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A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery

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Abstract

This note examines the international efforts undertaken by nations collectively and individually to resolve extraterritorial discovery conflicts. Discussed are the international efforts to achieve uniform discovery international discovery standards. The U.S. and U.K. systems and their joint efforts to establish a set of legal tenets and norms to resolve costly extraterritorial discovery disputes.

A COMPARATIVE STUDY OF U.S. AND BRITISH APPROACHES TO DISCOVERY CONFLICTS: ACHIEVING A UNIFORM SYSTEM OF EXTRATERRITORIAL DISCOVERY

*Daniela Levarda**

INTRODUCTION

Extraterritorial discovery orders issued unilaterally by domestic courts are a primary source of conflict in international litigation.[1] Judicial requests for information located across state boundaries are considered intrusive upon the sovereignty of nations,[2] and are countered by strict confidentiality objectives enforced through the imposition of criminal and civil penalties for disclosure.[3] Domestic courts and international litigants have found it difficult to accommodate their own need for information as well as other countries' secrecy concerns.[4] These difficulties have prompted multinational efforts to set forth uniform procedures for obtaining discovery abroad, such as the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("Hague Convention" or "Convention")[5] and bilateral treaties.[6]

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1. *See* Sidney S. Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061 (1984) (discussing conflicts arising from different national discovery that permeate international legal system); Andreas F. Lowenfeld, *Introduction: Discovering Discovery, International Style*, 16 N.Y.U. J. INT'L L. & POL. 957 (1984) (identifying discovery as main battleground in controversy over extraterritorial jurisdiction).

2. Lenore B. Browne, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1320 (1983). Many governments resent extraterritorial discovery as an infringement upon their sovereignty, and enact blocking legislation in order to thwart such discovery orders. *Id.*

3. David. E. Teitelbaum, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841 (1986). Many nations that find extraterritorial discovery orders offensive to their sovereignty have enacted legislation that prohibits compliance with such orders at the risk of criminal penalties. *Id.*

4. *See* Rosdeitcher, *supra* note 1, at 1063 (discussing inability of domestic courts to satisfactorily accommodate competing national interests in disclosure versus confidentiality); Browne, *supra* note 2, at 1320 (discussing difficulties facing litigants confronted with hard choice of obeying one court's discovery order or complying with another forum's non-disclosure laws).

5. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Convention].

6. *See* PAUL B. STEPHAN III ET. AL., INTERNATIONAL BUSINESS AND ECONOMICS - LAW

Variant national policies, however, such as the propensity of the United States to compel broad extraterritorial discovery,[7] contrasted by the United Kingdom's deference to foreign confidentiality concerns,[8] have preserved a marked disparity in the adjudication of discovery disputes, both on a global and a domestic level.[9] Furthermore, these differences have encouraged the proliferation of blocking statutes[10] and secrecy laws[11]

AND POLICY 211 (1993). The United States has negotiated agreements setting forth dispute resolution procedures with several countries. *Id.*; *see, e.g.*, Agreement Between the United States and the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, 27 U.S.T. 1956, T.I.A.S. No. 8291 (regulating cooperation in enforcement of antitrust policies between U.S. and German antitrust authorities); Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, 23 I.L.M. 275 (1984) (mandating cooperation in resolving jurisdictional and economical conflicts resulting from differing antitrust policies between United States and Canada); Agreement Between the United States and Australia Relating to Cooperation on Antitrust Matters, Jan 16, 1985, T.I.A.S. No. 10365, 34 U.S.T. 388, 1369 U.N.T.S. 43 (establishing bilateral framework for consultations with regard to implementation of antitrust policies between United States and Australia); Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487, 61 Antitrust 8 Trade Reg. Rep. (BNA) No. 1534, at 382 (mandating coordination of antitrust investigations to minimize disruption to international trade). Although these agreements foster more than procedural cooperation between nations, their primary concern lies in the resolution of international discovery disputes. STEPHAN, *supra*, at 211.

7. *See* Douglas E. Rosenthal & Stephen Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery*, 16 N.Y.U. J. INT'L L. & POL. 1075, 1076-77 (1984). The United States may be the only nation which believes that the unilateral extension of its broad discovery laws extraterritorially does not violate international law. *Id.* at 1075; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 rep. n.1 (1986) [hereinafter RESTATEMENT (THIRD)] (discussing international controversy concerning discovery abroad). "The United States' position . . . has been that persons who do business in the United States, or who otherwise bring themselves within United States jurisdiction to prescribe and to adjudicate, are subject to the burdens as well as the benefits of United States law, including the laws of discovery." *Id.*

8. *See* DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 59 (1992) (discussing British courts' sensitivity to foreign secrecy policies as reason for more restrained use of extraterritorial discovery orders than customary in U.S. litigation).

9. *Id.* at 56-59.

10. *See* In re Anschuetz & Co., 754 F.2d 602, 614 n.29 (5th Cir. 1985) (defining blocking statute as law passed by government imposing penalty upon nationals for complying with foreign court's discovery request). In an attempt to curtail the extraterritorial exercise of discovery powers within their borders, many nations have adopted secrecy laws and blocking statutes that prevent the disclosure of specific information. Silvia B. Piñera-Vàsquez, *Extraterritorial Jurisdiction and International Banking: A Conflict of Interests*, 43 U. MIAMI L. REV. 449, 466 (1988).

11. Piñera-Vàsquez, *supra* note 10, at 466. Secrecy laws are a recognized means of

designed to obstruct the disclosure of information[12] across state borders.[13] Thus, litigants such as multinational corporations,[14] whose activities subject them to the jurisdictions of several nations,[15] are often faced with the choice of obeying discovery orders at the cost of sanctions abroad, or having otherwise meritorious claims prejudiced by lack of evidence.[16] This conflict of laws has become an impediment to international economic development[17] and a strain on judicial resources.[18]

This Note examines the international efforts undertaken by

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ensuring a client's confidentiality in commercial transactions, and thereby also attracting foreign investment. *Id.* at 467. The effect of both blocking statutes and secrecy laws are the same. *Id.* at 466.

12. STEPHAN, *supra* note 6, at 211. Australia, Bermuda, Canada, the Cayman Islands, Germany, France, Liechtenstein, Norway, Panama, Singapore, Switzerland, and the United Kingdom have enacted such statutes. *Id.* In addition, the Commission of the European Communities is considering a more general directive on the subject. *Id.*

13. *See* PUBLIC POLICY IN TRANSNATIONAL RELATIONSHIPS (Mauro Rubino-Sammartano & C.G.J. Morse eds.,), at USA-203 (1991) [hereinafter RUBINO-SAMMARTANO & MORSE] (discussing extraterritorial reach of U.S. discovery processes as incentive to diplomatic protests and legislation to block production of evidence).

14. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 863 (1991). The multinational enterprise or corporation, an established feature of the international economic environment, generally consists of a group of corporations, each organized under the law of some state, linked by common managerial and financial control and pursuing integrated policies. *Id.*

15. RESTATEMENT (THIRD) § 213 cmts. a-f. A state may exercise jurisdiction to prescribe laws for acts of its corporate national committed outside of its territory. *Id.* cmt. b. Connections other than nationality, however, may be significant for the exercise of such jurisdiction. *Id.* cmt. d. The fact that a substantial part of a corporation's shares are owned by nationals of that state, or that the corporation is managed from an office located in that state, or that the corporation's principal place of business is in that state, authorizes the particular state to treat the corporation as analogous to its national. *Id.* In addition, other states having such links to the corporation may also exercise jurisdiction over the corporation for limited purposes. *Id.*

16. Rosdeitcher, *supra* note 1, at 1062-63. In situations where the subject of a non-U.S. secrecy state is faced with a discovery order from a U.S. court, a legal conflict ensues, whereby the U.S. judge will threaten sanctions against the entity for non-compliance, while the opposing state will threaten criminal or civil penalties should its subject comply with the disclosure request. *Id.*; *see* RESTATEMENT (THIRD) § 442(c) (stating that U.S. court may draw unfavorable inferences toward party unable to comply with discovery due to disclosure prohibition abroad, even when party made good faith effort to secure waiver of confidentiality from non-U.S. jurisdiction).

17. *See* STEPHAN, *supra* note 6, at 302 (stating that substantive differences such as disclosure laws constitute regulatory impediment to international market, particularly within context of securities transactions).

18. *See* David J. Gerber, *International Discovery After Aérospatiale: The Quest For An Analytical Framework*, 82 A.J.I.L. 521 (1988) (discussing injurious effects of extraterritorial discovery conflicts on effectiveness of U.S. litigation as well as their interference with policies of both United States and other nations).

nations collectively and individually to resolve extraterritorial discovery conflicts. Part I discusses the plight of multinational corporations as examples of litigants most often embroiled in costly discovery conflicts. Part I also examines international efforts to achieve uniform standards of extraterritorial discovery. Part II discusses relevant discovery laws and judicial principles employed by the United States and the United Kingdom for resolving disclosure conflicts in the context of multinational litigation. Part III argues that the various legal tenets developed unilaterally by U.S. and British courts have failed to achieve consistent norms in adjudicating discovery conflicts, resulting in the inequitable administration of domestic laws. Part III also sets forth a proposal for a neutral international panel that would promulgate not only common procedures of disclosure, but also a uniform structure of analysis for the adjudication of interjurisdictional discovery conflicts. This Note concludes that such a system would objectively address contradictory concerns of confidentiality versus disclosure, as well as comport with the aims of global economic development.

I. *MULTINATIONAL EFFORTS TO RECONCILE JUDICIAL DEMAND FOR INFORMATION WITH CONCERNS OF CONFIDENTIALITY*

The enactment of blocking legislation[19] designed to insulate commercial[20] information against the broad discovery powers exercised by nations such as the United States[21] has placed international litigants in the difficult position of having to comply with conflicting jurisdictional disclosure policies.[22] This result is increasingly[23] apparent within the context of international

19. *See supra* note 10 and accompanying text (defining blocking legislation).

20. *See* Jonathan I. Blackman & Mitchell A. Lowenthal, *United States, in* DISPATCHING THE OPPOSITION: A LEGAL GUIDE TO TRANSNATIONAL LITIGATION, INT'L FIN. L. REV., Aug. 1992 at 50 (noting that international commercial litigation in United States frequently involves issues of extraterritorial discovery and potential conflicts with non-U.S. secrecy laws).

21. *See supra* note 7 and accompanying text (discussing broad extraterritorial discovery practices of U.S. courts).

22. *See* Rosdeitcher, *supra* note 1, at 1062-63 (discussing plight of international litigants subject to conflicting disclosure policies of different jurisdictions).

23. *See* Morris H. Deutsch, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. § 1782, for Use in a Foreign or International Tribunal*, 5 B.C. INT'L & COMP. L. REV. 175, 176 n.6 (1982) (stating that significant increase in international transactions has led to higher incidence of multinational litigation).

corporate litigation.[24] The rules of procedure adopted at the Hague Convention[25] have attempted to ease some of the hardships encountered in obtaining discovery abroad in civil and commercial suits.[26] In addition, bilateral treaties have invited governmental cooperation with regard to the resolution of interjurisdictional discovery disputes.[27]

A. *Multinational Corporations and Interjurisdictional Discovery Conflicts*

The significant increase in international transactions[28] has led to the establishment of multinational corporations as perhaps the most important actors in the world economy.[29] The expansion of commercial activities undertaken by transnational enterprises has continued despite the recess of world economic growth and the subsequent heightening of international economic uncertainties.[30] With newly available opportunities for investment, transnational enterprises have become more diversified commercially and geographically.[31] Currently, a large transnational firm typically maintains economic ties to several nations that furnish it with raw materials, labor, and capital.[32] This expansion in economic activity has clouded the delineations of nationality[33] with respect to corporations doing business across na-

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24. *See* Henry Harfield, *The Implications of U.S. Extraterritorial Discovery Proceedings Against Multinational Corporations For the Judiciary*, 16 N.Y.U. J. INT'L L. & POL. 973 (1984). The detrimental impact of U.S. discovery proceedings on multinational corporations reverberates through the U.S. judicial system and throughout international law. *Id.*

25. Hague Convention, *supra* note 5, 23 U.S.T. 2555, 847 U.N.T.S. 231.

26. Robert J. Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: An Exposition of the Procedures and a Practical Example: In re Westinghouse Uranium Contracts Litigation*, 10 GA. J. INT'L. & COMP. L. 101, 103-04 (1980). The Hague Convention is the most extensive and successful international effort to simplify and expedite the process of judicial assistance in procuring evidence extraterritorially among signatories. *Id.*

27. *See supra* note 6 and accompanying text (listing bilateral treaties for judicial assistance and cooperation).

28. *See* STEPHAN, *supra* note 6, at 32 (discussing increase in international transactions).

29. *The Process of Transnationalization in the 1980's*, [1988] U.N.C.T.C. Rep. No. 26, at 5.

30. *Id.*

31. STEPHAN, *supra* note 6, at 32.

32. *Id.* at 33.

33. RESTATEMENT (THIRD) § 213. "For purposes of international law, a corporation

tional borders, subjecting the enterprises to the procedural demands of multiple jurisdictions.[34] The resulting international commercial litigation has served as the legal battle ground for interjurisdictional discovery battles[35] with multinational corporations[36] as the often unwilling warriors.[37]

The conflicts center on sovereigns' reluctance to submit the domestic conduct of their national corporations to the scrutiny of other nations that share jurisdiction over those enterprises by reason of sustaining the effects[38] of their activities.[39] Although there has been considerable impetus to create international regulatory standards for multinational enterprises,[40] a uniform system of settling disclosure demands in transnational corporate lit-

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has the nationality of the state under the laws of which the corporation is organized." *Id.* In addition to being a national of its state of incorporation, however, a multinational corporation may also be considered a national of a state from which it draws its labor force, where its investors are, where it sells its products, or where its corporate headquarters are located. *Id.* cmt. d; STEPHAN, *supra* note 6, at 33.

34. Harfield, *supra* note 24, at 973.

35. *See* JAMES R. ATTWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 15.10 (2d ed. 1981) (discussing jurisdictional conflicts resulting from U.S. custom of extraterritorial discovery).

36. *See* Lee Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 21 COLUM. J. TRANSNAT'L L. 233, 234 (1986). The rise of multinational corporations with branches or subsidiaries in different states, each controlling its own domain of information, has added a special dimension to international litigation. *Id.*

37. *See* Rosenthal & Yale-Loehr, *supra* note 7, at 1081 (discussing special situation of third-party multinational corporations, such as banks, embroiled in interjurisdictional discovery conflicts based on holding of confidential information as fiduciaries for others).

38. *See* CARTER & TRIMBLE, *supra* note 14, at 726. Territorial regulation may be extended by a state to conduct by a multinational corporation which has limited contact with that state, but whose acts caused an effect within the borders of that state. *Id.* Western European nations have often criticized the exercise of such extended jurisdiction by the United States, which leads to the application of U.S. laws extraterritorially in areas such as antitrust, export controls, securities trading, and environmental protection. *Id.*; *see also* RESTATEMENT (THIRD) § 402. A nation has basis for jurisdiction to prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory." *Id.*

39. *Books on Transnational Corporations*, [1984] U.N.C.T.C. Rep. No. 18, at 58 (reviewing A.H. HERMAN, CONFLICTS OF NATIONAL LAWS WITH INTERNATIONAL BUSINESS ACTIVITY: ISSUES OF EXTRATERRITORIALITY (1982)).

40. *See Transnational Corporations in World Development*, United Nations Centre on Transnational Corporations, Third Survey, at 106, U.N. Doc. ST/TC/46, U.N. Sales No. E.83.II.A.14 (1983) (advocating multilateral approach in settling intergovernmental disputes regarding treatment of transnational corporations, particularly where different jurisdictions impose conflicting requirements on various entities of transnational enterprises).

igation has not yet been achieved.[41] Consequently, the disparate policies that are continually employed in the unilateral adjudication of discovery disputes have heightened the uncertainty in commercial litigation[42] and have been considered a trade barrier that limits the access of multinational corporations to global markets.[43]

B. *The Hague Convention: An International Effort to Achieve Uniform Procedures for Obtaining Extraterritorial Discovery*

The most prominent international effort to reconcile broad interests in discovery with concerns of confidentiality has been the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial[44] Matters.[45] The Convention was intended to codify a universal procedure for the procurement of evidence in litigation among signatory nations[46] that could be tailored to the discovery practices of both common law[47] and civil law[48] regimes.[49] The proposed mechanism for obtaining ev-

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41. Rosenthal & Yale-Loehr, *supra* note 7, at 1081.

42. *Id.* at 1080-81.

43. *Id.* at 1080.

44. *See* 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE CIVIL AND COMMERCIAL § 5-1-4, at 162 (1990). Although Article I of the Hague Convention limits its utility to obtaining evidence in "civil or commercial matters," the text of the convention does not define either term. *Id.* Signatories to the Hague Convention subscribe to divergent views of what constitutes "civil or commercial" matters. *Id.* For example, civil jurisdictions do not consider administrative issues to come within the scope of the Hague Convention, while signatories such as the United States attribute a more inclusive, liberal meaning to the "civil and commercial" limitation. *Id.* at 163.

45. Hague Convention, *supra* note 5, 23 U.S.T. 2555, 847 U.N.T.S. 231. The following states are parties to the Hague Convention: Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, Mexico, Monaco, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, United Kingdom, and the United States. MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST - Selected International Conventions, at IC-17 (1993).

46. Augustine, *supra* note 26, at 103-04. The Hague Convention is the most prominent international effort to simplify and expedite the process of procuring evidence across national borders through judicial assistance among signatories. *Id.*

47. *See* HARRY W. JONES ET AL., LEGAL METHOD 5 (1980).

> The Anglo-American legal system, unlike the "civil law" system which prevails with variations in most of the countries of the western world, explicitly recognizes the doctrine of precedent, known also as the principle of *stare decisis*. It is the distinctive policy of a "common law" legal system that past judicial decisions are "generally binding" for the disposition of factually similar present controversies.

Id.

48. *Id.*; *see* ATTWOOD & BREWSTER, *supra* note 35, at 227 (discussing discovery differ-

idence among signatories operates principally through letters of request[50] transmitted from courts to designated Central Authorities[51] in each of the participating states.[52] This process is intended to eliminate the intricate, time-consuming diplomatic channels otherwise utilized by domestic courts to obtain transnational judicial assistance.[53] As long as signatories to the Convention follow the prescribed procedures for seeking relevant information, fellow members are under an international legal obligation to render a minimum amount of cooperation in response.[54] This duty can be modified by subsequent treaties entered into independent of the Hague Convention.[55]

Although the Convention was intended to harmonize the means of obtaining international discovery,[56] it also incorporated provisions allowing signatories to opt out of the agreed procedures.[57] At least three clauses included in the text of the

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ences between United States and civil law countries). Discovery in civil law countries is a judicial function undertaken by the courts themselves. *Id.* at 228. Should U.S. counsel engage in U.S. style discovery in civil law jurisdictions, their conduct may be taken as a transgression upon the jurisdiction of local non-U.S. courts. *Id.*

49. Teitelbaum, *supra* note 3, at 851.

50. Hague Convention, *supra*, note 5, 23 U.S.T. 2555, 847 U.N.T.S. 231. The English term "letter of request" is synonymous with the term "letter rogatory" used in U.S. discovery procedures. RISTAU, *supra* note 44, § 5-1-3, at 161.

51. Hague Convention, *supra* note 5, art. 2, 23 U.S.T. at 2558, 847 U.N.T.S. at 241. Article 2 requires each signatory to establish a "central authority" for the receipt of requests from other signatories. *Id.* In the United States, for example, the Department of Justice has been designated as the central authority which receives requests for discovery from abroad. RISTAU, *supra* note 44, § 5-1-5, at 168.

52. RISTAU, *supra* note 44, § 5-1-5 at 168-69.

53. *Id.* § 5-1-5, at 169.

54. *Id.* § 5-2-7, at 225-26. A signatory to the Hague Convention has an obligation to respond to another signatory's letter of request with a minimum amount of judicial assistance. *Id.* The minimum obligation imposed on signatories to the Hague Convention is to honor letters of request. *Id.* at 226 n.77. Signatories may expand or curtail this obligation by filing declarations upon ratification setting forth any reservations with regard to providing evidence under Convention rules. *Id.*

55. *Id.* Treaties worked out by individual signatories independent of the Hague Convention and other provisions of the Convention itself that allow participants to opt out of certain procedures of discovery create different obligations to honor discovery requests among signatories to the Hague Convention. *Id.*

56. *See* ATTWOOD & BREWSTER, *supra* note 35, § 15.12, at 230-31 (discussing objectives of Hague Convention to speed and standardize process of obtaining discovery abroad via letters rogatory).

57. Hague Convention, *supra* note 5, art. 9, 23 U.S.T. at 2561, 847 U.N.T.S. at 243. Article 9 mandates that a state executing a letter of request shall apply its own laws with regard to the procedures to be followed. *Id.* Furthermore, should the requesting state demand the use of specified methods under Article 9, the executing state may refuse to

Hague Convention have limited its utility as a viable discovery alternative to liberal disclosure approaches exercised by nations such as the United States.[58] First, the Convention grants the ultimate authority to honor letters rogatory to the signatory where discovery is sought, which may not agree with the scope of disclosure requested.[59] Second, the rules set forth by the Convention do not authorize litigants to search for information to the extent permissible under some members' domestic evidence policies.[60] For example, Article 23[61] allows states to opt out of established procedures with regard to pre-trial discovery.[62] In the United States, however, litigants are permitted to obtain discovery of all

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comply if it deems such methods incompatible with its domestic law. *Id.* Article 23 allows signatories to opt out of discovery obligations with regard to pre-trial discovery. Hague Convention, *supra* note 5, art. 23, 23 U.S.T. at 2568, 847 U.N.T.S. at 243. Article 33 permits a signatory, at the time of signature, ratification, or accession, to opt out of the obligations set forth in Chapter II of the Hague Convention, dealing with the taking of evidence by diplomatic officers, consular agents and commissioners. Hague Convention, *supra* note 5, art. 33, 23 U.S.T. at 2571, 847 U.N.T.S. at 247. Furthermore, Article 12 allows a signatory to refuse letters rogatory if it considers that enforcement of same would prejudice its security or sovereignty. Hague Convention, *supra* note 5, art. 12, 23 U.S.T. at 2562-63, 847 U.N.T.S. at 243.

58. *See* Gerber, *supra* note 18, at 545 (discussing relevance of pre-trial limitations that circumscribe utility of Hague Convention as alternative to U.S. discovery procedures); Martin Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning Its Scope, Methods and Compulsion*, 16 N.Y.U. J. INT'L L. & POL. 1031, 1053 (1984) (discussing liberal discovery as fundamental principle of U.S. judicial proceedings).

59. STEPHAN, *supra* note 6, at 210. "[The Hague Convention] grants the ultimate authority to accept or reject a request to the courts of the country where discovery is sought, which may not take as generous a view as do the courts of the country seeking discovery." *Id.*; *see* Gerber, *supra* note 18, at 544 n.131 (stating that despite convenience of letters rogatory, fact that they do not oblige situs state to honor request negates their utility as viable alternative to U.S. discovery procedures).

60. *See* RUBINO-SAMMARTANO & MORSE, *supra* note 13, at USA-203 (discussing different discovery policies of Hague Convention signatories as causes of dispute with regard to extraterritorial evidence gathering).

61. Hague Convention, *supra* note 5, art. 23, 23 U.S.T. at 2568, 847 U.N.T.S. at 245. "A contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery documents as known in Common Law countries." *Id.*

62. MARTINDALE-HUBBELL LAW DIGEST at IC 15-26 (1993). Nations such as the Federal Republic of Germany, Monaco, Spain, and Italy preclude the use of all letters of request issued under the Hague Convention procedures for the purpose of obtaining pre-trial discovery. *Id.* Other states, including Cyprus, Denmark, Finland, France, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom, and Mexico have also filed reservations under Article 23, declaring that they will not execute letters rogatory for the purpose of pre-trial discovery. *Id.*

relevant data prior to the commencement of the actual trial.[63] Furthermore, the Convention does not address the amount of judicial supervision necessary to execute an extraterritorial evidence request.[64] Thus, the Convention does not create a middle ground between civil law signatories where discovery is controlled by trial judges with little participation from litigants' attorneys,[65] and countries such as the United States where discovery is conducted primarily by parties' lawyers with limited direct judicial supervision.[66]

Lastly, the Hague Convention does not set forth specific relevance standards to be adhered to in advancing letters of request.[67] Several signatories, however, have proclaimed that Convention procedures can be utilized to acquire only the information that a judge has determined to be directly relevant to the substantive issues in dispute.[68] The United Kingdom has also refused to assist indeterminate disclosure demands that could merely lead to the discovery of admissible evidence.[69] In contrast, the United States permits discovery of any information pertinent to the particular judicial proceeding, as long as it is reasonably calculated to result in the procurement of admissible evidence.[70]

Signatories are engaged in an ongoing debate over the exclusivity of the Hague Convention as the principal method of

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63. FED. R. CIV. P. 26(a)(3). Rule 26(a)(3) states that a party shall provide to other parties all relevant information with regard to witnesses, claims, and evidence to be adduced at trial "at least 30 days before trial." *Id.*

64. *See* RISTAU, *supra* note 44 § 5-1-4, at 167 (discussing ambiguity regarding acts that fall within functions of judiciary among signatory nations); Hague Convention, *supra* note 5 art. 12, 23 U.S.T. at 2562-63, 847 U.N.T.S. at 243 (stating that letter of request may be refused if its execution does not fall within function of judiciary in signatory requested to produce evidence).

65. RUBINO-SAMMARTANO & MORSE, *supra* note 13, at USA-203.

66. *Id.*

67. Hague Convention, *supra* note 5, art. 3, 23 U.S.T. at 2558-59, 847 U.N.T.S. at 241-42. Article 3 provides that the letter of request shall specify "the evidence to be obtained or other judicial act to be performed." *Id.* art. 3(d).

68. MCCLEAN, *supra* note 8, at 99 (discussing reservations filed by signatories to Hague Convention with regard to Article 23). The United Kingdom included in its reservation a specific relevance requirement, declaring it would not honor letters of request that merely require a person to state what documents relevant in the proceeding are within his power to produce. *Id.*

69. *Id.* at 99-100.

70. FED. R. CIV. P. 26. Rule 26 allows for the disclosure of all documents which are relevant to the proceeding in issue, or which appear reasonably calculated to lead to the discovery of admissible evidence. *Id.*

transnational discovery.[71] The United Kingdom has sustained the priority of the Convention by incorporating its rules into domestic statutory[72] provisions.[73] The United States, however, declined to prescribe recourse to the Hague Convention as a precursor to alternative domestic processes.[74] Rather, the U.S. Supreme Court insisted that the Convention does not limit the power of federal courts to give precedence to other discovery techniques authorized by the U.S. Federal Rules of Civil Procedure.[75]

C. *An Alternative to the Hague Convention: International Agreements for the Resolution of Interjurisdictional Discovery Conflicts*

The Hague Convention has neither achieved a uniform system of obtaining extraterritorial discovery nor conclusively resolved interjurisdictional discovery disputes.[76] Therefore, several nations enacted blocking legislation[77] designed to frustrate requests for the disclosure of information in commercial litigation from countries such as the United States.[78] Confronted

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71. RUBINO-SAMMARTANO & MORSE, *supra* note 13, at USA-204.

72. Evidence (Proceedings in Other Jurisdictions) Act 1975 (Eng.).

73. *See* MCCLEAN, *supra* note 8, at 105. "[T]he Evidence (Proceedings in Other jurisdictions) Act of 1975 was enacted to enable the United Kingdom to ratify the [Hague] Convention." The provisions of the Evidence (Proceedings in Other Jurisdictions) Act of 1975 resemble the rules set forth in the Hague Convention. *See id.* at 105-06 (discussing and comparing provisions of Evidence (Proceedings in Other Jurisdictions) Act of 1975 to Hague Convention procedures).

74. Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522 (1987).

75. *Id.* at 541-46. The U.S. Supreme Court held that under international comity, the Hague Convention is merely an undertaking among sovereigns to provide optional, not mandatory, procedures to facilitate discovery, to which courts should resort when they deem that course of action appropriate. *Id.*

76. *See* STEPHAN, *supra* note 6, at 210-11 (noting that Hague Convention has not served as "panacea" for interjurisdictional discovery disputes).

77. *See* In re Anschuetz & Co., 754 F.2d 602, 614 n.29 (5th Cir. 1985) (defining blocking statute as law passed by government imposing penalty upon nationals for complying with foreign court's discovery request).

78. *See* STEPHAN, *supra* note 6, at 211. Among countries which have enacted blocking legislation are Australia, Bermuda, Canada, the Cayman Islands, Germany, France, Liechtenstein, Norway, Panama, Singapore, Switzerland, and the United Kingdom. *Id.*; Gerber, *supra* note 18, at 548-49 (analyzing non-U.S. blocking statutes enacted in response to broad discovery powers exercised by U.S. courts). *See generally* A. V. LOWE, EXTRATERRITORIAL JURISDICTION 79-143 (1983) (presenting annotated collection of blocking statutes in English).

with these barriers to the normal disposition of claims,[79] the United States has responded by negotiating agreements[80] with several countries[81] that provide more elaborate cooperative procedures with regard to obtaining disclosure abroad.[82] At present, Australia, Canada, Germany, and the United Kingdom are among the nations that utilize inter-governmental consultation with regard to certain discovery requests.[83]

These agreements have proven useful in furthering general good will and economic cooperation among nations.[84] They have failed, however, to conclusively resolve the dissension over variant interjurisdictional discovery procedures.[85] One reason for this impasse is that domestic courts still serve as the unilateral interpreters of these treaties.[86] Furthermore, these pacts are, in

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79. *See* Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 544 n.29 (1987), quoting RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 437(1)(c) rep. n.5, at 41-42 (Tent. Draft No. 7, 1986) (approved May 14, 1986). The American Law Institute has summarized this interplay of blocking statutes and discovery orders:

> [W]hen a state has jurisdiction to prescribe and its courts have jurisdiction to adjudicate, adjudication should (subject to generally applicable rules of evidence) take place on the basis of the best information available. . . . [Blocking] statutes that frustrate this goal need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States. . . . On the other hand, the degree of friction created by discovery requests . . . and the differing perceptions of the acceptability of American-style discovery under national and international law, suggest some efforts to moderate the application abroad of U.S. procedural techniques, consistent with the overall principle of reasonableness in the exercise of jurisdiction.

Id.

80. *See* Hague Convention, *supra* note 5, art. 28, 23 U.S.T. at 2570, 847 U.N.T.S. at 246. Article 28 of the Hague Convention itself authorized signatories to enter into collateral agreements limiting or elaborating upon the procedures set forth in the text of the Convention. *Id.*

81. *See* STEPHAN, *supra* note 6, at 211 (setting forth agreements for cooperation in discovery conflicts).

82. *See* Marian Nash, *Judicial Assistance*, 86 AM. J. INT'L L. 548, 550 (1992) (discussing mutual legal assistance treaties as agreements intended to enable law enforcement authorities to obtain evidence abroad).

83. STEPHAN, *supra* note 6, at 211.

84. *Id.* The utility of the agreements surpasses the resolution of discovery conflicts, even though they play their biggest role in this area. *Id.*

85. *See* Claus-Dieter Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L. J. 833, 834 (1994) (discussing questionable success of agreements for cooperation in international discovery, as evidenced by fact that conflicts still occur).

86. *See* RESTATEMENT (THIRD) § 326(2). "Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive

large part, merely agreements to cooperate,[87] setting forth desirable, but not mandatory rules of conduct.[88] Consequently, the agreements are sometimes bypassed in favor of other governmental needs,[89] or side-stepped in order to avoid burdensome diplomatic processes.[90] The evasion of these accords, however, fosters animosity among nations, and undermines the good will the pacts were intended to create.[91]

II. *THE U.S. AND BRITISH PERSPECTIVES ON EXTRATERRITORIAL DISCOVERY*

The United States has formulated its procedural laws based

Branch." *Id.*; *see also* CARTER & TRIMBLE, *supra* note 14, at 105 (discussing how differences between methods of interpretation employed by U.S. courts, such as looking outside instrument to determine its meaning, may lead them to accord meaning to treaties different from what non-U.S. tribunals would derive).

87. *See, e.g.*, Agreement Between the United States and the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, 27 U.S.T. 1956, T.I.A.S. No. 8291 [hereinafter U.S. - Germany Agreement]. Article 2 imposes an obligation of cooperation in antitrust matters between the United States and Germany. *Id.* art. 2, 27 U.S.T. at 1957-58, T.I.A.S. No. 8291 at 2-3. This cooperation is not defined by the rest of the agreement's text, however, and, rather than being mandatory, is conditioned upon each party's public policy and national interests. *Id.* art. 3(1)(b), 27 U.S.T. at 1958, T.I.A.S. No. 8291 at 3.

88. *See* U.S. - Germany Agreement, *supra* note 87, art. 3, 27 U.S.T at 1958, T.I.A.S. No. 8291 at 3 (conditioning cooperation in antitrust conflicts on individual state policies and national interests). *But see* CARTER & TRIMBLE, *supra* note 14, at 86-87 (discussing treaties in context of international law). Even though these agreements may not impose legally binding rules of conduct, they may still carry force as "political commitments." *Id.* at 86. Governments may develop expectations of compliance with political commitments, invoke them in public debate to marshall support, and even impose sanctions for their violation. *Id.*

89. Rosenthal & Yale-Loehr, *supra* note 7, at 1076.

90. *Id.*; *see* In re Grand Jury Proceedings (United States v. Bank of Nova Scotia), 722 F.2d 657 (1983) (appeal from order of contempt issued upon bank for failure to comply with grand jury subpoena despite agreement between United States and Cayman Islands requiring U.S. government to resort to stipulated procedures for requesting disclosure prior to issuing grand jury subpoena).

91. *See* ATTWOOD & BREWSTER, *supra* note 35, § 15.10, at 228. These agreements preserve the signatories' right to refuse assistance according to local policies. *Id.* Efforts by U.S. courts to compel discovery without regard to the agreements are viewed as attempts to circumvent international accords, and may cause antagonism toward U.S. courts. *Id.*; *see* CARTER & TRIMBLE, *supra* note 14, at 87 (noting that violation of international agreements justifies victim of that violation using all means permissible under international law to bring about cessation of that violation and obtain reparation); Rosenthal & Yale-Loehr, *supra* note 7, at 1081 (stating that disputes concerning standards of discovery that escalate into conflicts of sovereignty, jurisdiction, and self-determination undermine ability of countries to work harmoniously in other economic, political, and military matters).

on the notion that liberal discovery[92] is a fundamental precept of judicial proceedings.[93] Thus, both the U.S. Federal Rules of Civil Procedure[94] and the Restatement (Third) of Foreign Relations Law[95] affirm the power of U.S. courts to issue broad discovery orders, even when the information requested is located abroad.[96] U.S. judges have respected their domestic forum's tradition of broad discovery by generating and compelling production of all relevant information within a party's control.[97] Unlike the United States, the United Kingdom employs a more restrictive approach, and generally tries to limit the scope of discovery orders to information located within its borders.[98] Furthermore, British courts are considered more sensitive to other countries' concerns for confidentiality than their U.S. counterparts.[99]

A. *U.S. Statutory and Common Law Precedents for Broad Extraterritorial Discovery*

Discovery among international litigants in U.S. district courts is governed by the Federal Rules of Civil Procedure.[100] The Restatement (Third) of Foreign Relations Law[101] sets forth principles of international law applicable to transnational discov-

92. Teitelbaum, *supra* note 3, at 843. Civil litigation in the United States is based on the concept that free and open discovery is essential to the equitable adjudication of disputes. *Id.* U.S. courts have broad authority to order disclosure even when the information is located abroad. *Id.*

93. *See* Radvan, *supra* note 58, at 1053 (discussing liberal discovery as fundamental principle of U.S. judicial proceedings).

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

95. RESTATEMENT (THIRD).

96. FED. R. CIV. P. 34. Rule 34 requires only that the information requested in discovery be within the party's possession, custody, or control. *Id.*. RESTATEMENT (THIRD) § 442. Section 442 authorizes courts or agencies of the United States to require persons within their jurisdiction to submit to discovery even if the information or the person in possession of the information is located abroad. *Id.*

97. *See* Teitelbaum, *supra* note 3, at 843 (discussing broad powers of U.S. courts to compel production of documents within litigants' control).

98. *See* MCCLEAN, *supra* note 8, at 59 (discussing British courts' sensitivity to position of non-British nations as reason for more restrained use of extraterritorial discovery).

99. *Id.*

100. 28 U.S.C. § 1332(a) (1988 & Supp. V 1993). "The district courts shall have original jurisdiction of all civil action where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between . . . citizens of a State and citizens or subjects of a foreign state." *Id.*

101. RESTATEMENT (THIRD).

ery within the U.S. justice system.[102] In addition, U.S. courts have unilaterally developed multiple standards to evaluate the need for ordering extraterritorial discovery and to determine whether disclosure orders should be enforced through the imposition of sanctions.[103] These precepts are predicated on the principles of good faith,[104] comity,[105] and a balancing of domestic interests in disclosure versus non-U.S. concerns of confidentiality.[106]

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102. *Id.* Section 442 deals with the authority of U.S. courts to request disclosure from international litigants in accordance with established principles of international law. *Id.* § 442.

103. FED R. CIV. P. 37. Rule 37 authorizes U.S. courts to impose sanctions upon litigants who fail to comply with discovery orders. *Id.*

104. *See* Société Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958) (dismissal of action with prejudice as sanction for non-compliance with discovery order inappropriate where party attempted in good faith to produce requested documents). Pursuant to good faith standard established by the U.S. Supreme Court in *Société*, parties to litigation and non-party targets of civil or criminal investigation in connection with the suit may be required to show that they have made diligent efforts to comply with a disclosure order, and that they have attempted to secure a release or waiver of confidentiality from a state which incorporates blocking legislation. RESTATEMENT (THIRD) § 442 cmt. h. Evidence that parties or targets colluded with secrecy jurisdictions in obtaining prohibition against disclosure, or deliberately secreted documents within a state with blocking legislation, may be regarded as evidence of bad faith and justify imposition of sanctions for non-production. *Id.*; *see generally* Browne, *supra* note 2, at 1324-27 (discussing analysis used in determination of good faith).

105. Hilton v. Guyot, 159 U.S. 113 (1895). The doctrine of comity was first recognized by the Supreme Court in 1895. *Id.* It is generally defined as "the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum." Laker Airways v. Sabena, 731 F.2d 909, 937 (D.C. Cir. 1984). In international legal practice, comity embodies the objectives of "practical convenience and expediency based on [the] theory that a court that first asserts jurisdiction will not be interfered with in [the] continuance of its assertion by a court of a foreign jurisdiction unless it is desirable that one give way to the other." Neal v. State, 135 So.2d 891, 895 (1961).

106. *See* RESTATEMENT (THIRD) § 442 cmt. (c) (discussing consideration of relevant U.S. and non-U.S. interests in extraterritorial discovery).

> In making the necessary determination of foreign interests . . . , a court or agency in the United States should take into account not merely a general policy of the foreign state to resist 'intrusion upon its sovereign interests,' or to prefer its own system of litigation, but whether producing the requested information would affect important substantive policies or interests of the foreign state. In making this determination, the court or agency will look, *inter alia*, to expressions of interests by the foreign state, as contrasted with expressions by the paries; to the significance of disclosure in the regulation by the foreign state of the activity in question; and to indications of the foreign state's concern for confidentiality prior to the controversy in connection with which the information is sought.

1. Federal Rules of Civil Procedure

Should a party to litigation in the United States fail to make voluntary discovery of all relevant documents,[107] his opponent may petition the court to issue a discovery order.[108] While a showing of good cause is no longer required to trigger the obligation of voluntary discovery,[109] a showing of need is necessary to move the court to order production of trial evidence.[110] Once the applicant demonstrates a need for the production of relevant information, the court must decide whether to issue a discovery order and, should the ordered party fail to comply, whether to enforce it through sanctions under Rule 37 of the Federal Rules of Civil Procedure.[111] The nationality of the party

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Id.

107. FED. R. CIV. P. 26(a)(1)(b). "[A] party shall, without awaiting a discovery request, provide to other parties . . . all documents . . . in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings." *Id.*

108. FED. R. CIV. P. 37(a). "A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery." *Id.*

109. FED. R. CIV. P. 26 advisory committee's notes to 1970 amd. (showing of good cause no longer required for discovery of documents).

110. FED. R. CIV. P. 26 advisory committee's notes to 1970 amd., advisory committee's notes to 1980 amendment (judges encouraged to curtail needless discovery).

111. FED. R. CIV. P. 37(b) (Sanctions by Court in Which Action Is Pending).

> If a party or . . . agent of a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Id.

requested to produce is irrelevant as long as the court can establish personal jurisdiction over the entity through the effects test[112] or the conduct analysis.[113] Furthermore, the court's broad authority to order disclosure is resolute regardless of the location of the documents requested, provided that the information is under the litigant's control.[114]

The scope of discovery authorized by the U.S. Federal Rules of Civil Procedure has often been criticized by non-U.S. courts.[115] In particular, the relevance requirement stated in Rule 26[116] was denounced by at least one non-U.S. judge[117] as an incentive for overbroad disclosure requests by U.S. litigants.[118] One commentator has also hinted that U.S. litigants may take advantage of the liberal discovery authorized by the Federal

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112. Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir.) *rev'd with respect to holding on merits*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom.* Manley v. Schoenbaum, 395 U.S. 906 (1969) (effect in United States of conduct occurring abroad confers personal jurisdiction upon U.S. courts over perpetrator of that conduct).

113. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1333-34 (2d Cir. 1972) (domestic conduct, in nature of substantial representations made in United States, was sufficient to trigger applicability of U.S. securities laws to transaction that occurred abroad).

114. *See* RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 297. A party to litigation in the United States has been deemed by U.S. courts to be in control of requested documents even when that party does not possess them itself, but has influence over the actual possessor of the information. *Id.*; *see* Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918 (S.D.N.Y. 1984). The defendant airplane manufacturer was deemed to be in control of the information requested despite the fact that the documents were in possession of the defendant's British affiliate. *Id.* Consequently, the court imposed sanctions for non-compliance with discovery upon the defendant. *Id.*

115. *See* Robert B. Mehren, *Discovery Abroad: The Perspective of the U.S. Private Practitioner*, 16 N.Y.U. J. INT'L L. & POL. 985, 986 (1984) (discussing non-U.S. criticism of expansive scope of U.S. discovery procedures).

116. FED. R. CIV. P. 26. Rule 26 provides for the disclosure of all documents relevant to the subject matter. *Id.* In addition, Rule 26 states that the information sought need not be admissible at trial as long as it appears reasonably calculated to lead to the discovery of admissible evidence. *Id.*

117. Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., [1978] 1 All E.R. 434, 441-42. "It is plain that [the] principle of discovery has been carried very much farther in the United States of America than it has been carried in this country." *Id.* "It seems to me to be plain enough that . . . questions would not necessarily be restricted to matters which were relevant in the suit or to produce necessarily what was admissible evidence, but might be used to lead to a train of inquiry which might itself lead to relevant material." *Id.*

118. *Id.* The court indirectly compared the broad U.S. discovery practices to the more restrictive U.K. system of discovery, which requires that documents must be clearly specified in the request so as to avoid "fishing expeditions." *Id.*

Rules at the cost of foregoing Hague Convention procedures.[119] Moreover, dissatisfaction with the wide discovery orders granted under the Federal Rules of Civil Procedure has been considered a reason for the non-cooperation of foreign courts with U.S. production requests,[120] as well as for the promulgation of blocking legislation abroad.[121]

2. Extraterritorial Discovery Under the Restatement (Third) of Foreign Relations

The Restatement (Third) of Foreign Relations Law of the United States ("Restatement (Third)")[122] presents an authoritative[123] but not binding[124] formulation of the laws and policies applicable to international discovery.[125] The issuance of an extraterritorial discovery order according to the Restatement (Third)[126] is an exercise of a U.S. court's jurisdiction[127] to

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119. *See* CHARLES PLATO, ed., OBTAINING EVIDENCE IN ANOTHER JURISDICTION IN BUSINESS DISPUTES 132 (1988) (noting that although both Hague Convention and U.S. statutory instruments provide for extraterritorial discovery, litigants may take advantage of more liberal U.S. procedures).

120. Mehren, *supra* note 115, at 986.

121. *Id.*

122. RESTATEMENT (THIRD). The Restatement (Third) is compiled by the American Law Institute, which was organized in 1923 as a non-profit membership association whose members are selected on the basis of professional standing. *Id.* at xi. The Institute defines its purpose as the "clarification and simplification of the law and its better adaptation to social needs." *Id.* The Restatement (Third) is not an official document of the United States, but rather the considered opinion of the American Law Institute. *Id.* at ix.

123. Rosenthal & Yale-Loehr, *supra* note 7, at 1082. The prestige of the American Law Institute and its writers established the Restatement (Third) as a leading authority in cases involving the proper scope of extraterritorial discovery. *Id.*

124. *See supra* note 121 and accompanying text (stating that Restatement (Third) is not official document).

125. RESTATEMENT (THIRD) § 442. Section 442 sets forth principles of international law applicable in a U.S. court's determination of whether to issue and compel extraterritorial discovery. *Id.*

126. *Id.*. Section 442 confirms the authority of a U.S. court to impose an extraterritorial discovery order upon a litigant within its jurisdiction. *Id.* (1)(a).

127. *Id.* § 401. International law encompasses three types of jurisdiction:

> (a) jurisdiction to prescribe, i.e. to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;
>
> (b) jurisdiction to adjudicate, i.e. to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;
>
> (c) jurisdiction to enforce, i.e. to induce or compel compliance or to

prescribe[128] as well as to enforce[129] its procedural rules upon a non-U.S. litigant.[130] Recognizing that the extraterritorial application of one nation's laws can amount to an unwarranted intrusion upon another's sovereignty,[131] the Restatement (Third) moderates the exercise of enforcement jurisdiction across state borders through a requirement of reasonableness.[132] This condition carries over into the relevant discovery provision[133] of the Restatement, advising U.S. courts to temper their enforcement of production orders that challenge non-U.S. confidentiality laws.[134] At the same time, however, Section 442 permits U.S.

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punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

Id.

128. *Id.* § 402.

[A] state has jurisdiction to prescribe law with respect to

(1) (a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relation of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id.

129. *Id.* § 431(1). "A state may employ judicial or nonjudicial measures to induce or compel compliance or punish non-compliance with its laws or regulations, provided it has jurisdiction to prescribe in accordance with §§ 402 and 403." *Id.*

130. *Id.* § 402. Section 402 recognizes the jurisdiction of U.S. courts over conduct by U.S. nationals both within and outside U.S. territory, as well as conduct by non-U.S. persons that has an effect within the United States. *Id.*

131. *Id.* § 431, introductory n., at 320.

132. *Id.*

133. *Id.* § 442 (Requests for Disclosure: Law of the United States).

134. *Id.* § 442(2).

(2) If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,

(a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of in-

courts to draw unfavorable inferences toward litigants unable to produce requested documentation due to legal restraints abroad.[135]

In the absence of non-U.S. secrecy statutes, the Restatement (Third) grants wide powers to domestic courts or agencies to order[136] and compel[137] extraterritorial discovery.[138] Judges are encouraged to scrutinize requests for the production of documents located abroad more closely than comparable requests for information situated within the United States.[139] The relevance requirement imposed by Section 442,[140] however, mirrors that of the Federal Rules of Civil Procedure.[141] Thus, even though the Restatement (Third) recognizes that it is reasonable to limit extraterritorial discovery to data necessary to the action,[142] it does not restrict a court's power to request disclosure of information that is not admissible evidence at trial.[143]

The Restatement's status as a leading authority in interjuris-

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formation or of failure to make a good faith effort in accordance with paragraph (a);

Id.

135. *Id.*

(c) [A] court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

Id.

136. *Id.* § 442.

(1) (a) A court or agency in the United Sates, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.

Id.

137. *Id.*

(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanction, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party.

Id.

138. *Id.*

139. *Id.* § 442 cmt. a.

140. *Id.* § 442.

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

142. RESTATEMENT (THIRD) § 442 cmt. a.

143. *Id.*

dictional discovery conflicts[144] is derived from its recommended balancing[145] of national and procedural interests in determining whether a court should issue a disclosure order.[146] The importance of non-U.S. claims should be based on the relevant substantive policies of the particular state, as well as on its general interests in sovereignty.[147] Similarly, the significance of U.S objectives should be assessed according to the relevance of the requested documents, as well as to the dynamics of international judicial cooperation.[148]

The framework of analysis set forth by the Restatement (Third) for determining the proper scope of extraterritorial discovery has received wide approval in the U.S. judicial system.[149] Questions still remain, however, regarding the ability of U.S. courts to balance unilaterally the national interests at stake.[150]

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144. *See* Rosenthal & Yale-Loehr, *supra* note 7, at 1082 (noting status of Restatement (Third) as leading authority in cases involving questions on proper scope of extraterritorial discovery).

145. *See* Douglas H. Meal, *Governmental Compulsion as a Defense Under United States and European Community Antitrust Law*, 20 COLUM. J. TRANSNAT'L L. 51, 98-101 (1981) (noting popularity of balancing approach as means of resolving disclosure conflicts within context of antitrust litigation).

146. RESTATEMENT (THIRD) § 442(c).

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Id.

147. *Id.* § 442 cmt. c.

148. *Id.*

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

Id.

149. *See* Meal, *supra* note 145, at 98-101 (noting popularity of Restatement's balancing approach).

150. *See* Serge April & Jonathan T. Fried, *Compelling Discovery and Disclosure in Transactional Litigation: A Canadian View*, 16 N.Y.U. J. INT'L L. & POL. 961, 967-68 (1984) (arguing that extraterritorial discovery contravenes international law because balancing

At least one U.S. judge has doubted the competence of the judiciary to equitably resolve disclosure disputes through a balancing analysis.[151] Given these reservations, several commentators have deemed the unilateral consideration of conflicting international concerns objectionable.[152]

3. Common Law Precedents Developed by U.S. Courts in Extraterritorial Discovery Disputes

In international litigation, U.S. courts have had to weigh the extensive objectives of U.S. discovery against established principles of international law such as territorial sovereignty[153] and comity.[154] These principles are both predicated on the international law principle known as the Act of State Doctrine.[155] When evaluating other nations' concerns of confidentiality against U.S. interests in disclosure, however, domestic courts have found it difficult to arrive, unilaterally, at a consistent framework of analysis.[156]

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approach in context of jurisdictional analysis is tainted by inherent bias of national courts).

151. Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 949 (D.C. Cir. 1984).

> We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom. It is the crucial importance of these policies which has created the conflict. A proclamation by judicial fiat that one interest is less "important" that the other will not erase a real conflict.

Id.

152. *See, e.g.*, Teitelbaum, *supra* note 3, at 860-61 (discussing impossibility of unilateral balancing of vital national interests that are diametrically opposed).

153. *See* The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812) (defining territorial sovereignty). "[T]he jurisdiction of a nation within its own territory is necessarily exclusive and absolute. . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction." *Id.* at 136. Thus, the principle of territorial sovereignty confines the exercise of governmental power within the borders of the particular sovereign, where the authority to prescribe legislative principles is absolute. *Id.*

154. *See supra* note 105 and accompanying text (defining comity as deference that should be accorded by one government to acts of another government).

155. *See* Underhill v. Hernandez, 168 U.S. 250 (1897). The Supreme Court founded the Act of State Doctrine by stating that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252.

156. *See* Teitelbaum, *supra* note 3, at 842. The inconsistent approach developed by U.S. courts faced with the sensitive issue of weighing national and non-U.S. interests in discovery conflicts is representative of a deeper problem, namely that [c]ourts are not

a. The Good Faith Standard Promulgated by *Société Internationale v. Rogers*

The most prominent U.S. Supreme Court decision attempting to reconcile domestic and foreign interests into a viable framework of discovery was *Société Internationale pour Participations Industrielles et Commerciales v. Rogers.*[157] *Société* involved a civil claim whereby the plaintiff, a Swiss holding company, sued the U.S. Attorney General pursuant to Section 9(a) of the Trading with the Enemy Act[158] ("TWEA") to recover assets seized by the United States under other provisions of the TWEA.[159] The U.S. government moved for an order requiring the plaintiff to make available for inspection[160] certain Swiss banking records which it claimed would document the real ownership of the assets in dispute.[161] Société failed to comply with the disclosure order, arguing that it lacked control of the requested documents because applicable Swiss penal and banking law prohibited their production at the risk of criminal sanctions.[162] Notwithstanding Société's claim of impossibility of performance, the federal district court dismissed the suit on the ground that Swiss law did not furnish an adequate excuse for claimant's failure to comply with the production order,[163] and the Court of Appeals affirmed.[164]

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equipped to balance properly the national interests at stake, and acting unilaterally, they cannot resolve the underlying conflict between American and foreign law." *Id.*

157. 357 U.S. 197 (1958).

158. Trading With the Enemy Act, Oct. 6, 1917, ch. 106, 40 Stat. 411, 50 U.S.C. app. 1191 (1988 & Supp. V 1993). [hereinafter TWEA]. TWEA was passed by the United States during World War I in order to "define, regulate, and punish trading with the enemy." *Id.* Section 9 authorized recovery of seized assets by "[a]ny person not an enemy or ally of an enemy." TWEA § 9, 40 Stat. at 419, 50 U.S.C. App. at 1206.

159. *Société*, 357 U.S. at 198.

160. FED. R. CIV. P. 34(a).

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents . . . or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

Id.

161. 357 U.S. at 200.

162. *Id.*

163. *Id.* at 202 (citing Participations Industrielles et Commerciales, S.A. v. McGranery, 111 F. Supp. 435, 441-442 (D.D.C. 1953), *aff'd sub nom.* Société Internationale v. Brownell, 225 F.2d 532 (1955), *cert. denied*, 350 U.S. 937 (1956)).

164. 243 F.2d 254, 255 (1957).

In addition, recourse to the International Court of Justice[165] was denied on account of Société's failure to avail itself of the full assortment of legal remedies provided by the U.S. judicial system.[166]

On certiorari, the U.S. Supreme Court confined its opinion to the narrow issue of whether the district court's dismissal of the action as a sanction for nonproduction was permissible under Rule 37 of the Federal Rules of Civil Procedure.[167] The Court unanimously held that such a severe penalty was inappropriate where the party had attempted in good faith to produce the requested documents.[168] Consequently, the case was remanded to the District Court.[169]

The *Société* decision established that where noncompliance with a discovery order rests on inability rather than unwillingness, a court must pursue sanctions less extreme than dismissal

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165. *See* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute]. The International Court of Justice, often called the ICJ or the World Court, was established by the Charter of the United Nations in 1945, and designed to be the principal judicial organ of the United Nations. *Id.* art. I, 59 Stat. at 1055, 3 Bevans at 1179. The ICJ is composed of 15 judges or members, no two of whom may be nationals of the same state. *Id.* art. III, 59 Stat. at 1055, 3 Bevans at 1179. The members of the ICJ are elected for nine-year terms. *Id.* art. 13, 59 Stat. at 1056-57, 3 Bevans at 1181-82. The jurisdiction of the ICJ is based on consent of the parties. *Id.* art. 36(1), 59 Stat. at 1060, 3 Bevans at 1186. In addition, nations may declare that they will submit to compulsory jurisdiction by the ICJ with regard to any legal disputes concerning the interpretation of a treaty, any question of international law, or the existence of any fact that could amount to the breach of an international obligation. *Id.* art. 36(2), 59 Stat. at 1060, 3 Bevans at 1186-87. The jurisdiction of the ICJ under Article 36(2) is limited to legal disputes. *Id.* art. 36(2), 59 Stat. 1060, 3 Bevans 1186-87. The ICJ, however, may also accept a case involving a political question, in which case it must decide that dispute *ex aequo et bono*. RESTATEMENT (THIRD) § 903 cmt. d. Under the *ex aequo et bono* standard, the ICJ may base its holding upon equity rather than upon existing legal principles. *Id.* § 903, rep. n.9. The same *ex aequo et bono* standard may be applied by the court to legal disputes, provided that the parties acquiesce to this standard. ICJ Statute, *supra*, art. 38(2), 59 Stat. at 1060, 3 Bevans at 1187.

166. Interhandel Case (Switzerland v. U.S.A.), 1959 I.C.J. 6 (Mar. 21).

167. 357 U.S. 197.

168. *Id.* at 211-12. The Court stated:

> [P]etitioner's extensive efforts at compliance compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.

Id. at 211.

169. *Id.* at 213.

of a seemingly meritorious suit.[170] The Court did not, however, elaborate on the type of sanctions admissible in this context.[171] Also, dicta intimated that despite the plaintiff's good faith effort to comply with discovery demands, the district court might still have justifiably drawn unfavorable inferences toward Société's suit so as to determine that the absent information could prejudice its claim.[172] Furthermore, *Société*'s indication that fear of criminal prosecution may excuse non-compliance with a discovery order[173] was deemed by commentators to invite the proliferation of criminally enforced secrecy laws abroad as a means of inducing U.S. courts to curb disclosure orders that expose litigants to non-U.S. penal sanctions.[174]

b. The Pure Comity Approach

Pursuant to *Société*, some courts interpreted the Supreme Court's reluctance to dismiss an international case for non-compliance with discovery and its indeterminate standard of sanctions as a motion for deference to non-U.S. secrecy laws.[175] Consequently, several cases resorted to a pure comity approach[176] in deciding whether extraterritorial discovery should be compelled.[177] This doctrine centered on maintaining amicable rela-

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170. *Id.* at 212.

171. Teitelbaum, *supra* note 3, at 845.

172. 357 U.S. at 212-13. "This is not to say that petitioner will profit through its inability to tender the records called for .... It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner . . . ." *Id.*

173. *Id.* at 211.

174. *See, e.g.*, Teitelbaum *supra* note 3, at 845.

175. *See supra* note 168 and accompanying text (stating that fear of criminal prosecution abroad constitutes excuse for non-compliance with discovery order).

176. *See* Hilton v. Guyot, 159 U.S. 113, 164 (1894) (defining comity as "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").

177. *See* In re Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962) (upholding district court's modification of subpoena duces tecum on showing that compliance would violate Panamanian law); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960) (holding that where party served with subpoena duces tecum was only witness and where evidence could have been secured by letters rogatory, subpoena had to be modified so as not to require production of documents protected by Canadian law); First National City Bank of N.Y. v. IRS, 271 F.2d 616 (2d Cir. 1959); *cert. denied*, 361 U.S. 948 (1960) (holding that production would not be ordered if compliance violated Panamanian law, but that such violation was not established).

tions with non-U.S. trading partners by deferring to their concerns for confidentiality at the cost of proceeding without the necessary information to equitably adjudicate multinational commercial claims.[178]

In *First National City Bank of New York v. IRS*,[179] First National argued that it could not comply with a discovery order for documents relevant to a pending tax investigation, because the situs of the information was Panama, where disclosure was prohibited by law.[180] Finding that a potential violation of Panamanian law had not been conclusively established, the Second Circuit ordered discovery.[181] The court explicitly asserted, however, that such order should not issue where a litigant makes a clear showing that foreign legislation definitively prohibits disclosure.[182]

The Second Circuit reasserted its comity-oriented perspective in the context of a corporate litigation in *Ings v. Ferguson*.[183] Following its previous holding in *First National City Bank v. IRS*,[184] the court modified an order requiring production of documents situated in Canada and protected under Canadian secrecy laws.[185] The decision evinced a more extensive examination of the relevant non-U.S. prohibition than that undertaken in *First National City Bank v. IRS*.[186] In the interest of sovereignty[187] and comity,[188] however, the court refused to interpret the Canadian statute, choosing instead to defer to the Canadian

178. *See* Teitelbaum *supra* note 3, at 854 (discussing shortcomings of "pure comity" approach). "Such deference does not adequately address the need to foster American substantive law, the potential for expansion of non-disclosure jurisdictions, or the injustice of depriving the requesting party of discovery." *Id.*

179. 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

180. *Id.* at 617.

181. *Id.*

182. *Id.* at 619.

183. 282 F.2d 149 (2d Cir. 1960).

184. 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 498 (1960) (clear showing of non-U.S. prohibition on disclosure will stay discovery order).

185. 282 F.2d at 152.

186. *Id.* at 150-52. In *First National City Bank v. IRS*, the court limited its analysis of the non-U.S. secrecy statute to a factual inquiry. 271 F.2d at 619. In *Ings v. Ferguson*, however, the court not only examined the relevant non-disclosure law, but also consulted and relied upon affidavits provided by Canadian counsel, documenting the prohibition of disclosure under Canadian law. 282 F.2d at 150.

187. 282 F.2d at 151. "Each state . . . by the very definition of sovereignty is entitled to declare its own national policy with respect to such limitations on the production of records as its lawmakers may choose to enact." *Id.*

188. *Id.* at 152. "Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a

authorities' ban on disclosure.[189]

Similarly, in *In Re Chase Manhattan Bank*,[190] the Second Circuit again affirmed the modification of a subpoena on grounds that strict compliance would have resulted in a violation of Panamanian law punishable by a minimal fine.[191] Given the monetary and penal[192] insignificance of the potential sanction, the court's decision necessarily rested on the principles behind the enactment of the Panamanian secrecy law, rather than on the hardship imposed on Chase Manhattan had production been compelled.[193] The second circuit's comity oriented approach to extraterritorial discovery disputes[194] has been criticized by commentators as encouraging the promulgation of blocking legislation by non-U.S. regimes.[195]

c. The Balancing Approach and the Restatement Factor Analysis

The pure comity approach generated difficulties in adjudicating claims without the necessary information.[196] Therefore, courts developed a more comprehensive system of resolving discovery disputes by balancing the interests of sovereigns in order to achieve a common ground between the need for disclosure

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violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures." *Id.*

189. *Id.* Citing *First National Citibank v. IRS* for the proposition that illegality abroad justifies quashing a discovery order, the court held that "[w]hether removal of records from Canada is prohibited is a question of Canadian law and is better resolved by Canadian courts." *Id.*; *see First National Citibank v. IRS*, 271 F.2d at 619.

190. 297 F.2d 611 (2d Cir. 1962).

191. *Id.* at 613. The fine imposed by Panamanian law was no more than 100 Balboas, equivalent to US$100. *Id.*

192. *Id.* at 613. The violation itself was equal to a misdemeanor under U.S. criminal law. *Id.*

193. *Id.* at 613. The court refused to decide whether non-U.S. sanctions for disclosure need be of a criminal nature to excuse non-compliance with a discovery decree. *Id.* Instead, the court focused on Panama's right to regulate businesses operating within its borders, and stated: "Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries." *Id.*

194. *See supra* note 188 and accompanying text (discussing comity as reason for deference to non-U.S. secrecy laws).

195. *See* Teitelbaum, *supra* note 3, at 855 (criticizing pure comity approach as encouraging spread of blocking legislation at cost of undermining U.S. substantive law).

196. *Id.* at 856 (discussing problems of adjudicating claims based on strict comity standard and resulting absence of vital information).

and concerns of confidentiality.[197] The Second Circuit was the first to undertake this extensive analysis in *United States v. First National City Bank*,[198] which was considered a landmark decision for U.S. banks with branches or offices in non-U.S. jurisdictions.[199] A federal grand jury investigation into a worldwide quinine cartel involving First National's customers had generated a subpoena for the production of bank documents from its New York and Germany offices.[200] First National refused to comply with respect to documents situated in Frankfurt, claiming that disclosure would subject it to civil liability and economic loss in Germany.[201] After analyzing the relevant German law, the district court concluded that the bank would not be subject to criminal sanctions abroad, and that its alleged civil liability was merely speculative.[202] Consequently, the district court determined that First National had not acted in good faith in refusing to produce the information and held the bank and its relevant personnel in contempt.[203]

On appeal the court analyzed and balanced the individual[204] and national interests at stake, in accordance with the criteria established by the Restatement (Second) of Foreign Relations Law of the United States ("Restatement (Second)").[205]

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197. *See supra* notes 144-52 and accompanying text (discussing balancing approach under Restatement (Third)).

198. 396 F.2d 897 (2d Cir. 1968).

199. *Id.* at 898.

200. *Id.*

201. *Id.* at 897.

202. *Id.* at 899-900.

203. *Id.* at 900. The sanctions imposed by the court entailed a fine of US$2000 per day to be enforced until the bank complied with the requested disclosure and a sentence of a maximum of 60 days imprisonment for the bank's vice president. *Id.*

204. *Id.* at 901. The court stated that "a state having jurisdiction to prescribe or 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." *Id.* (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 39(1) (1965)) [hereinafter RESTATEMENT (SECOND)].

205. RESTATEMENT (SECOND) § 40. Section 40, the precursor to the disclosure provision of the Restatement (Third), set forth the following five factors to balance to national interests entailed in an extraterritorial discovery conflict:

> a) vital national interests of each of the states,
>
> b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> c) the extent to which the required conduct is to take place in the territory of the other state,

The court stressed the omnipotence of a grand jury subpoena in the context of U.S. antitrust law, which was considered a cornerstone of U.S. economic policies.[206] Germany's interests in banking secrecy were accorded less weight based on the absence of criminal penalties for disclosure.[207] In addition, the court took the fact that the German government had not expressed a view on the case as evidence that Germany did not consider its national interests threatened by the requested discovery.[208] Also, noting that First National's customers included a New York corporation, the court justified its holding as an attempt to prevent U.S. businesses from insulating themselves against investigation by making contracts with banks situated in secrecy jurisdictions.[209]

Though the Restatement's balancing approach has emerged as the dominating means of reconciling conflicting national disclosure policies,[210] the difficulties of unilaterally weighing diametrically opposed interests soon became apparent.[211] In *In re Westinghouse Electric Corporation Uranium Contracts Litigation*[212] the majority and the dissent each focused on separate factors of the balancing test,[213] causing them to reach different de-

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d) the nationality of the person, and

e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Id. § 40.

206. 396 F.2d at 901-02.

207. *Id.* at 903.

208. *Id.* at 904.

209. *Id.* at 905.

210. *See* LOWE, *supra* note 78, at xvi (stating that balancing approach dominates settlement of extraterritorial discovery disputes as means of accommodating conflicting national legal systems).

211. *See The Uranium Antitrust Litigation*, comprised of a group of cases arising from an alleged uranium cartel. Confronted with several secrecy statutes enacted specifically to frustrate U.S. antitrust law and protect non-U.S. commercial and security interests in atomic industries, courts could not arrive at a consistent analysis for compelling or withholding extraterritorial discovery orders. *See, e.g.*, In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977) (reversing contempt order and sanctions because compliance with discovery order would have violated Canadian law). *But see* In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979) (sustaining discovery order despite illegality of disclosure abroad). *See* Teitelbaum, *supra* note 3, at 860-61 (discussing difficulty in unilateral balancing of diametrically opposed national interests).

212. 563 F.2d 992 (10th Cir. 1977).

213. *Id.* The majority focused on Westinghouse's good faith, determined by the standard set forth in *Société Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958). 563 F.2d at 996. The dissent concentrated on Canada's

cisions.[214] The case arose out of a series of contracts whereby Westinghouse Electric Corporation ("Westinghouse") committed to supply uranium to various U.S. utilities at a fixed price.[215] When Westinghouse defaulted on its obligations following a drastic price increase for uranium, the utilities brought a breach of contract action.[216] Upon counterclaiming with an antitrust suit for an alleged conspiracy to raise the price of uranium, Westinghouse sought extensive discovery abroad in connection to both its impracticability defense and its antitrust claim.[217] Rio Algom, a U.S. company, refused to comply with a subpoena for documents situated at its corporate offices in Canada, claiming that disclosure would subject it to criminal penalties under Canadian law.[218] The district court held Rio Algom in contempt and imposed monetary sanctions, which the court of appeals reversed and vacated.[219]

The majority in *Westinghouse* concentrated on balancing the interests at stake, in accordance with the factor analysis suggested by the Restatement (Second)[220] of Foreign Relations Law of the United States.[221] Finding no evidence of collusion between the company and the Canadian sovereign,[222] the court held that Rio Algom had made diligent efforts to comply with the subpoena by seeking a waiver from the Canadian government.[223] The court also found that the national interest expressed by Canada in controlling and supervising its atomic industries was superior to the U.S. interest in discovery, especially since the information sought by Westinghouse was not disposi-

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efforts and purpose to frustrate U.S. discovery orders by enacting secrecy statutes. *Id.* at 1001.

214. *Id.* The majority held that Rio Algom's good faith efforts to comply with the discovery request, defeated only by Canada's secrecy laws, should weigh against enforcing the discovery order via sanctions. *Id.* at 999. The dissent favored compulsion through sanctions as a penalty for Canada's deliberate subversion of U.S. discovery demands, and refused to consider good faith an excuse for non-compliance. *Id.* at 1001-03.

215. *Id.* at 994.

216. *Id.*

217. *Id.*

218. *Id.* at 994-95.

219. *Id.* at 995.

220. RESTATEMENT (SECOND) § 40.

221. 563 F.2d at 997.

222. *Id.*

223. *Id.* at 998.

tive in value, but merely cumulative.[224]

As far as criminal sanctions were concerned, the court cited *Société* for the proposition that potential penalties abroad do not constitute a bar to ordering discovery within the United States.[225] Unlike the dissent, however, which focused on Canada's objectives in enacting the criminal secrecy laws,[226] the majority dealt primarily with Westinghouse's efforts of compliance.[227] Consequently, the Court held that inability to satisfy discovery based on criminal penalties should tilt the scales against compelling enforcement of the disclosure order through sanctions.[228] The dissent, on the other hand, viewed the Canadian secrecy laws as a deliberate attempt to frustrate discovery in the present claims,[229] and maintained that the sanctions should not be vacated, but should only be examined and possibly modified in light of Rio Algom's diligent effort to comply.[230]

Given the difficulties of unilaterally balancing conflicting national interests,[231] some courts reverted to resolving extraterritorial discovery disputes through a comity[232] and territoriality[233]

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224. *Id.* at 998-99.

225. *Id.* at 997. The court, however, qualified this reasoning by stating that "*Société* calls for a 'balancing approach' on a case-by-case analysis." *Id.*

226. *Id.* at 1001.

227. *Id.* at 998.

228. *Id.* at 997.

229. *Id.* at 1001. In reaching this conclusion, Circuit Judge Doyle examined a variety of documents, previous court opinions and press releases. *Id.*

230. *Id.* at 1003.

231. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir. 1983). Judge Wilkey delivered a thorough criticism of the impropriety and difficulty entailed in a unilateral balancing analysis by a domestic court:

> [T]his approach is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law. Interest balancing in this problem is hobbled by two primary problems: (1) there are substantial limitations on the court's ability to conduct a neutral balancing of the competing interests, and (2) the adoption of interest balancing is unlikely to achieve its goal of promoting international comity.

Id. at 948.

232. *See supra* note 176 and accompanying text (defining comity as one nation's recognition of another nation's extraterritorial acts).

233. *See* Laker Airways v. Sabena, 731 F.2d 909 (D.C. Cir. 1983) (defining territoriality as most pervasive principle underlying prescriptive jurisdiction). "The prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty." *Id.* at 921.

analysis. *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson*[234] circumscribed the power of a U.S. regulatory agency to serve compulsory process upon a non-U.S. national by differentiating between prescriptive[235] and enforcement jurisdiction.[236] Namely, a subpoena issued by the Federal Trade Commission ("FTC") to be served upon a French corporation via registered mail was viewed as an effort to serve compulsory process upon an unwilling non-party witness.[237] Because such service is limited to a sovereign's authority to enforce its laws within its own borders, the extraterritorial reach of the subpoena was deemed a transgression upon French sovereignty and a violation of international law.[238] The court was careful to preserve the FTC's right to investigate and regulate all activities affecting U.S. commerce.[239] The court qualified this license, however, through a disguised comity analysis that warned against liberal judicial control of government agencies threatening to exercise their powers extraterritorially.[240] Consequently, enforcement of the subpoena was vacated.[241]

On the other hand, in *Mark Rich and Co. v. United States*,[242] comity was superseded by U.S. territoriality principles.[243] Mark Rich was a Swiss commodities trading corporation that came under grand jury investigation for an alleged tax evasion scheme perpetrated upon the U.S. government.[244] When the company failed to comply with a subpoena *duces tecum* issued in the course of the investigation, the court sustained a coercive fine for non-production of documents despite the illegality of compliance in

234. 636 F.2d 1300 (D.C. Cir. 1980).

235. *Id.* at 1315. Jurisdiction to prescribe was defined by the court as a "state's authority to enact laws governing the conduct, relations, status, or interests of persons or things, whether by legislation, executive act or order, or administrative rule or regulation." *Id.*

236. *Id.* Jurisdiction to enforce was defined by the court as a "state's authority to compel compliance or impose sanctions for noncompliance with its administrative or judicial orders." *Id.*

237. *Id.* at 1316.

238. *Id.*

239. *Id.* at 1322.

240. *Id.*

241. *Id.*

242. 707 F.2d 663 (2d Cir. 1983).

243. *Id.* at 666.

244. *Id.* at 665.

the country where discovery was sought.[245] The opinion justified the grand jury's authority to query suspect commercial transactions that could bear upon U.S. nationals through a territorial and protective analysis that excluded any consideration of conflicting non-U.S. law.[246] Consequently, the court held that given the illegality of the alleged activities and the detrimental effects of tax crimes on the U.S. economy, the extraterritorial compulsion of discovery was reasonable and just.[247]

d. Judicial Treatment of the Hague Convention in U.S. Extraterritorial Discovery Conflicts

The extent, if any, to which the discovery procedures set forth in Hague Convention[248] supplanted those established by the Federal Rules of Civil Procedure[249] was a common theme in extraterritorial discovery disputes.[250] In *Laker Airways Ltd. v. Pan American World Airways*[251] the court quashed a subpoena served on two English banks at their New York offices requiring them to produce documents held in London relating to transactions that took place in the United Kingdom.[252] The decision depicted the court's effort to comply with international procedures of discovery by condemning the service of subpoenas in New York as a transparent attempt to circumvent the Hague Convention.[253] In addition, the court recognized the controversy of extraterritorial jurisdiction granted by U.S. antitrust law, particularly as it relates to non-U.S. third-party witnesses and their conduct abroad.[254]

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245. *Id.* at 670. The court held Mark Rich Co. in civil contempt and sustained a coercive fine of US$50,000 per day pending compliance with the discovery order. *Id.*

246. *Id.* at 666.

> The territorial principle is applicable when acts outside a jurisdiction are intended to produce and do produce detrimental effects within it. Under the protective principle, a state "has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens . . . the operation of its governmental functions . . . ."

Id. (quoting RESTATEMENT (SECOND) § 33).

247. 707 F.2d at 666.

248. Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *supra* note 5, 23 U.S.T. 2555, 847 U.N.T.S. 231.

249. *See supra* notes 107-21 (discussing discovery under the Federal Rules of Civil Procedure).

250. MCCLEAN, *supra* note 8, at 107.

251. 607 F. Supp. 324 (S.D.N.Y. 1985).

252. *Id.* at 325.

253. *Id.* at 326.

254. *Id.* at 327.

Although this opinion did not undertake an in-depth analysis of the conflicting national interests at stake, nor establish an order of precedence between the Federal Rules of Civil Procedure and the Hague Convention, it was viewed by English courts as a welcome revival of sensitivity to non-U.S. sovereign interests.[255]

Deference to the Hague Convention as a means of uniform procedural treatment in extraterritorial discovery was nearly extinguished by the U.S. Supreme Court's holding in *Société Nationale Industrielle Aérospatiale v. United States*.[256] The plaintiffs in *Aérospatiale* were U.S. citizens who sustained injuries in a plane crash in Iowa.[257] They sued the manufacturer of the airplane, Aérospatiale, a French corporation wholly owned by the government of France.[258] When a second set of extensive discovery requests were served upon it, Aérospatiale refused to comply with respect to documents situated in France, arguing that Hague Convention procedures should take precedence over any U.S. disclosure methods.[259]

Upon certiorari, the Supreme Court held in a five-to-four opinion that recourse to the Hague Convention was not mandatory.[260] Rather, domestic discovery procedures could be

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255. MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp., [1986] 1 All E.R. 653, 660.

256. 482 U.S. 522 (1987). Prior to *Aérospatiale*, other courts also held that the Hague Convention does not modify, restrict or replace the Federal Rules of Civil Procedure or any other accepted means of discovery in U.S. litigation. *See* Lasky v. Continental Products Corp., 569 F.Supp. 1227 (E.D. Pa. 1983) (holding that Hague Convention provides permissive but not mandatory procedures of discovery, based on Article 27 of Hague Convention). Article 27 allows states to utilize domestic methods of discovery other than those provided for in the text of the Hague Convention. Hague Convention, *supra* note 5, art. 27, 23 U.S.T. at 2569, 847 U.N.T.S. at 246; *see* Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co., No. 81 Civ. 4463 (S.D.N.Y. Jan. 25, 1983) (holding that goal of Hague Convention is to increase exchange of information between nations, not to frustrate domestic discovery process); International Society for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984) (holding that application of Hague Convention procedures is within discretion of court, and does not preclude discovery according to Federal Rules of Civil Procedure); *see also* Guy M. Struve, *Discovery From Foreign Parties in Civil Cases Before U.S. Courts*, 16 N.Y.U. J. INT'L L. & POL. 1101, 1109-13 (1984) (discussing judicial curtailment of Hague Convention).

257. 482 U.S. at 524.

258. *Id.*

259. *Id.* at 527.

260. *Id.* at 539. The majority supported its decision by an analysis of the control necessarily exerted by domestic courts over inherent procedural aspects of U.S. litigation, and stated:

used in place of the Hague Convention to obtain information located outside the United States.[261] The decision did undertake in-depth considerations of comity and fairness to litigants.[262] In a close majority, however, the court found that comity did not mandate initial resort to Hague Convention processes, unless prior scrutiny of the particular facts and sovereign interests in each case provided a likelihood that recourse to the Convention would be more effective.[263] The Court also stated that blocking legislation should not be viewed as a bar to discovery demands, but should only be considered in identifying the nature of a sovereign's interest in nondisclosure of certain information.[264]

Aérospatiale did not indicate whether litigants favoring the use of Hague Convention procedures should bear the burden of satisfying the proposed balancing test,[265] or whether Convention opponents should prove the impracticability of the request.[266]

> An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that State. Interrogatories and document requests are staples of international commercial litigation, no less than of other suits, yet a rule of exclusivity would subordinate the court's supervision of even the most routine of these pre-trial proceedings to the actions or, equally, to the inactions of foreign judicial authorities.

Id.

261. *Id.* at 542. According to the court, the Hague Convention itself neither stated nor implied that it was the exclusive means of obtaining foreign information, and no other basis existed for imposing such an obligation. *Id.* at 540.

262. *Id.* at 542.

263. *Id.* at 544. The court set up what later decisions termed a three-prong test for determining whether recourse to the Hague Convention should take precedence over domestic methods of discovery, based on: (1) the particular facts of the case, (2) sovereign interests, and (3) likelihood that resort to Hague Convention procedures will prove effective. *Id.*

264. *Id.*; *see* Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992) (hereinafter "*Richmark*"). Relying on *Aérospatiale*'s dismissal of blocking legislation as ban to discovery, the court upheld fines of contempt for a Chinese company's failure to supply financial information necessary to satisfy a judgment against it in the United States, despite illegality of disclosure abroad. *Id.*

265. *See supra* note 263 and accompanying text (stating prongs of *Aérospatiale* balancing test).

266. *See* Joseph P. Griffin & Mark N. Bravin, *Beyond Aérospatiale: A Commentary on Foreign Discovery Provisions of the Restatement (Third) and the Proposed Amendments to the Federal Rules of Civil Procedure, in* THE INTERNATIONAL LAWYER: COMMENTARIES ON THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 75, 80 (1992) (surveying implementation of vague *Aérospatiale* precedent). "The majority opinion in *Aérospatiale* is not clear as to whether the proponent of the [Hague Conven-

Although post-*Aérospatiale* decisions have consistently placed the burden on the party advocating recourse to Hague Convention procedures,[267] they have accorded varying degrees of significance to the individual prongs[268] of the *Aérospatiale* test.[269] Questions remain with respect to the utility of *Aérospatiale's* balancing criteria,[270] as well as regarding the priority of the Hague Convention over the U.S. Federal Rules of Civil Procedure.[271]

B. *Statutory and Common Law Precedents Developed by the United Kingdom for Resolving Interjurisdictional Discovery Disputes*

The British equivalent to the U.S. Federal Rules of Civil Procedure[272] are the Rules of the Supreme Court.[273] The scope of discovery permitted under U.K. regulations, however, is more limited than that allowed in the United States.[274] Extraterritorial discovery is similarly curtailed by the British Protection of Trading Interests Act.[275] In addition, U.K. courts embroiled in interjurisdictional discovery disputes place more emphasis on comity and non-U.K. concerns for confidentiality than their U.S. counterparts.[276]

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tion] or the proponent of the FRCP should bear the burden for proving that its method should be used for foreign discovery." *Id.* at 80.

267. *Id.*

268. *See supra* note 263 and accompanying text (setting forth three-prong test established by *Aérospatiale* for determining whether Hague Convention should take precedence over domestic methods of discovery).

269. *See* Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386 (D.N.J. 1987). A specific declaration by the Swedish government stating that Hague Convention procedures comport with Swiss policies more so than the U.S. Federal Rules of Civil Procedure was not considered to express a sovereign interest strong enough to satisfy the second prong of the *Aérospatiale* test. *Id.* at 391. *But see* In re Perrier Bottled Water Litigation, 138 F.R.D. 348 (D.Ct. 1991). France's general disfavor with the U.S. Federal Rules of Civil Procedure and its adoption of the Hague Convention were held to manifest enough of a sovereign interest in the implementation of Hague discovery procedures to fulfill the second prong of the *Aérospatiale* test. *Id.* at 354-55.

270. Griffin & Bravin, *supra* note 266, at 84.

271. *Id.*

272. *See supra* notes 107-21 and accompanying text (discussing U.S. Federal Rules of Civil Procedure).

273. R.S.C. Ord. 24 r. 1-3 (Eng.).

274. McCLEAN, *supra* note 8, at 72.

275. Protection of Trading Interests Act of 1980 (Eng.).

276. *See* McCLEAN, *supra* note 8, at 59 (stating that British courts are more sensitive to non-U.K. concerns of confidentiality, leading to more restrained use of extraterritorial procedural jurisdiction).

1. Discovery Under the U.K. Rules of the Supreme Court

Discovery in U.K. courts proceeds under the Rules of the Supreme Court.[277] At the close of the pleadings, litigants may request discovery of all relevant documentation within the parties' possession or power to produce.[278] The duty to engage in discovery is limited to actual parties to the action.[279] This obligation does not arise until the pleadings have been completed,[280] so as to limit production requests to information directly relevant to issues on trial.[281] Should the parties fail to honor production demands, the court may issue an order for compliance under Rule 3 of Order 24.[282]

By making completion of the pleadings a condition to dis-

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277. R.S.C. Ord. 24 r.1-3 (Eng.).

278. R.S.C. Ord. 24 r.2 (Eng.).

> Discovery by parties without order. (1) Subject to the provisions of this rule and of rule 4, the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents, and, accordingly, each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action.

Id.

279. *Id.* "[T]his paragraph shall not apply in third party proceedings, including proceedings under that Order involving fourth or subsequent parties." *Id.*; *see* Plummer v. May, [1750] 1 Ves. Sen. 426, 27 E.R. 1121 (holding that it would be "very mischievous" to seek to make one who was merely a witness a party in order to obtain discovery).

280. R.S.C. Ord. 24 r.2 (Eng.).

281. *See* McCLEAN, *supra* note 8, at 60 (noting delayed discovery in U.K. courts as means to prevent overly broad disclosure requests engendered by fragmentary pleadings).

282. R.S.C. Ord. 24 r.3 (Eng.).

> Order for Discovery.
>
> (1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter . . . to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.
>
> (2) Where a party who is required by rule 2 to make discovery of document fails to comply with any provision of that rule, the Court, o the application of any party to whom the discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant.

Id.

covery,[283] the United Kingdom has also limited the scope of voluntary pre-trial discovery.[284] Order 38, however, permits a court to issue a disclosure decree at proceedings other than a trial,[285] but limits that exercise to information that would be admissible at the actual hearing.[286] Furthermore, a court must constrain its power to order disclosure to documents that are clearly specified in the party's request for discovery.[287]

The U.K. practice of issuing extraterritorial discovery decrees is a product of case law, as well as of the Rules of the Supreme Court.[288] Order 38 authorizes such decrees to be made where necessary for the purposes of justice.[289] British case law, however, has established that the issuance of such orders lies primarily within the discretion of the courts.[290]

2. U.K. Statutory Treatment of Extraterritorial Discovery

The United Kingdom's aversion toward the extraterritorial exercise of procedural jurisdiction has been prompted in response to the broad discovery exerted by U.S. courts,[291] and criticized by U.K. judges as a transgression upon the sovereignty of other nations.[292] The Protection of Trading Interests Act of

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283. R.S.C. Ord. 24 r.2 (Eng.).

284. *Id.* The obligation to engage in discovery is limited to "parties to an action between whom pleadings are closed." *Id.* Thus, there is no obligation to participate in pre-trial disclosure. *Id.*

285. R.S.C. Ord. 38 (Eng.).

> Order to produce document at proceeding other than trial.
>
> (1) At any stage in a cause or matter the Court may order any person to attend any proceeding in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to the Court to be necessary for the purpose of that proceeding.

Id.

286. R.S.C. Ord. 38 (Eng.). "(2) No person shall be compelled by an order under paragraph (1) to produce any document at a proceeding in a cause or matter which he could not be compelled to produce at the trial of that cause or matter." *Id.*

287. R.S.C. Ord. 24 r.2 (Eng.). Upon application by a party, a court may order discovery "of such documents or classes of document only, or as to such only of the matters in question, as may be specified in the order." *Id.*

288. *See* McCLEAN, *supra* note 8, at 75 (discussing practice of U.K. courts in taking evidence abroad).

289. R.S.C. Ord. 38 r.1 (Eng.).

290. McCLEAN, *supra* note 8, at 75.

291. *See* 973 H.C. DEBS. cols. 1533-41 (Nov. 1979), *reprinted in* BRIT. Y.B. INT'L L. 358 (denouncing as objectionable powers possessed by U.S. agencies authorizing extraterritorial investigations and proceedings against individuals outside their jurisdiction).

292. *See* Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., [1978] 1 All E.R. 434

1980 ("PTIA")[293] authorizes the Secretary of State to reject any measures sought to be imposed upon a British national by another state with regard to conduct that occurred in the United Kingdom.[294] Furthermore, the PTIA authorizes British courts to deny non-U.K. requests for disclosure of evidence, which infringe upon the sovereignty and jurisdiction of the United Kingdom.[295]

The PTIA also empowers the Secretary of State to prohibit compliance by British nationals with disclosure requests[296] that

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(holding wide extraterritorial investigatory procedures practiced in U.S. litigation as transgression upon sovereignty of United Kingdom).

293. Protection of Trading Interests Act 1980 (Eng.).

> (1) If it appears to the Secretary of State —
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> (a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade; and
>
> (b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom, . . .
>
> (3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.

Id.

294. *Id.*

295. *Id.* § 4 (Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975).

> A court in the United Kingdom shall not make an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.

Id.

296. Protection of Trading Interests Act 1980 § 2.

> (1) If it appears to the Secretary of State—
>
> (a) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority, . . . the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with that requirement.

Id.

threaten the security of the United Kingdom[297] or are prejudicial to its sovereignty.[298] Preserving the traditional U.K. bar on pre-trial discovery, the PTIA enables the Secretary of State to declare a non-U.K. disclosure request inadmissible if made for purposes other than a trial commenced abroad.[299] The PTIA also incorporates the specificity standard included in the Rules of the Supreme Court[300] by making a request for indeterminate information similarly inadmissible.[301]

In addition to the PTIA, the Evidence (Proceedings in Other Jurisdiction) Act of 1975[302] ("Evidence Act of 1975") imposes similar restraints on discovery,[303] particularly where disclosure is likely to expose British nationals to penalties or claims abroad.[304] Although its text does not mention the Hague Con-

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297. *Id.* The Secretary of State may prohibit compliance with any requirement that "would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country." *Id.*

298. *Id.* Compliance with a discovery request may be prohibited by the Secretary of State if the request "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom." *Id.*

299. *Id.* "A requirement . . . is also inadmissible — if it is made otherwise than for the purpose of civil or criminal proceedings which have been instituted in the overseas country." *Id.*

300. *See supra* note 287 and accompanying text (discussing specificity requirement of R.S.C. Ord. 24 r.2 (Eng.)).

301. Protection of Trading Interests Act 1980 § 2. A request for discovery is inadmissible "if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purpose of any such proceedings any documents other than particular documents specified in the requirement." *Id.*

302. Evidence (Proceedings in Other Jurisdictions) Act 1975 (Eng.) [hereinafter Evidence Act of 1975].

303. *See, e.g.*, Civil (Proceedings in Other Jurisdictions) Evidence Act of 1975 § 2(4) (Eng.) (imposing requirement of specificity in discovery requests, similar to PTIA and R.S.C. (Eng.) specificity requirements).

> (4) An order under this section shall not require a person
> (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
> (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.

Id.

304. *Id.* § 3.

> (1) A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give
> (a) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or

vention, the Evidence Act of 1975 was actually passed so as to enable the United Kingdom to ratify the Convention.[305] In fact, the text of the Evidence Act of 1975 resembles the provisions of the Hague Convention, especially with regard to measures available to compel disclosure.[306] Furthermore, the specificity requirement contained by Section 2(4) the Evidence Act of 1975[307] constitutes the statutory equivalent of reservations filed by the United Kingdom[308] upon signing the Hague Convention.[309]

3. Common Law Precedents Developed by U.K. Courts in Extraterritorial Discovery Disputes

British courts have grappled with the same issues facing U.S. courts with regard to discovery in transnational litigation.[310] Unlike the United States, which takes the offensive in compelling extraterritorial disclosure, the United Kingdom has traditionally employed a defensive approach in limiting the scope of discovery orders to conduct within its borders.[311] The specific balancing analysis undertaken by U.S. courts has been explicitly re-

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(b) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.

Id.; *see* Rio Tinto Zinc v. Westinghouse Electric Corporation, [1978] 1 All E.R. 434 (section 3(1)(b) of Evidence Act of 1975 used successfully to invoke 5th Amendment privilege against disclosure in United States).

305. McCLEAN, *supra* note 8, at 105.

306. Evidence Act of 1975 § 3. "An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order." *Id.*; *compare with* the Hague Convention, *supra* note 5, art. 10, 23 U.S.T. at 2561-62, 847 U.N.T.S. at 243.

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Id.

307. *See supra* note 303 and accompanying text (stating specificity requirement imposed by Evidence Act of 1975).

308. *See supra* notes 61-62 and accompanying text (discussing reservations under Article 23 of Hague Convention and listing signatories, including United Kingdom, that filed such reservations).

309. Rio Tinto Zinc v. Westinghouse Electric Corp., [1978] 1 All E.R. 434, 455.

310. *See* McCLEAN, *supra* note 8, at 59 (discussing British practice of discovery).

311. *Id.* "[English courts] retain . . . a proper sensitivity to the position of foreign countries, and exercise their discretion with that in mind. The result is a much more restrained use of orders with extra-territorial effects than is the practice in the United States." *Id.*

jected by the United Kingdom as an impossible task that invariably results in prejudice to foreign litigants.[312] Instead, British decisions focus on comity[313] and fairness to litigants.[314]

a. The Strict U.K. Requirement of Specificity

One of the most prominent British decisions with respect to extraterritorial discovery was *Rio Tinto Zinc Corporation v. Westinghouse Electric Corp.*[315] Westinghouse, a U.S. company, was the defendant in a mass litigation in the United States concerning its breach of contract for the supply of uranium to various utility companies.[316] In support of its defense of commercial impracticability arising from an alleged uranium producers' cartel, Westinghouse issued letters rogatory to the High Court of Justice in England.[317] These requests sought to procure the testimony of various employees[318] of the Rio Tinto Zinc Corporation ("RTZ"), as well as associated documents on the existence of the alleged cartel.[319] The RTZ companies claimed privilege against production of nearly all the scheduled documents on grounds that it would expose them to proceedings for the recovery of a penalty under Section 14 of the Civil Evidence Act of 1968.[320] Faced with the possibility of subjecting British nationals to potential domestic liabilities, as well as antitrust penalties in the United States, the High Court dismissed the letters rogatory.[321] Further-

312. *See* MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp., [1986] All E.R. 653, 662 (noting potential for domestic favoritism in weighing foreign policies against national interests of sovereignty).

313. *See supra* note 105 and accompanying text (defining concept of comity).

314. *See, e.g.*, Lonrho Ltd. v. Shell Petroleum Co. Ltd., [1980] 2 W.L.R. 367, *aff'd*, [1980] 1 W.L.R. 627 (H.L.). In deciding whether to order a British company to produce documents kept by its subsidiary abroad in a secrecy jurisdiction, the court considered the likelihood of success and the burden imposed on the company should it be compelled to pursue disclosure. *Id.*

315. [1978] 1 All E.R. 434.

316. *Id.* at 434; *see supra* notes 211-30 and accompanying text (discussing *Uranium Antitrust Litigation* in U.S. courts).

317. [1978] 1 All E.R. 434, 435.

318. *Id.*

319. *Id.*

320. *Id.* at 436. Section 14 of the Civil Evidence Act 1968 provided for "[t]he right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty." Civil Evidence Act 1968 § 14(1) (Eng.).

321. *Rio Tinto Zinc*, [1978] 1 All E.R. at 478.

more, the court denounced the broad extraterritorial investigatory procedures employed in U.S. antitrust legislation as an infringement upon the jurisdiction and sovereignty of the United Kingdom.[322]

The opinions also criticized the low relevance and specificity standards permitted in U.S. extraterritorial discovery, particularly in the context of pre-trial disclosure orders addressed to non-party litigants.[323] Consequently, the court sustained a rigid requirement of specificity that limited compliance to those records stipulated in the discovery request.[324] These qualifications mandated strict judicial construction of non-U.K. orders for disclosure addressed to non-party witnesses,[325] so as to discourage fishing expeditions.[326] Should letters rogatory fail to clearly identify the information demanded, the court indicated that they might employ a blue pencil[327] approach, giving effect solely to those portions of the request that adhere to the above conditions.[328] The judges, however, declined to become the self-appointed editors of petitions that are so far-reaching in scope as to justify their overall rejection.[329]

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322. *Id.* at 448 (quoting notice of intervention by Her Majesty's Attorney-General on behalf of the Government of the United Kingdom). "Her majesty's government considers that the wide investigatory procedures under the United States antitrust legislation against persons outside the United States who are not United States citizens constitute an infringement of the proper jurisdiction and sovereignty of the United Kingdom." *Id.*

323. *Id.* at 452. The court noted that U.S. discovery proceeds on a much wider basis then permitted in the United Kingdom, especially with regard to pre-trial and non-party discovery. *Id.* The court then chastised the lack of attention given by the respondents to the differences inherent between the U.K. and U.S. system, particularly with regard to the distinction between "the obtaining of evidence in the strict sense and the obtaining of information which might lead to the obtaining of evidence." *Id.*

324. *Id.* at 442.

325. *Id.*

326. *Id.* The court noted that the Evidence Act of 1975 called for production of "particular documents specified in the order." *Id.* This language had evolved from an earlier evidence act, which merely called for discovery of "documents to be mentioned in the order." *Id.* The Court took this change as indicative of a higher degree of specificity necessary to grant a discovery request, instead of a mere blanket disclosure order, or a "fishing expedition." *Id.*

327. *Id.* at 443. The Court of Appeals had deleted parts of the request, and replaced the words "relating thereto" with the more specific "referred to therein." *Id.* Lord Wilberforce referred to this editing as applying a "blue pencil." *Id.*

328. *Id.*

329. *Id.* at 444.

b. British Deference to Secrecy Concerns of Foreign Jurisdictions

In addition to the protectionist ideologies that characterize many British decisions in extraterritorial discovery disputes, the United Kingdom has also shown respect for other sovereigns' confidentiality concerns.[330] Thus, U.K. courts have refrained from compelling disclosure by companies operating in secrecy jurisdictions or in nations that otherwise reject the open exchange of commercial information.[331] Unlike U.S. courts, British judges also temper their production orders based on the likelihood of success in obtaining the information requested,[332] as well as on the significance of that data in the particular suit.[333]

The decision in *Lonrho Ltd. v. Shell Petroleum Co. Ltd.*[334] defined the standard for determining whether documents are within a litigant's power to disclose in the context of a multinational corporation and its foreign subsidiaries.[335] Lonrho was the owner of an oil pipeline running from Mozambique to Rhodesia.[336] It brought a suit against the defendant oil companies, claiming damages arising from non-use of the pipeline based on the defendants' covert supply of petroleum to Rhodesia.[337] The Shell companies failed to comply with plaintiff's discovery requests, claiming that they lacked control over the respective records, which were held at their subsidiaries in South Africa.[338] The actual subsidiary directors had also refused to produce the documents on grounds that they would be held criminally liable

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330. MCCLEAN *supra* note 8, at 59.

331. *See* MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp., [1986] 1 All E.R. 653, 660 (noting international law right of state to regulate conduct of its nationals even outside its jurisdiction, provided such regulation does not involve disobedience to local law).

332. *See* Lonrho Ltd. v. Shell Petroleum (C.A.), [1980] 2 W.L.R. 367, 376. Documents are to be disclosed only if they are in the immediate power of the party requested to produce them. *Id.* Where the parties requested to produce discovery had to take additional steps to secure the information, without guarantee of success, the discovery order was not sustained. *Id.*

333. *Id.* Documents are to be disclosed only if they are important in the present claim, or are necessary to save costs. *Id.*

334. [1980] 2 W.L.R. 367, *aff'd*, [1980] 1 W.L.R. 627 (H.L).

335. *Id.* at 369.

336. *Id.* at 367.

337. *Id.*

338. *Id.* at 370.

in local proceedings for divulging confidential information.[339] The plaintiffs, however, contended that the defendants did have control of the records in question by reason of their ownership of the subsidiaries, and that their refusal to produce was in bad faith.[340]

The court excused Shell Petroleum's non-compliance, holding that the documents were not under its immediate control.[341] Before requiring the defendants to take radical steps toward production, the justices evaluated the burden imposed on them based on the likelihood of success in obtaining disclosure.[342] The only way to surmount the subsidiary directors' autonomy in refusing production was to fire them or to alter the charters of the companies.[343] Neither route, however, was certain to result in compliance with the discovery requests, as new directors would still owe their primary loyalty to the subsidiaries, requiring them to resist disclosure and shield the firms from criminal prosecution.[344] Before deferring to the subsidiaries' penal concerns, however, the judges ensured that the enterprises were legitimate businesses, rather than sham organizations used to conceal commercial information against judicial discovery orders.[345] Furthermore, the court examined the relevance of the requested information to the adjudication of the underlying claim.[346] After finding the particular data to be cumulative rather than dispositive in nature, the court dismissed the appeal.[347]

The deference to local jurisdictional concerns espoused by the *Lonrho* court is a recurring theme in the United Kingdom's settlement of extraterritorial discovery disputes, particularly in

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339. *Id.*

340. *Id.* at 372.

341. *Id.* at 376.

342. *Id.* at 377. The court considered the steps Lonrho would have had to take to obtain the information, such as firing the directors and altering the articles of incorporation of the subsidiaries, an "affront on the persona of the company itself." *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 373. The court commissioned a thorough investigation of the subsidiaries to ascertain that they were indeed legitimate businesses, rather than mere sham organizations designed to circumvent disclosure laws. *Id.*

346. *Id.* at 376. "Documents are only to be disclosed if they are necessary for fairly disposing of the matter or for saving costs." *Id.*

347. *Id.* at 379.

the context of international banking.[348] In *R. v. Grossman*[349] the court of appeal set aside an order for disclosure directed toward a British bank operating in the Isle of Man, even though the documents in question were necessary to prosecute an alleged tax evasion in Wales.[350] The respondents had tried to evade the local court's refusal to order disclosure by obtaining an equivalent decree from a U.K. tribunal.[351] The court of appeal, however, deferred to the Isle of Man judiciary, upholding their refusal as a rightful exercise of sovereignty.[352] The decision also took into account the confidentiality expectations of local branch customers, and noted the unfairness of compelling them to open their records in support of a foreign proceeding.[353]

The court's self-imposed limitation in compelling discovery from a multinational bank characterizes British sensitivity to the plight of financial institutions forced to juggle the disclosure regulations of multiple jurisdictions.[354] In *MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp.*[355] the London branch of a U.S. bank was similarly excused from producing documents held in its New York office, on grounds that judicial enforcement of the disclosure request would infringe upon the sovereignty of the United States.[356] The records in question related to the U.S. conduct of a Bahamian corporation.[357] The plaintiffs had neglected to obtain the necessary documents until two months before trial, rendering adherence to Hague Convention procedures impracticable due to time constraints.[358] Therefore, the plaintiffs applied ex parte to the British court, seeking enforce-

348. *See* McCLEAN, *supra* note 8, at 271-73 (discussing balancing that courts have to engage in within context of international banking).

349. [1981] 73 Cr.App.R. 302.

350. *Id.* at 308.

351. *Id.* at 305.

352. *Id.* at 308. Lord Denning M.R. noted that should an order issue notwithstanding the Isle of Man court's refusal, a conflict of jurisdiction would ensue. *Id.* "That is a conflict which we must always avoid." *Id.*

353. *Id.* at 307-08. The court, however, preserved its right to make such an order in "unusual circumstances," the likes of which did not exist in the present case. *Id.* at 310.

354. *See* MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp., [1986] 1 All E.R. 653, 660 (discussing special position of banks faced with protecting their customers' privacy at risk of sanctions for non-disclosure abroad).

355. [1986] 1 All E.R. 653.

356. *Id.* at 654.

357. *Id.* at 665.

358. *Id.* at 656.

ment of process served upon the bank's London branch for production of records situated in New York.[359]

Given the situs of the alleged conduct and the nationality of its perpetrators, the plaintiff was denied enforcement of the subpoena.[360] The court stressed that a state should not impose its jurisdictional demands upon another country's nationals[361] with respect to their conduct abroad.[362] Therefore, the judges declined to compel the bank to violate its duty of confidentiality by exposing its customers' foreign transactions.[363] The court, however, reserved the right to execute an extraterritorial subpoena, but limited this exercise to situations where parties specifically consent to the enforcement of transnational disclosure requests.[364] Where the suit involves allegations of fraud, the court warned that territorial limitations will be severely curtailed.[365] Nevertheless, the onerous burden imposed on non-U.K. subsidiaries forced to comply with domestic discovery orders must be qualified by a commercial equivalent of hot pursuit,[366] or else must be renounced as an unforgivable transgression upon the sovereignty of other countries.[367]

This pronounced aversion to interfering with the jurisdiction of other nations also led the *MacKinnon* court to denounce the balancing approach undertaken by U.S. judges.[368] The potential for prejudice inherent in unilaterally weighing the objec-

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359. *Id.*

360. *Id.* at 662.

361. *Id.* at 658. "[A] state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction." *Id.*

362. *Id.*

363. *Id.* Judge Hoffman stated that if every country where a bank operated "asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure." *Id.*

364. *Id.* at 658.

365. *Id.* at 661.

366. *See id.* (discussing London and County Securities v. Caplan (May 26, 1978, unreported)). An English bank was ordered to procure documents from its foreign subsidiaries, relating to embezzlement charges. [1986] 1 All E.R. at 661. The allegation of criminal fraud, coupled with the need for urgent relief so as to prevent destruction of the evidence and the fruits of the crime, constituted "exceptional circumstances" justifying the imposition of a discovery order, which the judge himself called "onerous." *Id.* These exceptional circumstances were referred to as the "commercial equivalent of hot pursuit." *Id.*

367. *Id.*

368. *Id.* at 662.

tives of non-U.K. litigants against the forum's interests was considered too great to warrant an infringement upon the sovereignty of the adversary state.[369] Thus, a U.S.-style comparative analysis of conflicting national interests played no part in the court's holding that the extraterritorial enforcement of a subpoena was held unjustifiable in the absence of urgent necessity created by circumstances of hot pursuit.[370] The court also supported recourse to the Hague Convention as a precursor to domestic means of discovery by chastising the plaintiffs' delay, which had rendered application to the Convention impracticable.[371]

c. A Balance of Convenience

Although *MacKinnon* rejected the balancing approach to settling international discovery disputes,[372] the Commercial Court nevertheless employed a similar test in *X AG v. A Bank.*[373] The anonymous plaintiffs were non-U.K. oil corporations who had accounts with the London branch of the defendant, a U.S. bank.[374] The companies came under investigation in the United States concerning their dealings in the crude oil market.[375] Upon refusing to produce certain documents, a subpoena was issued to the Bank's London branch requiring it to disclose records of the plaintiffs held at the bank's New York office.[376] When the London branch expressed its intentions to comply with the subpoena, the plaintiffs obtained injunctions against discovery on grounds that disclosure would severely impair their business.[377]

In upholding the injunctions, the court employed a balance of convenience to determine which alternative would entail less harm to all parties.[378] On one hand, the plaintiffs alleged severe

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369. *Id.*

370. *Id.*

371. *Id. Compare with* Societe Nationale Industrielle Aérospatiale v. United States, 482 U.S. 522 (1987) (holding that Hague Convention procedures do not have priority over traditional means of disclosure permitted under U.S. Rules of Civil Procedure).

372. [1986] 1 All E.R. 653, 662.

373. [1983] 2 All E.R. 464.

374. *Id.* at 464.

375. *Id.* at 469.

376. *Id.* at 470.

377. *Id.* at 472.

378. *Id.* at 470-71.

financial trauma should their dealings in politically sensitive parts of the world be disclosed.[379] On the other hand, an injunction would impede the New York court in the exercise of its jurisdiction extraterritorially, which was considered excessive by U.K. standards.[380] Furthermore, the bank stood little chance of being held in contempt for non-production based on an injunction issued by the U.K. court.[381] In addition, the plaintiffs had anticipated that their relationship with the London branch would be governed by British law.[382] To submit their relationship to U.S. procedural law would, in effect, have required the court to rewrite their contract.[383] Consequently, the balance of convenience weighed heavily in favor of the plaintiffs, and the injunctions were continued.[384]

Judge Leggatt also stated that to have allowed the subpoena to take effect on a bank conducting its business in London would be to authorize an infringement upon the sovereignty of the United Kingdom.[385] Furthermore, by discontinuing the injunctions, the court would have fostered the enforcement of a penal proceeding in the United States.[386] Such courtesy would contradict the international law principle that prohibits enforcement by one nation of another state's penal laws.[387]

III. *ADDRESSING THE NEED FOR UNIFORMITY IN EXTRATERRITORIAL DISCOVERY THROUGH A MULTINATIONAL REVIEW PANEL*

The difficulties encountered by U.S. and British courts attempting unilaterally to resolve extraterritorial discovery disputes point to the conclusion that this task cannot be successfully undertaken by a single domestic judicial entity. Further-

379. *Id.* at 472.

380. *Id.* at 480.

381. *Id.* at 474. An injunction issued by the court in the jurisdiction where the documents are located would amount to a foreign compulsion defense to non-compliance. *Id.*

382. *Id.* British law was deemed to be the proper governing law because the contract was, from its inception, executed according to British law. *Id.*

383. *Id.* at 477.

384. *Id.* at 480.

385. *Id.* at 478. "[T]he fact is that to allow that order to take effect on a bank conducting its business in the city of London, would be, as it would appear, to allow a fairly large cuckoo in the domestic nest." *Id.*

386. *Id.*

387. *Id.*

more, the drastic differences between the approaches developed by the United States and the United Kingdom evidence a strong need for an equitable middle ground that can reconcile conflicting views with regard to the scope of extraterritorial discovery. The Hague Convention attempted to unify international procedures for obtaining evidence across state borders.[388] Its approach was deficient, however, in that it only set forth the methods for procuring disclosure abroad, without addressing the need for a uniform analysis in determining whether discovery requests should be granted or denied. An internationally accepted framework of discovery that addresses both policy and procedure still remains to be established.

A. *Fundamental Flaws in U.S. Approaches to Extraterritorial Discovery Conflicts*

The U.S. approaches to interjurisdictional discovery disputes do not effectively reconcile the judicial need for information with non-U.S. concerns of confidentiality, nor do they foster a secure commercial environment for international business enterprises. The pure comity[389] analysis employed in *First National City Bank of New York v. IRS*,[390] *Ings v. Ferguson*,[391] and *In Re Chase Manhattan Bank*,[392] failed to recognize that comity and its underlying concern for sovereignty cannot serve as the principal basis for analysis. Plain deference to foreign legislation neglects the objectives of U.S. substantive law, and unjustly deprives litigants of vital information necessary to pursue meritorious claims. This inequity is exacerbated when a party deliberately insulates documents in a secrecy jurisdiction for the purpose of foiling potential litigation in the United States.

An analysis centered on comity also underestimates the powers of U.S. regulatory agencies, such as the Federal Trade

388. *See supra* notes 44-75 and accompanying text (discussing procedures and provisions of Hague Convention).

389. *See supra* note 176 and accompanying text (discussing pure comity approach as motion for deference to secrecy laws abroad).

390. 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960); *see supra* notes 179-82 and accompanying text (discussing facts and holding of *First National City Bank of New York v. IRS*).

391. 282 F.2d 149 (2d Cir. 1960); *see supra* notes 183-89 and accompanying text (discussing facts and holding in *Ings v. Ferguson*).

392. 297 F.2d 611 (2d Cir. 1962); *see supra* notes 190-95 and accompanying text (discussing facts and holding in *In re Chase Manhattan Bank*).

Commission, to monitor potentially fraudulent activities within its jurisdiction. The decision in *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson*[393] created a false sense of security for international corporations by implying that the FTC will not be readily allowed to exercise its investigatory powers extraterritorially.[394] The international character of most commercial transactions in today's global economy,[395] however, will serve to lengthen the jurisdictional arm of U.S. courts, despite any judicial constraint on federal agencies' powers.[396]

The balancing approach recommended by the Restatement (Third)[397] and undertaken by the court in *Societe Nationale Industrielle Aérospatiale v. United States*,[398] has often been criticized as inherently biased in favor of the forum engaging in the unilateral consideration of competing interests.[399] Furthermore, *Aérospatiale* did not conclusively resolve the issue of the Hague Convention's precedence over domestic discovery means. The Court conditioned recourse to the Convention on the likelihood of success in obtaining the necessary information, and on the monetary and temporal costs entailed in adhering to Convention procedures.[400] Unfortunately, the Court did not clarify whether these temporal and fiscal considerations should be given the same weight as the probability of success in obtaining disclosure.[401] *Aérospatiale* also mandated consideration of the respec-

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393. 636 F.2d 1300 (D.C. Cir. 1980); *see supra* notes 234-41 and accompanying text (discussing facts and holding in *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson*).

394. 636 F.2d at 1322. Focusing on comity, the court mandated tight judicial control over government agencies threatening to exercise their investigatory powers extraterritorially. *Id.*

395. *See* STEPHAN, *supra* note 6, at 32 (discussing commercial and geographical expansion of businesses in today's global economy).

396. *See supra* note 38 and accompanying text (discussing extraterritorial extension of states' jurisdiction over other states' nationals through effects doctrine).

397. *See supra* notes 122-52 and accompanying text (discussing criteria utilized by Restatement (Third) in balancing national interests at stake in extraterritorial disclosure disputes).

398. 482 U.S. 522 (1987); *see supra* notes 256-71 (discussing facts and holding in *Aérospatiale*).

399. *See* April & Fried, *supra* note 150, at 967-68 (noting impropriety of balancing approach in international discovery disputes due to inherent bias of domestic courts engaged in balancing competing national interests).

400. 482 U.S. at 544-47; *see supra* note 263 (discussing three-prong test established by *Aérospatiale* for determining whether recourse to Hague Convention should take precedence over domestic methods of discovery).

401. *See* Gerber, *supra* note 18, at 526 (discussing lack of guidance provided by

tive sovereign interests in application to the Hague.[402] The court did not specify, however, what type of materials suffice in determining the strength of these interests, or the degree of significance that should be accorded to governmental interventions. This lack of guidance led to contradictory results in later cases relying on the *Aérospatiale* precedent.[403] In addition, the Court's minimization of blocking legislation[404] overlooked the severe impact on litigants forced to comply with U.S. disclosure requests at the risk of civil and penal sanctions abroad.

Cases such as *Aérospatiale*[405] and *Richmark Corp. v. Timber Falling Consultants*[406] demonstrate an unwavering concern to protect U.S. investment abroad, but neglect the impact of their doctrines upon the international appeal of U.S. commercial enterprises. Concurrently, these decisions undermine the incentive to make opportunities for investment available to U.S. nationals, lest the connection bring the particular enterprise within the realm of U.S. broad discovery laws and force a forfeiture of confidentiality. The control fostered by the exercise of such jurisdiction over domestic and foreign financial institutions is arguably desired by every sovereign. This dominion, however, carries the high cost of undermining the purpose of profitable investment and the benefits that accrue to a financially prosperous state.

Aérospatiale court in evaluating probability of obtaining information against costs and time constraints).

402. 482 U.S. at 544.

403. *See supra* note 269 (discussing varying results of cases using *Aérospatiale* test to determine precedence of recourse to Hague Convention); *see also* ATTWOOD & BREWSTER, *supra* note 35, § 18.28, at 337 (discussing competence and impartiality necessary for courts to balance competing national interests in context of antitrust litigation). "[Courts] should welcome and appreciate the [views] of foreign governments, but also understand the failure of a government to make an amicus appearance may reflect that nation's notions of sovereignty and self-respect, rather than a lack of interest or concern." *Id.*

404. 482 U.S. at 544. The court stated that blocking legislation should not be regarded as a bar to discovery, but should only be considered in identifying the nature of a state's interest in protecting certain information. *Id.*

405. *Id.* at 522.

406. 959 F.2d 1468 (9th Cir. 1992); *see supra* note 264 and accompanying text (discussing facts and holding in *Richmark*).

B. *Inadequacies Inherent in the British Approach to Resolving Extraterritorial Discovery Conflicts*

The *Rio Tinto Zinc*[407] litigation espoused a strong protectionist policy that limits compliance of British nationals with broad discovery orders issued by foreign sovereigns, especially where disclosure could expose U.K. entities to penalties abroad.[408] The specificity requirement imposed by the court on extraterritorial disclosure requests protects against the monetary and temporal burdens characteristic of extensive discovery under U.S. procedural rules.[409] The opinion, however, ignored the potential prejudice to litigants forced to adjudicate their claims without necessary facts. Moreover, the unilateral application of protectionist principles by English courts could become a disguised form of favoritism that discounts the complex issues entailed in multinational litigation. Just as a potential lack of confidentiality can frustrate commercial ties to U.S. corporations, investment in U.K. companies can be deterred for fear that litigation will be impaired by the secrecy bestowed upon British nationals.

The deferential approach employed in *MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp.*[410] and *R. v. Grossman*[411] displays a strong concern for the confidentiality interests of sovereigns that open their borders to multinational banks.[412] While these holdings may have sharpened the competitive edges of British banks operating in confidential regimes, they also furthered the handicap of litigants left to adjudicate meritorious suits without adequate discovery. The balance of convenience undertaken in *X AG v. A Bank*[413] mirrored the criterion analysis employed by the Restatement (Third)[414] and denounced by the

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407. [1978] 1 All E.R. 434; *see supra* notes 315-29 and accompanying text (discussing facts and holding of *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*).

408. *Id.* at 478.

409. *Id.* at 442.

410. [1986] All E.R. 653; *see supra* notes 355-71 and accompanying text (discussing facts and holding of *MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp.*).

411. [1981] 73 Cr. App. R. 302 (C.A.); *see supra* notes 349-53 and accompanying text (discussing facts and holding in *R. v. Grossman*).

412. *See* MacKinnon v. Donaldson Lufkin & Jenrette Securities Corp., [1986] 1 All E.R. 653, 660 (discussing special position of banks faced with protecting their customers' privacy at risk of sanctions for non-disclosure abroad).

413. [1983] 2 All E.R. 464; *see supra* notes 373-87 and accompanying text (discussing facts and holding in *X AG v. A Bank*).

414. *See supra* notes 144-52 and accompanying text (discussing balancing criteria used by Restatement (Third)).

court in *MacKinnon*.[415] This balancing approach is arguably more equitable than the pure comity and protectionist ideologies espoused by earlier British decisions. The unilateral determination of adversarial national interests, however, entails the same difficulties encountered by U.S. courts. More specifically, the ability of a court to objectively measure these antagonistic concerns is necessarily limited by a strong incentive to uphold its own forum's rules.[416]

C. *Proposal for a Multinational Procedural Review Panel for the Adjudication of Extraterritorial Discovery Disputes*

The foundation for such a system has already been laid through the establishment of the International Court of Justice ("ICJ").[417] Indeed, litigants who found themselves embroiled in the international web of disclosure regulations have appealed to this tribunal for relief.[418] The ICJ, however, has limited its assistance in these matters by requiring parties to exhaust procedural remedies available in their respective jurisdictions before consenting to hear their claims.[419] Unfortunately, the added monetary and temporal expenses in pursuing domestic alternatives have hardly benefitted the litigants or their respective judiciaries.[420] Nor has this policy served to consolidate the myriad of conflicting criteria used by national courts to settle discovery conflicts into a unified body of rules.

1. Proposed Structure of Procedural Panel

The ICJ should incorporate a multinational panel to provide for interlocutory as well as final appeals to resolve extraterri-

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415. *MacKinnon*, [1986] 1 All E.R. 653, 662.

416. *See* April & Fried, *supra* note 150, at 968 (arguing that balancing approach is tainted by inherent bias of national courts).

417. *See supra* note 165 and accompanying text (discussing establishment, structure, and jurisdiction of ICJ).

418. *See* Interhandel Case, 357 U.S. 197 (1958) (Swiss company appealed to ICJ to modify discovery order issued by U.S. court based on prohibition of disclosure in Switzerland).

419. *Id.* The ICJ declined to take the claim on the basis that Switzerland had not exhausted her legal remedies in the United States before submitting the claim to the ICJ. *Id.*

420. *See* ATTWOOD & BREWSTER, *supra* note 35, § 18.26, at 335 (discussing added expenses in unilateral adjudication of variant national interests and resultant broad discovery within context of antitrust litigation).

torial discovery disputes.[421] The jurisdiction of this panel should be invoked by consent of the parties to the discovery claim in dispute.[422] The determinations of the panel should be conclusive and without further recourse of appeal to domestic courts.

The panel presiding over any dispute should consist of an odd number of judges, with no more than two members from the particular adversary nations, as well as two or more additional parties from neutral sovereigns. All cases undertaken by this panel should be decided by a majority vote. The members of the particular adversary forums would provide knowledge of the regulations in issue, while the neutral judges would bring their own objective perspectives to the deliberations. Furthermore, the multinational make-up of the panel would enable a more comprehensive understanding of the impact of its decisions on the global commercial community.

In addition, interlocutory appeals should be subject to strict temporal limitations, so as to ensure prompt settlement of discovery disputes. After all, a primary benefit of this panel will be to reduce the financial expenses incurred by litigants through lengthy international discovery battles. The swift adjudication of these conflicts, whether through interlocutory or final appeals, will also comport with the interests of judicial economy in international and domestic fora.

2. Proposed Analytical Framework

The recommended framework of analysis that should be undertaken by this panel in determining whether to grant discovery requests and compel production through sanctions involves a four-prong test. First, the court must decide whether the infor-

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421. ICJ Statute, *supra* note 165, 29 Stat. 1055, 3 Bevans 1179. Article 26 and Article 29 permit the ICJ to incorporate a similar panel for adjudication of certain disputes. *Id.* art. 26, 59 Stat. at 1058, 3 Bevans at 1184; art. 29, 59 Stat. at 1058, 3 Bevans at 1184. "The court may, from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases." *Id.* art. 26, 59 Stat. at 1058, 3 Bevans at 1184. "With a view to the speedy despatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure." *Id.* art. 29, 59 Stat. at 1058, 3 Bevans at 1184.

422. *Id.* art. 36, 59 Stat. at 1055, 3 Bevans at 1179. The jurisdiction of the ICJ itself is voluntary as well as compulsory in certain matters. *Id.* Nevertheless, the ICJ should set forth voluntary jurisdiction only for this proposed panel, as authorized by Article 30. *Id.* art. 30, 59 Stat. at 1058, 3 Bevans at 1184. "The court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure." *Id.*

mation requested is relevant to the particular claim. This determination should be based on a high standard, mandating the proponent of disclosure to prove that the data is not only pertinent, but also necessary in the present suit. Concurrently, the conditions of "relevant and necessary" discovery would enable the panel to screen frivolous requests without hindering legitimate information needs.

Furthermore, the panel must demand a high degree of specificity in any discovery demands submitted by litigants. Should the request be too vague or cumulative in nature, the panel should not hesitate to employ a blue pencil[423] approach. A petition that solicits unspecified data that could merely lead to usable evidence should be considered in the determination of the requesting party's good faith. Consequently, if that litigant's purpose in asking for the information is merely to harass opponents or delay the proceeding, the request for discovery should be dismissed.

Second, the court must necessarily decide whether discovery would violate any nation's laws, by undertaking a complete examination of the particular non-disclosure prohibition and its legislative history. Thirdly, if this analysis reveals a potential violation, the court must weigh that sovereign's interests in confidentiality against the particular litigant's need for full discovery. Factors such as the country's objectives in enacting the secrecy laws should be examined, as well as any government interventions from either nation. Furthermore, the burden imposed on the party or non-party required to produce should be weighed against the potential handicap inflicted on its adversary in adjudicating a claim without the information in question. If the fairness scale tips heavily in favor of production, discovery should be mandated.

If the interests at stake are substantially equal, the panel should proceed to the last prong of the analysis. At this point, the party requesting production should prove by a preponderance of the evidence or a similar civil standard, that its opponent manifested bad faith in refusing to comply with the request. Bad faith could be inferred from acts including, but not limited to, collusion between that party and a secrecy jurisdiction, or

423. *See supra* note 327 and accompanying text (defining blue pencil approach as remediary editing by court of ambiguous discovery requests).

through the litigant's exploitation of information havens. Should bad faith be proven, discovery must be ordered, and if necessary compelled through sanctions. If insufficient evidence of bad faith is adduced, the request must be dismissed in whole or in part, and the claim remitted to the domestic court qualified to hear it based on the discovery authorized by the panel.

This process of judicial collaboration would promote comity by enabling a more equitable balancing of national interests that could not be achieved through the inconsistent application of unilaterally developed standards. Without this cooperation, international commercial litigation will be handicapped by protectionist idealogies and biases inherent in the domestic adjudication of claims. Furthermore, commercial relationships in today's global economy will be disadvantaged by the lack of predictability engendered by conflicting judicial standards.

CONCLUSION

A uniform system of international discovery comports with the objectives of judicial economy, comity, and fairness to litigants. A structured framework of analysis applied objectively by a neutral forum will reduce the incentives of states to create secrecy havens that hinder the adjudication of commercial claims. Furthermore, it will foster predictability in international commercial transactions and facilitate global economic development.