

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177. *Gucci Am. Inc.*, 768 F.3d at 140 ("Ordering compliance with an asset freeze, however, implicates different concerns from those implicated by an order for the production of documents").

178. *Id.*

179. *Id.* (internal quotation marks and citations omitted).

180. *Id. See also* Gliklad v. Bank Hapoalim B.M., No. 155195/2014, 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014) (holding that a foreign bank with a New York branch did not "meet the two paradigm bases for general jurisdiction articulated in *Daimler*. [The bank] is incorporated in Israel and its principal place of business is in Tel Aviv").

181. Letter from Huai Peng Mu, *supra* note 2.

182. *Id.*

Third, the U.S. government as *amicus curiae* argued strongly for vacatur so that the lower court could perform a "thorough international-comity" analysis and carefully weigh the sovereign interests at stake.[183] The U.S. government argued that when the extraterritorial application of U.S. laws implicate sovereign interests of foreign countries, "submissions from interested governments that address comity issues should be given serious consideration."[184] Moreover, the *amicus* made an important declaration: comity is not "mere courtesy and good will," but involves serious consideration of "international duty and convenience."[185] The *amicus* announced the government's official policy that the U.S. legal system should promote harmony, coordination, and respect for foreign sovereigns. Accordingly, the government lambasted the district court for not taking into account China's interests, arguing that the "*Gucci* court should have been more mindful . . . and should not have summarily dismissed representations describing the national importance of China's banking secrecy laws."[186] The U.S. position clearly recognized that deep issues of Chinese sovereignty and trade relations were at stake.

In sum, international comity was integral in the Second Circuit's *Gucci* decision. Building on *Daimler*, the Second Circuit and U.S. *amicus* emphasized the renewed importance of international comity and its central role in foreign relations. Regardless of the reasons for the renewed importance of comity, the Second Circuit wanted to make clear to lower courts that comity should be seriously considered in every decision affecting foreign countries.

C. Motorola: The New International Comity Paradigm is Established

In *Motorola Credit Corp. v. Standard Chartered*, the New York State Court of Appeals upheld the continued applicability of the separate entity rule,[187] which dictates that a U.S. bank branch is not concerned or responsible for assets held in foreign branches and thus cannot be forced to restrain or turnover assets held abroad.[188] The separate entity rule is the embodiment of international

183. Brief for United States as Amicus Curiae, Gucci Am., Inc. v. Bank of China, 768 F.3d 122 (2d Cir. 2014) (Nos. 11-3934), 2014 WL 2290273, at *3.

184. *Id*.

185. *Id*. at *17.

186. *Id*. at *25.

187. The separate entity rule is a creature of New York common law, providing that even if a bank is subject to personal jurisdiction in New York, "its other branches are to be treated as separate entities for certain purposes," including prejudgment attachments and "postjudgment restraining notices and turnover orders." As the *Motorola* court noted, the rule has been justified on three grounds: (1) the importance of international comity and respect for foreign sovereigns' power over banks located in their countries; (2) the danger of double liability that banks may face at home and abroad; and (3) the high burden and cost of requiring banks to "monitor and ascertain the status of bank accounts in numerous other branches." Motorola Credit Corp. v. Standard Chartered Bank, 21 N.E.3d 223, 226-27 (2014).

188. *Id*. at 149.

comity; it exists to avoid forcing foreign bank branches to comply with U.S. orders and as recognition of foreign sovereign power over banks located in their countries. *Daimler* and *Gucci* provided intellectual support for the revival of the rule.

Motorola involved the prolonged litigation of Motorola Credit Corporation against the Uzans, a Turkish family involved in a sprawling web of businesses. The Uzans borrowed billions of dollars from Motorola before diverting and misappropriating those funds. In 2003, the District Court for the Southern District of New York awarded Motorola $2.1 billion in compensatory damages and noted that the Uzans were criminals who had "perpetrated a huge fraud."[189] Since 2003, *Motorola* has endeavored to enforce its award, as well as $1 billion in additional punitive damages, by serving subpoenas on non-party banks and attempting to attach Uzan-related property around the world.[190]

In 2013, the district court ordered the restraining of Uzan assets anywhere in the world by anyone with notice of the order. Thereafter, Motorola served restraining orders and subpoenas on a variety of banks, including Standard Chartered Bank ("SCB"), a bank incorporated and headquartered in the United Kingdom, through service on its New York branch.[191] Pursuant to the order, SCB searched and located Uzan assets in its United Arab Emirates branches.[192] After SCB froze $30 million worth of Uzan assets, the U.A.E. central bank retaliated against SCB by debiting around $30 million from an SCB account therein. Likewise, the Central Bank of Jordan seized documents from SCB's Jordan branch to punish the bank.[193] These actions prompted SCB to seek relief from the restraining order and the subpoena, arguing that the separate entity rule and international comity confined the restraining notice to its New York branch and not its foreign branches.[194] Motorola moved to compel the requests.

In August of 2013, the district court sided with SCB and refused to compel the subpoenas because of, among other things, international comity. In its analysis, the court noted that the subpoenas implicated the criminal laws of Jordan and the U.A.E., which were being enforced to the detriment of SCB. Although the court rejected the applicability of the separate entity rule, it ultimately found that international comity weighed against the production of SCB documents in the U.A.E. and Jordan. This was a victory for international comity. Motorola appealed this decision, and the Second Circuit certified the question of the separate entity rule to the New York Court of Appeals.

A five-member majority of the Court of Appeals upheld the separate entity rule as a crucial part of New York common law. The court noted that "[c]ourts

189. *Id*. at 156.
190. *Id*. at 156–57.
191. *Id*. at 157.
192. *Id*.
193. *Id*.
194. *Id*.

have repeatedly used it to prevent the postjudgment restraint of assets situated in foreign branch accounts based solely on the service of a foreign bank's New York branch."[195] The majority concluded that a "judgment creditor's service of a restraining notice on a garnishee bank's New York branch is ineffective under the separate entity rule to freeze assets held in the bank's foreign branches."[196]

In reaching this conclusion, the majority analyzed the history and purpose of the rule and emphasized that one of the most important justifications for the rule was "the importance of international comity" and foreign laws and regulations.[197] The majority observed that the same justifications that led to the creation of the rule continued to resonate, including the avoidance of "competing claims and the possibility of double liability" and "the practical constraints and costs associated with conducting a worldwide search for a judgment debtor's assets."[198] The majority thus rejected Motorola's argument that new technological developments rendered the rule anachronistic.

In the context of discovery and comity, the court made various relevant findings that follow directly from *Daimler*. First, to emphasize that it was following the Supreme Court, the New York Court of Appeals cited *Daimler* as "recognizing the importance of considering 'the risks to international comity'" and supporting the proposition that "the separate entity rule promotes international comity and serves to avoid conflicts among competing legal systems."[199] Second, the court noted the costs of worldwide discovery, commenting that "courts have continued to recognize the practical constraints and costs associated with conducting a worldwide search for a judgment debtor's assets."[200] The prospect of burdensome discovery and its implications for international comity was an important factor animating the decision. Third, the court recognized that the rule provided benefits to international banks and to New York's "status as the preeminent commercial and financial nerve center of the Nation and the world."[201] Finally, the majority noted that in this specific case SCB faced clear repercussions in Jordan and the U.A.E., placing it in an impossible situation and risking double liability.[202] In sum, *Motorola*'s holding, much like *Daimler* and *Gucci*, was based on practical considerations of international comity, the global economy, and the United States' place in it.

Writing for the dissent, Judge Abdus-Salaam echoed *Aérospatiale*'s embrace of broad U.S. power over foreign parties and defended broad

195. *Id*. at 162.

196. *Id*. at 163.

197. *Id*. at 159.

198. *Id*. at 159–62.

199. *Id*. at 162.

200. *Id*.

201. *Id*. (internal quotation marks omitted).

202. It bears emphasis that the relevance of foreign criminal laws providing the prospect of double liability is one of the foundational reasons for the existence of international comity.

http://scholarship.law.berkeley.edu/bjil/vol34/iss1/7
DOI: https://doi.org/10.15779/Z384K2P

jurisdiction as appropriate in the modern world where discovery should not be burdensome. After laying out its view of the world as different than the majority's, the dissent dismissed the court's concern with comity as "akin to using a cannon to kill a fly" because many countries did not have conflicting laws and thus a case-by-case approach would be more appropriate. Judge Abdus-Salaam otherwise criticized the separate entity rule as anachronistic and misguided. First, the dissent complained that the decision allowed the criminal Uzan family to evade enforcement proceedings in New York and shielded judgment creditors who could "make a mockery of our courts' duly entered judgments."[203] A general fear that judgments will go unenforced is a common concern among courts that support broad U.S. discovery. Second, the dissent relied on statutory construction of New York's Civil Practice and Rules, concluding that under Section 5222 foreign bank branches were not exempt from complying with a restraining notice.[204] Third, Judge Abdus-Salaam emphasized that technology had rendered the rule obsolete because "[i]n this day of centralized banking and advanced technology, bank branches can communicate with each other in a matter of seconds."[205] Plaintiffs seeking broad discovery typically argue it is not as burdensome as defendants or non-parties claim it is. Finally, the dissent stressed that banks faced increasingly complex regulations and were not deterred from conducting business in New York and would thus adapt to the abolishment of the separate entity rule. In support of this conclusion, Judge Abdus-Salaam quipped that:

> Banks have apparently adjusted to the societal expectation that they will be responsible corporate citizens, presumably by using modern technology and a reasonable share of their resources to shoulder the burden of compliance with a regulatory regime of global reach.[206]

This sentence encapsulated the dissent's theory: banks will adapt and comply, as they have with other regulations, as long as courts require them to do so. The dissent concluded that the rights of judgment creditors outweighed the concerns of foreign banks.

On the whole, *Motorola* is a remarkable case that explores two vastly different views of the modern globalized economy and the United States' place in it. The majority strained to maintain New York's privileged position as the financial capital of the world while the dissent dismissed these concerns as overblown and irrelevant. In so doing, *Motorola* relied on *Daimler* and *Gucci*'s renewed appreciation for international comity, emphasizing respect for foreign countries and the need to limit the uninhibited nature of U.S. judicial power.

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203. *Motorola Credit Corp*., 24 N.Y.3d at 164 (Abdus-Salaam, J., dissenting).

204. *Id*. at 165–66. The dissent criticized the Separate Entity Rule as a "judicially created doctrine" that is not "tethered to the CPLR's text." Because the CPLR did not limit the reach of restraining notices, the dissent concluded that restraining notices applied abroad and the Separate Entity Rule should therefore be "rejected, not embraced."

205. *Id*. at 167.

206. *Id*. at 169.

Motorola is crucial because it will impact the way banks operate in New York, and it signals the extension of *Daimler* into matters of state law.

* * *

In conclusion, *Daimler*, *Gucci*, and *Motorola* represent a new paradigm of respect for international comity. These cases signify a break from the past because they made international comity a prominent reason for refusing to hear cases implicating foreign interests. These cases also weakened the *Aérospatiale* paradigm that relied on personal jurisdiction and control. Although many other courts had considered international comity in the past—through a pretense balancing test—no three cases from such prominent courts had so thoroughly and so quickly linked respect for other sovereigns to decisions about jurisdiction and discovery.[207]

One could argue that *Daimler*, *Gucci*, and *Motorola* are outliers because of their unique facts: the involvement of the Argentine government and a German corporation, the state-owned Bank of China, and the threat of actual criminal punishment confronting SCB in other countries. Yet the *Aérospatiale*-era was littered with cases involving even greater foreign interests. For example, in *Bodner v. Paribas*, plaintiff Holocaust survivors and defendant French Banks implicated the deep and historical interests of a variety of European countries.[208] Similarly, *Wiwa v. Royal Dutch Petroleum Co.* involved torture, imprisonment, and murder by Nigerian government officials and English and Dutch oil companies, somewhat akin to the facts in *Daimler*.[209] But in both of those cases district courts ignored the overriding importance of international comity. Moreover, much like *Gucci*, *Aérospatiale* itself and various cases thereafter involved state-owned companies,[210] and, like *Motorola*, foreign countries have threatened to punish companies who produce documents in U.S. courts.[211] There simply is no clear way to factually distinguish these cases.

It seems likely that the newfound respect for international comity will revive the Hague Convention.[212] The *Aérospatiale* paradigm relied on two

207. Recently, in Motorola Credit Corp. v. Uzan, No. 02 Civ. 666(JSR), 2015 WL 5613077, at *3 (S.D.N.Y. Sept. 9, 2015), Judge Rakoff, perhaps recognizing the new paradigm, granted a protective order in favor of two banks seeking to avoid discovery in violation of Swiss law. Similarly, the district court for the Northern District of Illinois refused to order two foreign banks to produce documents located abroad due to concerns with international comity, holding that "the interests of international comity weigh against ordering these foreign non-party banks to comply with Plaintiffs' broad discovery requests." Leibovitch v. Islamic Republic of Iran, No.08 C 1939 (N.D. Ill. May 19, 2016) Dkt. 203.

208. Bodner v. Paribas, 202 F.R.D. 370 (E.D.N.Y. 2000).

209. Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88 (2d Cir. 2000).

210. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 524 n.2 (1987).

211. *In re* Marc Rich & Co., A.G., 736 F.2d 864, 866 (2d Cir. 1984) (ordering production of documents despite threats from the Swiss government of criminal consequences).

212. Requests for documents held abroad can be targeted at (1) foreign companies with U.S. affiliates or at (2) U.S. companies with foreign affiliates. These cases directly attack the first kind of

pillars: control and personal jurisdiction. *Daimler* and *Gucci* have severely limited the existence of general personal jurisdiction over foreign companies with affiliates in the United States. As long as the foreign companies involved in any particular case are based and registered in foreign countries, they are not "at home" in the United States and cannot be subjected to general jurisdiction.[213] Therefore, barring an extraordinary expansion of specific jurisdiction or the concept of "consent" to general jurisdiction, the *Aérospatiale* paradigm has been weakened.[214] Accordingly, the Hague Convention will, at the very least, become necessary in cases dealing with foreign corporations with a presence in the United States. If *Daimler* and *Gucci* are applied consistently by lower courts in transnational discovery disputes, litigants will have to familiarize themselves with the requirements of the Hague Convention in order to request documents held abroad, as it may be the only vehicle available.[215]

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request, and indirectly weaken the second kind. In either case, the Hague Convention should be substantially strengthened.

213. Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014).

214. An expansion of specific jurisdiction is possible, and perhaps likely. But the extent of any such expansion is unclear. If the target of a discovery request is a defendant and they are found to have "purposefully directed" their activities at the forum, then why would the documents be located abroad? This could happen in certain cases but it should not be the norm. Similarly, if the target of a request is a non-party, then surely plaintiffs cannot argue that their claims are based on the foreign company purposefully directing its activities at the forum and that litigation arises out of or relates to those activities. Moreover, in either case courts will have to evaluate the "fair play and substantial justice" necessary for any assertion of jurisdiction and, as explained above, may often find that this factor is not satisfied.

On the other hand, on September 29, 2015, the *Gucci* district court, on remand from the Second Circuit, found specific jurisdiction over Bank of China records in China related to New York transactions. Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974(RJS), 2015 WL 5707135, at *7 (S.D.N.Y. Sept. 29, 2015). The court held that the Bank of China had purposefully availed itself of New York by establishing an office there, owning various properties, initiating lawsuits, and generally doing business therein. As such, Bank of China gained access to "New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States." *Id*. at *3. The court also rejected comity concerns, but mostly because it had already conducted a pre-*Daimler* comity analysis. *Id*. at *11–12. It is unlikely that other courts will follow this precedent to order the production of documents held abroad because the documents at issue in *Gucci* were directly related to the litigation and had, at one point, touched New York. *See also* Strauss v. Credit Lyonnais, S.A., 2016 WL 1305160, at*17-19 (E.D.N.Y. Mar. 3l, 20l6) (accepting a broad theory of specific jurisdiction).

With regards to consent to general jurisdiction, although some courts have been receptive to arguments that foreign corporations consent to jurisdiction when they register to do business in a particular state, the Second Circuit recently rejected this theory. *Brown v. Lockheed Martin Corp.*, No. 14-4083, 2016 WL 641392 (2d Cir. Feb. 18, 2016).

215. Gap, Inc. v. Stone Int'l Trading, Inc., No. 93 Civ. 0638 (SWK), 1994 WL 38651, at *1 (S.D.N.Y. Feb. 4, 1994) ("As a practical matter, in many cases the Hague Convention provides the only means to request documents or testimony from foreign non-parties over whom the court has no personal jurisdiction and who are beyond the subpoena power of the court."). *See* Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144 (E.D. Tex. 1992) (case dismissed on forum non conveniens grounds where nonparty witness beyond subpoena power of court and Hague Convention thus provided only means of obtaining testimony), *aff'd*, 11 F.3d 55 (5th Cir. 1993).

Looking to the future, if Hague Convention procedures are invoked more often, this could initiate a self-reinforcing mechanism whereby growing familiarity with the Convention encourages more litigants and courts to employ it. As legal actors become more familiar with the Convention, they might develop the institutional knowledge necessary to make applying the Convention a smoother and more routine process. That would, in turn, encourage further use of the Convention to the detriment of the Federal Rules. This process might even catalyze the development of a new treaty that could replace the Convention and become even more useful. In short, the cases and doctrines described above may have far-reaching consequences. [216]

IV.
ECONOMICS AND DIPLOMACY: THE MAIN FACTORS BEHIND *DAIMLER*, *GUCCI*, AND *MOTOROLA*

If *Daimler*, *Gucci*, and *Motorola* represent a change in the law, as this Article has thus far argued, then it is worth exploring the reasons behind such a change. There are two common elements in these decisions that are worth briefly discussing here: (1) the need for reciprocity in international relations and the danger of retaliatory laws, and (2) the importance of international comity to international trade and the global economy.

1. Reciprocity, Retaliation, and Foreign Relations

Concerns with retaliation and reciprocity animated the three decisions. Foreign companies often argue in front of U.S. courts that exercising overbroad jurisdiction will cause foreign sovereigns to treat U.S. companies the same way. If a court orders production of documents by a French company in New York, the thinking goes, then a French court is more likely to order transnational discovery against a U.S. company in Paris. *Daimler*, *Gucci*, and *Motorola* took this argument into serious consideration and followed *Kiobel*'s advice that courts should be wary of the "danger of unwarranted judicial interference in the conduct of foreign policy."[217]

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216. On the other hand, requests for documents held abroad by American companies face an uncertain future. Although "personal jurisdiction and control" will almost always be present, the requests will still involve the interests of foreign countries in the litigation. *Motorola* may be instructive in this regard as it shows that *Daimler* means more than just a limitation on general jurisdiction; it also means greater general respect for international comity. *Motorola* involved the freezing of a British bank's property in the U.A.E. and Jordan. Although it was not a Jordanian or Emirates company, these countries were still deeply interested in the litigation and the New York Court of Appeals recognized that fact. *Motorola* therefore indicates that *Daimler*'s consequences will reverberate in the context of American companies with documents abroad. Courts will have to conduct a rigorous analysis of the foreign interests at stake before deciding, as they have for thirty years, to order production.

217. Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1661 (2013).

Echoing one of the most important justifications for international comity, the defendant in *Daimler* argued that broad U.S. jurisdiction would "encourage foreign nations to enact retaliatory jurisdictional laws that threaten U.S. companies with subsidiaries abroad."[218] This was not an empty claim. It was substantiated by Ninth Circuit Judge O'Scannlain's finding that other countries had already enacted retaliatory laws against the United States.[219] Indeed, renowned academic Gary Born found that:

> [S]everal civil law countries have enacted "retaliatory" jurisdictional provisions. These provisions empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner's home state would have asserted jurisdiction. For example, Belgian domiciliaries can bring actions in Belgian courts against foreign defendants if they can demonstrate that the courts of the foreigner's domicile would entertain a comparable action against a Belgian defendant. Likewise, Italian courts will exercise jurisdiction over actions by Italian nationals against foreigners, provided that the foreigner's courts would entertain claims against Italians in like circumstances. Austria and Portugal also have comparable retaliatory statutes.[220]

Taking these concerns into account, the Supreme Court explicitly noted the Solicitor General's statement that foreign sovereign objections to broad general jurisdiction had "in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[221] Even plaintiffs in *Daimler* recognized in their brief that "international opposition to American legal tradition" caused "international friction."[222] In short, the danger of retaliatory laws or impediments to international negotiations was an important factor for the Supreme Court in *Daimler*.

In *Gucci*, the Second Circuit was similarly concerned about the consequences of its ruling for China-U.S. relations. Chinese regulators submitted a letter ominously warning that the case would impact "the conduct of China-U.S. relations, and, in particular, our countries' Strategic and Economic Dialogue."[223] The court took this threat seriously and, as a result, invited the U.S. government to weigh in on the case.[224] In response, the government urged the court to take greater account of China's sovereign interests and criticized the district court for not doing so.[225]

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218. Brief for Petitioner, DaimlerChrysler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3362080, at *35.

219. *Id*.

220. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15 (1987).

221. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).

222. Brief for the Respondents, DaimlerChrysler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 4495139, at *35.

223. Letter from Huai Peng Mu, *supra* note 2.

224. Gucci Am., Inc., v. Weixing Li, 768 F.3d 122, 128–29 (2d Cir. 2014).

225. Brief for the United States as Amicus Curiae Supporting Petitioner, DaimlerChrysler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3377321.

Likewise, the *Motorola* court did not have to consider a hypothetical punishment under foreign law because Jordan and the U.A.E. had already proven their willingness to challenge U.S. discovery rules when they held SCB criminally liable under local law. The New York Court of Appeals specified that one of the main reasons the separate entity rule, itself an embodiment of international comity, was applicable in the case was because SCB faced repercussions abroad.[226] Ordering the bank to comply with the turnover order would have placed it in the difficult position of obeying conflicting rules by three sovereigns—exactly the kind of situation the separate entity rule and international comity principles attempt to avoid.

In sum, concerns of reciprocity and retaliation played important roles in all three decisions. The important feature to notice is that all three courts dealt with these concerns in the same way—by emphasizing the importance of international comity and foreign sovereigns' interests in the litigation. Unlike the *Aérospatiale*-era, these three courts took foreign interests seriously, keeping in mind the *Kiobel* advice that courts should avoid "clashes between our laws and those of other nations which could result in international discord."[227] Although many courts during the *Aérospatiale*-era paid lip service to this idea, they often concluded that U.S. interests were more important and justified broad international jurisdiction and discovery. *Daimler*, *Gucci*, and *Motorola* are revolutionary in concluding the opposite, that foreign interests are important enough to limit U.S. general jurisdiction, discovery, and restraining notices.

2. The International Economy

International comity has always been, to a large extent, about the international economy and commercial system. Justice Blackmun emphasized in his *Aérospatiale* dissent that the Convention "serves the long-term interests of the United States in helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems."[228] Commercial interdependence across the globe is one of the most important factors behind the need for international legal harmony. This is why the U.S. Chamber of Commerce has prudently noted that "[a]s globalization advances, the potential for conflicting judicial processes to harm U.S. commercial and other interests increases, and in reaction the United States has consistently promoted international comity as a means to harmonize

226. Motorola Credit Corp. v. Standard Chartered Bank, 21 N.E.3d 223, 229 (2014) ("Indeed, as the District Court observed, the facts of this case aptly demonstrate that the policies implicated by the separate entity rule run deeper than the ability of a bank to communicate across branches. In seeking to comply with the restraining order, SCB faced regulatory and financial repercussions abroad.").

227. Kiobel v. Royal Dutch Petro. Co., 133 S. Ct. 1659, 1661 (2013) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

228. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 550 (1987).

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international legal systems."[229] The Supreme Court recently agreed with this spirit, stating that taking account of the "legitimate sovereign interests of other nations . . . helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."[230]

Courts generally recognize the interaction between global commerce and international comity but have only recently begun to view transnational discovery in this context. Just a few years ago, one court expressly recognized that "transnational discovery requests are increasing due to the global nature of 'international commerce.'"[231] Beyond diplomacy and paying heed to the concept of "harmony," international comity affects the country's bottom line: the economy.

In *Daimler*, *Gucci*, and *Motorola*, the foreign parties highlighted the cases' possible repercussions on international commerce. The three courts responded by finally affirming the importance of international comity in this context. In *Daimler*, defendant's brief highlighted that Judge O'Scannlain had sought a rehearing en banc because the Ninth Circuit's decision could "have unpredictable effects . . . on our nation's economy."[232] The defendant also warned that foreign corporations would withdraw their investments out of the United States and that this could cause possible damage to "U.S. consumers and the U.S. economy."[233] Justice Sotomayor explicitly recognized these arguments, noting in her concurrence that "[w]hat has changed since *International Shoe* is not the due process principle of fundamental fairness but rather the nature of the global economy."[234] It seems that *Daimler*, *Gucci*, and *Motorola* recognized that, by extension, what has changed since *Aérospatiale* is the nature of the global economy.

Gucci and *Motorola* also faced these concerns. In *Gucci*, Chinese regulators wrote a letter outlining that cooperation was crucial "in the arenas of banking and finance."[235] Broad U.S. jurisdiction over the BOC threatened this stability and the U.S.-China economic dialogue. Plaintiff argued that Chinese data protection laws were part of China's strategy in developing its financial system "which is of no small importance to the world economy."[236] The U.S.

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229. Memorandum of Law by Chamber of Commerce of the United States of America as Amicus Curiae in Opposition to Plaintiff's Motion to Compel at 6, Quinn v. Altria Grp, Inc., No. 07 Civ. 8783(LTS)(RLE), 2008 WL 3518462 (S.D.N.Y. Aug. 1, 2008).

230. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–65 (2004).

231. Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 795 (S.D.N.Y. 2012).

232. Brief for Petitioner, DaimlerChrysler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3362080, at *10.

233. *Id*. at *35.

234. DaimlerChrysler AG v. Bauman, 134 S. Ct. 746, 771 (2014).

235. Letter from Huai Peng Mu, *supra* note 2.

236. Brief for Appellant, Gucci Am., Inc., v. Bank of China, 768 F.3d 122 (2d Cir. 2014) (Nos.

amicus even asked the court to weigh the interests of China in opposing the asset freeze in accordance with a wider balancing test provided by Section 403 of the Restatement (Third) of Foreign Relations Law, which takes into account "the importance of the regulation to the international political, legal, or economic system."[237] The Second Circuit duly obliged, ordering the district court to use that test.

Motorola prominently featured a profound debate between the majority and the dissent discussing New York's place as the financial capital of the world. The majority noted that "[u]ndoubtedly, international banks have considered the [separate entity rule's] benefits" when opening branches in New York, which "has played a role in shaping New York's status as the preeminent commercial and financial nerve center of the Nation and the world."[238] The court also emphasized that it believed abolition of the rule "would result in serious consequences in the realm of international banking to the detriment of New York . . ."[239] In espousing these ideas, the majority evinced a profound concern for New York's economy and its relationship with international comity. In contradistinction, the dissent, embracing the style of *Aérospatiale* progeny, emphasized repeatedly the rights of U.S. plaintiffs to enforce their judgments, concluding that "any burden imposed on the banks is far outweighed by the rights of judgment creditors to enforce their judgments."[240] Moreover, the dissent rejected any arguments that banks relied on the rule, noting that they faced increasingly complex government regulations and "[y]et banks continue to do business in this country."[241] The dissent went on to emphasize that the U.S. government had recently imposed severe fines on foreign banks, but nonetheless banks had "adjusted to the societal expectation that they will be responsible corporate citizens."[242]

Ultimately, the *Motorola* dissent rejected the majority's concern with international comity as overbroad because it protected restraining assets in countries without conflicting laws. However, an overbroad rule of comity seems preferable to one that is underinclusive. As shown *infra* Part II, the *Aérospatiale* paradigm was insufficient to quell foreign-sovereign concerns with U.S. discovery. It was also inadequate for the modern international economy. The *Motorola* majority's take on international comity sought to foster an international environment that promotes cooperation and international trade. The dissent did not truly take this into account. It instead focused on the hardship to

11-3934-cv), 2013 WL 1790984, at *37.

237. Brief for United States as Amicus Curiae, Gucci Am., Inc., v. Bank of China, 768 F.3d 122 (2d Cir. 2014) (Nos. 11-3934), 2014 WL 2290273, at *20.

238. Motorola Credit Corp. v. Standard Chartered Bank, 21 N.E.3d 223, 229 (N.Y. 2014) (citations and quotations omitted).

239. *Id*. at 163.

240. *Id*. at 170.

241. *Id*. at 168.

242. *Id*. at 234.

http://scholarship.law.berkeley.edu/bjil/vol34/iss1/7
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American plaintiffs. But this ignores the fact that American plaintiffs seeking to enforce their judgments abroad will not suffer significant difficulties as they may use local procedures.

These two views of the global economy and international comity embraced by the majority and the dissent could not have been more different. The majority pinpointed economics as the most important factor in the case and saw the court's role as the protector of New York's position as the financial capital of the world. On the other hand, the dissent approached the case from the point of view of litigants seeking to enforce their judgments who nonetheless face difficulties due to state law artificial restraints. One point to note is that this debate over economics was inextricably linked to value judgments about the importance of litigant rights and state interests, and involved deep questions of international comity and its relationship to global economics.

In conclusion, *Daimler*, *Gucci*, and *Motorola* challenge the *Aérospatiale* paradigm of international comity partly because of the necessities of the modern global economy. Taking this factor into account, the New York Court of Appeals saw the separate entity rule as necessary for maintaining New York's place as the global financial center. The Supreme Court in *Daimler* recognized the wide-ranging effects on the U.S. economy and global trade of an "uninhibited" rule of general personal jurisdiction. Likewise, the Second Circuit saw the danger of upsetting the crucial U.S.-China economic relationship. These three cases did not deal with exceptional facts. It is the reality of the modern global economy that cases dealing with jurisdiction and discovery will inevitably involve important foreign interests. In the face of such a reality, a broad rule of international comity is necessary.

V.
HOW *DAIMLER* SHOULD RESHAPE COMITY: IMPOSING LIMITS ON U.S. INTERESTS AND REQUIRING INPUT FROM FOREIGN SOVEREIGNS

The downfall of broad general jurisdiction over foreign parties with affiliates in the United States and the renewed respect for international comity will have a deep impact on future case law. It will affect the way courts evaluate international comity concerns in the context of transnational discovery and the Hague Convention. It seems clear that courts should take heed of *Daimler*, *Gucci*, and *Motorola* when evaluating international comity and should no longer shirk their international comity responsibilities by reciting the elements of a pretense test that almost always allows courts to order discovery of documents held abroad. *Daimler*, *Gucci*, and *Motorola* require a more serious and rigorous consideration of foreign countries' interests.

As explained *infra* Part II, at least two arguments have been leveled against the *Aérospatiale* paradigm: (1) the *Aérospatiale* balancing test overvalues U.S. interests; and (2) U.S. courts are unable to adequately address the interests of foreign nations because judges have little experience with foreign laws or

international law. These are legitimate concerns with the way U.S. courts treat international comity. Scholars and judges writing before *Daimler* proposed improvements to the comity analysis in ways that still resonate today. One way to support the changes heralded by *Daimler* is to alter the existing balancing test towards a presumption in favor of the Hague Convention.[243] Another way would be to shift the burden of persuasion on plaintiffs to prove that the Convention should not be employed.[244] Although both of these approaches are appropriate, they do not tackle the overvaluing of U.S. interests responsible for the excesses of the *Aérospatiale*-era.

For that reason, this Article advocates a third, more novel approach: courts should engage in a qualitative limitation on the kinds of U.S. interests that are significant and should require frequent input from foreign sovereigns.[245] As many courts have noted, the "most important" factor in the comity analysis is the balance of national interests.[246] Targeting this factor could ameliorate the problem of overvaluing U.S. interests above foreign laws and is a particularly attractive way to nudge U.S. law towards a more international approach, as it does not necessitate a broad makeover of current law.

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243. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 547 (1987) (Blackmun, J., concurring in part and dissenting in part). This is the approach advocated by Justice Blackmun's dissent in *Aérospatiale*. This approach would greatly aid the adoption of Hague Convention procedures and will limit the uninhibited exercise of U.S. power. Such an approach would limit the obstacles currently in place on the use of the Hague Convention and would influence the balancing test in favor of the Convention. Justice Blackmun's presumption would shift this burden and force plaintiffs, instead of defendants, to prove that the Federal Rules should trump the Convention.

244. This burden shifting scheme has been proposed before, Matthew B. Kutac, *Reallocating the Burden of Persuasion Under the Aérospatiale Approach to Transnational Discovery*, 24 REV. LITIG. 173, 199 (2005). Cases that ratified the current burden scheme: *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 305 (3d Cir. 2004); Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 552 (S.D.N.Y. 2012); *In re* Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 51 (D.D.C. 2000); Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344, 346 (D. Conn. 1997); *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 354 (D. Conn. 1991). *See also In re* Vivendi Universal, S.A. Sec. Litig., 02-CIV-5571(RJH)(HBP), 2006 WL 3378115, at *2 (S.D.N.Y. Nov. 16, 2006). Arguably, plaintiffs are in a better position than defendants to meet this burden, as they know the *kind* of information they are seeking, the *locations* where they are seeking it, and are thus better equipped to argue for one procedure over another. Plaintiffs should therefore meet their burden by specifically outlining why the Federal Rules provide a more efficient procedure in a particular case, and crucially, by showing that the foreign country at issue has cooperated in the past with such requests and is likely to do so in this case. Plaintiffs should also be required to evaluate the possible conflict of laws and outline why U.S. procedures should nonetheless overcome foreign law. The most important effect of such a requirement would be to incentivize plaintiffs to truly consider the Hague Convention before launching into broad subpoenas and requests under U.S. law. This would, in accord with *Daimler* and its progeny, limit the raw and uninhibited exercise of U.S. courts' power.

245. I use the word "qualitative" here to refer to changes in the substantive scrutiny of the current comity test. In short, I argue that courts should improve the test by changing the quality of their legal analysis. This "qualitative" argument can be distinguished from a second argument I offer below: that courts should limit the number of interests recognized by the comity analysis.

246. *See*, *e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y. 2010).

A. The Problems with the Categorical Approach that Overvalued U.S. Interests

The single most important problem with the *Aérospatiale* paradigm was the pretense of a balancing test, which almost always discounted foreign interests in favor of U.S. judicial power. In his *Aérospatiale* dissent, Justice Blackmun correctly predicted this development, noting:

> Experience to date indicates that there is a large risk that the case-by-case comity analysis now to be permitted by the Court will be *performed inadequately* and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently. I fear the Court's decision means that courts will resort unnecessarily to issuing discovery orders under the Federal Rules of Civil Procedure in a *raw exercise of their jurisdictional power*. . .[247]

Justice Blackmun did not see the three decades of case-by-case comity evaluations that followed *Aérospatiale*, where courts invariably affirmed the Federal Rules. However, he understood that a balancing test was inappropriate in this context because courts would, even if subconsciously, always favor U.S. interests and an exercise of the courts' "raw power."[248] A balancing test in this context was always misplaced because the question for courts was, in effect, whether to balance away their power in favor of foreign sovereigns. Given the expected effects of pro-forum bias, the test always weighed against comity. One court perfectly encapsulated this problem:

> Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws. The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus, courts *inherently* find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests. This partially explains why there have been few times when courts have found foreign interests to prevail.[249]

Sure enough, case law shows that courts are unwilling to reduce their own power, particularly in the context of discovery, where court supervision can determine the evidence to be used in an entire case.[250]

The effect of pro-forum bias reached such heights that before *Daimler*, courts had nearly stopped their exacting examination of U.S. interests and instead had developed certain categories of U.S. interests that automatically overcame concerns for foreign laws. These categories included cases involving

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247. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 548 (1987) (Blackmun, J., concurring in part and dissenting in part) (emphasis added).

248. *Id*. at 553 (Blackmun, J., concurring in part and dissenting in part) ("pro-forum bias is likely to creep into the supposedly neutral balancing process and courts not surprisingly often will turn to the more familiar procedures established by their local rules.").

249. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 951 (D.C. Cir. 1984) (emphasis added).

250. *See* notes 252–62 for cases where courts rejected international comity.

patent law,[251] antitrust law,[252] criminal law,[253] and anti-terrorism laws.[254] Although these categories concerned legitimate interests, this Article attempted an exhaustive review of all court acknowledged U.S. interests and found that courts had developed wildly uninhibited categories, where U.S. interests were seen as paramount without much explanation. These interests included: "fully

251. *See, e.g.*, Coloplast A/S. v. Generic Med. Devices, Inc., No. C10–227BHS, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011); Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. De Equip. Medico, No. 07-CV-309-L(AJB), 2008 WL 81111, at *6 (S.D. Cal. Jan. 8, 2008); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 512 (N.D. Ill. 1984) ("The present conflict implicates United States interests of a Constitutional magnitude. Graco alleges infringement of a patent held under the United States patent laws, enacted by Congress . . ."); Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc., 99 F.R.D. 269 (N.D. Ill. 1983) (U.S. plaintiff and patent law); *cf.* Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866, at *7 (S.D.N.Y. May 23, 2012) ("It can hardly be disputed that the United States has a strong national interest in safeguarding intellectual property rights and protecting consumers from counterfeit products."); Metso Minerals Indus., Inc. v. Johnson Crushers Int'l, Inc., 276 F.R.D. 504, 505 (E.D. Wis. Nov. 3, 2011), *order clarified*, No. 10–C–0951, 2011 WL 6257135 (E.D. Wis. Dec. 14, 2011); *In re* Nifedipine Capsule Patent Litig., No. M21–51 (JFK), 1989 WL 111112, at *1 (S.D.N.Y. Sept. 20, 1989).

252. *See*, *e.g.*, *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C–07–5944–SC, 2014 WL 5462496, at *6 (N.D. Cal. Oct. 23, 2014) ("the strong national interests of the United States are at play. This is a case alleging violations of United States antitrust laws, laws that are of fundamental importance to American democratic capitalism.") (citations omitted); Trueposition, Inc. v. LM Ericsson Tel. Co., No. 11–4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012); *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y. 2010) (antitrust laws "essential" to the country's interests); *In re* Aspartame Antitrust Litig., No. 2:06-CV-1732-LDD, 2008 WL 2275531 (E.D. Pa. May 13, 2008); *cf. In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004); Emerson Elec. Co. v. Le Carbone Lorraine, S.A., No. 05-6042(JBS), 2008 WL 4126602, at *1 (D.N.J. Aug. 27, 2008); *In re* Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 50 (D.D.C. 2000).

253. *E.g.*, *In re* Grand Jury Subpoena Dated Aug. 9, 2000, 218 F.Supp.2d 544, 562 (S.D.N.Y. 2002) ("The United States interest in enforcing its criminal laws is unquestionably strong."); Matter of One Grand Jury Subpeona Returnable Jan. 11, 1989, No. N-89-7(TFGD), 1989 WL 49165, at *2 (D. Conn. Mar. 22, 1989) ("The United States has a strong interest in enforcing its criminal laws."). This was an important interest recognized even before *Aérospatiale*. *See, e.g.*, United States v. Davis, 767 F.2d 1025, 1035 (2d. Cir. 1985) (affirming discovery order for documents in the Cayman Islands and noting U.S. interest in enforcing criminal laws); United States v. Noriega, No. 88-0079-CR-HOEVELER, 1990 WL 142524, at *3 (S.D. Fla. Sept. 24, 1990), *vacated pursuant to settlement* (Oct. 11, 1990).

254. *E.g.*, Linde v. Arab Bank, PLC, 706 F.3d 92, 112 (2d Cir. 2013) ("[W]e find no clear abuse of discretion in the District Court's conclusion that the interests of other sovereigns in enforcing bank secrecy laws are outweighed by the need to impede terrorism financing as embodied in the tort remedies provided by U.S. civil law and the stated commitments of the foreign nations."); Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 556 (S.D.N.Y. 2012) ("But in light of the significant U.S. interest in eliminating sources of funding for international terrorism, and the other factors discussed below, the law governing discovery disputes in this case must ultimately be the broad discovery rules of the Federal Rules of Civil Procedure."); Rubin v. Islamic Republic of Iran, No. 03 C 9370, 2008 WL 192321, at *20 (N.D. Ill. Jan. 18, 2008) ("Congress has also decided that the 'grace and comity' generally extended to foreign sovereigns should be limited in specific ways, particularly when those sovereigns promote terrorist acts that injure U.S. nationals."); Strauss v. Credit Lyonnais, S.A., 242 F.R.D 199, 214 (E.D.N.Y. 2007) (U.S. interest in "combating terrorism"); Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 47 (E.D.N.Y. 2007) ("Executive and Congressional interests in freezing terrorist financing.").

and fairly adjudicating matters before [U.S.] courts;"[255] protecting U.S. nationals merely because they were involved in a case as defendants[256] or vindicating the rights of American plaintiffs;[257] ensuring the integrity of the financial markets or securities laws;[258] personal injury or products liability

255. *E.g.*, Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397, 402 (S.D.N.Y. 2014) ("there is an obviously strong U.S. interest in enforcing the final judgment of a federal court, even if the judgment is designed to protect the property rights of a private party."); Tansey v. Cochlear Ltd., No. 13-CV-4628 (SJF)(SIL), 2014 WL 4676588, at *4 (E.D.N.Y. Sept. 18, 2014); Chevron Corp. v. Donziger, 296 F.R.D. 168, 206 (S.D.N.Y. 2013); NML Capital, Ltd. v. Republic of Arg., No. 03 Civ. 8845(TPG), 2013 WL 491522 at *10 (S.D.N.Y. Feb. 8, 2013); Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866, at *7 (S.D.N.Y. May 23, 2012); SEC v. Stanford Int'l Bank, Ltd., 776 F. Supp. 2d 323, 335 (N.D. Tex. 2011); Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238, 248 (S.D.N.Y. 2010); *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y. 2010); Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co. Ltd., No. 03–08554 (DCP), 2009 WL 1055673, at *3 (S.D.N.Y. Apr. 17, 2009); Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 443 (E.D.N.Y. 2008); Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 46 (E.D.N.Y. 2007); Reino De Espana v. Am. Bureau of Shipping, No. 03CIV3573LTSRLE, 2005 WL 1813017, at *4 (S.D.N.Y. Aug. 1, 2005); Alfadda v. Fenn, 149 F.R.D. 28, 34 (S.D.N.Y. 1993); Dexia Credit Local v. Rogan, 231 F.R.D. 538, 549 (N.D. Ill. 2004); Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petrol. Comp., 105 F.R.D. 16, 30 (S.D.N.Y. 1984); First Am. Corp. v. Price Waterhouse LLP, 988 F. Supp. 353, 364 (S.D.N.Y. 1997); *In re* Glob. Power Equip. Grp. Inc., 418 B.R. 833, 848 (Bankr. D. Del. 2009); *cf.* JW Oilfield Equip., LLC v. Commerzbank AG, 764 F. Supp. 2d 587, 597 (S.D.N.Y. 2011); Trueposition, Inc. v. LM Ericsson Tel. Co., No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012); Hagenbuch v. 3B6 Sistemi Elettronici, No. 04 C 3109, 2005 WL 6246195, at *5 (N.D. Ill. Sept. 12, 2005); *In re* Honda Am. Motor Co., 168 F.R.D. 535, 539 (D. Md. 1996); First Nat'l Bank of Cicero v. Reinhart Vertrieb's AG, 116 F.R.D. 8, 9 (N.D. Ill. 1986). *But see* CE Int'l Res. Holdings, No. 12-CV-08087 (CM)(SN), 2013 WL 2661037, at *14 (S.D.N.Y. June 12, 2013) ("By contrast, where the interest is a generalized interest in 'fully and fairly adjudicating matters before its courts,' . . . courts allocate relatively less weight to the United States in this analysis."); Haynes v. Kleinwefers, 119 F.R.D. 335, 338 (E.D.N.Y. 1988).

256. *E.g.*, Reino De Espana v. Am. Bureau of Shipping, No. 03CIV3573LTSRLE, 2005 WL 1813017 (S.D.N.Y. Aug. 1, 2005); Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petrol. Comp., 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (U.S. defendant, "an important interest in protecting [U.S.] nationals from unfair disadvantage when they are being sued in the courts of their own nation.").

257. *E.g.*, Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1477 (9th Cir. 1992); BrightEdge Tech., Inc. v. Searchmetrics, GmbH., No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062, at *5 (N.D. Cal. Aug. 13, 2014); Pershing Pac. W., LLC v. MarineMax, Inc., No. 10-cv-1345-L (DHB), 2013 WL 941617, at *8 (S.D. Cal. Mar. 11, 2013); Coloplast A/S. v. Generic Med. Devices, Inc., No. C10-227BHS, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011) (noting "the United States' interests in vindicating the rights of American plaintiffs and in enforcing the judgments of its courts, which has been described as vital) (citations and quotation marks omitted); Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. De Equip. Medico, No. 07-CV-309-L(AJB), 2008 WL 81111, at *6 (S.D. Cal. Jan. 8, 2008); *In re* Air Crash at Taipei, Taiwan on Oct. 31, 2000, 211 F.R.D. 374, 379 (C.D. Cal. 2002); AG Volkswagen v. Valdez, 897 S.W.2d 458, 462 (Tex. Ct. App.), *subsequent mandamus proceeding sub nom.*, 909 S.W.2d 900 (Tex. 1995); *cf.* Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.), 902 F.2d 1275, 1280 (7th Cir. 1990); Int'l Ins. Co. v. Caja Nacional De Ahorro Y Seguro, No. 00 C 6703, 2004 WL 555618, at *3 (N.D. Ill. Mar. 18, 2004) (citing "interest in the United States' protecting its citizens").

258. *See, e.g.*, SEC v. Stanford Int'l Bank, Ltd., 776 F. Supp. 2d 323, 335 (N.D. Tex. 2011); *In re* Vivendi Universal, S.A. Sec. Litig., 618 F. Supp. 2d 335, 341 (S.D.N.Y. 2009) (having "little doubt that the United States has a strong interest in enforcing its securities laws."); United States CFTC v. Lake Shore Asset Mgmt., No. 07 C 3598, 2007 WL 2915647, at *12 (N.D. Ill. Oct. 4,

cases;[259] the administration of bankruptcy cases;[260] and ad hoc categories, such as "assuring restitution to holocaust victims," "regulating the economy," "ensuring that [U.S.] laws are enforced," and ensuring "the solvency of [American] insurance companies."[261]

Although courts could argue that all of these interests are compelling, two complicating consequences weaken that position: (1) there is no discernible limiting principle to such a laundry list of interests; and (2) similar foreign interests should be equally compelling. Lacking a proper limiting principle, the laundry list would continue to grow and swallow the Hague Convention (as it arguably did), rendering the entire comity analysis illusory. Extending the recognition of these interests to foreign nations—as courts would have to do to retain a semblance of balance—would otherwise lead courts back to step one: how to compare compelling sovereign interests. The longer the list of compelling interests grows, the more difficult such a competing analysis would become. Because of this, it is much simpler, more predictable, more effective, and more loyal to Hague Convention treaty obligations to enumerate as few compelling interests as possible and avoid the complications of a laundry list.

2007) ("strong interest of the U.S. in getting to the bottom of an apparent international scheme to engage in commodity trading fraud"); SEC v. Euro Sec. Fund, 98 CIV. 7347(DLC), 1999 WL 182598, at *4 (S.D.N.Y. Apr. 1, 1999); Alfadda v. Fenn, 149 F.R.D. 28, 34 (S.D.N.Y. 1993); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117 (S.D.N.Y. 1981) ("The strength of the United States interest in enforcing its securities laws to enforce the integrity of its financial markets cannot seriously be doubted."); *cf.* First Am. Corp. v. Price Waterhouse LLP, 988 F. Supp. 353, 364 (S.D.N.Y. 1997) (asserting an interest in bank fraud cases).

259. *See*, *e.g.*, Doster v. Schenk, 141 F.R.D. 50, 52 (M.D.N.C. 1991) ("This country has a strong interest in these actions because both cases are personal injury actions based on product liability from defendant's construction activities in this country."); *cf.* Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 389 (D.N.J. 1987); Moake v. Source Int'l Corp., 623 A.2d 263, 265 (N.J. Super. Ct. App. Div. 1993); Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344, 349 (D. Conn. 1997).

260. *In re* Glob. Power Equip. Grp. Inc., 418 B.R. 833, 848 (Bankr. D. Del. 2009).

261. *See*, *e.g.*, Chevron Corp. v. Donziger, 296 F.R.D. 168, 206 (S.D.N.Y. 2013) ("The United States has an interest also in ensuring that its laws are enforced."); Ssangyong Corp. v. Vida Shoes Int'l, Inc., No. 03 Civ.5014 KMW DFE, 2004 WL 1125659, at *7 (S.D.N.Y. May 20, 2004) ("The vital interest of the United States, or any state for that matter, in enforcement of its tax laws is unquestionable."); Adams v. Unione Mediterranea Di Sicurta, No. Civ.A. 94-1954, 2002 WL 472252, at *4 (E.D. La. Mar. 28, 2002) ("This is an instance in which use of the Hague Convention procedures would undermine important interests of the United States by impeding the progress of this litigation"); Bodner v. Paribas, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) (noting that the United States has a "significant interest in assuring restitution to Holocaust victims"); British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A., No. 90Civ.2370 (JFK)(FM), 2000 WL 713057, at *10 (S.D.N.Y. June 2, 2000) ("[T]he United States obviously has a great interest in the solvency of its insurance companies, one element of which is ensuring that their reinsurers honor their financial commitments."); First Nat'l Bank of Cicero v. Reinhart Vertrieb's AG, 116 F.R.D. 8, 9 (N.D. Ill. 1986) ("The United States clearly retains a substantial interest in regulating the economy and ensuring private commercial disputes are fairly, yet expeditiously resolved."). Although outside of the purview of this Article, some criminal cases embrace various ad hoc interests as well. *See*, *e.g.*, United States v. Vetco Inc., 691 F.2d 1281, 1289 (9th Cir. 1981) ("There is a strong American interest in collecting taxes from and prosecuting tax fraud").

The *Aérospatiale* paradigm utterly failed to do this.

This laundry list of categories represented the excesses of *Aérospatiale*. In effect, it meant that no U.S. interest was speculative enough to overcome foreign law concerns. Such a haphazard categorical analysis even led the Seventh Circuit to comment that considering national interests seems a "ridiculous assignment."[262]

Approximate Number Of Post-*Aérospatiale* Cases Asserting The Interest (lower-bound estimate)[263]	**U.S. Interest Category**
7+	Patent law
7+	Antitrust law
7+	Terrorism and criminal law
21+	Fully adjudicating matters before U.S. courts and enforcing its judgments
10+	Protecting U.S. defendants and vindicating the rights of American plaintiffs
3+	Products liability
7+	Financial markets
5+	Ad Hoc interests (bankruptcy, restitution to holocaust victims, regulating the economy, ensuring that U.S. laws are enforced, and ensuring the solvency of American insurance companies.)[1]

262. Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1280 (7th Cir. 1990).

263 This table is not exhaustive. It includes cases found in Westlaw and Lexis using broad search terms designed to capture citations to the Hague Convention and *Aérospatiale*.

Admittedly, such a categorical approach can be efficient for lower courts as it allows them to fit the facts of each case into pre-developed groupings that have been determined to overcome foreign interests in the transnational discovery context. This approach has the added benefit of being consistent and predictable to a certain extent. However, lower courts took this approach too far by relying on inchoate categories and avoiding a scrutiny of the specific facts of each case. Relying on broad categories—for example, a U.S. interest in "fully adjudicating matters before U.S courts"—can be unfair for defendants and foreign countries because it ignores the factual nuances of each case and overvalues U.S. interests. Moreover, loosely defined categories can become entrenched and allow courts to forfeit their duty to properly evaluate comity. This is precisely what happened after *Aérospatiale*. Lower courts developed loosely defined yet insurmountable interests that unfairly ignored foreign laws and, in the words of *Daimler*, became "uninhibited."

For example, an important problem with a categorical interest in "fully and fairly adjudicating matters before [the U.S.'s] own courts" is that, by definition, it forecloses any possibility of the United States *not* having a substantial interest in *any case*. This is so because the comity-balancing test is a feature of U.S. jurisprudence and therefore will always be evaluated in front of a U.S. court. If the United States always has an interest in fully and fairly adjudicating matters before its courts—an interest embraced by more than twenty-one cases—then its interests will almost *always* overcome foreign interests, thus rendering international comity a dead concept. Such an interest is wildly uninhibited.

In the same manner, an "interest in vindicating the rights of American plaintiffs" will settle any case involving an American plaintiff regardless of whether genuine national interests are involved or not. The United States could conceivably, given the right set of facts, prefer that an American plaintiff proceed through the Hague Convention. But an interest in vindicating the rights of American plaintiffs is so broad that it does not allow for a detailed analysis to accommodate other, perhaps more valid, national interests.

These are not hypothetical concerns; they are the natural consequence of the flawed categorical analysis that district courts conducted for thirty years. This wildly uninhibited approach to discovery was embraced in *In re Air Cargo Shipping*,[264] where plaintiff sued Société Air France ("Air France") for antitrust violations due to an alleged price-fixing scheme. During discovery, plaintiff moved to compel Air France to produce information held in France. Defendants rejected this request because of the risk of criminal sanctions for violating the French blocking statute. Applying the comity balancing test, the district court noted that the balance of national interests was the "most important" factor and that the United States had "several strong national interests" implicated, namely, an interest in "antitrust laws whose enforcement is essential to the country's interests in a competitive economy" and "a substantial interest in fully and fairly

264. *See In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51 (E.D.N.Y. 2010).

adjudicating matters before its courts."[265] With those two generalities uttered and nothing more, the court found it necessary to compel the production of documents held in France.[266]

Similarly, in *Pershing Pacific West, LLC v. MarineMax, Inc.*, an American company brought claims against a German defendant, among others, for the faulty manufacture of a yacht.[267] When plaintiff demanded the production of documents related to the manufacturing process, defendant objected that German law did not permit such discovery except through the Hague Convention. In its analysis of the national interests involved, the district court specified that "[w]e must assess the interests of each nation in requiring or prohibiting disclosure, and determine whether disclosure would affect important substantive policies or interests of either the United States or [Germany.]"[268] Then, however, the court engaged in a perfunctory three-sentence analysis of U.S. interests, noting that "[t]he United States has a[n] interest in vindicating the rights of American plaintiffs," and that "[t]his interest has been described as vital."[269] Without any further scrutiny, the court then evaluated German law, which penalized the discovery at issue. Nevertheless, the court concluded that discovery should proceed through the Federal Rules because, among other things, the national interests "factor weighs slightly in favor of the United States' interest and disclosure under the Federal Rules."[270] The court apparently did not find it necessary to note that the Hague Convention was an available "avenue" that could satisfy the sovereign interests involved.

In re Air Cargo Shipping and *Pershing Pacific West* are representative of a wider jurisprudence that engaged in a meaningless analysis of national interests lacking any rigor. The courts merely surmised that the antitrust violations at issue in *In re Air Cargo Shipping* and the interests in vindicating the rights of American plaintiffs in *Pershing Pacific West* involved actual U.S. interests in those particular cases. The *In re Air Cargo Shipping* court made no findings regarding the specific interests of the United States in that particular case. Both courts were satisfied with making general unsubstantiated statements about national interests. Clearly, both courts failed to properly take international comity into account.

It is difficult to reconcile the existence of a balancing test and the Hague Convention with the perfunctory dismissal of foreign interests. These decisions exemplify the problems with *Aérospatiale*-inspired judicial chest-thumping,

265. *Id.* at 54.

266. *Id.* at 55.

267. Pershing Pac. W., LLC v. MarineMax, Inc., No. 10-CV-1345-L(DHB), 2013 WL 941617, at *1 (S.D. Cal. Mar. 11, 2013), *on reconsideration in part*, 2013 WL 1628938 (S.D. Cal. Apr. 16, 2013).

268. *Id.* at *8.

269. *Id.* (citations and quotation marks omitted).

270. *Id.* at *9.

concerned only with "reaffirming the sovereignty of our judicial system."[271] Categorical interests have rendered the Convention inapplicable in almost all cases. Such an approach must change in light of *Daimler* and its progeny.

B. Daimler Demands a More Individualized Analysis of U.S. Interests

The limits to U.S. jurisdiction recognized in *Daimler*, *Gucci*, and *Motorola* and the renewed importance of international comity strike directly at the categorical analysis that allows an overvaluing of U.S. interests and the overbroad exercise of raw judicial power. The main problem noted by these courts was the "uninhibited" reach of U.S. jurisdiction, and by extension, discovery. Because of this, as explained below, *Daimler*, *Gucci*, and *Motorola* teach that U.S. interests have to be *specific* to each case and cannot be based on speculative generalities.

In *Daimler*, the Ninth Circuit affirmed jurisdiction over a case that had no relationship to the United States, but instead involved foreign officials and a foreign corporation. The Supreme Court rejected the Ninth Circuit's holding due to the threat to international comity posed by the Ninth Circuit's "*uninhibited* approach to personal jurisdiction."[272] The Supreme Court did not speak in generalities about U.S. interests. Instead, it directly quoted the Solicitor General's opinion that uninhibited personal jurisdiction had "in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[273] This approach at least valued non-speculative interests. In *Gucci*, the lower court held the State-owned Bank of China in contempt for actions wholly unrelated to their New York branch. In reviewing this decision, the Second Circuit did not overvalue speculative U.S. interests. It instead asked the United States to express its interests in the case through an *amicus*. Likewise, in *Motorola*, the plaintiff sought to restrain assets of a British bank wherever located regardless of any foreign criminal laws penalizing such actions or of any jurisdictional concerns. The *Motorola* court described at length why the separate entity rule was incredibly important for New York.

Applying the teachings of *Daimler* means that U.S. interests need to be more than merely speculative or stated in broad terms. This can be done by following two steps: (1) limiting the categories included as "important U.S. interests" and (2) evaluating the interests of the United States in each specific case rather than through mere generalities. Courts may use these two methods to begin engaging in a proper and legitimate balancing of U.S. interests against foreign law concerns. These two methods can work in the following ways:

Daimler and its progeny embraced a standard that counsels the following: U.S. interests should be specific to the case and not just broad, uninhibited, and

271. Fields, *supra* note 112.

272. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).

273. *Id*.

vague. Excessive interests, such as "the United States['s] . . . interest in fully and fairly adjudicating matters before its courts"[274] or vindicating the rights of an American plaintiff,[275] must be rejected. A good example of this constrained approach was embraced in *Weiss v. National Westminster Bank, PLC*,[276] where survivors of terrorist attacks sued terrorist group Hamas, seeking assets held by U.K. based National Westminster Bank. When plaintiffs sought banking documents in the United Kingdom, defendant refused and demanded compliance with the Hague Convention. In its comity analysis, the court analyzed U.S. interests in-depth. After noting that the United States had an interest in "combating terrorism," it scrutinized how that interest applied against Hamas and related defendants (Interpal), noting that "[t]he American interest in disrupting terrorist networks with global assistance from American allies is *particularly apparent here*,"[277] because the Department of the Treasury had designated the particular groups involved in the case (Hamas charities) as terrorists. Moreover, the court highlighted that "not only does the United States have a demonstrated interest in halting terrorist financing, both domestically and internationally, but the United States has also explicitly found that NatWest's client, Interpal, is a 'principal' conduit for those funds."[278] This represented a laser-like focus on the defendant at issue and not on the general interest in combating terrorism.

The most important point to notice about *Weiss* is that the court narrowed the specific interests of the United States to those involved in that particular case. The court refused to rely on uninhibited platitudes about U.S. interests in combating "terrorism" generally, but instead focused on NatWest's client, Interpal, who was involved in the case.

Another example of this salutary approach was adopted in *Doster v. Schenk*, where defendants claimed that subpoenas to produce information located in Germany were intrusive under Germany's constitutional principle of

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274. *See supra* note 255. Other cases have adopted similarly tenuous interests. *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y 2010) (U.S. litigants and antitrust laws "essential" to the country's interests); Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 214 (E.D.N.Y. 2007) (U.S. plaintiffs and interest in "combating terrorism"); *In re* Vivendi Universal, S.A. Sec. Litig., No. 02CIV5571RJH/HBP, 2006 WL 3378115, at *1 (S.D.N.Y. Nov. 16, 2006) (U.S. plaintiffs, U.S. witness, and securities laws); Bodner v. Paribas, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) (U.S. plaintiffs, "significant interest in assuring restitution to Holocaust victims," alien tort claims act, and tort law); Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petro. Co., 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (U.S. defendant, "an important interest in protecting [U.S.] nationals," and contract law); Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc., 99 F.R.D. 269 (N.D. Ill. 1983) (U.S. plaintiff and patent law); *In re* Glob. Power Equip. Grp. Inc., 418 B.R. 833, 849–50, n.7 (Bankr. D. Del. 2009) (U.S. company, bankruptcy laws and U.S. courts).

275. *See, e.g.*, *In re* Vivendi Universal, S.A. Sec. Litig., No. 02CIV5571RJH/HBP, 2006 WL 3378115, at *1 (S.D.N.Y. Nov. 16, 2006).

276. Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 36 (E.D.N.Y. 2007).

277. *Id.* at 47 (emphasis added).

278. *Id.* at 48.

proportionality "pursuant to which a judge must protect personal privacy, commercial property, and business secrets."[279] Those were speculative interests expressed in broad terms, much like those embraced by the *Aérospatiale*-era courts. The *Doster* court, however, rejected this argument because "[e]ven if the Court were to recognize those principles as significant sovereign interests, defendant must show that the *specific discovery in these cases would compromise those interests* by a resort to the Federal Rules of Civil Procedure."[280] Although this case involved the analysis of German interests and not the United States' interests, the approach is illustrative.

Courts should focus on the "specific discovery" requested in each case and how it would "compromise" U.S. interests. They should not answer these questions through generalities. This approach is important because, as some courts have recognized, "[U.S.] interests diminish the less closely a case is related to the United States."[281] A court can only determine how "closely a case is related to the United States" through an individualized analysis. For example, in a case involving antitrust laws, a court should not effuse that the enforcement of those laws "is essential to the country's interests in a competitive economy."[282] That kind of general statement is uninhibited, ignores the particularities of the case, and fails to rigorously evaluate the interests at stake. Instead, courts should analyze why the United States has a specific interest in the particular case by referring to previous instances where the United States submitted amici in similar cases, or policy statements from the U.S. Justice Department antitrust division showing an interest in the particular antitrust violations. That is exactly what the court did in *Weiss* where it highlighted that the Department of the Treasury had designated the particular groups involved in that case as terrorists. *Daimler* and its progeny demand this approach.

Although employing a categorical analysis is not always inappropriate, it should only be the beginning of an international-comity scrutiny. Thus, for example, cases involving patents can be analyzed by courts through recognition that the U.S. has an important interest in patents generally; but, in addition, they should find that the patents involved in the case are relevant to the U.S. government. This method combines the benefits of a categorical approach with an individualized case-by-case analysis. A list of legitimate interests would include cases that involve U.S. criminal laws, antitrust laws, or terrorism laws, as well as U.S. government agencies or possible impact on a broad segment of the population. The most important benefit of this approach is that it forces courts to conduct a more individualized analysis that will improve respect for international comity.

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

280. *Id*. (emphasis added).

281. Madanes v. Madanes, 186 F.R.D. 279, 286 (S.D.N.Y. 1999).

282. *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y. 2010).

One possible negative effect of employing a more specific analysis of U.S. interests is that it would require more specialized knowledge from courts and might weigh down dockets. To deal with these problems, this Article advocates a more proactive approach by the federal government in these cases. Courts and litigants should seek *direct* input from the government. As described below, this approach would be in line with prior case law and would be relatively easy to employ.

Courts have previously recognized that the United States has a "right to make its position known in cases with important foreign policy ramifications."[283] Some courts have even emphasized the importance of this type of input.[284] Although it is not realistic to expect letters or amici from the government in every case, both *Gucci* and *Daimler* show that when these kinds of input are present, courts are much better informed. Government input is beneficial because the executive is much better equipped than courts to evaluate the interests of the nation in each particular case. As noted by Justice Blackman in his *Aérospatiale* dissent, "[i]t is the Executive that normally decides when a course of action is important enough to risk affronting a foreign nation or placing a strain on foreign commerce. It is the Executive, as well, that is best equipped to determine how to accommodate foreign interests along with our own."[285] The executive should, through letters and amici, supplement judicial determinations by emphasizing the interests of the United States in discovery cases. After *Daimler*, it is no longer legitimate to continue the judicial policy of determining U.S. interests without the input of the executive because, "[u]nlike the courts, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association."[286] In short, whenever a comity issue arises in the context of discovery, courts should request that the executive intervene in some way.

Government intervention in discovery cases might dramatically burden the executive's workload. However, there are various practical ways in which the executive can assert the government's interest without significant added burden. This might include the submission of department letters of interest, re-used amici, policy papers, or regulatory statements. For example, as described above, the *Weiss* court relied on a Department of the Treasury designation of a terrorist

283. Rubin v. Islamic Republic of Iran, No. 03 C 9370, 2008 WL 192321, at *19 (N.D. Ill. Jan. 18, 2008), *rev'd and remanded*, 637 F.3d 783 (7th Cir. 2011); Republic of Austria v. Altmann, 541 U.S. 677, 714 (2004) (the United States may recommend dismissal in a variety of cases).

284. Freund v. Republic of France, 592 F. Supp. 2d 540, 563 (S.D.N.Y. 2008) ("[T]he Executive Branch has described the interests of the United States in this matter through its Statement of Interest . . . the general interests it describes also bear on the Court's overall exercise of its discretion in connection with Plaintiffs' discovery request.").

285. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 552 (1987).

286. *Id*. (quotations and citations omitted).

group. The court did not need further input from the government. Below, this Article discusses other methods that are currently used by foreign governments to achieve this. Although this may be difficult in lower court proceedings, courts should experiment with requesting different types of input.

C. The Need for Input from Foreign Countries

For over two decades, courts have recognized the importance of direct input from foreign governments in transnational discovery cases.[287] At various times, however, courts have also ignored letters from foreign ministers and ordered the production of documents located abroad despite foreign protests.[288] *Daimler* and its progeny urge courts to increase their openness to direct foreign input in transnational discovery cases.

There is little doubt that direct foreign input can strengthen a foreign party's arguments. In *Gucci America, Inc. v. Curveal Fashion*, a case involving the production of documents located in Malaysia, the court noted that, "the Malaysian government has not voiced any objections to disclosure in this case, which the Second Circuit has found militates against a finding that strong national interests of the foreign country are at stake."[289] Similarly, in *In re Honda America Motor Co.*, the court recriminated the Japanese government for failing to intervene in the transnational discovery question at issue, highlighting that "[t]he failure of the Japanese government to weigh in as amicus curie on this matter is further evidence that its sovereignty is not implicated" in the case.[290] These statements can be so important that some courts have declared that without foreign input it is difficult for courts to weigh sovereign interests at all. In *British International Insurance Co. v. Seguros La Republica, S.A.*, where plaintiff sought documents in Mexico, the court noted that "[t]he level of [sovereign] interest is difficult to gauge in this case since the Mexican government has not taken any steps to object to the discovery sought . . ."[291]

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287. *See* United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 525 (S.D.N.Y. 1987) (Switzerland's interest substantial as expounded in two official statements).

288. Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238, 248 (S.D.N.Y. 2010) (ordering production despite letter from the Chinese Ministry of Justice); Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 447–50 (E.D.N.Y. 2008) (ordering production through the Federal Rules despite a letter from the French Ministry of Justice, noting that "[w]ith the utmost respect for the Republic of France, this court has gone to great lengths to analyze and balance the various interests at stake, including those of the United States, France, and the litigants, yet the French Ministry's letter has added little to the analysis that justifies altering in any significant way the court's prior balancing of the national interests").

289. Gucci Am., Inc. v. Curveal Fashion, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639, at *6 (S.D.N.Y. Mar. 8, 2010) (quotations and citations omitted).

290. *In re* Honda Am. Motor Co., 168 F.R.D. 535, 538 (D. Md. 1996).

291. British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A, No. 90Civ.2370(JFK)(FM), 2000 WL 713057, at *10 (S.D.N.Y. June 2, 2000).

Requiring input from foreign sovereigns should be institutionalized to complement the reduced emphasis on U.S. interests. Courts should routinely require input from foreign countries, either through government officials or agencies. The U.S. amicus in *Gucci* advocated this approach, arguing that when the extraterritorial application of U.S. laws implicate foreign sovereign interests, "submissions from interested governments that address comity issues should be given serious consideration."[292] Requiring input from foreign governments serves three goals: (1) avoiding the "danger of unwarranted judicial interference in the conduct of foreign policy;"[293] (2) tackling judges' lack of experience with foreign law by giving them reliable information about those laws; and (3) continuing *Daimler*'s call for "inhibiting" U.S. judicial power.

At least one Supreme Court justice has explicitly voiced support for this approach. In *Republic of Argentina v. NML Capital, Ltd.*—involving the worldwide discovery of Argentine sovereign property under the Foreign Sovereign Immunities Act—Argentina argued during oral argument that foreign countries opposed such discovery of Argentine property in their countries.[294] Justice Scalia responded by asking,

> Why haven't foreign countries protested? Why aren't they here as amici? Is there a single foreign state that has taken your position? . . . They file amicus briefs all the time and if this is as horrific as [Argentina is] painting it, we would have had some briefs from them.[295]

Justice Scalia's eagerness to hear from other countries should be shared by all courts. If foreign countries do not intervene through amici or letters, then courts should feel free to make adverse inferences.[296] This would encourage countries to intervene whenever possible. In *Daimler*, the Supreme Court took special notice of the Solicitor General's opinion in amici and European Union general jurisdiction rules. The Court quoted specific foreign law language provided by foreign organizations' amici.[297] In *Motorola*, the court also took special heed of Jordan and the U.A.E.'s reactions to the restraining notices.

These cases are exhorting courts to seek more information about foreign interests. Indeed, these cases seem to be saying that whenever a litigant faces requests for discovery of documents or property located abroad, they should find documentary support to counteract the request. Even if this means submitting

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292. Brief for United States as Amicus Curiae, Gucci Am., Inc. v. Bank of China, 768 F.3d 122 (2d Cir. 2014) (Nos. 11-3934), 2014 WL 2290273, at *3.

293. Kiobel v. Royal Dutch Petro. Co., 133 S. Ct. 1659, 1661 (2013).

294. Oral Argument Transcript, Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) (No. 12-842), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-842_3c45.pdf.

295. *Id.* at 22.

296. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 106–07 (2d Cir. 2002) (stating that district court has "broad discretion" in dealing with breaches of discovery obligations, including the power to draw an adverse inference).

297. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).

amici from other cases or any other policy statement. Switzerland has been particularly active in this area, submitting amici even in district court proceedings.[298] The current system relies on expert submissions by the parties, which the U.S. government took seriously in *Gucci*, arguing that the "*Gucci* [lower] court should have been more mindful . . . and should not have summarily dismissed *representations* describing the national importance of China's banking secrecy laws."[299] This can be supplemented by letters as China submitted in *Gucci*, where Chinese regulators expressed China's objections to the overbroad discovery requests.[300] Letters provide an efficient alternative to amici. Parties should try to obtain letters from local government officials that detail limitations under local law, express their preference for the Hague Convention, and describe problems with U.S. style discovery.[301]

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298. *See* Brief for Government of Switzerland as Amicus Curiae Supporting Respondents at 1–2, 13–15, United States v. UBS AG, No. 09-20423-CIV, 2009 WL 2241122 (S.D. Fla. July 7, 2009).

299. Brief for United States as Amicus Curiae, Gucci Am., Inc., v. Bank of China, 768 F.3d 122 (2d Cir. 2014) (No. 11-3934), 2014 WL 2290273, at *3 (emphasis added).

300. *See* Letter from Huai Peng Mu, *supra* note 2.

301. Even if courts welcome input from foreign sovereigns and begin to cabin U.S. interests, they may still have to use a balancing test. A great concern with *Aérospatiale* is that it "regrettably. . . declined to set forth specific rules" for the international comity analysis. Scarminach v. Goldwell Gmbh, 531 N.Y.2d 188, 189 (1988). Adding to this difficulty is that lower courts felt compelled to analyze all of the factors expressed in the Restatement test, instead of engaging in a more qualitative analysis that can be both simpler but also more rigorous. *Daimler* is a good example of a simpler international comity analysis. The Supreme Court warned of the dangers to international comity and then analyzed only four factors: (1) European Union laws, (2) the Solicitor General's views, (3) the Defendant's arguments, and (4) the fair play and substantial justice concerns involved in the case. Daimler AG v. Bauman, 134 S. Ct. 746 (2014). This basic test is different from the current balancing test in that it is both simpler but more substantive. Instead of attributing speculative interests to the United States, the Court focused on a specific interest voiced by the executive in that particular context. Moreover, the Supreme Court took into account "fair play and substantial justice" in the context of international comity, not just as another element in a personal jurisdiction test. *Id*. at 763. This should, without doubt, be incorporated by lower courts.

A rigorous analysis of the fair play and substantial justice concerns of requiring foreign companies to produce documents in accordance with the Federal Rules would cut against the excesses of the *Aérospatiale* era. For example, the Second Circuit should overturn its finding in *First Am. Corp. v. Price Waterhouse LLP*, that a foreign non-party can be ordered to produce documents in the same manner as a litigant. Fair play and substantial justice after *Gucci* counsel a change of law in this context. As a general matter, courts should adopt the rule that "an order compelling production should be imposed on a nonparty . . . only in extreme circumstances." Minpeco, S.A. v. Conticommodity Serv., Inc., 118 F.R.D. 331, 332 (S.D.N.Y. 1988). And this rule should be even more important in the context of foreign non-parties who may have no reason to expect being hauled to U.S. courts for actions wholly unrelated to their operations. Moreover, an emphasis on fair play and substantial justice would overturn the Third Circuit's finding in *In re Auto. Refinishing Paint Antitrust Litig*., that the Hague Convention should not be employed for jurisdictional discovery. 358 F.3d 288 (3d Cir. 2004). If anything, international comity means that the Convention should always apply in cases of jurisdictional discovery where a court has not even established jurisdiction. Beyond this, courts should also incorporate the approach advocated by the U.S. amicus in *Gucci* that urged courts to take into account a wider balancing test provided by Section 403 of the Restatement (Third) of Foreign Relations Law, which evaluates "the importance of [a foreign] regulation to the

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In sum, *Daimler*, *Gucci*, and *Motorola* counsel that discovery of documents abroad can no longer be "uninhibited." A good starting place would be to qualitatively limit the kind of U.S. interests that are considered "substantial." By focusing on the specific interests involved in each case and by soliciting foreign input whenever possible, courts can begin to honor their comity duties.

CONCLUSION

Daimler and its progeny suggest that the thirty-year *Aérospatiale* paradigm is coming to an end. The United States Supreme Court, the Second Circuit, and the New York State Court of Appeals have revived international comity with decisions that prominently denied the uninhibited exercise of raw judicial power over foreign parties. Influenced by concerns with international commerce and retaliation by foreign sovereigns, these courts have imposed limits on judicial power. Even if courts continue to reject the Hague Convention and alternatives to overbroad U.S. discovery, we should never again see the excesses of the *Aérospatiale*-era which discarded the Convention as a useless treaty and affirmed U.S. transnational discovery rules in almost all cases.

If *Daimler* and its progeny are taken to their logical conclusion, the balancing of foreign interests should change dramatically. Courts should focus on the specific interests of the United States involved in each case, and should refrain from ruling based on mere generalities. Courts should also create a more routine procedure for acquiring executive and foreign input in particular cases. Finally, the comity balancing test should be reworked to emphasize this input from foreign countries and the U.S. government. Generally, lower courts should begin to experiment with ways to change the current comity analysis to accommodate the *Daimler* emphasis on international comity.

Taking everything into account, international comity in the discovery context is making a comeback. Following in the footsteps of *Morrison* and *Kiobel*, the U.S. judiciary seems ready to adopt a more diplomatic stance in the face of foreign interests. The changing nature of the modern global economy and the danger of retaliation by foreign countries should continue to influence these developments. What is clear is that U.S. courts are more attuned to international norms than they have been in the recent past, especially in the context of discovery.

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international political, legal, or economic system." Such an approach would allow courts to consider the possible effects of any case on the global economy and consider a wider array of foreign interests.