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Two Cheers for the ALI Restatement's Provisions on Foreign Discovery

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TWO CHEERS FOR THE ALI RESTATEMENT'S PROVISIONS ON FOREIGN DISCOVERY

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Perhaps the most important problem in transnational litigation is the conflict faced by the multinational enterprise caught between U.S. laws compelling discovery and foreign laws prohibiting it. This Article both identifies the principles underlying this conflict and evaluates the effectiveness of the initial draft of the Revised Restatement of the U.S. Foreign Relations Law.

U.S. procedural rules reflect a distinct approach to information gathering (discovery) in governmental law enforcement investigations and in the pre-trial phase of civil and criminal litigation. These laws permit litigants before U.S. courts to cast a broader, stronger and more finely meshed net of discovery than do the laws of any other nation.[1]

Several reasons exist for this approach to discovery. First, the United States may be the only nation that believes unilateral extraterritorial discovery does not violate international law.[2] Our laws permit more inclusive personal jurisdiction

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1. *See generally* D. ROSENTHAL & W. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY 68-80 (1982).

2. *See* 2 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD §15.10 (2d ed. 1981); INT'L LAW ASS'N, REPORT OF THE FIFTY-FIRST CONFERENCE 407 (1964), *cited in* Note, *Extraterritorial Discovery: An*

over witnesses, documents, parties and investigative subjects outside our territorial boundaries than those of other countries.[3] Further, our legal system allows for foreign discovery to determine whether U.S. courts have jurisdiction over a foreign party.

Unlike other nations, we permit discovery not only of clearly relevant material and admissible evidence, but also of information which would be inadmissible at trial yet "appears reasonably calculated to lead to the discovery of admissible evidence."[4] U.S. courts frequently require the production of information located outside the U.S. which may be subject to privileges against disclosure under the law of the host nation, such as Crown privilege. The fact that the information contains communications between foreign nationals and public officials of their own government relating to matters properly regulated by such officials may be irrelevant.[5] Recently, one court required the disclosure of such information, notwithstanding a traditional claim of state secret privilege involving diplomatic communications between sovereign governments.[6]

U.S. courts often permit unilateral discovery even where bilateral intergovernmental agreements exist. These agreements, providing mutually acceptable methods of obtaining relevant information, are sometimes bypassed to save time, to avoid burdensome diplomatic processes, or to satisfy other governmental needs.[7] If foreign discovery demands are not fulfilled, a few federal district courts have asserted the right to

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Analysis Based on Good Faith, 83 COLUM. L. REV. 1320, 1322 (1983) [hereinafter "Int'l Law Ass'n Report"].

3. 1 J. Atwood & K. Brewster, *supra* note 2, § 5.04 at 113 & n.14. *Cf.* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 441 (Tent. Draft No. 2, 1981) [hereinafter "Restatement (Revised No. 2)"].

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

5. *See, e.g.,* Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53 (2d Cir. 1983).

6. United States Steel Corp. v. United States, No. 83-101, slip op. (Ct. Int'l Trade Oct. 11, 1983), *rev'd on other grounds,* No. 84-639 (Ct. Customs and Patents Appeals March 23, 1984) (the court, however, acknowledged the sensitive nature of the requested material by staying the order pending appeal).

7. For example, in *In Re* Grand Jury Proceedings (United States v. Bank of Nova Scotia), No. 83-1 (WPB), slip op. (S.D. Fla. Feb. 28, 1984)

coerce compliance through the direct imposition of sanctions on the non-complying party.[8] United States courts increasingly impose sanctions of considerable weight, even on foreign nationals, for failing to produce information located abroad.[9] To our knowledge, no foreign jurisdiction has ever ordered a similar penalty.

In contrast to practices in the United States, foreign democracies, both civil and common law, tend to avoid asserting "long-arm" jurisdiction over non-residents, at least when they are not nationals. Moreover, these countries, unlike the United States, do not consider the foreign subsidiary of a domestic parent corporation to be a "national."[10] These nations limit court-ordered inquiries to information located within their territory. When they do seek facts and data abroad, they usually do so only with the cooperation and acquiescence of the courts and law enforcement officials in the foreign state where the information is found.[11]

[hereinafter "*Bank of Nova Scotia II*"], the bank took the position that an informal "gentlemen's agreement" between the United States and the Cayman Islands obligated the U.S. government to follow the stipulated procedures for obtaining documents on tax fraud information before unilaterally serving a grand jury subpoena on the bank. The district court rejected that argument, however, and upheld enforcement of the grand jury subpoena. *Id.* at 11-14.

See also Agreements between the United States and the Federal Republic of Germany on Judicial Assistance: Taking of Evidence (agreements effected by exchange of notes dated Feb. 11, 1955, Jan. 13, 1956, Oct. 8, 1956, Oct. 17, 1979 and Feb. 1, 1980), United States-Federal Republic of Germany, T.I.A.S. No. 9938.

8. Authority for mandating compliance is found in Rule 37 of the Federal Rules of Civil Procedure. A noncomplying party can be held in civil contempt. If the conduct is particularly egregious, criminal contempt is also possible. *See* 18 U.S.C. § 401 (1982).

9. *See, e.g.*, Marc Rich & Co. v. United States, 707 F.2d 663, 670 (2d Cir. 1983) (upholding fine of $50,000 per day for failing to comply with grand jury subpoena), *cert. denied*, 103 S. Ct. 3555 (1983); Bank of Nova Scotia II, No. 83-1 (WPB), (S.D. Fla. Oct. 20, 1983) (fine of $25,000 per day).

10. *See, e.g.*, Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Administration Regulations, at 5 (copy on file at N.Y.U. J. INT'L L. & POL.).

11. *See, e.g.*, Procedures for Mutual Assistance in Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, Mar. 23, 1976, United States-Japan, 27 U.S.T. 946, T.I.A.S. No. 8233.

Departures from this practice are often condemned. In a recent case, a Swiss court sentenced two French police officials to prison terms. The two officers had traveled to Switzerland several times to interview a former Swiss banker about French clients using a Swiss bank to evade French tax and exchange control laws.[12]

Moreover, when other countries seek foreign information, they tend to request specific documents or provide detailed interrogatories.[13] Foreign legal experts believe the expansive breadth of U.S. discovery encourages wasteful and intrusive "fishing expeditions."[14]

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12. This case is described in RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 432, Reporters' note 1 (Tent. Draft No. 3, 1982) [hereinafter "Restatement (Revised No.3)"].

13. That foreign countries are likely to seek only specific information from abroad reflects their different legal traditions. *See generally* 2 J. Atwood & K. Brewster, *supra* note 2, § 15.10. Moreover, they will often refuse to honor U.S. litigants' wide-ranging discovery demands for information in their own countries. For example, Article 23 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter "Hague Convention"], allows signatory states to refuse to grant American style discovery requests. Twelve of the sixteen signatory states to the Hague Convention have invoked Article 23. 28 U.S.C.A. § 1781 (West Supp. 1983).

14. Radio Corp. of America v. Rauland Corp., [1956] 1 Q.B. 618, 649 (Lord Goddard, C.J.), *quoted with approval in* Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434, 455. Negative perceptions of U.S. discovery practices will probably increase based on two recent Supreme Court decisions protecting the confidentiality of grand jury proceedings. Even when U.S. authorities use established intergovernmental agreements and cooperate with affected foreign governments to obtain extraterritorial evidence, the requirements of grand jury secrecy may prohibit officials from making detailed information requests. As a result, foreign governments may be unable to determine whether discovery demands are reasonable or appropriate under their laws. United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983); United States v. Baggot, 103 S. Ct. 3164 (1983).

In United States v. Sells Engineering, Inc., 103 S. Ct. at 3148, the Court held that disclosure of grand jury materials by Internal Revenue Service attorneys to other government attorneys for use in a potential civil suit could be authorized only upon a showing of particularized need under Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure. In United States v. Baggot, 103 S. Ct. 3164 (1983), the Court found that grand jury documents could not be disclosed to the Internal Revenue Service for use in

Many Americans, including the Reporters of the pending draft of the American Law Institute's Revised Restatement of the Foreign Relations Law of the United States, say that the U.S. approach is correct because it encourages disclosure of the truth, and because it requires foreigners who choose to do business here to play by the same rules as Americans.[15] Support for the U.S. approach exists in part because many Americans lack faith that foreign, or even U.S. bureaucrats, will do what is fair or right rather than what is expedient. We have more confidence in the impartiality and fairness of U.S. courts, especially federal judges. We suspect that foreign officials and judges, including those of our close allies, may sometimes be the handmaidens of foreign commercial interests.[16]

Foreign experts and officials reply that such unilateral extraterritorial discovery is inconsistent with the spirit, if not the letter, of bilateral enforcement cooperation agreements.[17] They argue it violates long-standing national laws of civilized nations and thus international law,[18] and that it undermines

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a civil tax audit, since an investigation to determine a taxpayer's civil tax liability did not fall within the parameters of Rule 6(e)(3)(C)(i). Although neither case involved the disclosure of foreign documents, U.S. attorneys will probably cite both cases as inferential support for their refusal to explain grand jury subpoena demands to others, including foreign governments.

Bank of Nova Scotia II exemplifies this problem. A Cayman Islands court held that it had insufficient information about the nature of the grand jury investigation to allow the bank to produce the subpoenaed documents under the Cayman Islands secrecy law. The U.S. Attorney refused to inform the bank of the materiality and necessity of the documents despite the foreign court's request. The U.S. district court upheld the U.S. Attorney's refusal, citing the need for grand juries to investigate without impediments. *See Bank of Nova Scotia II, supra* note 7, at 5-7, 15.

15. Restatement (Revised No. 3), *supra* note 12, § 420, Reporters' notes 1 & 4.

16. *See, e.g., In Re* Uranium Antitrust Litigation, 617 F.2d 1248, 1256 (7th Cir. 1980) (court castigated foreign governments for presenting briefs on behalf of foreign parties).

17. *Cf.* Brief of Cayman Islands as *Amicus Curiae* at 16-19, *In Re* Grand Jury Proceedings (Bank of Nova Scotia v. United States), No. 83-5708 (11th Cir. Dec. 28, 1983); Joint Supplemental Brief of United Kingdom and Cayman Islands at 30-38, *In Re* Grand Jury Proceedings (Bank of Nova Scotia v. United States), No. 83-5708 (11th Cir. Dec. 28, 1983) (copies on file at N.Y.U. J. INT'L L. & POL.).

18. *Supra* note 17; Int'l Law Ass'n Report, *supra* note 2.

effective international commerce and imposes a discriminatory trade barrier that limits the fair access of foreign multinational enterprises to U.S. markets.[19] Furthermore, they assert, U.S. courts often are not impartial in disputes involving conflicts between American and foreign interests, and it is as politically intolerable for leaders of foreign democracies to have their official policies evaluated, "balanced" and coerced by U.S. courts as it would be for our leaders to have important U.S. policies and interests evaluated, judged and coerced in foreign courts.[20]

As discussed elsewhere in this Symposium issue, the major formal foreign response to unacceptable extraterritorial information gathering has been blocking legislation and directives. Those foreign nations that have adopted blocking laws tend to view such statutes as an unfortunate but necessary act of self-defense providing some, albeit incomplete, protection against the undermining of their laws and policies. Some U.S. experts, including Professor Andreas Lowenfeld, tend to question the validity, in principle, of these laws.[21] This view is rather surprising, since the United States has adopted its own blocking law. The anti-boycott provisions of the Export Administration Act and of the Internal Revenue Code prohibit U.S. citizens from furnishing certain information to foreign authorities in furtherance of political boycotts, such as the Arab League boycott of Israel and the black African nations' boycott of South Africa.[22] We do not believe that Professor Lowenfeld opposes this U.S. blocking law.

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19. *See, e.g.,* Brief on Behalf of Government of Canada as *Amicus Curiae* at 7-9, *In re* Grand Jury Proceedings (Bank of Nova Scotia v. United States), No. 83-5708 (11th Cir. Dec. 28, 1983) (copy on file at N.Y.U. J. INT'L L. & POL.).

20. *E.g.,* Joint Brief of United Kingdom and Cayman Islands at 16-20, *In Re* Grand Jury Proceedings (United States v. Bank of Nova Scotia), No. 83-1 (WPB) (S.D. Fla. Feb. 28, 1984) (criticizing *In Re* Grand Jury Proceedings (United States v. Field), 532 F.2d 404 (5th Cir.), *cert. denied,* 429 U.S. 940 (1976), for its pro-U.S. bias in balancing U.S. and Cayman Islands interests) (copy on file at N.Y.U. J. INT'L & POL.).

21. Lowenfeld, *Sovereignty, Jurisdiction and Reasonableness: A Reply to A. V. Lowe,* 75 AM. J. INT'L L. 629 (1981).

22. Export Administration Act of 1979, § 8, 50 U.S.C. § 2407 (1982); I.R.C. § 999 (1983).

The foregoing portrays an ideological, divisive and emotional conflict between friendly and otherwise generally like-minded nations. Disputes concerning technical legal standards for conducting foreign discovery that escalate into serious conflicts over sovereignty, jurisdiction and self-determination may threaten the willingness of these allies to work harmoniously on other economic, political and military matters.

Such conflicts are imposing an intolerable dilemma for those multinational enterprises, especially third-party multinational banks and accounting firms,[23] that hold confidential information as fiduciaries for others. What are these companies to do when threatened by penal sanctions under U.S. law if they fail to comply with a U.S. subpoena or document request, yet at the same time are threatened with severe penal sanctions under the laws of a foreign jurisdiction if they do comply? Most importantly, the incidence of such dilemmas appears to be increasing—with no evidence of any framework or set of agreed standards for their resolution.

The American Law Institute's views on foreign discovery, as well as on other issues of U.S. foreign relations and international law, are worth examining in large part because of the absence of other authoritative voices to be heard. Neither laws passed by Congress, or the Federal Rules of Civil Procedure, or decisions of the Supreme Court, or actions by federal law enforcement agencies have given significant direction in dealing with a discovery conflict between the United States and a foreign nation. Since the end of World War II, only one decision by the Supreme Court has specifically adjudicated this issue.[24] Moreover, that opinion largely limited its holding to its particular facts.

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23. *See, e.g.*, X AG v. A Bank, [1983] 2 All E.R. 464 (Q.B.); United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968); First National City Bank of New York v. IRS, 271 F.2d 616 (2d Cir. 1959), *cert denied*, 361 U.S. 948 (1960).

24. Societe Internationale v. Rogers, 357 U.S. 197 (1958). There, the Supreme Court held that a Swiss company seeking the return in federal court of property seized by the U.S. Alien Property Custodian could avoid dismissal of its suit, notwithstanding its failure to produce documents blocked by a Swiss penal statute, and notwithstanding that such documents might prove crucial to the determination of the case. The suit survived dismissal because the Swiss company had demonstrated good faith in its efforts to comply with the discovery order of the U.S. court.

The American Law Institute (ALI) is a private, voluntary association which chooses its membership from American judges, academically oriented attorneys and law professors.[25] Organized in 1923,[26] it has supported the preparation and publication of "restatements" of then existing U.S. law in several specialized areas. The goal of these restatements is to clarify, rationalize, and thereby *improve* the law as it is interpreted and applied by lawyers, the courts and enforcement officials.[27] In 1965, after more than ten years of work, the ALI published its first Restatement of United States Foreign Relations Law.[28]

The prestige of the ALI, and of the experts involved in drafting the Restatement of Foreign Relations Law, quickly established it as a leading authority in cases involving the proper scope of foreign discovery. Frequently, courts have relied on it exclusively, not only for a statement of U.S. foreign relations law but also as a statement of applicable principles of international law generally accepted by experts in the international legal community outside of the United States.[29]

The Restatement (Second) makes the bold claim that "in stating rules of international law," the Restatement "represents the opinion of The American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law."[30] Thus, it purports to reflect a consensus of international law unless it specifically indicates otherwise.[31] Given what has

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25. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Introduction at IX-X (1965) [hereinafter "Restatement (Second)"].

26. H. GOODRICH, THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961, at 7 (1961).

27. *Id.* at 7-9.

28. Restatement (Second), *supra* note 25, at VII. Anomalously, it is called the restatement "second" of U.S. foreign relations law because it was published with a second wave of other restatement volumes.

29. *E.g.,* United States v. Toyota Motor Corp., 569 F. Supp. 1158, 1162-63 (C.D. Cal. 1983) (following Restatement (Revised) § 420 as principle of international law).

30. Restatement (Second), *supra* note 25, at XII.

31. Restatement (Revised No. 3), *supra* note 12, Introductory Note to Part IV, Chap. 1, at 95 ("An effort is made here to state principles [of

been said above, there is no basis for claiming that there is an *international* consensus on the Restatement's views of national jurisdiction.[32] It is not even clear that there is a consensus among international lawyers within the United States.

In 1979, the ALI embarked on a revision of the Restatement of Foreign Relations Law. This revision is still in progress. While we do not yet know with certainty, the new version will probably also purport to reflect a consensus of international law. So far, five partial drafts have been prepared. Together, these will comprise a complete first draft of the Revised Restatement.

Professor Lowenfeld, an eminent scholar at New York University School of Law, is an associate Reporter for the Revised Restatement.[33] He has the initial responsibility for preparing Part IV of the Restatement, the very important portion dealing with U.S. jurisdiction and judgments in the international community. Section 420 is that segment of Part IV which deals explicitly with the conflict between U.S. discovery compulsion and foreign blocking laws.

Professor Lowenfeld is a crucial actor in this project because he not only pulls the oar, subject to review by his co-reporters and members of the ALI, for the "black letter" text of Part IV of the Restatement, but also for the Comments elaborating that text. The reporters are also free to draft, subject to no right of revision by others, the Reporters' Notes for these sections. These Reporters' Notes further refine the text and Comments, and thus serve as an important guide to lawyers and courts in construing the text. The Revised Restatement is very much a work in progress open to further modification, at least for another year or so, when it is scheduled to be submitted for a comprehensive review by the ALI membership. Accordingly, what we have to say here is ad-

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jurisdiction] consistent with both international law and United States law.").

32. *Cf. id.* at 89-94 (differing international conceptions of national jurisdiction); *id.* § 403 reporters' note 1 (questioning applications of U.S. law).

33. The other Reporters are Louis Henkin of Columbia Law School, the Chief Reporter, Detlev Vagts of Harvard Law School and Louis Sohn, formerly of Harvard, now of the University of Georgia Law School.

dressed not only to a wider audience but to my friend Andy Lowenfeld directly.

The 1965 Restatement does not have a specific section dealing with the problem of discovery conflicts. Rather, it contains a general, largely hortatory admonition in Section 40 that when any jurisdictional conflict between the United States and another sovereign nation develops, U.S. judges and law enforcers should exercise restraint in applying U.S. law.[34] Section 40's restraint is considered largely discretionary, a statement of the principle of comity or respect for good manners in dealing with the significant values and interests of other nations.[35]

Until recently, the restrained "moderating" approach of the Section 40 balancing test led U.S. courts to avoid coercing the production of documents located in a foreign jurisdiction whose laws made it illegal to produce them to an American court.[36] In those instances where production was compelled, there was usually reason to doubt that production would violate foreign law.[37] However, as we learn from other articles in

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34. Restatement (Second), *supra* note 25, § 40. Section 40 states:
Limitation on Exercise of Enforcement Jurisdiction

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
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> (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,
>
> (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.

35. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

36. *See, e.g.*, Ings v. Ferguson, 282 F.2d 149, 152-53 (2d Cir. 1960) (order requiring production of foreign documents should be quashed if production would violate foreign law).

37. *E.g.*, United States v. First Nat'l City Bank, 396 F.2d 897, 903-05 (2d Cir. 1968) (not a crime in Germany to disclose banking records to U.S. grand jury investigating alleged antitrust violations, and risk of civil liability

this issue, in the *Bank of Nova Scotia*,[38] *Banca Svizzera*[39] and *Marc Rich*[40] cases, the balance point in the Section 40 weighing process has recently shifted. It has moved from the "deference to comity" side toward the "paramount importance of U.S. law enforcement" side of the scale. Section 40 has little restraining impact on this shift. The standards are too vague and open-ended; they are only a moderating suggestion, not a command.

The Revised Restatement improves upon its predecessor on this issue in two key respects. First, while it too invokes a balancing test, a principle of reasonableness,[41] the factors to be

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in Germany if bank acted pursuant to U.S. court order was "quite remote"); First Nat'l City Bank of New York v. IRS, 271 F.2d 616, 619-20 (2d Cir. 1959) (bank required to produce customer's records located in Panamanian branch pursuant to IRS summons where no showing that criminal sanctions would attach if bank waived Panamanian privilege against disclosure), *cert. denied,* 361 U.S. 948 (1960). *Cf.* United States v. Vetco, 644 F.2d 1324, 1326-31 (9th Cir. 1981) (legal dispute as to whether compliance with U.S. civil IRS subpoena required respondent to commit a crime under Swiss law), *cert. denied,* 454 U.S. 1098 (1981).

38. United States v. Bank of Nova Scotia, 691 F.2d 1384, 1389-91 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983) [hereinafter "Bank of Nova Scotia I"].

39. SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-19 (S.D.N.Y. 1981).

40. Marc Rich & Co. v. United States, 707 F.2d 663, 666-70 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 3555 (1983).

41. Restatement (Revised No. 2), *supra* note 3, § 402 at 97, 98, 103-05. Sections 402 and 403 provide in full:

§ 402. *Bases of Jurisdiction to Prescribe*

Subject to § 403, a state may, under international law, exercise jurisdiction to prescribe and apply its law with respect to

(1)(a) conduct a substantial part of which takes place within its territory;

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

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

(2) the conduct, status, interests or relations of its nationals outside its territory; or

(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or certain state interests.

§ 403. *Limitations on Jurisdiction to Prescribe*

(1) Although one of the bases for jurisdiction under § 402 is present, a state may not apply law to the conduct, relations, status, or

balanced are given fuller explication, with substantially more text, commentary and notes. The court, in balancing interests, is somewhat better encouraged by that explication to refrain from the temptation to tilt too casually toward finding appropriate U.S. jurisdiction.[42] Second, the Revised Restatement

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interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial direct, and foreseeable effect upon or in the regulating state;

(b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of regulation to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity;

(h) the likelihood of conflict with regulation by other states.

(3) An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2).

(4) Under the law of the United States:

(a) a statute, regulation or rule is to be construed as exercising jurisdiction and applying law only to the extent permissible under § 402 and this section, unless such construction is not fairly possible; but

(b) where Congress has made clear its purpose to exercise jurisdiction which may be beyond the limits permitted by international law, such exercise of jurisdiction, if within the constitutional authority of Congress, is effective as law in the United States.

42. Sections 403 and 441 of the Revised Restatement focus on reasonableness as a general limitation on a court's jurisdiction to prescribe and

incorporates several circuit court decisions since 1976 which have held that balancing is mandatory, not hortatory.[43] If there is a conflict between the assertion of U.S. jurisdiction and foreign law denying that jurisdiction, the U.S. decision-maker *must* undertake a conflict of laws analysis. If the predominant contacts or interests weigh against exercising U.S. jurisdiction, notwithstanding that U.S. jurisdiction would lie *absent* a conflict, then, as a matter of international law, the United States has no jurisdiction to proceed with the matter.[44]

Another improvement in the draft Revised Restatement is that it devotes an entire section to the discovery conflict itself.[45] Section 420, "Requests For Disclosure and Foreign Government Compulsion," has two parts. Section 420(1) imposes conditions of self-restraint on U.S. foreign discovery, whether or not a foreign law might apply to block it.[46] This is appropriate because the United States is, to the best of our knowledge, the only nation which permits any foreign discovery in conflict with local foreign law. Section 420(2) suggests standards for properly compelling U.S. discovery in the face of foreign blocking laws.

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adjudicate, respectively. Sections 415 to 418 apply the principle of reasonableness to specific substantive areas. *Id.* at §§ 403, 415-18, 441.

43. *See, e.g.,* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1978); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613, 614-15 (9th Cir. 1976).

44. Timberlane Lumber, 549 F.2d at 607-08. *See also,* J. Atwood & K. Brewster, *supra* note 2, § 6.13, at 166. *Cf.* Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981) (denying jurisdiction because plaintiff had failed to show that challenged license agreement would be likely to have anticompetitive effect on U.S. commerce); Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 (5th Cir. 1982) (court held as a matter of law that "[a] district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law, or international law."), *vacated and remanded on other grounds*, 103 S. Ct. 1244, *reaff'd,* 704 F.2d 785 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 393 (1983).

45. Restatement (Revised No. 3), *supra* note 12, § 420. The four pages of Comments and ten and a half pages of Reporters' Notes are valuable scholarship.

46. *Id.* Section 420(1) reads as follows:

Requests for Disclosure and Foreign Government Compulsion.

(1)(a) Where authorized by statute or rule of court, a court in the United States may order a person before the court to produce documents or other information directly relevant,

Section 420(1) states the terms on which a United States court may require the production of information located abroad. It suggests valuable improvements in U.S. procedural law over some lower court applications.[47] Among these (as explained in the Comments and Reporters' Notes) are three requirements that must be met by one seeking information from abroad.

First, all demands for foreign discovery by private litigants must be reviewed by a court applying the principle of reasonableness and, if found unreasonable, must be rejected.

Second, during this threshold state of review, the court must apply the principle of reasonableness using the criteria set forth in 420(1)(c). These criteria are:

(a) the importance of the information sought to the investigation or litigation in progress;

(b) the degree of specificity of the request;

(c) whether the documents or information originated in the United States;

(d) the extent to which compliance with the request would undermine important interests of the state where the information is located; and

(e) the possibility of alternative means of securing the information requested.

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necessary, and material to an action or investigation, even if the information is located outside the United States.

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

(c) In issuing an order directing production of documents or other information located abroad, a court in the United States must take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; in which of the states involved the documents or information originated; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.

47. *Cf.* Bank of Nova Scotia I, 691 F.2d at 1389-91; United States v. Field, 532 F.2d 404, 407-09 (5th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

Third, "a more stringent test of direct relevancy, necessity and materiality" is required to authorize the issuance of foreign information demands than for demands for information located within the United States.[48]

Furthermore, in recognition of the experience that attorneys, including some representing U.S. government agencies, "do not always engage in the kind of evaluation called for by this section, particularly on issues of . . . discovery,"[49] it is proposed that U.S. government investigative and enforcement demands for foreign discovery must also be reviewed by the court.[50]

The absence of this type of threshold review increases the chances of conflict. If, however, courts were to set a low threshold of governmental justification, the moderating effect would be modest.

We start with the brute fact that U.S. extraterritorial discovery is viewed by most foreign international law experts as a violation of international law.[51] Applying a principle of reasonableness to that fact should, at least, lead to the following inquiry before foreign discovery is authorized: (1) Have substantial, good faith efforts to obtain information within the territory of the United States been undertaken and found wanting? (2) What is the likelihood that information exists abroad that can be expected to be important evidence in an investigation or litigation, justified by some probative infor-

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48. Restatement (Revised No. 3), *supra* note 12, § 420 comment a, at 15.

49. *Id.* Reporters' note 8, at 28.

50. The Revised Restatement apparently proposes that governmental investigative agencies make applications to the court *before* the subpoena is served. In that event, the applications will be *ex parte*, and it will still be *necessary* to give the recipients a separate opportunity to challenge the order to produce before the court considers, as a separate issue, the imposition of sanctions for non-compliance. Thus, a three-step review process is established. While federal courts probably do have the discretion to impose this requirement in individual cases, such a blanket rule probably requires amendment of the Federal Rules of Civil and Criminal Procedure, plus several separate statutes relating to the enforcement authority of various federal agencies. *E.g.*, Federal Trade Commission Act § 9, 15 U.S.C. § 49 (1982), *discussed in* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1305 (D.C. Cir. 1980).

51. *See supra* note 2.

mation already obtained? (3) Can it be shown that jurisdiction is likely to be established over the one from whom the information is sought and over the subject matter of the investigation or litigation? (4) Are there any reasonable alternative means of securing the foreign information available, such as a bilateral agreement or the issuance of letters rogatory, which will not be viewed by foreign governments as a breach of their sovereignty and a violation of international law?

A request for foreign discovery should be quite specific. Foreign nations and foreign persons have little experience with the time, expense and other burdens of legal process which American legal institutions assume and the American people accept. The commentary to Section 420(a) should candidly state that even this much discovery is not permitted by international law since it is improbable that an international tribunal would uphold such discovery if challenged, but make clear that it is valid under U.S. foreign relations law. The Revised Restatement states that regulation must be "consistent with the traditions of the international system."[52] But it fails to make clear just how isolated our legal system is, particularly with respect to foreign discovery, from the international system. These prescriptions receive support from some existing case law[53] and from recent trends in the development of the Federal Rules.[54]

The commentary adds, constructively, that discovery should be less intrusive when it is being applied to third party witnesses, especially foreign third party witnesses, who stand to receive no benefit in the investigation or litigation from non-production.[55] It also refrains from requiring the disclosure of

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52. Restatement (Revised No. 2), *supra* note 3, § 403(2)(f).

53. *E.g,* United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983); FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980).

54. *See, e.g.*, 1980 Amendments to FED. R. CIV. P. 26(f), 33(c) and accompanying Advisory Committee Notes. *See generally* American Bar Association, *Report of Section of Litigation, Special Comm. for the Study of Discovery Abuse* (App. Draft 1977); *ABA Section of Litigation, Second Report of the Special Comm. for the Study of Discovery Abuse* (1980); *Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* 41-80 (1979).

55. Restatement (Revised No. 3), *supra* note 12, § 420 Reporters' note 9.

information subject to a claim of privilege under the law of the host jurisdiction.[56] The Reporters' Notes indicate that discovery from the foreign subsidiaries of U.S. parents is permissible, as is discovery from foreign parents through their U.S. subsidiaries, if the activities of the parent and subsidiary substantially overlap and if the documents relate to transactions involving both entities.[57] U.S. courts should follow the Revised Restatement's presumption against ordering a foreign company, through its U.S. branch or affiliate, to produce documents located in a third country having nothing to do with the foreign company's activities in the United States.[58] This is especially inappropriate where the information sought does not involve activities of the branch or affiliate in the United States. Such discovery would border on serving a subpoena on a foreigner not present within the jurisdiction.[59]

The first part of Section 420 deserves the support of the foreign international legal community. While not totally compatible with their view of international law, it is a substantial step toward accommodation. It should also receive the support of the U.S. legal community involved in transnational litigation, because it retains the *right* to unilateral foreign discovery to discover the truth when reasonable alternatives are lacking. It clarifies, in accord with recent legal trends, the proper scope of foreign discovery under U.S. law. If consistently applied, these standards would reduce international conflicts without doing an injustice to the important interests of U.S. law enforcers and private litigants.

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56. *Id.* comment c.

57. *Id.* Reporters' note 9.

58. *Id.* ("If the documents concern the activities of third parties—*e.g.*, If the New York branch of a London bank is asked to provide records of depositors at the main office—production will not normally be ordered."). *Contra,* Bank of Nova Scotia I, 691 F.2d at 1384; Bank of Nova Scotia II, No. 83-1 (WPB) (S.D. Fla. Feb.28, 1984).

59. *Cf.* 28 U.S.C. § 1783 (1982) (authorizing issuance of subpoena to a U.S. national or resident in a foreign country). When it enacted Section 1783, Congress placed several limitations on this subpoena power, in recognizing the relevant concerns of international law. First, such subpoena may be issued only by the court, not by the clerk of the court or a grand jury. Second, as noted above, such subpoenas may be issued only to nationals or residents of the United States. Third, such subpoenas may be issued only "if the court finds that particular testimony or the production of the docu-

The second part of Section 420, which deals with resolving a clear jurisdictional conflict over discovery, could be significantly improved.[60] Section 420(2) is divided into three sub-parts. The first and second subsections, following *Societe Internationale,*[61] impose an obligation upon the party caught in the middle to make a "good faith effort" to have the blocking law waived or otherwise not applied. Although not expressly stated, the provision implies that good faith efforts must be shown whatever the broader balancing of conflicting *state* interests would yield.[62] While Section 420(1)(c) does require a court to consider important interests of the state where the information is located when the discovery is authorized, the precise nature and full extent of those interests may not be known at the threshold. Foreign governments, not foreign nationals, are

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ment or other thing by him is necessary in the interest of justice." *Id.* In non-criminal cases, a fourth condition applies. The court must find "that it is not possible to obtain [the witness'] testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner." *Id.*

Thus, even for U.S. nationals temporarily abroad, Congress has shown its concern over potential international conflict and has limited the issuance of subpoenas in such situations accordingly. The case for restraint is even stronger for discovery demands on foreigners located outside U.S. jurisdiction.

60. Restatement (Revised No. 2), *supra* note 3, § 420(2) states as follows:

> (2) If disclosure of information located outside the United States is prohibited by a law or regulation of the state in which the information or prospective witness is located, or by the state of nationality of the prospective witness,
>
> (a) the person to whom the order is directed may be required by the court to make a good faith effort to secure permission from the foreign authority to make the information available;
>
> (b) the court may not ordinarily impose the sanction of contempt, dismissal, or default on the party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);
>
> (c) the court 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 authority to make the information available and that effort has been unsuccessful.

61. Societe Internationale v. Rogers, 357 U.S. 197 (1958).

62. *See, e.g.,* Int'l Law Ass'n Report, *supra* note 2, at 1340-45.

in the best position to articulate state interests. At this early stage, before a conflict has become manifest, foreign governments will usually not know that the investigation or discovery has been initiated. They will, accordingly, be unable to inform a court of their state interests.

It thus becomes important for the balancing process required by Sections 403 and 404 to take place as soon as the jurisdictional conflict becomes apparent. If that weighing process results in a decision not to compel discovery, the subpoena demand should be quashed, or the discovery order should be vacated, regardless of the good faith efforts of the non-complying party.[63] If a non-complying third party over whom a U.S. court has personal jurisdiction shows contempt for the U.S. judicial process, or obstructs justice by its misconduct, an appropriate remedy is available—criminal contempt of court,[64] or a prosecution for obstruction of justice.[65] Neither of these remedies punishes the affected foreign nation. There is no justification for undermining valid foreign state interests through an overbroad punishment for witness or party misconduct. It is the state, in a blocking situation, not the subpoenaed party, which is legitimately frustrating discovery because of state interests. Fraudulent or contemptuous conduct by the individual should be punished for itself.

The Revised Restatement tends to encourage the U.S. court to hold the subpoenaed party as a hostage. The U.S. court threatens the party in the hope that (a) the party can either influence the foreign government to relent, or (b) the foreign government will take more pity on the hardship to the victim caught in the middle than the U.S. court has.[66] U.S. courts should not engage in this kind of coercion. It is not only fundamentally unfair to the private enterprise to hold it responsible for the policies of its foreign host government; it is also fundamentally unfair to the foreign sovereign.

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63. Restatement (Revised No. 2), *supra* note 3, § 419 comment b, consistently with this suggestion, implies that some third party disclosure by foreign banks as to the names of depositors with accounts in foreign branches should not be enforced based on a conflict of laws analysis alone.

64. 18 U.S.C. §§ 401, 402 (1982).

65. 18 U.S.C. §§ 1001, 1505 (1982).

66. *See, e.g.*, Lowenfeld, *supra* note 21, at 632-35 (discussing *In re* Ampicillin Antitrust Litigation).

The second problem with Sections 420(2)(a) and (b) is that they fail to explain what constitutes a good faith effort, short of gross misconduct, sufficient to avoid sanctions, or at least disabling sanctions.[67] How far must one go to show sufficient good faith? Surely, the individual is not obliged to assure production. If the foreign administrative authorities have discretion to waive the blocking law, presumably the enterprise from whom the information is sought is obliged to seek a waiver. Is it also obliged to try again once rebuffed? Should it seek an order of the foreign court that the blocking law not be applied? Or might that be considered a bad faith courting of impediments, as when the foreign court *reinforces* the application of the statute by issuing an order specifically compelling non-compliance with the U.S. discovery request or subpoena? Is it obliged to appeal a blocking order? Is it obliged to appeal to the court of last resort?

The Revised Restatement shows a disturbing tendency to create an overbroad concept of courting impediments. It suggests that initially communicating with a foreign government, informing it of a subpoena or document request in such a way as to invite a blocking directive, may be bad faith.[68] Such an expansive concept of bad faith is inconsistent, both with the laws and interests of the foreign state, which needs to know of potential significant jurisdictional conflicts at an early stage, and with our own legal standards, which recognize the right of persons to petition officials of the United States government, even if the purpose and effect of such petitioning may conflict with other U.S. state interests embodied in U.S. law.[69]

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67. *See, e.g., In re* Oil Spill by Amoco Cadiz, 93 F.R.D. 840 (N.D. Ill. 1982). In this case, only two disabilities for non-production of blocked foreign documents were imposed: (1) the court gave non-conclusive weight to other available foreign evidence helpful to defendant; and (2) reasonable fees and expenses of litigating the foreign discovery issue were awarded to the blocked plaintiff. *Id.* at 844.

68. *Cf.* Restatement (Revised No. 2), *supra* note 3, § 420 Reporters' note 7 (U.S. courts have become alert to parties "seeking to take advantage of foreign laws restricting disclosure of information").

69. In Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Supreme Court precluded a finding of antitrust liability arising from an allegedly malicious anti-competitive attack by the railroads against truckers in a legislative lobbying campaign. This was because

If a person resides and does business in State A, it is obliged to obey that state's laws and regulations. If it believes officials of State A have reason to block the production of information being sought from it, does that person not have a duty to bring the matter to the attention of its host government? We expect such from the U.S. branches and subsidiaries of foreign enterprises that are asked to comply with information sought to enforce the Arab League boycott of Israel. The Revised Restatement should make it clear that a foreign resident's bringing a U.S. discovery request or subpoena to the attention of its host foreign government is not bad faith conduct.

In note 1 of Section 419, dealing with foreign government compulsion generally, the reporters observe:

> It is sometimes difficult to distinguish the authentic commands of a foreign government in pursuit of national policy from commands responding to solicitations by a private party.[70]

This is a disturbing statement. It implies that foreign government officials are manipulated to impose compulsion orders inappropriately. The term *inauthentic* is provocative. It could mean either unofficial blocking orders not valid under that nation's law or perhaps valid foreign blocking orders which, in the U.S. court's view, the foreign government should not have granted in its own national interest. Why should a U.S. court pass judgment on either type of authenticity with respect to the activities of the executive branch of a foreign government? This is just the kind of judgment about a foreign act of state that a U.S. court should avoid.[71]

Another justification for a finding of insufficient good faith is the person's "parking" documents in a foreign state that has a blocking law to frustrate discovery in future litiga-

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finding an antitrust cause of action would have had a chilling effect on the exercise of the railroad's First Amendment rights to petition the government officials under the Constitution.

70. Restatement (Revised No. 2), *supra* note 3, § 419 reporters' note 1.

71. *See generally,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

tion.[72] Certainly, removing responsive documents from the United States after notice of a discovery request or investigative subpoena has been received, even without a document preservation order in place, is misconduct. But what if the documents originated in the foreign jurisdiction and involve sensitive commercial and political information which is subject to greater safeguards of confidentiality under the foreign state's law? Is it misconduct to take explicit steps to keep the documents there and not let them come to the United States affiliate or parent as other documents routinely would? It should not be. A contrary rule would undermine valid foreign interests and would be inconsistent with conduct we would permit our resident companies to engage in. Would the U.S. government not approve of American enterprises keeping in the United States and out of the Middle East documents identifying suppliers of components for U.S. assembly of finished goods for shipment to the Middle East that are blacklisted by the Arab boycott?

Good faith is wrongly made only a one way street pointing in the direction of the party possessing the information, regardless of the conduct of the party seeking it. This is a matter of special concern in criminal enforcement. There are a number of bilateral criminal assistance agreements in place between the United States and friendly states which have blocking legislation.[73] As the product of an explicit, bargained-for joint agreement, they are not subject to the same objection of infringing foreign sovereignty as is unilateral U.S. discovery. One common element in these agreements is a requirement that the U.S. enforcement officials give some explanation of the nature of the criminal investigations, and some justification for the necessity of the foreign discovery.[74] If U.S.

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72. A leading case in an analogous domestic context is United States v. Fruchtman, 421 F.2d 1019 (6th Cir. 1970), *cert. denied*, 400 U.S. 849 (1970), in which the defendant had submitted false invoices purporting to show steel sales to Canadian companies to hide evidence of illegal price discounts.

73. *See, e.g.*, Switzerland - U.S.: Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, *reprinted in* 22 I.L.M. 1 (1983).

74. Compare the gentleman's agreement between the United States and the Cayman Islands as set forth in a letter from D.H. Foster, acting Governor of the Cayman Islands to Michael Carpenter, Consul General,

officials are unwilling to provide this much initial explanation, the information may not be forthcoming. Sometimes, U.S. officials have claimed they are constrained by the rule of grand jury secrecy from giving this explanation. However, where foreign governments do not require actual grand jury testimony, names of witnesses, or the contents of documents before the grand jury, this is a dubious excuse. If U.S. law enforcement officials have failed to meet their disclosure obligtations under bilateral understandings, should enterprises caught in the middle between conflicting discovery directions be penalized? At the very least, insufficient good faith by U.S. prosecutors should be a proper subject for inquiry. The absence of a sufficient good faith effort on their part should be a heavy factor in the balancing process.

In civil proceedings, where few bilateral agreements are in place, it may be quite reasonable to employ foreign judicial assistance procedures to avoid conflict. The United States has ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which encourages the use of these procedures.[75] Unless use of the Convention will be totally unavailing, it should be the means of first resort for obtaining foreign civil discovery from signatory nations.[76]

United States Embassy, Kingston, Jamaica (Oct. 5, 1982) (copy on file at J. INT'L L. & POL.). The letter establishes procedures for considering U.S. government requests for information protected under Cayman Island confidentiality laws. Under the agreement's procedures, the U.S. government must include with the information requests "such supporting documentary evidence and affidavits as are necessary to establish that the requests are in connection with [i]nquiries into a criminal offence which is such both under the laws of the United States and of the Cayman Islands, other than a tax offence." *Id.* at 1.

75. *See* Hague Convention *supra* note 13.

76. Once again, the Supreme Court has failed to clarify important open issues on foreign discovery presented to it. In Volkswagenwerk A.G. v. Falzon, *appeal dismissed*, No. 82-1888, 52 U.S.L.W. 3609 (U.S. Feb. 21, 1984), the Court rejected an appeal challenging a Michigan state court order that the plaintiff take depositions of the defendant's employees in Germany, notwithstanding the Hague Convention. The Solicitor General, in an *amicus* brief, invited the Court not to hear the appeal. The brief did so even though it concluded that the Michigan court had erred in ordering the foreign depositions in violations of the Convention. Brief for the United States as *Amicus Curiae* at 4-11 (copy on file at offices of N.Y.U. J. INT'L L. & POL.). However, the Solicitor General stated that the Department of State will instruct its consular officials in Germany not to conduct depositions as

Section 420(2)(b) and (c) distinguish between serious and mild sanctions imposed under Rule 37 against a party failing to comply with the production order. Section (b) is both reasonable and consistent with most existing law other than, at present, that in the 11th Circuit.[77] However, subsection (c) improperly permits drawing adverse inferences of fact against the non-complying party *at a pre-trial state of litigation,* even when that party was acting in good faith—if the information remains blocked. That seems to go well beyond the point reached by the Supreme Court in *Societe Internationale.*[78] As the Reporters tell us in Note 5 to Section 420, the Supreme Court merely observed there

> that in the absence of complete disclosure . . . the District Court would be justified in drawing inferences unfavorable to . . . [a party] as to particular events . . . . But these problems go to the adequacy of . . . proof and should not on this record preclude . . . [a party] from being able to contest on the merits.[79]

Adverse findings of fact made before trial may be tantamount to partial summary judgment, or even to default. Good faith conduct by one in the middle should not be penalized even to this extent because of a dispute between sovereign states. Noting that general principles cannot justify denial of a party's fair day in court, except upon serious willful default, Wright and Miller conclude that the courts generally

> have exercised their discretion in a fashion intended to encourage discovery rather than simply to punish for failure to make discovery.[80]

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ordered by the Michigan court. *Id.* at 11. This will moot the threat of a violation of the Convention. *Id.* The Court followed the Solicitor General's advice.

77. *In re* Grand Jury Proceedings (United States v. Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982), *cert. denied,* 103 S. Ct. 3086 (1983); *In re* Grand Jury Proceedings (United States v. Bank of Nova Scotia), No. 83-1 (WPB) (S.D. Fla. Feb. 28, 1984).

78. 357 U.S. at 212.

79. Restatement (Revised No. 2), *supra* note 3, § 420 Reporters' note 5.

80. 8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2284, at 772 (1970). Comment f to § 420 of the Restatement (Revised)

The Revised Restatement should reflect this principle more strongly.

The problem with Section 420, the reason for withholding the third cheer for the present,is that it institutionalizes a bias in the balancing against foreign laws that block discovery. These laws, according to the Reporters, are generally entitled to less deference because their main purpose is to frustrate the necessarily reasonable and paramount U.S. goal of adjudicating disputes "on the basis of the best information available."[81]

How can that be squared with the following facts: (1) Foreign governments and most foreign scholars view U.S. foreign discovery as a violation of international law; (2) No other nation engages in the same kind of discovery as we do; (3) We block foreign discovery aimed at getting certain information from within our borders; and (4) The United States government, in 1972, ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[82] That Convention, which has been ratified by sixteen nations, expressly provides that a signatory state may legitimately refuse to give a foreign court or enforcement agency access to evidence located within its territory.[83] If a foreign government objects to a United States law enforcement agency or court going forward with a proceeding it finds hostile to its vital sovereign interests, and the U.S. authorities have disregarded these interests, what other form of resistance does that govern-

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says that a decision to impose a contempt or dismissal sanction for willful noncompliance may be subject to a right of appeal as a final order. However, "a finding with respect to a fact or set of facts will not ordinarily be subject to appeal, except by leave of the court, until judgment is rendered in the action." *Id.* If adverse findings of fact are to be permitted, it should be recognized that they may sometimes be as outcome determinative as penal orders of contempt or default. Accordingly, there should be a right of appeal, without the court's leave, with respect to adverse findings that are or may be determinative of key claims, defenses and issues in the litigation. This is crucial where such adverse findings are made at a sanctions hearing. Ideally, adverse factual inferences that may determine the issue of liability should be appealable before trial of the issue of damages, where the two issues are tried separately.

81. Restatement (Revised No. 2), *supra* note 3, § 420, Reporters' note 4.

82. *See* Hague Convention, *supra* note 13.

83. *Id.* arts. 11, 12(b), 23 U.S.T. at 2562-63, 2568.

ment have but to block foreign discovery? To suggest that this type of blocking is suspicious or tainted evinces the very U.S. parochialism that properly worries our foreign friends.

Perhaps the balancing could be fairer if we recognized a jurisdictional golden rule as fundamental to a resolution of sovereign conflicts: "Do unto other states as you would have them do unto us." Would we let a German court punish a U.S. bank for failing to produce records in Germany from its New York office in violation of an order not to produce based on a Federal Executive Order relating to classified documents, and issued by a Federal District Court in New York City? These authors think not. For that very reason, we should not do so in an analogous reverse situation. Such a jurisdictional golden rule is missing from the principle of reasonableness.

One might ask whether the function of a restatement is to correct erroneous lower court decisions, harmonizing United States and foreign law in a way different from some recent precedents. Where, as here, the United States is so clearly out of step with the laws of other developed democracies, Congress has not demonstrated a clear purpose to exercise U.S. enforcement jurisdiction beyond the limits permitted by international law, and the Supreme Court has refrained from speaking on these issues, the answer is yes.

Section 420 contains much to be praised. The Restatement Reporters have already accomplished great things in the sweep and depth of their pending draft. This paper seeks to praise and encourage the Reporters' labor, not to bury it. Happily, there is time, and they seem willing to consider constructive criticism. We look forward to giving voice to a full-throated "three cheers" when their labor is complete.