EXTRATERRITORIAL DISCOVERY: A SOCIAL CONTRACT PERSPECTIVE

I. INTRODUCTION

The basic philosophy of the U.S. system of discovery is that justice is best served when, prior to trial, litigants in a civil action fully disclose all information potentially pertinent to the claim at issue.[1] This idea is embodied in Federal Rule of Civil Procedure 26(b)(1):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[2]

Most restrictions upon this broad right to discovery pertain to the permissible use of information and to the amount presumptively discoverable without a showing of need, rather than to what particular information may be discovered at all.[3] The purpose of broad pretrial discovery is to better prepare parties and to make trial less a battle of wits and more of a focused, surprise-free search for truth based on narrow issues and access to all relevant facts.[4]

When evidence to be discovered is located outside the United

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1. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.").

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

3. *See* R. LAWRENCE DESSEM, PRETRIAL LITIGATION: LAW, POLICY, & PRACTICE 227 (1996); 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001 (1970).

4. *See* United States v. Proctor & Gamble, 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve a useful purpose .... They, together with pretrial procedures, make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."). It is also hoped that broad discovery will promote settlement, as each party will fully know the other's case and thus be better able to evaluate accurately the strength of its own case. *See, e.g.*, DESSEM, *supra* note 3, at 204.

States, courts may request the assistance of foreign judicial authorities to obtain the information via the Hague Convention on the Taking of Evidence Abroad.[5] Prior to this convention, such formal requests for foreign assistance were considered the only available recourse to obtain the information. This was so because of the "strict territorial" view of sovereignty, a doctrine which limited the ability of countries to take action outside their borders.[6] This strict view has since been replaced by the "effects principle", which grants a nation authority to take extraterritorial actions in response to the conduct of anyone outside its territory which produces effects within the nation's borders.[7] Applying the effects principle to extraterritorial discovery, if a U.S. court finds that it has personal jurisdiction over a party, that court may, solely upon its own authority, order the party to produce evidence pursuant to U.S. law regardless of location of the evidence.[8] The use of formal requests for assistance remains an option, but is generally disfavored because such requests are time consuming, ex-

5. *See* Hague Convention on The Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, entered into force for the United States Oct. 7, 1972, 23 U.S.T. 2555, 847 U.N.T.S. 241. For commentary on the Hague Convention, see GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: CASES AND MATERIALS 411-47 (2d ed. 1992). *See also* Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-*Aerospatiale *Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393 (1990); Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903 (1989).

6. For enunciation of the strict view of sovereignty, see The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); American Banana v. United Fruit Co., 213 U.S. 347 (1909) ("The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.").

In *Societé Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 538 (1987), the non-producing party used the strict territorial view to argue that the United States could conduct extraterritorial discovery only via the Hague Convention procedures. The U.S. Supreme Court disagreed, holding that direct discovery remains an option, but that courts should "exercise special vigilance to protect foreign litigants." *Id.* at 546.

7. For enunciation of the effects principle, see United States v. Aluminum Co., 148 F.2d 416, 443 (2d Cir. 1945) ("[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which a state reprehends....").

The effects principle was adopted by the RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS].

8. RESTATEMENT (THIRD) FOREIGN RELATIONS § 442(1)(a) (1987). *See, e.g.*, In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1145 ("Once personal jurisdiction over the person and control over the documents by the person are present, a U.S. court has the power to order production of the documents. The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power.").

pensive, and much less certain to be successful.[9]

Unfortunately, such "direct" discovery by U.S. courts is not well received by the rest of the world.[10] The primary explanation for this resistance is that the U.S. system of broad discovery is fundamentally different from that of most foreign countries. Most other countries fiercely limit the scope of discovery to protect personal privacy and consider U.S. discovery to be a "fishing expedition."[11] It is this fundamental opposition to broad discovery that prevents indirect methods of extraterritorial discovery such as the Hague Convention from being effective: If a foreign country believes that the information sought is beyond the scope of proper discovery, it is under no obligation to provide access to it and generally will not allow disclosure. The problem is further exacerbated because most other countries do not even recognize the legitimacy of direct extraterritorial discovery, but instead regard it as a violation of their sovereignty and territorial integrity.[12]

In order to restrict the use of direct discovery, many foreign nations have adopted "blocking statutes" that create civil and penal sanctions prohibiting compliance with U.S. discovery orders.[13] These blocking statutes take three basic forms:[14] (1) laws prohibiting disclosure of particular types of information;[15] (2) laws prohibiting compliance with foreign discovery orders without government approval;[16]

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9. *See, e.g.*, BORN & WESTIN, *supra* note 5, at 348-49; *Aerospatiale*, 482 U.S. at 542.

10. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS § 422, Reporters' Note 1 (1987) ("[N]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents in investigation and litigation in the United States.").

11. *See* BORN & WESTIN, *supra* note 5, at 349-50; *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS § 442.

12. *See* BORN & WESTIN, *supra* note 5, at 350; *see also* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST CONFERENCE 407 (1964) ("It is difficult to find any authority under international law for the issuance of orders compelling the production of documents from abroad.").

13. *See generally* Paul A. Batista, *Confronting Foreign "Blocking Legislation": A Guide to Securing Disclosure from Non-Resident Parties to American Litigation*, 17 INT'L LAW. 61, 63-72 (1983).

14. *See* BORN & WESTIN, *supra* note 5, at 371-72. There is also a fourth category, containing laws pre-dating the direct discovery controversy which also have the effect of blocking the production of information. *Id.* See, e.g., Swiss bank secrecy laws such as The Swiss Penal Code, CODE PENAL SUISSE [CP] art. 273 (1971) (Switz.).

15. For laws prohibiting the disclosure of information, see, e.g., Uranium Information Security Regulations, R.S.G. 1976-2368 (1976) (Can.); Shipping Contracts and Commercial Documents Act (1964) (Eng.).

16. *See, e.g.*, (Law No. 80-538 of July 16, 1980) JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] (relating to the communication of economic, commercial, industrial, finan-

and (3) laws giving governmental agencies power to forbid compliance with specified foreign discovery orders.[17] When these blocking statutes and U.S. discovery orders come into conflict, dueling notions of sovereignty and of the appropriate level of judicial truth-seeking violently clash, usually to the disservice of innocent litigants.

For almost fifty years, the U.S. judiciary has tried with little success to find a resolution to the extraterritorial discovery conflict. This Note surveys the evolution of U.S. law in this area and argues using the political theory concept of social contract that current U.S. law fails to achieve both its stated goal of balancing U.S. and foreign interests and its implicit goal of pursuing equal justice for all litigants. Essentially, U.S. courts' attention in this matter has been misplaced—the courts have attempted to maintain good foreign relations, a field which should be the province of the executive branch, instead of concentrating on enforcing U.S. law as embodied in broad discovery. Regardless of its merits, broad discovery is the method the United States has chosen as the best way to pursue justice. If broad discovery is the standard in purely domestic cases, why should it not also be the standard in cases involving parties with foreign connections who have fully availed themselves of all the other benefits of U.S. law? If uniform enforcement of broad discovery is not conducive to U.S. foreign relations, the problem should be resolved not by the courts, but by the executive branch.

II. CONFLICT BETWEEN DIRECT DISCOVERY AND BLOCKING STATUTES: A CRITICISM OF U.S. LAW

U.S. law has used two approaches to deal with the blocking statute problem: First, the comity analysis, whereby, when confronted with a foreign blocking statute, U.S. courts refuse to order discovery, motivated by strict territorial notions of sovereignty and fears of retaliation; and later, the balancing analysis, whereby courts weigh various factors to decide whether or not to exercise their power to order discovery.[18] Although the comity approach increasingly has

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cial or technical documents or information to foreign natural or legal persons). For an English translation with commentary, see 75 AM. J. INT'L L. 382 (1981).

17. *See, e.g.*, British Protection of Trading Interest Act, 1980, ch. 11, secs. 1-4 (Eng.), *reprinted in* 21 I.L.M. 834 (1982).

18. *See generally* Lenore B. Browne, Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1330-35 (1983); David E. Teitelbaum, Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 856-74 (1986); Note, *Beyond the Rhetoric of Comparative Interest Balancing: An Alternative Approach to Extraterritorial Discovery*, 50 LAW & CONTEMP. PROB. 95, 97-105, Summer 1987 [hereinafter *Beyond the*

been replaced by a balancing analysis, the comity approach has not disappeared. Neither approach, however, adequately protects both U.S. sovereignty and the U.S. interest in broad discovery.

A. Prior Law: Comity

The comity approach was first developed by the Second Circuit in a line of cases from the late 1950s.[19] Generally, the principle of comity requires sovereign states to uphold the domestic laws of all other sovereign states without inquiry into the substance of the laws themselves.[20] It is based on reciprocity but is not limited by it. Ultimately, comity is little more than a hope that other countries will choose to respect U.S. laws.[21]

In the context of direct extraterritorial discovery, the comity approach demands that the United States demonstrate its respect for foreign laws by refusing to order direct discovery abroad when compliance with such an order would lead to the violation of a foreign law.[22] The Second Circuit extended comity to its logical conclusion

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Rhetoric]; Daniela Levarda, Note, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving A Uniform System of Extraterritorial Discovery*, 18 FORDHAM INT'L L.J. 1340, 1366-72 (1995).

19. *See* First Nat'l City Bank of New York v. Internal Revenue Serv., 271 F.2d 616 (2d Cir. 1959); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); In re Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962).

20. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 164 (1894) ("[Comity] is 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."); *Aerospatiale*, 482 U.S. at 544 n.27 ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.").

21. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 411 (1964) ("Although Hilton v. Guyot [citation omitted] contains some broad language about the relationship of reciprocity to comity, the case in fact imposed a requirement of reciprocity only in regard to conclusiveness of judgments, and even then only in limited circumstances."); Direction der Disconto-Gesellschaft v. United States Steel Corp., 300 N.Y.S. 2d 741, 747 (S.D.N.Y. 1924).

22. *See First Nat'l City Bank*, 271 F.2d at 619. In this case, a non-party bank refused to produce certain records held in its Panamanian branch subpoenaed by the IRS pertinent to an investigation of one of the bank's depositors on grounds that such production would violate Panamanian law. The Second Circuit stated that discovery should not be ordered if production would be illegal under Panamanian law. The court found insufficient evidence to establish that production would in fact be a violation of Panamanian law and therefore ordered discovery. *Id.*

The Second Circuit's reasoning in this case is questionable, however. For the proposition that discovery should not be ordered when compliance is illegal under foreign law, the court cited *S.E.C. v. Minas De Artensia*, 150 F.2d 215 (9th Cir. 1945), which does not seem to support it. In *Minas*, an Arizona corporation refused to comply with an SEC subpoena to produce documents held in Mexico on grounds that Mexican law forbade removing the documents from the country. The lower court accepted the argument and, accordingly, granted Minas a

by refusing to order discovery when compliance would violate the spirit of a foreign law, if not the actual letter.[23] Because there is no guarantee that the foreign country will defer to U.S. broad discovery laws if alternative, indirect methods are followed, the comity analysis often resulted in foreign blocking statutes defeating the U.S. interest in broad discovery.

Scholars have resoundingly criticized the comity analysis not only because it completely ignores the importance of broad discovery, but also because it encourages the hiding of documents outside the United States behind the protection of foreign laws. Furthermore, the comity analysis ignores the U.S. Supreme Court precedent of *Societé Internationale Pour Participations Industrielles et Commerciales v. Rogers,*[24] which held that the existence of a blocking statute was not in and of itself a bar to direct discovery.[25] While use of the comity analysis did quell international complaints about U.S. discovery, it ultimately created just as many domestic ones.

For all of these reasons the comity analysis has fallen out of favor in recent years with most U.S. courts, including the Second Circuit.[26] Nonetheless, comity-driven decisions have never been explicitly overruled and comity jurisprudence continues to be influential,

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dismissal. The Ninth Circuit reversed, however, holding that the corporation should still be required to make the documents available to the SEC, but that it might do so in an alternative manner, consistent with Mexican law. Thus, despite the blocking statute, the court still ordered the discovery. *Id.*

23. *See Ings*, 282 F.2d 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 violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures."), *quoted in Chase Manhattan*, 297 F.2d at 613. In *Chase Manhattan*, the government argued that production should be ordered because compliance would not be technically illegal. The court responded that "this would be nothing more than an attempt to circumvent the Panamanian law. Such a maneuver scarcely reflects the kind of respect which we should accord to the laws of a friendly foreign sovereign state." *Id.*

24. 357 U.S. 197 (1958).

25. *See* Browne, *supra* note 18, at 1329; Teitelbaum, *supra* note 18, at 855-56.

26. *See* S.E.C. v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 114 (S.D.N.Y. 1981) (distinguishing *First Nat'l City Bank*, *Ings*, and *Chase Manhattan* on the grounds that they deal with non-party witnesses); United States v. Vetco, 691 F.2d 1281, 1288 n.8 (9th Cir. 1981) (finding that there were feasible alternative means).

The Second Circuit has since moved to a "more flexible position." *See, e.g.*, Minpeco v. Conticommodity Servs., 116 F.R.D. 517, 521 (S.D.N.Y. 1987); Compagnie Française D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 29 (S.D.N.Y. 1984). In fact, the Second Circuit explicitly rejected the comity analysis in favor of a balancing analysis in United States v. First Nat'l City Bank, 396 F.2d 897, 901 (2d Cir. 1968) ("Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case.").

appearing not only in dicta, but also in applications of the current balancing analysis.[27]

B. Current Law: Balancing Analysis

Societé Internationale v. Rogers[28] was the first U.S. case to employ a balancing analysis to uphold a discovery order despite the existence of a foreign blocking statute. The case involved a claim by a Swiss holding company against the United States for the return of property seized by the United States during World War II under the Trading with the Enemy Act.[29] At issue was whether the Swiss holding company was sufficiently connected with a German corporation to make the Swiss company an "enemy national" within the meaning of the Act. Seeking information on this issue, the U.S. government moved for discovery of the Swiss company's bank records. The Swiss company protested, claiming that production would violate Swiss law. Despite the ultimate production of many documents by the Swiss company, a dismissal for non-compliance was nonetheless entered by the lower court.[30]

On appeal the U.S. Supreme Court reversed and remanded the case for further consideration on the proper sanction in light of the Swiss company's good faith attempts to comply. In coming to this conclusion, the U.S. Supreme Court reevaluated whether the district court should have ordered production in the first place by balancing three factors: (1) the chances of flexibility by the foreign state in application of its statute; (2) the U.S. interest in the Trading with the Enemy Act; and (3) the importance of the information to the litiga-

27. *See, e.g.*, In re Sealed Case, 825 F.2d 494, 498 (D.D.C. 1987) ("We do not here decide the general issue of whether a court may ever order action in violation of foreign laws, although we should say that it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question."), *quoted in* In re Grand Jury Proceedings (Marsoner v. United States) 40 F.3d 959, 967 (9th Cir. 1994) (Pregerson, J., dissenting) (adding, "[l]ikewise, it might also be an affront for a United States court to compel an action, which is performed in the United States but has ramifications in a foreign country, in an attempt to circumvent the laws of that foreign country").

28. 357 U.S. 197 (1958).

29. Procedurally, the Swiss company was the plaintiff, but the U.S. Supreme Court considered its position more analogous to a defendant because "it belatedly challenges the Government's action by now protesting against seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian...." *Rogers*, 357 U.S. at 210.

30. Societé Internationale Pour Participations Industrielles et Commerciales v. McGranery, 111 F. Supp. 435, 443-47 (D.D.C. 1953), *rev'd sub. nom.* Societé Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958).

tion.[31] The Court concluded that despite the fact that the Swiss company would be liable for criminal sanctions, discovery was properly ordered because of the important U.S. policy behind the Trading with the Enemy Act and the fact that the information would have a "vital influence upon this litigation."[32]

This balancing test has since been expanded and codified in two versions of the Restatement of Foreign Relations Law of the United States.[33] The test's purpose is to reach some sort of accommodation between U.S. discovery and the need for international comity, rather than simply yielding outright to foreign pressure as the comity analysis prescribed.[34]

The majority of courts perform this balance when considering whether to make the initial order of discovery. However, a distinct minority, relying on *Rogers*, delay any considerations of balancing factors until the party has refused to comply with a discovery order and a motion for sanctions has been made.[35] Nonetheless, under both

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31. *Rogers*, 357 U.S. at 204-05.

32. *Id.*

33. RESTATEMENT (SECOND) FOREIGN RELATIONS § 40 (1965) includes the following factors:

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

Furthermore, according to the Third Restatement:

> 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.

RESTATEMENT (THIRD) FOREIGN RELATIONS § 442(1)(c).

34. *See, e.g.*, In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 996-99 (10th Cir. 1977); Arthur Andersen v. Finesilver, 546 F.2d 338, 341-42 (10th Cir. 1977); Volkswagenwerk Aktiengellschaft v. Superior Court, Alameda County, 123 Cal. App. 3d. 840, 857 (Cal. Ct. App. 1981).

35. *See, e.g.*, *Finesilver*, 546 F.2d 338 (10th Cir. 1977); In re Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979); Laker Airways v. Pan Am., 103 F.R.D. 42 (D.D.C. 1984) (*Laker I*); Lyons v. Bell Asbestos, 119 F.R.D. 384 (D.S.C. 1988); Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat, 902 F.2d 1275 (7th Cir. 1990) (Easterbrook, J., concurring); Central Wesleyan College v. W.R. Grace, 143 F.R.D. 628 (D.S.C. 1992).

For criticism of this approach, see, e.g., SEC v. Banca Della Svizzera Italiana, 92

approaches the decision whether to impose sanctions is based on a *Rogers* analysis of the non-producing party's good faith, defined as "serious efforts before appropriate authorities of states with blocking statutes . . . to secure release or waiver from a prohibition against disclosure"[36] and the absence of evidence that the party actively sought out the blocking statute or moved the information into the country to receive protection from the blocking statute.[37] When sanctions are imposed, they tend to be limited to the finding of facts adverse to the nonproducing party.[38]

Although such a balancing analysis might seem straightforward, it is inherently unworkable with respect to its limited goal of providing disclosure to litigants. The analysis is centered around an attempt to impartially evaluate the relative importance of both foreign and domestic national interests, neither of which can be objectively measured.[39] This task is impossible for U.S. courts because, as na-

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F.R.D. 111 (S.D.N.Y. 1981); Minpeco v. Conticommodity Servs. 116 F.R.D. 517 (S.D.N.Y. 1987).

For courts that bifurcate the process, the balance factors will only be considered at the sanctions phase. *See, e.g., Finesilver*, 546 F.2d at 341. The distinction between the majority and the bifurcation minority is less one of actual outcome and more one of orientation: The majority places the emphasis on protecting the sovereignty of the other country involved, and is hence reluctant to offend by ordering discovery, whereas the bifurcation courts attempt to maximize the likelihood that the U.S. litigant will actually receive the requested information by giving the order initially and hoping for voluntary compliance. *See, e.g.*, Civil Aeronautics Bd. v. Deutsche Lufthansa, 591 F.2d 951, 953 (D.C. Cir. 1979) (per curiam) ("Moreover, this court's affirmance of the enforcement order may be a factor in facilitating production of the documents by petitioner without risking sanctions by the German Government.").

36. RESTATEMENT (THIRD) FOREIGN RELATIONS § 442(2) (1987).

37. *See Rogers*, 357 U.S. at 208 ("Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.").

38. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS § 442(2)(c) (1987). *See also Rogers*, 357 U.S. at 212-13; General Atomic v. Exxon Nuclear, 90 F.R.D. 290 (S.D. Cal. 1981).

39. Many courts consider national interests to be the most important factor upon which their entire analysis turns. *See, e.g.*, In re Grand Jury Proceedings (United States v. Field), 532 F.2d 404 (5th Cir. 1976).

The *Rogers* balance only considered the interest of the United States in the underlying claim, but both versions of the Restatement suggest that courts determine and balance the policy interests of both countries involved. RESTATEMENT (SECOND) FOREIGN RELATIONS § 40 (1965); RESTATEMENT (THIRD) FOREIGN RELATIONS § 442 (1987). Courts are not in agreement about what sort of national interest they are balancing. While the Restatements suggest a balancing of the policy behind the particular law at issue in the case, some courts instead balance the more general interest of the United States in ensuring fair judgments or pursuing discovery. *See, e.g., In re Westinghouse*, 563 F.2d at 1002 (balancing U.S. discovery rules against foreign interest in protecting prices); *Reinsurance Co. of Am.*, 902 F.2d at 1280 (Easterbrook, J., concurring) (balancing the general interest of the forum state and interest in dispute resolution).

tional tribunals, they must necessarily be partial: "National legal systems cannot provide objectivity in the international context, because they do not regulate the relationships among states and because each is subject to alteration by the state in which it operates."[40] Furthermore, "national interest" in the sense employed by the Restatements cannot be measured because it cannot exist apart from the nations that create it.[41] The national interest behind a statute is whatever that nation says it is, and no other country could be in any position to declare it to be anything different.[42] Any analysis based on such a subjective standard would be necessarily discretionary.[43]

Even if one assumes that national interests can be determined, the balancing analysis still falls apart when the U.S. court is asked to weigh the two interests to determine which is the most compelling. By definition, the interests of equal, sovereign nations controlling actions within their own territories must necessarily be of equal weight.[44] No nation is above another such that it could place national interests into any sort of legitimate hierarchy.

Furthermore, such a balance requires political expertise beyond the proper scope of the judiciary.[45] The courts implicitly acknowledge

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40. David J. Gerber, *International Discovery After* Aerospatiale*: The Quest for an Analytical Framework*, 82 AM. J. INT'L. L. 521, 541 n.113 (1988). *See also* Graco v. Kremlin, Inc., 101 F.R.D. 503, 513 (N.D. Ill. 1984).

41. The *Restatement (Third) Foreign Relations* §442, cmt. c, suggests that the court use expressions of interest by the state itself, the significance to regulation, and the timing of the origin of the concern to evaluate this importance. Even with these guidelines the analysis must necessarily break down. For example, in *Minpeco*, the court found the Swiss bank secrecy laws to be an important state policy because they serve the "legitimate purpose of protecting commercial privacy inside and outside Switzerland." 116 F.R.D. at 524. The court then went on to contrast the Swiss statute with French, Dutch, Canadian, Australian, and South African statutes it declared unimportant because the court considered their true purposes to be only frustration of U.S. discovery, which is apparently not a "legitimate purpose" for a nation to pursue. *Id.*

42. *See* Gerber, *supra* note 40, at 540-41.

43. *Id.*

44. *See, e.g., Uranium Antitrust*, 480 F.Supp. at 1148 ("Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. . . . It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions."); *Reinsurance Co. of Am*, 902 F.2d at 1284 (Easterbrook, J., concurring) (referring to national interests as "incommensurables").

45. *See generally Beyond the Rhetoric*, *supra* note 18, at 104-05. *See also* Laker Airways v. Sabena et al. (*Laker II*), 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 than the other will not erase a real conflict.").

this when they consider statements (or the lack thereof) by the executive branch in performing the balancing analysis.[46] It has been argued that interest balancing is a violation of the political question doctrine, *i.e.*, the idea that courts should not adjudicate questions concerning foreign relations when they turn on standards that defy judicial application or involve the exercise of discretion that normally belongs to another branch.[47] Whether or not this argument has merit, it is clear that interest balancing takes the courts outside their normal scope of activities.[48] The situation is analogous to the problem addressed by the Act of State doctrine: Courts might be capable of determining whether actions of foreign states are illegal under either foreign or international law, but because of the peculiar elements of foreign relations involved, such a judicial determination is not wise and should be left up to the executive branch.[49]

With the exception of the importance of the information sought, most of the balance factors are not really relevant to the inquiry. The other factors, *i.e.*, hardship, place of performance, nationality, specificity, origin of the information, and existence of alternative means, are merely restatements of the issue involved in balancing national interests. For all but hardship, the courts have explicitly stated that these factors are less important.[50] But even in considerations of hardship, the courts consider much the same factors as they do with national interests. How much the party asked to produce will suffer is considered to be directly proportional to the importance of the governmental interest in the blocking statute.[51] All of these factors are

46. *See, e.g., Minpeco*, 116 F.R.D. at 523.

47. *See Beyond the Rhetoric, supra* note 18, at 104. For a discussion of the political question doctrine, see Baker v. Carr, 369 U.S. 186, 211, 217 (1962).

48. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS § 442, cmt. c (explaining the analysis required to balance national interests).

49. *See Sabbatino*, 376 U.S. 398 (1964). In its discussion of the Act of State doctrine, the U.S. Supreme Court concluded that the doctrine was not mandated by notions of sovereignty, international law, or the Constitution, but "arises out of the basic relationships between branches of government in a system of separation of powers." *Id.* at 423. The Court further stated that allowing the judiciary to make Act of State decisions could have negative consequences on foreign policy. *Id.* at 423-24.

50. *See, e.g.*, Electro Design Mfg. v. Texas Instruments, No. CV 89 1843 (JMM) 1990 WL 21105 at *3; *Minpeco*, 116 F.R.D. at 522; *Banca Della Svizzera Italiana*, 92 F.R.D. at 119.

51. *See* Alfadda v. Fenn, 149 F.R.D. 28, 38 (S.D.N.Y. 1993). Courts determine whether there is hardship based on whether the blocking statute carries mandatory criminal penalties and whether or not it is certain to be enforced. *See Minpeco*, 116 F.R.D. at 525-526; *see also* United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968) (holding that civil liabilities suffice to show hardship).

For criticism of this determination of hardship, see *Reinsurance Co. of Am.*, 902 F.2d

just as impossible to determine and to weigh as national interest and thus can provide no additional assistance to the balance.

In practice the balancing analysis provides little improvement over the comity analysis because it still defers to foreign law with its final factor, the importance of the information sought. The comments to section 442 of the Restatement (Third) suggest that before extraterritorial discovery is ordered, the information should be shown to be "necessary to the action—typically, evidence not otherwise readily discoverable—and directly relevant and material,"[52] thus creating a heightened standard of relevancy for all requests for extraterritorial discovery.[53] This determination is often the decisive factor in a balancing analysis.[54] U.S. courts do consider the importance of the information sought when deciding other discovery issues such as motions for limitations on the amount of discovery to be allowed,[55] claims of privilege,[56] motions for protective orders,[57] and the creation

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at 1284 (Easterbrook, J., concurring).

52. RESTATEMENT (THIRD) FOREIGN RELATIONS § 442, cmt. a (1987).

53. *See Uranium Antitrust*, 480 F. Supp. at 1146, explaining Societé Internationale v. McGranery, 111 F. Supp. 435 (D.D.C. 1953), *rev'd. sub nom.* Societé Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958) (holding that "the normal discovery standard . . . should be replaced by the higher standard of whether the requested documents are crucial to the resolution of a key issue in the litigation").

54. *See, e.g.*, *Minpeco*, 116 F.R.D. at 530 ("The significance of the factor bearing upon the importance to the litigation of the documents and information requested for a court's decision to order production of the information located abroad is indicated by the prominent place it occupies in the revised balancing test contained in the newest Restatement draft [referring to RESTATEMENT (THIRD) FOREIGN RELATIONS § 437(1)(c) cmt. a (tentative draft no. 7, 1986)]."); *Uranium Antitrust*, 480 F. Supp. at 1154-55; United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 346 (7th Cir. 1983).

Although importance of the information was a factor in *Rogers*, it was not included in the *Restatement (Second)* factors. But, because courts continued to consider it in their analyses, the ALI added the importance of the information to the factors listed in the *Restatement (Third)*. *See, e.g.*, Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972).

55. FED. R. CIV. P. 26(b)(2) states in part that

> [t]he frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

56. *See* FED. R. CIV. P. 26(b)(5). Privileges do not relieve parties of the duty to generally disclose information, but allow the withholding of certain information that falls into well-defined exceptions based on constitutional law, statutory law, common law, and the rules of evidence. *See generally* ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 201-13 (2d ed. 1992). Where a privilege is found, the interest behind the privilege is considered to outweigh the interest in disclosure even if the information sought is important.

of discovery plans.[58] But there is a significant difference between these determinations and that made in the balancing analysis: The importance of the information in the first instance is generally considered only as a concession to practicality and the needs of litigants to pursue cost-effective and timely discovery, but in the balancing analysis, considering the importance of the information is a concession to foreign law, similar in effect to the comity analysis. Furthermore, the imposition of discovery limitations in these previously enumerated areas is still guided by the principle that a litigant should have the discovery that he or she seeks,[59] whereas balancing is guided by the principle that foreign countries should not be inconvenienced. By requiring in the balancing analysis that the information be "important," U.S. courts allow foreign law to dictate the scope of U.S. law and thereby infringe upon U.S. sovereignty.[60]

Because all of the factors considered in the balancing analysis are vague and indeterminate, courts cannot apply the balancing analysis in any manner that would lead to predictable, consistent decisions.[61] For example, in *In re Westinghouse Electric Corporation Uranium Contracts Litigation*,[62] the majority and the dissent reached

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For this reason, privileges are narrowly drawn. *Id.*

57. *See* FED. R. CIV. P. 26(c). The issue involved here "is not whether the court is going to allow parties to embark upon a fishing expedition, but whether the court may make the voyage more pleasant for those who are required to become passengers by the Rules of Civil Procedure." Twin City Fed. Sav. & Loan Ass'n v. American Title Ins. Co., 31 F.R.D. 526, 527 (W.D. Mo. 1962). Protective orders prohibiting discovery are usually only issued when the discovery was not for legitimate needs, but instead an attempt to take advantage of the discovery system. *See* Schweinert v. Insurance Co. of N. Am., 1 F.R.D. 247 (S.D.N.Y. 1940).

58. *See* FED. R. CIV. P. 26(f). This rule grants judges the discretion to develop a discovery plan that focuses discovery on relevant issues and to impose limitations on the amount of discovery that may be had.

59. *See* McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937) ("The suppression of truth is a grievous necessity at best . . . it can be justified at all only where the opposing private interest is supreme.").

60. *See Finesilver*, 546 F.2d at 342 ("An anomalous situation with great potential effect would result from recognition of the right of a litigant to avoid discovery permitted by local law though the assertion of violation of foreign law. Foreign law may not control local law. It cannot invalidate an order which local law authorizes.").

Some courts have recognized this inconsistency and have discounted the significance of this factor accordingly. *See, e.g.*, Fundacion Museo de Arte Contemporaneo de Caracas v. CBI-TDB Bancaire Privee, No. 93 CIV 6870 (PKL) 1995 WL 805120 at *2 (S.D.N.Y. 1995) ("Because the documents at issue have not been produced and no convincing arguments of irrelevance have been offered, the court cannot conclude that they are so irrelevant as to minimize the otherwise substantial interests of the United States in full disclosure."); *Compagnie Francaise*, 105 F.R.D at 32 n.8 (refusing to consider anything other than whether the documents are "relevant").

61. *See* Levarda, *supra* note 18, at 1368-70.

62. 563 F.2d 992 (10th Cir. 1977).

opposite conclusions while supposedly balancing the same factors in the same test. For the majority, the facts that the non-producing party had acted in good faith, that the records were physically located in Canada and were not crucial to the other party's defense, and that Canada had a legitimate national interest as evidenced by the fact that Canada had protested, outweighed any U.S. interest in "adequate discovery."[63] The dissent strongly disagreed, especially with the majority's assessment of national interests: "When the strong underlying policy reasons in connection with the discovery rules are pitted against the Canadian policy of protecting its local industries from insufficient prices, no real contest exists."[64] Because of the inadequacy of the factors, the outcome of the test turned on vague notions of sovereignty and concerns about "the long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance"[65] rather than on law.[66]

The balancing analysis also runs into difficulty in the sanctions phase. Sanctions are important because they send a message to the present parties and to all potential future litigants that discovery orders must be obeyed.[67] But, by allowing the issuance of sanctions in the extraterritorial discovery situation to turn on "good faith," the court shoots itself in the foot: As long as the nonproducing party does not purposefully deposit the information where a blocking statute would apply in an attempt to hide the information behind it, the court will not be able to take any significant steps to provide to rule-abiding litigants the discovery to which they are entitled. The good faith analysis grants so much deference to foreign blocking laws that in ultimate effect, it is much the same as the previously rejected comity analysis.[68]

In an attempt to avoid some of these flaws, scholars have suggested many alternatives to the current balancing approach. David Gerber has suggested replacing the vague balance factors with what he calls a "legal framework" to balance interests based on norms of

63. *See id.* at 998-99.

64. *Id.* at 1003 (Doyle, J., dissenting).

65. RESTATEMENT (THIRD) FOREIGN RELATIONS § 442 cmt. c (1987).

66. *Reinsurance Co. of Am.*, 902 F.2d at 1283 (Easterbrook, J., concurring) ("I would be most reluctant to accept an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste. Although it is easy to identify many relevant considerations, as the ALI's restatement does, a court's job is to reach judgments on the basis of rules of law rather than to use a different recipe for each meal.").

67. *See* National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976).

68. *See generally* Teitelbaum, *supra* note 18, at 841.

international law.[69] Gerber argues for a balance based on "objective" standards of national interests derived from public international law to determine which interests of states should be legally protected.[70] Gerber would balance the U.S. regulatory interest in discovery weighted according to how important the information is, against the sovereign interests of the foreign state, giving separate consideration to fairness to the private litigants and to whether production would violate the international law principle of noninterference.[71] Gerber's suggestion might solve the problem of the current balancing analysis's vagueness, but it does not address the fact that the United States has guaranteed to all litigants in U.S. courts an opportunity for broad discovery, but routinely denies litigants this opportunity if they are unfortunate enough to sue or be sued by a party with relevant evidence located in a foreign country.

III. A SOCIAL CONTRACT ANALYSIS OF THE PROBLEM

Social contract theory dominated political philosophy in the seventeenth and eighteenth centuries and because of its influence on the formation of American government it remains highly relevant today, despite current criticism and the emergence of new theories.[72] By "social contract" what is generally meant is that governments and those that they govern have reciprocal obligations resembling a con-

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69. *See* Gerber, *supra* note 40, at 521.

70. *See id.*

71. *See id.*

72. *See* J.W. GOUGH, THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS DEVELOPMENT 229-43 (2d ed. 1957).

For specific examples of the influence of social contract theory in American government, *see, e.g.,* Constitution of New Jersey (1776) in Constitutions of the United States (1809) ("Whereas all the constitutional authority ever possessed by the kings of Great Britain over these colonies, or their other dominions, was, by compact, derived from the people, and held of them for the common interest of the whole society; allegiance and protection are, in the nature of things, reciprocal ties, each equally depending on the other, and liable to be dissolved by the others being refused or withdrawn."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776):

> We hold these truths to be self evident—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

The influence of social contract theory can also be seen in the secession controversy that culminated in the Civil War. *See, e.g.,* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, 1833).

tract. The government promises to provide certain rights and protections to those it governs and in return those governed promise to obey.[73] This Note takes no position on whether social contract theory is the "correct" philosophy of government, but rather uses this well-established idea as an analytical tool to organize some general thoughts regarding the duties of the United States and all litigants in its courts.

Inherent in the nature of a contract is that all who accept the benefits conferred by the contract must necessarily become bound by it and subject to the burdens that it imposes. Similarly, one who accepts the benefits of living under the U.S. government should be obligated to obey the U.S. government. The social contract, therefore, would not extend exclusively to U.S. citizens, but to anyone actively partaking in the benefits of the United States, including foreign citizens and foreign corporations.[74] The extent of the social contract is roughly equivalent to the extent of personal jurisdiction in that it requires some level of "minimum contacts" with the United States.[75] If a party conducts business in the United States, it is only fair that the party should submit to all the obligations that the United States imposes upon those over which it governs, including the rules of discovery.[76]

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73. *See generally* JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT (1978).

74. *See, e.g., Marsoner v. United States,* 40 F.3d at 964 (holding that although Marsoner was an Austrian citizen, as a United States resident whose American activities created a U.S. tax liability he could be forced by an American grand jury to sign a disclosure directive ordering release of his bank records located in Austria).

75. *See* Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987). The idea behind minimum contacts is similar to the social contract, but it is sometimes argued that minimum contacts are present in situations where one would be hard pressed to find that the party accepted the benefits of the United States in any significant capacity. *See id.* (Brennan, J., concurring). This disunity in jurisdictional theory may not be of great significance as long as there is some consideration of fairness to the defendant. *See id.* at 115 (requiring a "careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case"). *Compare* RESTATEMENT (THIRD) FOREIGN RELATIONS § 403 (1987) (forbidding the exercise of jurisdiction when unreasonable.)

See generally Burger King Corp. v. Rudzewics, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

76. *See Aerospatiale,* 482 U.S. at 539 n.25. In its discussion of why the Hague Evidence Convention was not intended to provide the exclusive mechanism for extraterritorial discovery, the Court states:

> a rule of exclusivity would enable a company which is a citizen of another contracting state to compete with a domestic company on uneven terms, since the foreign company would be subject to less extensive discovery procedures in the event that both companies were sued in an American court. Petitioners made a voluntary decision to market their products in the United States. They are entitled to compete on equal

It is a fundamental principle in the United States that all people should have an equal and fair opportunity to pursue life, liberty, and happiness.[77] This idea forms the basis of the notions of due process and equal protection, and is integral to social contract. From this concept derives the proposition that all litigants in U.S. courts, irrespective of any particular ties to a foreign state, should be subject to the same standards of procedure, including the same rules of discovery. If the governed are to be expected to obey, then the government should continue to provide all the rights that it has promised, including equal application of the law of procedure. The United States owes a duty to all "consenters" to the social contract to require that parties with foreign ties produce requested information on the same terms as domestic litigants.[78]

While it is difficult to argue that the United States has not guaranteed equal application of the law, one might argue that this guarantee extends only as far as the sovereignty of the U.S. government, and that under a strict territorial view, this duty stops at the border. However, even if one were to subscribe to this strict view, the competing sovereignties at issue would balance out.[79] Sovereignty is offended when a foreign state controls actions within another state; if the action of the United States in ordering discovery offends foreign sovereignty, then the action of not ordering discovery because of the foreign law must necessarily offend domestic sovereignty.

There are no theoretical impediments to the equal treatment in

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terms with other companies operating in this market. But since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors. A general rule according foreign nationals a preferred position in pretrial proceedings in our courts would conflict with the principle of equal opportunity that governs the market they elected to enter.

See also Compagnie Francaise, 105 F.R.D. at 32 ("Plaintiffs cannot avail themselves of these benefits, yet neglect their accompanying responsibility to disclose all relevant facts to their adversary.").

77. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. V; amend. XIV.

78. *See Banca Della Svizzera Italiana*, 92 F.R.D. at 119 ("It would be a travesty of justice to permit a foreign company to invade American markets, violate American laws if they were indeed violated, withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law.").

79. *See* Emory v. Greenough, 3 Dall. 369, 370 n.2, 1 L.Ed 640 (1797) (setting forth an extract from a treatise by seventeenth century Dutch jurist Ulrich Huber), *quoted in Aerospatiale*, 782 U.S. at 543 n.27 ("By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, *so far as they do not occasion a prejudice to the rights of the other governments, or their citizens.*") (emphasis added). One could argue that because deference to foreign blocking statutes would prejudice rights granted by the United States, the foreign sovereignty would not be implicated.

U.S. courts of all non-producing parties, both foreign and domestic. The only real impediment is a pragmatic concern about the effect of such orders for production on foreign relations. U.S. courts sought to address this concern with the concept of comity, but had little success. Foreign relations is not a proper concern for the judiciary.[80] The judiciary has long acknowledged this limitation in the Act of State doctrine.[81] It is unfortunate that the judiciary refuses to accept this limitation with regard to extraterritorial discovery.

IV. CONCLUSION: EQUAL JUDICIAL TREATMENT AND A FOREIGN POLICY SOLUTION

This Note proposes that the only viable solution to the extraterritorial discovery problem is the equal treatment of all litigants in U.S. courts, with no preference shown to litigants with foreign connections. Discovery should be ordered in international situations on the same terms as it is in purely domestic cases. This proposal differs from the Restatement balancing test and earlier proposals because it refuses to consider the importance of the information sought.[82] Most proposals use the importance of the information as a safeguard against unnecessary infringement upon the rights of foreign nations,[83] thus assuming the interests of foreign nations are implicated whenever the production of information located within their territories is ordered by a U.S. court. This proposal disagrees with that assumption, disregarding the importance of the information sought, and instead focuses on fairness to both parties, regarding foreign interests in this area as limited to pursuing fair treatment for their citizens and residents in U.S. courts. If a foreign party actively partakes in the benefits of the United States by doing business there, it is only fair that such a party be subject to all the burdens imposed by the United States, including the inconvenience of broad discovery.

Extraterritorial discovery on equal terms has been suggested be-

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80. *See* U.S. CONST. art. II, §§ 2-3.

81. *See Laker II*, 731 F.2d at 953-54:

> It is permissible for courts to disengage when judicial scrutiny would implicate inherently unreviewable actions, such as conduct falling within the act of state or sovereign immunity doctrines. But both institutional limitations on the judicial process and Constitutional restrictions make it unacceptable for the Judiciary to seize the political initiative and determine that legitimate application of American laws must evaporate when challenged by a foreign jurisdiction.

82. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS § 442 (1986); Teitelbaum, *supra* note 18, at 875-76; *Beyond the Rhetoric*, *supra* note 18, at 106-08; Levarda, *supra* note 18, at 1394-95.

83. *See, e.g.*, Teitelbaum, *supra* note 18, at 875-76.

fore, but with one caveat: that sanctions for non-production be limited to findings of fact against the non-producing party if that party in good faith attempted to comply with the order for production but was prevented from doing so by a foreign government's threat of civil or criminal penalties.[84] The problem with such limited sanctions is that they will promote fairness only in the event of non-production of an already known piece of evidence. Thus, if the foreign party fails to produce in good faith, that party will be sanctioned by acting as if the evidence had been produced.[85] But what if the information sought is only "reasonably calculated to lead to the discovery of admissible evidence"?[86] Without already knowing exactly what one is looking for, a finding of fact is meaningless. This Note therefore proposes that sanctions for non-production imposed on foreign parties should be certain, significant, and on the same terms as they would be imposed on domestic non-producers, regardless of the existence of a blocking statute.[87]

The argument against the use of equal sanctions is that courts should not order parties to do the impossible, and that blocking statutes make production impossible by creating the possibility of civil or criminal penalties. Giving credence to this argument will only lead to a stalemate: The United States will order discovery and in response foreign nations will make compliance "impossible"; evidence will never be discovered. Instead, impossibility should be interpreted in its literal sense—something is impossible only if it physically cannot be done—in order for any form of direct discovery to work. If a party truly cannot produce the requested information, no sanction should be issued. However, blocking statutes do not make production impossible, but merely more inconvenient.

Furthermore, if there is to be a real solution to the extraterritorial discovery problem, it must be crafted not by the judiciary but by the executive. Foreign relations is the special province of the execu-

84. *See generally* Browne, *supra* note 18. This idea is at the heart of the bifurcation analysis: Order discovery and then if there is non-compliance, punish with sanctions based on good faith.

85. *See Rogers*, 357 U.S. 212-213 ("It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events.").

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

87. *See* Laitram Corp. v. Hale, 438 So.2d 269, 272 (La. Ct. App. La. 1983) (interpreting *Rogers* as permitting severe sanctions even if there is "actual inability" to comply).

tive and only the executive has the perspective necessary to accommodate all implicated interests.[88] In a speech to the South Carolina Bar Association in Columbia, South Carolina on May 5, 1984, then Secretary of State George Schultz addressed the problem of extraterritorial application of U.S. law in general terms and specifically singled out the problem of foreign statutes blocking U.S. discovery, stressing the role of the executive branch in the solution.[89] He proposed four goals, uniquely within the executive's power: (1) to resolve policy differences with foreign nations via diplomacy; (2) to make international agreements based on comity; (3) to improve coordination within the U.S. government towards the goal of a more consistent foreign policy; and (4) to work out more bilateral and multilateral mechanisms for notice, consultation, and cooperation.[90]

At least in the limited area of antitrust, the executive branch has already laid a foundation for such a diplomatic solution by passing the International Antitrust Enforcement Assistance Act of 1994.[91] The Act's stated purpose is to "facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis."[92] Nonetheless, more should be done.

The U.S. government has a duty to either equally enforce the right to broad discovery or revoke it. If the executive decides not to subject foreign parties to broad discovery, it should likewise not subject domestic parties to it. Many people would consider such a scaling back of the discovery process to be a vast improvement. Regardless, if broad discovery is retained, its application should be uniform.

This proposal will place a significant burden on parties subject to foreign blocking statutes,[93] but this is not necessarily an unfortunate outcome. These parties chose to do business in the United States, and by virtue of that decision, submitted themselves to the burdens

88. *See* U.S. CONST. art. II, §§ 2-3.

89. Trade, Interdependence, and Conflicts of Jurisdiction, DEP'T OF STATE BULL., June 1984, at 33.

90. *Id.*

91. International Antitrust Enforcement Assistance Act, 15 U.S.C. §§ 6201, 6212 (1994).

92. *Id.* For background on this act, see News Conference with Attorney General Janet Reno, Senator Howard Metzenbaum, Representative Jack Brooks, Assistant Attorney General Anne Bingaman, Federal News Service, June 13, 1994.

93. *See* Levarda, *supra* note 18, at 1391.

imposed by the United States.[94] The implications of broad discovery should have been considered in the initial decision to do business in the United States.

Moreover, this proposal will place the burden on the "lowest cost avoider." The foreign party is the only party with significant ties to both countries and is thus in the best position to encourage both countries to come to some sort of meaningful resolution to the overall problem of extraterritorial discovery. This scenario was predicted by the court in *Uranium Antitrust*:

> The order will serve to declare [the requesting party's] right to the discovery it seeks, thereby framing the competing interests of the United States and the foreign governments on a plane where the potential moderation of the exercise of their conflicting enforcement jurisdictions can be meaningfully considered. We do not seek to force any defendant to violate foreign law. But we do seek to make each defendant feel the full measure of each sovereign's conflicting commands . . . .[95]

Strict and equal enforcement of the U.S. discovery laws is the only solution to the extraterritorial discovery problem. It will ensure fair treatment for all litigants in U.S. courts and will promote a much needed foreign policy solution.

Karen A. Feagle

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94. *See First Nat'l City Bank*, 271 F.2d at 620 ("If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and of Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom."); *see also* Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1478-79 (9th Cir. 1992):

> In reaching this conclusion, we are not unmindful of the difficulties foreign corporations face in doing business in the United States, nor of the rather delicate nature of relations between sovereign states. We sincerely hope that today's decision will not adversely affect the cordial business relationship between the United States and the PRC. However, international business requires the accommodation of different legal climates. Just as United States companies doing business in the PRC must expect to abide by PRC law, when Beijing availed itself of business opportunities in this country it undertook an obligation to comply with the lawful orders of United States courts.

95. *Uranium Antitrust*, 480 F. Supp. at 1156; *see also Laker II*, 731 F.2d at 955 ("Granting recognition to this form of coercion will only retard the growth of international mechanisms necessary to resolve satisfactorily the problems generated when radically divergent national policies intersect in an area of concurrent jurisdiction.").