Resolving the Cross-Border Discovery Catch-22

"A proclamation by judicial fiat that one interest is less 'important' than the other will not erase a real conflict."[1]

I. INTRODUCTION

The extraterritorial reach of the Federal Rules of Civil Procedure's (Federal Rules) evidence-gathering provisions has long been a source of tension in foreign relations.[2] The world we live in is increasingly interconnected and litigation between parties subject to multiple sovereigns has become more commonplace.[3] Often, the discovery provisions of the Federal Rules come into conflict with foreign laws, such as banking secrecy or blocking statutes.[4] Under such a predicament, a litigant that operates both abroad and in the United States is placed in a catch-22: produce discovery in violation of foreign law (and be subject to liability) or refuse to produce discovery (and be subject to

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

2. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442, reporters' note 1 (1987). "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States." *Id*.

3. *See* Emily Flitter, *Insight: Gucci, Tiffany Target Chinese Banks*, REUTERS, Oct. 4, 2011, http://www.reuters.com/assets/print?aid=USTRE7931ND20111004 (reporting luxury-goods companies targeting U.S. branches of major Chinese banks conducting business with pirates); Chao Liu, *The State Secrets Issue In SEC V. Deloitte*, LAW360, (Nov. 10, 2011, 12:57 PM), http://www.law360.com/articles/284022/the-state-secrets-issue-in-sec-v-deloitte (explaining more and more Chinese companies involved in cases where SEC faces state secrets issues); Doug Tsuruoka, *U.S.-China Accounting Standoff Raises Tricky Issues*, INVESTORS BUS. DAILY (Feb. 15, 2013, 05:47 PM), http://news.investors.com/print/business/021513-644721-us-chinese-officials-face-off-on-audit-access.aspx (discussing current conflict-of-laws issue). *See generally* Don Mayer & Ruth Jebe, *The Legal and Ethical Environment for Multinational Corporations*, *in* GOOD BUSINESS: EXERCISING EFFECTIVE AND ETHICAL LEADERSHIP 159-71 (James O'Toole & Don Mayer eds., 2010), *available at* http://www.enterpriseethics.org/Portals/0/PDFs/good_business_chapter_13.pdf (giving overview of legal issues multinational corporations may face); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997) (challenging conventional understanding and relationship between federalism and foreign affairs).

4. *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06MD1775, 2010 WL 2976220, at *1, 3 (E.D.N.Y. July 23, 2010) (compelling party to produce transaction and cost data in violation of South African law); Ssangyong Corp. v. Vida Shoes Int'l., Inc., No. 03 Civ. 5014 KMW DFE, 2004 WL 1125659, at *7, *13 (S.D.N.Y. May 20, 2004) (compelling party to produce bank documents in violation of Hong Kong's banking secrecy laws); S.E.C. v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 112, 117 (S.D.N.Y. 1981) (ordering party to produce discovery and answer interrogatories in violation of Swiss law); *In re* Global Power Equip. Grp. Inc., 418 B.R. 833, 836, 851 (Bankr. D. Del. 2009) (compelling party to produce documents and witness testimony in violation of French law).

sanctions).[5] These types of scenarios can arise in almost every context and implicate the laws of many of nations.[6] For example, consider the Securities and Exchange Commission's (SEC) recent conflict with Deloitte's branch in China regarding the production of documents.[7] The SEC sought documents related to Deloitte's audit of Longtop Financial Technologies, but Deloitte claimed it was barred from doing so by Chinese secrecy laws.[8]

Courts have attempted to resolve these conflicts in a variety of ways.[9] The United States Supreme Court has even offered guidance.[10] Federal courts, however, continue to apply an inconsistent standard that balances various interests.[11] Thus, it is common for courts to decide cases in this area in conflicting fashion.[12] The conflicting decisions, however, run further than a

5. *See generally* Andreas F. Lowenfeld, *Some Reflections on Transnational Discovery*, 8 J. COMP. BUS. & CAP. MARKET L. 419 (1986), *available at* https://www.law.upenn.edu/journals/jil/articles/volume8/issue4/Lowenfeld8J.Comp.Bus.%26Cap.MarketL.419(1986).pdf (providing useful background and framework of transnational discovery); Cynthia Day Wallace, *'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?*, 37 INT'L L. 1055 (2003) (discussing issue of extraterritorial discovery). In one sense, this conflict of laws creates a judicial prisoners' dilemma between nations. *See* Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1022-23 (1991) (describing classic prisoners' dilemma); *see also* Avinash Dixit & Barry Nalebuff, *Prisoners' Dilemma*, LIBR. ECON. & LIBERTY, http://www.econlib.org/library/Enc/PrisonersDilemma.html (last visited May 21, 2014) (explaining prisoners' dilemma theory).

6. *See supra* note 4 (listing various cases and foreign laws implicated).

7. Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Deloitte & Touche in Shanghai with Violating U.S. Securities Laws in Refusal to Produce Documents (May 9, 2012), *available at* https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488960#.U2xbP62Vn3A.

8. Rachel Armstrong, *Deloitte Opposes SEC Move to Restart China Audit Paper Case*, REUTERS, Jan. 7, 2013, http://www.reuters.com/article/2013/01/08/us-deloitte-china-idUSBRE90704N20130108 (discussing SEC-Deloitte case). A federal judge censored the Chinese units of the Big Four accounting firms and suspended them for six months from practicing in the United States. *See* Michael Rapoport, *China Units of Big-Four Firms Appeal Audit Ban*, WALL ST. J., Feb. 12, 2014, http://online.wsj.com/news/articles/SB10001424052702303704304579379410335942436. Eventually the Chinese government provided the SEC with a "substantial volume" of the documents they requested. *See* Tammy Whitehouse, *SEC Gets Longtop Papers, Stands Down Against Deloitte*, COMPLIANCEWEEK, Jan. 24, 2014, http://www.complianceweek.com/sec-gets-longtop-papers-stands-down-against-deloitte/article/331348.

9. *See infra* notes 84-106 and accompanying text (discussing two primary ways courts have attempted to resolve these conflicts: comity and balancing).

10. *See* Societe Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 525-26, 547 (1987) (holding courts may compel discovery despite French law prohibiting petitioners from doing so); Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 357 U.S. 197, 211-12 (1958) (considering dismissal in failure to comply with discovery order because of foreign law).

11. *See infra* notes 122-144 and accompanying text (highlighting drawbacks of current judicial approaches); *see also* Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1817 (1992) (suggesting balancing tests not effective).

12. *Compare* Gucci America, Inc., v. Weixing Li, No. 10 Civ. 4974(RJS), 2011 WL 6156936, at *1 (S.D.N.Y. Aug. 23, 2011) (holding non-party bank must comply with valid discovery request despite conflict with Chinese secrecy laws), *with* Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 144, 160 (S.D.N.Y. 2011) (holding plaintiffs must seek discovery from same bank using Hague Evidence Convention). The facts and discovery requested in these two cases are almost identical; nevertheless, the judges resolved the disputes in conflicting fashion. *See* Edward M. Spiro & Judith L. Mogul, *Obtaining Discovery from Foreign Litigants:*

typical circuit split.[13] The United States District Court for the Southern District of New York recently decided virtually identical cases involving the discovery obligations of Chinese banks differently.[14] Neither judge was wrong in either of those cases; rather, the legal standard itself provides the judiciary with almost unlimited discretion to make subjective policy judgments.[15]

This Note aims to provide a useful framework for resolving these types of cross-border discovery disputes. This framework would remove the current balancing tests courts utilize and replace them with a uniform system of enforcement of the Federal Rules, coupled with discretion as to the sanctions imposed for violations. Part II of this Note will outline the background and legal principles that govern cross-border discovery disputes. Part III will suggest a different type of framework for these cases, which aims to change the way courts resolve these disputes. This framework will promote uniformity and force the political branches to find a solution through negotiation.

II. HISTORY

A. Comparing Evidence-Gathering Systems

In the United States, judges typically select the more persuasive of opposing legal arguments formulated by the litigants, rather than directly seeking the truth of a matter.[16] The evidence-gathering process under the Federal Rules, known as discovery, is considered one of the most far-reaching and invasive systems in the world.[17] The process is broad in scope, plentiful in method, and

Competing Views on Comity, 427 N.Y. L.J. 3, 3, 5 (2012), *available at* http://www.maglaw.com/publications/articles/00303/_res/id=Attachments/index=0/Article%20June%202012.pdf (describing courts' competing holdings in similar cases).

13. *See supra* note 12 (comparing cases with same facts in Southern District of New York resolved differently).

14. *See* Spiro & Mogul, *supra* note 12 (describing competing approaches to resolving same set of facts).

15. *See infra* notes 125-136 and accompanying text (discussing flaws of commonly applied balancing test, which many courts endorse as governing legal standard).

16. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV 1031, 1038 (1975) ("[A]dvocates freely employ time-honored tricks and stratagems to block or distort the truth."). For example, judges in adversarial legal systems typically do not question witnesses in an effort to develop and understand the facts of a case; instead, the parties' counsel will generally do so. *See* John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 992-96 (1989) (discussing cultural differences of judicial systems). It must be noted that this is a general rule; courts may, in some instances, raise legal issues on their own initiative. *See* Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."); Atlas Life Ins. Co. v. W. I. S., Inc., 306 U.S. 563, 568 n.1 (1939) (advising objection to equity jurisdiction should be raised by federal courts *sua sponte* when obvious).

17. *See* LARRY L. TEPLY ET AL., CASES, TEXT, AND PROBLEMS ON CIVIL PROCEDURE 794-95 (2d ed. 2002) (discussing scope of Federal Rules' provisions); Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV 1017, 1021 (1998) ("[A]djudication in the civil law system proceeds according to an entirely different logic.").

"sweeping, virtually creating a presumption of discoverability."[18] Under the Federal Rules, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," and "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[19] Thus, information and other materials must often be disclosed to the opposing party, even though both sides know it will never be admissible during the trial.[20]

The Federal Rules' discovery provisions reflect the underlying philosophy of litigation in the United States.[21] This philosophy emphasizes the importance of obtaining the maximum amount of information about the facts of a case prior to the trial.[22] The Supreme Court emphasized this when holding that "[m]utual

18. JOSEPH W. GLANNON ET AL., CIVIL PROCEDURE: A COURSEBOOK 770 (2011). The reach of pretrial discovery in the United States was not always so extensive. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698-99 (1998) (noting earlier theories of evidence gathering prior to revisions of Federal Rules). Early common-law judges did not see the litigation process as an exercise aimed at finding the truth of a matter; rather, litigation was a method by which society could resolve which side God favored. *See id.* at 694-95 (discussing limited role of discovery prior to twentieth century). Over time, the legal realist movement began to emphasize the importance of gathering all of the facts of a case prior to deciding it. *See id.* at 739-40 (reviewing changes to evidence gathering procedures). Charles Clark would famously remark that procedure is intended to be a "handmaid," rather than a "mistress," of justice. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938). One of the distinguishing traits of pretrial discovery under the Federal Rules is that it is largely managed through the initiative of each party's counsel, by demand and response. *See* GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 114-15 (1993) (discussing counsel's role in discovery system). Generally, discovery disputes are resolved through negotiation; however, a court's ruling may be requested when the parties cannot resolve a dispute. *See id.* at 115.

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

20. *See* United States v. Wright Motor Co., 536 F.2d 1090, 1095 (5th Cir. 1976) ("[G]enerally the scope of inquiry for the purposes of discovery is broader than the test for admissibility at trial…."); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 447-63 (1991) (summarizing development of discovery provisions of Federal Rules). Moreover, the Federal Rules require initial disclosure at the outset of a lawsuit, prior to the opposing parties' requests. *See* FED. R. CIV. P. 26(a)(1); *see also* R & R Sails, Inc. v. Ins. Co. of Pa., 673 F.3d 1240, 1247 (9th Cir. 2012) (discussing party's failure to supplement incomplete initial disclosures); Archer v. Air Jam., 268 F.R.D. 401, 403 (S.D. Fla. 2010) (dismissing case for, among other things, failure to provide timely initial disclosures); Sender v. Mann, 225 F.R.D. 645, 650-55 (D. Colo. 2004) (discussing and applying initial disclosure requirement).

21. *See* TEPLY ET AL., *supra* note 17, at 794-95 (describing foundation behind broad discovery). American courts have declared a variety of different rationales for the broad scope of discovery, among them, to obtain evidence, eliminate surprise, clarify and fully disclose issues and facts, and promote settlement. *See, e.g.*, United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) ("[P]retrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."); Doe v. Young, 664 F.3d 727, 734 (8th Cir. 2011) ("One of the purposes of discovery is to eliminate unfair surprise."); Rivera v. NIBCO, Inc., 384 F.3d 822, 824 (9th Cir. 2004) ("[P]re-trial discovery has been recognized as an essential means for evaluation of damages, so that settlements can be achieved."); Pub. Citizen v. Liggett Grp., Inc., 858 F.2d 775, 781 (1st Cir. 1988) (noting discovery's purpose of allowing opposing parties to obtain materials relevant to case's subject matter).

22. *See supra* note 21 and accompanying text (discussing foundation behind and various rationales for broad discovery). In fact, doctrines that limit the broad scope of pretrial discovery are often narrowly construed in order to limit their impact. *See* Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 152 F.R.D. 132, 135 (N.D.

knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[23] As long as a United States court has personal jurisdiction over a party, the court can compel that party to produce discoverable materials under their "possession, custody, or control," regardless of the materials' location.[24] The doctrinal justification for this notion is derived from the underlying rationale for personal jurisdiction itself: if a party conducts business in a territory, that choice equates to consenting to be governed by the territory's laws.[25]

Under the Federal Rules, the discovery process is usually handled by the parties themselves, each requesting discovery from the other.[26] If a party refuses a valid discovery request, however, the court can grant a motion to compel production of the requested information.[27] If the motion to compel is granted, failure to comply can be devastating.[28] The court can, for example, award fines and fees, resolve an issue against the noncompliant party, partially or entirely dismiss the action, or render a default judgment.[29] Thus, United

Ill. 1993) ("As the attorney-client and work product privileges obscure the search for the truth, they are both narrowly construed by courts to restrict their impact upon the discovery process.").

23. Hickman v. Taylor, 329 U.S. 495, 507 (1947). The Court also recognized that limitations arise when the examination is conducted in bad faith or to harass the person subject to an inquiry. *See id.* at 507-08. *See generally* Subrin, *supra* note 18 (discussing how revisions to Rules provide context for understanding foundations upon which they were built).

24. FED. R. CIV. P. 45(a)(1)(A)(iii). Discoverable materials, such as documents, are deemed to be under a party's "control" if the party has the "legal right to obtain [the requested] documents upon demand." *See* United States v. Int'l Union of Petroleum & Indus. Workers, AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989); *see also* Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1426 (7th Cir. 1993) (noting requirement to produce documents in possession, custody, or control, even without physical possession). Moreover, courts have construed the term "control" broadly, as the "right, authority, or *practical ability*" to obtain the requested discovery. Bank of N.Y. v. Meridien BIAO Bank Tanz. Ltd., 171 F.R.D. 135, 146 (S.D.N.Y. 1997) (emphasis added).

25. *See* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 395 (2012) (discussing doctrinal origins of personal jurisdiction). The social contract theory asserts that humans are initially in a "state of nature" that provides both liberty and defects. *See* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 8-9, 45 (1986). *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (discussing social contract theory's influence during America's founding); Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 26-33 (1999) (discussing social contract theory's effect on American case law). *But see* JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 16-17 (abridged ed. 1995) (arguing Locke's social contract theory's influence on American Whigs "has too long been overemphasized").

26. *See* FED. R. CIV. P. 26(b)(1) (providing "parties may obtain discovery"); Miller, *supra* note 20, at 445-63 (providing overview of mechanics of Federal Rules' discovery provisions).

27. *See* FED. R. CIV. P. 37(a)(1) (allowing party to move for order compelling discovery after good-faith effort to confer with other party).

28. *See id.* at (b)(2)(A) (listing various sanctions available to court); SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE: ESSENTIALS 126-27 (2007) (equating one sanction with the death penalty).

29. *See, e.g.*, *In re* Leiferman, 428 B.R. 850, 854 (B.A.P. 8th Cir. 2010) (affirming lower court's sanction of default judgment); Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 679 (S.D. Tex. 2010) (holding sanction of adverse-inference instruction appropriate); Klayman v. Judicial Watch, Inc., 256 F.R.D. 258, 263 (D.D.C. 2009) (sanctioning party by prohibiting introduction of certain evidence), *aff'd*, 628 F. Supp. 2d 84 (D.D.C. 2009).

States pretrial discovery is litigant managed and judicially enforced.[30]

In contrast to the Federal Rules, many civil law judicial systems do not entrust evidence gathering to the parties.[31] In fact, civil law nations have no equivalent to our evidence-disclosure process.[32] Even nations with common-law systems are often unfamiliar with the scope and breadth of United States discovery procedures.[33] In many jurisdictions around the world, judges inquire into what evidence is needed to reach a justifiable decision, rather than what is required to understand the entire context of a case.[34] These jurisdictions are naturally suspicious of evidence-gathering systems of judicial supervision, a concept wholly divergent from the civil law judge's primary role in obtaining and presenting evidence.[35] Moreover, other types of legal systems, such as mixtures of common, civil, and other legal theories (often religious), typically do not allow broad pretrial discovery compatible with the American system.[36]

China's civil procedure system, for example, is largely aimed at ascertaining the truth of a matter.[37] Unlike their American counterparts, Chinese judges

30. *See* FED. R. CIV. P. 37(a)(3)(B) ("A party seeking discovery may move for an order compelling an answer, designation, production, or inspection.").

31. *See* David E. Teitelbaum, Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 846 (1986) (providing useful description of evidence gathering in civil law jurisdictions). France and other civil law countries "reject the suggestion that such a critical function of the court," such as evidence gathering, "be entrusted to the parties themselves." *Id.* Civil law nations, as well as many others, question whether partisans should manage evidence gathering; some argue that situational factors affect partisan judgment and make ethical and objective decision-making difficult. *See* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 459-71 (2007) (describing potential resulting pitfalls of broad discovery commanded by adversarial litigators).

32. *See* LAWRENCE COLLINS, ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS 294 (1994) (discussing differing evidence-gathering systems).

33. *See id.* at 294-98 (referencing American discovery as "more extensive" than English evidence-gathering procedures); *see also* JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 26-27 (1995) (noting and drawing distinctions between American discovery and evidence-gathering systems in other countries).

34. *See* Hazard, *supra* note 17, at 1022 (discussing roles of civil-law judges).

35. James H. Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States*, 13 INT'L LAW. 5, 6-7 (1979) (explaining difficulties tied to obtaining evidence located abroad).

36. *See, e.g.*, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261 (2004) ("A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions"); *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 352 (D. Conn. 1991) ("Unlike the United States . . . civil-law countries . . . view the evidence gathering process as an exercise of judicial sovereignty to be entrusted entirely to the courts"); Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 391 (D.N.J. 1987) (noting Sweden's preference of civil law discovery procedures over liberal and broad Federal Rules); S & S Screw Mach. Co. v. Cosa Corp., 647 F. Supp. 600, 612 (M.D. Tenn. 1986) ("Great differences exist, however, between the American approach that places discovery largely in the hands of the parties with minimal court supervision before trial, and the traditional civil law approach that regards gathering of evidence as an exercise of judicial sovereignty entrusted largely to the court and often delayed until the trial itself.").

37. *See* Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved this Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 393 (2004) (explaining China's civil procedure system designed to find truth). Indeed, the goals of China's civil procedure system, such as to "ensure the ascertaining of facts by the people's courts," "distinguish right from wrong," and "apply the law correctly," are all, of course, impossible without the truth being ascertained. Zhonghua Renmin Gongheguo Minshi Susong

share little power with juries, launch independent investigations, collect evidence, and search beyond the pleadings to discover the "objective truth" of a matter.[38] China's system also affords counsel a role in the evidence-gathering process, but does not provide enforceable methods of obtaining the evidence sought.[39] If a party is unable to obtain evidence, then the court has the authority to investigate and collect it on its own initiative.[40]

In Germany, courts are primarily concerned with "cost-containment, swiftness, and the privacy of the litigants."[41] This results in pretrial evidence gathering that is narrow and restrained.[42] For instance, only a judge may order the production of documents, and fishing for information is generally impermissible.[43] Notably, a party generally has no procedural right to demand the disclosure of information.[44] Instead, judges lead witness testimony.[45]

Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991, effective Apr. 9, 1991) *Civil Procedure Law of the People's Republic of China*, LAWINFOCHINA art. 2, *available at* http://www.lawinfochina.com/display.aspx?id=19&lib=law&SearchKeyword=&SearchCKeyword= (last visited May 20, 2014). *See generally* Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and A Bitter Experience*, 24 TEMP. INT'L & COMP. L.J. 1 (2010) (providing useful background of Chinese legal system and its development).

38. *See* Jianhua & Guanghua, *supra* note 37, at 393-94, 400-01 (noting differences between American and Chinese judges); *see also* John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L. J. 455, 470 (2012) ("The goal of the Chinese civil process is to seek 'objective truth' beyond any doubt; that is, the truth ascertained by the court must be completely consistent with the fact."). Interestingly, Chinese scholars use the term "objective truth" in contrast to "legal truth." *See* Jianhua & Guanghua, *supra* note 37, at 400 n.50. The "objective truth" and the facts of a case are entirely consistent, while the "legal truth" is only consistent with the facts that are ascertained in compliance with rules relating to evidence and proof. *See id.* In regards to Chinese juries, there is a system in which laypersons are involved as "people's assessors," but are usually seen as "'decorations' in the courtroom." *Id.* at 404.

39. *See* Civil Procedure Law of the People's Republic of China, art. 64 (addressing party's rights when attempting to obtain evidence).

40. *See id*. arts. 64-65 (giving court authority to collect evidence on its own initiative); *see also* Margaret Y. K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581, 599 (1999) ("Recent reforms in civil and criminal trial procedure notwithstanding, Chinese judges have typically had broad responsibility for collecting evidence and investigating cases").

41. Jan W. Bolt & Joseph K. Wheatley, *Private Rules for International Discovery in U.S. District Court: The U.S.-German Example*, 11 UCLA J. INT'L L. & FOREIGN AFF. 1, 6 (2006).

42. *See id*. at 6. Germany requires pleadings to have specific allegations concerning all substantive aspects of their assertions and the parties must designate sources of evidence supporting their contentions. *See* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BUNDESGESETZBLATT [BGBL I], at 3202, § 130 (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (last visited May 20, 2014). Different from the American complaint, German complaints must propose means of proof for their main factual contentions. *See id.* Major documents in support of a party's claim are scheduled and often attached, while other documents (such as government records) are identified, and witnesses are listed. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 827 (1985) (discussing German civil-procedure system).

43. *See* Joachim Bornkamm, *The German Supreme Court: An Actor in the Global Conversation of High Courts*, 39 TEX. INT'L L.J. 415, 416 (2004) (noting rules of evidence "may not be used for fishing expeditions.")

44. *See* Langbein, *supra* note 42, at 827-28 (discussing parties' procedural rights under German

In France, another example of a civil-law nation that does not have comparable discovery procedures, the trial judge controls most of the evidence gathering, rather than the litigants.[46] Similarly, in the Netherlands, the scope of discovery is much narrower than in the United States, but some have noted a policy shift in the Dutch courts to allow for broader disclosure obligations.[47] Similar to Germany, the Swiss rules of civil procedure are based upon the notion that evidence gathering is a judicial task.[48] The examples could go on further, but are outside the scope of this Note.[49] Often, nations limit the scope of discovery based on constitutional and societal principles respecting privacy, an essential right throughout much of the world.[50]

B. Foreign Laws that Preclude Evidence Gathering

This Note addresses the catch-22 dilemma that arises when a foreign law

procedural system).

45. *See* CODE OF CIVIL PROCEDURE §§ 395-97 (Ger.) (outlining rules for examining witnesses). The court actually has very little power to force a refusing party to produce material requested by another party, unless the other party made reference to the document during the proceedings, or the requesting party establishes a substantive right to the information. *See* Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, 18 ARB. INT'L 1, 2 (2002) (discussing powers of those courts to compel discovery).

46. *See* Marat A. Massen, Note, *Discovery for Foreign Proceedings After* Intel v. Advanced Micro Devices*: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 888 (2010) (discussing French discovery process). "French litigants are expected to have most of the evidence they will use in their possession before proceedings begin." *Id.* Nevertheless, the judge may order the production of additional evidence. *Id.* The discovery provisions of the French Civil Code state that all parties must cooperate with the court to facilitate the search for truth. *See* CODE CIVIL [C. CIV.] art. 10 (Fr.), *available at* http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf. Although judges do have the power to compel the production of evidence, they rarely utilize this authority. *See* Rosemary A. Bruckner, *The Taking of Evidence in France*, 5 TRANSNAT'L LAW. 759, 762-63 (1992) (noting judicial reluctance to order discovery).

47. *See* WETBOEK VAN BURGERLIJKE RECHTSVORDERING [RV] [CODE OF CIVIL PROCEDURE] art. 843a (Neth.) (outlining procedure for taking discovery in Netherlands); Marielle Koppenol-Laforce, *The Dutch Legal Perspective on American e-Discovery*, in US E-DISCOVERY IN THE NETHERLANDS 16, 17-18 (Nov. 2010), *available at* http://www.houthoff.com/uploads/tx_hhpublications/The_Dutch_Perspective_US_e-Discovery_in_the_Netherlands_-_Nov_2010.pdf (providing overview of Dutch system); C.H. (Remco) van Rhee & Remme Verkerk, *Chapter 13 the Netherlands: A No-Nonsense Approach to Civil Procedure Reform*, 31 IUS GENTIUM 259, 265 (2014) (noting broader scope of discovery after Dutch civil procedure reform).

48. *See* SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 19, 2008, SR 272, RS 272, art. 153 (Switz.), *available at* http://www.admin.ch/ch/e/rs/272/a153.html (mandating "[t]he court takes evidence ex officio whenever it must ascertain the facts ex officio.").

49. *See generally* Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMP. L. REV. 1 (2011) (outlining recent trends in global civil procedure).

50. *See e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5(X) (Braz.) (mandating equality in "the privacy, private life, honour and image of persons"); KONSTITUTSIYA NA REPUBLIKA BALGARIYA [KRB] [CONSTITUTION] art. 32 (Bulg.) ("The privacy of citizens shall be inviolable. Everyone shall be entitled to protection against any illegal interference in his private or family affairs and against encroachments on his honour, dignity and reputation."); SUOMEN PERUSTUSLAKI [SP] [CONSTITUTION] § 10 (Fin.) ("Everyone's private life, honour and the sanctity of the home are guaranteed."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 17 (S. Kor.) ("The privacy of no citizen shall be infringed.").

directly conflicts with the Federal Rules.[51] These foreign laws vary in scope; for example, blocking, privacy, and secrecy laws contain different prohibitions and are enforced for different reasons.[52] Foreign blocking statutes are enacted to generally block, within a nation's territory, the gathering of evidence for litigation conducted abroad.[53] These statutes vary in severity and scope, however, depending on the country.[54] For example, some of these statutes prohibit disclosure in all circumstances, while others may merely provide the government with the discretionary authority to forbid compliance.[55] One of the first blocking statutes was enacted in Canada, in reaction to an antitrust investigation of a Canadian paper company.[56] Since then, similar laws have been enacted across the world in an effort to prevent the production of documents requested by—and limit the extraterritorial reach of—foreign courts and litigants.[57] It is important to recognize that the distinguishing characteristic

51. *See, e.g.*, Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548 (S.D.N.Y. Oct. 29, 2012) (granting motion to compel discovery in violation of Chinese law); *In re* Vivendi Universal, S.A. Sec. Litig., 618 F. Supp. 2d 335, 338, 343 (S.D.N.Y. 2009) (compelling production of documents from third-party auditor although prohibited by French law); Dexia Credit Local v. Rogan, 231 F.R.D. 538, 540, 550 (N.D. Ill. 2004) (requiring production in violation of Belize Trusts Act).

52. *Compare* Loi 78-17 du 6 janvier 1978 relative a l'informatique, aux fichiers et aux libertes [Law 78-17 of Jan. 6, 1978, relating to Data Processing, Data Files and Individual Liberties], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 7, 1978, p. 227 (establishing National Processing and Liberties Commission), *with* Loi 80-538 du 16 juillet 1980 relative à la communication de documents ou renseignements d'ordre economique, commercial ou technique à des personnes physiques ou morales etrangères [Law 80-538 of July 16, 1980, relating to the disclosure of documents and information of an economic, commercial, industrial, financial or technical assistance to individuals or legal entities], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1980, p. 1799 (mandating French evidence-blocking tradition). *See generally* Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982) (discussing foreign blocking statutes); Werner de Capitani, *Banking Secrecy Today*, 10 U. PA. J. INT'L BUS. L. 57 (1988) (discussing banking secrecy); Joshua Engel et al., Book Review, *International Data Privacy Laws and the* Protectors of Privacy, 5 BYU INT'L L. & MGMT. REV. 173 (2008) (discussing data-privacy laws).

53. *See e.g.*, Law 80-538 of July 16, 1980, p. 1799 (Fr.) (blocking evidence gathering in France); SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0, art. 271 (Switz.) (blocking evidence gathering in Switzerland); Protection of Businesses Act 99 of 1978 § 1(b) (S. Afr.) (blocking evidence gathering in South Africa).

54. *Compare* Law 80-538 of July 16, 1980, art. 2 (Fr.) (blocking all discovery), *with* Protection of Trading Interests Act, 1980, c. 11, § 2 (U.K.) (providing discretion to block discovery).

55. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 972-73 (5th ed. 2011) (describing different categories of blocking statutes).

56. *See* Business Records Protection Act, R.S.O. ch. 54, § 2(1) (1970) (Can.) (blocking evidence gathering in Canada); Thomas Scott Murley, Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877, 879 (1982) (discussing purpose of enacting statute).

57. *See* Murley, *supra* note 56, at 877 n.1 (listing variety of blocking statutes in effect at time of publication). Blocking statutes, however, do not uniformly result in a lack of cooperation among countries. *See* Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, U.S.-Can. March 9, 1984, 23 I.L.M. 275, 275 [hereinafter Canada MOU] (acknowledging differences in laws and agreeing to cooperate); *see also* Agreement Regarding the Application of their Competition and Deceptive Marketing Practices Laws, U.S.-Can., Aug. 1, 1995, 35 I.L.M.

of a blocking statute is its objective: precluding evidence gathering rather than protecting certain information that a litigant might seek to gather.[58]

Privacy laws also regularly conflict with American-style discovery.[59] The right to privacy in many nations is directly tied to individual-rights principles.[60] In the European Union, for example, all personal information is protected and any production of documents could infringe the privacy rights of any number of individuals.[61]

Secrecy laws, however, are probably the most well-known foreign laws that preclude discovery.[62] Banking secrecy laws, for example, often serve the purpose of protecting customer information, which may make a country's banking system attractive to potential customers.[63] United States federal courts have had to resolve countless conflicts between the Federal Rules and banking secrecy statutes.[64] These laws present significant challenges during pretrial discovery.[65] For example, China has crafted, over the past two decades, a comprehensive set of laws and regulations that are aimed to oversee its banking industry.[66] This regulatory system reflects the Chinese government's goal of fostering a modern banking system that can guarantee confidentiality and overcome the traditional reluctance by many Chinese citizens to open bank accounts.[67]

309 (including commitment to consult on antitrust-enforcement activities).

58. *See supra* note 54 (comparing types of discovery blocking statutes).

59. *See generally* WORKING GROUP 6, THE SEDONA CONFERENCE, INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING THE PRESERVATION & DISCOVERY OF PROTECTED DATA IN U.S. LITIGATION (European Union ed., 2011) (discussing conflicts between non-U.S. data-protection laws and American-style discovery).

60. *See supra* note 50 and accompanying text (listing constitutional provisions relating to privacy).

61. Dan Cooper, *e-Discovery and EU Privacy Laws – Part II*, 8 PRIVACY & DATA PROT. 3, 3-6 (2008).

62. *See*, *e.g.*, Linde v. Arab Bank, PLC, 706 F.3d 92, 111-13 (2d Cir. 2013) (explaining banking laws of Arab nations and territories in relation to discovery); Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 437-38 (E.D.N.Y. 2008) (describing French banking law relative to discovery); Ssangyong Corp. v. Vida Shoes Int'l, Inc., No. 03 CIV.5014 KMW DFE, 2004 WL 1125659, at *7 (S.D.N.Y. May 20, 2004) (discussing Hong Kong banking secrecy).

63. *See* Bashar H. Malkawi, *Bank Secrecy in Arab Countries: A Comparative Study*, 123 BANKING L.J. 894, 894-904 (2006) (providing survey of banking secrecy in different Arab countries); Ken Harvey & Pierre Noel, *U.S. Tax Laws Change the Rules of the Game*, FORBES, May 13, 2011, http://www.forbes.com/2011/05/13/tax-havens-fatca-opinions-contributors-ken-harvey-pierre-noel.html (highlighting commonly used offshore tax havens).

64. *See supra* note 62 (listing various cases concerning foreign banking secrecy laws); *see also Swiss Finished?*, ECONOMIST, Sept. 7, 2013, http://www.economist.com/news/finance-and-economics/21585009-america-arm-twists-bulk-switzerlands-banks-painful-deal-swiss/ (alleging Swiss banks "bullied" by America to provide information shielded by Swiss banking secrecy laws).

65. *See* Lutz Krauskopf, *Comments on Switzerland's Insider Trading, Money Laundering, and Banking Secrecy Laws*, 9 INT'L TAX & BUS. LAW. 277, 293-99 (1991) (discussing Swiss banking secrecy).

66. *See generally* MICHAEL F. MARTIN, CONG. RESEARCH SERV., R42380, CHINA'S BANKING SYSTEM: ISSUES FOR CONGRESS (2012) (providing useful background of China's banking laws and regulatory system); ZHONGFEI ZHOU, CHINESE BANKING LAW AND FOREIGN FINANCIAL INSTITUTIONS (2001) (providing information on Chinese regulation of foreign banking).

67. *See* Alev M. Efendioglu & Vincent F. Yip, *Chinese Culture and E-Commerce: An Exploratory*

C. Early Decisions

Traditionally, in the conflict-of-laws context, the law of the forum governs matters of procedure.[68] Yet, courts are often hesitant to order foreign parties to violate the laws of other sovereigns in which they reside on the grounds of "international comity."[69] One of the earliest attempts by the Supreme Court to resolve the evidence-gathering conflicts between American and foreign law was the 1958 case *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*.[70] In *Société Internationale*, the United States government—through an alien-property custodian—seized assets from a German corporation during World War II.[71] The Trading with the Enemy Act authorized such a seizure, but allowed for the recovery of seized assets by those who were not "enemies."[72] The plaintiff filed a lawsuit to recover assets, claiming they were neutral.[73] The government challenged this claim, arguing that the plaintiff was connected with a German firm and was therefore "affected with 'enemy taint' despite its 'neutral' incorporation."[74]

The government sought to prove their case through the use of banking records located in Switzerland, and requested these materials through the discovery provisions of the Federal Rules.[75] The lower court ordered the production of the requested discovery, but the plaintiff refused on the grounds that disclosure would violate Swiss banking secrecy laws and may lead to criminal penalties.[76] During this period, the Swiss government confiscated the documents, deeming disclosure of the requested materials a violation of Swiss

Study, 16 INTERACTING WITH COMPUTERS 45, 58-59 (2004) (describing reluctance of traditional Chinese culture to utilize modern technology and systems in the financial sector). Nonetheless, China's banking system is considered to be less developed than countries of comparable economic stature. *See* Franklin Allen et al., *Law, Finance, and Economic Growth in China*, 77 J. FIN. ECON. 57, 70-72, 76-77 (2005) (comparing China's banking system with other countries' systems).

68. *See* Dixon's Ex'rs v. Ramsay's Ex'rs, 7 U.S. 319, 324 (1806) ("[s]uits . . . must be governed by the laws of that country in which the tribunal is placed"); Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961) (discussing settled conflict-of-laws principle that law of forum controls procedures); Ernest G. Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311, 327 (1923) (noting matters of procedure governed by law of forum). *See generally* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963) (noting difficulties in conflict-of-laws rules and providing useful overview); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998) (discussing conflict of laws in relation to extraterritoriality).

69. *See infra* note 102 (listing cases rejecting international comity defense in extraterritorial discovery cases); s*ee also* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 3-6 (1991) (providing useful background on concept of "international comity" in international law).

70. 357 U.S. 197 (1958).

71. *See id*. at 198-99 (discussing assets valued over $100,000,000).

72. *See id*. at 199; *see also* Trading With the Enemy Act of October 6, 1917, 40 Stat. 411 (1917) (regulating and punishing trading with enemies).

73. *See Societe Internationale*, 357 U.S. at 199 (discussing petitioner's reasoning for filing suit).

74. *Id*.

75. *See id*. at 199-200.

76. *See id*. at 200 (discussing lower court decisions and petitioner's noncompliance).

laws relating to banking secrecy and economic espionage.[77] The lower court ordered the plaintiff to comply and, when they did not, dismissed the case.[78] The appeals court affirmed this decision, holding that "the procedural laws of the United States, as well as the substantive laws, may not be relaxed upon its courts because of difficulties a party may have with a different sovereign power."[79]

The Supreme Court reversed the lower court decisions, holding that the discovery order was valid, but the sanction—dismissal of the case—was not.[80] The Court first held that the lower court had the authority in this case to order the plaintiff to produce discovery in violation of Swiss law.[81] Justice Harlan reasoned that to hold otherwise would undermine congressional intent.[82] Nevertheless, the Court also held that the sanction of dismissal was unjust because the plaintiff's failure to comply was not due to "willfulness, bad faith, or any fault" of its own.[83]

D. Judicial Decisions After Société Internationale

After the *Société Internationale* decision, some courts began to consider the "fundamental principles of international comity" as the governing standard in resolving these cases.[84] They reasoned that international comity required courts to avoid enforcing United States laws when doing so "may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures."[85] Under this approach, no discovery orders were issued when foreign law forbade the production of the requested materials.[86] A few years later, courts began to recognize the challenges of this approach.[87] The 1965 edition of the Restatement (Second) of Foreign Relations Law noted, "[a] state having jurisdiction to prescribe or to enforce a rule of law

77. Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 200 (1958) (discussing Swiss government's reaction).

78. *See id*. at 203 (discussing district court's decision).

79. Societe Internationale Pour Participations Industrielles Et Commerciales S.A. v. Brownell, 243 F.2d 254, 256 (D.C. Cir. 1957), *rev'd sub nom*. Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197 (1958).

80. *See Societe Internationale*, 357 U.S. at 206-08, 210 (discussing role of good faith).

81. *See id*. at 211 (noting actions trigger criminal sanctions in Switzerland).

82. *See id*. at 204-05 (explaining policies underlying relevant law).

83. *Id*. at 212.

84. *See In re* Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962) (refusing to order production of discovery in violation of Panamanian law); *see also* Ings v. Ferguson, 282 F.2d 149, 151-52 (2d Cir. 1960) (refusing to order discovery of evidence in Canada).

85. *Ings*, 282 F.2d at 152.

86. *See* Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petrol. Co., 105 F.R.D. 16, 29 (S.D.N.Y. 1984) ("The Second Circuit, in cases decided shortly after *Societe Internationale*, appeared to hold that a foreign law prohibition on disclosure is an absolute bar to ordering inspection or production of documents.").

87. *See* SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 115 (S.D.N.Y. 1981) (noting Second Circuit's transition to more flexible approach).

is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct."[88] Courts began to—and still to this day—cite the Restatement when enforcing American discovery procedures, acknowledging the need for courts to remain a forum where United States substantive law can be enforced against foreign parties.[89]

As the application of a uniform extension of comity began to wane, courts attempted to solve extraterritorial discovery conflicts using balancing tests.[90] The Restatement provides a framework that many courts have found useful:

> 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.[91]

Courts adjust the wording of these factors from time to time, and occasionally supplement additional factors for consideration as well.[92] In 1987,

88. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 39 (1965).

89. *See, e.g.*, NML Capital, Ltd. v. Republic of Argentina, No. 03 CIV. 8845 (TPG), 2013 WL 491522, at *4-9 (S.D.N.Y. Feb. 8, 2013) (discussing legal implications of discovery under laws of Spain, Brazil, Bolivia, Chile, Panama, and Paraguay); Ssangyong Corp. v. Vida Shoes Int'l, Inc., No. 03 Civ.5014 KMW DFE, 2004 WL 1125659, at *6 (S.D.N.Y. May 20, 2004) (ordering production despite Hong Kong banking secrecy law); Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 521 (S.D.N.Y. 1987) (applying balancing test in case regarding Swiss statute).

90. *See, e.g.*, United States v. First Nat'l Bank, 699 F.2d 341, 345 (7th Cir. 1983) (weighing considerations regarding compelled disclosure); United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1389-91 (11th Cir. 1982) (using balancing test to analyze subpoena); United States v. Vetco Inc., 691 F.2d 1281, 1288 (9th Cir. 1981) (contemplating competing interests); United States v. Field, 532 F.2d 404, 407 n.5 (5th Cir. 1976) (requiring balancing test).

91. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965); *see supra* note 90 (listing courts applying balancing tests).

92. *See* Linde v. Arab Bank, PLC, 706 F.3d 92, 109-10 (2d Cir. 2013) (outlining reasoning behind decision); *In re* Asbestos Prods. Liab. Litig. (No. VI), No. 11-31524, 2012 WL 3553406, at *2 (E.D. Pa. Aug. 13, 2012) (using three-factor test); *see also* Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 210 (E.D.N.Y. 2007) (acknowledging additional factors in Second Circuit). "Cases from our Circuit counsel that, when deciding whether to impose sanctions, a district court should also examine the hardship of the party facing conflicting legal obligations and whether that party has demonstrated good faith in addressing its discovery

after much development and confusion in cases involving extraterritorial discovery in nations with blocking, secrecy, and privacy laws, a foreign blocking statute case was granted certiorari by the Supreme Court.[93] In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, plaintiffs filed a lawsuit against French aircraft manufacturers arising from damages caused by an airplane crash.[94] During the pretrial discovery phase of the case, the French defendants requested a protection order from the court, alleging that complying with some of the discovery requests would force them to violate French law.[95] The defendants requested that the information be obtained through the procedures set forth in the Hague Convention for the Taking of Evidence Abroad, and both the district court and appeals court rejected this request.[96]

In *Aérospatiale*, the Supreme Court affirmed that the Hague Convention's procedures regarding foreign blocking statutes—in this case, French Penal Code Law No. 80-538—do not deprive United States courts of the authority to order a party subject to its jurisdiction to produce evidence, regardless of whether the act of production violates the foreign statute.[97] The Court specifically held that the often slow and unreliable Hague Evidence Convention is neither the required first resort nor the exclusive method to obtain evidence located outside of the United States.[98] While the Court did not expressly provide a test, a balancing test mirroring the Restatement was enumerated in a

obligations." *Linde*, 706 F.3d at 110; *cf.* Brief of Amicus Curiae the Hashemite Kingdom of Jordan in Support of Petitioner at 6, Arab Bank, PLC v. Linde, No. 12-1485 (July 24, 2013) (positing decision undercuts relationship between United States and Jordan).

93. *See* Societe Nationale Industrielle Aérospatiale v. United States Dist. Court for S. Dist. of Iowa, 476 U.S. 1168 (1986) (granting petition for writ of certiorari).

94. *See* 482 U.S. 522, 524-25 (1987).

95. *See id*. at 525-26.

96. *See id*. at 526-28. The Hague Evidence Convention is a multilateral treaty signed in 1970. *See* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2557, 847 U.N.T.S. 241. The Hague Convention took effect in 1972, and many nations, including the United States, have ratified it. *See Status Table*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Apr. 30, 2014), http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (listing members of treaty). The Convention's drafters sought to reconcile differing legal philosophies by establishing a framework of efficient evidence taking that recognizes judicial sovereignty. *See* Patricia J. Youngblood & John J. Welsh, *Obtaining Evidence Abroad: A Model for Defining and Resolving the Choice of Law Between the Federal Rules of Civil Procedure and the Hague Evidence Convention*, 10 U. PA. J. INT'L BUS. L. 1, 9-10 (1988) (discussing drafters' intent).

97. *See Aérospatiale*, 482 U.S. at 526 n.6, 542. The Court noted that it could not "accept petitioners' invitation to announce a new rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant." *Id*. The Court reasoned that such a "rule of first resort in all cases would . . . be inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts." *Id*. at 542-43 (quoting FED. R. CIV. P. 1).

98. *See id*. at 543-44 (asserting Hague Convention procedures not required first resort). *See generally* J. Erik Groves, Note, *Transnational Civil Litigation—The Hague Evidence Convention*—Société Nationale Industrielle Aérospatiale v. United States District Court, S. District Iowa, 23 WAKE FOREST L. REV. 371 (1988) (discussing implications case has on Hague Convention).

footnote.[99] This test contained five factors: the requested document or information's importance to the litigation; the request's degree of specificity; whether the information was created in the United States; whether alternative means are available to retrieve the information; and the extent to which compliance or noncompliance would subvert important interests of the United States or the nation where the information is located.[100] The Court wrote that those factors are "relevant to any comity analysis."[101]

*E. Judicial Decisions Post-*Aérospatiale

Hundreds of cases have applied the balancing test recommended in *Aérospatiale*.[102] The majority of courts favor compelling discovery through the Federal Rules.[103] After balancing interests, lower courts generally favor the interests of domestic procedure over the concerns of foreign litigants.[104] Moreover, discovery is much more likely to be ordered in cases that arise from statutes with an extraterritorial theme, such as Anti-Terrorism Act cases.[105]

99. *See Société Nationale Industrielle Aérospatiale*, 482 U.S. 522, 544 n.28 (1987) (referencing Restatement's balancing test).

100. *Id*.

101. *Id*. The Court noted that, "while we recognize that § 437 of the Restatement may not represent a consensus of international views on the scope of the district court's power to order foreign discovery in the face of objections by foreign states, these factors are relevant to any comity analysis." *Id.*

102. *See, e.g.*, Wultz v. Bank of China Ltd., No. 11 CIV. 1266 (SAS), 2014 WL 572527, at *2-3, *10 (S.D.N.Y. Feb. 13, 2014) (denying motion to quash subpoena that would allegedly force bank to violate Chinese law); Chevron Corp. v. Donziger, 296 F.R.D. 168, 204-07 (S.D.N.Y. 2013) (ordering discovery after balancing American and Ecuadorian interests); Motorola Credit Corp. v. Uzan, 293 F.R.D. 595, 599-601 (S.D.N.Y. 2013) (denying motion to compel bank to produce discovery in violation of United Arab Emirates and Jordanian law); CE Int'l Res. Holdings, LLC v. S.A. Minerals Ltd. P'ship, No. 12-CV-08087 (CM)(SN), 2013 WL 2661037, at *8-16 (S.D.N.Y. June 12, 2013) (preferring discovery through Hague Convention to avoid violating Singapore law); Pershing Pac. W., LLC v. MarineMax, Inc., No. 10-CV-1345-L (DHB), 2013 WL 941617, at *6-10 (S.D. Cal. Mar. 11, 2013) (applying balancing test and ordering discovery despite conflict with German law), *on reconsideration in part*, 10CV1345-L DHB, 2013 WL 1628938 (S.D. Cal. Apr. 16, 2013) (declining request to limit scope of discovery); *In re* Asbestos Prods. Liab. Litig. (No. VI), No. 2:11-31524, 2012 WL 3553406, at *2 (E.D. Pa. Aug. 13, 2012) (applying test using only three factors); *In re* Chevron Corp., No. 11-24599-CV, 2012 WL 3636925, at *12-13, 16 (S.D. Fla. June 12, 2012) (applying balancing test and deeming subpoena potentially forcing party to violate Ecuadorian law valid). *See generally* Matthew J. Smith, Case Note, *Discovering New Ways to Deter Terrorism: The ATA and the Cross-Border Discovery Catch-22*, 1 SUFFOLK U. L. REV. ONLINE 25 (Feb. 25, 2013), http://www.suffolklawreview.org/smith-discovery (discussing implications of recent Second Circuit decision to affirm discovery order).

103. *See supra* notes 4, 102 (listing cases applying Restatement's balancing test); *see also* Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-*Aérospatiale *Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393, 394 (1990) (showing lower courts deem *Aérospatiale* comity analysis cumbersome and refuse to follow Hague Evidence Convention).

104. *See infra* note 105 and accompanying text (highlighting relevance of substantive legal issues litigated in resolving discovery conflicts); *see also supra* note 102 and accompanying text (citing cases compelling discovery in violation of foreign law).

105. *See, e.g.*, Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 559 (S.D.N.Y. 2012) ("The interest of the United States in depriving international terrorist organizations of funding that could be used to kill American citizens strongly outweighs the interest of a foreign nation in bank secrecy laws and the abstract or general assertion of sovereignty."); Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 443 (E.D.N.Y. 2008)

Courts typically examine the foreign interests in blocking discovery and weigh them against the interests of the United States in enforcing its laws.[106]

Because the balancing test is ambiguous and vague, it is no surprise that cases with similar facts are often resolved differently.[107] It is difficult for parties to predict how courts may resolve these cases; one might speculate that it often comes down to the trial judge's discretion.[108] Discretion is, of course, a vital part of our judicial process.[109] In this context, however, like cases are certainly not being decided alike, which is a fundamental principle of law in the United States.[110] Much of the writing that addresses foreign discovery disputes of this type criticizes the absence of proper attention to comity.[111] The American Bar Association, for example, has written about the Hobson's choice dilemma courts place foreign parties in by ordering discovery located in a foreign country be produced in violation of that country's laws—an act that

("The interests of the United States and France in combating terrorist financing . . . outweigh the French interest in bank secrecy laws and its generally asserted interest in 'sovereignty.'"); Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 45 (E.D.N.Y. 2007) ("The interests of the United States and the United Kingdom in combating terrorist financing . . . outweighs the British interest in preserving bank customer secrecy.").

106. *See supra* note 105 (listing cases weighing United States interest in enforcing Antiterrorism Act against foreign interests). *See generally* U.S. CONST. art. III (granting judiciary power to resolve cases or controversies, rather than general policy matters); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (examining separation of powers in context of comity).

107. *See supra* note 12 and accompanying text (comparing different outcomes in *Tiffany* and *Gucci* cases despite similar facts); *supra* note 91 and accompanying text (outlining Restatement's balancing test).

108. *See supra* note 12 and accompanying text (citing similar cases decided differently by different judges of same district court).

109. *See* United States v. Tucker, 404 U.S. 443, 446 (1972) (recognizing wide discretion of trial judges in federal courts).

110. *See* Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 50 (2d Cir. 1965) ("It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice."); A. M. HONORÉ, *Social Justice*, *in* ESSAYS IN LEGAL PHILOSOPHY 61, 67-71 (Robert S. Summers ed., 1968) (describing inherent inequity of inconsistent application of rules); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997 (1994) (stating "like cases should be treated alike" concept rooted in law and Article III's "judicial power"); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) ("[B]road judicial review is necessary to preserve the most basic principle of jurisprudence that 'we must act alike in all cases of like nature.'").

111. *See generally* Hannah L. Buxbaum, *Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from* Aérospatiale, 38 TEX. INT'L L.J. 87 (2003) (arguing court in *Aérospatiale* applied Restatement's balancing test without serious comity analysis); James G. Dwyer & Lois Yurow, *Taking Evidence and Breaking Treaties:* Aérospatiale *and the Need for Common Sense*, 21 GEO. WASH. J. INT'L L. & ECON. 439 (1988) (arguing *Aérospatiale* decision likely to produce "ill-reasoned trial court decisions"); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982) (emphasizing need for proper comity analysis); Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903 (1989) (arguing courts should not discard Hague Convention); Owen Peter Martikan, Note, *The Boundaries of the Hague Evidence Convention: Lower Court Interest Balancing After the Aérospatiale Decision*, 68 TEX. L. REV. 1003 (1990) ("Neither [the majority opinion nor Justice Blackmun's dissent in *Aérospatiale*], however, provides any valuable guidance about the factors that trial courts should consider in deciding whether to follow the Convention").

they contend violates principles of international comity.[112]

While addressing these criticisms is beyond the scope of this Note, it is important to understand what international comity means.[113] References to the concept are almost as old as the Republic itself.[114] In 1822, the Supreme Court referenced the "doctrine of comity," as "founded on the supposition of the utmost good faith, [requiring] perfect reciprocity in order to support it."[115] Seventy-three years later, the Supreme Court held that:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[116]

One who wonders what the limits, bounds, or effects of comity are would be in good company.[117] It is an amorphous concept, and its existence has been debated as both "a value and a rule."[118] There are some doctrines, however,

112. *See* AM. BAR ASS'N, RESOLUTION 103 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_103.authcheckdam.doc (outlining ABA's argument against current trend); Debra Cassens Weiss, *ABA Seeks to Avoid 'Hobson's Choice' in International Discovery*, ABA JOURNAL (Feb. 6, 2012), http://www.abajournal.com/news/article/ABA_seeks_to_avoid_hobsons_choice_in_international_discovery (reporting ABA's passing of resolution urging courts to respect privacy laws of foreign countries).

113. *See* Walton v. McNeil, 29 F. Cas. 141, 141-42 (C.C.D. Mass. 1794) (referencing international comity prior to any other case). The court in *Walton* referenced "international comity," in the context of deciding that it would not exercise jurisdiction because the litigation was between two aliens that arose outside of the United States. *See id*.

114. *See* The Divina Pastora, 17 U.S. 52, 55 (1819). In this 1819 case, the Supreme Court refused to involve itself on the question of property rights of those engaged in a foreign war, when the United States was neutral, based on the "comity and respect due from one independent nation to another." *Id*.

115. The Arrogante Barcelones, 20 U.S. 496, 512 (1822).

116. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237 (11th Cir. 2004) ("[Comity] is an abstention doctrine: [a] federal court has jurisdiction but defers to the judgment of an alternative forum."); *see also* Agreement Relating to Cooperation on Antitrust Matters, U.S.-Austl., June 29, 1982, 21 I.L.M. 702, 702 (using interest of comity to justify agreement to cooperate on conflict-of-laws matters); Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, U.S.-Germ., June 23, 1976, 15 I.L.M. 1282, 1282 (analyzing effects on respective countries supported cooperation on restrictive business practices).

117. *See generally* Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893 (1998) (offering suggestions to clarify meaning of "international comity"). This phrase has come to mean many things. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 33, at 33-34 (1834) (discussing comity in context of moral obligation); FRANCIS WHARTON, A TREATISE ON CONFLICT OF LAWS §1a, at 5 (2d ed. 1881) (discussing comity in context of reciprocity); Harold Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 588-89 (1983) (discussing comity in context of diplomacy).

118. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1180 (2007). International comity as a value stands for the proposition that "cases affecting foreign interests should be decided in a manner that accounts for these interests in some way." *Id.* Comity's application as a rule is

which touch upon foreign law and do not implicate international comity at all.[119] Indeed, United States courts will not enforce foreign tax or criminal judgments, but will generally enforce other types of foreign judgments arising in tort or breach of contract.[120] United States courts also refuse to enforce foreign laws that "offend [our] values or sensibilities," even if courts would ordinarily hold otherwise.[121]

III. ANALYSIS

Pretrial discovery is vital to any party's ability to effectively present their case and seek redress for the harms they allege were committed against them.[122] Without the uniform application of evidence-gathering rules, a litigant's ability to prove the substantive aspects of a claim could be limited by something as arbitrary as the location of the evidence.[123] Thus, in a system that applies the rules without uniformity, the substantive rights of parties may be affected by arbitrary facts—such as, whether a bank keeps their records in the United States or China—rather than a claim's substantive merits.[124]

A. The Flaws of the Restatement's Balancing Test

The Restatement's balancing test, endorsed by the Supreme Court as "relevant to any comity analysis," places the responsibility of weighing which nation has the more "important interests" on the judiciary.[125] This is the central flaw of the current interest-balancing framework.[126] The impracticality of

highlighted by *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, a case where the Supreme Court was hesitant to assert jurisdiction over a matter between two aliens litigating conduct that took place abroad. *See* 473 U.S. 614, 628-29 (1985) (asserting comity requires enforcing rules contrary to domestic law).

119. *See* Pasquantino v. United States, 544 U.S. 349, 360-61 (2005) (discussing revenue rule). Indeed, the revenue rule dictates that the United States shall not enforce foreign tax liabilities in its courts; yet, international comity is described as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton*, 159 U.S. at 164; *see Pasquantino*, 544 U.S. at 361 (discussing revenue rule).

120. *See* Will Rearden, Note, *"A Delicate Inquiry": Foreign Policy Concerns Revive the Revenue Rule in the Second Circuit and Bar Foreign Governments from Suing Big Tobacco*, 51 ST. LOUIS U. L.J. 203, 206-220 (2006).

121. Posner & Sunstein, *supra* note 118, at 1182. One example of such a law that offends American values is English libel law. *See* Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (holding enforcement of English libel law judgment would violate U.S. public policy).

122. *See supra* notes 16-23 and accompanying text (describing American evidence-gathering system).

123. *See* Smith, *supra* note 102, at 29 ("If foreign banking-secrecy laws effectively shield evidence located abroad, plaintiffs bringing suit under the ATA would be unable to prove their cases.").

124. *Compare* Gucci America, Inc., v. Weixing Li, No. 10 Civ. 4974(RJS), 2011 WL 6156936, at *1 (S.D.N.Y. Aug. 23, 2011) (holding non-party Bank of China must comply with valid discovery request under Federal Rules of Civil Procedure), *with* Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 144, 160 (S.D.N.Y. 2011) (holding plaintiffs must seek discovery from same bank using Hague Evidence Convention).

125. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 n.28 (1987) (citing tentative draft of Restatement).

126. *See infra* notes 127-138 and accompanying text (arguing Restatement's balancing test flawed).

balancing interests in a truly dispassionate way is evident through the results of the test's application in federal courts.[127]

The balancing test, at its core, is an attempt to resolve the inevitable overlap of multiple sovereigns maintaining simultaneous jurisdiction over parties.[128] Nevertheless, the best decision courts can hope to achieve by balancing interests and selecting the more important of those compared is, in a sense, an estimate of how the political branches would resolve the conflict.[129] That is, courts hope to resolve the catch-22 by implementing a system in which judges respect the more vital interest and accordingly defer to another forum's law during an appropriate case.[130] Under this system, United States courts supposedly limit the application of their own discovery rules when they determine that other foreign interests merit supremacy; nevertheless, foreign law rarely trumps United States law after interests have been balanced.[131]

As a practical matter, this system has stark shortcomings.[132] First, real cooperation will only occur through negotiation, not through judicial guesswork or blind faith that balancing principles will be applied uniformly and objectively.[133] Indeed, foreign and United States courts cannot enter into binding agreements, so the application of such a rule must be reciprocated in kind.[134] The scenario is analogous to a "prisoners' dilemma" hypothetical, where courts have to rule against their own forum's interests in order to receive a benefit.[135] Second, giving courts the option of deferring to foreign law, when the foreign country's interest is more important, incentivizes the erosion of American substantive law.[136] Lastly, simply weighing the Restatement's factors and concluding that the United States' interest in barring the practice, or

127. *See* Spiro & Mogul, *supra* note 12 (discussing conflict between judges on similar issues).

128. *See* Maier, *supra* note 111, at 286 ("After making it clear that a court is required to follow clear statutory directions by its own legislature about choice of law, the [Restatement] lists the now familiar seven factors to be considered in choosing the applicable rule."); *supra* note 91 and accompanying text (outlining framework laid out in Restatement).

129. *Cf.* Baxter, *supra* note 68, at 7-9 (explaining deficiency in conflict-of-laws rules); Dodge, *supra* note 68, at 106 (providing example of judicial response to political conflict).

130. *See* Dodge, *supra* note 68, at 133, 142 (criticizing comparative interest balancing).

131. *See supra* note 102 and accompanying text (listing cross-border discovery cases and how courts have resolved them).

132. *See infra* notes 133-138 and accompanying text (explaining political shortcomings of judicial foreign interest balancing).

133. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.").

134. *See id*. at 432 (noting judicial dispositions could interfere with negotiations carried out by political branches).

135. *See* Goldsmith, *supra* note 3, at 1623 (explaining political branches better suited than judiciary at addressing foreign relations); *see also* Dixit & Nalebuff, *supra* note 5 (providing concrete applications of prisoners' dilemma theory).

136. *See* Teitelbaum, *supra* note 31, at 869-70 (criticizing balancing test for parties using it to subvert U.S. substantive law).

vice versa, overrides the foreign nation's interest in blocking discovery does nothing to better international cooperation.[137] Generating forum friendly results, while reasoning that comity has been taken into account, may in fact damage any spirit of international cooperation—as opposed to emphasizing the United States' reasonable interests in applying her own laws and procedures in her courtrooms, pending dialogue and negotiation between the political branches.[138]

B. The Flaws of Pure Comity Tests

American substantive law relies upon pretrial discovery to resolve cases in ways that are just.[139] Without access to proper discovery procedures, a litigant's right to seek justice is limited.[140] An example is not difficult to conjure: consider a company that operates in jurisdictions around the world and hopes to engage in a business practice that is barred by United States law.[141] Now imagine that this business practice can only be proven through review of certain documents.[142] Storing these documents overseas, in a jurisdiction that prohibits their disclosure (and possibly values the business practice), could allow the company to engage in the business practice and avoid the consequences.[143] If the existence of foreign laws can preclude United States law when in conflict, then the enforceability of United States substantive law quickly erodes.[144]

C. An Alternative Method: Unilateral Application of the Federal Rules

The Restatement's balancing test is no panacea.[145] It will never lead to a resolution that embodies the underlying ideals of international comity; in fact, it may harm them.[146] Indeed, courts are not suited to resolve the conflict between

137. *See* Brief of Amicus Curiae the Hashemite Kingdom of Jordan in Support of Petitioner at 6, Arab Bank, PLC v. Linde, No. 12-1485 (July 24, 2013) (arguing Second Circuit decision undermines "key United States ally" Jordan); *see also* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 949 (D.C. Cir. 1984) ("We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom . . . . A proclamation by judicial fiat that one interest is less 'important' than the other will not erase a real conflict.")

138. *See* Goldsmith, *supra* note 3, at 1623 (arguing political branches better suited to address foreign relations issues than judicial branch).

139. *See* FED. R. CIV. P. 1 (noting discovery rules administered to secure justice); Surbin, *supra* note 18, at 738 ("We must also discard the notion that questions from the other side can be fended off on the ground that the opponent's lawyer is simply engaged in a fishing expedition.").

140. *See* FED. R. CIV. P. 1.

141. *Cf.* Smith, *supra* 102, at 27 (discussing Antiterrorism Act cases and need for certain types of evidence located abroad).

142. *See id*.

143. *See id*.

144. *See id*.

145. *See supra* Part III.A and accompanying text (discussing flaws of Restatement's balancing test).

146. *See* Dodge, *supra* note 68, at 104-06 (noting drawbacks of balancing interests).

American and foreign views of evidence gathering and privacy.[147] The balancing test provides all of the tension of conflict (because federal courts consistently favor the "more important" interests of United States law) and none of the benefits (because the parties are not driven to the negotiating table).[148]

Balancing interests removes the incentive for international negotiation, which is the only true solution to such conflicts, and takes away the United States' chief bargaining chip (by entertaining that foreign law *can* override American law) in such a negotiation before the political branch can use it.[149] True international cooperation will only come through negotiation, not judicial guesswork; to recall and apply the teaching of the well-known prisoners' dilemma hypothetical, two self-interested courts will both choose to apply their own law even though this leaves both sides in a worse position than they would be with cooperation.[150]

The argument that enforcing laws that conflict will incentivize negotiation and ultimately an equitable resolution, at first brush, might sound nonsensical.[151] This argument, however, is supported by successful precedent.[152] The broad scope and cross-border reach of United States antitrust laws resulted in the retaliatory enactment of foreign blocking statutes.[153] For example, the Business Records Protection Act was passed in Canada in response to a United States federal court's order to produce discovery.[154] While the Act barred the production of the requested discovery, the end result was not a standstill ending all cooperation.[155] The United States has negotiated and agreed upon mutual cooperation in the antitrust field with many nations that initially enacted blocking laws, including Canada.[156] Under the agreement

147. *See* U.S. CONST. art. III. The judiciary functions to resolve cases or controversies, not general policy matters. *See id*.

148. *See* Liu, *supra* note 3 (providing example of conflict between nations over discovery dispute); *see also supra* note 102 (listing cases where U.S. courts consistently favor own interests).

149. Weintraub, *supra* note 11, at 1817 (contending balancing tests ineffective).

150. Kramer, *supra* note 5, at 1022-23 (discussing prisoners' dilemma). Nevertheless, parties that interact indefinitely can eventually achieve cooperation. *See id*. In this context, cooperation is contingent upon each side's capacity to compensate and penalize the other. *See id*. That is, each side can punish the other for noncompliance by refusing to comply as well (i.e., returning back to applying their own evidence-gathering procedures). *See id*.; *see also* Dixit & Nalebuff, supra note 5 (describing prisoners' dilemma).

151. *See supra* note 111 and accompanying text (listing various articles criticizing approaches without proper comity analysis).

152. *See* Agreement Relating to Cooperation on Antitrust Matters, U.S.-Austl., June 29, 1982, 21 I.L.M. 702, 702 (agreeing to cooperate on conflict-of-laws matters in interest of comity); Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, U.S.-Germ., June 23, 1976, 15 I.L.M. 1282, 1282 (agreeing to cooperate on restrictive business practices in light of effects on their respective countries).

153. *See supra* note 56 and accompanying text (discussing origins of Canada's first blocking statute).

154. *See supra* note 56 and accompanying text (explaining Canadian blocking statute).

155. *See supra* note 56 and accompanying text (highlighting effect of Canadian blocking statute).

156. *See* Canada MOU, *supra* note 57 (acknowledging differences in U.S. and Canadian antitrust laws, yet delineating terms of cooperation); *see also* Dodge, *supra* note 68, at 166 (listing countries in agreements with

with Canada, the United States would consider modifying its enforcement activities in light of Canada's interests and Canada would agree to generally not invoke their blocking legislation.[157] Moreover, a more recent agreement with Canada allows for one party to request that the other initiate enforcement proceedings.[158]

It is unlikely that such an agreement would have arisen without strict judicial enforcement of United States laws driving the parties to the negotiating table.[159] Indeed, the agreement shortly followed a lawsuit and investigation that pushed the laws of both nations into deeper conflict.[160] The preamble to the agreement with Canada explicitly states its purpose, noting that it was reached to "avoid[] or moderat[e] conflicts of interests and policies."[161] Regarding this agreement, Professor William Dodge noted that:

> Conflict appears to have put the issue on the diplomatic agenda and to have given the parties an incentive to negotiate. One finds further confirmation of this point in the fact that those who have most often been subject to the extraterritorial application of antitrust law are today pushing the hardest for a more comprehensive international antitrust agreement.[162]

Another example of the value of conflict is found in the context of tax havens in Swiss banks.[163] Indeed, "[f]earful that other banks could suffer the same fate as Wegelin, a venerable private bank that was indicted in New York in 2012 and put out of business, the Swiss government has been seeking an agreement with America."[164] Conflict in this context was the first step towards negotiation.[165]

United States regarding antitrust laws).

157. *See* Canada MOU, *supra* note 57, at 278-79 (outlining considerations given to others' interests).

158. *See* Agreement Regarding the Application of their Competition and Deceptive Marketing Practices Laws, U.S.-Can., Aug. 1, 1995, 35 I.L.M. 309; *see also* Dodge, *supra* note 68, at 165.

159. *See* Canada MOU, *supra* note 57, at preamble (recognizing differences regarding applications of antitrust law). Dialogue would achieve the true balancing of United States and foreign interests in a way that discretionary and unpredictable judicial application of a balancing test could not. *See* Dodge, *supra* note 68, at 119 n.102 (noting importance of predictability). Indeed, once it is resolved that United States courts will uniformly apply United States evidence-gathering procedures abroad, corporations that conduct business around the world would begin to lobby foreign governments to negotiate an amicable compromise. *See id*. at 153-54 (noting foreign interests unrepresented in U.S. legislative decisions).

160. *See* Westinghouse Elec. Corp. v. Rio Algom Ltd. (*In re* Uranium Antitrust Litig.), 480 F. Supp. 1138, 1156 (N.D. Ill. 1979) (compelling production of documents prior to agreement).

161. Canada MOU, *supra* note 57, at preamble.

162. Dodge, *supra* note 68, at 166.

163. *See* Harvey & Noel, *supra* note 63 (reporting on effort to reduce offshore tax havens).

164. *Swiss Finished?*, *supra* note 64.

165. *See id*.

D. Addressing the Perceived Injustice of Unilaterally Applying the Federal Rules

There is, of course, an element of inequity that exists in an order forcing a foreign party to either violate the laws of its own country or face penalties in the United States.[166] Nevertheless, the order to produce discovery, itself, is not a penalty.[167] As previously discussed, it is the subsequent order imposing sanctions for noncompliance with a discovery order that is punitive.[168] The Federal Rules, however, do not *require* sanctions; rather, Rule 37 states that the court "*may* issue further just orders."[169] Courts have discretion to decide the correct penalties for noncompliance, and can offer nominal or no sanction if it reasons that doing so would be just—this is the proper step of the legal analysis where considerations of foreign law belong.[170]

The Supreme Court has already held that it is unjust to dismiss an action for noncompliance with a discovery order in this context, if the noncompliant party has acted with a certain level of good faith.[171] It should not be much of a surprise, however, that foreign parties involved in high-stakes litigation, may not be forthcoming with important evidence that could assist their adversaries.[172] Past actions, the purpose of the requested discovery, the type of foreign law, and the likelihood of enforcement are all considerations courts should take into account when crafting sanctions.[173]

For example, in the case of *Linde v. Arab Bank*, the plaintiffs brought suit under the Antiterrorism Act against the bank for aiding terrorists.[174] The bank refused to produce discovery located in the Kingdom of Jordan—which the plaintiffs believe would prove their case—because of Jordan's banking secrecy laws.[175] The bank alleged that foreign law required absolute secrecy and prohibited disclosure to anyone.[176] Yet, the bank disclosed information to United States authorities in the past without notifying or seeking authorization

166. *See supra* note 5 and accompanying text (outlining classic catch-22 scenario).

167. *See* FED. R. CIV. P. 37 (outlining penalties where party fails to produce discovery).

168. *See id*.; *see also supra* notes 26-30 and accompanying text (providing overview of U.S. discovery procedures).

169. FED. R. CIV. P. 37(b)(2)(A) (emphasis added).

170. *See id*. (leaving sanctions within court's discretion); *see also supra* notes 24-28 and accompanying text (explaining U.S. discovery procedures).

171. *See* Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 357 U.S. 197, 212-13 (1958) (discussing Rule 37 and good faith).

172. *See* Perlman, *supra* note 31, at 463-64 (conducting observations of human nature in adversarial system of litigation).

173. *Cf. Societe Internationale*, 357 U.S. at 200 (holding dismissal not required where noncompliance with forced violation of foreign law in good faith).

174. *See* Linde v. Arab Bank, PLC, 706 F.3d 92, 95 (2d Cir. 2013).

175. *See id*. at 95 (stating bank's justification for not producing requested discovery).

176. *See* Linde v. Arab Bank, PLC, 463 F. Supp. 2d 310, 313 (E.D.N.Y. 2006), *aff'd*, No. 04CV2799 (NG)(VVP), 2007 WL 812918 (E.D.N.Y. Mar. 14, 2007).

from Jordan.[177] In such a case of selective compliance with a foreign law, clear evidence establishes a lack of good faith.[178]

Another example is the Bank of China, known to be controlled by the Chinese government, who is fearful that the Chinese government would prosecute it for producing discovery located in China.[179] Additionally, courts should consider the type of foreign law at issue as relevant.[180] Indeed, foreign blocking statutes solely aim to *preclude* evidence gathering, as opposed to *protecting* a specific type of information.[181] Thus, a law that is enacted to hinder the enforcement of United States law should not be given as much deference under a comity system aimed at mutual deference.[182]

While applying the Federal Rules and enforcing valid discovery requests may prejudice the foreign entity, the result is far from inequitable.[183] Indeed, if a foreign party is under the personal jurisdiction of an American court, a choice has been made to operate under two sovereigns that may, at times, conflict with one another.[184] Thus, if a foreign party weighs the costs and benefits of being subject to the laws of the United States as well as another jurisdiction and finds the cost to be too high, they can choose not to conduct business under United States law.[185] The choice any business entity makes when conducting business in the United States is telling.[186] By operating in the United States, a foreign business reaps the benefits of United States financial markets and the protections of United States laws.[187] Accordingly, they should also be exposed

177. Brief in Opposition to Petition for A Writ of Certiorari at 4 n.4, Arab Bank, PLC v. Linde, No. 12-1485 (U.S. Sept. 16, 2013).

178. *Cf. Linde*, 706 F.3d at 116 (finding lower court did not err in holding noncompliant party acted in bad faith); Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976 (NRB), 2012 WL 3686289, at *6 (S.D.N.Y. Aug. 23, 2012) ("BOC's actions reflect a conscious decision to selectively disclose information pertinent to the case, and to the discovery dispute more specifically, only as it suits BOC's litigation interests. Such . . . action is precisely the type of conduct that the Court may consider in undertaking the applicable comity analysis.").

179. *See Tiffany (NJ) LLC*, 2012 WL 3686289, at *1 (requesting discovery modification due to Chinese banking secrecy law). Central Huijin Investment Ltd., which was formed "in 2003 to hold the Chinese government's stakes in banks and insurance companies," owns more than sixty-seven percent of the Bank of China's stock. *Chinese Banks Reveal Central Huijin Investment*, CHINA DAILY (Oct. 13, 2012), http://www.chinadaily.com.cn/bizchina/2012-10/13/content_15815185.htm.

180. *See infra* note 181 and accompanying text.

181. *See* Teitelbaum, *supra* note 31, at 864 (quoting report of French National Assembly that reveals true intentions behind blocking statute). The French blocking statute was enacted to "assure foreign judges of the judicial basis for the legal excuse" to avoid discovery obligations. *Id*.

182. *See* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237 (11th Cir. 2004) (discussing deference and its importance for comity).

183. *See supra* note 25 and accompanying text (discussing theory that party impliedly consents to obey U.S. law when opening business with U.S. territory).

184. *See* Rhodes, *supra* note 25, at 394-98 (recognizing doing business in jurisdiction subjects one to its laws).

185. *See id*.

186. *See id*.

187. *See id*.

to the potential hindrances of those laws.[188]

IV. CONCLUSION

This Note challenges the current framework for resolving cross-border discovery conflicts and contends that deference to foreign law is not an amicable solution. The judiciary should not be balancing the interests of equal sovereigns. Nor should judges pass judgment on which laws are more vital when in conflict. Rather, American courts should apply American law and the political branches should resolve the conflicts that may arise. That is the only solution that will resolve the current cross-border discovery catch-22.

Matthew J. Smith

188. *See* Rhodes, *supra* note 25 (discussing benefits and consequences of conducting business abroad).