OBTAINING DISCOVERY ABROAD:THE UTILITY OF THE COMITY ANALYSIS IN DETERMINING WHETHER TO ORDER PRODUCTION OF DOCUMENTS PROTECTED BY FOREIGN BLOCKING STATUTES.

I. INTRODUCTION

The global economy is now a reality. With the increasing globalization and diversification of commerce and human interaction comes a concomitant globalization and diversification of legal proceedings.[1] In this age of growing international economic interaction, discovery driven document production often involves corporations with offices overseas.[2] Because of resistance to American style discovery in some foreign jurisdictions, attempts to obtain information essential to litigation are sometimes frustrated by foreign blocking statutes.[3] Blocking statutes, laws of foreign countries that impose criminal penalties upon parties within their jurisdiction who disclose specified documents, are so named because of their effect upon American style discovery.[4] The tension created by these statutes has led

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1.*See* notes 20–48 *infra* and accompanying text.

2.*See* notes 20–48 *infra* and accompanying text.

3.Taking exception to the extraterritorial application of U.S. antitrust and securities laws, many nations have instituted legislation forbidding the disclosure of relevant commercial documents. Three types of regulations are common:

a) older laws drafted without U.S. litigation in view, yet now applied to thwart that litigation;

b) blanket protection for broad categories of material with discretionary powers vested in some government official;

c) specifically targeted legislation aimed at denying disclosure of documents in a particular case.

See David E. Teitelbaum, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 846–48 (1986).

Some foreign collateral suits are allowed in the foreign jurisdiction to regain the compensatory laws express open hostility for U.S. discovery by containing "clawback" provisions whereby damages portion of U.S. treble damages awards. *See id.* at 848 n.29; *see also* Protection of Trading Interests Act 1980, § 6(1)–(4) (Eng.).

4.*See In re* Uranium Antitrust Litigation, 480 F.Supp. 1138, 1143 (N.D. Ill. 1979) (addressing Canadian, Australian, and South African statutes enacted for the express purpose of impairing jurisdiction of U.S. courts). Particularly striking are Canada's Uranium Information Security Regulations, which unabashedly block U.S. antitrust litigation by forbidding production of any documents relating to "conversations, discussions or meetings that took place

commentators to assert that no aspect of extending the U.S. legal system abroad has given rise to more friction than discovery of materials associated with investigation and litigation in the United States.[5]

Balancing the need for production of vital information with the possibility that its discovery orders will lead to criminal liability for the producing party, a U.S. court must determine whether to grant a motion compelling production.[6] Further, if the motion to compel production is not complied with, the court must decide whether to impose sanctions through Rule 37 of the Federal Rules of Civil Procedure.[7]

Gaining compliance with a production order can mean the difference between winning a multi-million dollar verdict for one's client, or paying one.[8] Partly because the stakes are so high, courts have had trouble agreeing on a uniform standard.[9] Ever since *Societe Internationale,* where the

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between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export . . . use or sale of uranium." Uranium Information Security Regulations, C.R.C., ch. 366, §3 (1978) (Can.).

5.*See* RESTATEMENT (THIRD) OF THE FOREIGN RELATION LAW OF THE UNITED STATES § 442 reporter's note 1 (1987).

6.*See* Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 199–201 (1958) (the leading Supreme Court case on the subject).

7.Ideally, discovery will proceed without significant court intervention. When one party fails to produce documents, however, the court must decide whether to order that production. If the court issues a discovery order and the party continues to refuse to comply, the court may enforce its prior order. Rule 37 includes the general provision which authorizes district courts to order sanctions for failure to abide by a previous discovery ruling. These sanctions include, but are not limited to:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders of in addition thereto, an order treating as a contempt of court the failure to obey any orders; . . . FED. R. CIV. P. 37(b).

8.*See* notes 85–111 *infra* and accompanying text.

9.*See* notes 85–111 *infra* and accompanying text.

Supreme Court affirmed a district court's power to order a party to produce documents kept in a foreign country despite the fact that such production may subject the party to criminal sanctions in the foreign country, courts have differed in their assessment of which factors to use in arriving at the decision to compel production.[10] Because issues of national sovereignty and of respect for duly enacted legislation of foreign countries arise whenever U.S. courts attempt to compel discovery in foreign jurisdictions, it behooves U.S. courts to arrive at a consistent comity analysis when determining under what circumstances to compel.[11] This comment suggests a consistent comity analysis to be applied to the determination of whether to compel production of documents when illegality is raised as an excuse. By so doing, this analysis addresses a significant question left open ever since the *Societe Internationale* decision in 1958.[12]

II. FOREIGN BLOCKING STATUTES

The foundational principles upon which civil law countries have developed render them ill suited for the American style discovery assault.[13] There, the discovery process is shepherded by the judge, who alone has power to investigate facts.[14] The civil law tradition rejects the idea that such a vital function should be placed within the purview of the parties themselves.[15]

Given this predisposition in some foreign forums, it should not be surprising that American style discovery is met with a less than enthusiastic welcome abroad.[16] Even where the forum shares the U.S.' adversarial judicial system, the natural instinct to protect one's own interests produces antipathy in some nations toward U.S. antitrust and securities regulations.[17] This antipathy is sometimes expressed in the form of legislation aimed at thwarting the

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10. *See* Teitelbaum, *supra* note 3, at 844–46, 851.

11. *See* notes 149–84 *infra* and accompanying text.

12. *See* David S. Pennock, *U.S. Procedures for Obtaining Discovery Abroad for Use in Proceedings in the United States in* OBTAINING DISCOVERY ABROAD at 1, 20 (ABA Antitrust Trial Practice Handbook Series v. 1, 1990).

13. *See* Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 531–32 (1987); *see also* Teitelbaum, *supra* note 3, at 846.

14. *See* Teitelbaum, *supra* note 3, at 846.

15. *See id.*

16. *See id.* at 846–49.

17. *See id.* at 846–48.

efforts of U.S. courts to pursue their jurisdictional privileges through discovery in foreign forums.[18] Accordingly, the taking of otherwise available evidence may be impossible if

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18.Note the United States Supreme Court's view of blocking statutes expressed in Societe Nationale Industrielle Aerospatiale, 482 U.S. at 544, n. 29:

> The French "blocking statute," (footnote omitted) does not alter our conclusion. It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. *See Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). Nor can the enactment of such a statute by a foreign nation require American courts to engraft a rule of first resort onto the Hague Convention, or otherwise to provide the nationals of such a country with a preferred status in our courts. It is clear that American courts are not required to adhere blindly to the directives of such a statute. Indeed, the language of the statute, *if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge*, forbidding him or her from ordering any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge. It would be particularly incongruous to recognize such a preference for corporations that are wholly owned by the enacting nation. *Extraterritorial assertions of jurisdiction are not one-sided*. While the District Court's discovery orders arguably have some impact in France, the French blocking statute asserts similar authority over acts to take place in this country. *The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign.* The blocking statute thus is relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.
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> The American Law Institute has summarized this interplay of blocking statutes and discovery orders: "[w]hen a state has jurisdiction to prescribe and its courts have jurisdiction to adjudicate, adjudication should (subject to generally applicable rules of evidence) take place on the basis of the best information available . . . . [Blocking] statutes that frustrate this goal need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States." See Restatement, § 437, Reporter's Note 5, pp, 41,42. "On the other hand, the degree of friction created by discovery requests . . . and the *differing perceptions of the acceptability of American-style discovery under national and international law, suggest some efforts to moderate the application abroad of U.S. procedural techniques*, consistent with the overall principle of reasonableness in the exercise of jurisdiction." *Id.* at 42 (emphasis added).

that evidence is subject to the reach of a foreign blocking statute.[19]

III. THE ROLE OF THE HAGUE EVIDENCE CONVENTION

A. General Provisions

Before addressing the issue of whether to order production of documents subject to a foreign blocking statute, a U.S. court must first determine whether to proceed with discovery under the Federal Rules of Civil Procedure or the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention).[20] The Hague Convention is a multilateral agreement that prescribes procedures by which litigants involved in civil and commercial matters may obtain evidence from abroad.[21] It was initially adopted in October 1968 to provide a uniform system for the transmission and execution of requests for gathering evidence in foreign jurisdictions.[22] There are now over twenty signatories to the Hague Convention, including most major Western trading nations.[23] Because of widely perceived difficulties with existing methods of transnational discovery, the United States became a signatory to the Hague Convention in 1972.[24]

A primary objective of the Hague Convention was to provide an effective method for taking evidence abroad.[25] A particular concern was to ensure that the taking of evidence on foreign soil would be consistent with the laws of that country, while nevertheless providing useful results for the

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19.*See, e.g.,* Uranium Information Security Regulations, *supra* note 4, promulgated under the Atomic Energy Control Act, R.S.C. ch. A–16, § 8(d) (1978) (Can.) (Canadian statute prohibiting production of documents in response to United States litigation); *see also* JAMES B. STEWART, THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS 178–81 (1983).

20.Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241 [hereinafter the Hague Convention]; *see also* Aerospatiale, 482 U.S. at 541–43, 544 n.29.

21.*See* the Hague Convention, *supra* note 20 at 2557.

22.*See id.* at 2555–2557. (The Convention was opened for signature on March 18, 1970).

23.*See* Pennock, *supra* note 12, at 8.

24.*See id.*

25.*See* the Hague Convention, *supra* note 20, at 2557.

litigants involved.[26] Therefore, the Hague Convention's drafters were scrupulous to include local judicial or government officials in most evidence gathering functions allowed under the Convention's terms.[27] The practical result of this operational philosophy is that U.S. litigants are usually able to obtain only the discovery which litigants in the country where the documents are located would be able to obtain.[28]

The main means of evidence gathering under the Hague Convention is through the Letter of Request procedure.[29] Under article 2 of the Hague Convention, all signatory states are required to establish "Central Authorities" comprised of governmental agencies responsible for receiving incoming Letters of Request from other signatory nations and overseeing their execution.[30]

A litigant in a signatory state request to the domestic court where his action is pending issue a Letter of Request seeking production of specified documents or the taking of testimony from a particular witness.[31] The designated Central Authority in the country where the sought after evidence is located receives the Letter of Request and transmits it to the court in the jurisdiction where the evidence is located.[32] This court then conducts an evidentiary proceeding and transmits the results directly back to the foreign court that first issued the Letter of Request.[33]

Signatory nations are required to cooperate in executing the Letters of Request from other signatory nations.[34] However, article 23 provides an often utilized limitation to this requirement for countries opposed to American style discovery.[35] Member states may declare that they "will not

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26.*See* Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 530 (1987).

27.*See* Pennock, *supra* note 12, at 9.

28.*See id.*at 9–10.

29.*See* the Hague Convention, *supra* note 20, arts. 1–14.

30.*See id.* art. 2.

31.*See id.* at arts. 1–2.

32.*See id.*

33.*See id.* at arts. 5–13.

34.*See id.* at arts. 9–12 (emphasizing that a Letter of Request shall be executed expeditiously).

35.*See id.* at art. 23 (stating that a Contracting State may refuse to execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries).

execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."[36] Of the twenty plus nations that are signatories of the Hague Convention, only the United States, Czechoslovakia, Barbados, and Israel have not limited pre-trial discovery through some type of article 23 preclusion.[37] It is this significant limitation of the Hague Convention that has provoked much of the resistance to the Convention's use in the United States.[38]

B. The U.S. Supreme Court's *Aerospatiale* Decision

The Hague Convention has become the object of frequent litigation in the United States.[39] The principle issue litigants face is determining what role the Hague Convention is to play when a U.S. court has jurisdiction over a foreign party and discovery is sought abroad from that party in a pending U.S. suit.[40] Before the U.S. Supreme Court's *Aerospatiale* decision, lower courts had reached a variety of different conclusions regarding the role of the Hague Convention.[41] One court suggested that the Convention was the exclusive means of obtaining discovery from a signatory nation.[42] Other courts adopted a rule that the Convention should be used as a first recourse before resorting to discovery under the Federal Rules of Civil Procedure if the Convention's procedures proved to be ineffective.[43] Some courts held that

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36.*Id.*

37.*See* Pennock, *supra* note 12, at 13–14.

38.*See id.* at 13 (asserting that most signatories to the Convention oppose American style document discovery).

39.*See, e.g., In re* Anschuetz & Co., 838 F.2d 1362, 1364 (5th Cir. 1988) (noting that many foreign countries do not subscribe to our open-ended views regarding pretrial discovery); *In re* Benton Graphics v. Uddenholm Corp., 118 F.R.D. 386 (D.N.J. 1987) (relating that the Supreme Court rejected the position that a party would first be required to utilize Hague Convention procedures whenever discovery is sought of a foreign litigant).

40.*See, e.g.,* Pierburg Gmbh & Co. v. Superior Court, 186 Cal. Rptr. 876 (Cal. App. 3d 1982) (holding that the trial court abused its discretion when ruling that the Hague Convention need not be utilized by a U.S. plaintiff seeking discovery of a West German defendant).

41.*See* notes 42–44 *infra* and accompanying text.

42.*See* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Penn. 1983).

43.*See, e.g.,* Goldschmidt A.G. v. Smith, 676 S.W.2d 443 (Tex. App.—Houston [1st Dist.] 1984, n.w.h.) (holding that an American company was required to comply with the Hague Convention procedures as an avenue of first resort in seeking production of documents by a West German corporation).

the Convention's procedures were not appropriate when the country producing the discovery had to transmit it to the United States rather than to foreign soil.[44]

In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, the U.S. Supreme Court held that the Hague Convention was not the exclusive means of discovering evidence located in a signatory state.[45] Although district courts are free to use U.S. discovery methods, at least one court observes:

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the District Court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence. Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration. *In addition, we have long recognized the demands of comity in suits involving foreign states*, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. *We do not articulate specific rules to guide this delicate task of adjudication*[46] (emphasis added).

44.*See In re* Anschuetz & Co., 754 F.2d at 615 (holding that a German corporation subject to the jurisdiction of the district court was required to comply with discovery pursuant to the Federal Rules of Civil Procedure).

45.*See* Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 539–40 (1987).

46.*Id.* at 546.

In the same way that the Supreme Court rejected the notion that the Hague Convention was the sole method by which U.S. courts could obtain discovery abroad, it also cautioned courts from running roughshod over the jurisprudential system of the foreign sovereign.[47] According to the Court, the circumstances in which Convention procedures must be used depend upon the principle of international comity, which the Court defined as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[48]

IV. THE IMPORTANCE OF INTERNATIONAL COMITY

A. Comity's Significance

> 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 . . . 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.[49]

United States judicial policy has traditionally been supportive of the notion of comity, presuming its applicability and its necessity to the functioning of the international legal system.[50] One circuit court described the essential nature of this principle as "the mortar which cements together a brick house."[51]

The doctrine of comity is necessarily implicated whenever international commercial disputes arise.[52] However, although United States and foreign courts stress the importance of adhering to this doctrine with vigor, they are deficient at

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47.*See id.*

48.*Id.* at 543 n.27, 544.

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

50.*See* Aerospatiale, 482 U.S. at 543–544.

51.Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d. 909, 937 (D.C. Cir. 1984).

52.*See* Pennock, *supra* note 12, at 4–7 (expressing that U.S. courts make great use of comity analysis in international disputes).

applying comity with any consistency.[53] The inherent difficulty behind following such an amorphous, voluntary policy of noninterference with other sovereign forums lies in its essential character as a balancing act of politics, courtesy, and good faith between nations.[54] In order to facilitate the resolution of international discovery disputes that impede U.S. litigation, a consistent means of comity analysis should be adopted by U.S. courts.[55] A critical question that must be answered is whether the behavior of the party resisting discovery should be analyzed as a part of the decision to compel production, or whether this analysis is better deferred until consideration of sanctions for disobeying the court's order to compel, should this phase be reached.[56]

B. Early U.S. Attempts at Comity in the Context of International Antitrust Litigation

Litigation in the United States operates on the premise that wide open discovery is, like freedom of speech, an essential aspect of finding truth.[57] This is especially the case in increasingly complicated commercial suits such as antitrust, where discovery is absolutely essential to adequate fact finding.[58] In a world with perfect comity between sovereign states, there would be no difficulty when documents vital to a plaintiff's case happened to be housed in a multinational corporation's foreign office. So long as the

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53.*See* Laker Airways, 731 F.2d at 916 (noting competing national policies in the litigation that represent a "head-on collision between the diametrically opposed antitrust policies of the United States and United Kingdom, and is perhaps the most pronounced example in recent years of the problems raised by the concurrent jurisdictions held by several states over transactions substantially affecting several states' interests." The court eventually decided that it could not determine which sovereign's interests should take precedence).

54.*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, 760–71 (1996) (weighing the various factors).

55.For an overview of the presently confused situation, see notes 85–130 *infra* and accompanying text.

56.*See* Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208 (1958) (finding that dismissal of petitioner's claim despite a finding that petitioner acted in good faith was inappropriate).

57.*See* FED. R. CIV. P. 1 (asserting that the Federal Rules of Civil Procedure are intended to "secure the just, speedy, and inexpensive determination of every action").

58.*See* Pennock, *supra* note 12, at 1–2 (demonstrating the importance of discovery by listing various methods that can be used to obtain discoverable information in foreign countries).

U.S. court possessed personal jurisdiction over the defendant, the court could force that party to produce materials under the party's control, wherever those materials were located.[59]

This rather rosy scenario is complicated greatly by the antipathy some foreign jurisdictions have for American style discovery.[60] The U.S. Supreme Court has spoken only once on the standard that U.S. courts should apply when faced with the excuse of foreign illegality for nonproduction, and its voice was somewhat faltering.[61]

1. Societe Internationale v. Rogers (1958)

In *Societe Internationale v. Rogers*, a Swiss holding company brought suit under the Trading with the Enemy Act to recover assets that the U.S. government had seized during World War II.[62] Early in the litigation the government moved under Rule 34 of the Federal Rules of Civil Procedure for an order requiring the holding company to produce documents held by its bank in Switzerland.[63] The plaintiff sought relief from production on the ground that disclosure of the required bank records would violate Swiss penal laws on bank secrecy and subject those responsible for disclosure to criminal sanctions.[64] When the plaintiff failed to comply with the awarded production order, the district court dismissed the plaintiff's case, holding that the plaintiff had control over the bank records, that the records might prove a deciding factor in the suit and that Swiss law did not provide an adequate excuse for noncompliance.[65]

On certiorari, the Supreme Court affirmed the issuance of the production order but reversed the dismissal of the action.[66] The Court utilized three factors that influenced its decision and have since become the backbone of current analysis of the suitability of production orders for foreign

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59.*See id.* at 3–7.

60.*See supra* notes 3, 4.

61.*See* Pennock, *supra* note 12, at 18–21.

62.Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 198 (1958).

63.*See id.* at 204.

64.*See id.* at 200.

65.*See id.* at 201–02.

66.*See id.* at 204, 213.

evidence.[67] First, a court should consider and facilitate the strength of the American interests underlying the statute that gives rise to the cause of action.[68] Second, a court should replace the normal discovery standard of being "reasonably calculated to lead to the discovery of admissible evidence"[69] with a higher standard that inquires into whether the requested documents are crucial to the resolution of a key issue in the litigation.[70] Third, the Court indicated that a party's good faith attempt to timely comply with a production order, to obtain a waiver, or otherwise to achieve compliance, is important to consider when determining whether sanctions are appropriate for nonproduction.[71]

If *Societe Internationale* had stopped at that, then lower courts would have had a consistent analysis to apply to later comity concerns when determining whether to compel production in the face of a foreign blocking statute. Unfortunately, the *Societe Internationale* Court went on to explicitly limit its ruling to the case before it, limiting the precendential value of its three-pronged analytical framework.[72] The Supreme Court also indicated that the propriety of issuing a production order should depend not only upon the factors it identified, but also upon "the exigencies of the particular litigation" and "the circumstances of the given case."[73] This open ended analysis left lower courts to speculate broadly regarding the correct comity analysis to apply when determining whether to order production of documents subject to a foreign blocking statute.[74]

Furthermore, the Supreme Court's acknowledgment that "the fear of criminal prosecution constitutes a weighty excuse for nonproduction"[75] has served in the years since *Societe*

67.*See* Lenore B. Brown, *Extraterritorial Discovery: An Analysis Based On Good Faith*, 83 COLUM. L. REV. 1320, 1330 (1983).

68.Thomas Scott Murley, *Compelling Production of Documents In Violation of Foreign Law: An Examination and Reevaluation of The American Position,* 50 FORDHAM L. REV. 877, 890 (1982) (discussing application of factors in the issuance of a production order in *Societe*).

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

70 *See* Murley, *supra* note 68.

71 *See* Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 201 (1958).

72 *See* Murley, *supra* note 68, at 891.

73 Societe Internationale, 357 U.S. at 206.

74 *See* notes 85–130 *infra* and accompanying text.

75 Societe Internationale, 357 U.S. at 211.

Internationale to foster a climate in which foreign governments are encouraged to provide cover for their country's corporations by enacting nondisclosure statutes.[76] If foreign governments are persuaded that U.S. courts will not compel discovery when production will subject a party to criminal penalties abroad, then those governments will be likely to exploit their advantage and pursue such legislation vigorously.[77] This phenomenon accounts for the growth of nondisclosure statutes abroad in the years since the *Societe Internationale* decision.[78]

There is a strong incentive for multinational corporations to collude with foreign governments in secreting documents beyond the reach of U.S. courts.[79] The nonproducing party is able to raise the issue of foreign illegality as an excuse when arguing that the court should not grant her opponent's motion to compel production.[80] If the court should go ahead and issue the order compelling production, the nonproducing party may still be unable (or simply unwilling) to comply, in which case she may attempt to avoid Rule 37 sanctions on the grounds that foreign illegality made compliance impossible.[81] Courts have weighed the foreign illegality defense against the need for discovery of documents at both the order and sanctions phases of the litigation.[82] This encourages those seeking to create "information havens" abroad to exploit this advantage in thwarting, or at the least

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76 *See* Teitelbaum, *supra* note 3, at 846.

77 *See* Application of Chase Manhattan Bank, 297 F.2d. 611, 613 (2d Cir. 1962) (demonstrating where a grand jury request for Chase Manhattan documents located in Panama was greeted by a Panamanian law that made disclosure of the very documents sought by the court a criminal offense. The Second Circuit Court capitulated, deferring to "fundamental principles of international comity" and refusing to order production).

78 *See* Teitelbaum, *supra* note 3, at 846.

79 *See, e.g.,* General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 302 (S.D. Cal. 1981) (involving stored documents in Canada and possible collusion with Canadian government); *see also* Ohio v. Arthur Anderson & Co., 570 F.2d 1370, 1373 (10th Cir.) (demonstrating the rationale behind denying a foreign illegality excuse when the company vigorously asserts protection of Swiss secrecy laws only to find that those laws did not cover their situation).

80 *See In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1145 (N.D. Ill. 1979).

81 *See* Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 211–12 (1958).

82 *See* Minepco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 522 (S.D.N.Y. 1987).

delaying, U.S. litigation.[83] Courts have proposed a number of approaches to both stages in the process, but those proposals still lack consistency regarding which standards to apply and at which stage to apply them.[84]

2. Early Second Circuit Decisions

One line of Second Circuit cases decided in the years immediately following the Supreme Court's decision in *Societe International* held that foreign law prohibitions on disclosure act as a bar to ordering production of documents.[85]

In *Chase Manhattan* a grand jury request for Chase Manhattan documents located in Panama was greeted by Panamanian Law No. 17, which made disclosure of the very documents sought by the court a criminal offense.[86] The Second Circuit Court capitulated, deferring to "fundamental principles of international comity" and refusing to order production.[87] Particularly striking was the fact that January 30, 1961, the very day that Chase was ordered to show cause why an already issued subpoena should not be modified to include documents Chase had secreted in Panama, the president of Panama signed Law No. 17.[88] The president and the legislature had hurriedly enacted the law the previous day.[89] The Second Circuit based its order denying the U.S. government's request for an order compelling production in part upon Article 89 of Law No. 17:

> The merchant furnishing a copy or reproductions of the contents of his books, correspondence and other documents for use in an action abroad, in compliance with an order of an authority not of the Republic of Panama, shall be penalized with a fine not greater than one hundred balboas.[90]

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83 *See* Tietelbaum, *supra* note 3, at 846; *see also In re* Uranium, 480 F. Supp. at 1145.

84 *See* notes 85–130 *infra* and accompanying text.

85 *See* First Nat'l City Bank v. IRS, 271 F.2d. 616, 619 (2d Cir. 1959); *see also* Ings v. Ferguson, 282 F.2d. 149, 152 (2d Cir. 1960); *see also* Application of Chase Manhattan Bank, 297 F.2d. 611, 613 (2d Cir. 1962).

86 *See* Application of Chase Manhattan Bank, 297 F.2d. at 611–13 (2d Cir. 1962).

87 *Id.* at 613 (quoting Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960)).

88 *See id.* at 611–612.

89 *See id* at 612.

90 *Id.* at 612.

Citing an earlier decision, the court asserted that "if in fact production of branch records located in Panama would require action by personnel in Panama in violation of laws of Panama . . . production . . . should not be ordered by the courts of this country."[91] In ruling upon the government's assertion that compliance with production would not necessitate illegal action because the subpoena is directed only to the head of Chase's office in New York rather than to Panamanian personnel, the court replied "this would be nothing more than an attempt to circumvent the Panamanian law."[92] According to the court, "such a maneuver scarcely reflects the kind of respect which we should accord to the laws of a friendly foreign sovereign state."[93]

The precedent for the court's ruling in *Chase Manhattan* had been set in an earlier Second Circuit decision, *Ings v. Ferguson*.[94] In *Ings*, New York branches of a Canadian bank were allowed to secret documents necessary to establish the case against the Canadian bank.[95] The court based its reasoning upon the assertion that:

> [a]n elementary principle of jurisdiction is that the processes of the courts of any sovereign state cannot cross international boundary lines and be enforced in a foreign country. Thus service of a U.S. District Court subpoena by a U.S. Marshal upon a Montreal branch of a Canadian bank would not be enforceable. *However, amongst civilized nations, between which international comity exists, procedures*

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91 *Id.* at 613 (referring to the Second Circuit's earlier decision in First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959)).

92 *Id.*

93 *Id.* The court added "we also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own. As we recently said in modifying subpoenas duces tecum in another case, '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.' *Ings v. Ferguson*, 282 F.2d. 149 (2d Cir. 1960)." *Id.* In *Ings v. Ferguson*, the court modified an order of the district court denying motions to quash subpoenas duces tecum calling for production by New York agencies of Canadian banks of records located outside the United States. The Circuit Court allowed the subpoenas to be modified to require production only of documents that might be in possession of agencies in New York. Ings, 282 F.2d. at 152.

94 *See* Application of Chase Manhattan Bank, 297 F.2d. at 613; *see also* Ings, 282 F.2d. at 152.

95 *See* Ings, 282 F.2d. at 153.

> *have long been established whereby the requests of litigants in other countries seeking testimony and records are honored.* Such reciprocity is evidenced by the laws which each of the sovereign states has enacted to enable this purpose to be achieved. *Each state nevertheless by the very definition of sovereignty is entitled to declare its own national policy with respect to such limitations upon the production of records as its lawmakers may choose to enact*[96] (emphasis added).

By allowing multinational corporations headquartered in the United States (like Chase Manhattan Bank) and outside the United States (like the Canadian bank in *Ings v. Ferguson*) to exploit the opportunity to secret documents abroad, these early Second Circuit cases demonstrate the futility of attempting to adhere too scrupulously to a pure comity approach.[97] This extremely deferential, almost reverential, treatment of foreign blocking statues provided incentive to foreign governments to expand the scope and number of laws imposing criminal sanctions upon those who disclose documents allegedly important to some specified national interest.[98] Another approach was needed that would not unjustly punish the party seeking production simply because the materials sought were conveniently located in a jurisdiction hostile to American style discovery, commercial interests, or both.[99]

3. The Tenth Circuit's Decision in Arthur Andersen

The Tenth Circuit adopted a somewhat different approach than the Second Circuit when confronted with a defendant claiming the protection of Swiss secrecy laws as shelter from a discovery request.[100] The state of Ohio sued Arthur Andersen in the U.S. District Court for the Southern District of Ohio claiming that, in the state's purchase of KRC securities, Andersen fraudulently misrepresented the financial condition of KRC in violation of state and federal law.[101] At issue in *Andersen* was whether the district court usurped its power in entering discovery orders which

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96 *Id.* at 151.

97 *See* notes 3 & 4, *supra* and accompanying text.

98 *See* Eckert, *supra* note 54, at 766–67.

99 *See id.* at 765–66.

100 *See* Arthur Andersen & Co. v. Finesilver, 546 F.2d. 338 (10th Cir. 1976).

101 *See id.* at 340.

required the accounting firm to produce certain documents, even though production of those documents would allegedly violate nondisclosure laws in Switzerland.[102] The *Andersen* Court took *Societe Internationale* to imply that consideration of foreign law in a discovery context is required only in determining whether sanctions should be imposed for disobeying an order to compel, not in deciding whether the discovery order should be issued in the first place.[103] *Andersen* refused to capitulate to overblown notions of comity in deciding whether to order document production, holding that foreign law cannot control local law and cannot invalidate an order which local law authorizes.[104]

The Tenth Circuit Court had an opportunity to solidify its holding in *Andersen* when the accounting giant appealed the trial court's ruling imposing Rule 37 sanctions upon Arthur Andersen for refusing to comply with the discovery order the court had issued despite Andersen's foreign illegality defense.[105] The court cited the Supreme Court's *Societe Internationale* decision, distinguishing between "inability to comply and willful or bad faith noncompliance."[106] In light of Andersen's "dilatory response to [the trial court's] December 16, 1975 order hardly bespeak[ing] the good faith compliance Andersen . . . asserts,"[107] the Tenth Circuit ruled that the preclusionary and monetary sanctions imposed by the trial court were "just and authorized by the Rule."[108]

Whereas the early Second Circuit decisions discussed above seemed to give undue deference to notions of international comity, the Tenth Circuit in its *Andersen* decisions disregarded comity considerations altogether.[109] *Andersen v. Finesilver* could even be regarded as dismissive toward the importance of comity considerations:

> "We are not impressed by Andersen's contention that international comity prevents a domestic court from

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102 *See id.* at 339–40.

103 I*d.* at 341.

104 *Id.* at 342.

105 *See* Ohio v. Arthur Andersen & Co., 570 F.2d. 1370 (10th Cir. 1978).

106 *Id.* at 1375.

107 *Id.* at 1373.

108 *Id.* at 1375; *compare In re* Westinghouse Electric Corporation Uranium Contracts Litigation, 563 F.2d 992, 999 (10th Cir. 1977) (balancing the good faith efforts of the nonproducing party and the interests of Canada and the United States and holding that sanctions were not appropriate as a punishment for nonproduction).

109 *See* Finesilver, 546 F.2d. at 342; *see also* Ohio, 570 F.2d. at 1375–76.

> ordering action which violates foreign law. . . *[I]f the problem involves a breach of friendly relations between nations, Andersen should call the matter to the attention of those officers and agencies of the United States charged with the conduct of foreign affairs,* and they could make such representation to the court as they deemed suitable. Andersen has not taken this step. Instead, it purports to speak for the United States"[110] (emphasis added).

Nevertheless, as other Tenth Circuit decisions reveal, there is an appropriate place for considerations of international comity by the courts,[111] not just for "those officers and agencies . . . charged with the conduct of foreign affairs . . ."[112] Determining the appropriate place, and giving the appropriate weight to interests of comity, however, has proven to be a difficult task for the courts.[113]

C. The Middle Ground: Balancing Tests

A compromise has been struck in recent court decisions between the extremes of undue reverence for foreign blocking statutes and outright disregard for comity sensitivities.[114] While these recent decisions acknowledge that they must balance competing national interests in determining whether foreign illegality should preclude the issuance of a production order, no consensus has yet been reached as to the balancing test to be utilized.[115]

1. Minpeco v. Conticommodity Services

The *Minpeco* decision reflects the analysis of those courts which have evolved a four part test incorporating elements of section 40 of the *Restatement (Second) of the Foreign Relations Law* with various elements of the *Societe Internationale* decision.[116]

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110 Finesilver, 546 F.2d. at 342.

111 *See In re* Westinghouse, 563 F.2d at 999.

112 Finesilver, 546 F.2d. at 342.

113 *See* notes 62–84 *supra* and accompanying text.

114 *See* notes 131–48 *infra* and accompanying text.

115 *See* United States v. Vetco, Inc., 691 F.2d 1281, 1288 (9th Cir. 1981) (utilizing a straight RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 balancing test); *compare* Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 522–523 (S.D.N.Y. 1987) (crafting a modified § 40 analysis).

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

In *Minpeco,* the plaintiffs in three related cases moved for an order compelling production of documents by defendant Banque Populaire Suisse (BPS).[117] Charged with violation of antitrust, racketeering, and securities laws, BPS opposed discovery, claiming the protection of Swiss banking secrecy laws.[118] Acknowledging BPS's argument that earlier Second Circuit decisions held that foreign law prohibitions on disclosure act as a bar to ordering production of documents, the *Minpeco* court nonetheless pointed to more recent decisions in which the Second Circuit had moved to a more flexible position.[119] The court then relied heavily upon the *Restatement (Second) of the Foreign Relations Law* to establish a balancing test incorporating both comity and good faith concerns.[120]

Without explaining why, the *Minpeco* court asserted that the Second Circuit has treated the first two section 40 factors—the competing interests of the countries involved and the hardship imposed by compliance—as far more

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117 *Id.* at 519.

118 *See id.*

119 *Id.* at 520–21.

120 *See id.* at 521. The relevant portions of the Restatement (Second) of the Foreign Relations Law read as follows:

> § 39 Inconsistent Requirements Do Not Affect Jurisdiction
>
> (1) 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 the conduct.
>
> (2) Factors to be considered in minimizing conflicts arising from the application of the rule stated in Subsection (1) with respect to enforcement jurisdiction are stated in § 40.
>
> § 40 Limitations on Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, *each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as*
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state (emphasis added).

Restatement (Second) Of The Foreign Relations Law Of The United States § 39–40 (1965).

important than the last three.[121] The court then combined these two factors with two of the considerations identified by the Supreme Court in *Societe Internationale*.[122] The first consideration was the importance of the documents requested to the conduct of the litigation.[123] The second additional factor was the good or bad faith of the party resisting discovery.[124] To summarize, according to the *Minpeco* court, the principle factors to consider in deciding a motion to compel in the face of a foreign blocking statute are 1) the competing interests of the nations whose laws are in conflict, 2) the hardship of compliance on the party or witness from whom discovery is sought, 3) the importance to the litigation of the information and documents requested, and 4) the good faith of the party resisting discovery.[125]

In the end, the *Minpeco* court crafted a hybrid balancing test that proved very demanding upon the courts attempting to apply it.[126] Reflecting the Second Circuit's profound regard for international comity and good faith, the trial court in *Minpeco* (itself in the Second Circuit) made no distinction between applying this cumbersome test at the production stage of the litigation or at the sanctions stage should that determination become necessary.[127] On the contrary, the *Minpeco* court asserted that the Second Circuit has applied concerns of good faith and comity both when determining whether production should go forward in the face of a foreign blocking statute and when attempting later to decide whether sanctions should be imposed for failing to comply with the court's production order.[128] This "doubling up" of comity and

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121 *See id.* at 522.

122 *See id.*

123 *See id.*

124 *See id.* (citing Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958)). The issue of the party's good faith is reflected as well in the RESTATEMENT'S § 40 direction to states with conflicting interests to consider, in good faith, international fairness. "Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, *each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction . . . .*" RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (emphasis added).

125 Minpeco, 116 F.R.D. at 523.

126 *See* Alfadda v. Fenn, 149 F.R.D. 28, 34 (S.D.N.Y. 1993) (attempting to apply the same four-part test).

127 Minepco, 116 F.R.D. at 522.

128 *Id.* at 521.

good faith analyses is both unfair and inefficient as it often leads to confusion and delay for all participants and a lack of remedy to the party seeking production.[129]

2. In re Uranium

A better line of reasoning is reflected in *In re Uranium Antitrust Litigation*, which adheres more closely to the original three-part comity analysis suggested by the Supreme Court in *Societe Internationale*.[130] The U.S. District Court for the Northern District of Illinois in its *In re Uranium* decision described these three factors as follows:

> *Societe* teaches that the decision whether to [compel production of materials subject to a foreign blocking statute] is a discretionary one which is informed by three main factors: 1) the importance of the policies underlying the U.S. statute which forms the basis for the plaintiffs' claims; 2) the importance of the requested documents in illuminating key elements of the claims; and 3) the degree of flexibility in the foreign nation's application of its nondisclosure laws.[131]

The critical distinction between the three-part analysis of *In re Uranium* and the four-part analysis of *Minpeco* is the greater weight *In re Uranium* places upon discerning the

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129 Note the United States Supreme Court's view of blocking statutes expressed in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 544 n. 29 (1987):

> The French "blocking statute," [footnote omitted] does not alter our conclusion. It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. . . Indeed, the language of the statute, *if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge*, forbidding him or her from ordering any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge (emphasis added);

see also Daniela Levarda, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery*, 18 FORDHAM INT'L L.J. 1340, 1361 (1995); *International Agreements and Understandings for Production of Information and Other Mutual Assistance*, 29 INT'L LAW J. 780 (1995).

130 *In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1146–48 (N.D. Ill. 1979).

131 *Id.* at 1148.

strength of American interests and its deferral of any good faith analysis to the decision regarding Rule 37 sanctions for noncompliance with the court's discovery order, should such decision have to be made.[132]

The facts surrounding the *In re Uranium* case are compelling. Westinghouse Corporation was the victim of a price fixing scheme enacted by a worldwide uranium cartel, organized with the intent of putting Westinghouse out of the uranium/nuclear power business.[133] When Westinghouse, which had enacted contracts with uranium producers worldwide, saw its price for uranium ore jump from $10-$15 per metric ton to over $40 per metric ton in under one year, it had no choice but to stop delivery on its shipments of enriched uranium to various electric utilities dependant upon nuclear power to supply their customers.[134] These utilities brought suit against Westinghouse for breach of contract, which Westinghouse unsuccessfully defended on the legal theory of commercial impracticability.[135] Staring bankruptcy right in the eye, Westinghouse decided to sue its suppliers of uranium ore, some of which were U.S. companies, for antitrust violations, misrepresentation, and fraud.[136] Critical to Westinghouse's case was the ability to obtain discovery of inculpatory documents that several defendants had conveniently stored in foreign jurisdictions.[137]

Not surprisingly, foreign governments were quite amenable to pressure from major corporations headquartered upon their soil to do all in their power to prevent disclosure of embarrassing (and under U.S. law potentially illegal) secrets regarding the existence and operation of a worldwide cartel engaging in price fixing on a grand scale.[138] Canadian, Australian, and South African lawmakers responded by enacting statutes for the express purpose of impairing the

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132 *Id.* at 1147–48; *see also* Minpeco, 116 F.R.D. at 521.

133 *See* STEWART, *supra* note 19, at 171, 178.

134 *See id.* at 153–70*; see also In re* Westinghouse Electric Corporation Uranium Contracts Litigation, 563 F.2d 1992 (10th Cir. 1977) (determining the appellate outcome of the suit filed by Westinghouse against uranium producers).

135 *See* STEWART, *supra* note 19, at 153, 162, 192–93.

136 *See id.* at 161, 178*; see also In re* Uranium, 480 F. Supp. at 1138.

137 *See* STEWART, *supra* note 19, at 178.

138 *See In re* Uranium, 480 F. Supp. at 1143; *see also* STEWART, *supra* note 19, at 177, 185.

power of U.S. courts to extend their jurisdiction abroad.[139] Especially striking were Canada's Uranium Information Security Regulations,[140] which unabashedly blocked U.S. antitrust litigation by forbidding production of any documents relating to "conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export . . . use or sale of uranium."[141]

The *In re Uranium* Court responded by crafting a simplified and more manageable balancing test using the key factors identified by the Supreme Court in its *Societe Internationale* decision.[142] The court reasoned that by emphasizing the important congressional policy reflected in enacting antitrust legislation, the Supreme Court in *Societe* intended that American interests be adequately protected in the face of foreign blocking statutes.[143] Further, because the Supreme Court in *Societe* gave no hint that the disclosure policies of the American statute should be balanced against the secrecy laws of Switzerland, the district court in *In re Uranium* concluded that the only pertinent inquiry was the strength of the American interests reflected in the legislation that gave rise to the cause of action.[144] The *In re Uranium* decision correctly asserts that the Supreme Court in *Societe* reserves certain factors for consideration solely at the sanctions phase of the enforcement process.[145]

Chief among these factors is any assessment of the good or bad faith of the party resisting disclosure.[146] As the Supreme Court pointed out in *Societe Internationale*, such an

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139 *See In re* Uranium, 480 F. Supp. at 1143. The laws "generally prohibit the production of any document relating to uranium marketing activities from 1972 through 1975 and also prohibit communications that would result in the disclosure of the contents of such documents." *Id.*

140 *See* Uranium Information Security Regulations, C.R.C. (1970) (Can.), promulgated under the Atomic Energy Control Act, R.S.C. ch. A–16 (1985) (Can.).

141 *Id.*

142 *In re* Uranium, 480 F. Supp. at 1148.

143 *See id.* at 1146.

144 *Id.*

145 *Id.* at 1147.

146 *See id.*

analysis is relevant only after compelled production has not been performed.[147]

V. THE LIMITATIONS OF COMITY

The discussion above points out not only the essential nature of the comity analysis to any litigation involving foreign courts, it also highlights the limitations of the comity analysis in the context of foreign blocking statutes.[148] Seeking definitive boundaries for a doctrine comprised of the interplay of politics, courtesy, and good faith among nations is demanding under the best of circumstances.[149] United States courts have found some guidance in the notion of reciprocity, so that they generally enforce final judgments of foreign courts of competent jurisdiction in a manner similar to the regard given U.S. courts in the foreign jurisdiction in question.[150] While a good general rule, in practice the doctrine of reciprocity becomes not only difficult to enforce, but unfair as well.[151]

A. The Importance of Protecting U.S. Interests From Opportunistic Foreign Legislation

1. The Principle of Reciprocity

The principle of reciprocity works well when all parties involved are determined to place international comity ahead of national interest.[152] However, this is not always the case. The common law "parallel proceeding rule" serves as a prime example of the type of protective practices that undermine international comity.[153] United States case law establishes that where an in personum judgment is sought and both a

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147 *See* Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208 (1958); *see also In re* Uranium, 480 F. Supp. at 1147.

148 *See* notes 127–42 *supra,* and accompanying text.

149 *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

150 *See id.* at 166 (determining that a judgment rendered in a French court against a U.S. citizen was only prima facie evidence in an action brought upon the judgment in the United States because the French courts do not recognize the judgments of U.S. courts as conclusive).

151 *See* notes 131–48 *supra* and accompanying text.

152 *See* Hilton, 159 U.S. at 165–66.

153 Julie E. Dowler, *Forging Finality: Searching for a Solution to the International Double-Suit Dilemma*, 4 DUKE J. COMP. & INT'L. L. 363, 368–69 (1994).

U.S. court and a foreign court have concurrent jurisdiction, each court may proceed until a judgment is reached in one court which may then be recognized as res judicata in the other.[154] Because of the parallel proceedings rule, U.S. courts are reluctant to issue restraining orders preventing parties from bringing the same suit in a foreign court.[155] This policy serves the interest of international comity by discouraging interference in the legal proceedings of other nations.[156] However, it backfires on U.S. plaintiffs when a foreign defendant convinces the courts of her nation to issue a declaratory judgment in her favor despite the litigation pending in a U.S. court.[157] In such an instance, the U.S. court's adherence to principles of comity —by allowing the defendant to proceed with litigation in the foreign jurisdiction— has allowed a foreign defendant, and the courts of her nation, to thwart the valid jurisdiction of U.S. courts.[158] This inures to the harm of the U.S. plaintiff, who may be left with a valid final judgment in her favor from the U.S. court which heard the case, but is absolutely powerless to enforce the judgment in the nation where the defendant resides because of the declaratory judgment issued in defendants favor by the court in her homeland.[159]

Like the parallel proceedings rule, foreign blocking statutes also thwart the valid jurisdiction of U.S. courts and inure to the harm of U.S. plaintiffs.[160] For that reason, the U.S. Supreme Court has expressed its dissatisfaction with a statute that, "if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the [foreign country] over a U.S. district judge, forbidding him or her from ordering any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge."[161] Maintaining that "extraterritorial assertions of jurisdiction are not one-sided," the Court went

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154 *See* Laker Airways Ltd. v. Sabena, Belgium World Airlines, 731 F.2d. 909, 926–27 (D.C. Cir. 1984).

155 *See id.*

156 *See id.* at 927.

157 *See* Dowler, *supra* note 155, at 368–69.

158 *See id.* at 369.

159 *See id.*

160 *See* notes 11–19 *supra* and accompanying text.

161 Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 544 n.29 (1987).

on to point out that "the lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign."[162] Therefore, since "adjudication should . . . take place on the basis of the best information available . . . statutes that frustrate this goal need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States."[163]

This attitude toward foreign blocking statutes seems to be more congruent with the comity analysis utilized by the district court in *In re Uranium* than that used by the Second Circuit in its *Minpeco* decision.[164] Rather than attempting to balance the "competing interests of the nations whose laws are in conflict,"[165] as the *Minpeco* court would counsel, the challenge to the court when faced with a foreign statute blocking discovery needed for the just resolution of the dispute would be to "assess the importance of the policies underlying the U.S. statute which forms the basis for the plaintiff's claims."[166]

In addition, the analysis of the policies underlying the American legislation giving rise to the cause of action is more within the competence of a U.S. court than attempting to weigh the importance of the blocking statute to the foreign nation which enacted it.[167] Indeed, it is somewhat presumptuous of a U.S. court to assume to know how much more or less important the blocking statute is to the foreign nation enacting it than the antitrust legislation giving rise to the cause of action is to the United States.[168] While some blocking statutes are specific responses by foreign nations to U.S. litigation aimed at a particular national industry, others are generalized legislation having more to do with a broad based, philosophical difference in the foreign country's

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162 *Id.*

163 *Id.*

164 *See In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979); *compare* Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

165 Minpeco, 116 F.R.D. at 523.

166 *In re* Uranium, 480 F. Supp. at 1148.

167 *See* Teitelbaum, *supra* note 3, at 863.

168 *See id; see also In re* Uranium, 480 F. Supp. at 1148 (stating that "the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country . . .").

approach to litigation.[169] This reality further illustrates the difficulty a U.S. court faces when attempting to determine not only the importance to the foreign nation of the economic and social policies giving rise to its blocking statute, but also the weight to be given to the foreign statute vis a vis the U.S. legislation giving rise to the cause of action.[170] This analysis is doomed to be inaccurate, inefficient, and offensive to notions of international comity.[171]

2. The Appropriate Scope of the Comity Analysis

This is not to suggest that international comity has no place in the court's analysis when considering whether to order production of documents subject to a foreign blocking statute.[172] Comity demands that, should a court decide to order production, the documents compelled be identified with specificity.[173] Narrowing the focus of discovery to only those documents deemed essential to the litigation is an important concession to the policies underlying many foreign judicial systems.[174]

This is a significant change from the usual U.S. practice allowing discovery of any documents "reasonably calculated to lead to the discovery of admissible evidence."[175] Comity demands that U.S. courts exercise restraint when exerting their jurisdiction over documents located on foreign soil.[176] Nevertheless, this restraint should not consist of such deference to comity that parties to the suit are denied relief altogether because of misguided notions of undue reverence for foreign blocking statutes, combined with overreaching

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169 *See* Tietelbaum, *supra* note 3, at 846–48 (explaining the three types of foreign blocking statutes and their purposes).

170 *See In re* Uranium, 480 F. Supp. at 1148.

171 *See In re* Uranium, 480 F. Supp. at 1148 (discussing that "the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country"); *see also* Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 526 (S.D.N.Y. 1987) (suggesting that "attempts by American courts to manipulate outcomes in a foreign legal system . . . would produce the very opposite of comity").

172 *See, e.g.*, Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 544 (1987).

173 *See* RESTATEMENT OF THE Foreign RELATION LAW OF THE UNITED STATES (REVISED) § 473 cmt. h (Tent. Final Draft No. 2 1985).

174 *See* notes 11–19 *supra* and accompanying text.

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

176 *See supra* text accompanying notes 67–71.

attempts at balancing foreign and U.S. policies underlying their respective legislation.[177]

Not only is the heightened analysis advocated by the *Minpeco* court ill conceived regarding its approach to weighing U.S. and foreign interests in their respective legislation, it is also deficient in its good faith analysis.[178] The U.S. Supreme Court made it clear in its *SocieteInternationale* decision that there are certain factors that should be reserved for consideration solely when determining whether sanctions are appropriate for nonproduction of ordered documents, should that phase be reached.[179] Chief among these factors is any assessment of the good or bad faith of the party resisting disclosure, because such an analysis is relevant only after compelled production has not been performed.[180] It is both inefficient and unfair to the party seeking discovery for the court to perform an analysis of the good or bad faith of the party resisting discovery both when determining whether to order production and then again when determining whether to impose sanctions for nonproduction.[181] The utilization of the good faith analysis when determining whether to compel production opens the door to manipulation of U.S. courts through lengthy haggling over whether good faith has in fact been exercised by the resisting party.[182] At best, such an approach unduly lengthens the discovery process without seriously damaging the case of the party seeking disclosure of documents subject to foreign blocking statutes. Often however, a court ends up giving so much deference to the supposed good faith of the resisting party that documents vital to the litigation are not ordered to be produced, thus denying any remedy to the party seeking discovery.[183]

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177 *See* Teitelbaum, *supra* note 3, at 869.

178 *See* notes 126–30 *supra*, and accompanying text.

179 Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208, 211, 213 (1958).

180 *See id.* at 210–12.

181 *See id.* at 208 (stating the good faith of the party resisting discovery is relevant only when determining whether or not to impose sanctions).

182 *See* Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 527–29 (S.D.N.Y. 1987).

183 *See id.* at 528–29.

B. Federal Rule of Civil Procedure 37 Sanctions For Nonproduction

Ideally, discovery will proceed without significant court intervention. When one party fails to produce documents, however, the court must decide whether to order that production.[184] If the court issues a discovery order and the party continues to refuse to comply, the court may choose to enforce its prior order.[185] The Federal Rules of Civil Procedure authorize district courts to order sanctions for failure to abide by a court's previous discovery ruling.[186] These sanctions include, but are not limited to:

> An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> In lieu of any of the foregoing orders of in addition thereto, an order treating as a contempt of court the failure to obey any orders . . .[187]

The latitude of choices given to the trial court in assessing sanctions indicates that the prudent judge will weigh the resisting party's conduct when determining not only whether to impose sanctions, but also to what degree the court should punish him for nonproduction.[188] It is at this stage of the litigation, and not before, that an

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184 *See In re* Westinghouse Electric Corporation Uranium Contracts Litigation, 563 F.2d 992, 997 (10th Cir. 1977).

185 *See id.* at 994–95.

186 *See* FED. R. CIV. P. 37(b).

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

188 *See* Societe Internationale Pour Participations Industrialles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208 (1958).

assessment of the nonproducing party's good or bad faith is relevant to the court's analysis.[189]

Sanctions should always be imposed in cases where a court order is not obeyed.[190] In cases where the nonproducing party made a good faith attempt at complying with the court order compelling production but was prevented from doing so by foreign legislation which in fact covered the documents in question, it is appropriate to impose the least onerous sanction mentioned in Rule 37—adverse inferences.[191] Under the adverse inferences doctrine, any facts which cannot be conclusively established because of the nonproducing party's failure to comply with the court order are construed in accordance with the claim of the party seeking the order to compel production.[192] By so doing, neither the nonproducing party nor the foreign nation resisting openness and truth are rewarded for their failure to be forthcoming.[193] In cases where a lack of good faith effort at compliance is demonstrated, the court is free to impose sanctions ranging from stifling the disobedient party's case to dismissing it altogether.[194] Either way, international comity will have served its purpose under the doctrine of reciprocity.[195]

VI. CONCLUSION

Because of foreign antipathy toward U.S. antitrust and securities legislation, collusion between foreign governments and the major corporations that are headquartered within their jurisdictions in resisting production of documents essential to U.S. litigation is an unpleasant reality which thwarts the efforts of U.S. courts to exercise their rightful jurisdictional privileges.[196] This degree of cooperation between foreign business and governmental interests in impeding U.S. judicial proceedings is not likely to diminish without a significant disincentive.[197] Accordingly, it behooves

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189 *See id.*

190 *See* Eckert, *supra* note 99, at 787.

191 *See id.* at 785–86.

192 *See id.*; *see also* FED. R. CIV. P. 37(b)(2).

193 *See* Eckert, *supra* note 54, at 787.

194 *See* FED. R. CIV. P. 37(b)(2).

195 *See* Hilton v. Guyot, 159 U.S. 113, 166 (1895).

196 *See* notes 1–6 *supra* and accompanying text.

197 *See* Teitelbaum, *supra* note 3, at 869–70.

U.S. courts to arrive at a comity analysis that does not give incentive to foreign governments to enact further blocking statutes and that provides incentive for them to reconsider the ones already in place.[198] Deferring analysis until the sanctions phase of the proceedings of the good faith, or lack thereof, of the party resisting production accomplishes this goal.[199] It focuses the court's analysis during the production phase of the litigation on more objective standards such as the importance of the American interests underlying the legislation that gives rise to the cause of action and the importance of the documents sought to the litigation.[200] Additionally, the duty of international comity is fulfilled at the production stage by narrowing the focus of any discovery order to only those documents deemed essential to the litigation and assessing the degree of flexibility of application of the foreign blocking statute that is impeding production.[201] Because U.S. courts are not competent to assess the economic and policy factors underlying the foreign blocking statute and weigh its relative importance to the foreign nation enacting it vis a vis the U.S.' interest in enforcing its legislation, such an overblown attempt at balancing the interests of the nations whose laws are at issue in the litigation should not be attempted.[202] To do so is both inefficient and unfair.[203]

Once an appropriate comity analysis is agreed upon by U.S. courts, it must be applied with consistency. This will send a clear signal to those nations that may be tempted to collude with business interests within their borders that U.S. courts have gotten their bearings and are now united in their intent to pursue discovery of essential documents regardless of the impediment of foreign illegality. Both foreign governments and businesses that house documents abroad will then have clearer parameters for their actions and policies regarding doing business in the United States.

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198 *See id.*

199 *See In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1147–48 (N.D. Ill. 1978).

200 *See id.*

201 *See* notes 173–78 *supra* and accompanying text.

202 *See* notes 168–72 *supra* and accompanying text.

203 *See* notes 168–72 *supra* and accompanying text.