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United States v. First National Bank of Chicago: Limiting American Extraterritorial Authority to Order the Production of Documents in Violation of Foreign Law

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UNITED STATES V. FIRST NATIONAL BANK OF CHICAGO: LIMITING AMERICAN EXTRATERRITORIAL AUTHORITY TO ORDER THE PRODUCTION OF DOCUMENTS IN VIOLATION OF FOREIGN LAW*

In an economy increasingly characterized by international transactions and multinational corporations with divided loyalties and responsibilities, United States courts inevitably face problems caused by conflicts between the laws of nations.[1] One particularly troublesome area in which U.S. courts have not reached a philosophical or analytical consensus is the entering and enforcement of orders compelling the production of documents and oral testimony in violation of foreign law.[2] The United States Court of Appeals

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* The author of this Note is employed by First Chicago Corporation. The views expressed herein are his own and do not necessarily represent those of the Corporation.

1. The expansion of international economic activity is indicated by the fact that the value of United States exports increased from about $156 billion in 1975 to about $373 billion in 1981. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 820 (103d ed. 1982-83). During the same period, the value of U.S. imports grew from $133 billion to $362 billion. *Id.* The value of monthly exports from member countries of the Organization for Economic Cooperation and Development increased from $47 billion in 1975 to $102 billion in 1981, while during the same period, imports grew from $49 billion to $108 billion. *Id.* at 869.

Multinational corporations account for 69% of all U.S. exports and 41% of its imports. R. MURRAY, MULTINATIONALS BEYOND THE MARKET: INTRA-FIRM TRADE AND THE CONTROL OF TRANSFER PRICING 3 (1981). They also produce about one third of the world's gross product. O. FREEMAN, THE MULTINATIONAL COMPANY: INSTRUMENT FOR WORLD GROWTH 2 (1981). From 1975 to 1981, the capital expenditures of the foreign affiliates of U.S. multinationals increased from $26.8 billion to $45.5 billion. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 547 (103d ed. 1982-83).

2. *See, e.g.*, Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-06 (1958) (plaintiff must comply with discovery order although compliance would violate Swiss law); United States v. Bowe, 694 F.2d 1256, 1258 (11th Cir. 1982) (civil contempt order for violation of order to comply with subpoena affirmed despite claim that attorney would be subject to sanctions under Bahamian law for testifying); United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1391 (11th Cir. 1982) (possibility of sanctions under Bahamian law insufficient justification for failure to comply with grand jury subpoena); United States v. Vetco, Inc., 644 F.2d 1324, 1329-33 (9th Cir. 1981) (possible criminal liability under Swiss law does not preclude enforcement of IRS summons); Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 952-53 (D.C. Cir. 1979) (per curiam) (enforcement of subpoena affirmed despite claim that foreign law prohibited compliance); Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 341-42 (10th Cir. 1976) (foreign law does not invalidate discovery order authorized by local law), *cert. denied,* 429 U.S. 1096 (1977); United States v. First Nat'l City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968) (potential civil liability in Germany does not justify noncompliance with subpoena); *In re* Grand Jury 81-2, 550 F. Supp. 24, 27-29 (W.D. Mich. 1982) (even if disclosure is prohibited under German law, subpoena compelling disclosure may be enforced); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-18 (S.D.N.Y. 1981) (deliberate use of foreign nondisclosure law to evade U.S. disclosure requirements does not shield defendant from federal

for the Seventh Circuit addressed this problem in *United States v. First National Bank of Chicago*[3] and held that compliance with an Internal Revenue Service (IRS) summons to produce records located at the Athens Branch of the First National Bank of Chicago ("First Chicago") was not required because the persons who could make the records available would be subject to criminal prosecution under Greek law.[4] The case appears to be at odds with recent decisions that have held that foreign law should not deter courts from enforcing orders compelling production of information or imposing sanctions for violations of such orders.[5]

Because of this inconsistency in case law, judicial attempts to resolve the problem of enforcing production orders in violation of foreign law must be reviewed in order to place the *First Chicago* case in perspective and determine its impact upon the present status of the law. An analysis of *First Chicago* reveals that the Seventh Circuit comprehensively balanced the competing interests raised in the case and showed greater respect for foreign law than have many other courts. The analysis, however, also reveals deficiencies in the approaches currently taken by courts that are faced with this

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securities law); Westinghouse Elec. Corp. v. Rio Algom, Ltd., 480 F. Supp. 1138, 1145-49 (N.D. Ill. 1979) (discovery order enforced despite possible foreign penalties); American Indus. Contracting, Inc. v. Johns-Manville Corp., 326 F. Supp. 879, 880-81 (W.D. Pa. 1971) (provincial law prohibiting removal of documents from province does not preclude answering interrogatories that might require such removal). *But see* Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 40-41 (2d Cir. 1972) (district court's failure to compel production of information that might violate Swiss secrecy law not an abuse of discretion); Application of Chase Manhattan Bank, 297 F.2d 611, 612-13 (2d Cir. 1962) (subpoena modified to exclude demand for information from Panamanian branch of bank since Panamanian law prohibited furnishing of documents outside the country); Ings v. Ferguson, 282 F.2d 149, 151-53 (2d Cir. 1960) (New York agencies of Canadian bank need not comply with subpoena when Canadian law forbids disclosure); First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959) (if production of records would violate Panamanian law, it should not be ordered), *cert. denied,* 361 U.S. 948 (1960); *In re* Equitable Plan Co., 185 F. Supp. 57, 60 (S.D.N.Y. 1960) (records need not be produced because to do so would violate Cuban law), *modified sub nom.* Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).

3. 699 F.2d 341 (7th Cir. 1983).

4. *Id.* at 342.

5. In its opinion, the *First Chicago* court admitted that its result differed from that of the Eleventh Circuit in United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384 (11th Cir. 1982). In *Bank of Nova Scotia,* the court affirmed a civil contempt order issued against a bank for its failure to comply with a subpoena duces tecum that had been issued by a grand jury investigating possible tax and narcotics law violations, despite the fact that compliance would have exposed the bank to criminal liability under Bahamian law. *First Chicago,* 699 F.2d at 356-47. *First Chicago* also conflicts with United States v. Field, 532 F.2d 404 (5th Cir. 1976), which provided much of the rationale for the *Bank of Nova Scotia* decision. In *Field,* civil contempt sanctions were upheld against the Canadian manager of a Cayman Islands bank who refused to testify pursuant to the order of a grand jury investigating possible tax law violations, although the mere act of testifying would have violated Cayman Islands law. *See also supra* note 2. *But see* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1326-27 (D.C. Cir. 1980) (FTC has no authority to serve subpoenas on French citizens because, among other reasons, French law prohibits disclosure of certain business information).

issue and, accordingly, suggests the need for formulating additional tests to determine the circumstances under which the extraterritorial judicial enforcement of subpoenas and summonses is appropriate.

LEGAL AND HISTORICAL BACKGROUND

Before a court can apply U.S. law extraterritorially, it must possess either prescriptive or enforcement jurisdiction.[6] Prescriptive jurisdiction exists when a state has the power to prescribe rules of law governing the conduct, relations, or interests of persons.[7] It is exercised when a court, a grand jury, or an administrative agency issues a summons or a subpoena requiring the production of documents or personal testimony. Enforcement jurisdiction refers to the authority of a state to apply its prescribed rules and to compel compliance with them in individual situations.[8] It is applied when a court orders enforcement of the process or imposes sanctions for a failure to comply.[9]

Nationality and territoriality have formed the traditional bases for the exercise of jurisdiction.[10] Together, these concepts enable a state to exercise jurisdiction over acts committed by its nationals anywhere in the world[11] and over conduct occurring within its borders.[12] U.S. courts have developed exceptions to these generally recognized jurisdictional limitations. For example, in the area of prescriptive jurisdiction, courts have primarily used the "effects doctrine," under which a United States court can exercise jurisdiction to prescribe rules of law over acts occurring outside its territory if the acts produce an effect within its territory.[13] Some courts have supplemented

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6. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 8 (1965) [hereinafter cited as RESTATEMENT].

7. *Id.* § 6 comment (a).

8. *Id.*

9. FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316 (D.C. Cir. 1980); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs,* 64 NW. U.L. REV. 487, 498-99 (1969); Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position,* 60 FORDHAM L. REV. 877, 881-82 (1982) [hereinafter cited as Note, *Compelling Production*].

10. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1179 (E.D. Pa. 1980); Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law,* 63 COLUM. L. REV. 1441, 1473-80 (1963) [hereinafter cited as Note, *Limitations*].

11. RESTATEMENT, *supra* note 6, § 30.

12. *Id.* §§ 17, 18, 20.

13. The first significant formulation and application of the effects doctrine occurred in United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), in which the Sherman Act was held applicable to agreements between subsidiaries of Alcoa and other foreign producers of aluminum. The doctrine, as stated by Judge Learned Hand, provides that United States law can be applied to conduct occurring in foreign territory if the conduct was intended to have, and actually did have, effects within the United States. *Id.* at 443; *see also* Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 883 (5th Cir. 1982) (a restraint that affects U.S. commerce is within the scope of the Sherman Act); United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. (CCH) 70,600 (S.D.N.Y. 1962) (if foreign

the effects doctrine with a "jurisdictional rule of reason," which is applied to determine whether the assertion of jurisdiction is appropriate.[14] This rule reflects concern for principles of international comity[15] by weighing various elements before deciding whether the interests of the United States are sufficient to justify the exercise of extraterritorial jurisdiction.[16]

Extraterritorial enforcement jurisdiction is more severely restricted. It cannot be exercised until a finding of prescriptive jurisdiction is made;[17] even then, courts should consider refraining from exercising enforcement jurisdiction if it would result in a conflict with existing foreign law.[18] In the case

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defendant's acts have affected U.S. commerce, U.S. courts have jurisdiction); United States v. Imperial Chem. Indus., 100 F. Supp. 504 (S.D.N.Y. 1951) (conspiracies that affect U.S. commerce violate the Sherman Act, whether the acts were done in the U.S. or abroad); United States v. General Elec. Co., 82 F. Supp. 753, 891 (D.N.J. 1949) (foreign corporation can be found to have violated Sherman Act if its acts affected U.S. commerce). The Restatement has adopted the effects test for general foreign relations law. RESTATEMENT, *supra* note 6, §§ 18, 38.

14. The Ninth Circuit's "jurisdictional rule of reason" was announced in Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 613-15 (9th Cir. 1976), which identified the following factors as relevant in determining the existence of extraterritorial jurisdiction: the degree of conflict with foreign law resulting from an exercise of jurisdiction; the nationality, allegiance or location of the parties; the extent to which enforcement of the prescribed rule could be expected to achieve compliance with it; the significance of the effects on the U.S. relative to those effects produced elsewhere; the existence of any intent to affect U.S. commerce; the foreseeability of any such effect; and whether conduct important to the alleged violation occurred in the U.S or abroad. *Id.* at 614. In Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), the Third Circuit adopted the jurisdictional rule of reason but emphasized that its application was appropriate in deciding whether to exercise jurisdiction, not in determining the existence of such jurisdiction. *Id.* at 1296; *see also* National Bank of Can. v. Interbank Card Assoc., 507 F. Supp. 1113, 1119-21 (S.D.N.Y. 1980) (*Timberlane* standard adopted for determining jurisdiction); *cf.* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1189 (E.D. Pa. 1980) (effects plus *Timberlane* jurisdictional rule of reason test appropriate); Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680 (S.D.N.Y. 1979) (effects test alone inadequate and should be supplemented by considerations of international comity as indicated in the jurisdictional rule of reason).

15. International comity generally refers to the mutual respect and recognition for laws and legal authority among nations. J. STORY, CONFLICTS OF LAW §§ 33-36 (1834). It has been described as the concept that states "should not, as a matter of sound international relations, require acts or forebearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative[s] . . . makes clear that the order is justified." Volkswagenwerk Aktiengesellschaft v. Superior Ct., 123 Cal. App. 3d 840, 857, 176 Cal. Rptr. 874, 884 (1981).

16. *See supra* note 14.

17. In document production cases, orders to produce cannot be issued to determine whether the effects on the United States are sufficiently substantial to confer jurisdiction on a U.S. court; such an order would be an exercise of enforcement jurisdiction prior to a finding of prescriptive jurisdiction. FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316-17 (D.C. Cir. 1980); Onkelinx, *supra* note 9, at 498-99; Note, *Compelling Production, supra* note 9, at 883; RESTATEMENT, *supra* note 6, §§ 7-8.

18. RESTATEMENT, *supra* note 6, § 40. The Restatement takes the position that an inconsistent foreign law does not preclude a court from exercising its jurisdiction, but the Restatement suggests that courts must consider certain factors in order to minimize conflicts. *Id.* §§ 39-40; *see also* United States v. First Nat'l City Bank, 396 F.2d 897, 901 (2d Cir. 1968) (state not prevented from exercising jurisdiction solely because the person involved is subject to liability

of a foreign nondisclosure law, whether related to bank secrecy or to other categories of information, the possibility that a person may be subject to liability for disclosing the requested information should be considered by a court before entering an order compelling production or before applying available sanctions.[19]

The "good faith" test of *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*[20] was the first standard developed to resolve such conflicts.[21] In *Societe,* the plaintiff-corporation claimed that the district court's dismissal of its action for failure to comply with a discovery order was unjustified because compliance would subject it to criminal penalties under Swiss law.[22] The United States Supreme Court acknowledged that fear of criminal prosecution, whether by the United States or a foreign sovereign, constituted a "weighty excuse" for nonproduction.[23] Nevertheless, the Court rejected the plaintiff's arguments that Swiss law deprived it of control over the documents[24] and provided it with an immunity

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under foreign law, but each nation should make effort to reduce conflict); *In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 317-18 (D.D.C. 1960) (court has authority to order production of documents located in foreign countries, but should consider objections of foreign nations).

19. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3rd Cir. 1979); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614 (9th Cir. 1976).

20. 357 U.S. 197 (1958).

21. In *Societe,* the plaintiff-corporation brought an action to recover assets confiscated by the United States government under the Trading With the Enemy Act, 50 U.S.C. app. §§ 1-6, 7-39 and 41-44 (1976). The district court dismissed the plaintiff's claim for failure to comply with the court's order to produce certain records. In so doing, the court held that the plaintiff had control over the requested records and that Swiss law provided an inadequate excuse for the failure to produce them. The Supreme Court reversed the dismissal and remanded the case to the district court for further consideration of the good faith issue or for a trial on the merits. 357 U.S. 197 (1958).

22. 357 U.S. at 200. One commentator has suggested that there may be constitutional limitations on the power of U.S. courts to compel violations of foreign law, based either upon considerations of due process or upon the possibility that it would be cruel and unusual punishment to imprison someone for contempt when a conflicting foreign law restricts his ability to comply with a court's order. Note, *Limitations, supra* note 10, at 1472-73. A due process argument was expressly rejected in United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1388-89 (11th Cir. 1982). The *Bank of Nova Scotia* court relied upon the Supreme Court's holding in *Societe* to conclude that only extreme sanctions, such as dismissal, violate due process when noncompliance with a production order is grounded on contrary foreign law. *Id.*

23. 357 U.S. at 211.

24. *Id.* at 205. The issue of control has more typically arisen in circumstances in which foreign affiliates of a U.S. corporation physically possess the documents in question. *See, e.g., In re* Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co., 72 F. Supp. 1013, 1020-21 (S.D.N.Y. 1947) (location of records in Canada does not excuse production where subject of subpoena has effective control over documents). The argument that subsidiaries and branches of U.S. corporations are separate entities and are, thus, exempt from subpoenas served on the head office has not been well received. *See, e.g.,* First Nat'l City Bank v. IRS, 271 F.2d 616, 618 (2d Cir. 1959) (bank had control over documents since it could require branch to send records to head office for corporate purposes); *In re* Equitable Plan Co., 185 F. Supp. 57, 59-60 (S.D.N.Y. 1960) (independent entity doctrine does not create exception to require-

from production orders.[25] According to the Court in *Societe,* such a holding would undermine congressional policies allowing broad discovery and would encourage attempts to make fraudulent use of foreign nondisclosure laws.[26] Although the Court did not invalidate the production order, it reversed the dismissal of the plaintiff's action, holding that such a severe sanction was unjustified in view of the fact that the plaintiff had made a good faith effort to comply with the order.[27] On the other hand, the Court also indicated that had the plaintiff "deliberately courted legal impediments," its decision regarding the justification for dismissal might have been different.[28]

The good faith test articulated in *Societe,* and subsequently interpreted by lower courts, consists of the following essential characteristics: it is to be applied in determining sanctions for noncompliance, rather than in deciding whether the production order should issue;[29] attempts to obtain waivers from the foreign government to overcome its disclosure restrictions are required to avoid sanctions;[30] and deliberately placing documents in countries where nondisclosure laws exist, or any other showing of bad faith, will justify the use of sanctions.[31] By incorporating only these elements, the test limits the scope of a court's inquiry. No serious consideration is given to interests other than those of the United States. The hardship inflicted upon the person ordered to produce the information, and the interests of the foreign state in prohibiting disclosure are not significant under the good faith standard.

This deficiency in the good faith approach led to the development of the "balancing of interests" test. The newer standard attempts to resolve conflicts between national laws by weighing the competing interests of the par-

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ment that branch comply with subpoena), *modified sub nom.* Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960). Control in these situations now depends upon whether the parent corporation can direct the management of the affiliate through the election of a majority of the affiliate's board of directors. Westinghouse Elec. Corp. v. Rio Algom, Ltd., 480 F. Supp. 1138, 1144-45 (N.D. Ill. 1979) (citing *In re* Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280, 285 (D.D.C. 1952)).

25. 357 U.S. at 212.

26. *Id.* at 205.

27. *Id.* at 201, 212-13. The plaintiff-corporation obtained waivers from the Swiss government allowing disclosure of approximately 190,000 documents. *Id.* at 202-03.

28. *Id.* at 209.

29. *Id.* at 208; Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 341-42 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977); General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 295-96 (S.D. Cal. 1981); Westinghouse Elec. Corp. v. Rio Algom, Ltd., 480 F. Supp. 1138, 1145-49 (N.D. Ill. 1979); United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 202-03, 629 P.2d 231, 278-79 (1980), *appeal dismissed and cert. denied,* 451 U.S. 901 (1981).

30. Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 953 (D.C. Cir. 1979).

31. Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208-09 (1958); General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 296 (S.D. Cal. 1981); United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 230-31, 629 P.2d 231, 306-07 (1980), *appeal dismissed and cert. denied,* 451 U.S. 901 (1981).

ties and countries involved in the dispute.[32] It encourages restraint in the assertion of enforcement jurisdiction when onerous or undesirable consequences are likely to result.[33] The factors relevant to evaluating those consequences are enunciated in the Restatement (Second) of the Foreign Relations Law of the United States, which contains the foremost articulation of the balancing of interests test.[34]

The balancing of interests test is a flexible standard, and courts have used it in that manner, emphasizing those factors deemed most relevant to particular cases.[35] Most commonly, courts focus upon the relative national interests involved and, typically, accept the interest asserted by the United States as significant.[36] These courts then closely scrutinize the relevant foreign law for characteristics or exceptions that would indicate that the foreign state's

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32. The balancing of interests test relies heavily upon the Restatement, which provides in relevant part:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
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> (a) vital national interests of each of the states,
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> (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
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> (c) the extent to which the required conduct is to take place in the territory of the other state,
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> (d) the nationality of the person, and
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> (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.

RESTATEMENT, *supra* note 6, § 40.

This test, or a derivative of it, has been adopted by many lower federal courts. *See, e.g.*, United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1389 (11th Cir. 1982) (Restatement balancing test adopted and applied); United States v. Vetco, Inc., 644 F.2d 1324, 1331 (9th Cir. 1981) (factors court must balance in determining whether to enforce summons are essentially those set forth in Restatement); United States v. Field, 532 F.2d 404, 407-09 (5th Cir. 1976) (Restatement balancing test appropriate for deciding between conflicting national laws); Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972) (application of balancing test by district court not an abuse of discretion). Some courts apply the balancing of interests test in determining whether to issue production orders or compel testimony, while others employ it at the sanctions stage. *Compare* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1318 (D.C. Cir. 1980) (balancing of interests used to determine propriety of order) *with* Westinghouse v. Rio Algom, Ltd., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (consideration of foreign law should be deferred until sanctions stage). Although some commentators have expressed a preference for the latter and have criticized courts that quashed production orders after balancing the relevant interests, this distinction is of little significance to the practical results of the tests. *See* Comment, *Ordering Production of Documents from Abroad in Violation of Foreign Law,* 31 U. CHI. L. REV. 791 (1964); Note, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal,* 37 N.Y.U. L. REV. 295 (1962).

33. RESTATEMENT, *supra* note 6, § 40.

34. For text of § 40, see *supra* note 32.

35. *See infra* notes 37-56 and accompanying text.

36. *See infra* note 37.

public policy interest is less substantial than that of the United States.[37] This analysis was applied in *United States v. Bank of Nova Scotia* (*In re* Grand Jury Proceedings),[38] when a bank refused to obey a subpoena duces tecum, issued by a grand jury investigating tax and narcotics law violations, on the grounds that compliance would violate the bank secrecy law of the Bahamas.[39] The *Bank of Nova Scotia* court found both the role of grand juries in criminal investigations and the collection of tax revenue to be significant national interests weighing in favor of exercising enforcement jurisdiction.[40] The interest of the Bahamas in the right of privacy, as reflected by its bank secrecy law, was held to be less important because Bahamian courts, under certain circumstances, could order production of the same documents sought by the United States grand jury. Furthermore, Bahamian law permitted bank officials who were performing their official functions to disclose limited information regarding bank accounts.[41] Accordingly, the court held that based upon the superiority of the United States interests, the subpoena should be enforced.[42]

On occasion, courts have been sufficiently impressed by the foreign state's demonstrated interest,[43] or sufficiently skeptical of the asserted United States

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37. *See, e.g.*, United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1390-91 (11th Cir. 1982) (vital role of grand jury investigation and importance of tax collection outweigh interest of Bahamas in privacy, because Bahamian court could order disclosure, and bank officials are permitted to release some information in performance of their jobs); United States v. Vetco, Inc., 644 F.2d 1324, 1331 (9th Cir. 1981) (U.S. interest in collecting taxes and prosecuting tax fraud is superior to Swiss interest in preserving bank secrecy when disclosure is allowed upon consent of party whose privacy is being protected); United States v. Field, 532 F.2d 404, 407-08 (5th Cir. 1976) (because Cayman Islands authorities could obtain requested information in domestic investigation, U.S. interest in effective grand jury proceedings represents stronger policy); United States v. First Nat'l City Bank, 396 F.2d 897, 901-05 (2d Cir. 1968) (because bank secrecy is a contractual obligation enforceable only by private litigation, because the right can be waived by the customer, and because bank secrecy is inferior to other recognized confidential relationships, German interest is subordinated to that of the U.S. in enforcing its antitrust laws); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117-19 (S.D.N.Y. 1981) (U.S. interest in integrity of securities markets is significant and Swiss interest is diminished by flexibility in its law); Westinghouse Elec. Corp. v. Rio Algom, Ltd., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (decision whether to exercise jurisdiction should be based upon importance of U.S. interests, importance of documents requested to the claim, and degree of flexibility in foreign law). Courts have not, however, required a showing that foreign criminal sanctions will be imposed for disclosure in order to demonstrate a superior foreign national interest. *See* United States v. First Nat'l City Bank, 396 F.2d 897, 901-02 (2d Cir. 1968).

38. 691 F.2d 1384 (11th Cir. 1982).

39. *Id.* at 1385-86.

40. *Id.* at 1391.

41. *Id.*

42. *Id.*

43. *See, e.g.*, FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1306, 1326-27 (D.C. Cir. 1980) (authority of FTC to serve compulsory process on French citizens rejected in light of French criminal penalties for disclosure of certain information and letter of protest by French embassy to U.S. State Department); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 998-99 (10th Cir. 1977) (contempt judgment for failure to com-

interest,[44] to quash production orders or reverse the imposition of sanctions. In *FTC v. Compagnie de Saint-Goban-Pont-a-Mousson,*[45] the court held that the FTC had no authority to serve French citizens with administrative subpoenas.[46] According to the court, the French national interest was adequately demonstrated by the imposition of criminal penalties for the disclosure of business information to be used in foreign legal proceedings and by a letter sent to the United States Department of State from the French embassy protesting the FTC practice.[47] The United States, on the other hand, failed to prove that Congress expressly intended to authorize the extraterritorial service of subpoenas by the FTC.[48]

For a short time, the United States Court of Appeals for the Second Circuit took a minority position by advocating extreme deference to conflicting foreign laws. In a series of cases, which arose shortly after the *Societe* decision but before the publication of the Restatement, the Second Circuit generally held that disclosure orders should not be enforced when foreign law prohibits the disclosure.[49] The Second Circuit later modified its analysis, however, and adopted the Restatement balancing test.[50]

Another factor in the test that has formed a primary basis for some judicial decisions is the extent of the hardship which enforcement of United States

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ply with discovery order reversed, in part because Canada demonstrated the strength of its interest in preventing disclosure by refusing letters rogatory).

44. *See, e.g.,* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1304 (D.C. Cir. 1980) (lack of clear congressional intent was one factor in rejecting authority of FTC to serve subpoenas on French citizens); Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 40-42 (2d Cir. 1972) (U.S. interest in names of bank customers small when bank provided other account information).

45. 636 F.2d 1300 (D.C. Cir. 1980).

46. *Id.* at 1304.

47. *Id.* at 1306, 1326.

48. *Id.* at 1304.

49. *See* Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962) (subpoena modified to exclude records located in Panama because Panamanian law provided criminal penalties for disclosure and because U.S. could apply to Panamanian authorities for release of bank records); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960) (subpoena duces tecum not enforced because compliance might violate Canadian law and interpretion of law is a matter for Canadian courts). The most extreme expression of the Second Circuit's position came in Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962), when the court stated, "Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries." *Id.* at 613. At the time the Second Circuit was taking this position, one commentator remarked that "[a]t present the law in this area, which concerns sensitive issues of foreign relations and has a potentially detrimental effect upon international harmony, consists of one basic principle—that courts should not order the violation of the law of a foreign state in its own territory. . . ." Note, *Limitations, supra* note 10, at 1464-65.

50. *See* Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972); United States v. First Nat'l City Bank, 396 F.2d 897, 901 (2d Cir. 1968); *see also* SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 116 (S.D.N.Y. 1981) (recognition that Second Circuit has abandoned position that violation of foreign law is absolute bar to production of documents).

law would impose upon the person subject to the court order.[51] Most cases emphasizing this factor have involved criminal penalties, although it has never been held that criminal sanctions are the only hardship sufficiently extreme to justify exemption from production orders.[52] Yet, even when the extent of the hardship attracts the court's attention, the national interest of the United States has also been an influential factor.[53]

Some courts expressly adopting the Restatement balancing test have considered additional factors not incorporated into the test. For example, good faith in attempting to comply with a court order has remained significant in some decisions.[54] The importance of the documents requested[55] and the availability of alternative means to obtain the information sought[56] have also assumed significance in some courts' analysis. Other courts have rejected the Restatement approach entirely in favor of their own balancing tests.[57]

The one consistent feature of the American courts' various analyses has been the absence of thoughtful consideration of foreign states' interests in

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51. *See, e.g.*, United States v. Vetco, Inc., 644 F.2d 1324, 1331-32 (9th Cir. 1981) (court not convinced that Swiss law represented "great danger" to corporation on which IRS summons had been served); United States v. First Nat'l City Bank, 396 F.2d 897, 901-02 (2d Cir. 1968) (compliance ordered since it would not result in penalty "substantially equivalent" to criminal sanctions); Application of Chase Manhattan Bank, 297 F.2d 611, 612 (2d Cir. 1962) (Chase could not respond to subpoena without suffering criminal penalties).

52. *See, e.g.*, FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1326 (D.C. Cir. 1980) (French criminal penalties for disclosing certain business information); Application of Chase Manhattan Bank, 297 F.2d 611, 612 (2d Cir. 1962) (Panamanian criminal penalty of fine for furnishing business documents for use in action abroad); Ings v. Ferguson, 282 F.2d 149, 151 (2d Cir. 1960) (Quebec statute prohibited banks and employees from sending business records outside the province).

53. *See, e.g.*, United States v. Vetco, Inc., 644 F.2d 1324, 1331 (9th Cir. 1981); United States v. First Nat'l City Bank, 396 F.2d 897, 904-05 (2d Cir. 1968).

54. *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 998 (10th Cir. 1977); United States v. First Nat'l City Bank, 396 F.2d 897, 905 (2d Cir. 1968).

55. *See, e.g.*, United States v. Vetco, Inc., 644 F.2d 1324, 1332 (9th Cir. 1981); Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 40 (2d Cir. 1972); United States v. Standard Oil Co. (N.J.), 23 F.R.D. 1, 3 (S.D.N.Y. 1958). *But see* United States v. Bowe, 694 F.2d 1256, 1258 (11th Cir. 1982) (no showing that subpoenaed documents are relevant is necessary); United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1387-88 (11th Cir. 1982) (requirement that relevance of documents be proven would unduly restrict grand jury).

56. *See, e.g.*, United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1390-91 (11th Cir. 1982) (order of judicial assistance an inadequate alternative to a subpoena); United States v. Vetco, Inc., 644 F.2d 1324, 1332-33 (9th Cir. 1981) (none of six proposed alternatives is equivalent to summons); Ings v. Ferguson, 282 F.2d 149, 151-52 (2d Cir. 1960) (district court could have used letters rogatory).

57. In Westinghouse Elec. Corp. v. Rio Algom, Ltd., 480 F. Supp. 1138 (N.D. Ill. 1979), the court found the Restatement test unworkable because the Canadian statute in question had been adopted specifically to prohibit discovery with respect to the production, distribution, and pricing of uranium, the subject of the litigation. The test established by the court included the following elements: the significance of the United States interests implicated in the decision, the importance of the documents to the claim, and the degree of flexibility in the conflicting foreign law. *Id.* at 1148.

enforcing their nondisclosure laws. In neither the good faith test, nor the balancing of interests test, are the interests of foreign nations accorded significant respect.[58] Courts have rested their decisions on the supremacy of U.S. interests,[59] on lack of good faith by the person being required to produce the documents,[60] and on the absence of a sufficiently extreme hardship[61] or a failure to prove such hardship.[62] On the whole, the failure of the courts to balance all relevant factors, the varying emphases of different courts, and the lingering effect of the good faith test have created an uncertainty in the law at a time when, because of increasing international activity, corporations are in need of clear principles upon which to rely in making decisions and taking action with respect to establishing and conducting foreign operations.

First Chicago Facts and Procedure

As part of an effort to levy and collect taxes owed by Christ and Helen Panos for the years 1970 through 1972,[63] IRS officer Earl Tripplett issued a summons to First Chicago in September of 1978.[64] The summons required First Chicago to produce bank statements of the Panoses, who resided in Greece at the time, for the month of June 1978, and to disclose the amount contained in their deposit with First Chicago's branch in Athens, Greece, as of June 19, 1978.[65]

First Chicago responded to the summons with a letter to the IRS stating that its Greek counsel had advised that production of the required information would violate the Greek Bank Secrecy Act ("the Act")[66] and subject

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58. *See supra* notes 29-40 and accompanying text.

59. *See supra* notes 36-37 and accompanying text.

60. *See supra* notes 29-31 and accompanying text.

61. *See supra* notes 51-53 and accompanying text.

62. Failure of proof has been a determining factor in a number of cases. *See, e.g.,* United States v. First Nat'l City Bank, 379 U.S. 378, 384 (1965); United States v. Vetco, Inc., 644 F.2d 1324, 1331-32 (9th Cir. 1981); First Nat'l City Bank v. IRS, 271 F.2d 616, 620 (2d Cir. 1959); *In re* Grand Jury 81-2, 550 F. Supp. 24, 28 n.1 (W.D. Mich. 1982).

63. Reply Memorandum for Appellant in Opposition to Government's Motion to Vacate Stay Pending Appeal at 1, United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983).

64. Brief for Appellant at 1, United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983).

65. 699 F.2d 341, 342 (7th Cir. 1983).

66. The Greek Bank Secrecy Act, as quoted by the court, provides:

Article 1: Deposits in Greek banks are regarded as secret.

Article 2:

1. Governors, members of the board, [members of] other collective bodies, or employees of a bank who, in the course of their duties acquire knowledge of deposits, convey any information in any manner are punished with a minimum of 6 months' imprisonment.

The consent or approval of the depositor who has the right to secrecy does not change the punishable nature of the act.

2. Upon conviction for the offense mentioned in the above paragraph, the court

its employees who disclosed data regarding the accounts of its depositors to criminal prosecution.[67] First Chicago did confirm, however, that the Panoses maintained one account at its Athens branch and informed the IRS that in June of 1978, the account contained approximately 40,000 Greek drachmas or about 1,100 U.S. dollars.[68]

Despite this response, the IRS petitioned the district court to enforce the summons, and the court ordered compliance.[69] First Chicago subsequently moved to vacate the order, again arguing that adherence to it would force its Athens branch employees to violate Greek law.[70] In support of its motion, First Chicago supplied two letters from its Greek counsel which stated that disclosure of bank account records to United States authorities would violate the Greek Bank Secrecy Act, and that the minimum penalty for violating the Act was six months imprisonment, for which a fine could not be substituted.[71] The government then filed an answering memorandum and, without opinion, the district court denied the motion to vacate.[72]

First Chicago followed with a motion for reconsideration, after receipt of which the district court held a hearing and allowed First Chicago to reply to the IRS memorandum.[73] Two affidavits were submitted by First Chicago at this time, one from the manager of its Athens branch and one from its records manager. The branch manager stated that, to his knowledge, the Act was still in effect, that First Chicago had retained the same Greek counsel for nine years, and that Greek currency exchange regulations restricted the conversion of drachmas into another currency and the transmittal of drachmas outside Greece.[74] The affidavit of the records manager explained that the records requested by the IRS were maintained only at the Athens branch.[75]

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cannot order suspension of the above penalty nor can it change a conviction to a fine.

3. The persons mentioned in paragraph 1, called upon as witnesses at a civil or criminal trial, cannot be questioned on the secret deposits, even though the depositor consents.

Article 3: As an exception, information is allowed on secret bank deposits only by virtue of a specially justified decision of a domestic court, to the extent that the information is regarded as absolutely necessary for searching and punishing offenses which are regarded as felonies committed in Greece.

Id. at 344 n.2.

67. *Id.* at 342.

68. *Id.* The government argued that by releasing this information, First Chicago had waived the foreign law defense. Brief for Appellee at 14, United States v. First National Bank of Chicago, 699 F.2d 341 (7th Cir. 1983) [hereinafter cited as Brief for Appellee]. The language of the Act indicates that even this disclosure may have constituted a violation. *See supra* note 66.

69. 699 F.2d at 342.

70. *Id.*

71. *Id.* The letters were dated March 9, 1972, and July 1, 1978, both prior to the initiation of this litigation. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 342-43.

75. *Id.* at 343.

Again without opinion, the district court denied the motion for reconsideration but granted a stay of its enforcement order pending appeal.[76]

THE *FIRST CHICAGO* DECISION

The Seventh Circuit Court divided its analysis in *First Chicago* into two distinct parts. Initially, it held that First Chicago adequately met its burden of proving that Greek law prohibited, under penalty of imprisonment, disclosure of the records required by the IRS summons.[77] It then turned its attention to whether, notwithstanding the effect of the Greek law, First Chicago should be ordered to comply with the summons.[78]

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76. *Id.*

77. *Id.* at 345. As a threshold issue, the court of appeals determined that because the district court issued no opinion, and because determinations of foreign law are questions of law rather than fact, the Seventh Circuit was entitled to review independently the evidence offered at trial to prove the effect of the Act. *Id.* at 344; *see also* FED. R. CIV. P. 44.1 (determination of foreign law shall be treated as a ruling on a question of law).

The government claimed that discrepancies between the translation of the Act it received from the Library of Congress, and the certified translation which First Chicago obtained from the Greek Ministry of Foreign Affairs, affected the meaning of the Act. In particular, the government argued that its version of Article 3 could be interpreted to include an exception to the general secrecy requirement for investigations of offenses that would be considered a felony in Greece, regardless of where the offense occurred. Brief for Appellee, *supra* note 68, at 11-12. The court reproduced the version from the Library of Congress in its opinion, *see supra* note 66, but described the discrepancies as insubstantial and did not comment on the government's proposed interpretation of Article 3. 699 F.2d at 344 n.2.

In evaluating the sufficiency of proof offered by First Chicago, the court of appeals reviewed the letters from First Chicago's Greek counsel, the affidavits of the Athens branch manager and the records manager, and two English translations of the Act. *Id.* at 343-45. The court accorded much probative value to the letters from First Chicago's Greek counsel, although the letters were unsworn. *Id.* at 345. The government had argued that, at a minimum, sworn affidavits are required to prove foreign law. Brief for Appellee, *supra* note 68, at 10. But, as the Seventh Circuit noted, the Federal Rules of Civil Procedure allow the consideration of a broad range of relevant material. 699 F.2d at 343-44 (citing FED. R. CIV. P. 44.1). Because the letters were not prepared in anticipation of the litigation and because First Chicago had retained the same counsel for several years, the court concluded that the letters were reliable. *Id.* at 345. The failure of the government to offer evidence to dispute the statements made in the letters also bolstered the court's confidence in their accuracy. *Id.*

Somewhat less clear were the issues of whether the Act was currently in effect and whether it applied to branches of foreign banks located in Greece. The letters of counsel failed to cite any authorities to support their contention that recent cases had enforced the Act against foreign bank branches. Brief for Appellee, *supra* note 68, at 13. The general reliability of the letters and the "clear and unambiguous" language in the Act, however, combined to overcome those deficiencies. 699 F.2d at 344-45. The statement in the branch manager's affidavit that the law remained in effect was deemed adequate by the Seventh Circuit due to the manager's experience supervising employees in Greece and his likely expertise in areas related to that function. *Id.* at 345. Finally, the records manager's statement that the required records were held only in Athens demonstrated to the court that persons subject to the Act would likely be involved in disclosing the summoned data. *Id.*

78. 699 F.2d at 345-47.

The court of appeals adopted the Restatement balancing test as a framework for evaluating this issue[79] and, after enumerating the factors in the test, proceeded to apply each of them to the *First Chicago* situation. The fact that the disclosure would be initiated in Greece and the likelihood that Greek nationals would participate in the release of the information weighed in favor of First Chicago, because exposure of those individuals to criminal liability in Greece would be high.[80]

The Seventh Circuit then emphasized the extent and nature of the hardship that compliance would inflict upon the individual employees of First Chicago.[81] Citing a comment from the Restatement, the court noted that when criminal sanctions rather than civil liability are involved, a state should consider more seriously the option of not exercising its enforcement jurisdiction.[82] In *First Chicago,* those sanctions included only imprisonment, with no possibility of reduction to a fine. The rationale for employing such restraint was further strengthened, according to the court, because First Chicago was a neutral party, a mere source of information for the IRS, rather than an adverse party.[83]

With respect to the relative national interests implicated in the conflict, the *First Chicago* court recognized the importance of the broad interests of the United States in revenue collection as well as Greek interests in bank secrecy laws.[84] Upon closer inspection, however, the Seventh Circuit found that the U.S. interest in this case was actually a limited one. No investigation of criminal tax evasion was involved because the summons was served only for the purposes of levy and collection.[85] Additionally, because the Panoses' deposit with First Chicago was a small one, the information regarding the account would have been of little value to the IRS.[86] Furthermore, the existence of currency exchange control regulations may have frustrated attempts by the IRS to collect and convert the drachmas held in that account, even if First Chicago supplied the summoned information.[87] After weighing the serious hardship that compliance would impose on First Chicago's Greek employees against the relatively weak interest of the United States, the court concluded that the district court's order enforcing the summons should be reversed.[88]

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79. *Id.* at 345.
80. *Id.* at 345-46.
81. *Id.*
82. *Id.* (citing RESTATEMENT, *supra* note 6, § 40 comment (c)).
83. *Id.* at 346.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 347. This holding, however, did not end the court's analysis. The Seventh Circuit further noted that the Restatement is being revised, and the court relied upon a principle expressed in a draft of the revision to remand the case for further proceedings. *Id.* at 346-47. The section invoked by the court states:

If disclosure of information located outside the United States is prohibited by a

ANALYSIS AND CRITIQUE

The *First Chicago* court performed a complete and thoughtful balancing of several of the Restatement test factors. With respect to the vital national interests involved in the case, the court realistically considered the interests actually affected, rather than resting its decision upon vague references to general policy concerns.[89] Although it recognized the broad significance of effective tax law enforcement, the Seventh Circuit remained flexible in evaluating all relevant facts, including those tending to diminish the importance of United States interests.

The court of appeals also conducted a thorough examination of the extent of the hardship to First Chicago employees that would result from an order compelling production of the Panoses' bank records. Unlike some other courts that have viewed this factor as secondary to American policy interests,[90] the *First Chicago* court elevated the extent of hardship to a major position in the Restatement test hierarchy.[91] The evaluation of potential hardships constituted the primary rationale for the court's holding. The location at which the disclosure would occur, the nationality of those likely to make the disclosure, the unambiguous wording of the Greek Act, and the status

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> law or regulation of the state in which the information or prospective witness is located . . . the person to whom the order is directed may be required by the court to make a good faith effort to secure permission from the foreign authorities to make the information available.

Id. at 346 (quoting RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 (2) (Tent. Draft No. 3) [hereinafter cited as DRAFT RESTATEMENT]). The court hypothesized that the Athens branch might lawfully forward the required records to First Chicago's head office in the United States, based upon the narrow exception contained in Article 3 of the Act. 699 F.2d at 346. Applying the Draft Restatement principle to this theory, the court of appeals remanded the case to the district court to determine if an obligation should be imposed upon First Chicago to investigate, in good faith, how Greek authorities construe Article 3 and whether the summoned information could be transmitted to First Chicago personnel in the United States without violating the Act. *Id.*

89. *Id.* at 345-46. Such reliance on vague policy interests can be seen in other decisions. *See, e.g.*, Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 205-06 (1958) (courts should avoid undermining congressional policies and should discourage evasive placement of assets in jurisdictions with bank secrecy laws); United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1391 (11th Cir. 1982) (avoid emasculation of grand jury process and financial integrity of U.S.); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117 (S.D.N.Y. 1981) (maintain integrity of financial markets); United States v. Field, 532 F.2d 404, 407-08 (5th Cir. 1976) (preserve pivotal role of grand jury and protect financial integrity of the republic).

90. *See, e.g.*, United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1391 (11th Cir. 1981) (inconsistent legal commands of separate sovereigns creates an unfortunate situation, but U.S. criminal investigations cannot be hindered by conflicting foreign law); United States v. Field, 532 F.2d 404, 410 (5th Cir. 1976) (requiring defendant to violate law of his country of residence is regrettable, but court can not acquiesce in thwarting of criminal investigations by foreign law); First Nat'l City Bank v. IRS, 271 F.2d 616, 620 (2d Cir. 1959) (if bank cannot comply with laws of both sovereigns, it may have to surrender the privileges received from one sovereign or the other).

91. 699 F.2d at 345-46.

of First Chicago in the underlying dispute were reviewed by the court in light of their impact upon the likelihood of, and justification for, the imposition of the Act's severe sanctions.[92] Ultimately, the court concluded that the possibility that compliance with the IRS summons would expose individual employees, of a third-party source of information, to criminal liability and imprisonment constituted a sufficiently extreme hardship to outweigh the United States' interest in the strict enforcement of its tax laws.[93]

The *First Chicago* court's analysis of these issues differs substantially from that of the majority of U.S. courts.[94] Consequently, *First Chicago* adds to the existing confusion and uncertainty among courts in their approach to foreign nondisclosure laws. As a result, business enterprises remain unable to evaluate fully the risks attendant in locating affiliates in countries with nondisclosure laws, or in adopting courses of action or modes of operation with respect to the release of information. The absence of predictable legal consequences to their actions deprives businesses of a valuable decision-making tool.

The Seventh Circuit's treatment of the vital national interests of Greece, however, resembles that of most United States courts faced with cases involving nondisclosure laws.[95] That treatment failed to identify the nature of the Greek interests or discuss the policies or principles underlying the Act. By proposing that First Chicago should attempt to acquire permission to forward the records to its head office, the court of appeals revealed that its main concern was the avoidance of criminal sanctions, not the privacy rights which the Act may have been designed to protect.[96] If the Act contained broader exceptions to its basic secrecy requirement or imposed lesser penalties, it is likely that the *First Chicago* court's balancing analysis would have produced a different result.[97]

One reason for this general neglect of foreign states' interests may be the United States courts' unfamiliarity with the nature and purpose of nondisclosure laws, which are common in countries with civil law systems.[98] The right of individual privacy is significantly more developed and well established in civil law countries than it is in the United States; often it includes the right to privacy in business transactions and financial affairs.[99] Because the

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92. *Id.*

93. *Id.* at 346.

94. *See supra* notes 89-90 and accompanying text.

95. *See supra* notes 36-37 and accompanying text.

96. In *Application of Chase Manhattan Bank,* a similar approach was rejected as an attempt to circumvent the relevant law, an act which would show little respect for the interests of the foreign state involved. 297 F.2d 611, 613 (2d Cir. 1962).

97. *See supra* notes 36-37 and accompanying text.

98. *See* Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States,* 14 NEW ENG. L. REV. 18, 20-22 (1978).

99. Civil law systems distinguish between public law, which governs the relations between the state and the citizen, and private law, which regulates the relations between citizens. J.H. MERRYMAN, THE CIVIL LAW TRADITION 76 (1969). Private law recognizes that certain rights, including those of personality, are absolute. *Id.* at 79-80. Personality rights generally protect

United States places less importance on privacy rights than do civil law countries, its courts are less likely to respect nondisclosure laws enacted to protect those rights.

Some American courts also view foreign nondisclosure laws as vehicles by which to veil criminal activity.[100] Such laws can be used to hide illegally obtained money, to evade taxes, and to circumvent business regulations.[101] Nevertheless, a legitimate and highly valued legal principle, rather than mere economic gain,[102] may underly a state's adoption and enforcement of nondisclosure laws.

The lack of appreciation for civil law privacy concepts, combined with the advantages that such laws provide in the commission of crimes, have led U.S. courts to overemphasize United States' interests at the expense of a meaningful consideration of foreign states' interests.[103] Although the *First Chicago* court did not show undue deference to United States interests, neither

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characteristics of personhood inherent in all human beings, Meyer, *supra* note 98, at 20, and specifically include the rights to a name, an image, legal status and capacity, and physical and intellectual integrity. J.H. MERRYMAN, *supra,* at 80; Meyer, *supra* note 98, at 20. Protection of private rights, including those of the legal personality, is the primary role of the state in private law. J.H. MERRYMAN, *supra,* at 100. State enforcement of confidential relations between persons is one mechanism for implementing this role. Meyer, *supra* note 98, at 21. The business transactions and financial affairs of individuals are often considered confidential and, thus, qualify for such protection. *Id.* at 22.

The United States, however, provides no explicit constitutional right to privacy and, therefore, enforceable privacy rights remain generally vague and relatively narrow in scope. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 893-94 (1978). Furthermore, because the Constitution restrains only government action, *id.* at 1147, it provides little protection for confidential relations between citizens. In the banking context, the United States imposes a duty upon banks to disclose information about their accounts. De Masters v. Arend, 33 F.2d 79, 83 (9th Cir.) (IRS can investigate bank records of individuals although statute of limitations would bar recovery), *appeal dismissed,* 375 U.S. 936 (1963); Pollard v. Roberts, 283 F. Supp. 248, 259 (E.D. Ark.) (depositor has no standing to prevent subpoena of bank records in investigation of election law violations), *aff'd,* 393 U.S. 14 (1968); United States v. People's Deposit Bank & Trust Co., 112 F. Supp. 720, 723-24 (E.D. Ky. 1953) (depositor has no proprietary interest in bank records and IRS can require bank to produce such records), *aff'd,* 212 F.2d 86 (6th Cir.), *cert. denied,* 348 U.S. 838 (1954); 12 U.S.C. § 1829 (b) (1980) (national banks must retain records useful in investigations); 31 U.S.C. § 5391 (Secretary of Treasury must make information in required bank reports available to other federal agencies). Furthermore, the United States does not recognize that individuals have an expectation of privacy in their banking activities. United States v. Miller, 425 U.S. 435, 442-43 (1976).

100. *See, e.g.,* United States v. Vetco, Inc., 644 F.2d 1324, 1333 (9th Cir. 1981); United States v. Field, 532 F.2d 404, 408-09 (5th Cir. 1976). *But see* Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 607 (9th Cir. 1976) (legitimacy of national interests is assumed; only relative concern and involvement of each state should be evaluated).

101. *See generally* Comment, *The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes,* 73 J. CRIM. L. & CRIMINOLOGY 675, 681-86 (1982) (description of various tax evasion schemes aided by secrecy laws).

102. Some poor countries attempt to raise revenue through bank licensing fees and seek to attract banks by offering the advantages of strict secrecy laws. *Id.* at 678-79. Some have been spectacularly successful. The Bahamas, for example, held $95.2 billion in foreign assets in its banks in 1978, while it needed only $1.8 billion to finance its foreign trade. *Id.* at 680.

103. As one commentator has noted, considerations of international comity rarely have been

did it review the interests of Greece adequately in reaching its decision.

The position of the American courts with respect to foreign nondisclosure laws has provoked much criticism as part of a general reaction against the extraterritorial application of United States law.[104] Several countries have enacted laws to prevent U.S. courts from exercising jurisdiction over persons and acts occurring within these nations' territories, particularly in the areas of antitrust law and discovery orders.[105] Even nations with which the United States enjoys generally friendly relations perceive the use of production orders as arrogant attempts by the United States to extend its laws and policies beyond its borders.[106] That arrogance is clearly demonstrated by the

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found controlling when U.S. courts have been requested to order conduct in violation of the law of a foreign state. Note, *Limitations, supra* note 10, at 1485.

104. *See generally* Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction,* 30 AM. U.L. REV. 323, 324 (1981) (foreign criticism of extraterritorial exertions of jurisdiction by U.S. courts is based on both economic and political considerations); Grundman, *The New Imperialism: The Extraterritorial Application of United States Law,* 14 INT'L LAW. 257, 258 (1980) (extraterritorial application of U.S. law causes foreign subsidiaries of U.S. companies to be perceived as instruments of U.S. policy); Onkelinx, *supra* note 9, at 499-500 (extraterritorial application of U.S. law has generated criticism and friction); Note, *Compelling Production, supra* note 9, at 880 (foreign resistance to U.S. production orders is frequent); RESTATEMENT, *supra* note 6, § 40 reporters' note 2 (foreign governments have criticized extraterritorial application of antitrust laws as exceeding U.S. authority).

105. *See generally* Note, *Compelling Production, supra* note 9, at 879 (nondisclosure laws adopted in reaction to extraterritorial application of U.S. law); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation,* 88 YALE L.J. 612, 613 n.5 (1979) (a number of foreign nondisclosure laws were adopted to prevent perceived U.S. intrusions on territorial integrity of foreign nations resulting from antitrust litigation). Prominent among these laws is the Protection of Trading Interests Act, 1980, ch.11 (U.K.), under which British courts can order their subjects not to comply with the judgments of foreign courts if compliance poses a danger to British trading interests. In addition, it allows corporations doing business in the United Kingdom to sue in British courts to recover any punitive damages imposed against these corporations in foreign litigation. *See also* Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 Austl. Acts 1125, *as amended by* 1976 Austl. Acts 1743 (providing criminal penalties for production of documents regarding designated subjects); Uranium Information Security Regulations, CAN. STAT. O. & REGS. 76-644 (1976) (prohibiting production of certain documents and testimony related to uranium marketing activities); Economic Competition Act of June 28, 1956, art. 39, Stb. 401, *as amended by* Act of July 16, 1958, Stb. 413 (Neth.) (preventing disclosure of documents requested in foreign discovery and compliance with foreign court orders that affect economic competition).

106. Several international conferences have been critical of the efforts by U.S. courts to assert their jurisdiction extraterritorially. *See* [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 963, at A-10 (May 5, 1980) (41 British Commonwealth nations adopt resolution critical of extraterritorial enforcement of U.S. antitrust laws); Report of the Fifty First Conference, INTERNATIONAL LAW ASSOCIATION (Tokyo 1964) 301-47 (diplomats protest and criticize U.S. exercise of extraterritorial jurisdiction). A British court demonstrated its opposition to the extraterritorial jurisdiction of U.S. courts in the prominent case of British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., [1953] 1 Ch. 19. In that litigation, Imperial, a British corporation doing business in the United States, was ordered by a U.S. court to cancel an assignment of patents it had received because the assignment violated U.S. antitrust laws. United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952). Imperial had already granted an exclusive license for the patents to another English company and the British court ordered

failure of U.S. courts, including the *First Chicago* court, to consider the interests of the foreign state whose law is being interpreted. This attitude not only risks damaging American relations with individual countries, but it may also contribute to a deterioration of the climate for international trade, which represents a major portion of the United States' economy.

In *First Chicago,* the Seventh Circuit also revived the good faith test by remanding the case to the district court.[107] The court of appeals did not attempt to judge the good faith of First Chicago's past behavior, but it directed the district court to consider whether an obligation should be imposed upon First Chicago to obtain a waiver from the Greek government.[108] The court's requirement that permission to disclose the information be sought in good faith represents a less intrusive procedure than an enforcement order, but it may give the district court excessive authority to order compliance by finding a lack of good faith when the balancing test would operate against compelling production.

The *First Chicago* analysis, while it represents a full and fair balance of several Restatement factors, illustrates deficiencies in that approach. These include placing insufficient importance upon the interests of the foreign state, failing to relate the exercise of jurisdiction to the accomplishment of national interests, and removing the good faith of the parties as a factor for consideration. Thus, a new test, eliminating these deficiencies, should be considered.[109]

SUGGESTIONS FOR A REVISED TEST

The wavering of courts between the two established tests, and the inconsistent application of the balancing test, may be partially explained by the fact that neither test provides courts with adequate guidelines for a fair resolution of all conflicts between production orders and nondisclosure laws.[110] Courts have ignored some of the factors in the Restatement test and have

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specific performance of that agreement, notwithstanding the U.S. court order. *British Nylon Spinners,* 1 Ch. at 25. The court regarded the U.S. court's order as an intrusion upon British sovereignty because it directed a British national to violate a British agreement in an effort to serve the interests of United States trade. *Id.*

107. *First Chicago,* 699 F.2d at 346.

108. The order for remand is consistent with the statement in *Societe* that the person resisting production is in the best position to secure a relaxation of the foreign government's nondisclosure law. Nevertheless, it is inconsistent with *Societe* because a good faith test is used to determine whether to enforce the summons and not used to choose appropriate sanctions. Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 205 (1958).

109. The modified good faith test employed in *First Chicago* is based on DRAFT RESTATEMENT, *supra* note 88, § 420. This modified test requires the person subject to the production order to make a good faith attempt to obtain permission to disclose the required information. Under this test, the result of such a good faith attempt is one of several factors to be considered in making a determination of whether a production order should issue.

110. *See generally* Note, *Compelling Production, supra* note 9, at 897-905 (both good faith test and balancing of interests test seriously flawed).

established varying hierarchies of factors based upon their own perceptions and priorities. Although flexibility is necessary in any test to enable courts to use it under differing circumstances, the balancing test must incorporate additional principles that will accomplish certain basic goals: to avoid unnecessarily subjecting individuals to unfair legal sanctions, to accord the interests and policies of all states the respect to which they are entitled under international law, and to prevent courts from interfering with United States' foreign relations and, thereby, becoming a source and target of political controversy. Neither test presently accomplishes these goals.

The good faith test is most objectionable because it considers only the behavior of the person subject to the production order.[111] Thus, if that person has acted in good faith, important U.S. interests may be ignored; if he has not acted in good faith, the interests of the foreign state and the burden on that person, or on third parties, become irrelevant to the court's decision.

Nevertheless, the good faith actions of the person subject to the production order should remain a factor for judicial consideration. The Restatement balancing test, however, fails to incorporate this factor and is therefore unsatisfactory. As suggested in *First Chicago,* courts should consider first whether an attempt has been made to secure permission from the foreign state to disclose the required information.[112] Then, if no such effort is shown, the court should require the party to pursue in good faith the possibility of obtaining a waiver or relaxation of the foreign law, before it proceeds with balancing other factors to determine the propriety of issuing an enforcement order.[113] Bad faith, or the deliberate courting of legal impediments, should be added to the list of factors in the Restatement balancing test and should weigh heavily in deciding whether to compel production or order sanctions.[114]

The Restatement test is also deficient in its treatment of vital national interests. It includes those interests as one of the factors to be used in determining whether enforcement jurisdiction should be exercised,[115] but it provides no meaningful guidelines for balancing conflicting interests. Furthermore, the Restatement does not require that courts review the policies that underlie the foreign state's interest in enacting and enforcing its nondisclosure laws.

As one commentator has noted, the narrow definition of "vital national

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111. *See supra* notes 20-31 and accompanying text.

112. 699 F.2d at 346.

113. This approach was recommended by the court in Montship Lines, Ltd. v. Federal Maritime Bd., 295 F.2d 147, 156 (D.C. Cir. 1961).

114. The presence of bad faith, however, should not automatically result in an order to compel production or sanction. For example, in *First Chicago,* if bad faith on the part of the bank had been found, the court should still have considered the hardship that would be imposed upon employees who may have had no role in, or knowledge of, the bank's acts.

115. RESTATEMENT, *supra* note 6, § 40.

interest"[116] in the Restatement, and its position that the existence of a vital national interest weighs in favor of exercising jurisdiction, have led courts to focus on the interests of the United States without attempting to reconcile them with those of the foreign state.[117] The resulting balance then becomes, as it was in *First Chicago,* one between the national interests of the United States and the hardship that compliance with the production order would impose.[118] The *First Chicago* court's analysis, typical of most U.S. courts, fails to identify and accommodate the policies of the foreign state as reflected in its laws.[119] Foreign national interests are typically addressed by finding an exception in the nondisclosure law in order to demonstrate that no strong policy supports the law.[120] The important interest a nation has in interpreting its own law through its established procedures, in order to protect the policies and accomplish the purposes underlying those laws, has been recognized in only one decision.[121] To remedy this analytical imbalance, the balancing test should require that in evaluating national interests, courts extend the same degree of respect and legitimacy to the laws of the United States as to the laws of foreign nations. Additionally, the test should require that courts review the public policies underlying a foreign law to determine its importance in the context of its country's legal system.

Another problem with the Restatement balancing test is its failure to consider whether enforcement of a particular law would further the articulated national interest. In document production cases, this would require a finding that the information being sought is relevant and important to the ultimate purpose of the authority ordering its production (i.e., criminal investigation, tax collection, or other objective). By noting that the amount of the deposit in question was small and that currency exchange regulations were operative in Greece, the *First Chicago* court not only examined the actual nature of the U.S. interests, but also determined that enforcement of the summons would not significantly further those interests. The balancing test should

116. In a comment to the Restatement, vital national interests are defined as interests such as "national security or general welfare to which a state attaches overriding importance." RESTATEMENT, *supra* note 6, § 40 comment (b).

117. Note, *Compelling Production, supra* note 9, at 900.

118. *First Chicago,* 699 F.2d at 345-46.

119. *Id.* at 346.

120. *See, e.g., id.; see also supra* notes 34-37 and accompanying text. The reliance upon exceptions in the foreign law to measure the strength of the foreign state's public policy may not be totally misplaced. Review of the substance and wording of laws may provide an objective means by which courts can determine the foreign state's interest without making judgments regarding the legitimacy of the state's objectives. It would seem difficult, however, to evaluate the significance of a particular exception without some understanding of the underlying policies. In addition, the United States law at issue may contain exceptions that could be interpreted as revealing an insubstantial national interest. Perhaps because of their greater familiarity with, and appreciation for, the purposes of the U.S. law, or because of their suspicion of foreign law, U.S. courts have not performed equivalent analyses of the conflicting foreign laws in regard to the national interests that they reflect.

121. Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960).

specifically require that the national interests be evaluated according to their particular importance in each case; this would discourage courts from routinely accepting the preeminence of a United States policy concern.

The balancing test would also be improved by incorporating consideration of the availability of alternative means to acquire the information sought by the government. Some courts have refused to make use of alternative means such as letters rogatory,[122] treaty procedures,[123] applications for judicial assistance,[124] and other procedures to avoid the intrusiveness of an enforcement order. The *First Chicago* court mentioned the possible relevance of the tax treaty of the IRS European office between the United States and Greece, but it never reached the point of seriously examining these potential alternatives.[125] Attempts to employ such measures could achieve the United States government's purpose while allowing the foreign state to interpret its law and control its procedure.

The incorporation of these factors into the Restatement balancing test could strike a fairer balance among competing interests when a U.S. court is confronted with a foreign nondisclosure law. Yet, it is the manner in which courts apply the test that will determine the extent to which foreign law is respected and whether the uncertainty in this area will be resolved.

CONCLUSION

The *First Chicago* holding creates a conflict among United States courts of appeals regarding the propriety of enforcing an order to produce infor-

122. *See, e.g.,* United States v. Vetco, Inc., 644 F.2d 1324, 1332-33 (9th Cir. 1981). *But see* Ings v. Ferguson, 282 F.2d 149, 152-53 (2d Cir. 1960) (court of appeals suggesting that district court might have used letters rogatory); *cf.* General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 295 (S.D. Cal. 1981) (letters rogatory rejected by Supreme Court of Canada). A letter rogatory is a "medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the requesting country." BLACK'S LAW DICTIONARY 815 (5th ed. 1979). Letters rogatory most often involve requests for testimony or information which is within the jurisdiction of the other country. *Id.*

123. *See, e.g.,* United States v. Vetco, Inc., 644 F.2d 1324, 1332 (9th Cir. 1981). One particularly relevant treaty is the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for Signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, in which the United States has joined. This convention allows judicial authorities in one state to forward "Letters of Request" to a designated recipient in another state, which will transmit them to the competent authorities for review and execution. The Letters may request the execution state to take testimony, obtain evidence, or perform other judicial acts, not including the issuance of process. 23 U.S.T. at 2557-58. The execution state may refuse to honor the request if the requested action is not one of its judicial functions or if its sovereignty would be prejudiced. *Id.* at 2562. Yet, the execution state may not refuse solely because it claims exclusive jurisdiction over the subject matter of the request. *Id.* at 2562-63. At least one court has considered use of this procedure a viable alternative. Volkswagenwerk Aktiengesellschaft v. Superior Ct., 123 Cal. App. 3d 840, 852-53, 176 Cal. Rptr. 874, 881-82 (1981).

124. *See, e.g.,* United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384, 1390-91 (11th Cir. 1982).

125. 699 F.2d at 346.

mation in violation of foreign law.[126] The *First Chicago* court's application of the Restatement balancing test differs significantly from that of the majority of courts in its thorough examination of the articulated U.S. interests, and in its recognition that the enforcement of American law must be tempered by fairness to persons subject to conflicting legal dictates. This conflict contributes to the already uncertain status of the law on these issues, and it creates practical problems for corporations in analyzing the legal and economic impact of their decisions. Correcting the deficiencies in the Restatement balancing test in a manner suggested by the *First Chicago* analysis would contribute substantially to obtaining more consistent results in cases involving nondisclosure laws.

An additional problem is demonstrated by the *First Chicago* court's superficial analysis of, and inadequate appreciation for, Greek interests. This analysis, which is consistent with that of the majority of courts,[127] does nothing to correct the negative effect that the extraterritorial enforcement of United States law has had on international relations.[128] The adverse legislative and judicial reactions of foreign nations to the tendency of U.S. courts to extend their authority are likely to continue and may result in a deterioration of the overall international economic climate. Until courts modify their practice of blindly accepting asserted United States interests and engage in good faith evaluations of foreign interests, the situation will not improve. The *First Chicago* court's careful review of American interests, and its appreciation of the hardship that enforcement of the production order would impose, are positive developments in the approach taken by U.S. courts toward exercising extraterritorial jurisdiction. Nevertheless, *First Chicago* failed to give appropriate consideration to the interests of Greece.

Because the *First Chicago* court did not expressly distinguish its analysis from that of previous cases and did not adequately consider the interests of Greece, it failed to sharpen the issues in a manner that would force a recognition of the conflict. The United States Supreme Court, which has not ruled on the issues raised by nondisclosure laws since *Societe Interna-*

126. *See supra* note 5. The *First Chicago* court addressed this conflict by identifying several factual distinctions which purportedly reconciled its decision with the Eleventh Circuit's opinion in United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 691 F.2d 1384 (11th Cir. 1982). *See First Chicago,* 699 F.2d at 346-47. The Seventh Circuit first noted that in *Bank of Nova Scotia,* the district court determined that the bank did not make a good faith effort to comply with the subpoena that had been issued by a grand jury investigating tax evasion and narcotics trafficking. *Id.* at 347. In addition, evidence existed that the bank deliberately sought the protection of the Bahamian secrecy laws because its United States branch may have been able to handle all the transactions of its foreign branch. *Id.* Also, the Bahamian law in question allowed the release of records upon customer consent and granted its courts greater power to permit disclosure than did the Greek statute involved in *First Chicago. Id.* Based on these factual dissimilarities, the *First Chicago* court considered the cases distinguishable and not conflicting. *Id. But cf. supra* notes 90-109 and accompanying text for a discussion of the distinctions between the analyses of the *First Chicago* court and that found in cases such as *Bank of Nova Scotia.*

127. *See supra* notes 37, 95 and 118 and accompanying text.

128. *See supra* notes 105-07 and accompanying text.

tionale pour Participations Industrielles et Commerciales, S.A. v. Rogers, should take a fresh look at the problems caused by subsequent lower court decisions and resolve the existing conflict among the circuits.

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