1997

Note, Beyond the Rhetoric of Comparative Interest Balancing: An Alternative Approach to Extraterritorial Discovery Conflicts

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NOTE

BEYOND THE RHETORIC OF COMPARATIVE INTEREST BALANCING: AN ALTERNATIVE APPROACH TO EXTRATERRITORIAL DISCOVERY CONFLICTS

I

INTRODUCTION

In a tort action before a U.S. court, the Plaintiff seeks to compel the corporate Defendant to produce documents held by the Defendant's Canadian subsidiary. The Defendant counters by moving for a protective order prohibiting the discovery, arguing that a Quebec blocking statute[1] prevents the disclosure of the documents.[2] At stake are the conflicting interests of the Plaintiff, the Defendant, the United States, and the Canadian province of Quebec.[3] Courts faced with this increasingly common type of

1. Blocking statutes, or nondisclosure laws, are laws that prohibit the disclosure or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 437 reporter's note 4 (1986) [hereinafter RESTATEMENT (REVISED)]. Such legislation is designed to counter U.S. efforts to secure foreign production and has been enacted in several foreign states, including Australia, Belgium, Canada, Denmark, Finland, France, India, New Zealand, the Netherlands, the Philippines, South Africa, Switzerland, the United Kingdom, and West Germany. The complete texts of most of these foreign blocking statutes are reprinted in A. LOWE, EXTRATERRITORIAL JURISDICTION—AN ANNOTATED COLLECTION OF LEGAL MATERIALS (1983).

2. This hypothetical is based on the fact situation presented in State v. Keene Corp., No. 1108600, slip op. (Cir. Ct. Md. July 10, 1986) (granting protective order). The blocking statute involved in *Keene Corp.* was the Quebec Business Concerns Records Act, QUE. REV. STAT. ch. D-12 (1977) [hereinafter Quebec Act].

3. The Plaintiff has an interest in having the adjudication go forward with the best evidence available. In addition to the obvious desire of avoiding the admission of potentially damaging evidence, the Defendant has an interest in avoiding the criminal sanctions (up to one year's imprisonment) which may be imposed for violating the provisions of the blocking statute. Quebec Act, *supra* note 2, § 5. The interests of the United States include the interest in protecting U.S. citizens from harmful products and compensating them for injuries resulting from the use of such products, and the interest in deciding cases on the basis of all relevant information in accord with the Federal Rules of Civil Procedure. FED. R. CIV. P. 26(b)(1). The interests of the Province of Quebec in the nondisclosure of business records located within its borders are reflected in the Quebec Act. The fact that the Quebec Act makes the removal of records from Quebec in pursuance of an order by a foreign authority a criminal offense punishable by imprisonment illustrates that the Quebec Parliament considered protection of business records to be of critical importance to a viable business environment and to the territorial integrity of the province. Quebec Act, *supra* note 2.

extraterritorial jurisdictional conflict receive scant guidance from the confused and inconsistent case law and vague authoritative pronouncements on the subject of extraterritorial discovery.

Most courts ostensibly employ one of several comparative interest balancing approaches[4] to determine whether production should be ordered in cases in which domestic corporations refuse to produce documents held by their foreign subsidiaries, branches, or parent corporations because of the existence of a foreign blocking statute. The term "comparative interest balancing" denotes a decisionmaking process in which the court identifies the conflicting interests of each state, weighs each state's interest against that of the other, and makes a decision according "to the turn of the scale."[5] Although each of the several comparative interest balancing approaches lists factors to be balanced, none explains how the factors are to be evaluated or how they are to be weighed against one another.[6] The major weaknesses of comparative interest balancing are simply that courts lack the institutional resources and expertise to assess the interests of foreign states and that no judicially manageable standards exist for assigning weight to competing national interests.[7] As a number of commentators have pointed out, balancing national interests is a political, not legal task,[8] and is unlikely to produce the predictability and certainty necessary to minimize jurisdictional conflicts.[9]

In recognition of these deficiencies of comparative interest balancing, this note proposes not a better rule of law, but rather a more realistic and coherent process for extraterritorial decisionmaking in cases involving

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4. For a summary of judicial application of interest balancing, see RESTATEMENT (REVISED), *supra* note 1, § 437 reporter's note 7. *But see In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

5. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 589 (1983).

6. *See* RESTATEMENT (REVISED), *supra* note 1, § 437(1)(c); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) [hereinafter RESTATEMENT (SECOND)]; Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976), *aff'd*, 749 F.2d 1378 (9th Cir. 1984).

7. These weaknesses were noted in *In re* Uranium Antitrust Litig., 480 F. Supp. 1139, 1148 (N.D. Ill. 1979), where the court rejected the comparative interest balancing approach and concluded:

> Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, . . . [i]t is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.

Similar sentiments were echoed in Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 949-50 (D.C. Cir. 1984), in which the D.C. Circuit Court of Appeals stated:

> Given the inherent limitations of the Judiciary, which must weigh these issues in the limited context of adversarial litigation, we seriously doubt whether we could adequately chart the competing problems and priorities that inevitably define the scope of any nation's interest in a legislated remedy.

8. *See* Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 205 (1984); Durack, *Australia: Conflicts and Comity*, in ACT OF STATE AND EXTRATERRITORIAL REACH: PROBLEMS OF LAW AND POLICY 41, 44 (J. Lacey ed. 1983); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U.L. REV. 487, 531 (1969).

9. *See* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1322 (1985); Gerber, *supra* note 8.

conflict between discovery and foreign blocking statutes. This note focuses on the distinction between interest balancing within the realm of "private law" and "public law."[10] The critical difference lies in the fact that interest balancing in public law cases has operated as a means of asserting the primacy of U.S. interests[11] in the guise of applying a "jurisdictional rule of reason."[12] Although courts profess to apply a comparative interest balancing approach, in public law cases they actually exercise enforcement jurisdiction[13] whenever more than a *de minimis* U.S. interest is present; consideration of foreign interests is rarely more than perfunctory.[14] Only in private law cases are courts willing to defer to foreign interests.[15] This note seeks to conform the courts' rhetoric to reality by providing an analytical framework which acknowledges that interest analysis has actually been, by necessity, unilateral and non-comparative.

Before setting forth the proposed approach, this note first examines the several balancing approaches that courts have attempted to follow. Next, this note exposes the deficiencies inherent in comparative interest balancing. Finally, this note describes a methodological paradigm that more accurately reflects the substance, if not the form, of judicial decisionmaking in the area of extraterritorial discovery than do comparative interest balancing formulations.

I

COMPARATIVE INTEREST BALANCING

A. *Societe Internationale*: A Legacy of Confusion

The United States is presently the only nation which regularly compels foreign discovery in conflict with local foreign law.[16] Prior to 1958, however, U.S. courts, like their foreign counterparts, deferred to foreign interests on a

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10. As defined in this note, "private law" includes cases of a purely private civil law nature such as contract and tort actions. "Public law" refers to cases of a significant national interest such as securities, tax, patent, antitrust, and criminal proceedings.

11. *See, e.g.*, Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 950-51 (D.C. Cir. 1984).

12. RESTATEMENT (REVISED), *supra* note 1, § 503(1).

13. Enforcement jurisdiction is the power of a state "to induce or compel compliance or punish noncompliance with its laws or regulations. . . ." RESTATEMENT (REVISED), *supra* note 1, at § 401(3). Thus, when a court in one state orders a party, under the threat of sanctions for non-compliance, to produce documents that are located in another state, it exercises enforcement jurisdiction. *Id.* § 431 comment b.

14. *See infra* notes 72-73, 86-104 and accompanying text.

15. *See infra* notes 105-109 and accompanying text.

16. *See* Rosenthal & Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery*, 16 N.Y.U. J. INT'L L. & POL. 1075, 1075-77 (1984). *See, e.g.*, Frischke v. Royal Bank, 17 Ont.2d 388 (1970). In *Frischke*, the Ontario Court of Appeals declined to order production of documents located in Panama, stating that notwithstanding exceptional circumstances, "[a]n Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that state." *Id.* at 399. *See also* Lonrho Ltd. v. Shell Petroleum Co., 1 W.L.R. 627, 634-35 (H.L. 1980) (holding that the existence of a local foreign law prohibiting disclosure prevents the documents from being in a party's power for the purposes of ordering discovery).

basis of comity[17] and would not order discovery within the territory of another state when such disclosure conflicted with the law of that state.[18] It was in that year that the Supreme Court, in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*[19] (*Societe Internationale*), upheld a production order despite the fact that disclosure of the records would violate Swiss penal laws and would lead to the imposition of criminal sanctions.[20] Thus began the era of extraterritorial discovery conflict.

In *Societe Internationale*, a Swiss holding company brought suit against the Attorney General of the United States to recover property seized during World War II under the Trading with the Enemy Act.[21] Pursuant to discovery requests, the district court ordered the plaintiff to produce certain documents relevant to the issue of plaintiff's possible enemy taint. The records were not produced on the ground that production would violate Swiss secrecy laws, which carried criminal penalties, and the district court imposed the sanction of dismissal with prejudice of plaintiff's complaint. On appeal, the Supreme Court held that the production order was justified notwithstanding the nondisclosure law, but held also that a party's failure to comply with a production order due to inability fostered neither by its own conduct nor by circumstances within its control did not justify the sanction of dismissal with prejudice.[22]

Societe Internationale is the only case in which the Supreme Court has directly confronted the issue of conflict between a discovery order of a U.S. court and a foreign blocking statute. Although *Societe Internationale* is universally recognized as holding that severe sanctions for noncompliance with a production order will be imposed only upon a showing of bad faith, courts have subsequently focused on various other aspects of the Supreme Court's decision, such as its bifurcated analysis[23] and its stress on the importance of the requested documents in illuminating key elements of the claims.[24] Apart from the requirement of good faith, however, the Supreme

17. Comity has been defined as "a way of saying fair play—that each of two parties will yield to the one that has interests that are clearly paramount . . . . Where conflicts arise between sovereigns, the sovereigns have an obligation to resolve the conflict with restraint, cooperation and good will." Durack, *supra* note 8, at 43 (quoting former United States Attorney General, Judge Griffin Bell).

18. *See, e.g.*, Hirshorn v. Hirshorn, 278 A.D. 1006, 1007, 105 N.Y.S.2d 628, 630 (1951).

19. 357 U.S. 197 (1958).

20. *Id.* at 205.

21. *Id.* at 199.

22. *Id.* at 212.

23. The Court in *Societe Internationale* considered the validity of discovery orders and the issue of the propriety of sanctions separately, stating: "Such reasons [for noncompliance], and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply." *Id.* at 208. *See* Arthur Anderson & Co. v. Finesilver, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1976) ("*Societe* implies that consideration of foreign law problems in a discovery context is required in dealing with sanctions to be imposed for disobedience and not in deciding whether the discovery order should issue"). *But see* SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117 n.3 (S.D.N.Y. 1981) (noting that the Second Circuit, unlike other circuits, does not distinguish the analysis used for deciding to issue an order compelling discovery from that used for imposing sanctions).

24. *See, e.g., In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1146 (N.D. Ill. 1979).

Court's analysis of the validity of the discovery order is masked in ambiguity. As a result, the decision has produced more confusion than guidance.[25]

Much of the confusion surrounding the proper interpretation of *Societe Internationale* stems from a passage in the decision in which the Court stated:

> We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. Rule 34—of the Federal Rules of Civil Procedure—is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order.[26]

Many courts and commentators have interpreted this language as calling for "a balancing approach on a case-by-case basis."[27] One court has nevertheless noted that "the Court gave no hint that the disclosure policies of the American statute should be balanced against the secrecy policies of the Swiss law," and concluded instead that "the only pertinent inquiry is the strength of the American interests."[28] It is more likely that the Court never even considered, let alone decided, the issue of whether interest balancing is required. A review of the briefs submitted by the parties in *Societe Internationale* reveals that the issue of whether the courts below impermissibly failed to balance interests before ordering production was never raised.[29]

B. The Approach of the Restatements: Factors Without Guidance

For many courts, the question of the proper interpretation of *Societe Internationale* was resolved by the American Law Institute when it published the Restatement (Second) of Foreign Relations Law of the United States in 1965.[30] The prestige of the American Law Institute and of the drafters of the Restatement (Second) quickly established the Restatement as a leading authority in cases involving extraterritorial discovery conflicts.[31] The Restatement (Second) took on enhanced significance because of the confusion created by *Societe Internationale* and the fact that American judges are generally not as familiar with international law as with domestic law.

The Restatement (Second) does not directly address the problem of extraterritorial discovery conflicts. Instead, it contains a general section

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25. For a discussion of the numerous conflicting judicial approaches spawned by *Societe Internationale*, see Browne, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1324-39 (1983).

26. 357 U.S. 197, 205-06 (1958).

27. *See, e.g., In re* Westinghouse Electronic Corp. Uranium Contracts Litig., 563 F.2d 992, 997 (10th Cir. 1977).

28. *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1146 (N.D. Ill. 1979).

29. Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 8 n.9, Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 107 S. Ct. 2542 (1987).

30. Although this was actually the American Law Institute's first Restatement of United States Foreign Relations Law, it was entitled the "Restatement (Second)" because it was published with a second wave of other restatement volumes. Rosenthal & Yale-Loehr, *supra* note 16, at 1082 n.28.

31. *Id.* at 1082.

pertaining to international jurisdictional conflicts. This provision declares that states are required by international law to moderate their exercise of jurisdiction by weighing all respective interests.[32] The Restatement (Second) lists five factors to be balanced, including the vital national interests of each of the states.[33] The Restatement (Second), however, mentions nothing about how these factors are to be ascertained or evaluated, and provides no standards by which the factors may be weighed against each other.

In May 1986, the American Law Institute approved the Restatement (Revised) of Foreign Relations Law which employs the same type of comparative interest balancing formulation as the Restatement (Second).[34] The Restatement (Revised), however, elevates the balancing test from a doctrine of comity to a criterion of jurisdiction *vel non* (literally meaning jurisdiction or not). In contrast to the Restatement (Second), the Restatement (Revised) requires comparative interest balancing "not as a basis for requiring that states consider moderating their enforcement of laws which they are authorized to prescribe, but as an essential element in determining whether, as a matter of international law, the state has jurisdiction to prescribe" the laws at all.[35]

Although the Restatement (Revised) is in some respects a substantial improvement over the Restatement (Second),[36] its balancing formula is no less vague than that of its predecessor. A comment following its text indicates

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32. RESTATEMENT (SECOND), *supra* note 6, § 40 states:

> 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 actions of either state can reasonably be expected to achieve compliance with the rule prescribed by the state.

33. *Id.* § 40(a).

34. RESTATEMENT (REVISED), *supra* note 1, § 437(1)(c) states:

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

The comment to this section indicates that in addition to these factors, the eight factors listed in § 403 of the Restatement (Revised) should also be considered. *Id.* § 437 comment c.

35. *Id.* § 403 reporter's note 10. Contrary to the assertion of the American Law Institute, however, one court has noted that "there is no evidence that interest balancing represents a rule of international law." Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 950 (D.C. Cir. 1984).

36. Unlike the Restatement (Second), the Restatement (Revised) explicitly adopts various aspects of the *Societe Internationale* analysis, such as the requirement of a stringent standard of relevance and the bad faith prerequisite to the imposition of severe sanctions. RESTATEMENT (REVISED), *supra* note 1, § 437(2)b & comment a.

that the Restatement (Revised)'s list of factors to be balanced is not meant to be exhaustive and acknowledges that "no special significance or scheme of priorities is implied in the order in which the factors are listed. Not all factors are equally important in all situations, and the weight to be given to any particular factor or group of factors will depend on the circumstances."[37]

An impressive number of courts have professed to follow the approach of the two Restatements of Foreign Relations Law,[38] yet attempts to apply their hollow balancing formulas have resulted largely in confused, ad hoc decisionmaking.[39] Judicial refinement and expansion of the list of factors to be balanced[40] have not added coherence or certainty to the balancing calculus. Lacking a conceptual structure and an assessable metric for weighing relative interests, the balancing approach of the Restatements has failed to provide a basis for developing predictability over time.

C. *Aerospatiale*: An Opportunity for Clarification Squandered

Despite confused and inconsistent judicial application of the Restatement's vague balancing formula, the Supreme Court has, since its 1958 holding in *Societe Internationale*, consistently declined to render additional guidance on the issue of extraterritorial discovery conflicts.[41] The Court's latest refusal to clarify the criteria that U.S. courts should employ in determining when to require production of evidence located abroad in contravention of foreign blocking statutes came in 1987 with its decision in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Dist. of Iowa*.[42]

The *Aerospatiale* case arose out of a products liability suit against French aircraft manufacturers. When the U.S. plaintiffs sought broad discovery of evidence located abroad under the Federal Rules of Civil Procedure, the foreign defendants moved for a protective order, arguing that the U.S. court should prohibit discovery in France through any procedures other than those provided in the Hague Evidence Convention. Because article 23 of the Hague Convention provides that contracting states may declare that they will refuse

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37. *Id.* § 403 comment b.

38. *Id.* § 437 reporter's note 7 (listing cases that have followed the Restatement (Second) balancing approach. For cases citing the tentative drafts of the Restatement (Revised), see Graco v. Kremlin, Inc., 101 F.R.D. 503, 509 (N.D. Ill. 1984); United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 346 (7th Cir. 1983); United States v. Toyota Motor Corp., 569 F. Supp. 1158, 1162 (C.D. Cal. 1983).

39. For a discussion of the confused judicial application of the *Restatement* balancing formula, see Browne, *supra* note 25, at 1330-39.

40. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976), *aff'd*, 749 F.2d 1378 (9th Cir. 1984). For an analysis of the *Timberlane* approach, see Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 296-300 (1982).

41. The Supreme Court declined to grant certiorari in a case raising the issue most recently in *In re* Grand Jury Proceedings Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

42. 107 S. Ct. 2542 (1987).

requests for the type of sweeping pre-trial discovery known in common law countries,[43] application of the Convention can potentially have an effect identical to imposition of a blocking statute.[44] Therefore, despite the fact that the case involved application of the Hague Convention rather than conflict with an actual blocking statute, it nonetheless presented an ideal opportunity for the Court to refine the formula for resolving all extraterritorial discovery conflicts.

Citing the comparative interest balancing formula of section 437 of the Revised Restatement of Foreign Relations Law, the Supreme Court held that the Hague Convention's procedures constitute an option that a U.S. court may or may not elect to employ, depending on the outcome of "scrutiny in each case of the particular facts [and] sovereign interests."[45] The Court, however, evaded the underlying issue of exactly how the comparative interest balancing approach is to be applied by stating "[w]e do not articulate specific rules to guide this delicate task of adjudication."[46]

The majority's holding produced a sharply worded dissent in which Justice Blackmun, joined by Justices Brennan, Marshall, and O'Connor, exclaimed that "[e]xperience to date indicates that there is a large risk that the case-by-case comity analysis now to be permitted by the Court will be performed inadequately."[47] Arguing that the Court should have instead adopted a general presumption that courts should resort first to the procedures of the Hague Convention, Justice Blackmun stated, "I dissent because I cannot endorse the Court's case-by-case inquiry . . . and its failure to provide lower courts with any meaningful guidance for carrying out that inquiry."[48] He concluded that, "[t]he majority fails to offer guidance in this endeavor, and thus it has missed its opportunity to provide predictable and effective procedures for international litigants in United States courts."[49]

If the legacy of *Societe Internationale* can be said to be confusion, the Court's latest decision involving extraterritorial discovery conflicts will be remembered as a missed opportunity to resolve that confusion. Although the majority in *Aerospatiale* refrained from explicitly stating how its decision would affect lower court cases involving foreign blocking statutes, it is likely that the *Aerospatiale* precedent will be interpreted as endorsing a vague notion of comparative interest balancing in that context as well.

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43. 23 U.S.T. at 2568, TIAS 7444. Thirteen of the seventeen signatory states have made such declarations under Article 23 of the Convention. *See* 7 MARTINDALE-HUBBELL LAW DIRECTORY 15-19 (1986).

44. *See* S&S Screw Mach. Co. v. Cosa Corp., 647 F. Supp. 600, 617 (M.D. Tenn. 1986) (granting protective order in contract case in which, pursuant to article 23 of the Hague Convention, West Germany refused American pre-trial discovery requests).

45. *Aerospatiale*, 107 S. Ct. at 2555-56..

46. 107 S. Ct. at 2557.

47. 107 S. Ct. at 2558. The dissent later elaborated that "courts are generally ill-equipped to assume the role of balancing the interests of foreign nations with that of our own [and that a] pro-forum bias is likely to creep into the supposedly neutral balancing process." 107 S. Ct. 2560.

48. 107 S. Ct. at 2558.

49. 107 S. Ct. at 2568.

D. The Deficiencies of Comparative Interest Balancing

Vagueness is but one of the many deficiencies inherent in comparative interest balancing which render it an impractical approach to the problem of extraterritorial discovery conflicts. A second major problem with comparative interest balancing is that courts are simply unable to ascertain and to evaluate accurately the interests of the foreign states that are to be weighed against those of the United States. The Restatement (Second) requires an assessment of the "vital national interests" of the foreign state,[50] and the Restatement (Revised) calls for an inquiry as to "the extent to which compliance with an order to produce the requested information would affect important substantive policies or interests of the state."[51] Yet, unlike the United States Department of State, the judiciary possesses neither the special training nor the resources necessary to analyze the economic, political, and social interests that underlie a foreign state's policies of nondisclosure. Several courts have acknowledged that the judiciary lacks the "institutional resources,"[52] the expertise, and perhaps even the authority[53] to "adequately chart the competing problems and priorities that inevitably define the scope of any nation's interest in a legislated remedy."[54]

The Act of State doctrine presents a further barrier to the evaluation of the foreign interests underlying blocking legislation. The doctrine, which prevents an American court from sitting in judgment of the public acts of another country,[55] directly conflicts with the position taken by the Restatement (Revised) that foreign "statutes that frustrate [discovery] 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."[56] One court has recently rejected this assertion by the Restatement (Revised), noting that it is "somewhat presumptuous, to gauge the importance of the Blocking Statute to France."[57] This view was also highlighted in recent litigation in which the United Kingdom stated that it is as politically intolerable for leaders of foreign democracies to have their official policies evaluated, balanced, and coerced by

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50. RESTATEMENT (SECOND), *supra* note 6, § 40(a).

51. RESTATEMENT (REVISED), *supra* note 1, § 437 comment c.

52. Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 955 (D.C. Cir. 1984).

53. *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

54. Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 950 (D.C. Cir. 1984).

55. The doctrine was first promulgated in Underhill v. Hernandez, 168 U.S. 250, 252 (1897), where the Supreme Court declared:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment of the acts of the government of another done within its own territory.

For a recent example of the doctrine's application, see Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981), in which the court held that even where no sovereign state is a party to the action, the Act of State doctrine prevents a federal court from questioning the propriety of sovereign acts of foreign states such as the price setting activities of OPEC states.

56. RESTATEMENT (REVISED), *supra* note 1, § 437 reporter's note 5.

57. Graco v. Kremlin, Inc., 101 F.R.D. 503, 513 (N.D. Ill. 1984).

U.S. courts as it would be for American leaders to have important U.S. policies and interests evaluated, judged, and coerced in foreign courts.[58]

Even assuming domestic courts have the ability and authority to gauge vital foreign interests, they cannot reliably and impartially balance the foreign interests against those of the United States. In *Laker Airways v. Sabena, Belgian World Airlines*,[59] Judge Malcolm Wilkey of the D.C. Circuit Court of Appeals argued that domestic courts are incapable of sitting as international tribunals and evenhandedly balancing national interests. He concluded that "courts inherently find it difficult neutrally to balance competing foreign interests."[60] Given the vagueness of existing comparative interest balancing approaches, it is small wonder that a court might be encouraged to assert the primacy of U.S. interests. A court is likely to have difficulty, especially in a case involving U.S. nationals, in denying jurisdiction, unless it can base its decision on a concrete legal principle that clearly prohibits the exercise of such jurisdiction.[61] Comparative interest balancing provides no such concrete principle.

Finally, judicial use of comparative interest balancing is contrary to the political question doctrine which removes certain issues from the scope of judicial review.[62] In *Baker v. Carr*,[63] the Supreme Court extensively reviewed the history and evolution of the political question doctrine and explained that when the resolution of questions touching foreign relations turns on standards that defy judicial application, or involves the exercise of discretion demonstrably committed to the executive or legislature, such questions are nonjusticiable political questions.[64] The preceding discussion has illustrated that comparative interest balancing incorporates "purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing."[65] In his address to the American Bar Association in August 1981, the Attorney General of Australia, Senator Peter Durack, explained:

> In my view, however, it is not feasible for a court of law applying judicial techniques to balance the disparate interests of two States which they claim to be of national importance . . . .

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58. Joint Brief of United Kingdom and Cayman Islands at 16-20, *In re* Grand Jury Proceedings (United States v. Bank of Nova Scotia), No. 83-1 (S.D. Fla. filed Feb. 28, 1984), *cited in* Rosenthal & Yeal-Loehr, *supra* note 16, at 1080.

59. 731 F.2d 909 (D.C. Cir. 1984).

60. *Id.* at 950-51.

61. Gerber, *supra* note 8, at 209.

62. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 208-16 (1972). The political question doctrine, which prevents judicial determination of political questions for which courts lack competence, is to be contrasted with the Act of State doctrine, which is based on "the lack of consent by foreign states to review of their actions by domestic courts of another state." RESTATEMENT (REVISED), *supra* note 1, § 428 reporter's note 1.

63. 369 U.S. 186 (1962).

64. *Id.* at 211, 217. Although *Baker* involved the issue of legislative reapportionment, its criteria have subsequently been employed by countless courts identifying nonjusticiable political questions in cases involving foreign relations. *See, e.g.*, Cranston v. Reagan, 611 F. Supp. 247, 252 (D.D.C. 1985), and cases cited therein.

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

> [I]t is not merely that the courts lack the expertise. It is rather that it is not part of the judicial function to decide whether a law or policy is justified by what a court conceives to be in the national interest. That is a political function.[66]

Appraisal of the national interests of a foreign state is therefore more appropriately a political rather than a judicial judgment. In accordance with the political question doctrine, a court should refrain from subscribing to a formulation whose standards are neither judicially discoverable nor manageable.

III

PROPOSAL

Given the deficiencies inherent in comparative interest balancing, it is not surprising that the analyses of the courts in cases involving discovery orders and foreign nondisclosure laws have been inconsistent and confused. To resolve the current confusion, and to simplify the task confronting a judge or attorney in such cases, this note proposes a new framework in which to examine the factors traditionally analyzed. In contrast to previous approaches, this proposal does not require an assessment or balancing of foreign interests. Rather, it requires a straightforward and unilateral evaluation of domestic interests at the production stage of a trial.

Simply stated, under this proposal a court should issue an order for discovery upon a finding that the requested information is directly relevant *and* upon a further finding of *any* one of the following: (1) that the case involves public rather than private law; (2) that the blocking statute is not an actual barrier to production; or (3) that no reasonable good faith effort to obtain the documents was made. Accordingly, a court should refrain from ordering production, or issue a protective order preventing production, upon a finding that the requested information is not directly relevant *or* a finding of *all* of the following: (1) that the case involves private law; (2) that the blocking statute presents an actual barrier to production; and (3) that a reasonable good faith effort to obtain the documents was made. This formulation is expressed as follows:

66. Durack, *supra* note 8, at 48.