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Patrick M. Connorton

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Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law; B.A., Williams College. I would like to thank Professor Daniel Richman for his invaluable help and guidance.

TRACKING TERRORIST FINANCING THROUGH SWIFT: WHEN U.S. SUBPOENAS AND FOREIGN PRIVACY LAW COLLIDE

Patrick M. Connorton*

This Note examines the jurisprudence surrounding production orders that require the ordered party to violate foreign law, using the Terrorist Finance Tracking Program—better known as the SWIFT Program—as a case study. This Note recommends that courts excuse or punish noncompliance with such production orders based solely on the good or bad faith acts of the ordered party. Although this approach will clarify the law in this area, in certain circumstances it may make it more difficult for the United States to obtain information abroad. Consequently, this Note urges the United States to pursue formal and informal information-sharing agreements with its allies in the war on terror.

INTRODUCTION

We are caught between complying with the U.S. and European rules, and it's a train wreck.¹

—Leonard Schrank, Chief Executive Officer of the Society for Worldwide Interbank Financial Telecommunication

Since the September 11th attacks on the World Trade Center and the Pentagon, the United States has made tracking terrorist financing a top priority.² The most ambitious of these efforts is the Terrorist Finance Tracking Program, more commonly known as the SWIFT Program.³ Under the SWIFT Program, the U.S. Treasury uses administrative subpoenas to access the vast database of financial information gathered by the Society for

* J.D. Candidate, 2008, Fordham University School of Law; B.A., 2003, Williams College. I would like to thank Professor Daniel Richman for his invaluable help and guidance.

1. Dan Bilefsky, *Belgians Say Banking Group Broke European Rules in Giving Data to U.S.*, N.Y. Times, Sept. 29, 2006, at A10.

2. Nat'l Comm'n on Terrorist Attacks upon the U.S., *The 9/11 Commission Report* 382 (2004) (“Vigorous efforts to track terrorist financing must remain front and center in U.S. counterterrorism efforts.”).

3. See, e.g., Tony Snow, Press Sec’y, White House, Press Briefing (Sept. 27, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060927-2.html> (calling the program the “SWIFT Program”).

Worldwide Interbank Financial Telecommunication (SWIFT),⁴ a Belgium-based banking cooperative that supplies messaging services to thousands of financial institutions around the world.⁵ Those familiar with SWIFT's database have dubbed it "'the mother lode, the Rosetta stone' for financial data."⁶ Stuart Levey, Under Secretary of the Treasury for Terrorism and Financial Intelligence, has called the counterterrorism benefits of accessing this information "incalculable."⁷

Unfortunately, until June 2007, in order to grant the United States access to its financial records, SWIFT had to violate Belgian and E.U. privacy laws prohibiting the transfer of personal data to nations with relatively lax privacy laws, such as the United States.⁸ It was not until U.S. newspapers exposed the formerly classified SWIFT Program in the summer of 2006, however, that Belgian and E.U. officials became aware of these violations.⁹ Though SWIFT argued that it had complied with all relevant privacy regulations,¹⁰ Belgian and E.U. data protection authorities harshly reprimanded the group and demanded that it stop complying with the U.S. subpoenas.¹¹ SWIFT subsequently found itself in the unenviable position of deciding whether to comply with U.S. law or Belgian and E.U. law.¹²

4. See Press Release, U.S. Dep't of the Treasury, Testimony of Stuart Levey (July 11, 2006), available at <http://www.treas.gov/press/releases/hp05.htm>.

5. See Swift.com, About SWIFT, http://www.swift.com/index.cfm?item_id=43232 (last visited July 28, 2007). For further discussion of the Society for Worldwide Interbank Financial Telecommunication (SWIFT), see *infra* Part I.A.

6. Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. Times, June 23, 2006, at A1 (quoting a former government official).

7. Press Release, U.S. Dep't of the Treasury, *supra* note 4.

8. See Royaume de Belgique Commission de la Protection de la Vie Privée, Opinion No. 37/2006, Opinion on the Transfer of Personal Data by the CSLR SWIFT by Virtue of UST (OFAC) Subpoenas 26 (2006) (nonofficial and temporary translation) [hereinafter Belgian Opinion], available at http://www.privacycommission.be/communiqu%E9s/opinion_37_2006.pdf (detailing SWIFT's violations of Belgian and E.U. law); Press Release, European Union Article 29 Working Party, Press Release on the SWIFT Case, (Nov. 23, 2006), available at http://ec.europa.eu/justice_home/fsj/privacy/news/docs/PR_Swift_Affair_23_11_06_en.pdf (same). Note that, while technically distinct, Belgian and E.U. privacy laws overlap to the extent that Belgium has implemented E.U. directives. See Press Release, European Union Article 29 Working Party, *supra* ("SWIFT is subject to Belgian data protection law implementing the EU Data Protection Directive 95/46/EC."); see also European Commission, Status of Implementation of Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data, http://ec.europa.eu/justice_home/fsj/privacy/law/implementation_en.htm (last visited July 28, 2007) (outlining Belgium's implementation of relevant E.U. privacy directives).

9. See, e.g., Lichtblau & Risen, *supra* note 6; Josh Meyer & Greg Miller, *U.S. Secretly Tracks Global Bank Data*, L.A. Times, June 23, 2006, at A1; Glenn R. Simpson, *Treasury Tracks Financial Data in Secret Program*, Wall St. J., June 23, 2006, at A1.

10. Swift.com, SWIFT Statement on Compliance Policy (June 23, 2006), http://www.swift.com/index.cfm?item_id=59897.

11. See Belgian Opinion, *supra* note 8, at 25 (calling SWIFT's compliance with U.S. subpoenas "a serious error of judgment"); Press Release, European Union Article 29 Working Party, *supra* note 8 (stating that SWIFT had violated "fundamental European principles" as well as Belgian and E.U. law); see also, Bilefsky, *supra* note 1 (noting that Belgian Prime Minister Guy Verhofstadt "took Swift to task for passing on confidential

SWIFT remained torn between these conflicting obligations until June 27, 2007, when the United States and the European Union reached an agreement (the U.S.-E.U. Compromise) that allowed the SWIFT Program to continue operating in modified form.¹³ Under the U.S.-E.U. Compromise, the United States agreed to use information obtained from SWIFT only for counterterrorism purposes and to retain the information for no longer than five years.¹⁴

The trials and tribulations of the SWIFT Program highlight a problem that continuously threatens U.S. initiatives in the war on terror: The United States' unquenchable thirst for information and intelligence often puts it at odds with countries that highly value privacy, such as most European nations. This clash of principles explains, among other examples, the dispute between the U.S. Department of Homeland Security and the European Union over the use of air-passenger manifests by U.S. intelligence agencies.¹⁵ As evidenced by the recent agreement regarding the SWIFT Program, compromise is a potential solution to such clashes. But what if the cost of compromise is too high? Can the United States simply gather the desired information unilaterally? In the case of the SWIFT Program, could the United States have brought SWIFT before a U.S. court and demanded compliance with its subpoenas even though doing so would require SWIFT to violate foreign law?

The answer depends, in part, on where the suit is brought. Over the past fifty years, U.S. courts have taken wide-ranging positions on orders that require a party to violate foreign law.¹⁶ Initially, some courts took the

financial information without adequate safeguards that European privacy rules would be respected").

12. See *supra* note 1 and accompanying text.

13. See Press Release, Europa, USA to Take Account of EU Data Protection Principles to Process Data Received from Swift (June 28, 2007), available at <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/968&format=HTML&aged=0&language=EN&guiLanguage=en>; see also Ingrid Melander, *E.U. Approves Deal for U.S. Use of Banking Data in Anti-Terrorism Probes*, Wash. Post, June 28, 2007, at A21; James Risen, *U.S. Reaches Tentative Deal with Europe on Bank Data*, N.Y. Times, June 29, 2007, at A6.

14. See Press Release, Europa, *supra* note 13.

15. See Jane Perlez, *U.S. Asks Europe to Ensure Continued Access to Air Passenger Data*, N.Y. Times, May 14, 2007, at A3 ("In order to reduce the odds that terrorists will enter the United States, the Bush administration is asking the European Union to lift its objections to the sharing of airline passenger information with American intelligence agencies, said the secretary of homeland security, Michael Chertoff.").

16. See generally Mark Brodeur, Note, *Court Ordered Violations of Foreign Bank Secrecy and Blocking Laws: Solving the Extraterritorial Dilemma*, 1988 U. Ill. L. Rev. 563; Lenore B. Browne, Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 Colum. L. Rev. 1320 (1983); Karen A. Feagle, Note, *Extraterritorial Discovery: A Social Contract Perspective*, 7 Duke J. Comp. & Int'l L. 297 (1996); Daniela Levarda, Note, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery*, 18 Fordham Int'l L.J. 1340 (1995); 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 (1982).

position that such orders should never be enforced,¹⁷ while others required the ordered party to make a good faith effort to comply.¹⁸ Today, courts have largely abandoned these per se rules. Instead, courts now employ a balancing test that weighs, among other things, the conflicting national interests at stake and the hardship imposed on the ordered party.¹⁹ Courts differ, however, on how best to balance the relevant factors.²⁰ Some courts have even suggested that meaningfully balancing these factors is impossible.²¹

Courts today also consider the extent to which the ordered party has acted in good or bad faith in determining whether sanctions, such as fines or default judgments, are appropriate for noncompliance.²² Again, courts disagree on what qualifies as good or bad faith and what significance, if any, good or bad faith should have in determining sanctions for noncompliance with an order that requires violation of foreign law.

This Note examines U.S. courts' treatment of orders that require violation of foreign law using the SWIFT Program as a case study. This Note argues that the balancing test used to determine whether to enforce such orders has proven unworkable. Instead, this Note encourages courts to look solely to the good or bad faith acts of the ordered party. Since this approach will make it difficult for the United States to unilaterally gather information under certain circumstances, formal agreements like the U.S.-E.U. Compromise will become increasingly important. However, this Note argues that the United States should also make use of more informal agreements that offer greater flexibility.

17. See, e.g., *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (holding that courts should not cause violations of foreign law); *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) (same); *First Nat'l City Bank of N.Y. v. IRS*, 271 F.2d 616, 619 (2d Cir. 1959) (same).

18. See, e.g., *Gen. Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 296 (S.D. Cal. 1981).

19. See *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474-75 (9th Cir. 1992) (conducting a balancing test to determine the validity of an order requiring violation of foreign law); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1279-83 (7th Cir. 1990) (same); *United States v. Field*, 532 F.2d 404, 407 (5th Cir. 1976) (same); *Trade Dev. Bank v. Cont'l Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972) (same); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (same); *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 542-43 (N.D. Ill. 2004) (same); see also *Restatement (Third) of Foreign Relations Law* § 442 cmt. g (1987) (advocating the use of a balancing test); *Restatement (Second) of Foreign Relations Law* § 40 (1965) (same).

20. These differences are discussed at length in Part II.A.3.

21. *Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, 480 F. Supp 1138, 1148 (N.D. Ill. 1979) (calling the balancing test "inherently unworkable").

22. See *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 208-09 (1958) (evaluating the ordered party's good and bad faith acts); *United States v. Bank of N.S.*, 740 F.2d 817, 825-26 (11th Cir. 1984) (same); *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983) (same); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1287 (9th Cir. 1981) (same); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998 (10th Cir. 1977) (same); *Trade Dev. Bank*, 469 F.2d at 40-41 (same); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y. 1981) (same).

Part I of this Note introduces the SWIFT Program and addresses Belgium's and the European Union's findings that the program forced SWIFT to violate their laws. Part I also discusses the U.S.-E.U. Compromise, which will keep the SWIFT Program operational in modified form.

Part II examines the case law regarding orders that require violation of foreign law. Part II.A traces the evolution of U.S. courts' approach to such orders, focusing on the development of the balancing test. This history explains the terms of the current debate and details the conflicting approaches courts take. Part II.B examines the good faith standard and the varying degrees of significance that courts attach to good or bad faith acts. Part II.C discusses various attempts to circumvent the problems posed by orders requiring violation of foreign law with formal and informal international agreements.

Part III argues that a noncompliant party's good or bad faith acts in response to an order requiring violation of foreign law ought to be the sole factor in determining whether sanctions are appropriate for noncompliance. This part concludes that, under this approach, the United States would have been unable to compel SWIFT to comply with its subpoenas. As such, Part III encourages the United States to employ both formal and informal information-sharing agreements with its allies in the war on terror.

I. SWIFT AND THE SWIFT PROGRAM

This part gives background information on both SWIFT and the SWIFT Program. Part I.A traces the history of SWIFT, explaining its importance to the banking and finance industries. Part I.B addresses the development and operation of the SWIFT Program and details foreign objections to the program, focusing on Belgium's and the European Union's findings that the SWIFT Program violated their laws. Part I.B also discusses the U.S.-E.U. Compromise that will keep the SWIFT Program operational.

A. SWIFT

In 1973, a group of 239 banks from 15 different countries founded SWIFT as a financial-industry-owned cooperative in Brussels, Belgium. Through SWIFT, the banks hoped to create "a shared worldwide data processing and communications link and a common language for international financial transactions."²³ More specifically, they envisioned SWIFT as a network to carry messages containing instructions for international transfers of money between banks.²⁴ Today, SWIFT has nearly 2300 member organizations in 208 countries and provides transfer

23. Swift.com, SWIFT History, http://www.swift.com/index.cfm?item_id=1243 (last visited July 27, 2007).

24. See Meyer & Miller, *supra* note 9. SWIFT does not actually execute the transfer of funds, but merely communicates relevant instructions to the banks that do. See *id.* It is not a bank and does not hold accounts of customers. Swift.com, *supra* note 10.

instructions to 8147 financial institutions.²⁵ Its network carries up to 12.7 million messages a day.²⁶ “[V]irtually every major commercial bank, as well as brokerage houses, fund managers and stock exchanges, uses its services.”²⁷

B. *The SWIFT Program*

1. Creation and Operation

After the September 11th terrorist attacks, the Bush administration made “cut[ting] off the flow of money to Al Qaeda,” and similar organizations, a top priority.²⁸ On September 23, 2001, pursuant to the International Emergency Economic Powers Act,²⁹ President George W. Bush signed Executive Order 13224, declaring a national emergency to deal with the threat of terrorism.³⁰ The declared emergency granted the Treasury Department’s Office of Foreign Asset Control (OFAC) authority to issue administrative subpoenas to obtain financial records related to terrorism investigations.³¹

Shortly after President Bush signed Executive Order 13224, OFAC began using its new administrative subpoena powers on SWIFT in a secret effort that developed into the SWIFT Program.³² OFAC can subpoena SWIFT because “SWIFT has substantial business and operations in the United States, including data storage.”³³ By September 29, 2006, sixty-four

25. Swift.com, SWIFT in Figures (May 14, 2007), http://www.swift.com/index.cfm?item_id=61915.

26. Meyer & Miller, *supra* note 9.

27. Lichtblau & Risen, *supra* note 6.

28. *See id.*; Meyer & Miller, *supra* note 9.

29. 50 U.S.C. §§ 1701–1706 (2000).

30. *See* Fact Sheet, Office of the Coordinator for Counterterrorism, Executive Order 13224 (Dec. 20, 2002), available at <http://www.state.gov/s/ct/rls/fs/2002/16181.htm>.

31. *See* Meyer & Miller, *supra* note 9 (“The [Office of Foreign Asset Control’s] administrative subpoenas are issued under authority granted in the 1977 International Emergency Economic Powers Act.”); Press Release, *supra* note 4 (“The legal basis for this subpoena is the International Emergency Economic Powers Act (IEEPA), a statute passed in 1977, which allows the government to compel the production of information pursuant to Presidential declarations of national emergency. . . . In this case, our subpoena is issued pursuant to President Bush’s declaration of an emergency with respect to terrorism after September 11th in Executive Order 13224.”).

32. *See* Lichtblau & Risen, *supra* note 6 (noting that the first administrative subpoenas were issued “[w]ithin weeks of 9/11”). The idea to target SWIFT “grew out of a suggestion by a Wall Street executive, who told a senior Bush administration official about Swift’s database.” *Id.* Before then, “[f]ew government officials knew much about the consortium . . . but they quickly discovered it offered unparalleled access to international transactions.” *Id.*

33. Swift.com, Update and Q&A to SWIFT’s 23 June 2006 Statement on Compliance (Aug. 25, 2006), http://www.swift.com/index.cfm?item_id=60275; *see also* Belgian Opinion *supra* note 8, at 3 (noting that one of SWIFT’s two “operation centres” is in the United States). A detailed analysis of U.S. jurisdiction over SWIFT is beyond the scope of this Note. It warrants mentioning, though, that no one has challenged the SWIFT Program on jurisdictional grounds, particularly not SWIFT itself.

administrative subpoenas had been served on SWIFT,³⁴ generally at monthly intervals.³⁵ These subpoenas allowed OFAC to retrieve customers' names, bank account numbers, addresses, phone numbers, and other identifying information.³⁶

The physical transfer of information and documents from SWIFT to OFAC took place in two phases.³⁷ First, messages subject to the SWIFT Program's subpoenas were delivered from SWIFT's operation center in the United States to the U.S. Treasury, where they were stored in a "black box" or "production database."³⁸ Next, OFAC used software to search the production database for predetermined names related to terrorism investigations.³⁹ OFAC conducted these searches in collaboration with the Central Intelligence Agency, Federal Bureau of Investigation, and other interested agencies.⁴⁰ According to Stuart Levey, Under Secretary of the Treasury for Terrorism and Financial Intelligence, "tens of thousands" of such searches were conducted during the first five years of the program.⁴¹ U.S. intelligence agencies analyzed information gleaned from these searches "to detect patterns, shifts in strategy, specific 'hotspot accounts,' and locations that had become new havens for terrorist activity."⁴²

The scope of the SWIFT Program was not unlimited, however.⁴³ For example, before conducting a search, analysts first had to "articulate[] the specific link between the target of the search and a terrorism investigation."⁴⁴ Search requests were also reviewed by the U.S. Treasury's assistant secretary for intelligence and were subject to oversight by an outside auditor.⁴⁵ Furthermore, "SWIFT officials [were] . . . allowed

34. Belgian Opinion, *supra* note 8, at 5.

35. See Meyer & Miller, *supra* note 9.

36. *Id.*; see also Lichtblau & Risen, *supra* note 6 (calling SWIFT's database "a rich hunting ground for government investigators"); Simpson, *supra* note 9.

37. See Belgian Opinion, *supra* note 8, at 5.

38. *Id.*

39. See *id.* at 6.

40. See Lichtblau & Risen, *supra* note 6; Meyer & Miller, *supra* note 9.

41. Meyer & Miller, *supra* note 9.

42. *Id.*

43. Actually, at the outset, there were few if any limitations on the program. See Lichtblau & Risen, *supra* note 6 ("At first, they got everything—the entire Swift database, one person close to the operation said.").

44. Press Release, U.S. Dep't of the Treasury, *supra* note 4. "[T]here had been one instance of abuse in which an analyst had conducted a search that did not meet the terrorist-related criteria. The analyst was subsequently denied access to the database." Meyer & Miller, *supra* note 9.

45. Meyer & Miller, *supra* note 9 ("A SWIFT representative said that Booz Allen Hamilton, an international consulting firm, is the auditor but provided no further details on how the oversight process works."). More details regarding Booz Allen Hamilton's role emerged during Belgium's investigation of SWIFT:

A continuous audit by the American auditor Booz, Allen & Hamilton was provided for as of the middle of 2002. This concerns end-to-end audits of the [U.S. Treasury's] system to provide SWIFT with additional assurance that the system was secure (checking the conformity with [International Organization for Standardization] standards on security), that the purpose was limited to terrorism

to be present when analysts search[ed] the data and to raise objections with top officials.”⁴⁶

2. Reaction to the SWIFT Program in the United States

On June 23, 2006, *The New York Times*, *Los Angeles Times*, and *The Wall Street Journal* published stories revealing the existence of the SWIFT Program.⁴⁷ Initially, critics likened the program to the Bush administration’s controversial use of warrantless wiretaps.⁴⁸ Some of those who leaked information regarding the SWIFT Program did so out of concerns “that they were exploiting a ‘gray area’ in the law” and might be violating Fourth Amendment protections against illegal searches and seizures.⁴⁹ Critics considered the program’s use of administrative subpoenas particularly problematic.⁵⁰

Members of the Bush administration quickly defended the program, calling it “a vital tool” in the war on terror.⁵¹ Supporters pointed to specific successes of the SWIFT Program: the capture of Hambali, the mastermind of the 2002 resort bombing in Bali;⁵² the conviction of Brooklyn resident Uzair Parchara on terrorism-related charges;⁵³ and, generally, the SWIFT

investigations, that the scrutinizers . . . had access to everything the [U.S. Treasury] analysts were inquiring and to force continuing improvements to the system.

Belgian Opinion, *supra* note 8, at 7.

46. Meyer & Miller, *supra* note 9; *see also* Belgian Opinion, *supra* note 8, at 7 (discussing the role of SWIFT officials on-site at the U.S. Treasury). It is unclear what weight SWIFT’s objections would carry. As SWIFT takes pains to point out on its web site, SWIFT is not volunteering information to the United States but rather is being compelled to produce it through administrative subpoenas. *See* Swift.com, *supra* note 33.

47. *See* Lichtblau & Risen, *supra* note 6; Meyer & Miller, *supra* note 9; Simpson, *supra* note 9.

48. *See, e.g.*, Editorial, *Following the Money*, St. Louis Post-Dispatch, June 26, 2006, at B8 (“To the list of the Bush administration’s constitutionally dubious efforts to track terrorism suspects now add tapping international banking records without judicial subpoena.”); Editorial, *Following the Money, and the Rules*, N.Y. Times, June 24, 2006, at A14; Meyer & Miller, *supra* note 9 (“[The SWIFT Program] is part of an arsenal of aggressive measures the government has adopted since the Sept. 11 terrorist attacks that yield new intelligence, but also circumvent traditional safeguards against abuse and raise concerns about intrusions on privacy.”).

49. Lichtblau & Risen, *supra* note 6.

50. *See, e.g., id.* (referring to the use of administrative subpoenas as a “significant departure from typical practice in how the government acquires Americans’ financial records”); Meyer & Miller, *supra* note 9 (calling it “a major departure from traditional methods of obtaining financial records”).

51. John Ward Anderson, *Belgium Rules Sifting of Bank Data Illegal*, Wash. Post, Sept. 29, 2006, at A14.

52. *See* Lichtblau & Risen, *supra* note 6 (“The Swift data identified a previously unknown figure in Southeast Asia who had financial dealings with a person suspected of being a member of Al Qaeda; that link helped locate Hambali in Thailand in 2003 . . .”).

53. *See id.* (describing Parchara’s conviction for aiding “a Qaeda operative in Pakistan by agreeing to launder \$200,000 through a Karachi bank”).

Program's ability to monitor "lower- and mid-level terrorist operatives and financiers" as well as certain militant groups.⁵⁴

The Bush administration further contended that the program stood "on rock-solid legal ground."⁵⁵ While some debate this claim,⁵⁶ many of the program's critics do not dispute its legality.⁵⁷ The ombudsman for *The New York Times* even wrote that his newspaper rushed to judgment on the program's legality under U.S. laws.⁵⁸ Perhaps the best evidence of the SWIFT Program's legality is SWIFT's decision not to challenge the program's subpoenas in a U.S. court.⁵⁹

3. International Reaction to the SWIFT Program

Reaction to the SWIFT Program in Europe and other foreign nations, many of which have stronger privacy protections than the United States,⁶⁰ was and still is decidedly negative. Most notably, the Belgian Privacy Protection Commission concluded that SWIFT violated Belgian and E.U. law when it cooperated with OFAC's administrative subpoenas:⁶¹ "[It] must be considered a serious error of judgment on the part of SWIFT to subject a massive quantity of personal data to surveillance in a secret and

54. Meyer & Miller, *supra* note 9. According to Stuart Levey, Under Secretary of the Treasury for Terrorism and Financial Intelligence, the SWIFT Program is particularly useful in monitoring "Hezbollah, Hamas and Palestinian Islamic Jihad." *Id.* Other officials claim, however, that it has "been only marginally successful against Al Qaeda." *Id.*

55. Barton Gellman, Paul Blustein & Dafna Linzer, *Bank Records Secretly Tapped*, Wash. Post, June 23, 2006, at A1 (quoting Under Secretary Levey).

56. See Business Briefing, *Legal: SWIFT Ordered to Face Lawsuit*, Wash. Post, June 16, 2007, at D2 (noting that a lawsuit filed against SWIFT for the alleged violation of privacy rights had survived a motion to dismiss); Lichtblau & Risen, *supra* note 6 (interviewing a leading banking and privacy law expert who was troubled by the program's broad subpoena powers).

57. See, e.g., Editorial, *Bank Surveillance*, Wash. Post, June 24, 2006, at A20 (noting that the SWIFT Program "appears to be legal"); Byron Calame, Op-Ed., *Can 'Magazines' of The Times Subsidize News Coverage?*, N.Y. Times, Oct. 22, 2006, at A22 (faulting *The New York Times* for rushing to judgment on the SWIFT Program's legality); see also Eric Lichtblau, *Controls on Bank-Data Spying Impress Civil Liberties Board*, N.Y. Times, Nov. 29, 2006, at A26 (noting that a Democratic member of Congress's Privacy and Civil Liberties Oversight Board was impressed "with the lengths to which [the SWIFT Program has] gone to avoid infringing on people's civil rights").

58. See Calame, *supra* note 57.

59. See Soc'y for Worldwide Interbank Fin. Telecomm., Executive Summary of SWIFT's Response to the Belgian Privacy Commission's Advisory Opinion 37/2006 of 27 September 2006, at 8 (2006) [hereinafter SWIFT's Response], available at http://www.swift.com/index.cfm?item_id=60788 ("SWIFT determined [that a U.S. court] was highly unlikely to conclude the subpoena was invalid under US law—based upon advice received from specialized outside counsel."). A detailed analysis of the SWIFT Program's legality under U.S. law is beyond the scope of this Note. For further discussion of this topic, see Jeremy S. Shrader, Note & Comment, *Secrets Hurt: How SWIFT Shook Up Congress, the European Union, and the U.S. Banking Industry*, 11 N.C. Banking Inst. 397, 409–11 (2007).

60. See Bilefsky, *supra* note 1 ("The European Union does not consider the United States to be a country that offers sufficient legal protection of individual data.").

61. Belgian Opinion, *supra* note 8, at 26.

systematic manner for years without effective grounds for justification and without independent control in accordance with Belgian and European law.”⁶²

The Belgian Privacy Protection Commission found fault with SWIFT’s actions on a number of grounds. As a preliminary matter, the commission categorized SWIFT as a “data controller” as opposed to a “data processor,” a distinction that subjects SWIFT to greater liability for privacy violations under Belgian law.⁶³ According to the commission, SWIFT ignored its legal duty as a data controller to inform affected parties that it was providing their financial data to the United States.⁶⁴ Further, the commission faulted SWIFT for transferring personal data to a country with inadequate privacy protections, namely the United States.⁶⁵

Though the Belgian Privacy Protection Commission admitted that SWIFT had a “legitimate interest” in complying with valid U.S. subpoenas, it held nonetheless that this did not “justify a secret, systematic and large scale violation of the basic European principles of data protection.”⁶⁶ The commission chastised SWIFT for simply complying with the subpoenas rather than challenging them in a U.S. court.⁶⁷ Alternatively, the commission suggested that SWIFT could have appealed to international organizations that were developed to resolve conflict of laws problems related to tracking terrorist financing.⁶⁸

The Belgian Privacy Protection Commission did not recommend what action should have been taken against SWIFT for its infractions, stating instead merely that it would “remain[] available to issue further guidance.”⁶⁹ Other Belgian authorities similarly refrained from announcing plans for legal action against SWIFT.⁷⁰ In fact, after the commission announced its findings, Belgian Prime Minister Guy Verhofstadt called the SWIFT Program “an absolute necessity” and suggested that the United

62. *Id.*

63. *Id.* at 8. Under Belgian and E.U. law, a data controller “determines the purposes and means of the processing of personal data,” whereas a data processor “processes personal data on behalf of the data controller.” *Id.* at 9. “The distinction between both qualifications has very important consequences . . . [since] the processor has in principle a limited liability and [concerned persons] can in principle only assert their rights on the data controller.” *Id.* SWIFT has called this aspect of the Commission’s finding its “principal defect.” SWIFT’s Response, *supra* note 59, at 1. For further information on this topic, compare Belgian Opinion, *supra* note 8, at 8–15 (arguing that SWIFT is a data controller), with SWIFT’s Response, *supra* note 59, at 4–6 (arguing that SWIFT is a data processor).

64. See Belgian Opinion, *supra* note 8, at 17.

65. See *id.* at 18–19.

66. *Id.* at 20–21.

67. See *id.* at 21.

68. *Id.* In its response to the Belgian Privacy Protection Commission’s findings, SWIFT observed that such international organizations merely make recommendations to member states and are not available as forums in which private entities can file grievances. See SWIFT’s Response, *supra* note 59, at 8.

69. Belgian Opinion, *supra* note 8, at 26.

70. See Anderson, *supra* note 51.

States work with European nations to bring the program into line with E.U. law.⁷¹

Two months after the Belgian Privacy Protection Commission issued its findings, an E.U. Article 29 Working Group—a panel composed of representatives from each E.U. member country—reached largely the same conclusions.⁷² Like the Belgian Privacy Protection Commission, the working group considered SWIFT a “data controller.”⁷³ It also concluded that SWIFT had violated its “duty to provide information, the notification of the processing [of personal data], [and] the obligation to provide an appropriate level of protection to meet the requirements for international transfers of personal data.”⁷⁴ The working group continued,

[We are] of the opinion that the hidden, systematic, massive and long-term transfer of personal data by SWIFT to the [U.S. Treasury] in a confidential, non-transparent and systematic manner for years without effective legal grounds and without the possibility of independent control by public data protection supervisory authorities constitutes a violation of the fundamental European principles as regards data protection and is not in accordance with Belgian and European law.⁷⁵

Unlike the Belgian Privacy Protection Commission, the Article 29 Working Group issued a list of “immediate actions” meant to address SWIFT’s infractions.⁷⁶ Among other mandates, the working group called on SWIFT to cease its infringements of Belgian and E.U. law and to “[r]eturn to lawful data processing.”⁷⁷ According to E.U. officials, the working group’s findings caused the European Commission to consider taking Belgium to court for failing to force SWIFT to uphold E.U. data protection rules.⁷⁸ Some E.U. lawmakers even advised SWIFT to move its North American operation center to Canada, where it would be more insulated from U.S. subpoena power.⁷⁹

71. *Id.*

72. See Press Release, European Union Article 29 Working Party, *supra* note 8; see also Dan Bilefsky, *Panel Says Bank Group, Aiding U.S., Broke Law*, N.Y. Times, Nov. 23, 2006, at A22 (“A European Union panel concluded Wednesday that [SWIFT] breached European Union data protection rules when it gave the Bush administration access to millions of records of private financial transactions.”).

73. Press Release, European Union Article 29 Working Party, *supra* note 8.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See Bilefsky, *supra* note 72.

79. See Dan Bilefsky, *Europeans Berate Bank Group and Overseer for U.S. Access to Data*, N.Y. Times, Oct. 5, 2006, at A15. Even with the political compromise in place, SWIFT is partially following this advice. See Melander, *supra* note 13 (“The financial network announced earlier this month that it would modify its messaging system to ensure that intra-European data are stored only in Europe and not in the United States.”).

4. Subsequent Action by SWIFT

On the day the U.S. media exposed the SWIFT Program, SWIFT issued a press release to assure its clients that it had complied with the privacy laws of all affected nations.⁸⁰ In the press release, SWIFT stressed that, although it had voluntarily taken part in the negotiations that established the SWIFT Program, the subpoenas were ultimately compulsory.⁸¹ In the months after the program's initial exposure, SWIFT sought to convince Belgian and other E.U. officials that its compliance with the SWIFT Program was permissible under their laws.⁸² SWIFT also called on U.S. officials to engage their E.U. counterparts in the hopes that they would reach a mutually agreeable solution.⁸³

5. The U.S.-E.U. Compromise

The United States and the European Union heeded these calls and reached an accord regarding the SWIFT Program on June 27, 2007. Under the compromise, the United States agreed to (1) use data obtained through the SWIFT Program exclusively for counterterrorism purposes; (2) delete information unrelated to counterterrorism investigations on an ongoing basis; (3) retain data for no more than five years; (4) permit an E.U. official to monitor the program; and (5) publish the provisions of the agreement in the Federal Register.⁸⁴ Though the compromise assuaged the fears of E.U. officials,⁸⁵ certain details still must be approved by E.U. member states.⁸⁶

80. Swift.com, *supra* note 10.

81. *See id.* For the purposes of liability, SWIFT has stressed that its cooperation with the SWIFT Program is ultimately compelled by U.S. law and, thus, not actually voluntary.

82. *See* Swift.com, Commentary: SWIFT Defends Compliance at EU Parliament Hearing (Oct. 8, 2006), http://www.swift.com/index.cfm?item_id=60676 ("Speaking at a three-hour hearing of the European Parliament in Brussels on Wednesday 4 October, SWIFT CFO Francis Vanbever told Parliamentarians and journalists that SWIFT's compliance with compulsory subpoenas from the US Treasury was legal and that SWIFT 'strongly objected' to the opinion of the Belgian Data Privacy Commission that it had broken Belgian and EU data protection laws."); Swift.com, SWIFT Supports Calls for Debate to Move Beyond Data Privacy to Security and Public Safety (Nov. 16, 2006), http://www.swift.com/index.cfm?item_id=60784 ("SWIFT has submitted a comprehensive legal rebuttal to the Belgian Privacy Commission in response to its advisory opinion of 27 September 2006.").

83. Swift.com, US Bi-Partisan Panel "Impressed" by SWIFT's Controls to Protect Civil Liberties (Nov. 29, 2006), http://www.swift.com/index.cfm?item_id=60966 ("SWIFT, which is caught between serious interpretation issues surrounding current US and EU laws, has called repeatedly for a global solution for providing financial intelligence for counterterrorism purposes with adequate data protection safeguards.").

84. Press Release, Europa, *supra* note 13.

85. *See id.* European Commission Vice President Franco Frattini stated, "The EU will have now the necessary guarantees that [the] US Treasury processes data it receives from Swift's mirror server in [the United States] in a way which takes account of EU data protection principles." *Id.*

86. *See* Melander, *supra* note 13.

The E.U.-U.S. Compromise provided a mutually agreeable solution to a difficult legal and political conflict. However, some of the concessions that the United States made to preserve the SWIFT Program will almost certainly hamper U.S. counterterrorism efforts. For example, the U.S.-E.U. Compromise's requirement that the U.S. Treasury delete information unrelated to counterterrorism investigations may result in the irrevocable deletion of the financial records of terrorists who have not yet been identified as threats. While the compromise may have been necessary to maintain important allies in the war on terror, it raises the question of whether the United States had other options. Specifically, did the United States have legal recourse to enforce its subpoenas against SWIFT in a U.S. court even though doing so would force SWIFT to violate foreign law? Part II's examination of the jurisprudence surrounding orders requiring violation of foreign law reveals that there is no easy answer to this question.

II. U.S. COURTS' TREATMENT OF ORDERS REQUIRING VIOLATION OF FOREIGN LAW

This part traces the evolution of U.S. courts' treatment of orders requiring violation of foreign law and then addresses the current divide over the appropriate roles of the balancing test and good faith analysis. Part II.A examines attempts by U.S. courts to reconcile the Supreme Court's only relevant holding regarding such orders with the subsequent issuance of two restatements, both of which endorsed the use of a balancing test. Part II.B focuses on the good faith standard and the varying significance that courts attach to good and bad faith acts in response to orders requiring violation of foreign law. This section identifies three distinct approaches to the significance of good and bad faith acts. Finally, Part II.C discusses various attempts to circumvent the problem of orders requiring violation of foreign law through formal and informal international cooperation.

A. *Evolution of U.S. Courts' Treatment of Orders Requiring Violation of Foreign Law*

1. The Supreme Court Lays the Foundation: *Societe Internationale*

The Supreme Court last confronted the enforceability of orders requiring violation of foreign law in the landmark 1958 case *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*.⁸⁷ In *Societe Internationale*, Societe, a Swiss holding company, sued to recover assets seized by the U.S. government in World War II pursuant to the Trading with the Enemy Act.⁸⁸ In preparing its defense, the U.S. government moved for an order requiring Societe to produce banking records relevant to

87. 357 U.S. 197 (1958).

88. See *id.* at 198–99.

the ownership of the assets in question.⁸⁹ Though it partially complied with the order, Societe asked for relief from full compliance on the grounds that producing certain bank records would violate Swiss law.⁹⁰ In response, the U.S. government filed a motion to dismiss.⁹¹ The trial court granted the motion, holding, "Swiss law did not furnish an adequate excuse for [Societe's] failure to comply with the production order, since [Societe] could not invoke foreign laws to justify disobedience to orders entered under the laws of the forum."⁹² The U.S. Court of Appeals for the D.C. Circuit affirmed on appeal.⁹³

The Supreme Court reversed, finding that the threat of violating a foreign law could justify noncompliance with an otherwise valid production order.⁹⁴ The Court first addressed the propriety of the production order's issuance,⁹⁵ questioning whether Societe could be said to "control" the restricted materials for the purpose of production when Swiss law prohibited their disclosure.⁹⁶ After considering the policies underlying the Trading with the Enemy Act,⁹⁷ the importance of the materials to the litigation,⁹⁸ and Societe's nationality,⁹⁹ the Court found that Societe had control over the materials and that the issuance of the production order was

89. *See id.* at 199–200.

90. *See id.* at 200.

91. *See id.*

92. *Id.* at 201–02.

93. *See id.* at 202. Initially, the U.S. Court of Appeals for the D.C. Circuit altered the dismissal order to allow Societe an additional six months to ask the Swiss government for permission to produce the restricted materials. *See id.* at 202–03. The district court directed final dismissal after these efforts failed to comply sufficiently with the production order. *See id.* at 203. The court rejected Societe's suggestion that an independent investigator be given access to the restricted materials in order to identify relevant documents without compromising their confidentiality. *See id.* Interestingly, this plan bears some resemblance to the structure of the SWIFT Program in that both utilize an independent investigator/auditor as a means of straddling the line between disclosure and secrecy. *See supra* note 45 and accompanying text.

94. *Societe Internationale*, 357 U.S. at 213.

95. *See id.* at 204.

96. *Id.* ("The question then becomes: Do the interdictions of Swiss law bar a conclusion that petitioner had 'control' of these documents within the meaning of Rule 34 [of the Federal Rules of Civil Procedure]?"). The Swiss Federal Attorney had actually confiscated the restricted materials in this case to preserve their secrecy. *See id.* at 200. The Court held that this fact "add[ed] nothing to the dimensions of the problem," instead finding that the true bar to control was "the possibility of criminal prosecution" in Switzerland. *Id.* at 204.

97. *See id.* at 204–05 ("[The] possibility of enemy taint of nationals of neutral powers, particularly of holding companies with intricate financial structures, which asserted rights to American assets was of deep concern to the Congress.").

98. *See id.* at 205 ("The District Court here concluded that the [restricted materials] might have a vital influence upon this litigation insofar as they shed light upon [Societe's] confused background.").

99. *See id.* ("[Societe] is in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order.").

proper.¹⁰⁰ The Court noted, however, that its holding was limited to the circumstances of the case at hand.¹⁰¹

The Court next addressed whether Societe's failure to comply with the order was excusable.¹⁰² In conducting this analysis, the Court placed considerable emphasis on the district court's finding that Societe had not "conspired" to take advantage of Swiss secrecy laws and had made "good faith" efforts to comply with the production order.¹⁰³ The Court found that "[Societe's] failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control."¹⁰⁴ Unlike the lower courts, the Supreme Court found that these circumstances could potentially excuse noncompliance: "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."¹⁰⁵ The Court found that Societe was effectively asserting a defense of "inability to comply because of foreign law."¹⁰⁶ The Court concluded that the sanction of dismissal was improper where the "failure to comply [with a production order was] due to inability, and not to willfulness, bad faith, or any fault of [Societe]."¹⁰⁷

2. Deferring to International Comity: *Societe Internationale* Disregarded

Ironically, the first line of cases to emerge post-*Societe Internationale* completely disregarded the Supreme Court's ruling.¹⁰⁸ In a series of cases,

100. *See id.* ("United States courts should be free to require claimants of seized assets who face legal obstacles under the laws of their own countries to make all such efforts to the maximum of their ability where the requested records promise to bear out or dispel any doubt the Government may introduce as to true ownership of the assets.")

101. *See id.* at 205–06. The Court underscored the limited nature of its holding:

We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. . . . The propriety [of production orders] depends upon the circumstances of a given case, and we hold only that accommodation . . . in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order.

Id.

102. *See id.* at 208. As an intermediary step, the Court established that the district court did have the authority to dismiss the complaint. *See id.* at 206–08.

103. *Id.* at 208–09 (finding that bad faith on the part of Societe "would have a vital bearing on justification for dismissal of the action, but . . . [that the] findings below reach no such conclusions"). For a further discussion of good and bad faith, see *infra* Part II.B.

104. *Id.* at 211.

105. *Id.*

106. *Id.* at 212.

107. *Id.*

108. *See In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960); *First Nat'l City Bank of New York v. IRS*, 271 F.2d 616, 619–20 (2d Cir. 1959). The U.S. Court of Appeals for the Second Circuit may have failed to cite *Societe Internationale* since these cases concerned grand jury subpoenas duces tecum and administrative subpoenas as opposed to civil discovery orders. Courts would later apply the principles of *Societe Internationale* to such subpoenas, however. *See*,

the U.S. Court of Appeals for the Second Circuit held that courts should never order the production of materials that require violation of foreign law.¹⁰⁹ In *First National City Bank of New York v. I.R.S.*, the first of these cases, the Second Circuit confronted an Internal Revenue Service summons—a type of administrative subpoena—requiring a New York bank to produce records located in Panama allegedly in violation of Panamanian law.¹¹⁰ The Second Circuit found that there was insufficient evidence to conclude that production would actually violate Panamanian law,¹¹¹ but noted that, in cases where foreign illegality could be proven, “the production of the . . . records should not be ordered.”¹¹²

The Second Circuit cited this dictum in two subsequent cases, effectively establishing a ban against orders requiring violation of foreign law. In *Ings v. Ferguson*, the court modified a subpoena duces tecum that would have required a bank to produce financial records allegedly in violation of Canadian law.¹¹³ Rather than enforce the subpoena, the court advised the party seeking production to ask for assistance from Canada’s courts via a letter rogatory.¹¹⁴ (A letter rogatory is essentially a request that a foreign court take evidence on behalf of a U.S. court.)¹¹⁵ Two years later, in the case of *In re Chase Manhattan Bank*, the Second Circuit again modified a subpoena duces tecum that would have required a New York bank to violate Panamanian law.¹¹⁶ As in *Ings*, the court stated it would not order a production in violation of foreign law and advised the party seeking production—the U.S. government—to request assistance from Panamanian authorities in obtaining the documents.¹¹⁷

e.g., *United States v. Bank of N.S.*, 691 F.2d 1384, 1388–89 (11th Cir. 1982) (applying the logic of *Societe Internationale* to a grand jury subpoena duces tecum).

109. *See In re Chase Manhattan Bank*, 297 F.2d at 613; *Ings*, 282 F.2d at 152 (“Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.”); *First Nat’l City Bank of New York*, 271 F.2d at 619 (holding that the production of records should not be ordered where production would require violation of foreign law).

110. *First Nat’l City Bank of New York*, 271 F.2d at 618.

111. *See id.* at 619 (“[T]he only evidence [that production would violate Panamanian law] was contained in the affidavit of the Bank’s expert . . . which in our view constituted insufficient basis for nonenforcement of the subpoena.”).

112. *Id.*

113. *Ings*, 282 F.2d at 150–53.

114. *See id.* at 152–53. The court reasoned that a Canadian court would either enforce the production order or rule that production would be illegal, in which case the Second Circuit would quash the order. *See id.* at 152–53.

115. *See* ABA Section of Antitrust Law, *Obtaining Discovery Abroad* 9 (2005) (“[Letters rogatory] are formal communications sent by a court in which an action is pending to a court of a foreign country, requesting the foreign court to take the testimony of a witness resident within that country’s jurisdiction and transmit a transcript to the issuing court.”).

116. *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962).

117. Specifically, the court noted that the subpoena duces tecum was left outstanding to “insure [the bank’s] cooperation with the [U.S. government] when and if the [U.S. government] seeks to obtain the records by application to the Panamanian authorities.” *Id.* at

The guiding principle in these decisions was deference to international comity. According to the Second Circuit, “[U.S. courts] have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own.”¹¹⁸ The Second Circuit was not concerned that this strong deference to international comity invalidated all orders requiring violation of foreign law since alternative evidence-gathering techniques existed.¹¹⁹

Subsequent holdings in the Second Circuit and elsewhere have limited the significance of these cases.¹²⁰ But, even as courts have moved toward a more flexible approach, some commentators believe that deference to international comity remains an influential principle.¹²¹

3. The Restatement (Second): Introducing the Balancing Test

The next major shift in courts’ thinking came in 1965, with the American Law Institute’s (ALI) publication of the Restatement (Second) of Foreign Relations Law of the United States. The Restatement (Second) instructed courts to balance several important factors when assessing the validity of an order requiring violation of foreign law, specifically

(a) [the] vital national interests of each of the states,

613. The court appeared to advise the U.S. government to file a letter rogatory with the appropriate Panamanian authorities.

118. *Id.* at 613; *see also* *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 369, 372 (N.D. Ill. 2001) (“Comity, in the international sense, is defined as courtesy demonstrated between nations involving the mutual recognition of legislative, executive, and judicial acts.”).

119. *See In re Chase Manhattan Bank*, 297 F.2d at 613 (discussing the possibility that a party might “ask[] the [foreign] authorities to authorize . . . [production of] the documents”); *Ings*, 282 F.2d at 151 (“For many years the time honored custom of seeking evidence in foreign countries, particularly in cases in which the aid of foreign courts may be necessary to secure the production of records, has been by letters rogatory.”). *But see* U.S. Department of State, Preparation of Letters Rogatory, http://travel.state.gov/law/info/judicial/judicial_683.html (last visited July 28, 2007) (“Letters rogatory are a time consuming, cumbersome process and should not be utilized unless there are no other options available.”).

120. *See SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 115 (S.D.N.Y. 1981) (noting that the Second Circuit has disavowed these cases and “has clearly moved to a more flexible position”); *infra* notes 125–29 and accompanying text.

121. *See, e.g., In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) (“We do not here decide the general issue of whether a court may ever order action in violation of foreign laws, although we should say that it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question.”); Feagle, *supra* note 16, at 302–03 (“[International] comity-driven decisions have never been explicitly overruled and comity jurisprudence continues to be influential, appearing not only in dicta, but also in applications of the current balancing analysis.”). *But see* Restatement (Second) of Foreign Relations Law § 39(1) (1965) (“A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.”); Brodeur, *supra* note 16, at 585–86 (claiming that deference to international comity has “ceased to be influential”).

(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.¹²²

Commentators disagree as to whether the Restatement (Second) codified the Supreme Court's holding in *Societe Internationale* or moved in an entirely different direction altogether.¹²³

Regardless, courts quickly embraced the Restatement (Second)'s balancing test,¹²⁴ beginning with the Second Circuit in the watershed case of *United States v. First National City Bank*.¹²⁵ There, the court addressed a grand jury subpoena issued against Citibank pursuant to a government antitrust investigation of some of the bank's customers.¹²⁶ Citibank refused to comply with the subpoena on the grounds that production of the requested materials—documents located in Citibank's New York City and Frankfurt, Germany, branches—would violate its contractual obligations to these customers under German law, opening the bank to civil liability claims.¹²⁷

In assessing whether these circumstances excused Citibank's noncompliance, the court adopted the Restatement (Second)'s balancing test, overturning its prior holdings that such production orders were per se invalid.¹²⁸ The court held, "Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case."¹²⁹

122. Restatement (Second) of Foreign Relations Law § 40 (1965).

123. Compare Feagle, *supra* note 16, at 303–05 (arguing that *Societe Internationale*'s "balancing test" has been "expanded and codified in two versions of the Restatement of Foreign Relations Law of the United States"), with Brodeur, *supra* note 16, at 588 (arguing that a "close reading [of] *Societe Internationale* reveals no "balancing" unlike the Restatement (Second)).

124. See, e.g., *United States v. Field*, 532 F.2d 404, 407 (5th Cir. 1976) (citing the Restatement (Second)'s balancing test); *Trade Dev. Bank v. Cont'l Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972) (same); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (same).

125. 396 F.2d 897 (2d Cir. 1968).

126. See *id.* at 898.

127. See *id.* at 898–99.

128. See *id.* at 902 ("In evaluating Citibank's contention that compliance should be excused because of the alleged conflict between the order of the court below and German law, we are aided materially by the rationale of the recent Restatement [(Second)].").

129. *Id.* at 901.

The Second Circuit focused on two of the Restatement (Second)'s factors, namely the conflicting national interests at stake and the hardship facing Citibank.¹³⁰ In balancing national interests, the court gave great weight to the United States' interest in enforcing subpoenas generally and in antitrust actions in particular.¹³¹ Turning to Germany's interest in bank secrecy, the court admitted that assessing the importance of a foreign national interest was inherently difficult.¹³² Nonetheless, the court questioned the importance of bank secrecy to Germany given that it can be waived¹³³ and is not codified.¹³⁴ The court also noted that the German government did not expressly object to the subpoena in this case as endangering German interests.¹³⁵ The court then considered the hardship facing the bank—potential foreign civil liability—and found it too “slight and speculative” to excuse noncompliance with the subpoena.¹³⁶ Accordingly, the Second Circuit affirmed the district court's contempt order against Citibank for noncompliance.¹³⁷

The Restatement (Second)'s balancing test has proven highly influential following its use in *First National City Bank*, but courts disagree over many of its features. For example, courts disagree over whether to apply the test in two phases—first to the propriety of the order and then to the propriety of enforcing the order with sanctions—or simply to conduct a unitary analysis.¹³⁸ In *First National City Bank*, the Second Circuit drew no

130. *See id.* at 902 (limiting its inquiry to the “national interests of the United States and Germany” and “the hardship, if any, Citibank will suffer”).

131. *See id.* at 902–03. The court quoted Judge Learned Hand in support of the importance of subpoenas as an evidence-gathering tool: “The suppression of truth is a grievous necessity at best, more especially where as here the inquiry concerns the public interest; it can be justified at all only where the opposing private interest is supreme.” *Id.* The court did not appear troubled that avoiding “suppression of truth” could be offered as a vital national interest to justify any subpoena (or any civil discovery order) requiring violation of foreign law. *Id.* at 903 (“We would have great reluctance . . . to countenance any device that would place relevant information beyond the reach of this duly impaneled Grand Jury or impede or delay its proceedings.”).

132. *See id.* (“We examine the importance of bank secrecy within the framework of German public policy with full recognition that it is often a subtle and difficult undertaking to determine the nature and scope of the law of a foreign jurisdiction.”). Critics of the balancing test argue that U.S. courts are no better positioned to assess the importance of U.S. national interests than they are of foreign ones. *See infra* notes 158–61 and accompanying text.

133. *See First Nat'l City Bank*, 396 F.2d at 903 (“[I]t is surely of considerable significance that Germany considers bank secrecy simply a privilege that can be waived by the customer and is content to leave the matter of enforcement to the vagaries of private litigation.”).

134. *See id.* (“Indeed, bank secrecy is not even required by statute.”).

135. *See id.* at 904 (“[I]t is noteworthy that . . . the German Government has [not] expressed any view on this case or indicated that, under the circumstances present here, enforcement of the subpoena would violate German public policy or embarrass German-American relations.”).

136. *Id.* at 905.

137. *See id.*

138. *Compare id.* (assessing the propriety of the subpoena and enforcement together), and *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 n.3 (S.D.N.Y. 1981) (same), *with*

distinction between the propriety of the subpoena and the propriety of enforcing it with a civil contempt citation.¹³⁹ Other circuits criticize this approach, preferring a bifurcated analysis.¹⁴⁰ These courts construe *Societe Internationale* as advocating separate analysis of the order and its enforcement.¹⁴¹ Courts employing the bifurcated approach first examine the validity of the production order, and then, if the order is valid and the party fails to comply, whether sanctions are appropriate. Though this is a seemingly insignificant distinction,¹⁴² there are some cases in which it would alter the analysis.¹⁴³ In fact, some commentators suggest that this distinction must be made to conduct the good faith analysis mandated by *Societe Internationale*.¹⁴⁴

Different courts also emphasize different factors of the Restatement (Second)'s balancing test. For example, in *First National City Bank*, the Second Circuit only considered two of the Restatement (Second)'s five

In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992 (10th Cir. 1977) (separately assessing the propriety of the production order and sanctions), and *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976) (same).

139. *First Nat'l City Bank*, 396 F.2d at 897; see also *Banca Della Svizzera Italiana*, 92 F.R.D. at 117 n.3 ("One way in which the Second Circuit has not moved in line with other courts has been its failure thus far to distinguish the analysis used for deciding to issue an order compelling discovery and that for imposing sanctions."); Brodeur, *supra* note 16, at 589 (noting that the Second Circuit "merged the propriety of the production order and the propriety of contempt sanctions into a single issue in *First National City Bank*").

140. See, e.g., *Arthur Andersen*, 546 F.2d at 341 ("The failure of [the Second Circuit] to recognize the distinction between power to compel discovery and imposition of sanctions for noncompliance has been criticized.").

141. *In re Westinghouse*, 563 F.2d at 997 ("In our view [*Societe Internationale*] holds that, though a local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions in the foreign country, still the fact of foreign illegality may prevent the imposition of sanctions for subsequent disobedience to the discovery order."); *Arthur Andersen*, 546 F.2d at 342 ("[*Societe Internationale*] does not say that a discovery order mandating violation of foreign law is invalid. It only indicates that the foreign law question goes to the imposition of a sanction for noncompliance with local law.").

142. See *Banca Della Svizzera Italiana*, 92 F.R.D. at 117 n.3 ("Such a distinction in analysis makes little, if any, practical difference.").

143. Consider the following example: A bank is ordered to disclose records in violation of foreign law. The circumstances of the order are such that any court using the Restatement (Second)'s balancing test would excuse the bank's noncompliance. The merged analysis approach taken by the Second Circuit would thus excuse noncompliance. Under the bifurcated approach advocated by the Tenth Circuit, however, the court would find the issuance of the subpoena proper and expect the bank to make a good faith effort to comply as mandated by *Societe Internationale* (e.g., asking the foreign government to permit disclosure of records deemed essential by an independent investigator). If the bank's good faith efforts still fail to comply fully with the order, the court would find that the balancing test weighs in the bank's favor and that sanctions are therefore inappropriate. This bifurcated approach requires the bank to attempt to comply and, as such, has a better chance of compelling partial or full compliance than the unitary approach.

144. See Brodeur, *supra* note 16, at 589 ("Importantly, [the Second Circuit's merged or unitary approach in *First National City Bank*,] precluded an examination of the bank's good faith."). Brodeur notes that *First National City Bank* may ignore good faith analysis since the Restatement (Second) does the same. *Id.* at 589 n.143. For further discussion of good faith, see *infra* Part II.B.

factors: “[We must] balance the national interests of the United States and Germany and . . . give appropriate weight to the hardship, if any, Citibank will suffer.”¹⁴⁵ The U.S. Court of Appeals for the Fifth Circuit, on the other hand, held that the first factor alone—the vital national interests—is the “most important factor.”¹⁴⁶ Some courts even introduce additional factors into the balancing test, such as the importance of the evidence sought.¹⁴⁷

The most troublesome of the Restatement (Second)’s balancing factors—the conflicting vital national interests at stake—presents courts with an array of problems. As a preliminary matter, courts must identify what qualifies as vital national interests. As seen in *First National City Bank*,¹⁴⁸ the archetypal conflict of interest in these cases is between the United States’ far-reaching evidence-gathering tools and foreign secrecy laws.¹⁴⁹ Though courts balance these principles abstractly, they also consider the specific nature of the underlying action. For example, courts employing the Restatement (Second) have held that broad evidence gathering is necessary to properly enforce antitrust,¹⁵⁰ tax,¹⁵¹ securities,¹⁵² and narcotics laws,¹⁵³

145. *First Nat’l City Bank*, 396 F.2d at 902 (omitting or glossing over any discussion of the Restatement (Second)’s other factors); accord *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987) (“Courts in [the Second Circuit] have characterized the first two factors—the competing interests of the countries involved and the hardship imposed by compliance—as far more important in the balancing test than the last three.”).

146. *United States v. Field*, 532 F.2d 404, 407 (5th Cir. 1976) (omitting analysis of any factor save the interests of the states involved).

147. See *Trade Dev. Bank v. Cont’l Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972) (“In addition to the factors that ordinarily must be considered by the court in deciding whether to order a disclosure prohibited by the law of another state . . . the relative unimportance of the information . . . was entitled to be considered.”); see also *Minpeco*, 116 F.R.D. at 522 (noting that courts should also consider “the importance of the information and documents requested”).

148. See *supra* notes 125–27 and accompanying text.

149. See, e.g., *United States v. First Nat’l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983) (weighing U.S. interest in evidence gathering against a foreign nation’s interest in bank secrecy); *United States v. Bank of N.S.*, 691 F.2d 1384, 1391 (11th Cir. 1982) (same); *Field*, 532 F.2d at 407 (same); see also *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998–99 (10th Cir. 1977) (weighing U.S. interest in affording litigants adequate discovery against a foreign nation’s interest in regulating access to sensitive documents); *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 549 (N.D. Ill. 2004) (same).

150. See *First Nat’l City Bank*, 396 F.2d at 903 (“[Antitrust laws] have long been considered cornerstones of this nation’s economic policies.”); *Remington Prods., Inc. v. N. Am. Philips Corp.*, 107 F.R.D. 642, 651 (D. Conn. 1985) (“The vital national interest of the United States in the enforcement of its antitrust laws is unquestionable.”).

151. See *First Nat’l Bank of Chicago*, 699 F.2d at 346 (discussing the importance of tax investigations); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir. 1981) (“There is a strong American interest in collecting taxes from and prosecuting tax fraud by its own nationals operating through foreign subsidiaries.”); *Field*, 532 F.2d at 407 (“In this case, the United States seeks to obtain information concerning the violation of its tax laws.”).

152. See *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y. 1981) (“The strength of the United States interest in enforcing its securities laws to ensure the integrity of its financial markets cannot seriously be doubted.”).

153. See *United States v. Bank of N.S.*, 740 F.2d 817, 827 (11th Cir. 1984) (“Stemming the narcotics trade has long been a concern of paramount importance to our nation.”).

all of which protect vital national interests in their own right. Courts also examine the underlying purpose of foreign secrecy laws, according them little or no weight if their purpose is simply to frustrate U.S. evidence gathering.¹⁵⁴ Such laws are termed “blocking statutes.”¹⁵⁵

Courts also disagree over how to balance the conflicting national interests in a given case. Specifically, courts disagree over the significance of statements of interest—or the lack of such statements—by the United States and foreign nations. In *First National City Bank*, the Second Circuit attached great significance to the German government’s failure to object to the subpoena at issue: “We are fully aware that when foreign governments, including Germany, have considered their vital national interests threatened, they have not hesitated to make known their objections to the enforcement of a subpoena to the issuing court.”¹⁵⁶ On the other hand, the U.S. Court of Appeals for the Ninth Circuit held that such statements are significant only if they are made “prior to the litigation in question.”¹⁵⁷

Some courts have even suggested that balancing competing national interests is all but impossible. The U.S. Court of Appeals for the Seventh Circuit summed up the sentiment of these courts when it called this aspect of the Restatement (Second)’s balancing test a “ridiculous assignment.”¹⁵⁸ Courts complain that they lack the expertise to properly balance national interests,¹⁵⁹ and that they are uncomfortable making judgments traditionally

154. See *Remington*, 107 F.R.D. at 651 (“Frustration of the law enforcement efforts of another country is not a legitimate national interest which can justify the failure to enforce a valid Court order.”).

155. *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 524 (S.D.N.Y. 1987) (distinguishing “blocking statutes” from those protecting a legitimate national interest).

156. *United States v. First Nat’l City Bank*, 396 F.2d 897, 904 (2d Cir. 1968) (finding it “noteworthy” that “neither the [U.S.] Department of State nor the German Government has expressed any view on this case or indicated that, under the circumstances present here, enforcement of the subpoena would violate German public policy or embarrass German-American relations”); accord *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985) (“The absence of any objection by the Cayman government to the subpoena and subsequent order . . . is significant.”); *Minpeco*, 116 F.R.D. at 525 (attaching significance to two official statements related to the importance of Swiss bank secrecy laws). Some courts have also looked to foreign courts to assess the importance of a given national interest. See *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998 (10th Cir. 1977) (“That Canada has a legitimate ‘national interest’ in this matter is perhaps best illustrated by reading the opinion of the Ontario Supreme Court”); see also *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976) (“If the problem involves a breach of friendly relations between two nations, Andersen should call the matter to the attention of those officers and agencies of the United States charged with the conduct of foreign affairs, and they could make such representation to the court as they deemed suitable.”).

157. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1476 (9th Cir. 1992) (according little weight to China’s expression of interest since it was made after litigation commenced).

158. *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990); accord *id.* at 1284 (Easterbrook, J., concurring) (“If I thought we had to do such balancing, I would be at sea.”).

159. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (“Aside from the fact that the judiciary has little expertise, or perhaps even authority,

left to the political branches of government.¹⁶⁰ Though these courts generally try to balance the competing national interests nonetheless, at least one district court has refused to attempt the analysis, calling it “inherently unworkable.”¹⁶¹

Finally, some courts employing the Restatement (Second)’s test are more deferential to government subpoenas than to civil discovery orders, while other courts do not draw this distinction. In *United States v. Davis*, the Second Circuit held that subpoenas issued pursuant to government investigations deserve “some deference.”¹⁶² Yet courts in other circuits have failed to note this distinction even when particularly applicable.¹⁶³

Partially as a result of these various disagreements, the Restatement (Second)’s approach has yielded some unsatisfactory results. One of the most cited examples is *In re Westinghouse Electric Corp. Uranium Contracts Litigation*,¹⁶⁴ in which the majority and the dissent both relied on the Restatement (Second)’s balancing test, but reached opposite conclusions.¹⁶⁵ Critics view *In re Westinghouse* as emblematic of courts’ inability to employ the balancing test in a consistent manner.¹⁶⁶ Foreign

to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case.”)

160. *First Nat’l City Bank*, 396 F.2d at 901 (“[T]he difficulties are manifold because the courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs.”); see also *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 552 (1987) (Blackmun, J., concurring in part, dissenting in part) (“It is the Executive that normally decides when a course of action is important enough to risk affronting a foreign nation or placing a strain on foreign commerce. It is the Executive, as well, that is best equipped to determine how to accommodate foreign interest along with our own.”).

161. *Rio Algom*, 480 F. Supp at 1148. *But see* *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 548–49 (N.D. Ill. 2004) (criticizing *Rio Algom*’s refusal to conduct the balancing analysis, noting that “limited ability does not relieve us of the obligation to assess those interests as best we can, based on the record that we have”).

162. *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985) (“We must . . . accord some deference to the determination by the Executive Branch—the arm of the government charged with primary responsibility for formulating and effectuating foreign policy—that the adverse diplomatic consequences of the discovery request would be outweighed by the benefits of disclosure.”); accord *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288 (9th Cir. 1981) (“[S]ummonses appear to serve a more pressing national function than civil discovery.”).

163. See *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1284 (7th Cir. 1991) (Easterbrook, J., concurring). Judge Frank Easterbrook stated, “I would be hard pressed to agree . . . that a suit by the government is ‘more important’ than private litigation. In a capitalist economy enforcement of contracts is a subject of the first magnitude.” *Id.*

164. 563 F.2d 992 (10th Cir. 1977).

165. Compare *id.* at 999 (granting defendant relief after finding that the Restatement (Second)’s balancing test weighed in his favor), with *id.* at 1003 (Doyle, J., dissenting) (“If a balancing test is to be used and relief is to be granted, the case would have to show more merit than we see here.”). That said, balancing tests are used in all areas of the law even though judges sometimes reach conflicting conclusions from the same set of facts.

166. See Browne, *supra* note 16, at 1335 (highlighting *In re Westinghouse* as “aptly illustrat[ing] the problem” of using the Restatement (Second)’s balancing test); Levarda, *supra* note 16, at 1368–69 (same).

commentators have been equally harsh in their assessment of the Restatement (Second), claiming that it fails to adequately value the foreign interests at stake.¹⁶⁷

4. The Restatement (Third): The Balancing Test Refined

The ALI's 1987 Restatement (Third) of Foreign Relations Law of the United States attempts to address some of the issues raised by the Restatement (Second). First, the Restatement (Third) endorses the bifurcated or two-phased approach used by the U.S. Court of Appeals for the Tenth Circuit in *In re Westinghouse and Arthur Andersen*. "In the first phase, the requesting party seeks an order to compel compliance with the request, and the responding party seeks to have it set aside."¹⁶⁸ The Restatement (Third) instructs courts to use a modified version of the balancing test during this first phase to determine the validity of the order.¹⁶⁹ "If the first phase is decided in favor of production and the responding party fails to comply, there may be a second phase to determine the consequences of noncompliance."¹⁷⁰ Though courts "should not ordinarily impose sanctions," the Restatement (Third) advises that sanctions are appropriate "in cases of deliberate concealment or removal of information or of failure to make a good faith effort [to secure permission from the foreign authorities to make the information available]."¹⁷¹

Second, the Restatement (Third) advocates a modified balancing test for assessing the validity of the order in the first phase of analysis:

[A] court or agency . . . should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.¹⁷²

167. Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* 337 (1994). Collins writes,

It is sufficient to say that whilst by the mid-1960s the case-law was perceived as indicating a way in which conflicts between US law and foreign law could be resolved, it no longer provides such a resolution. The positions have become entrenched. The balancing required by the cases . . . has come down heavily in favour of US law.

Id. (citations omitted); *see also In re Grand Jury Subpoena*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002) ("Courts consistently hold that the United States interest in law enforcement outweighs the interests of the foreign states in bank secrecy and the hardships imposed on the entity subject to compliance.").

168. Restatement (Third) of Foreign Relations Law § 442 cmt. g (1987).

169. *See id.* § 442(1)(c).

170. *Id.* § 442 cmt. g.

171. *Id.* § 442(2)(b).

172. *Id.* § 442(1)(c).

Notably absent from this new list of factors is the extent and nature of the hardship that the foreign state would impose on the party for violation of its laws.¹⁷³

Finally, the Restatement (Third) prescribes a relatively specific method for balancing the vital national interests at stake:

In making this determination, the court or agency will look, *inter alia*, to expressions of interest by the foreign state, as contrasted with expressions by the parties; to the significance of disclosure in the regulation by the foreign state of the activity in question; and to indications of the foreign state's concern for confidentiality prior to the controversy in connection with which the information is sought.¹⁷⁴

The Restatement (Third) created disagreement of its own, however, especially as to whether it replaces or just supplements the Restatement (Second). A number of courts now use a balancing test combining all of the factors from both Restatements.¹⁷⁵ Others use only the Restatement (Third).¹⁷⁶ Still others continue to use only the Restatement (Second).¹⁷⁷ Though the Restatement (Second), unlike the Restatement (Third), does not discuss the significance of good faith efforts,¹⁷⁸ courts employing only the Restatement (Second) still conduct good faith analysis as mandated by *Societe Internationale*.¹⁷⁹

173. This is notable in that some courts considered the nature and extent of the hardship to be the most important factors of the Restatement (Second)'s balancing test. *See supra* note 145 and accompanying text.

174. Restatement (Third) of Foreign Relations Law § 442 cmt. c (1987).

175. *See, e.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474–75 (9th Cir. 1992) (citing both the Restatement (Second)'s and Restatement (Third)'s balancing tests); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1279–83 (7th Cir. 1990) (same); *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 542–43 (N.D. Ill. 2004) (same).

176. *See, e.g.*, *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 369, 374–75 (N.D. Ill. 2001) (balancing only the Restatement (Third)'s factors); *Madanes v. Madanes*, 186 F.R.D. 279, 285–86 (S.D.N.Y. 1999) (same); *McKesson Corp. v. Islamic Republic of Iran*, 138 F.R.D. 1, 3 (D.D.C. 1991) (same). In *Madanes* the district court claimed that the Supreme Court specifically endorsed the Restatement (Third)'s test. *Madanes*, 186 F.R.D. at 286; *see also Richmark*, 959 F.2d at 1474–75. It is true that, in *Aérospatiale*, the Supreme Court called the Restatement (Third)'s factors “relevant to any comity analysis.” *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.28 (1987). However, the Court did not hold that the Restatement (Second)'s factors should be disregarded.

177. *See, e.g.*, *Cochran Consulting, Inc. v. Uwaterc USA, Inc.*, 102 F.3d 1224, 1227 (Fed. Cir. 1996) (citing only the Restatement (Second)); *RNW Assocs., Inc. v. Corporate Underwriters, Ltd.*, No. 93-6327, 1994 U.S. App. LEXIS 36229, at *7–8 (10th Cir. Dec. 23, 1994) (same); *In re Grand Jury Subpoena*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002) (same).

178. *See Reinsurance Co. of Am.*, 902 F.2d at 1282 (“[The Restatement (Third)] does make one significant change to the old standard by introducing an element of good faith to be included at the court’s discretion.”).

179. *See RNW Assocs., Inc.*, 1994 U.S. App. LEXIS 36229, at *7–8 (discussing good faith in the context of the Restatement (Second)).

B. Good Faith Analysis

In *Societe Internationale*, the Supreme Court ultimately found that noncompliance with an order requiring violation of foreign law did not justify dismissal of Societe's claim, in light of Societe's good faith efforts to comply with the order.¹⁸⁰ Since then, lower courts have recognized the importance of conducting good faith analysis in cases involving orders requiring violation of foreign law.¹⁸¹ However, courts are unable to agree on a good faith standard or how much weight to attach to evidence of good or bad faith.

1. The Good Faith Standard

In *Societe Internationale*, the Supreme Court's good faith analysis involved two steps: (1) finding a lack of bad faith "collusion" with the foreign government in question and (2) assessing Societe's affirmative good faith efforts to comply with the production order.¹⁸²

a. Lack of Bad Faith

The Supreme Court initiated its good faith analysis in *Societe Internationale* by asking whether sanctions were appropriate "despite the findings that [Societe] had not been in collusion with the Swiss authorities to block inspection of the [requested documents]"¹⁸³ The Court suggested that, had Societe colluded with the Swiss government, it would weigh heavily in favor of enforcing the production order through sanctions.¹⁸⁴ Lower courts have followed the Supreme Court's lead in holding that a party that seeks out foreign legal impediments or colludes with foreign governments generally will not be considered to have acted in good faith.¹⁸⁵ Such collusion is relevant even if it occurred long before the litigation at issue.¹⁸⁶

180. See *supra* notes 102–07 and accompanying text.

181. See, e.g., *United States v. Bank of N.S.*, 740 F.2d 817, 825 (11th Cir. 1984) (discussing good faith); *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983) (same); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998 (10th Cir. 1977) (same); *Trade Dev. Bank v. Cont'l Ins. Co.*, 469 F.2d 35, 40 (2d Cir. 1972) (same); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 112 (S.D.N.Y. 1981) (same).

182. *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 208 (1958).

183. *Id.*

184. *Id.* at 209 ("[Courting foreign legal impediments] would have a vital bearing on justification for dismissal of the action.").

185. See, e.g., *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1227 (Fed. Cir. 1996) (quoting *Societe Internationale's* discussion of bad faith); *RNW Assocs. v. Corporate Underwriters, Ltd.*, No. 93-6327, 1994 U.S. App. LEXIS 36229, at *8 (10th Cir. Dec. 23, 1994) ("[T]o meet the good faith test, the party resisting discovery . . . must not have deliberately courted legal impediments to the production of the documents." (internal quotation marks omitted)); *In re Westinghouse*, 563 F.2d at 998 (noting that there was no evidence of collusion by the ordered party and the foreign government in question); *Banca*

Not all courts agree on what degree of collusion is necessary for a finding of bad faith. As a result, even courts within the same circuit have reached disparate decisions.¹⁸⁷ A comparison of two decisions from the Southern District of New York illustrates this point. In *SEC v. Banca Della Svizzera Italiana*, a district judge set an extremely low bar for findings of bad faith. In this case, the court addressed Banca Della Svizzera Italiana's (BSI) refusal to provide the Securities and Exchange Commission with the identities of the principals for whom it had purchased stock options allegedly in violation of insider trading laws.¹⁸⁸ BSI claimed that this disclosure would violate foreign bank secrecy laws.¹⁸⁹ The court held that BSI's expectation of being shielded from liability in the United States by foreign bank secrecy laws was enough to support a finding of bad faith:

A party's good or bad faith is an important factor to consider, and this Court finds that BSI, which deposited the proceeds of these transactions in an American bank account in its name and which certainly profited in some measure from the challenged activity, undertook such transactions fully expecting to use foreign law to shield it from the reach of our laws. Such 'deliberate courting' of foreign legal impediments will not be countenanced.¹⁹⁰

In *Minpeco, S.A. v. Conticommodity Services, Inc.*, a district judge employed a far more selective approach to bad faith.¹⁹¹ The case concerned a civil suit alleging a conspiracy to drive up the price of silver.¹⁹² The defendant sought documents from Banque Populaire Suisse (BPS)—a settling defendant—to support his defense that BPS was the true culprit.¹⁹³ BPS refused to comply on the grounds that production would violate Swiss bank secrecy laws.¹⁹⁴ After conducting its good faith analysis, the court observed that BPS "may be viewed as having courted legal impediments to production [of the requested documents and information]."¹⁹⁵ The court particularly criticized BPS's failure to secure secrecy waivers from certain

Della Svizzera Italiana, 92 F.R.D. at 119 (holding that the "deliberate courting" of foreign legal impediments will not be countenanced"); see also *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 60 (2d Cir. 2004) ("It is also well established, however, that orders of foreign courts are not entitled to comity if the litigants who procure them have 'deliberately courted legal impediments' to the enforcement of a federal court's orders.").

186. See *Gen. Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 299 (S.D. Cal. 1981) ("For [] conduct to amount to 'courting legal impediments' to production under [*Societe Internationale*], it is not required that the actual litigation in which the documents are ultimately ordered produced must be either pending or specifically contemplated at the time the [collusive] policy was initiated and followed.").

187. For a detailed comparison of these cases see *infra* notes 188–97 and accompanying text.

188. See *Banca Della Svizzera Italiana*, 92 F.R.D. at 112.

189. See *id.* at 113.

190. *Id.* at 118–19.

191. *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 118 F.R.D. 331 (S.D.N.Y. 1988).

192. See *id.* at 332.

193. See *id.*

194. See *id.*

195. *Id.* at 335 (internal quotation marks and citation omitted).

customers as mandated by relevant regulations and BPS's own internal policies.¹⁹⁶ Nonetheless, the court held that BPS's conduct did "not ris[e] to the level of bad faith."¹⁹⁷

b. *Affirmative Good Faith Efforts*

The Supreme Court's second step in its good faith analysis in *Societe Internationale* was to assess whether Societe had "made diligent efforts to execute the production order."¹⁹⁸ The Court discussed but did not explicitly endorse the test used by the special master at the district level: "[T]he test of good faith [is] whether petitioner [has] attempted all which a reasonable man would have undertaken in the circumstances to comply with the order."¹⁹⁹

Lower courts are in agreement that *Societe Internationale* requires affirmative good faith acts on the part of the ordered party.²⁰⁰ Some have seized on the Supreme Court's use of the phrase "diligent effort"²⁰¹ as establishing the good faith standard,²⁰² while others prefer the "reasonable man" language of the special master.

As with bad faith, there is some disagreement among lower courts as to what really qualifies as a "diligent effort" or "all which a reasonable man would have undertaken." For example, some courts have found that the ordered party must, at the very least, inquire into the scope of the foreign law in question and the status of the requested documents to confirm that production actually would violate foreign law.²⁰³ Others expect the ordered party to request permission from the foreign government to produce the

196. *See id.* ("Prior to litigation, BPS 1) engaged in transactions on the United States silver market without securing secrecy waivers from its customers, as necessary for [Commodity Exchange Act] reporting requirements and 2) granted [another defendant in this suit] an exception to BPS' internal policies that required its customers, prior to trading on U.S. markets, to execute bank secrecy waivers.").

197. *Id.* BPS's affirmative good faith efforts appear to have further persuaded the court that BPS's courtship of foreign legal impediments did not rise to the level of bad faith. *See id.* ("BPS has attempted to secure waivers of bank secrecy from its customers, it has produced volumes of documents, and it has not relied on a sham law to refuse disclosure.").

198. *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 208 (1958).

199. *Id.* at 201.

200. *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998 (10th Cir. 1977) (discussing the noncompliant party's affirmative good faith efforts).

201. *Id.*

202. *Id.* ("The record indicates that [the ordered party] has made diligent effort to produce materials not subject to the [foreign] regulation.").

203. *See, e.g., Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1373 (10th Cir. 1978) (holding that Arthur Andersen's failure to investigate the status of the requested documents and the law allegedly barring their production "places in substantial doubt . . . that it had proceeded in good faith to do the best it can" (internal quotation marks omitted)); *United States v. First Nat'l City Bank*, 396 F.2d 897, 900 n.8 (2d Cir. 1968) (noting that the trial judge "based his finding of lack of good faith on the fact that Citibank . . . had failed to even make a simple inquiry into the nature or extent of the records available at the Frankfurt branch").

requested documents or to develop alternative means of disclosure.²⁰⁴ For example, in *In re Westinghouse* the Tenth Circuit found that the ordered party's efforts to obtain permission from Canadian authorities to produce restricted documents were "in the best of faith."²⁰⁵ Consequently, the Tenth Circuit held that sanctions for noncompliance were not justified.²⁰⁶

It is unclear how courts should resolve situations where there is evidence of both affirmative good faith acts and bad faith collusion. The U.S. District Court for the Southern District of California confronted just such a scenario in *General Atomic Co. v. Exxon Nuclear Co.*²⁰⁷ In this matter, General Atomic brought suit against Exxon to enforce a uranium contract.²⁰⁸ Exxon argued that the contract was null and void as violative of U.S. antitrust law and counterclaimed against General Atomic for antitrust damages for General Atomic's participation in an illegal uranium cartel.²⁰⁹ Exxon requested documents from General Atomic pertaining to the cartel, but General Atomic refused to comply with the discovery orders on the grounds that doing so would violate the Canadian Uranium Information Security Regulations, subjecting General Atomic to criminal penalties.²¹⁰

Initially, the court noted that, during the course of the instant lawsuit, General Atomic had made "several good faith attempts to overcome the prohibitions of the Security Regulations."²¹¹ Specifically, General Atomic retained Canadian legal counsel to explore ways around the regulations and repeatedly, but unsuccessfully, petitioned the Canadian government for an exemption.²¹² General Atomic next appealed to the Canadian courts, filing letters rogatory with the Supreme Court of Canada, again without success.²¹³ The district court held that, together, these efforts constituted a "*prima facie* showing of good faith to comply with the production orders."²¹⁴

Nonetheless, the court found these good faith efforts were outweighed by acts of bad faith taken prior to the litigation.²¹⁵ According to the court,

204. See *In re Westinghouse*, 563 F.2d at 998; see also *Trade Dev. Bank v. Cont'l Ins. Co.*, 469 F.2d 35, 40 (2d Cir. 1972) ("There remains the question of whether the district court erred in not ordering the Bank . . . to make a good faith effort to obtain a waiver of that restriction from the customers involved.").

205. *In re Westinghouse*, 563 F.2d at 998.

206. See *id.* at 999 ("A 'balancing' of all of these various factors leads us to conclude that the trial court's order of contempt and the sanctions imposed in connection therewith are, on the basis of the present record, not justified.").

207. 90 F.R.D. 290 (S.D. Cal. 1981).

208. See *id.* at 291.

209. See *id.* at 291-92.

210. See *id.* at 294.

211. *Id.*

212. See *id.* at 294-95.

213. See *id.* at 295.

214. *Id.*

215. See *id.* at 304 ("The destruction or disappearance of the [General Atomic] cartel book when combined with [General Atomic's] housing of documents in Canada constitutes a

shortly after joining the uranium cartel, General Atomic established a policy of housing cartel-related documents at the offices of its Canadian subsidiary so that the documents' "transmittal to the United States would be avoided."²¹⁶ This "cartel concealment policy" also involved the transfer of certain employees to the Canadian offices.²¹⁷ The court was further troubled by General Atomic's lack of good faith in a related state suit²¹⁸ and the possibility that General Atomic had destroyed some relevant documents.²¹⁹ These facts, when combined, led the court to conclude that General Atomic had ultimately acted in bad faith.²²⁰

2. The Significance of Good Faith

U.S. courts are divided on the significance of a party's showing of good or bad faith in response to orders requiring violation of foreign law. This disagreement is a critical one, given that, in some cases, a finding of good or bad faith determines whether the court will sanction the noncompliant party, regardless of the Restatements' balancing tests. Courts have adopted three basic approaches in their treatment of good faith: (1) bad faith acts require sanctions *per se*; (2) good faith acts make sanctions inappropriate *per se*; (3) good or bad faith acts are a factor that courts should consider when deciding whether sanctions are appropriate.²²¹

sufficient basis of fault under [*Societe Internationale*] to conclude that harsh sanctions against [General Atomic] are not precluded.").

216. *Id.* at 296.

217. *Id.* ("Although [General Atomic] contends that the Gregg transfer to Toronto was for sound business reasons, there is evidence that the purpose of the transfer was to implement the cartel concealment policy.").

218. *See id.* at 299-300 ("By failing to provide cartel information prior to the passage of the Canadian Uranium Information Security Regulations [in a New Mexico state case], and then relying on these Regulations as an excuse for nonproduction, [General Atomic] is 'in the position of having slain [its] parents and then pleading for mercy on the ground that [it] is an orphan.'").

219. *See id.* at 303 ("In addition to charging that Roger Allen shipped cartel-related documents to Canada in 1972 to make them unavailable in anticipated litigation . . . Exxon further claims that Gulf destroyed or altered cartel documents which had entered the United States.").

220. *See id.* at 304.

221. The Restatement (Third) was aware of this split, though it offered no opinion on it:

As of 1987, the implications of the good faith requirement in the United States were still evolving. Good faith efforts to secure release of information subject to foreign secrecy laws will in some instances relieve a party or intermediary of exposure to contempt sanctions. . . . In other instances, good faith effort to comply will be taken into account in deciding whether to issue the order to produce the information, and in framing such an order If the respondent does not meet the test of good faith, some courts have taken the position that balancing of interest is not required, and that sanctions for noncompliance, including heavy fines, should be imposed.

Restatement (Third) of Foreign Relations Law § 442 reporter's note 8 (1987).

a. *The Bad Faith Approach: Bad Faith Acts Require Sanctions Per Se*

A number of courts have taken the position that a party that fails to meet the good faith standard must be sanctioned, regardless of the outcome of either Restatement's balancing test.²²² Essentially, under this Bad Faith Approach,²²³ bad faith acts preclude further analysis that might excuse noncompliance. Since courts following this approach can end their analysis after finding a lack of good faith efforts, they typically make good faith their first issue of inquiry.²²⁴

General Atomic is an example of this approach.²²⁵ In determining whether General Atomic's noncompliance with the discovery orders merited sanctions, the district court focused largely on good faith analysis.²²⁶ The court stated that sanctions would be appropriate for noncompliance with an order requiring violation of foreign law where "(1) the failure to fully comply with the production orders was caused by 'willfulness, bad faith, or any fault' of [General Atomic]; (2) the withheld documents [are] crucial to the outcome of this litigation; (3) Exxon is prejudiced by the failure of discovery in the presentation of its case; and (4) the sanctions sought are commensurate with the prejudice to Exxon and the degree of fault attributable to [General Atomic]."²²⁷ Notably, aside from considering the importance of the requested documents to the litigation—one of the Restatement (Third)'s balancing factors—the court made no reference to the restatements' balancing tests.²²⁸ Instead, after concluding that General Atomic had acted in bad faith,²²⁹ and that the requested

222. *See id.*

223. For the purpose of clarity, this Note coins the terms "Bad Faith Approach," "Good Faith Approach," and "Factor Approach" to denote the three main approaches to the significance of an ordered party's good or bad faith acts in response to an order requiring violation of foreign law.

224. *See, e.g., Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1228 (Fed. Cir. 1996) ("Guided by the Supreme Court and the criteria of courts that have considered similar issues, we start our analysis with the sound general rule that the person charged must have made a good faith effort to comply with the discovery order."); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1284 (7th Cir. 1990) (Easterbrook, J., concurring) ("[Under the Restatement (Third)], [a]s a rule, parties are entitled to seek information and, *without regard to balancing national interests*, the foreign party must make a good faith effort to secure its release."); *see also Montship Lines, Ltd. v. Fed. Mar. Bd.*, 295 F.2d 147, 156 (D.C. Cir. 1961) ("Prior to determining whether these foreign laws do in fact forbid the production of documents . . . the appropriate procedure is to require these petitioners to make a good faith attempt to obtain a waiver of such restrictions from their respective governments."). Contrary to what the majority opinion in *Cochran Consulting* claims, considering good faith efforts as a preliminary matter deviates from Supreme Court precedent. *See Societe Internationale pour Participations Industrielles et Commerciales v. Rogers* 357 U.S. 197 (1958) (analyzing good faith last).

225. *Gen. Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290 (S.D. Cal. 1981). For a discussion of the facts of this case, see *supra* notes 207–20 and accompanying text.

226. *Gen. Atomic*, 90 F.R.D. at 294–99 (conducting a thorough examination of General Atomic's good and bad faith acts).

227. *Id.* at 296.

228. The word "balancing" never appears in the opinion.

229. *See supra* note 220 and accompanying text.

documents were crucial to the litigation,²³⁰ the court imposed sanctions on General Atomic for noncompliance with an order requiring violation of foreign law.²³¹

Even though only a handful of courts explicitly endorse the Bad Faith Approach,²³² a far greater number appear to follow it in practice: Generally, courts will impose sanctions against a party that acts in bad faith in response to an order requiring violation of foreign law.²³³

The rationale for the Bad Faith Approach is that it minimizes reliance on balancing tests while nonetheless ensuring that courts will pressure parties to comply with production orders without actually violating foreign law.²³⁴ In the words of Judge Frank Easterbrook of the Seventh Circuit, "Such an approach is a careful accommodation of the legitimate interests of the parties and the nations alike, all without authorizing unconfined 'balancing' of the 'importance' of the nations' policies."²³⁵

The Bad Faith Approach, however, does not entirely circumvent the balancing tests. If the ordered party makes a good faith effort to comply but nonetheless fails to comply fully, courts following this approach conduct a balancing test to determine whether sanctions are appropriate.²³⁶

230. See *Gen. Atomic*, 90 F.R.D. at 307 ("The withheld documents are relevant and crucial to a fair trial.").

231. See *id.* at 309. The court did not impose the sanction of dismissal and default judgment as Exxon requested, but rather stated that it would sanction General Atomic by presuming that certain of Exxon's allegations were true subject to rebuttal. See *id.*

232. See, e.g., *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1226-27 (Fed. Cir. 1996) ("[T]o avoid sanctions the party that is unable to comply with a valid discovery request must have acted in good faith."); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring); *Gen. Atomic*, 90 F.R.D. at 296.

233. See, e.g., *RNW Assocs., Inc. v. Corporate Underwriters, Ltd.*, No. 93-6327, 1994 U.S. App. LEXIS 36229, at *8-9 (10th Cir. Dec. 23, 1994) (affirming sanctions where ordered party did not act in good faith in response to an order requiring violation of foreign law); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1479 (9th Cir. 1992) (same); *United States v. Bank of N.S.*, 740 F.2d 817, 825-26 (11th Cir. 1984) (affirming a \$25,000 per day fine against a bank that demonstrated a "lack of good faith" in response to an order requiring violation of foreign law); *United States v. Bank of N.S.*, 691 F.2d 1384, 1389 (11th Cir. 1982) (affirming civil contempt sanctions against a party that "had not made a good faith effort to comply" with an order requiring violation of foreign law); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1287 n.6 (9th Cir. 1981) (affirming sanctions where ordered party acted in bad faith by conducting "one of the greatest delaying actions [in] recent memory" (internal quotation marks omitted)); *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1376 (10th Cir. 1978) (affirming monetary sanctions against a party that acted in "flagrant bad faith" in response to an order requiring violation of foreign law); *Remington Prods., Inc. v. N. Am. Philips Corp.*, 107 F.R.D. 642, 644 (D. Conn. 1985) (imposing sanctions on a party whose refusal to provide discovery was in bad faith); see also *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 118-19 (S.D.N.Y. 1981) (enforcing an order requiring violation of foreign law against a party that acted in bad faith, but reserving the issue of sanctions to give the ordered party another chance to comply).

234. See *Reinsurance Co. of Am.*, 902 F.2d at 1284 (Easterbrook, J., concurring).

235. *Id.* Judge Easterbrook was discussing his interpretation of the Restatement (Third), which closely resembles the Bad Faith Approach. *Id.*

236. See *Cochran Consulting*, 102 F.3d at 1227 ("In considering whether to sanction non-production the court must seek a fair balance of the interests and litigation needs of the

b. *The Good Faith Approach: Good Faith Acts Make Sanctions Inappropriate Per Se*

Under the Good Faith Approach, good faith acts make sanctions inappropriate per se. A limited number of courts expressly endorse this approach.²³⁷ Nevertheless, some courts appear to follow the Good Faith Approach in practice: Courts generally do not impose sanctions against parties that have acted in good faith in response to orders requiring violation of foreign law.²³⁸

There are several rationales for the Good Faith Approach. First, it greatly reduces reliance on the restatements' balancing tests. Second, this approach meets the Restatement (Third)'s goal of "not ordinarily impos[ing] sanctions" when a party has made a good faith effort to comply.²³⁹ Third, it comports with the spirit of *Societe Internationale*, at least for commentators who view that case as "aim[ing] to vindicate the good faith custodian from the dilemma caused by a legal conflict between two sovereigns."²⁴⁰

A number of courts have criticized the Good Faith Approach. These critics point out that *Societe Internationale* did not hold that good faith efforts always excuse compliance with a production order requiring violation of foreign law, only that they excuse compliance under the specific facts of that case.²⁴¹

c. *The Factor Approach: Good or Bad Faith Acts Are a Factor to Consider When Determining Whether Sanctions Are Appropriate*

Under the Factor Approach, courts treat a party's good or bad faith acts as another factor in their balancing test. This approach is prevalent in the Second Circuit, particularly in the Southern District of New York.²⁴² In

parties . . ."); *Reinsurance Co. of Am.*, 902 F.2d at 1284 (Easterbrook, J., concurring) ("[A] court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.").

237. See, e.g., *Richmark Corp.*, 959 F.2d at 1479 ("It is true that contempt is inappropriate where a party has taken 'all the reasonable steps' it can take to comply.").

238. See, e.g., *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 208–12 (1958) (refusing to impose sanctions against an ordered party that acted in good faith); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998–99 (10th Cir. 1977) (same); *In re Oil Spill by Amoco Cadiz*, 93 F.R.D. 840, 843 (N.D. Ill. 1982) (refusing to impose harsh sanctions, but reserving the right to make adverse inferences, against the noncompliant party that acted in good faith).

239. Restatement (Third) of Foreign Relations Law § 442(2)(b) (1987).

240. See Brodeur, *supra* note 16, at 591.

241. See *Remington Prods., Inc. v. N. Am. Philips Corp.*, 107 F.R.D. 642, 647 (D. Conn. 1985) ("[In *Societe Internationale*,] [t]he Court did not hold that no sanctions were appropriate where good faith inability to comply is shown."); *In re Westinghouse*, 563 F.2d at 1002 (Doyle, J., dissenting) ("[T]he Supreme Court did not hold that good faith justified avoiding [production].").

242. See, e.g., *Reino de Espana v. Am. Bureau of Shipping*, 03 Civ. 3573, 2005 U.S. Dist. LEXIS 15685, at *10–11 (S.D.N.Y. Aug. 1, 2005) (listing the ordered party's good faith as

Reino de Espana v. American Bureau of Shipping, for example, the district court simply listed “the good faith of the party resisting discovery” as the final factor in the Second Circuit’s four-part balancing test.²⁴³ Similarly, the district court in *Banca Della Svizzera Italiana* treated good faith as if it were actually an aspect of the hardship factor of the Restatement (Second)’s balancing test.²⁴⁴

The rationale for the Factor Approach is a desire to leave the issue of sanctions to the courts’ discretion rather than forcing courts to employ a *per se* rule. This desire is drawn from the permissive language of the Restatement (Third).²⁴⁵ Theoretically, given this discretion, courts employing the Factor Approach could impose sanctions on a party that acted in good faith or refuse to impose sanctions on a party that acted in bad faith. Such outcomes are possible due to the role of the other factors in the balancing test. For example, a court using the Factor Approach could find that the U.S. interest at stake is so vital that this factor would outweigh the ordered party’s good faith efforts to comply. In such a case, the court could impose sanctions notwithstanding the ordered party’s good faith acts. Conversely, a court using the Factor Approach might find that the foreign interest at stake is so vital that the court could refuse to sanction a noncompliant party that acted in bad faith.²⁴⁶

one of four factors to be considered under the Second Circuit’s balancing test); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987) (same); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 118 (S.D.N.Y. 1981) (considering the ordered party’s good faith alongside the Restatement (Second)’s hardship factor). Some other courts have followed the Second Circuit in viewing good faith as a factor to be weighed before imposing sanctions. See *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 543 (N.D. Ill. 2004) (“The failure of a party raising a foreign law defense . . . to make [a] good faith effort is a factor that may be considered in requiring production despite the conflict with foreign law.”).

243. *Reino de Espana*, 2005 U.S. Dist. LEXIS 15685, at *10–11. The Second Circuit’s balancing test is derived from the Restatement (Second)’s test and, besides the ordered party’s good faith, considers: “(1) the competing interests of the nations whose laws are in conflict, (2) the hardship of compliance on the party or witness from whom discovery is sought, (3) the importance to the litigation of the information and documents requested” *Id.* (citing *Minpeco*, 116 F.R.D. at 522).

244. See *Banca Della Svizzera Italiana*, 92 F.R.D. at 118 (merging hardship and good faith analysis).

245. Restatement (Third) of Foreign Relations Law § 442(1)(b) (1987) (“Failure to comply with an order to produce information may subject the person . . . to sanctions”) (emphasis added); *Id.* § 442(2)(b) (“A court or agency should not ordinarily impose sanctions”).

246. Other commentators have observed this possibility as well. See Browne, *supra* note 16, at 1341 (noting that under the approach used in *Banca Della Svizzera Italiana*, “a finding of a less compelling United States interest on balance [would] preclude sanctions even absent a showing of good faith”). Browne suggests that the converse is not true: “If good faith had been shown, however, *Societe Internationale* would preclude an imposition of sanctions even if the [other balancing factors] supported imposition of sanctions.” *Id.* It is unclear, however, that *Societe Internationale* always precludes the imposition of sanctions where the ordered party acts in good faith. See *supra* note 241 and accompanying text. As such, it appears that both outcomes are possible.

C. International Cooperation

The United States has been able to circumvent the problems posed by orders requiring violation of foreign law, to a certain extent, through formal and informal international agreements.

1. Formal International Agreements on Evidence Gathering

Recognizing that conflicts between U.S. court orders and foreign law have far-reaching foreign-relations implications,²⁴⁷ the political branches of the U.S. government have tried to diffuse the potential for friction through formal international agreements.²⁴⁸ Such agreements generally provide for mutual assistance in the collection of evidence in a manner acceptable to all parties. The most prominent of these agreements is the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Convention),²⁴⁹ which governs extraterritorial evidence gathering in “civil and commercial matters.”²⁵⁰ The Hague Convention, to which the United States is a signatory, assists U.S.-based parties—including the U.S. government—in acquiring evidence that might otherwise be inaccessible, while protecting foreign states from what they consider “the limitless scope of U.S.-style pretrial discovery.”²⁵¹

The Supreme Court, however, has severely limited the Hague Convention’s efficacy.²⁵² In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, the Supreme Court held that the Hague Convention’s procedures are merely an optional alternative to traditional orders of production.²⁵³ The Court’s 5–4 decision

247. See Restatement (Third) of Foreign Relations Law § 442 reporter’s 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.”).

248. See generally ABA Section of Antitrust Law, *supra* note 115; David McClean, International Co-operation in Civil and Criminal Matters (2002).

249. The Hague Convention and the Inter-American Convention on Letters Rogatory are the only international agreements pertaining to the conduct of discovery in foreign jurisdictions that the United States has ratified. See ABA Section of Antitrust Law, *supra* note 115, at 27. The United States has also ratified the Inter-American Convention on Mutual Assistance in Criminal Matters, which requires mutual assistance in the “transmittal of documents, reports, information, and evidence” related to criminal investigations. McClean, *supra* note 248, at 223.

250. Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, art. 1, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

251. See ABA Section of Antitrust Law, *supra* note 115, at 30.

252. See Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 Am. U.J. Int’l & Pol’y 559, 602 (1996) (noting that “the Court’s decision has been almost universally condemned”); see generally Patricia A. Kuhn, Comment, *Societe Nationale Industrielle Aérospatiale: The Supreme Court’s Misguided Approach to the Hague Evidence Convention*, 69 B.U. L. Rev. 1011 (1989) (discussing the Supreme Court’s quasi-nullification of the Hague Convention).

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

was based largely on its finding that the “plain language of the Convention” made clear that its procedures were neither exclusive nor mandatory.²⁵⁴ In his dissent, Justice Harry Blackmun observed that the Hague Convention “provides effective discovery procedures that largely eliminate the conflicts between United States and foreign law on evidence gathering.”²⁵⁵ As such, he argued that there should be a “general presumption that, in most cases, courts should resort first to the [Hague] Convention procedures.”²⁵⁶ Justice Blackmun made it clear that he preferred the Hague Convention’s procedures to the continued use of either restatement’s “case-by-case comity analysis.”²⁵⁷

2. Informal International Cooperation

The United States has also taken advantage of informal methods of obtaining evidence abroad. Such methods have obvious advantages, but may present legal problems. According to Professors Bruce Zagaris and Jessica Resnick, “Informal requests usually secure assistance more quickly and flexibly than formal ones, but they do not always conform to the Federal Rules of Evidence.”²⁵⁸

The U.S. Department of Justice has identified six methods of obtaining evidence abroad through informal means: (1) persuading foreign authorities to gather evidence and share it with their U.S. counterparts as part of a joint investigation;²⁵⁹ (2) requesting documents through diplomatic channels;²⁶⁰ (3) taking depositions from voluntary witnesses at U.S. embassies and consulates;²⁶¹ (4) making a “treaty-type request that, even though no treaty is in force, the requested country decides to execute”;²⁶² (5) making police-to-police requests through U.S. federal law enforcement agents working abroad;²⁶³ and (6) making a request through INTERPOL.²⁶⁴

254. *Id.* at 529.

255. *Id.* at 548 (Blackmun, J., dissenting).

256. *Id.* at 548–49.

257. Specifically, Justice Blackmun wrote:

The Court ignores the importance of the Convention by relegating it to an “optional” status, without acknowledging the significant achievement in accommodating divergent interests that the Convention represents. Experience to date indicates that there is a large risk that the case-by-case comity analysis now to be permitted by the Court, will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently.

Id. at 548.

258. Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 *Ariz. J. Int’l & Comp. L.* 1, 10 (1997).

259. *See id.*

260. *See id.*

261. *See id.*

262. *Id.* at 11. According to Bruce Zagaris and Jessica Resnick, “This is what happened during the investigation of the murder of U.S. Drug Enforcement Agency (DEA) agent Enrique Camarena, which took place in Mexico. Although [no mutual assistance legal treaty was in place], the United States and Mexico cooperated as if there was a treaty.” *Id.*

263. *See id.*

Though formal and informal agreements on information and evidence sharing are widely used, they have not eliminated legal conflicts arising out of orders that require violation of foreign law. Consequently, the need for a well-reasoned approach to such orders is as pressing today as it was at the time the Supreme Court decided *Societe Internationale*.

III. MAKING GOOD OR BAD FAITH ACTS DETERMINATIVE AND THE CONSEQUENCES FOR U.S. INFORMATION-GATHERING EFFORTS

The best approach to orders requiring violation of foreign law is one in which the ordered party's good or bad faith acts, and not a balancing test, determine the party's fate. Part III.A explains how such an approach works and suggests that a number of courts already use it implicitly. Part III.B concludes that a court employing this approach likely would have excused SWIFT's noncompliance with U.S. subpoenas. In light of the difficulty of unilaterally gathering information, Part III.C encourages the United States to employ both formal and informal information-sharing agreements with its allies in the war on terror.

A. The Good or Bad Faith Acts of a Noncompliant Party Ordered to Produce Materials in Violation of Foreign Law Should Determine Whether Sanctions Are Appropriate

The proper approach to orders requiring violation of foreign law must follow the spirit of the Supreme Court's holding in *Societe Internationale* while minimizing reliance on unworkable balancing tests. Sanctioning an ordered party for noncompliance based solely on the party's good or bad faith acts accomplishes both goals. This approach essentially merges the Bad Faith Approach with the Good Faith Approach.²⁶⁵

In *Societe Internationale*, the Supreme Court recognized that "inability to comply because of foreign law" could be a valid excuse for noncompliance with a production order.²⁶⁶ The Court found that the sanction of dismissal was improper since the "failure to comply [with a production order was] due to inability, and not to willfulness, bad faith or any fault of [Societe]."²⁶⁷ The Court was further impressed by Societe's affirmative good faith efforts to produce the documents.²⁶⁸ In the end, the Court protected Societe because Societe acted in good faith.²⁶⁹ By making a noncompliant party's good or bad faith acts determine whether sanctions are appropriate, lower courts will honor the Supreme Court's desire to vindicate parties that act in good faith.

264. *See id.*

265. *See supra* Part II.B.2.a-b.

266. *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958).

267. *Id.*

268. *See supra* note 103 and accompanying text.

269. *See supra* note 107 and accompanying text.

This approach to good faith will greatly reduce reliance on the restatements' balancing tests. A court will impose sanctions regardless of any balancing if it finds that a party has acted in bad faith or failed to make sufficient affirmative efforts to produce the requested materials. Conversely, a court will not impose sanctions regardless of any balancing if it finds that a party has made sufficient affirmative efforts to produce the requested materials and has not acted in bad faith.

Reducing reliance on the restatements' balancing tests is desirable given that they have proven largely unworkable.²⁷⁰ The tests have numerous shortcomings, but the most egregious is their assumption that courts can fairly and meaningfully balance U.S. interests against those of foreign nations.²⁷¹ Although courts have gamely applied these tests, they have protested while doing so,²⁷² and with good reason, considering that the restatements' tests have yielded unsatisfactory results.²⁷³

Arguably, this approach simply makes explicit what courts have done in practice. Even when courts nominally use the restatements' balancing tests to determine the propriety of sanctions, they rarely sanction a party acting in good faith or fail to sanction a party acting in bad faith. The approach endorsed by this Note would simply streamline courts' reasoning, eliminating extraneous factor balancing.

B. *Application to the SWIFT Program*

Prior to the U.S.-E.U. Compromise, SWIFT was faced with the dilemma of deciding whether to comply with U.S. or Belgian and E.U. law.²⁷⁴ At the time, it seemed unlikely that the United States would drag SWIFT into court to enforce its subpoenas. Such a drastic step undoubtedly would have estranged European allies, not to mention SWIFT executives who had been extremely cooperative up to that point. However, if the United States did have the legal authority to demand that SWIFT continue to comply with its subpoenas, it would have had a much stronger position during the compromise negotiations. If the cost of compromise ever became too high, the United States could have threatened to abandon negotiations in favor of continuing the program unchanged.

Given the muddled nature of case law on orders requiring violation of foreign law, it is difficult to say whether the United States could have enforced the SWIFT Program's subpoenas in a U.S. court. This is principally because the balancing tests of both the Restatement (Second) and the Restatement (Third) yield unpredictable results.²⁷⁵ On the one hand, a court employing either of these tests could find that the United

270. See generally *supra* Part II.A.3-4.

271. See *supra* notes 158-61 and accompanying text.

272. See *id.*

273. See *supra* notes 164-66 and accompanying text.

274. See *supra* notes 61-62 and accompanying text.

275. See *supra* notes 164-66 and accompanying text.

States' interest in tracking terrorist financing tipped the scales in favor of compelling SWIFT to disclose its financial records.²⁷⁶ On the other hand, a court could reach the opposite conclusion or could even decline to undertake the balancing at all.²⁷⁷

What is clear, however, is that SWIFT acted in the best of faith once it found itself caught between conflicting legal obligations. First, SWIFT did not court the foreign legal impediments that led to the conflict. Second, it took numerous affirmative steps to try to remedy the situation, such as trying to convince Belgian and E.U. officials that its disclosures under the SWIFT Program were legal under all relevant laws.²⁷⁸ Third, the fact that SWIFT complied with SWIFT Program subpoenas for five years,²⁷⁹ enabling tens of thousands of searches to be conducted,²⁸⁰ strongly supports a finding of good faith.

The significance of this finding would vary from court to court. Courts employing the Good Faith Approach²⁸¹ or the approach advocated in Part III.A of this Note would excuse SWIFT's noncompliance based on SWIFT's good faith acts. Courts employing the Bad Faith Approach²⁸² or the Factor Approach²⁸³ would turn to one of the restatements' balancing tests to determine whether sanctions were appropriate. In theory, they might find that SWIFT's good faith was outweighed by other factors that favored disclosure.

C. The United States Should Take Greater Advantage of Informal Information-Sharing Agreements

Whether or not courts adopt this Note's approach to orders requiring violation of foreign law, the United States should recognize that it has limited power to gather information abroad. Formal agreements like the U.S.-E.U. Compromise reinforce these limitations in that they often require the United States to make substantial concessions.²⁸⁴ As such, it is imperative that the United States take greater advantage of informal information-sharing agreements, which are relatively more flexible.

Informal agreements between U.S. administrative agencies—such as the Treasury, Department of Justice, National Security Agency, or Central Intelligence Agency—and their E.U. counterparts may be particularly helpful given the ease with which they can be instituted.²⁸⁵ Such arrangements could supplement the information that the United States

276. *See supra* notes 122 and accompanying text.

277. *See supra* notes 158–61 and accompanying text.

278. *See supra* note 82 and accompanying text.

279. *See supra* note 32 and accompanying text.

280. *See supra* note 41 and accompanying text.

281. *See supra* Part II.B.2.b.

282. *See supra* Part II.B.2.a.

283. *See supra* Part I.B.5.

284. *See supra* note 258 and accompanying text.

285. *See supra* note 258 and accompanying text.

gathers through the modified SWIFT Program. For example, a Belgian investigative agency, in theory, would be able to access SWIFT's financial database without raising the same privacy concerns as the SWIFT Program.²⁸⁶ They could then share this information with the relevant U.S. agency through a joint investigation.²⁸⁷ Such an arrangement might enable the United States to access the financial data of individuals who are linked to terrorist activities only after the United States has deleted their data in accordance with the U.S.-E.U. Compromise.²⁸⁸

CONCLUSION

When confronted with orders requiring violation of foreign law, U.S. courts should sanction a noncompliant party based only on the party's good or bad faith acts. This approach meets the Supreme Court's goal of vindicating parties that act in good faith while reducing reliance on unworkable balancing tests. Under this approach, SWIFT, which acted in the best of faith after receiving U.S. subpoenas under the SWIFT Program, would have been immune from sanctions for noncompliance. Though the U.S.-E.U. Compromise largely diffused this thorny legal issue, the United States should also pursue more informal—and more flexible—information-sharing agreements with its European allies.

286. European privacy concerns have been triggered in part because SWIFT has provided financial information to a nation that Belgium deems to have inadequate privacy laws. *See supra* notes 61–65 and accompanying text. Presumably, these concerns would not come up if Belgium accessed the information itself.

287. *See supra* note 259 and accompanying text.

288. *See supra* Part I.B.5.