

Notes

The Need for a Refined Balancing Approach When American Discovery Orders Demand the Violation of Foreign Law

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I. Introduction

The English judge Lord Denning famously said, “As a moth is drawn to the light, so is a litigant drawn to the United States.”¹ There are a number of reasons for this attraction to the American courts: attorneys fees are not a deterrent for plaintiffs filing suit because of contingency-fee structuring; plaintiffs are not required to pay the opposing party’s attorneys fees if they lose; and plaintiffs have the right to a trial by jury, juries being notorious for awarding very high damages.² Another distinguishing factor that Lord Denning did not mention, however, is the discovery process in the United States. American courts allow for a much broader discovery process in which parties seeking information only must show that their request is “reasonably calculated to lead to the discovery of admissible evidence,”³ as opposed to systems such as England’s that require a higher degree of relevance and systems such as France’s where the judge (not the parties) plays the central role in requesting discovery.⁴

These differences have been particularly controversial when parties seek information that is located abroad, as foreign governments feel that broad American discovery orders are an intrusion on their sovereignty.⁵ As stated in the reporters’ notes of the Restatement (Third) of the Foreign Relations Law of the United States, “No aspect of the extension of the

1. *Smith Kline & French Labs. Ltd. v. Bloch* 1 [1983] 2 All E.R. 72, 74 (Ct. App. 1983) (U.K.).

2. *Id.*

3. See FED. R. CIV. P. 26(b)(1) (“Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”).

4. Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431, 443 (2004).

5. Lenore B. Browne, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1320 (1983).

American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.”⁶ In response to this friction, some foreign countries have established blocking statutes that attach criminal liability to the disclosure of certain information located in those countries.⁷

This Note will focus on discovery orders from United States federal courts that not only require the disclosure of information located abroad, but also require a litigant to violate foreign law by producing that information. This is a two-step process, because the “American court must decide first whether to make an order compelling discovery and second whether non-compliance with an order should be enforced through sanctions under Rule 37 of the Federal Rules of Civil Procedure.”⁸

A federal court’s decision of whether or not to compel discovery and issue sanctions for noncompliance affects the various competing interests of the party seeking discovery, the withholding party, the United States, and the foreign country whose laws prohibit disclosure. If the American court issues an order compelling discovery and issues sanctions if the order is not met, then the withholding party faces the unfortunate catch-22 of choosing between facing criminal liability in the country where the information is held or suffering sanctions that would destroy its chances of winning high-stakes litigation.⁹ Moreover, such an order can be highly offensive to another country because it impedes its sovereignty and disregards its laws and legal system.¹⁰ Also, blocking statutes, such as bank-secrecy laws, can be vital to foreign economies since the confidentiality benefit attracts businesses and investors.¹¹

Nonetheless, there are also significant consequences if an American court chooses not to compel discovery or issue sanctions. In these cases, the party seeking discovery abroad may be put at an unfair disadvantage if it does not have the same excuse to avoid discovery as the opposing party.¹² This disparity can be costly because billions of dollars are often on the line and discovery is crucial in many cases.¹³ Also, by establishing different standards for litigants who have information abroad and litigants who have all of

6. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 reporters’ note 1 (1987).

7. *Id.*

8. David E. Teitelbaum, Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 841–42 (1986). Federal Rule of Civil Procedure 37(a)(3)(A) states: “If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.”

9. Teitelbaum, *supra* note 8, at 850–51.

10. Browne, *supra* note 5, at 1320.

11. See Carter Dougherty, *Trying To Get the Swiss To Talk: Scandal Has Prompted Calls for More Banking Transparency*, N.Y. TIMES, Mar. 29, 2008, at C1 (“[Switzerland] has always loomed large in the global imagination as the place where the wealthy stash their money beyond the tax man’s reach. The best estimates suggest that image is true, to the tune of \$1 trillion to \$2 trillion.”).

12. Teitelbaum, *supra* note 8, at 872.

13. *Id.* at 842.

their information in the United States, courts could potentially create an un-level playing field. Companies with all of their information in the United States would face higher risks in litigation and the higher insurance premiums that attach to those risks.

Furthermore, the United States government has an interest in compelling disclosure. The laws of discovery are an important aspect of the U.S. legal system, and persons who “bring themselves within United States jurisdiction to prescribe and to adjudicate, are subject to the burdens as well as the benefits of United States law.”¹⁴ Additionally, the effective litigation of the substantive law involved in a case can also be of vital interest to the United States.¹⁵ It is well understood that “legislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intended to damage the protected interests within the territory.”¹⁶

While it is unlikely that all of these interests can be satisfied absent agreements and treaties with other countries, American courts can and must address the issue in the most just and balanced way possible. Part II of this Note discusses approaches that American courts now take in tackling this situation. It addresses the different methods courts have employed in deciding whether to issue orders to compel, as well as different sanctions that courts have issued for noncompliance. In Part III, I analyze these approaches, as well as other approaches proffered by academics. In Part IV, I argue that the optimal approach is one that focuses on narrow, preliminary procedural factors in determining whether to issue a discovery order and focuses on broader fairness and national-interest factors in determining whether to issue sanctions for noncompliance. This refined balancing approach would be the most fair to the individual parties and also give courts the flexibility they need in dealing with dramatically different cases. I also apply the refined approach to a case that is currently pending in the Eastern District of New York—*Linde v. Arab Bank, PLC*.¹⁷ Finally, in Part V, I recognize the limits of this judicial solution, but also suggest two alternatives that involve the other branches of government. Specifically, I suggest that the courts solicit comment from the Executive Branch and foreign governments to better understand our national interests, and that the Executive Branch cooperate with foreign governments to establish information-sharing agreements to prevent this kind of conflict before it starts.

14. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 reporters' note 1 (1987).

15. See, e.g., *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir. 1981) (describing the government's interest in fully adjudicating tax fraud); *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 214–18 (E.D.N.Y. 2007) (explaining the strong interest the United States has in fully adjudicating the Antiterrorism Act).

16. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984).

17. 384 F. Supp. 2d 571 (E.D.N.Y. 2005) (order denying in part defendant Arab Bank's motions to dismiss).

II. Federal Court Approaches: From *Société Internationale* to Today

A. *The Starting Point: Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*

Any discussion of U.S. discovery orders that require litigants to violate foreign law must start with the landmark 1958 Supreme Court decision in *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*.¹⁸ In that case, the district court dismissed the plaintiff's complaint due to noncompliance with a pretrial production order that would have required the production of materials located abroad.¹⁹ The Court narrowly held that this was error because dismissal is not authorized when it is established that a "petitioner's noncompliance with a pretrial production order . . . has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."²⁰

Just as important as what the Court held in this matter is what the Court did *not* hold. Despite denying the sanction of dismissal, the Court noted that the district court still possessed wide latitude in adjudicating the case on remand and could draw unfavorable inferences over the missing documents.²¹ The Court did not hold that all sanctions are inappropriate when a nondisclosing litigant carries its burden of establishing good faith. Moreover, the Court limited its holding to the facts of the case under the Trading with the Enemy Act and noted that the discovery rule is "sufficiently flexible to be adapted to the exigencies of particular litigation."²² The Court did not give specific guidance to lower courts about how to determine good faith or how to determine appropriate sanctions. Thus, the opinion has led to an array of various lower-court approaches in dealing with nonproduction when foreign law prohibits disclosure.

B. *Second Circuit Decisions Post-Société Internationale: The International-Comity Approach*

In three cases following *Société Internationale*, the Second Circuit ruled that production should not be ordered when it would violate foreign law.²³ In

18. 357 U.S. 197 (1958).

19. *Id.* at 197.

20. *Id.* at 212.

21. *Id.* at 212–13.

22. *Id.* at 206.

23. See *In re Chase Manhattan Bank*, 297 F.2d 611, 612–13 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149, 152–53 (2d Cir. 1960); *First Nat'l City Bank v. IRS*, 271 F.2d 616, 619 (2d Cir. 1959). It should be noted that the withholding parties in all three cases were third parties and not direct parties to the litigation. *Chase Manhattan Bank*, 297 F.2d at 611–12; *Ings*, 282 F.2d at 150; *First Nat'l City Bank*, 271 F.2d at 618. While the courts took this fact into consideration, it was not dispositive—the international-comity approach is not conditioned upon the withholding party not being a plaintiff or defendant in the case. *Chase Manhattan Bank*, 297 F.2d at 613; *Ings*, 282 F.2d at 152–53; *First Nat'l City Bank*, 271 F.2d at 619.

the first case, *First National City Bank v. IRS*,²⁴ the IRS sought banking records relating to a Panamanian corporation that was under a tax investigation.²⁵ The court ordered the corporation to produce the documents, but made clear that if the production of the banking records would require the violation of Panamanian law, “we should agree that the production of the Panama records should not be ordered.”²⁶ The Second Circuit followed this dictum in *Ings v. Ferguson*²⁷ when it stated, “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.”²⁸ In both *Ings* and *In re Chase Manhattan Bank*,²⁹ a third case decided by the Second Circuit during this period, the court refused to order the production of the documents based on this principle.

Although it was not the decisive issue in *Société Internationale* (which was decided only one year before *First National City Bank*), international comity³⁰ is the central element in all three Second Circuit cases. The court focused on the “elementary principle of jurisdiction . . . that the processes of the courts of any sovereign state cannot cross international boundary lines and be enforced in a foreign country.”³¹ Moreover, the court noted its “obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own.”³² The decisions were designed with the utmost regard for international relations, requiring United States courts to respect foreign laws and to utilize letters rogatory for obtaining information from other friendly countries.³³ While courts continued to recognize the value in the principle of international comity, they chose

24. 271 F.2d at 616.

25. *Id.* at 618.

26. *Id.* at 619.

27. *Ings*, 282 F.2d at 152–53.

28. *Id.* at 152.

29. *In re Chase Manhattan Bank*, 297 F.2d 611, 612–13 (2d Cir. 1962).

30. While international comity is a somewhat vague concept, it has been most famously defined by Justice Gray:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it 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.

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

31. *Ings*, 282 F.2d at 151.

32. *Chase Manhattan Bank*, 297 F.2d at 613.

33. *See id.* (leaving the subpoena intact to ensure ongoing cooperation with the government, but requiring production only if the government could secure authorization from the Panamanian government); *Ings*, 282 F.2d at 151–53 (honoring the custom of using letters rogatory to obtain evidence outside of the country, thereby deferring on the issue of compliance with Canadian law to the Canadian courts themselves); *First Nat’l City Bank v. IRS*, 271 F.2d 616, 619–20 (2d Cir. 1962) (compelling production because the court was unconvinced that Panamanian law forbade compliance).

to no longer make comity the decisive factor in the determination of whether to compel extraterritorial discovery in cases following *Chase Manhattan Bank*.³⁴

C. *The Emergence of Balancing Tests*

International comity was simply not a sufficient principle to guide American courts in dealing with compelling the production of information that requires a party to violate foreign law. By relying solely on the international-comity principle, courts overlooked both fairness to individual litigants and the vital interests of America in its own substantive law.

The international-comity approach was noble in recognizing the double bind facing litigants of whether to subject themselves to criminal liability under foreign law by disclosing information or whether to concede high-stakes litigation by abiding by the foreign laws and not disclosing. Nonetheless, the approach ignored the effect that deference to foreign sovereigns would have on the litigants seeking disclosure. This approach created an unlevel playing field, where one litigant was excused from some disclosures because of foreign laws, while the other litigant was required to produce everything. By avoiding an unfair situation for one litigant, the Second Circuit approach created a new unfair situation: the party seeking disclosure could be denied information that was essential to success in extremely expensive litigation.

Furthermore, the international-comity approach gave litigants incentives both to harbor information in countries with laws prohibiting disclosure and to exaggerate the weight of those laws. The rule in these three Second Circuit cases ignored the *Société Internationale* position that sanctions should be imposed when a litigant's conduct fosters the inability to comply with production orders. The international-comity approach was thus incomplete because it did not consider important factors involved in the individual litigation, such as the significance of the information to the litigation, the degree of hardship that the party would realistically face for disclosing information, and the good faith (or bad faith) effort of the nondisclosing party in trying to obtain the information.

Additionally, the Second Circuit international-comity approach ignores interests of the American legal system. With the emergence of a global economy, financial records that are necessary for litigation permeate geopolitical borders. American courts would not be able to exercise their jurisdiction effectively if "the processes of the courts of [one] sovereign state cannot cross international boundary lines and be enforced in a foreign country," as proposed by the Second Circuit in *Ings*.³⁵

34. See *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2nd Cir. 1968) (noting that comity is merely a principle of restraint, not an absolute limit on power and proceeding to use the factors of the Second Restatement of Foreign Relations Law as the basis for its analysis).

35. 282 F.2d at 151.

The Second Circuit comity decisions assert that international procedures, such as the use of letters rogatory, alleviate the problem by fostering cooperation and assistance from other countries;³⁶ however, the national interests of other countries often conflict with those of the United States.³⁷ Accordingly, assistance in disclosure from foreign governments is unlikely. Foreign countries are adverse to American-style discovery procedures³⁸ and would probably act to undermine the broad disclosure process rather than acting to aid it. In fact, the mere requirement of extraterritorial discovery was the impetus for the enactment of many foreign blocking statutes.³⁹ Moreover, foreign countries are adverse to certain aspects of American substantive law—e.g., antitrust law—and would likely act to diminish the United States' ability to adjudicate actions based upon such laws.⁴⁰

In this environment where international comity is already lacking, the reliance on foreign cooperation is more wishful thinking than sound judicial policy. The American judicial system and legal ideologies would be weakened if the courts lacked the necessary information for effective adjudication. Even if foreign governments complied in authorizing discovery through the use of letters rogatory, such a procedure “would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules.”⁴¹

Thus, following the three Second Circuit international-comity cases, U.S. federal courts began taking a more holistic approach to the issue of whether to order discovery and sanctions when such discovery would violate foreign law. Courts began to balance a variety of factors in making their decisions in order to increase fairness to the individual litigants and to better advance American interests in cases where personal jurisdiction had already been established.

1. Restatement (Second) of the Foreign Relations Law of the United States § 40: The First Balancing Test.—The first of these holistic balancing approaches emerged in 1965 with the American Law Institute's Restatement

36. *E.g., id.*

37. For example, a country with strict bank-secrecy laws would probably have interests in attracting investors and ensuring privacy, which would conflict with the United States' interest in enforcing tax laws.

38. *See supra* notes 1–11 and accompanying text.

39. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 reporters' note 2 (1965).

40. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 reporters' note 1 (1987) (“To a considerable extent, the hostility to United States discovery practices reflects dislike of aspects of substantive American law, notably United States antitrust law and laws providing for regulation of international shipping.”).

41. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 542 (1987). In this case, the U.S. Supreme Court held that U.S. district courts are not required to first resort to the Hague Convention on the Taking of Evidence Abroad (a treaty calling for the use of letters rogatory) when discovery is sought from a foreign litigant. *Id.*

(Second) of Foreign Relations.⁴² The American Law Institute rejected the Second Circuit international-comity approach in § 39 of the Restatement, stating, “A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.”⁴³ Restatement § 40 declares that in situations where two states have jurisdiction to prescribe laws that require inconsistent conduct upon the part of a person, international law requires each state to consider such factors as:

- vital national interests of each of the states,
- the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- the extent to which the required conduct is to take place in the territory of the other state,
- the nationality of the person, and
- the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.⁴⁴

None of these factors were intended to be determinative for a court in choosing whether or not to exercise jurisdiction; rather, the factors were intended as balancing devices to aid courts’ decision-making processes and to prevent international conflicts of law.⁴⁵

After the publication of the Restatement (Second) of Foreign Relations Law § 40, federal courts immediately began using the balancing approach.⁴⁶ While the Second Circuit was the first court to utilize the Restatement’s balancing approach in *United States v. First National City Bank*,⁴⁷ other circuits also embraced the Restatement approach and continued to apply its balancing test into the early 1990s.⁴⁸

2. *Variations on the Second Restatement Balancing Test.*—While Restatement (Second) of Foreign Relations Law § 40 provided courts with

42. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965). Note that although this was the “second” Restatement of Foreign Relations Law, it was actually the first restatement on the issue. ALI chose to designate it as “second” because of the emergence of other second-edition restatements.

43. *Id.* § 39.

44. *Id.* § 40 (formatting not in original).

45. *Id.* § 40 cmts. (a)–(e).

46. *See, e.g.*, *United States v. First Nat’l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (“In evaluating Citibank’s contention . . . we are aided materially by the rationale of the recent Restatement (2d), Foreign Relations Law of the United States, § 40.”).

47. *Id.*

48. *See, e.g.*, *Reinsurance Co. of America v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1279–80 (7th Cir. 1990); *United States v. First Nat’l Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288 (9th Cir. 1981).

five factors to consider in determining whether to compel discovery, courts have chosen to give little weight to some of those factors and to give weight to other factors not articulated in the Restatement. For instance, in *In re Uranium Antitrust Litigation*,⁴⁹ the Northern District of Illinois used a three-part balancing approach utilizing one of the factors from the Second Restatement—the likelihood of foreign enforcement of sanctions—while adding two new factors: the importance of the policies underlying the U.S. substantive law and the importance of the requested documents to the litigation.⁵⁰ The Fifth Circuit in *United States v. Field*,⁵¹ on the other hand, chose to emphasize the vital interests of each of the states as the decisive factor.⁵²

Second Circuit courts have consistently used a derivation of the Second Restatement § 40 test.⁵³ These courts “have characterized the first two factors—the competing interests of the countries involved and the hardship imposed by compliance—as far more important in the balancing test than the last three.”⁵⁴ In addition to these two factors, Second Circuit courts have also considered as a principal factor the importance of the requested information to the litigation and the good faith of the withholding party in complying.⁵⁵

3. *Restatement (Third) of the Foreign Relations Law of the United States § 442: Adjustments in the Balancing Factors and the Introduction of a Bifurcated Process.*—In 1987, the American Law Institute updated its balancing approach with the publication of a new version of its Restatement of Foreign Relations Law.⁵⁶ Section 442 of the Third Restatement starts out with the same premise articulated in § 39 of the Second Restatement: United States courts may order a person subject to their jurisdiction to produce information, even when that information is located in a foreign country.⁵⁷ The balancing approach in the Third Restatement, however, differs substantially from the Second Restatement balancing approach. The Third Restatement approach uses both a new set of balancing factors and introduces the concept of good faith into a bifurcated process that differentiates between the discovery-order phase and the sanctioning phase.⁵⁸

In the new Restatement, courts are to consider the following factors in choosing whether to order production:

49. 480 F. Supp. 1138 (N.D. Ill. 1979).

50. *Id.* at 1148.

51. 532 F.2d 404 (5th Cir. 1976).

52. *Id.* at 407.

53. *See, e.g.,* *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981).

54. *Minpeco*, 116 F.R.D. at 522.

55. *E.g., id.* at 523.

56. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (1987).

57. *Id.* § 442(1)(a).

58. *Id.* § 442(1)–(2).

- 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.⁵⁹

Perhaps the biggest change in the Restatement (Third) is its bifurcation of the discovery-order phase and the sanctions-order phase. While § 442(1) creates the balancing test for the discovery-order phase, § 442(2) addresses extraterritorial disclosure orders that require a litigant to violate foreign laws and sets forth a framework for analyzing the appropriateness of sanctions in the event of noncompliance.⁶⁰ Section 442(2)(a) explains that, in that situation, “a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available.”⁶¹ Subsections (b) and (c) articulate the *Société Internationale* principles regarding good faith: courts should not impose sanctions of contempt, dismissal, or default judgment when a party acts in good faith,⁶² but courts may make adverse findings of fact in the event of nonproduction, even if a good faith effort has been made.⁶³

Since the Third Restatement was published in 1987, many courts have utilized its approach.⁶⁴ While some courts have used the Third Restatement test on its own,⁶⁵ others have supplemented it with factors from the Second Restatement test. For instance, in *Richmark Corp. v. Timber Falling Consultants*,⁶⁶ the Ninth Circuit undertook the bifurcated Third Restatement approach, but included the extent-of-hardship factor and likelihood-of-

59. *Id.* § 442(1)(c) (list formatting added).

60. *Id.* § 442(1)–(2).

61. *Id.* § 442(2)(a).

62. This includes both a good faith effort in trying to secure permission from foreign authorities and good faith in not deliberately concealing the information in a country with a blocking statute. *Id.* § 442(2)(b)–(c) & cmt. (h).

63. *Id.* § 442(2)(b)–(c).

64. *E.g.*, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.28 (1987); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474–75 (9th Cir. 1992); *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 211 (E.D.N.Y. 2007); *Reino de España v. Am. Bureau of Shipping*, No. CV03-3573, 2005 WL 1813017, at *3 (S.D.N.Y. Aug. 1, 2005); *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 369, 374–75 (N.D. Ill. 2001); *Madanes v. Madanes*, 186 F.R.D. 279, 285–86 (S.D.N.Y. 1999).

65. *See, e.g.*, *Kenneth Warren & Son*, 203 F.R.D. at 374–75; *Madanes*, 186 F.R.D. at 285–86.

66. 959 F.2d 1468 (9th Cir. 1992).

compliance factor in its balancing analysis.⁶⁷ Other courts have supplemented a traditional Second Restatement approach with parts of the Third Restatement; these courts do not bifurcate the discovery-order and sanctions processes, but rather conduct one balancing test that includes factors from both Restatements, as well as the factor of good faith.⁶⁸

D. *The Good Faith Approach*

Instead of balancing a variety of factors, some courts evaluate nonproduction almost exclusively by measuring the good faith of the withholding party.⁶⁹ The good faith approach is based on the underlying holding in *Société Internationale* that extreme sanctions should not be ordered when nonproduction is caused by the inability of a party to produce rather than by a party's bad faith.⁷⁰ In some instances, this means that courts will readily issue discovery orders and then analyze the party's good faith when determining sanctions.⁷¹ This approach is "designed to do justice in the individual situation and to provide a less offensive approach from the international perspective."⁷²

E. *Choice of Sanctions*

If a party does not comply with a discovery order, a court must then decide whether or not to issue a sanction and what the sanction should be. United States federal courts derive this power from Rule 37(b) of the Federal Rules of Civil Procedure. Rule 37(b) states that upon failure to comply with a discovery order, a court may sanction the nondisclosing party by taking certain facts or matters to be established (adverse findings), by refusing to allow the withholding party to make claims or enter matters in evidence, by dismissing the action or issuing a default judgment, by issuing a contempt-

67. *Id.* at 1475–78.

68. This has particularly been the case in Second Circuit court decisions of the past two decades. *See, e.g., Strauss*, 242 F.R.D. at 211; *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 314–15 & n.4 (E.D.N.Y. 2006) (order granting in part and deferring in part plaintiffs' motion to overrule defendant's discovery objections); *Am. Bureau of Shipping*, 2005 WL 1813017, at *3; *Ssangyong Corp. v. Vida Shoes Int'l*, No. CV03-5014, 2004 WL 1125659, at *6–8 (S.D.N.Y. May 20, 2004).

69. *See, e.g., Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1373 (10th Cir. 1978); *CFTC v. Lake Shore Asset Mgmt. Ltd.*, No. 07-3598, 2007 WL 2915647, at *10, *14–17 (N.D. Ill. Oct. 4, 2007); *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 295–96, 304–05 (S.D. Cal. 1981).

70. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958).

71. *See, e.g., Arthur Andersen*, 570 F.2d at 1373 (conducting the good faith inquiry in sanctions phase after discovery had been ordered); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976) ("Foreign law may not control local law [in the discovery phase]. It cannot invalidate an order which local law authorizes.").

72. Teitelbaum, *supra* note 8, at 871.

of-court order, or by ordering the withholding party to pay fees and expenses.⁷³

Courts issuing Rule 37(b) sanctions are, however, constrained by the limits of due process as articulated in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.⁷⁴ Any sanction must be just and must relate specifically to the particular claim that was at issue in the discovery order.⁷⁵ Other opinions have also discussed the importance of sanctions in creating a deterrent effect against future violations of discovery orders.⁷⁶

Courts have ordered each of the Rule 37(b) forms of sanctions (and some courts have chosen not to order sanctions) when dealing with the situation addressed in this Note. The following provides a brief survey of sanctions that have been issued in this situation.

1. Dispositive Sanctions: Dismissal and Default Judgment.—As explained in *Société Internationale*, dismissal and default-judgment sanctions are the most extreme sanctions and must be reserved for instances where nonproduction results from the “willfulness, bad faith, or any fault” of the litigant.⁷⁷ In fact, numerous courts that have found bad faith have also reached the conclusion that dismissal or default judgment is necessary.⁷⁸ The Southern District of New York decision in *United States v. \$188,911.00 in United States Currency*⁷⁹ is representative of the situation required for a court to order dismissal or default judgment. Although this is not an international case, it does show what is typically necessary for a court to arrive at dismissal or default judgment. In that case, the court found “that no lesser sanction [than default judgment] will be effective.”⁸⁰ The judge had given numerous orders compelling discovery, and the claimants consistently and deliberately refused to comply with or sometimes even to respond to the judge’s orders.⁸¹ Since all fault for nonproduction was tied to the claimants and no other equitable option existed, the court issued a default judgment.⁸²

73. FED. R. CIV. P. 37(b)(2).

74. 456 U.S. 694, 705 (1982).

75. *Id.* at 707.

76. *See, e.g.,* Nat’l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976); *Chilcutt v. United States*, 4 F.3d 1313, 1325 (5th Cir. 1993).

77. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958).

78. *See, e.g.,* Am. Home Assurance Co. v. Société Commerciale Toutélectric, 128 Cal. Rptr. 2d 430, 453 (Cal. Ct. App. 2002) (upholding the trial court’s discretion in striking a French corporation’s answer and reaching default judgment).

79. *United States v. \$188,911.00 in U.S. Currency*, No. CV03-0382, 2005 WL 2446232, at *1–4 (S.D.N.Y. Oct. 4, 2005).

80. *Id.* at *4, *1–4.

81. *Id.* at *2–3.

82. *Id.* at *4.

2. *Evidentiary Sanctions: Adverse Findings of Fact and Preclusion Orders.*—The second harshest classification of sanctions articulated in Rule 37(b)(2) allows courts to take facts as established in favor of the party seeking disclosure or to preclude statements of fact or law by the withholding party.⁸³ The Supreme Court in *Société Internationale* alluded to this situation by providing 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.”⁸⁴

This approach is especially effective when the court and parties already have an understanding about the nature of the withheld information. It goes directly to the merits of the case by specifically addressing the problem of absence of information by creating a presumption (or more) against the nonproducer.⁸⁵ Courts, particularly those in the Ninth Circuit, have used this approach in situations where the nonproducing party’s good faith has been ambiguous,⁸⁶ and in situations where a balancing test decisively favors sanctions.⁸⁷ In *General Atomic Co. v. Exxon Nuclear Co.*⁸⁸ the district court found that the nonproducing party made a good faith effort to secure documents from the Canadian government, but intentionally housed its cartel documents in Canada to avoid disclosure in uranium antitrust litigation.⁸⁹ Based “upon an evaluation of the nature of prejudice to the discovering party and the degree of fault of the non-producing party,” the court held that designated facts should be presumed and precluded the admission of evidence relating to the withheld information.⁹⁰

The harshness of these evidentiary sanctions can vary greatly. Courts can take designated facts to be established or merely presumed subject to rebuttal. Courts can preclude the admission of a small category of evidence or preclude the admission of a wide scope of evidence. The sanction’s degree of severity depends on the specific court order and the nature of the situation.

83. See FED. R. CIV. P. 37(b)(2)(A)(i) (allowing for an order “directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims”); FED. R. CIV. P. 37(b)(2)(A)(ii) (allowing for an order “prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence”).

84. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 213 (1958).

85. Teitelbaum, *supra* note 8, at 886.

86. See, e.g., *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 308 (S.D. Cal. 1981) (electing to create a presumption in Exxon’s favor after General Atomic was unable to comply with the court’s discovery order).

87. See, e.g., *United States v. Vetco Inc.*, 691 F.2d 1281, 1288–91 (9th Cir. 1981).

88. *General Atomic Co.*, 90 F.R.D. at 296.

89. *Id.*

90. *Id.* at 307.

3. *Contempt Orders*.—Rule 37(b) also allows courts to treat the failure to comply with a discovery order as a contempt of court.⁹¹ Contempt orders usually require the party to pay a drastic daily or weekly fine to the court—e.g., \$10,000 per day—until the order is complied with.⁹² Contempt sanctions are used for the purpose of coercing good faith efforts to comply with discovery orders.⁹³ Thus, the decision to issue a contempt order hinges almost exclusively on a party's good faith and is premised on the fact that the withholding party has the ability to produce the information, even if such production might result in the violation of foreign law.

In *Richmark*⁹⁴ and two Eleventh Circuit grand jury cases,⁹⁵ the courts affirmed contempt sanctions. In two of those cases, the courts found good faith to be lacking on the part of the withholding party.⁹⁶ These cases contrast with *In re Sealed Case*⁹⁷ and *In re Westinghouse Electric Corp. Uranium Contracts Litigation*,⁹⁸ where the D.C. Circuit and Tenth Circuit, respectively, found that the withholding parties had made good faith efforts to produce available information and seek waivers. In *In re Sealed Case*, the D.C. Circuit court explicitly distinguished the case from *Bank of Nova Scotia*, both because of the good faith question and because there was no doubt that enforcement of the contempt order would require the violation of foreign laws in the case at hand.⁹⁹ In the *Westinghouse* case, the Tenth Circuit emphasized that the contempt sanction was unwarranted because the nonproducing party requested exemption and waiver from the Canadian government in a timely fashion.¹⁰⁰

Like the evidentiary sanctions discussed above, these monetary contempt sanctions are also highly dependent on the specific facts of the case. For instance, while a \$200-per-day fine might be appropriate against a tax evader in the Cayman Islands,¹⁰¹ a \$10,000-per-day fine might be appropriate against a large Chinese corporation.¹⁰² When the sanctions are

91. FED. R. CIV. P. 37(b)(2)(A)(vii).

92. *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1482 (9th Cir. 1992) (upholding a \$10,000-per-day contempt order).

93. *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 982 (11th Cir. 1986).

94. 959 F.2d at 1471.

95. *See United States v. Bowe (In re Grand Jury Proceedings)*, 694 F.2d 1256, 1257 (11th Cir. 1982); *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings)*, 691 F.2d 1384, 1385–86 (11th Cir. 1982). For a more detailed discussion of *Richmark*, see notes 105–10 and accompanying text.

96. *See Bank of Nova Scotia*, 691 F.2d at 1389; *Richmark*, 959 F.2d at 1479.

97. 825 F.2d 494 (D.C. Cir. 1987).

98. 563 F.2d 992 (10th Cir. 1977).

99. *Bank of Nova Scotia*, 825 F.2d at 498.

100. *Westinghouse*, 563 F.2d at 998. The court also based its decision on other balancing factors, such as the fact that the information was not crucial to the litigation. *Id.* at 999.

101. *See United States v. Bowe (In re Grand Jury Proceedings)*, 694 F.2d 1256, 1257 (11th Cir. 1982) (imposing such a penalty on a Bahamian attorney).

102. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1482–83 (9th Cir. 1992) (upholding the district court's imposition of a \$10,000-per-day fine on the Beijing Ever

tailored properly, they can be effective at compelling production and at deterring future noncompliance.¹⁰³

4. *Fees and Expenses.*—Rule 37(b) also mandates that courts order the disobedient party (or its counsel) “to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.”¹⁰⁴ Courts have followed this procedure,¹⁰⁵ but the rule clearly does not have the coercive force of contempt sanctions or evidentiary sanctions in compelling discovery.

III. Analyzing the Balancing and Good Faith Approaches

While the international-comity approach is no longer used by courts for reasons described in subpart I(C) of this Note, the use of balancing tests and good faith inquiries is still prevalent today. Many courts and commentators have criticized both the balancing approach suggested by the Restatements and the good faith approach endorsed by many courts. The Restatement balancing approach is often referred to as unworkable and outside the expertise of the judiciary, while the good faith approach is ambiguous and unfair to the individual litigants. In subpart III(A), I will discuss these criticisms of the status quo policies, and in subpart II(B), I will evaluate proposed alternatives.

A. *Critiques of the Status Quo Approaches*

1. *Problems with the Restatement Balancing Tests.*—While many courts use the Second or Third Restatement as a guide to dealing with the situation where disclosure requires the violation of foreign law, these courts have not all been satisfied with the approach.¹⁰⁶ The Restatements provide factors for the courts to consider, but provide little guidance in prescribing how much weight to afford each factor or how to assess situations where different factors favor different results. In this regard, courts have referred to the operation of the Second Restatement balancing test as a “ridiculous

Bright Industrial Company, even though the fine total had grown to exceed the entire judgment in the case).

103. See Teitelbaum, *supra* note 8, at 888–89 (noting that the contempt sanction in the Eleventh Circuit case successfully coerced the production of documents located in the Bahamas and that Bank of Nova Scotia willingly complied in subsequent litigation).

104. FED. R. CIV. P. 37(b)(2)(C).

105. See, e.g., *Estates of Ungar v. Palestinian Auth.*, 325 F. Supp. 2d 15, 25–26 (D.R.I. 2004) (upholding an award of attorneys fees as a separate discovery sanction).

106. See, e.g., *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (discussing the unworkability of the Restatement balancing approach).

assignment”¹⁰⁷ and as “inherently unworkable.”¹⁰⁸ As Judge Easterbrook of the Seventh Circuit put it:

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.¹⁰⁹

Much of the criticism over the balancing tests derives from the factor in the Second Restatement requiring the courts to assess “vital national interests” and the factor in the Third Restatement requiring the courts to consider the extent to which noncompliance would undermine United States and foreign interests.¹¹⁰ Similarly, measuring the extent of hardship for the nonproducing party has also been criticized as impossible.¹¹¹

In addition to problems with balancing itself, other commentators have criticized the Restatement approaches for yielding too much to foreign law and for providing litigants with documents located abroad an unfair advantage over litigants with documents in the United States.¹¹² These commentators argue that parties seeking extraterritorial disclosure must meet a heightened standard of relevancy in discovery because the Restatements include balancing factors such as “the importance to the . . . litigation of the documents” and “the availability of alternative means of securing the information.”¹¹³ As noted in the comments to the Third Restatement, the court “should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States.”¹¹⁴ While American courts require heightened scrutiny for discovery in other instances (i.e., pursuant to motions for limitations and motions for protective orders), those instances of heightened scrutiny are established out of concern for efficiency and fairness to the litigants, and not out of deference to foreign

107. See *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990).

108. See, e.g., *Uranium Antitrust Litigation*, 480 F. Supp. at 1148.

109. *Reinsurance Co. of America*, 902 F.2d at 1283 (Easterbrook, J., concurring).

110. Courts and commentators believe that balancing these interests is a political question that the judicial branch lacks the knowledge and jurisdiction to answer. As stated in *In re Uranium Antitrust Litigation*, “[T]he judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country.” 480 F. Supp. at 1148.

111. Teitelbaum, *supra* note 8, at 863–64.

112. See Karen A. Feagle, *Extraterritorial Discovery: A Social Contract Perspective*, 7 DUKE J. COMP. & INT’L L. 297, 308–09 (1996) (“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.”).

113. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1) (1987); see Feagle, *supra* note 112, at 308, 308–09 (concluding that § 442 of the Third Restatement creates “a heightened standard of relevancy for all requests for extraterritorial discovery”).

114. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 cmt. (a) (1987).

sovereigns.¹¹⁵ Thus, “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.”¹¹⁶

2. *Problems with the Good Faith Approach.*—Some commentators advocate that in evaluating nonproduction, courts should engage solely in an analysis of the nonproducing party’s good faith efforts to secure the information in order to avoid the vagueness and inconsistencies inherent in the Restatement balancing approaches.¹¹⁷ Nonetheless, reliance on a mere good faith test can also be very problematic for judicial decision making.

First, the approach is narrow-minded in that it simply ignores many relevant facts and can result in injustice. For instance, a party that makes a good faith effort to secure a waiver from a foreign government could be excused from producing information that is crucial to a multibillion-dollar lawsuit, even though the criminal sanctions they would face in another country by complying with a discovery order would only be a one-thousand-dollar fine. Furthermore, by only analyzing a nonproducing party’s good faith efforts, courts would ignore the good faith of the other party in constructing a legitimate discovery request. A court could sanction a nonproducing party for not making an affirmative showing of good faith, even though that party was faced with a burdensome discovery request and even though the same information could have been obtained through alternative means. Moreover, the strict good faith analysis could ignore fundamental American interests (in areas such as combating terrorism) for the sole reason that a foreign country passed legislation combating U.S. discovery.

Second, this strict good faith approach can be especially unfair to the party requesting discovery.¹¹⁸ As long as a nonproducing party can show good faith, the requesting party faces the burden of the absence of evidence and must prove its case at an evidentiary disadvantage.¹¹⁹ Therefore, despite “the fact that the United States has guaranteed to all litigants in U.S. courts an opportunity for broad discovery, [it] 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.”¹²⁰

In addition to creating an unfair advantage in the actual litigation, the strict good faith approach also creates an unlevel playing field that extends

115. See Feagle, *supra* note 112, at 309 (analyzing this key feature of the Restatement and contrasting it with other approaches).

116. *Id.*

117. See, e.g., Patrick M. Connorton, Note, *Tracking Terrorist Financing Through SWIFT: When U.S. Subpoenas and Foreign Privacy Law Collide*, 76 *FORDHAM L. REV.* 283, 319 (2007) (“The best approach to orders requiring violation of foreign law is one in which the ordered party’s good or bad faith acts, and not a balancing test, determine the party’s fate.”).

118. Teitelbaum, *supra* note 8, at 872.

119. *Id.*

120. Feagle, *supra* note 112, at 311.

beyond litigation. Lawyers for companies with information solely located in the United States might decide to forego litigation against people with information located abroad because of the lower probability of obtaining information and the risks that courts might provide deference for the withholding party's good faith. This unlevel playing field could also result in companies with information located solely in the United States paying higher insurance premiums than their foreign competitors. For instance, if Toyota and Nissan can delay or avoid discovery requests, but General Motors (GM) and Ford cannot, then it is likely that GM and Ford would have to pay higher products-liability premiums because they would face higher risks of paying damages in lawsuits.

Additionally, the good faith approach can provide an additional reason for foreign governments to pass blocking legislation or, at least, take a stronger position in enforcing their current blocking legislation. If United States courts were committed to not issuing discovery orders or sanctions when a nonproducing party acts in good faith, foreign governments could safely maintain their questionable blocking statutes without having to worry about litigants facing penalties for nondisclosure in the United States: "Foreign governments will have no incentive to grant waiver either, because of the knowledge that their companies will be free of liability if disclosure is refused."¹²¹ Nonproducing parties would no longer need to collude with foreign governments to enforce their blocking statutes; foreign governments could simply assert that their blocking statutes were strictly enforced and be certain that disclosure would be denied in the United States.¹²²

Finally, there are many difficulties involved in assessing good faith. Good faith has various meanings and can be applied in various ways.¹²³ For instance, when a corporation houses documents in a foreign jurisdiction with blocking statutes, it is not always clear whether it does so for good faith business reasons, or simply to avoid American discovery. Similarly, when a corporation seeks waiver from a foreign government's blocking statute, a court has no way of knowing whether a "wink wink" is attached to the waiver request. Good faith is not simply a black-and-white issue. There are many different degrees of good faith; thus, courts applying the good faith approach will encounter many of the same difficulties as courts applying the balancing tests in deciding whether or not to issue discovery orders and sanctions.

B. Proposed Alternatives

In addressing these problems with the balancing and good faith approaches, academics have offered a number of solutions. Each of the

121. Teitelbaum, *supra* note 8, at 873.

122. *Id.*

123. *See supra* notes 117–20 and accompanying text.

proposed alternatives makes changes that fix deficiencies in the current system; however, each alternative also creates new problems for courts—ones that are more detrimental than the problems under the current Third Restatement approach.

1. *The Strict-Application-of-Sanctions Alternative.*—One alternative that has been proposed is for courts to shape their discovery orders with a higher standard of scrutiny and to “without exception” enforce Rule 37 sanctions for noncompliance.¹²⁴ Courts would then determine which—not whether—sanctions would be appropriate based on a case-by-case analysis focusing “on such considerations as good or bad faith of the nonproducer, whether the nonproducer is a litigant or a third party, and whether the stage of discovery would permit evidentiary determinations.”¹²⁵ This strict-sanctions approach is designed to provide “a more balanced analysis of the burden of nonproduction, create[] a basis for long-term negotiation and cooperation, and deter[] future frustration of American law.”¹²⁶ This alternative is deficient, however, because it is antithetical to international comity and is unfair to the nonproducing party.

First, while the approach ostensibly fosters long-run comity by creating an impetus for negotiation between foreign governments and appropriate branches of the U.S. government,¹²⁷ in reality, it would simply be offensive to foreign governments and self-defeating. Unlike both Restatement approaches, the strict-sanctions approach refuses to consider any aspect of a foreign government’s interests in its own secrecy laws, both at the discovery-order phase and at the sanctioning phase. Although courts might generally tend to balance the factors in favor of American interests, the balancing approach at least creates the perception that American courts are not oblivious to the interests of other countries. Foreign governments already find the United States’ broad discovery procedures to be intrusive and self-serving;¹²⁸ by additionally removing the consideration of foreign interests from the evaluation of nonproduction, courts are not likely to encourage positive negotiation from other countries.

Moreover, after the Supreme Court’s ruling in *Société Nationale Industrielle Aérospatiale v. United States District Court*, the value of an international agreement is questionable. By holding that U.S. district courts are not required to first resort to the Hague Convention when deciding whether to issue extraterritorial discovery orders,¹²⁹ the Supreme Court made

124. Teitelbaum, *supra* note 8, at 877.

125. *Id.*

126. *Id.* at 880.

127. *Id.* at 880–81.

128. *See supra* note 5 and accompanying text.

129. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 543–44 (1987).

clear that even when the United States signs international agreements, it is not likely to follow them. Therefore, even if the strict-sanctions approach would provide an impetus for negotiation, foreign governments would be hesitant to sign treaty agreements regarding information gathering with the United States.

The other underlying concern with the strict-sanctions approach is that it is unfair to nonproducing parties who acted in good faith. The strict-sanctions approach creates the possible situation where a litigant does everything within her control to produce the information and seek waiver from a foreign government, but nevertheless faces the double bind of choosing either imprisonment and fines for violating foreign-secrecy laws or U.S. court sanctions that are detrimental to high-stakes litigation.

Despite these deficiencies with the strict-sanctions approach, some might argue that it is still the optimal approach because it would put the issue on the table for negotiation: "Companies would pressure foreign governments to take action, and foreign governments, while initially offended, would be forced to engage in constructive bargaining"¹³⁰ While there may be some truth to this argument, U.S. courts would not be justified in sacrificing fairness to individual litigants for the sake of providing an impetus for treaty negotiation. A court's role is to fairly and effectively adjudicate matters before it. The United States should pressure other countries into negotiating an agreement, but that pressure should come from the political branches and not the courts.

It is true that U.S. courts should seek an approach that considers the ability of a requesting party to access information that is vital to litigation. It is also true "that persons who do business in the United States, or who otherwise bring themselves within United States jurisdiction to prescribe and to adjudicate, are subject to the burdens as well as the benefits of United States law, including the laws on discovery."¹³¹ Although U.S. courts should try to even the playing field by erring on the side of requiring discovery for both parties, it is unjust for the courts to lay down a blanket rule requiring sanctions in every instance of noncompliance.

Facts vary dramatically from case to case. Courts must remain open to the possibility of not issuing sanctions when the fairness gained by the non-producing party would substantially outweigh the fairness lost by the requesting party. Courts should seek an approach that fosters international agreement and "long-run comity," but to do so at the expense of individual litigants would be unjust. Congress grants authority to Article III courts to

130. Teitelbaum, *supra* note 8, at 882; *see also* Jay Lawrence Westbrook, *Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 TEX. INT'L L.J. 71, 85 (1990) (book review) (arguing that the best way to achieve international agreement in transnational-business regulation is by forcing the issue onto the table with aggressive sovereign regulation rather than easing into international consensus through passive nonregulation).

131. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 reporters' note 1 (1987).

adjudicate “cases” and “controversies,”¹³² not to foster international agreements.

2. *The Equal-Judicial-Treatment Alternative.*—Another alternative very similar to the strict-sanctions approach is for U.S. courts to analyze extraterritorial discovery in the exact same way as they analyze discovery located within the United States.¹³³ The underlying principle of this theory is that all litigants should be treated equally, with no advantage given to litigants who have information stored abroad.¹³⁴ All persons engage in a social contract whereby they must abide by their governments’ laws in exchange for certain rights and protections.¹³⁵ Thus, no one within the jurisdiction of the United States should be immune from its discovery laws.¹³⁶

While this approach is philosophically attractive, it ignores the fact that persons can be within the jurisdiction of numerous sovereigns. While a Chinese corporation with minimum contacts in the United States would have a “social contract” with China, it would also have a “social contract” with the United States. With conflicting laws from both countries, it would be unrealistic for the Chinese corporation to abide by its social contract in each case.

Additionally, this theory exacerbates the problems involved with the strict-sanctions approach. In practice, equal judicial treatment would operate in the exact same way as the strict-sanctions approach, except there would be no heightened scrutiny in the discovery-order phase. Thus, for the same reasons described above, the equal-judicial-treatment approach would hinder international comity, unfairly harm the nonproducing party, and ignore relevant factors in individual cases.

3. *The Analytical-Framework Alternative.*—Another proposed alternative to the status quo is the enactment of an analytical framework that would eliminate the vagueness and confusion of a balancing test.¹³⁷ The proposed analytical framework goes as follows:

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

132. U.S. CONST. art. III, § 2.

133. See Feagle, *supra* note 112, at 298.

134. *Id.* at 314.

135. *Id.* at 312.

136. *Id.*

137. See David J. Gerber, *International Discovery After Aérospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT’L L. 521 (1988).

discovery to the extent necessary to avoid unjustified harm to those interests.¹³⁸

While this analytical framework purports to provide courts with a clearer method of handling extraterritorial discovery, it might actually make the courts' task more difficult. First, it is unclear when extraterritorial discovery would violate "United States standards of procedural fairness or established norms of international law."¹³⁹ For instance, the Hague Convention on the Taking of Evidence Abroad (which requires the utilization of letters rogatory when seeking information in another country) is presumably the established norm of international law regarding extraterritorial discovery; yet the United States Supreme Court has already rejected a rule requiring district courts to abide by that Convention.¹⁴⁰ Would courts be able to follow the Supreme Court ruling or would that be a violation of an international norm? Additionally, the only United States standard of procedural fairness specific to the issue is that dismissal and default judgment are inappropriate when nonproduction is due to the inability, and not the willfulness, of the party.¹⁴¹ That standard and the more general procedural standards encompassed in the Federal Rules of Civil Procedure will be enforced by U.S. courts regardless of an analytical framework.

Moreover, allowing the other branches of the U.S. government to issue mandatory requests for the modification of discovery orders is inherently problematic. While balancing vital national interests might be outside of the courts' direct expertise, such balancing is far less of a threat to America's separation-of-powers system than authorizing other branches to modify judicial-procedure orders. Judicial decisions are supposed to be insulated from the other branches, not dictated by the other branches. Also, by only mandating the courts to modify discovery orders when the government makes *reasonable* requests, courts would still have the power to deny modifications they disagreed with based on reasonableness. The approach could therefore result in political disputes within the U.S. government, in addition to political disputes between the U.S. government and foreign sovereigns.

In cases where extraterritorial discovery would not violate standards of procedural fairness and the U.S. government does not request a modification of the discovery order, the analytical framework instructs courts to engage in a modified balancing test.¹⁴² This balancing test would run into the same problems as the Restatement approaches in trying to create consistent, predictable results. By only balancing the importance of the requested in-

138. *Id.* at 531.

139. *Id.*

140. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 533–34 (1987) (declining to hold that comity requires a first resort to Hague procedures).

141. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958).

142. Gerber, *supra* note 137, at 531.

formation with the foreign sovereign's interests, however, this analytical framework provides less of a complete picture than the Restatements. Consequently, this analytical framework would not be an ideal alternative to the current system of handling extraterritorial discovery.

IV. The Solution: A Refinement of the Restatement Balancing Approaches

A. *A Balancing Approach Is Necessary*

Just as Winston Churchill said that “democracy is the worst form of government except all the others that have been tried,”¹⁴³ it can be said that a balancing approach is the worst form of addressing extraterritorial discovery except all the others that have been suggested. The criticisms about the balancing tests being vague are valid: because of the subjectivity involved in weighing contradictory interests against one another, courts could very well reach inconsistent, unpredictable conclusions using the same balancing test.¹⁴⁴ There are no objective numerical values attached to any of the balancing factors; rather, district judges alone have the discretionary power to decide when a factor favors the requesting or nonproducing party and how important that factor should be in the court's analysis.

Nonetheless, this discretionary power is what makes a balancing approach necessary in the evaluation of extraterritorial discovery. The facts from one case to another vary so much that a blanket rule would be inadequate. All balancing tests are inherently somewhat vague and unpredictable, but courts have still chosen to utilize them in various areas of the law because of the flexibility they afford judges to evaluate many different aspects of an issue.¹⁴⁵ This flexibility is especially important when addressing the issue of extraterritorial discovery, which requires the violation of foreign law. Some cases may involve fundamental national interests that cannot be overlooked and minimal concern about a party's good faith. Other cases may not involve vital national interests, but instead extreme concerns of good faith and individual fairness. Because there is such a wide range of cases that raise questions of extraterritorial discovery, judges must have the flexibility of a balancing test to determine what issues should be dispositive.

Although commentators are correct that the vital-national-interests factor can be unworkable, some cases involve clear national interests that

143. Winston S. Churchill, Speech Before the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7566 (Robert Rhodes ed., 1974).

144. See *supra* notes 106–16 and accompanying text.

145. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–35 (2004) (utilizing a balancing approach to determine detainees' rights to a hearing); *Matthews v. Eldridge*, 424 U.S. 319, 321 (1976) (utilizing a balancing approach to determine the right to a pretermination hearing for Social Security benefits).

should not be ignored.¹⁴⁶ In cases where it is unclear whether national interests weigh in favor of disclosure or not, district judges have the ability to underscore that factor and rely on other more relevant ones. The district judges must have the authority to analyze the situations and prioritize the different interests based on the facts of the specific cases.

As the discussion above of the good faith approach and the proposed alternatives demonstrates, only the balancing approach provides district judges the discretion they need in evaluating all of the different interests involved in an extraterritorial-discovery proceeding.

B. *Refinements to the Restatements*

A proper balancing test should inform judges of relevant factors that could arise when handling a certain area of law, so that a judge is instantly aware of the competing interests at stake and can determine a fair and just outcome. The Second Restatement and Third Restatement both make strides in reaching that goal, but their tests could be refined into a single test. To better understand what factors are important at which stage of the discovery process, it is helpful to group the Second and Third Restatement factors into four categories—(1) preliminary procedural factors, (2) fairness factors, (3) national-interest factors, and (4) location factors.¹⁴⁷

In order to increase fairness to all parties involved, the balancing approach should be restructured so that district judges only consider preliminary procedural factors at the discovery-order phase and then balance fairness factors and national-interest factors at the sanctioning phase. Courts should not consider location factors in evaluating the nonproduction of evidence located abroad.

1. *Courts Should Only Consider Preliminary Procedural Factors in Determining Whether to Order Discovery.*—The preliminary procedural factors are those that involve the nature of the discovery request by the party seeking disclosure. While there are no preliminary procedural factors in the Second Restatement, two factors from the Third Restatement should be classified under this category: “the degree of specificity of the request” and “the availability of alternative means of securing the information.”¹⁴⁸

146. See *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 214 (E.D.N.Y. 2007) (noting the strong national interest in combating terrorism).

147. As explained in sections IV(B)(1)–(3), *infra*, preliminary procedural factors include (1) the degree of specificity of the request, and (2) the availability of alternative means of securing the information. Fairness factors include (1) the extent and nature of hardship inconsistent rulings would impose, (2) the importance of the information to the litigation, and (3) a nonproducing party’s good faith in seeking to produce the information. The national-interest factor consists of the vital national interests of each state. The location factors include (1) the extent to which the required conduct is to take place in the other state, (2) the nationality of the person, and (3) whether the information originated in the United States.

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987).

Instead of conducting a balancing test to determine whether or not to issue a discovery order, courts should merely convert these preliminary procedural factors into the two sole requirements for issuing a discovery order. In other words, courts should issue discovery orders for information located in other countries as long as the discovery request is reasonably specific and there are no other reasonable alternatives for securing the information.

Limiting the discovery-order inquiry to these two requirements serves two purposes. First, by following these heightened requirements for extraterritorial discovery, American courts would signal their commitment to international comity to other countries. Although American courts might require the disclosure of information located abroad, these preliminary procedural factors ensure that they would do so in a restrained, nonfrivolous manner. While it is important for U.S. courts to be able to adjudicate effectively, U.S. courts should not intrude upon foreign sovereignty when doing so would be unnecessary.

Second, this more limited discovery-order inquiry would be fairer to the party seeking disclosure. As discussed in subsections II(B)(1) and (2) of this Note, harboring information in countries with blocking statutes can create an unfair advantage for litigants by providing them with an excuse to avoid disclosure. By limiting the discovery order inquiry as proposed, litigants with information in blocking-statute countries would no longer be immune from discovery orders and both litigants would start out on even ground. With a discovery order on the table, a nonproducing party would be more likely to make a concerted effort to disclose the information in order to avoid the possibility of sanctions. Withholding parties with information located abroad might face lighter sanctions for noncompliance in certain situations, but they would be treated nearly identically to domestic parties at the discovery-order phase.

2. Courts Should Balance Fairness Factors and National-Interest Factors at the Sanctioning Phase.—If a discovery order is issued and a litigant does not comply with it, then a district judge should use the second two factors—the fairness factors and the national-interest factors—to determine whether a sanction is appropriate, and if so, what that sanction should be.

“Fairness factors” are those which involve fairness to parties in the individual litigation. Fairness factors include the extent of hardship the nonproducing party would face, the likelihood of criminal sanctions being enforced, the good faith of the nonproducing party, and the importance of the information to the litigation. The first three of those factors deal with fairness to the nonproducing party, while the last factor deals with fairness to the requesting party. As its name suggests, the third category of “national-

interest factors” simply refers to the “vital national interests of each of the states.”¹⁴⁹ These two categories should guide a district judge’s inquiry because they encapsulate all four interests that are at stake in an extraterritorial discovery proceeding: the interests of the party seeking information, the party withholding information, the United States government, and the government of the foreign nation where the information is held.

In determining whether to issue a sanction, courts must only excuse noncompliance when the factors weigh heavily in favor of the nonproducing party. Although this means that a nonproducing party acting in perfectly good faith could be susceptible to sanctions, that unpleasant situation is justified by the fact that the party would not be under the jurisdiction of the U.S. courts unless it were enjoying the benefits of American law.¹⁵⁰ Nevertheless, courts should still have the option to excuse noncompliance in necessary situations where fairness and national interests clearly favor doing so.

The problems involved with this balancing test’s vagueness are solved by the wide choices of sanctions available to district judges. As discussed in subpart I(E) of this Note, different sanctions vary in their degrees of harshness and can be employed effectively in different types of situations. If the factors weigh decisively against the nonproducing party and the nonproducing party consistently refuses to cooperate, dismissal or default judgment could be appropriate.¹⁵¹ If factors weigh in favor of the party requesting disclosure and indicate that a nonproducing party has not acted with the utmost sincerity, then contempt sanctions could be appropriate in coercing compliance.¹⁵² In other cases, a judge might deem that evidentiary sanctions or claim preclusion could be the fairest way to level the playing field.¹⁵³ If the balancing approach is inconclusive and does not strongly favor either of the parties, then rebuttable adverse inferences could be appropriate.¹⁵⁴ District judges have a wide variety of sanctions available and should be able to choose which sanction is appropriate depending on the specific facts of each case.

149. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965). Note that while “vital national interests of each of the states” is the language used in the Second Restatement, these same interests are described in the final factor of § 442(1)(c) of the Third Restatement.

150. See *infra* notes 159–60 and accompanying text.

151. Courts issue default judgments and dismissals when no other equitable options exist. See *supra* notes 77–82 and accompanying text.

152. Courts have at times used contempt sanctions, which can be effective at coercing compliance from parties not acting in complete good faith. See *supra* notes 91–103 and accompanying text.

153. These sanctions are useful in addressing the merits of a case. See *supra* notes 83–90 and accompanying text.

154. See Paul Robert Eckert, Note, *Utilizing the Doctrine of Adverse Inferences When Foreign Illegality Prohibits Discovery: A Proposed Alternative*, 37 WM. & MARY L. REV. 749, 750 (1996) (“[T]he doctrine of adverse inferences provides an intermediate approach for a court to utilize when either the existing tests provide inconclusive results or when factual determinations regarding the secreting of evidence abroad warrant jury deliberation.”).

As explained in subpart IV(A), a balancing approach is necessary to provide judges with the discretion they need in deciding extraterritorial discovery cases. The fairness factors and national-interest factors listed here appropriately identify the competing interests that courts should be aware of in order to make the most equitable decisions.

3. *Courts Should Not Consider Location Factors in Either Phase of the Discovery Process.*—Although judges should use the preliminary procedural factors in determining whether to issue a discovery order, and the fairness and national-interests factors in determining sanctions, the “location factors” should simply be removed from the courts’ inquiry. These location factors include: “the extent to which the required conduct is to take place in the territory of the other state,”¹⁵⁵ “the nationality of the person,”¹⁵⁶ and “whether the information originated in the United States.”¹⁵⁷ As past cases have shown, these factors carry little weight in court and are usually mentioned for the sake of being mentioned.¹⁵⁸ Removing the location factors from the courts’ analysis would not hinder the courts’ ability to consider the totality of factors involved in each case; it would, on the other hand, significantly level the playing field between domestic and foreign litigants.

The first location factor—the extent to which the conduct would take place in another state—is irrelevant because almost every case will simply require the disclosure of information that is located in another state. There is no “conduct” that is required in other countries apart from the mere revealing of documents.

The second factor—the nationality of the person—explicitly should *not* be considered by courts of this country. As explained in section III(A)(2) of this Note, judges should not provide a procedural advantage to a party simply because of its nationality. By giving weight to a party’s nationality, courts create an unfair advantage for the foreign party in the actual litigation by providing them access to more information than the domestic party. Focusing on a party’s nationality also creates an unlevel playing field between foreign and domestic actors that extends beyond the immediate litigation. Domestic companies may choose to forego litigation against foreign wrongdoers because of the added risks involved with territorial

155. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965).

156. *Id.*

157. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987).

158. *See, e.g.,* Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1478 (9th Cir. 1992). Illustrating the unimportance of the location factors, the Ninth Circuit has stated:

The only factors weighing against compelling disclosure are that Beijing has the information in the PRC and may choose not to disclose it in spite of the court’s order. Were these factors alone sufficient, a foreign corporation could avoid its discovery obligations in almost every instance. We therefore conclude that the order compelling discovery should be upheld in spite of the PRC secrecy statute.

Id.

discovery. Domestic companies may also face higher product-liability premiums than their foreign competitors because of their increased risks in litigation.

Jurisdictional laws justify U.S. courts treating foreign litigants on an even par with American litigants. In order for a U.S. court to have personal jurisdiction over a person, that person must at least have minimum contacts with that jurisdiction.¹⁵⁹ “A foreign corporation doing business within the United States reasonably expects that its United States operations will be regulated by United States law.”¹⁶⁰ Because of personal jurisdiction requirements, U.S. courts should not provide foreign litigants with an advantage over American litigants. Both enjoy the benefits of American law, so both should endure the burdens of American procedural law. Furthermore, corporations like Motorola, Volkswagen, Toshiba, and AirBus undertake a wide range of business in the United States and should not be advantaged over corporations like AT&T, Ford, and Boeing just because of their foreign nationalities. Although a harsher balancing scheme may seem unfair to foreign persons or entities who have very minimal contacts in the United States, that is a problem with U.S. personal-jurisdiction law, not with the U.S. approach toward extraterritorial discovery.

Finally, the third factor—whether the information originated in the United States—is also irrelevant, or at least redundant. If the information originated in the United States and was unnaturally moved to another country for the sake of avoiding disclosure, then this fact would be accounted for with the good faith factor. When the fact that information originated in the United States implicates good faith and fairness, then that fact should be balanced, but that fact alone has no relevance in a court’s balancing inquiry.

C. *Application of the Refined Balancing Approach to Linde v. Arab Bank, PLC*

To demonstrate the workability and effectiveness of the refined balancing approach, I will apply it to a case currently pending in the Eastern District of New York, *Linde v. Arab Bank, PLC*.¹⁶¹ The case involves various tort claims by terror victims against Arab Bank, PLC for collecting and paying funds that went to support terrorist attacks in Israel, the West Bank, and Gaza.¹⁶² The court has jurisdiction under the Antiterrorism Act of 1992¹⁶³ (ATA) to provide civil remedies for American nationals injured in

159. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

160. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984).

161. 384 F. Supp. 2d 571 (E.D.N.Y. 2005) (order denying in part defendant Arab Bank’s motions to dismiss).

162. *Id.* at 575–76. Specifically, the terror victims allege that the bank collected money that went to the families of the suicide bombers to compensate them for their acts. *Id.* at 577.

163. Antiterrorism Act of 1992, Pub. L. No. 102-572, 106 Stat. 4522 (1992).

international terrorist attacks.¹⁶⁴ The plaintiffs in *Arab Bank* filed two production requests for bank transactions, which the defendants objected to because they would require the violation of the bank-secrecy laws of Jordan, Lebanon, and the Palestinian Monetary Authority.¹⁶⁵ In his November 25, 2006, decision and order, Judge Pohorelsky applied the Third Restatement analysis and determined that the bank-secrecy laws did not excuse Arab Bank from producing its bank records.¹⁶⁶ He did, however, require the plaintiffs to specify and narrow their second production order, and to provide Arab Bank time to make a good faith effort to seek permission from the foreign authorities to disclose the information.¹⁶⁷

A judge using the refined balancing approach would probably also order discovery conditioned upon the plaintiffs specifying and narrowing their second production order. In the refined approach, courts first evaluate preliminary procedural factors to determine whether to order discovery. For a court to order discovery, the discovery request must be reasonably specific and reasonable alternative means of securing the information must not be available. In this case, there were no reasonable alternative means for obtaining the information.¹⁶⁸ As stated in the ruling, “The transactional and customer information simply cannot be obtained without disclosure of the defendant’s records. The only other sources of most of that information would be customers and other participants in the transactions at issue, and their identities are largely unknown.”¹⁶⁹

Based on the November 25, 2006, decision and order, the first production order appears to be reasonably specific, but the second production order does not. While the first order was “highly specific,” the second order was “broader than it need[ed] to be to satisfy interests of comity.”¹⁷⁰ In light of disclosed information regarding the Saudi Committee (an alleged terrorist financier), the plaintiffs would be able to obtain their needed information with a narrower, more specific discovery request.¹⁷¹ Thus, using the refined balancing approach, the court would not order discovery on the second production request until it was reasonably specific. In this case, relying on the preliminary procedural factors at the discovery-order phase would yield the same results as applying a Third Restatement balancing test.

In the pending litigation, the Eastern District of New York is now between the discovery-order phase and the sanctioning phase. The court has ordered production, but “[b]efore granting the further relief sought by the

164. See 18 U.S.C. § 2333 (2006) (providing a civil remedy in the federal courts for U.S. nationals injured by acts of international terrorism).

165. *Linde*, 463 F. Supp. 2d at 312.

166. *Id.* at 314–17.

167. *Id.* at 316–17.

168. *Id.* at 315.

169. *Id.*

170. *Id.* at 315, 317.

171. *Id.*

plaintiffs on their motion . . . [i]t is appropriate to provide the defendant with [the opportunity to make a good faith effort to seek permission from the foreign authorities to disclose the information].”¹⁷² A court using the refined balancing approach would provide the defendant with that same opportunity. After a sufficient period of time, Arab Bank could either produce the bank records and end the discovery inquiry or not produce the information, and the court would balance fairness factors and national-interest factors to determine sanctions.

A court employing these factors would likely determine that they weigh heavily in favor of the plaintiffs seeking discovery. First, the extent and nature of hardship that the defendants would face from the bank-secrecy laws by disclosing the information is probably slight. Although both parties admit that those laws impose criminal sanctions of fines and incarceration,¹⁷³ it is unlikely that Jordan and Lebanon would enforce the laws in this instance. Both countries “have expressly adopted a policy not to rely on bank secrecy laws as a basis for protecting information relating to money laundering and terrorist financing.”¹⁷⁴ Therefore, the defendant would not likely face a great deal of hardship if it disclosed the transactional records.

The second fairness factor, the importance of the information to the litigation, also favors the plaintiffs because the information is crucial to their case. As stated in the November 25, 2006, decision and order:

Proof concerning the flow of money, if any, from those allegedly funding the payments through the bank to the families of known participants in the attacks is essential to the plaintiffs’ case. Furthermore, because the defendant denies knowing involvement in any such compensation scheme, proof concerning the arrangements for making such payments and the breadth of the payment scheme is also crucial.¹⁷⁵

The third fairness factor, the good faith of the nonproducing party, cannot yet be evaluated because Arab Bank’s efforts in securing permission to disclose the information are unknown and unfinished. The good faith of Arab Bank’s efforts to date is ambiguous. On one hand, Arab Bank has acted in good faith by submitting a motion for the issuance of letters rogatory to the governments of Lebanon, Jordan, and the Palestinian Monetary

172. *Id.* at 316. The court has not yet set a specific date by which Arab Bank must complete its effort. *Linde v. Arab Bank, PLC*, No. 04-2799, 2007 WL 812918, at *2 (E.D.N.Y. Mar. 14, 2007) (order affirming magistrate’s overruling of defendants’ discovery objections).

173. *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310 (E.D.N.Y. 2006) (order granting in part and deferring in part plaintiffs’ motion to overrule defendant’s discovery objections).

174. *Id.* at 315–16. The court noted that Jordan and Lebanon have signed a memorandum of understanding that prioritizes terror claims over bank-secrecy claims. *Id.* at 316 n.5. Memoranda of understanding, like the one involved here, can be effective tools that political branches can use to ease judges’ task of evaluating extraterritorial-discovery issues.

175. *Id.* at 311–12.

Authority regarding the production orders.¹⁷⁶ Moreover, it has gained permission from the Saudi Committee to produce 170,000 transaction records, in addition to producing a large volume of records not implicated by bank-secrecy laws.¹⁷⁷ On the other hand, the nonproduction appears to be willful because the Bank elected to produce the withheld information that falls under the bank-secrecy laws in government investigations by U.S. bank regulators, but elected not to produce the same information in civil litigation. This suggests bad faith—the Bank strategically chose when and when not to disclose its records and was not compelled by any “impossibility” or “inability” imposed by foreign bank-secrecy laws. While there is insufficient evidence to evaluate Arab Bank’s good faith, based on available information, Arab Bank seems to be operating somewhere in the spectrum between good faith and bad faith.

The final factor to be balanced, the national-interest factor, weighs heavily in favor of the requesting party and the United States. When the U.S. interest of fully and fairly adjudicating matters before its courts “is combined with the United States’s goals of combating terrorism, it is elevated ‘to nearly its highest point.’”¹⁷⁸ The ATA is an important governmental tool in both deterring terrorist financing and in providing a remedy for victims of international terrorism.¹⁷⁹ The U.S. interest in uncovering terrorist-financing regimes and combating terrorism outweighs a foreign interest in upholding its sovereignty and maintaining confidentiality for its citizens’ bank records. As discussed above, Jordan and Lebanon have already recognized this hierarchy of interests by adopting a policy to subordinate bank-secrecy laws when they are used to protect information relating to terrorist financing.¹⁸⁰ Thus, the vital-national-interest factor supports upholding the United States’ and requesting party’s interests.

In light of these factors, an evidentiary sanction would probably be the most appropriate action for a court using the refined balancing approach if Arab Bank does not comply with the discovery order. Specifically, this sanction would entail deeming facts established (regarding the flow of money through the bank from financiers to terrorists) and precluding Arab Bank from offering or using the documents it has withheld on bank-secrecy grounds. “When documents are not produced, one of the two parties must bear the burden of that omission,”¹⁸¹ and in this case, it makes sense that Arab Bank bear that burden. An evidentiary sanction would be ideal because

176. *Id.* at 317 n.7.

177. *Id.* at 312–13.

178. *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 214 (E.D.N.Y. 2007) (quoting *Dammarell v. Islamic Republic of Iran*, No. CV01-2224, 2005 WL 756090, at *20 (D.D.C. Mar. 29, 2005)).

179. *Id.* at 214–15.

180. *Linde*, 463 F. Supp. 2d at 315–16.

181. Teitelbaum, *supra* note 8, at 886.

it would put the plaintiffs in the same position that they would have been in had the Bank not refused to comply with the discovery orders.

As explained above, the factors weigh heavily toward sanctioning the defendant. Arab Bank would probably not be subject to a great extent of hardship for producing the documents, the documents are crucial to the plaintiffs' case, there is a vital national-security interest in adjudicating this case effectively, and Arab Bank's good faith is questionable. This sanction would level the playing field by not giving Arab Bank a procedural advantage for having evidence located abroad. Although this might seem unfair to Arab Bank because of the criminal sanctions attached to bank-secrecy laws, the other governmental investigations show that the decision of whether or not to disclose the information was a strategic choice made by Arab Bank.

Nevertheless, this is not the only appropriate sanction. If Arab Bank did make a wholehearted effort to secure permission to disclose the information, a lesser sanction may be fairer. For instance, instead of deeming the facts as established, the court could create a mere adverse inference of fact, which Arab Bank could rebut. Or, if the court thought Arab Bank was acting in bad faith and could be coerced into disclosure, it could issue a demanding contempt sanction with a daily monetary fine until Arab Bank cooperated. The district judge has a wide range of options in issuing sanctions. The refined balancing approach enables the judge to make the most informed decision based on the competing interests involved.

V. Looking Forward

A. *Scope of the Solution*

The refined balancing approach has two primary purposes. First, it creates a more level playing field between litigants with information located in the United States and litigants with information located abroad. To accomplish this goal, the refined approach puts both categories of litigants on near-equal footing at the discovery-order phase, and eliminates location as a factor for courts to consider in evaluating the nonproduction of evidence. Second, the new approach boils down the factors used in the Second and Third Restatements to create a uniform set of balancing factors that effectively addresses the competing interests of the parties to the litigation, the United States, and the foreign state with secrecy laws. The refined approach is also superior to other alternatives because it provides judges with the flexibility they need to adjudicate a wide variety of cases and ensures just treatment to the individual parties involved in litigation.

While the refined balancing approach is an improvement over the current system, it still has a number of deficiencies. The primary problem with the refined approach is that, like the current Restatements, it leaves judges with the impossible task of operating an unworkable balancing test. Despite the revised structure of the new approach, judges will still have to balance competing, mutually exclusive factors and make judgments about

national interests that are outside of their expertise or authority. Like its predecessors, the refined approach is not very predictable (at least at the sanctioning phase) and has the potential to yield inconsistent results.

Despite these shortcomings, the refined approach is the best action the courts can take in dealing with discovery that requires the violation of foreign law. To adjudicate justly and effectively, judges must be able to consider the different issues of fairness and national interest that are implicated by a given case. The true problem exists because of the emergence of foreign blocking statutes, which are aimed at disarming the American discovery process. Until foreign blocking statutes are eliminated, courts will continue to face difficult and sometimes unanswerable questions regarding a nonproducing party's good faith and competing national interests. Courts could potentially create a long-run solution and an impetus for negotiation by disregarding foreign blocking statutes and harshly sanctioning noncompliance; nevertheless, this approach should be avoided because it is unfair to individual litigants in the short run and denies courts their primary adjudicatory role.¹⁸²

A more permanent solution to the problem requires the political branches to negotiate with foreign governments to remove their blocking statutes, at least when important U.S. interests are involved. To the extent that we should "press" foreign sovereigns to change their policies, that pressing should be done by the Executive and Legislature, and not at the expense of individual litigants. In the meantime, however, there are mechanisms that courts can use to make the balancing test more workable.

B. Other Suggestions

1. *Solicit Comments from U.S. and Foreign Political Branches of Government.*—Although balancing national interests is a very difficult task for judges, soliciting opinions from the U.S. and foreign governments can make this task easier. While this technique may be somewhat novel, U.S. federal courts have the power to appoint their own expert witnesses.¹⁸³ Instead of hypothesizing as to what the vital U.S. national interests are in a case, judges should invite the Department of State or the Department of Justice to comment. Similarly, instead of hypothesizing about foreign interests or about the purpose of foreign blocking statutes, judges should invite foreign government officials to comment.

By inviting comment from government officials, courts would be able to make more informed decisions when balancing various factors. National interest and public-policy issues are outside of the judiciary's expertise, so seeking guidance from political branches is a logical solution. For instance,

182. See *supra* section III(B)(1) on the strict-sanctions approach.

183. FED. R. EVID. 706 ("The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.").

while a case may appear to implicate the strong national interest of enforcing U.S. tax law, it might also implicate a more pressing interest in improving foreign relations with Switzerland. Soliciting guidance from the State Department would put the court in a position to determine what the primary national interest is. Additionally, inviting foreign government officials into the process may foster international understanding. By engaging in the process, foreign officials will be made aware of the hardships that their blocking statutes can impose on their companies. This awareness could pressure foreign governments into entering international agreements with the United States to solve the problem.

2. *International Cooperation Spurred by Political Branches.*—In the current system, extraterritorial discovery that requires the violation of foreign law is a zero-sum practice: either the court will order discovery and sanctions for noncompliance to the detriment of the withholding party, or the court will not sanction noncompliance to the detriment of the requesting party. In order to eliminate this zero-sum system and provide the utmost fairness to *both* parties, the political branches should negotiate agreements with foreign governments to foster mutual assistance in the information-gathering process.

The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters was enacted for this purpose,¹⁸⁴ but it has been largely unsuccessful after the U.S. Supreme Court determined that its provisions were merely optional.¹⁸⁵ Instead of a broad treaty outlining discovery procedures, issue-specific memoranda of understanding would be better equipped to solve the problem. These memoranda of understanding (MOUs) would require countries to renounce bank secrecy as a basis for refusing requests for mutual legal assistance in evidence gathering in cases involving vital national interests, such as terrorism, antitrust, or taxation. At the same time, MOUs can assure foreign countries that information will be kept confidential and only used for litigation. For example, member states of the Middle East and North Africa Financial Action Task Force Against Money Laundering and Terrorist Financing signed an MOU prioritizing money laundering and terrorist-financing investigations over bank-secrecy laws.¹⁸⁶ The United States is not a party to the MOU but recommended it as a member of the G-7 Summit's Financial Action Task Force.¹⁸⁷ While a number of MOUs already exist,¹⁸⁸ the Executive and Legislature should be

184. Connorton, *supra* note 117, at 121.

185. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 538 (1987).

186. *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 316 n.5 (E.D.N.Y. 2006) (order granting in part and deferring in part plaintiffs' motion to overrule defendant's discovery objections).

187. *See id.* (noting that the United States participated in establishing the intergovernmental body that ultimately created the recommendations adopted in the MOU).

188. *See, e.g.*, Memorandum of Understanding on Mutual Enforcement Assistance in Commercial Email, July 2, 2004, available at http://www.ftc.gov/os/2004/07/040630spanmmou_text.pdf ("The Participants [the United States, the United Kingdom, and Australia] recognize that it

more proactive in negotiating these agreements to prevent parties from relying on blocking statutes to avoid discovery.

MOUs are not the only course of action the government can pursue and might not be best because of their discretionary nature. Regardless of what the specific approach is, however, the political branches should take strides to work out information-sharing agreements with foreign governments to ease the job of judges and make litigation fairer for parties seeking and withholding information located abroad.

VI. Conclusion

When dealing with discovery requests that require the violation of foreign law, courts should order discovery when the requests are reasonably specific and there are no other reasonable alternative means of obtaining the information. When parties do not comply with the discovery orders, then courts should balance factors of fairness and national interest to determine whether sanctions are appropriate and which sanction would be most appropriate. Courts should exclude from their analyses factors that focus on the nationality of litigants and the location of information. This approach levels the playing field between domestic and foreign litigants and provides judges with the flexibility they need to consider a wide range of issues on a case-by-case basis. While it is difficult to satisfy the competing interests of all parties involved absent international cooperation agreements, this solution is the best action the courts can take to adjudicate justly and fairly.

—*Keith Y. Cohan*

is in their common interests to share Evidence that will: facilitate effective enforcement against Spam Violations”); Memorandum of Understanding on Mutual Assistance in Consumer Protection Matters, U.S.–C.R., Mar. 20, 2007), *available at* <http://www.ftc.gov/bc/international/docs/MOUEnglish.pdf> (“Participants intend to assist one another and to cooperate on a reciprocal basis in providing or obtaining Information that could assist in determining whether a Person has violated or is about to violate their respective Consumer Protection Laws, or in facilitating the administration or enforcement of such [laws.]”); Mutual Agreement Regarding the Administration of Article 26 (Exchange of Information) of the Swiss–U.S. Income Tax Convention of October 2, 1996, U.S.–Switz., Jan. 3, 2003, *available at* <http://www.treas.gov/press/releases/mutual.htm> (“It is understood that, in response to a request, the requested State shall exchange information where the requesting State has a reasonable suspicion that the conduct would constitute tax fraud or the like.”).