

Reinforcing the Hague Convention on Taking Evidence Abroad After Blocking Statutes, Data Privacy Directives, and Aérospatiale

BRIAN FRIEDERICH*

TABLE OF CONTENTS

I.	INTRODUCTION	264
II.	HISTORY OF EVIDENCE GATHERING	266
	A. <i>Conflict Between Civil and Common Law</i>	266
	B. <i>International Discovery in the United States</i> <i>Before the Hague Convention</i>	268
	C. <i>The Hague Convention</i>	270
III.	OBSTACLES TO DISCOVERY SINCE THE HAGUE CONVENTION	273
	A. <i>Blocking Statutes</i>	274
	B. <i>European Data Protection Statutes</i>	275
IV.	U.S. COURTS APPROACH TO INTERNATIONAL DISCOVERY	279
	A. <i>Balancing Test for International Comity</i>	279
	B. <i>International Comity and the Hague Convention</i>	282
	C. <i>Applying the Balance Test</i>	283
V.	PROBLEMS WITH THE CURRENT STATE OF INTERNATIONAL DISCOVERY	286
	A. <i>The Hague Convention Does Not Reconcile Differences</i> <i>Between Common and Civil Law Evidence Gathering</i>	286

* Brian Friederich, J.D. Candidate 2011, University of San Diego School of Law, B.A. in Business Administration, University of Iowa. The author wishes to thank Professor Heiser at the University of San Diego School of Law for his guidance and feedback throughout the writing of this article and the *San Diego International Law Journal* editorial staff for their assistance in preparing this article for publication.

1.	<i>The Hague Convention Fails to Reconcile Differences Between Common and Civil Law Because it is Rarely Used in U.S. Courts</i>	286
2.	<i>Article 23 is Viewed as an Obstacle to U.S. Discovery</i>	287
B.	<i>Balancing Test Fails in Theory and Application</i>	288
C.	<i>Litigants are Forced to Choose Between Sanctions in United States or Criminal Liability at Home</i>	290
VI.	POSSIBLE SOLUTIONS	293
A.	<i>Convince the Supreme Court to Overrule <i>Aérospatiale</i></i>	293
B.	<i>Bright Line Rule for Protection from Criminal Sanctions</i>	293
C.	<i>Modify the Balancing Test</i>	294
VII.	PROPOSED SOLUTION: MODIFY THE HAGUE CONVENTION	295
A.	<i>Explicitly Specify the Hague Convention be Used First</i>	296
B.	<i>Rewrite or Eliminate Article 23</i>	297
C.	<i>Release Litigants from Liability</i>	297
VIII.	CONCLUSION	297

I. INTRODUCTION

Successful discovery requires a delicate balance between discovering the truth and protecting litigants from undue hardship. That balance demands even greater attention when the litigants are from different countries with different rules and policies regarding discovery.¹ French laws complicate this balance by imposing criminal sanctions on anyone who provides information that originated in France to parties conducting discovery in foreign nations.² This law is a blocking statute employed in many countries, in addition to France. Because of this law, French litigants have had to face the problem of either being sanctioned and losing lawsuits in the United States or being subject to criminal sanctions in France.³ The Hague Convention on Taking Evidence Abroad (Hague Convention)⁴ was supposed to solve the problems associated with taking evidence abroad, but the U.S. Supreme Court has found the Hague Convention optional at best and has not required trial courts to use the

1. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 533 (1987) (outlining the concern of international discovery).

2. See *Loi No. 80-538 du 16 juillet 1980 relative à la communication de documents ou renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], July 16, 1980, p. 1799 [hereinafter *French Blocking Statute*] (imposing a blanket prohibition of disclosure of information in France to foreign public authorities).

3. See discussion *infra* Part V.C.

4. See *generally* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (codified at 28 U.S.C. § 1780) [hereinafter *Convention*].

methods set out in the Hague Convention.⁵ The Hague Convention also allowed countries the option of not participating in “pre-trial” discovery procedures, which is an essential component of U.S. discovery.⁶

French litigants in U.S. courts face another hurdle: the European Union privacy directives.⁷ These directives prevent the dissemination of information to countries that do not pass the approved standards for data privacy and protection.⁸ The Hague Convention has not considered the effect these recent privacy directives have on the taking of evidence because the Hague Convention has not been modified since it was adopted and opened for signatures in 1970.⁹

Therefore, the Hague Convention must be changed in the following ways to address the shortcomings with the treaty’s handling of data privacy issues: (1) the Hague Convention needs to be rewritten so it is the first resort for taking evidence abroad; (2) treaty signatories need to accept the Hague Convention conditions and release litigants from liability if the Hague Convention is used for discovery; and (3) Article 23 of the Hague Convention requires alteration so that pre-trial discovery is clearly defined as discovery occurring before a suit is commenced. If these alterations are not possible, Article 23 should be eliminated.

5. See *Aérospatiale*, 482 U.S. at 533–45.

6. Convention, *supra* note 4, art. 23 (“A contracting state may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.”).

7. See generally Council Directive 95/46, of the European Parliament and of the Council of 24 Oct. 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data [hereinafter Data Protection Directive], 1995 O.J. (L 281) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML> (last visited August 16, 2010) (providing the procedures and policies for transferring automated data between member countries and restricting movement of data to countries without adequate data protection standards).

8. See *id.* at cl. 57 (“whereas . . . the transfer of personal data to a third country which does not provide an adequate level of protection must be prohibited”).

9. See Convention, *supra* note 4.

II. HISTORY OF EVIDENCE GATHERING

A. *Conflict Between Civil and Common Law*

In a common law system like the United States, the parties or the parties' lawyers conduct the evidence gathering.¹⁰ Evidence gathering in the United States is pre-trial discovery.¹¹ Pre-trial discovery begins after the filing of the lawsuit, and completed before trial starts.¹² Requiring early completion of discovery helps prevent the parties, the attorneys, and the judge from being surprised at trial.¹³

Even though the time allowance for discovery is limited, the scope is very wide. Discovery in the United States is only limited to "anything reasonably calculated to lead to admissible evidence," subject to protection for certain privileges that were available at common law, such as attorney-client privilege and the work product doctrine.¹⁴ The goal behind the wide scope of common law discovery is the free flow of information, truth finding, and informational equity between parties.¹⁵

The judge's role in discovery is quite limited in a common law system. Since the parties gather evidence themselves, the judge is there only to settle disputes that the parties cannot resolve.¹⁶ The disputes settled by the judge include whether a privilege exists, whether discovery is likely to lead to admissible evidence, and whether a party has complied with

10. See Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1017–18 (1998).

11. See *id.*

12. See FED. R. CIV. P. 26(d).

13. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1300 (1978).

14. See FED. R. CIV. P. 26(b)(1) [hereinafter FRCP 26] ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.; Explanation of the Attorney-Client Privilege and Work-Product Doctrine"); FED. R. EVID. 501 [hereinafter FRE 501] ("... [t]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience").

15. See Hazard, *supra* note 10, at 1018–19. See also FED. R. CIV. P. 2 ("[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

16. See Hazard, *supra* note 10, at 1019.

the other party's request for discovery.¹⁷ Judges make these decisions based on a combination of applicable case law and their own discretion.¹⁸

In a civil law system, the system in most European Union (E.U.) countries, discovery is very different from a common law system.¹⁹ Discovery does not technically exist in the civil law system, at least not as an individualized component of the civil procedural process as it exists in the United States.²⁰ Instead, civil law is one continuous process involving meetings, hearings, and written communications, through which evidence is introduced and evaluated.²¹ Thus, there are no separate trial and discovery phases like the United States.²²

The scope of evidence gathering in a civil system is not nearly as broad as the common law system where the parties conduct the discovery themselves.²³ Generally, the judge plays an active role, compared to the referee role of the judge in the common law system.²⁴ The judge performs the evidence gathering function in a civil law system instead of the parties or their lawyers.²⁵ The judge also questions the witnesses and decides which documents to request, based on the strict adherence to codified laws.²⁶

The differences in the two systems create conflict when litigation in one country requires the gathering of evidence from another country governed by a different legal system. Litigants in the United States have nearly unlimited access to all information that might be relevant to a

17. *See id.*

18. *See* JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 34 (Federal Judicial Center 1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).

19. *See id.* *See also* Carla L. Reyes, Note, *The U.S. Discovery-EU Privacy Directive Conflict: Constructing a Three-Tiered Compliance Strategy*, 19 DUKE J. COMP. & INT'L L. 357, 361–62 (2009).

20. *See* APPLE & DEYLING, *supra* note 18, at 25–28, 35–38.

21. *See id.*

22. *See id.*

23. *See* Reyes, *supra* note 19, at 361–62.

24. *See id.* (“[M]ost civil law countries view evidence gathering as a sovereign function best carried out by an active judge.”). *See also* Hazard, *supra* note 10, at 1022 (“[I]n the civil law system, the critically important function of exploring and sifting evidence is performed by the judge. . . The mind of the judge in a civil law jurisdiction, thus, is the medium of forensic exploration as well as the medium of forensic determination”).

25. *See* Reyes, *supra* note 19, at 362.

26. *See* APPLE & DEYLING, *supra* note 18, at 30 (“The standard image of the civil-law judge is one of ‘a civil servant who performs important but essentially uncreative functions.’ The judge’s role is a simple and narrow one, limited by strict notions of legislative supremacy.”).

case.²⁷ This broad standard causes a lot of resentment in countries where evidence gathering is exclusively a judicial function.²⁸ For instance, James H. Carter provides:

Procedures presently permitted by many American courts [are] so completely alien to the procedures in most other jurisdictions that an attitude of suspicion and hostility is created, which sometimes causes discovery which would be considered proper, even narrow, in this country to be regarded as a fishing expedition elsewhere.²⁹

Therefore, foreign countries are very sensitive about the United States pushing its views and methods of litigation onto them, thus they compromise to balance the interests of the two opposing views of litigation.³⁰

B. International Discovery in the United States Before the Hague Convention

Prior to the Hague Convention, there were two ways a party could obtain evidence from a foreign litigant in U.S. court. The party wanting information from abroad could use the Federal Rules of Civil Procedure (FRCP) and hope the opposing party had the ability and incentive to provide the information.³¹ Alternatively, a party could issue a letter rogatory to the country where the information is located, asking the country's judiciary to obtain and provide the requested information or documents.³²

The FRCP is the main method for obtaining evidence in the United States.³³ Under FRCP 26, parties conduct discovery, usually without an intermediary.³⁴ Almost all documents not protected by a specific privilege are subject to discovery.³⁵ If the judge finds a party has information reasonably calculated to lead to the discovery of admissible evidence and not protected by a privilege, he or she can compel that party to

27. See Reyes, *supra* note 19, at 361–62. See also FRCP 26, *supra* note 14.

28. See Reyes, *supra* note 19, at 362 (“These two aspects of the discovery process give rise to most of the objections raised by civil law countries, which view the scope of U.S. discovery as intrusive and the identity of the fact-finder inappropriate”).

29. James H. Carter, *Existing Rules and Procedures*, 13 INT’L LAW. 5 (1979).

30. See discussion *infra* Part II.B.

31. See RALPH G. STEINHARDT, INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW 372 (Matthew Bender & Company, Inc. 2002).

32. See *id.*

33. See FRCP 26, *supra* note 14.

34. See *id.*

35. The privileges available are the privileges that were available at common law. See FRE 501, *supra* note 14.

disclose the information.³⁶ If the party fails to comply with the order to compel discovery, FRCP 37 grants the court the power to impose sanctions.³⁷ It is largely up to the judge's discretion and interpretation of case law whether to issue an order to compel discovery or impose sanctions for noncompliance.³⁸ In cases of international discovery, the court has imposed a balancing test of factors to determine whether to grant an order.³⁹

Before the Hague Convention, the best hope of being able take evidence abroad was through a letter rogatory.⁴⁰ A letter rogatory is a formal request from a court in one country, to the appropriate judicial authorities in another country, for assistance with judicial acts.⁴¹ In civil litigation, those acts include obtaining testimony, or gathering documents or other evidence. The court of the foreign country executes a letter rogatory in accordance with the laws and regulations of that country.⁴² The United States courts derive their authority to issue letters rogatory from both 28 U.S.C. § 1781 and the courts' inherent authority.⁴³

36. See FED. R. CIV. P. 37(a)(1) [hereinafter FRCP 37] ("On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery.").

37. See *id.* at (b)(2)(A) ("If a party . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.").

38. See *id.*

39. See discussion *infra* Part IV.A.

40. See STEINHARDT, *supra* note 31, at 372.

41. See GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 893–94 (Kluwer Law Int'l, 2d. ed. 1996).

42. See *id.*

43. See *id.* See also 28 U.S.C. § 1781(a) (2006) ("The Department of State has power, directly, or through suitable channels--(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.").

Letters rogatory have a number of advantages over the FRCP for obtaining evidence from abroad. First, a letter rogatory does not conflict with civil law beliefs regarding discovery because a foreign judge presides over the process and decides if the court should comply with the request.⁴⁴ Second, a letter rogatory may compel a witness, who is not subject to jurisdiction, to testify, something that is not possible under the FRCP.⁴⁵ Third, a letter rogatory may be the only way to obtain evidence from a willing witness who cannot travel to the United States to testify because of costs or scheduling problems.⁴⁶

Many of the same advantages to using letters rogatory also underlie the disadvantages of using them. Since a request has to go through diplomatic channels, the process usually takes a minimum of three months and commonly can take more than a year.⁴⁷ Another disadvantage of a letter rogatory is the chance that the foreign court will not grant the request.⁴⁸ Foreign courts have often refused to grant requests for reasons such as bad relations with the United States, claims that conflict with foreign public policy, and “bureaucratic inertia.”⁴⁹ Even when a foreign court executes a letter rogatory, the court still maintains the ability to limit the extent it will grant the request.⁵⁰ Often, these foreign courts do limit the scope of discovery granted in comparison to what a U.S. court would have ordered.⁵¹

C. The Hague Convention

The available methods for taking evidence abroad before 1970 were inefficient and problematic.⁵² U.S. lawyers had a longstanding interest in improving procedures for taking evidence abroad because the FRCP could not be used in every situation and letters rogatory were often ineffective and time consuming.⁵³ Due to these problems, the United States took initiative and proposed that nations with conflicting discovery

44. See BORN, *supra* note 41, at 893.

45. See *id.*

46. See *id.*

47. See *id.* at 894.

48. See *id.* at 893.

49. See *id.*

50. See *id.* at 894.

51. See *id.*

52. See discussion *supra* Part II.B.

53. See discussion *supra* Part II.B. See also *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 530 (1987).

philosophies adopt a Hague Evidence Convention⁵⁴ to address many of the shortcomings of the FRCP and letters rogatory.⁵⁵

In 1970, the United States signed the Hague Convention. Legal organizations such as the American Bar Association, the Judicial Conference of the United States, and the National Conference of Commissions on Uniform State Laws supported the Hague Convention and there was no evidence of any opposition to the Hague Convention in any of the organizations.⁵⁶ The U.S. Senate ratified it in 1972 by unanimous vote.⁵⁷ Most members of the E.U., including France, have adopted the Hague Convention.⁵⁸

According to the Hague Convention explanatory report, “[t]he Hague Convention’s purpose was to establish a system for obtaining evidence abroad that would be ‘tolerable’ to the state executing the request and would produce evidence ‘utilizable’ in the requesting state.”⁵⁹ The U.S. Secretary of State’s letter of submittal to the President further outlined four purposes for the Hague Convention:

The [] Hague Convention is designed to (1) [m]ake the employment of letters of request a principal means of obtaining evidence abroad, (2) [i]mprove the means of securing evidence abroad by increasing the powers of consuls and by introducing in the civil law world, the concept of a commissioner, (3) [p]reserve means for securing evidence in the form needed by the court where the action is pending, and (4) [p]reserve all more favorable and less restrictive practices arising

54. *See Aérospatiale*, 482 U.S. at 530.

55. *See id.* at 531. The purpose behind the Convention was summarized by the Secretary of State’s letter of submittal to the President. *See id.* (“The willingness of the Conference to proceed promptly with work on the evidence conventions is perhaps attributable in large measure to the difficulties encountered by courts and lawyers in obtaining evidence abroad from countries with markedly different legal systems. Some countries have insisted on the exclusive use of the complicated dilatory and expensive system of letters rogatory or letters of request. Other countries have refused adequate judicial assistance because of the absence of a treaty or convention regulating the matter. The substantial increase in litigation with foreign aspects arising, in part from the unparalleled expansion of international trade and travel in recent decades had intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.”).

56. *See id.*

57. *See id.* at 530.

58. *See id.* at 524 n.1 (“The Hague Convention entered into force between the United States and France on October 6, 1974. The Convention is also in force in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, Germany, Israel, Italy, Luxemburg, the Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom.”).

59. *Id.* at 530 (citing AMRAM, EXPLANATORY REPORT ON THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, S. EXEC. DOC A, p. v).

from internal law, internal rules of procedure and bilateral or multilateral Hague Conventions.⁶⁰

The actual text of the Hague Convention declares its purpose as “[d]esiring to facilitate the transmission and execution of Letters of Request and to improve judicial co-operation in civil or commercial matters.”⁶¹

The Hague Convention delineates two options for conducting discovery abroad.⁶² The first option is a letter of request⁶³ which is a formal process where the judicial authority of the requesting state directs the request to the designated central authority of the state in which the evidence resides.⁶⁴ The judicial authority that executes a letter of request applies its own laws on the methods and procedures for taking the evidence.⁶⁵

One advantage of a letter of request over a letter rogatory is the country that receives the request cannot refuse for an arbitrary reason.⁶⁶ The central authority can reject the request if they believe the request does not comply with the Hague Convention provisions, but they must promptly inform the authority of their specific objections.⁶⁷ The requesting authority also has the ability to request a special procedure or method, which can only be refused if it is incompatible with the internal law of the State of execution or there are other practical difficulties.⁶⁸ Finally, a letter of request is less time consuming than a letter rogatory. A letter of request takes on average six weeks compared to the three months to over a year it takes to execute a letter rogatory.⁶⁹

The second option under the Hague Convention is for a contracting state’s diplomatic officer or consular agent to take evidence on his or her own in the country where the requestor is seeking evidence.⁷⁰ The officer or agent seeking evidence must have permission from the designated authority of the requesting state.⁷¹ If the agent or officer has permission,

60. *Id.* at 532.

61. Convention, *supra* note 4.

62. *See id.* chs. 1–2.

63. *See id.* ch. 1.

64. *See id.* art. 2.

65. *See id.* art. 1.

66. *See id.* art. 5 (“If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the letter.”).

67. *See id.*

68. *See id.* art. 9.

69. *See* BORN, *supra* note 41.

70. *See* Convention, *supra* note 4, ch. 2.

71. *See id.* art. 15.

they may also ask for assistance to obtain the evidence by compulsion.⁷² Unlike letters of request, the commissioner takes evidence in accordance with forms required by the law of the court where the plaintiff initiates the action.⁷³ It is also less time-consuming for a commissioner to take the evidence because the commissioner does not have to wait for someone else to move the process along.

Though the goal of the Hague Convention is to provide a compromise for taking evidence between countries with conflicting legal systems, the Hague Convention still allows the countries opposed to pre-trial discovery a way to “opt-out.”⁷⁴ Article 23 of the Hague Evidence Hague Convention allows member countries to declare that they will not enforce any pre-trial discovery order.⁷⁵ France is one country that took advantage of the opt-out provision. The French law reads:

In accordance with the provisions of Article 33, the French Government declares that in pursuance of Article 4, para. 2 it will execute Letters of Request only if they are in French or if they are accompanied by a translation into French; that, in pursuance of Article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries will not be executed.⁷⁶

This law severely limits much of the discovery allowed in common law systems such as the United States.

III. OBSTACLES TO DISCOVERY SINCE THE HAGUE CONVENTION

Since the Hague Convention was enacted, two types of laws have developed in the E.U. which have hindered the Hague Convention’s goal of cooperation between civil and common law countries. The first type is a blocking statute. The statute directly interferes with U.S. discovery because of disagreement with American policies.⁷⁷ The second type is data privacy statutes. Data privacy statutes can limit the discovery process when a requesting country does not meet the standards for data protection.⁷⁸

72. *See id.* art. 18.

73. *See id.* art. 21(d).

74. Convention, *supra* note 4.

75. *See id.* art. 22.

76. Reyes, *supra* note 19, at 367 n.63.

77. *See* discussion *infra* Part III.A.

78. *See* discussion *infra* Part III.B.

A. Blocking Statutes

A number of foreign countries have imposed blocking statutes that punish their citizens for disclosing information to other countries in international litigation.⁷⁹ The first blocking statute was enacted by Canada in response to an order of discovery in a grand jury antitrust investigation conducted by the United States.⁸⁰ Soon after, the Netherlands enacted a similar statute prohibiting compliance with the decision of another country regarding anti-competitive practices.⁸¹ A common theme among these statutes is the protection of litigants from discovery.⁸²

The French blocking statute is much broader than the Canadian and Dutch blocking statutes.⁸³ The statute's goal is to give French litigants an advantage in foreign countries by giving them a reason not to comply with discovery.⁸⁴ Article 1 of the blocking statute reads:

Subject to international treaties and agreements, any physical person who is of French nationality or habitually resides in French territory, and any manager, representative, agent or employee of a legal entity which has its registered office or a place of business in France is prohibited from communicating, in writing, orally or in any other form, in any place whatsoever, to foreign public authorities, economic, commercial, industrial, financial or technical documents or information, the communication of which is to infringe upon the sovereignty, security or essential economic interests of France or upon the public order, as specified by the administrative authority to the extent that may be required. (Ex. C to Affidavit of Herbert M. Wachtell, sworn to Oct. 8, 1982).⁸⁵

Article 3 of the statute allows for the imposition of criminal penalties of up to 120,000 Francs (\$20,000) and up to six months in prison.⁸⁶ However, there is an exception to the blocking statute if the Hague procedures are used.⁸⁷ Unfortunately, not every country is a member of the Hague Convention and the United States often uses the FRCP instead of Hague Convention procedures.

79. See Erica M. Davila, *International E-Discovery: Navigating the Maze*, 8 U. PITT. J. TECH. L. POL'Y 5, 11–14, available at <http://tlp.law.pitt.edu/wp-content/uploads/2009/10/e-discovery.pdf>.

80. See *id.*

81. See *id.*

82. See *id.*

83. See French Blocking Statute, *supra* note 2 (statute not limited to a specific purpose like anti-trust, but covers all transfer of information to foreign authorities for any purpose.).

84. See *Compagnie Française D'assurance pour le Commerce v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984).

85. French Blocking Statute, *supra* note 2.

86. See *id.*

87. See *id.*

B. European Data Protection Statutes

In addition to blocking statutes, French litigants are also subject to European data privacy laws. The European Union Privacy Directive⁸⁸ was created to ensure that all countries who handled the personal data of E.U. countries met a minimum level of protection for the privacy of data.⁸⁹ In 1995, the E.U. implemented the united privacy directive called Directive 95/46/EC (Privacy Directive).⁹⁰ All of the member states of the E.U. are required to adopt laws that comply with the Privacy Directive's terms.⁹¹ The Privacy Directive proposes to protect the transfer of "any information relating to an identified or identifiable natural person."⁹² The country receiving the data must provide an "adequate level of data protection" if the country is not a member of the E.U.⁹³ The E.U. evaluates adequate levels of protection based on nine different factors.⁹⁴ An E.U. committee evaluates a third party country's domestic

88. The EU Privacy Directive, see generally Data Protection Directive, *supra* note 7, is being used as an example of how data protection statutes hinder discovery, as opposed to just the German Privacy Laws or just the Swiss secrecy laws, because the E.U. Privacy Directive is the most extensive and far reaching. Data Protection statutes are addressed separately from broad blocking statutes because data protection statutes have been seen to have a legitimate purpose, while the only purpose of broad blocking statutes is to frustrate discovery. The two kinds of laws must be addressed differently, with more deference given to laws that have a legitimate purpose.

89. See Data Protection Directive, *supra* note 7, cl. 8 ("[W]hereas, in order to remove the obstacles to the flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States.").

90. See Reyes, *supra* note 19, at 358.

91. See Data Protection Directive, *supra* note 7, cl. 8–9, 12.

92. *Id.* art. 2(a).

93. See Data Protection Directive, *supra* note 7, art. 25.

94. The factors that the E.U. considers for evaluating an adequate level of protection include: (1) maintaining shorter retention periods relative to personal data, (2) achieving transparency by giving data holders advance, general notice of the possibility of their personal data being processed for litigation and identifying to the data subject any recipients of their data, (3) providing notice that the data subjects have the right to object to processing including the right (a) to right to object at any time on compelling legitimate grounds to the processing of data related to the data subject (b) the existence, purpose, and functioning of its data processing (c) the recipients of the personal data and (d) the right to access, rectification and reassurance of the personal data, (4) ensuring that all reasonable technical and organization precautions to preserve the security of the data to protect it from accidental or unlawful destruction and unauthorized disclosure or access have been taken by the data controller (5) considering whether personal data should be anonymised or at least pseudo-anonymised to protect the data subjects identity (6) considering the use of culling to separate the relevant from irrelevant (7) considering whether culling may be conducted

laws, and issues an opinion on whether the country meets the “adequate level of protection.”⁹⁵

Anyone who violates the Privacy Directive is subject to penalties, including a range of fines and imprisonment, depending on the specific implementation of the Privacy Directive by the member state where the violation occurred.⁹⁶ There is no consistent penalty among the E.U. member countries because the directive itself is not binding law. The law only requires the E.U. member countries to impose the standards for data privacy onto their own laws and leaves the penalties up to the specific country.⁹⁷

Litigants can face a difficult time complying with the Privacy Directive⁹⁸ because the directive places a variety of restrictions on the processing of personal data.⁹⁹ First, the directive must be processed fairly and lawfully for “specified, explicit, and legitimate” purposes.¹⁰⁰ Second, it must be adequate, relevant, and not excessive in relation to the purposes for which they are collected, processed, or both.¹⁰¹ Third, the directive applies to almost any possible action taken with the data. This includes, “collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination,” and other actions.¹⁰² Cumulatively, these restrictions place a strict limit on the scope of discoverable data. Specifically, an attorney would have a hard time performing any of his or her litigation functions without running into one of the actions covered by the statute.

The E.U. believes the United States does not have an adequate level of protection.¹⁰³ However, there are other options for a litigant in a non-

by a trusted third part in the European Union to reduce the number of personal records to be processed (8) recognizing that special categories of data such as doctor/patient confidential materials, should be managed in exclusive way according to the applicable special obligations that apply in those circumstances and (9) recognizing that sensitive personal data should be managed under article 8. See Moze Cowper & Amor Esteban, *E-Discovery, Privacy, and the Transfer of Data Across Borders: Proposed Solutions for Cutting the Gordian Knot*, 10 SEDONA CONFERENCE J. 263, 267–68 (2009).

95. Data Protection Directive, *supra* note 7, art. 25.

96. In one instance, Tyco Healthcare was fined \$40,350 for violating France’s data protection law. In another GS, a supermarket chain, was fined for violation Italy’s implementation of the privacy directive. See Reyes, *supra* note 19, at 358 n.5, 360 n.21.

97. See Data Protection Directive, *supra* note 7, cl. 9.

98. See Reyes, *supra* note 19, at 360.

99. *Id.* See also Data Privacy Directive, *supra* note 7, arts. 6–7.

100. Data Privacy Directive, *supra* note 7, art. 6(b).

101. *Id.* art. 6(c).

102. *Id.* art. 2(b).

103. See Reyes, *supra* note 19, at 360 (citing Working Party, *Opinion 10/2006 on the Processing of Personal Data by the Society for Worldwide Interbank Financial*

compliant country to obtain data from a country covered by the E.U. without being subject to penalties. The first approach is to follow the Hague Convention procedures.¹⁰⁴ If the litigant faces an evidence request from a Hague Convention signatory state, the executing authority can invoke Article 11 of the Hague Convention and refuse to provide any information that is in violation of their domestic laws, such as the Privacy Directive.¹⁰⁵ If the executing country invokes Article 11, it will only provide the information that does not violate the Privacy Directive. Thus, it is only a partial solution. If the Hague Convention requires full compliance, the requesting country must persuade the E.U. executing country that the data sought is vital to establish a legal claim or defense because the Privacy Directive allows an exception if the transfer is necessary for the establishment, exercise, or defense of legal claims.¹⁰⁶

If the Hague Convention procedures are not used, there are other options for litigants to obtain data if the litigant does not reside in a country with adequate data protection. One such option is to seek a protective order from the court excusing production, which will be discussed in greater depth in Part IV of this article.¹⁰⁷

Another possibility for achieving compliance with the Privacy Directive is to use the exceptions explicitly set out in the text of the Privacy Directive. The first exception is to transfer the data to an entity participating in the safe harbor provision.¹⁰⁸ The United States negotiated a safe harbor with the E.U.¹⁰⁹ Under the safe harbor provision, U.S. companies that adhere to previously agreed upon requirements between the United States and the E.U. may exchange personal data with companies in the E.U.¹¹⁰ However, the safe harbor provision is not much help in discovery. The safe harbor provision is only meant to allow a corporation or entity within an E.U. country to share data directly with a

Telecommunications (SWIFT), at 21, 01935/06/EN, WP 128 (Nov. 22, 2006) [hereinafter WP128]).

104. *See id.* at 364.

105. *See id.* at 365 (citing Convention, *supra* note 4, art. 11 (“[i]n the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence.”)).

106. *See* Data Protection Directive, *supra* note 7, art. 26(d).

107. *See* discussion *infra* part IV.

108. *See* Reyes, *supra* note 19, at 373.

109. *See* U.S. Dep’t of Commerce, Safe Harbor Privacy Principles (July 21, 2000), www.export.gov/safeharbor/SH_Privacy.asp [hereinafter Safe Harbor].

110. *See id.*

corporation or entity in a country outside of the E.U.¹¹¹ It was not meant to address transfers involving persons or entities who are outside of the corporation. For example, any transfers to opposing counsel of a non-member country or transfers to a foreign court are additional onward transfers¹¹² and “specifically prohibited under the terms of the safe harbor principal.”¹¹³

The other exceptions to the Privacy Directive are found in sections 1 and 2 of Article 26.¹¹⁴ Section 2 of Article 26 creates exceptions for contractual clauses and binding corporate rules.¹¹⁵ A contractual clause can constitute an adequate safeguard if the two parties split the data protection compliance and provide additional safeguards for the data.¹¹⁶ However, contractual clauses are considered unworkable when no supervisory body exists in the country receiving the data, or where the recipient country possesses power to access information that goes beyond internationally accepted standards.¹¹⁷ Because of the lack of a supervisory body in the United States and the broad power litigants have to access data in U.S. courts, contractual clauses in the United States will likely be seen as unworkable. Binding corporate rules are also ill suited for U.S. discovery because they only allow a member of the corporation to obtain the information.¹¹⁸ This would not include parties or their counsel who are not part of the corporation.

The first exception under Section 1 of Article 26 is consent to the subject of the data. Consent, however, is not practical in discovery because it can be withdrawn at any time.¹¹⁹ The other exception under section 1 is the “establishment, exercise, or defense of legal claims” exception.¹²⁰ The problem with the “defense of legal claims” exception is that it can only be used when the Hague Convention is invoked.¹²¹

111. See Reyes, *supra* note 19, at 373–74.

112. See *id.* at 374.

113. *Id.*

114. See Data Protection Directive, *supra* note 7, art. 26.

115. See *id.* art. 26(2).

116. See Reyes, *supra* note 19, at 374–75 (citing Working Party, *Working Document on Transfers of Personal Data to Third Countries: Applying Articles 25 & 26 of the EU Data Protection Directive*, at 16, DG XV D/5025/98, WP 12 (July 24, 1998) [hereinafter WP 12]).

117. See *id.* at 375 (citing WP 12 at 22–23).

118. See *id.* at 375–77.

119. See Data Protection Directive, *supra* note 7, art. 26(1). Consent is also problematic because U.S. courts generally object to consent being controlled by the will of third parties. See Reyes, *supra* note 19, at 379.

120. Data Protection Directive, *supra* note 7, art. 26(1)(d).

121. See Reyes, *supra* note 19, at 379.

IV. U.S. COURTS APPROACH TO INTERNATIONAL DISCOVERY

Since *Aérospatiale*, the only U.S. Supreme Court case that has addressed when Hague Convention procedures should be used, the Hague Convention has generally lost to the FRCP when it comes to choosing a method for discovery.¹²² In *Aérospatiale*, the Supreme Court held that the Hague Convention was an optional method for taking evidence abroad and imposed a balancing test; requiring lower courts to weigh the interest of the United States in production of data versus the foreign country's interest in using Hague Convention procedures.¹²³ The Court articulated a similar balancing test to determine whether to issue a protective order.¹²⁴ In most instances, the lower U.S. courts have refused to grant protection for litigants who are subject to blocking statutes.¹²⁵ U.S. courts are more lenient when they consider the foreign state's interest legitimate.¹²⁶

A. *Balancing Test for International Comity*

U.S. courts have struggled with the issue of when to compel discovery of foreign located documents long before the Hague Convention. In *Societe Internationale, Interhandel* (also known as Society Internationale) sought to recover assets taken by the United States under the Trading with Enemy Act.¹²⁷ The U.S. government compelled Interhandel to produce a large number of banking records for inspection under FRCP 34.¹²⁸ Interhandel, a Swiss Corporation, refused to supply the documents because "disclosure of bank records would violate Swiss penal laws, and therefore, might lead to criminal sanctions, including fine and imprisonment."¹²⁹

The U.S. district court dismissed the recovery action for noncompliance with the discovery order.¹³⁰ The U.S. Supreme Court held it was an error to dismiss the case because the noncompliance was due to inability, not

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

123. See *id.* at 542–44.

124. See *id.* at 545–46.

125. See discussion *infra* part IV.C.

126. See discussion *infra* part IV.C.

127. See *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 198–99 (1958).

128. See *id.* at 199–200.

129. See *id.* at 200.

130. See *id.*

bad faith.¹³¹ In spite of the Court's acceptance of the excuse, the Court held that the inability of Interhandle to produce the information would remain a serious handicap in proving its case and the trial court could draw unfavorable inferences because of the missing information.¹³²

After *Societe Internationale*, three Second Circuit decisions emphasized the importance of considering whether or not the order compelling production of documents in violation of foreign law violates principles of international comity in addition to the good or bad faith of the party opposing discovery.¹³³ In other words, "our courts . . . should not take any action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures."¹³⁴ The Restatement (Second) of the Foreign Relations Law of the United States created the first balancing test for international comity.¹³⁵ The five factors of the test include: (1) the vital national interests of each of the states; (2) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; (3) the extent to which the required conduct is to take place in the territory of the other state; (4) the nationality of the person; and (5) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state.¹³⁶

U.S. courts almost immediately began using this balancing test after its publication, but have failed to apply the factors consistently.¹³⁷ At least one court has used a three-part balancing test that includes one factor

131. *See id.* at 212.

132. *See id.*

133. *See In re Chase Manhattan Bank*, 297 F.2d 611, 612–13 (2d Cir. 1962) (refusing to order production of documents based upon principles of international comity); *Ings v. Ferguson*, 282 F.2d 149, 152–53 (2d Cir. 1960); *First Nat'l City Bank v. IRS*, 271 F.2d 616, 619 (2d Cir. 1959) (holding that the production of documents should not be ordered when it would require violating Panamanian law).

134. *Ings*, 282 F.2d at 619.

135. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1962). *See also* Keith Y. Cohan, Note, *The Need For a Refined Balancing Approach When American Discovery Orders Demand the Violation of Foreign Law*, 87 TEX. L. REV. 1009, 1017 (2009).

136. *See* RESTATEMENT (SECOND), *supra* note 135.

137. *See* Cohan, *supra* note 135, at 1017 n.46. *See, e.g., United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968).

from the Second Restatement and two factors of its own creation.¹³⁸ Other courts use the full test, but vary on which factors are given greater weight.¹³⁹

The Third Restatement introduced a new balancing test, referenced by the Supreme Court in *Aérospatiale*.¹⁴⁰ In a footnote in *Aérospatiale*, the Court mentioned the five factors from the Restatement that make up most balancing tests that courts now use.¹⁴¹ These factors are:

- (1) importance to the litigation of the documents or other information requested;
- (2) the degree of the specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; (5) 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.¹⁴²

However, the Supreme Court's reference to the Third Restatement balancing test did nothing to unify the different tests lower courts use. For example, some lower courts continue to use the original Second Restatement test.¹⁴³ Others use the Third Restatement test but supplement it with Second Restatement Factors.¹⁴⁴ Finally, some courts use a combination of both tests plus the good faith approach originally stated in *Societe Internationale*.¹⁴⁵ In some situations, all these approaches have led to a seven or eight factor test being applied to issues of international comity, with no guide on how the test should be applied or what weight should be assigned to each factor.¹⁴⁶

138. See *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980) (implementing a three-part balancing test using the likelihood of enforcement of sanction while adding two of the court's own factors: the importance of the policies underlying the U.S. substantive law and the importance of the requested documents to the litigation).

139. See *United States v. Field (In re Grand Jury Proceedings)*, 532 F.2d 404, 408 (5th Cir. 1976) (emphasizing the vital interest of each of states as the key factor).

140. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.28 (1987) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 437 (Tent. Draft No. 7, 1987) (current version at § 442)).

141. See *id.*

142. *Id.*

143. See discussion *supra* part V.A.

144. See *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1478–79 (9th Cir. 1992) (using the Third Restatement approach but adding the extent-of-hardship factor and likelihood-of-compliance factor in its balancing analysis).

145. See *Cohan*, *supra* note 135, at 1020. See also *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D 199, 211 (E.D.N.Y. 2007); *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 314–15 n.4 (E.D.N.Y. 2006).

146. *Cohan*, *supra* note 135, at 1025.

B. International Comity and the Hague Convention

In *Aérospatiale*, the U.S. Supreme Court held that the Hague Convention was optional.¹⁴⁷ The Court decided that the decision to resort to the Hague Convention should be weighed the same way a decision to issue a production order was weighed, on the basis of international comity.¹⁴⁸ In *Aérospatiale*, the petitioner, a French manufacturer, sought a protective order from having to produce documents that could only be found in France.¹⁴⁹ The petitioner argued that because the documents existed only in France, a foreign nation, the documents must be obtained through Hague Convention procedures.¹⁵⁰

The Court listed four ways to view the relationship between discovery under the FRCP and the Hague Convention: (1) exclusive use of the Hague Convention for taking evidence abroad; (2) turning first to the Hague Convention to take evidence but not exclusive relying on the Hague Convention; (3) optional use of the Hague Convention, but concerns of international comity require looking to the Hague Convention first; and (4) use of the Hague Convention procedures when American courts consider it appropriate after considering the interests of all parties to the suit and the foreign state.¹⁵¹ While the Court agreed with the petitioner that both the FRCP and the Hague Convention were valid law, the Court ruled that the Hague Convention was an optional procedure and did not have to be applied in the present case.¹⁵²

The Court also rejected the idea of requiring first resort to Hague Convention procedures, holding a case-by-case comity analysis was the appropriate method for determining whether to apply the Hague Convention.¹⁵³ The Court rejected a first resort rule because Letters of Request would be “unduly time consuming” and “less certain to produce needed evidence than direct use of the Federal Rules.”¹⁵⁴ The Court’s majority gave a number of reasons for their conclusion that the Hague Convention was optional, but was ultimately convinced by the text of the Hague Convention. Specifically, the Hague Convention states that it “may” be used for letters of request and consuls, not “must.”¹⁵⁵ The

147. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 531 (1987).

148. See *id.*

149. See *id.* at 525–26.

150. See *id.* at 528.

151. See *id.* at 533.

152. See *id.* at 538.

153. See *id.* at 542.

154. See *id.*

155. See *id.* at 535.

Court said, “the absence of any command that a contracting state must use Convention procedures when they are not needed is conspicuous.”¹⁵⁶

C. Applying the Balancing Test

When U.S. courts decide whether to use the Hague Convention or issue a protective order in cases not involving Hague Convention signatories, the decision usually hinges on the foreign interest factor of the balancing test.¹⁵⁷ When a court finds that a statute preventing discovery of foreign located data has a legitimate interest in doing so, the court will resort to the Hague Convention or issue a protective order.¹⁵⁸ In *Aérospatiale*, the Court held, whether or not a foreign blocking statute was grounds for a protective discovery was a question to be considered under the “interest of the foreign state” factor in a comity analysis.¹⁵⁹ When applying a particular statute to the “interest of the foreign state” factor, the Court held that statutes that frustrate the goal of obtaining the best available evidence “need not be given the same deference by courts of the United States as substantive rules of law at variance with the laws of the United States.”¹⁶⁰ Specifically, the Court held that “it is well settled” that a blocking statute “does not deprive an American Court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”¹⁶¹

Courts usually do not consider blocking statutes, specifically the French statute, to be a legitimate interest of the foreign state and are unlikely to be enforced. A number of U.S. district courts have specifically addressed whether the French blocking statute precludes production of documents.¹⁶² In *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Com.*, a U.S. district court considered whether a French plaintiff in a U.S. court could be compelled to provide

156. *See id.*

157. *See* discussion *infra* part IV.C.

158. *See* discussion *infra* part IV.C.

159. *Aérospatiale*, 482 U.S. at 544 n.29.

160. *Id.*

161. *Id.*

162. *See* *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) (holding that the French Blocking Statute did not represent a significant interest of France because it was enacted specifically to give French litigants an advantage in foreign courts); *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344 (D. Conn. 1997) (declining to apply French Blocking Statute).

documents that fell under the French blocking statute.¹⁶³ The plaintiff requested a waiver of the statute by the French government but only received a waiver for some of the documents.¹⁶⁴ Under the national interests factor, the court noted at first the French interest seemed to be substantial, but closer inspection revealed that “it was never expected nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts.”¹⁶⁵ Although the litigant had made a good faith effort to obtain a waiver, the court still would not issue a protective order because the court did not find the French interest to be valid.¹⁶⁶ The court performed a similar analysis for the hardship factor; however, the court found that the “plaintiffs’ fears . . . appear[ed] to have no sound basis. There [was] little evidence that the statute has been or will be enforced.”¹⁶⁷

A number of other U.S. district courts applied the same reasoning as that in *Compagnie* and refused to allow the French blocking statute to preclude document production. For example, in a securities fraud class action in the Southern District of New York, the court granted plaintiffs’ motion to compel a nonparty, Lazard Group LLC (Lazard), to provide documents located in France.¹⁶⁸ Judge Pitman observed that although Lazard had been threatened with prosecution by two French agencies, there was little likelihood that the threats would be carried out.¹⁶⁹ The “speculative possibility of prosecution” was “insufficient to displace the Federal Rules of Civil Procedure.”¹⁷⁰

Despite the general lack of respect for the French blocking statute, it has received deference by U.S. courts on a few occasions.¹⁷¹ In *In re Perrier Bottled Water Litigation*, defendant Source Perrier sought a court order requiring the plaintiffs to utilize the procedures established

163. See *Compagnie Française D’assurance pour le Commerce v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984).

164. See *id.*

165. *Id.*

166. See *id.*

167. *Id.* (“It is inconceivable that Law No. 80-538 is to be taken at face value as a blanket criminal prohibition against exporting evidence for use in foreign tribunals. For if it were, French nationals doing business abroad would be at the mercy of their business counterparts: they would be unable to redress breaches as frauds committed by suit in foreign courts since they would be barred from supporting their claims with their documents.”).

168. See *Liberty Media Corp. v. Vivendi Universal S.A. (In re Vivendi Universal, S.A. Secs. Litig)*, 618 F.Supp.2d 335, 343 (S.D.N.Y. 2006).

169. See *id.* at 342 (“Indeed, it is not clear that any court would have jurisdiction to try E & Y-U.S. for violations of French law. Absent a realistic threat of prosecution, there is no hardship for E & Y-U.S. to production.”).

170. *Id.*

171. See *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 355 (D. Conn. 1991).

by the Hague Convention in seeking discovery of information in Source Perrier's possession or control.¹⁷² The court found that although it does not usually grant requests for using the Hague Convention, a grant in this case was in line with French interests finding:

Although not all civil-law countries have expressed their disfavor of private litigants' use of the Federal Rules' procedures within its borders, of those which have, France has been among the most emphatic. Indeed, as defendants point out, and as the Court has earlier described in part, France has even amended its civil and penal codes to incorporate the Hague Convention, and proscribe foreign litigants' use of alternative, unauthorized procedures. The simple fact that, in joining the Hague Convention, France has consented to its procedures is an expression of France's sovereign interests and weighs heavily in favor of the use of those procedures.¹⁷³

Litigants have generally had better luck convincing courts that data protection statutes serve a legitimate foreign interest as opposed to blocking statutes.¹⁷⁴ In *Volkswagen A.G. v. Valdez*, the real parties sought production of Volkswagen A.G.'s (VWAG) current corporate telephone book to identify individuals who might have relevant information concerning defects in the automobile's door latches.¹⁷⁵ VWAG objected to this request because of the German Federal Data Protection Act, which prohibits the dissemination of private information without the consent of the individuals.¹⁷⁶ The court applied the factors for international comity and concluded that there was a definite danger of a violation of German law and interests.¹⁷⁷ The court concluded that, "as asserted by Germany in its amicus curiae brief, its interests would be undermined if VWAG complied with the real parties' request for production."¹⁷⁸ The court found that the trial court abused its discretion by ordering production of the phone book because the trial court rejected any consideration of German law.¹⁷⁹

172. *See id.*

173. *Id.*

174. *See, e.g.,* Salerno v. Lecia, Inc., No. 97-CV-973S(H) 1999 WL 299306 at *3 (W.D.N.Y. Mar. 23, 1999); Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 527-28 (S.D.N.Y. 1987) (holding that the Swiss Bank Secrecy Law protected the substantial interest in the protection of bank client account information); Volkswagen, A.G. v. Valdez, 909 S.W.2d 900, 902 (Tex. 1995).

175. *See Valdez*, 909 S.W.2d at 901.

176. *See id.*

177. *See id.* at 902-03.

178. *Id.* at 903.

179. *See id.*

Similarly, in *Salerno v Lecia, Inc.*, the plaintiff sought production of Lecia, Inc.'s severance package information and personnel files.¹⁸⁰ Lecia asserted that it could not disclose the documents because of E.U. and German data protection laws. The court found that Lecia's interpretation of the German Data Protection Laws was reasonable because: (1) the courts in E.U. countries consider the U.S. safeguards for the maintenance of personal data within the United States as insufficient; (2) the non-party European Lecia entities had no legal obligation to comply with defendant's request to produce severance and personnel documents; and (3) there were serious legal ramifications for those entities that disclosed personal information in contravention of E.U. and German data protection laws.¹⁸¹

V. PROBLEMS WITH THE CURRENT STATE OF INTERNATIONAL DISCOVERY

A. *The Hague Convention Does Not Reconcile Differences Between Common and Civil Law Evidence Gathering*

1. *The Hague Convention Fails to Reconcile Differences Between Common and Civil Law Because it is Rarely Used in U.S. Courts*

The Hague Convention had several purported purposes but essentially "establishe[d] methods to reconcile the differing legal philosophies of Civil Law and Common Law with respect to taking of evidence."¹⁸² The United States initiated the Hague Convention and had no objection to it at the time of ratification.¹⁸³ The Hague Convention was supposed to serve the long-term interests of the United States by furthering the climate of cooperation and goodwill necessary to the functioning of legal and commercial systems.¹⁸⁴

The U.S. Supreme Court has hindered this goal of cooperation by interpreting the Hague Convention as optional.¹⁸⁵ Since the FRCP is the default method used in international discovery, the Hague Convention

180. See *Salerno v. Lecia, Inc.*, No. 97-CV-973S(H) 1999 WL 299306 at *1 (W.D.N.Y. Mar. 23, 1999).

181. See *id.*

182. See discussion *supra* Part II.C.

183. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 531 (1987) (citing Statement of Carl F. Salans, Deputy Legal Adviser, Department of State, Convention on Taking of Evidence Abroad, S. Exec. Rep. No. 92-95, at 3 (1972)).

184. See discussion *supra* Part II.C.

185. See discussion *supra* Part IV.B.

does not reconcile different legal philosophies. The Hague Convention was created so an acceptable method would exist for the United States to obtain evidence in foreign countries.¹⁸⁶ The United States does nothing to further the climate of cooperation and goodwill when it bypasses a negotiation that it agreed on and automatically invokes its own procedures, which are offensive to countries who follow a civil system. As Justice Blackmun said in his dissent in *Aérospatiale*:

The civil law nations committed themselves to employ more effective procedures for gathering evidence within their borders, even to the extent of requiring some common-law practices alien to their systems . . . As a result, the primary benefit the other signatory nations would have expected in return for their concessions was that the United States would respect their territorial sovereignty by using the Hague Convention procedures.¹⁸⁷

2. Article 23 is Viewed as an Obstacle to U.S. Discovery

The Hague Convention also fails to achieve its purpose because of the opt-out provision of Article 23.¹⁸⁸ Article 23 allows a signatory to the Hague Convention to opt out of all pre-trial discovery as the United States understands pre-trial discovery. The Hague Convention fails to reconcile common and civil law evidence gathering if it allows a country to refuse a major portion of what the United States considers an essential part of the litigation process.¹⁸⁹

If Article 23 was not meant to allow a country to opt out of all U.S. style pre-trial discovery, then Article 23 still interferes with the purpose of the Hague Convention because its wording fails to convey its original intent. Justice Blackmun, in his dissent in *Aérospatiale*, understood the majority's problem with automatically resorting to the Hague Convention if Article 23 allowed a country to refuse all pre-trial discovery requests.¹⁹⁰ The dissent argued that pre-trial discovery was understood as something

186. See discussion *supra* Part II.C.

187. *Aérospatiale*, 482 U.S. at 550–51 (Blackmun, J., concurring in part, dissenting in part).

188. See Data Protection Directive, *supra* note 7, at art. 23.

189. See *Aérospatiale*, 482 U.S. at 536–37 (“Surely, if the Convention had been intended to replace completely the broad discovery powers that the common-law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common-law contracting parties to agree to Article 23, which enables a contracting party to revoke its consent to the treaty’s procedures for pre-trial discovery.”).

190. See *id.* at 563–64 (Blackmun, J., concurring in part, dissenting in part).

completely different in civil law countries.¹⁹¹ Since there is no separate trial phase from discovery in civil law, the dissent asserted that civil law countries thought pre-trial discovery meant discovery before a suit was initiated.¹⁹² According to a United States Delegate Report, a French commentator understood the pre-trial discovery exception as a reinforcement of the rule in Article 1 of the Hague Convention that a letter of request “shall not be used to obtain evidence, which is not intended for use in judicial proceedings, commenced or contemplated.”¹⁹³ The U.S. courts do not trust that parties will be able to get much of the information that is available normally through the FRCP because of a lack of a clear definition of pre-trial discovery, which hinders cooperation between the two systems.

B. Balancing Test Fails in Theory and Application

The balancing test for international comity is problematic because it encroaches on powers normally reserved for the executive and legislative branches.¹⁹⁴ The U.S. Constitution gives the executive branch the power to negotiate treaties, and the legislative branch the power to sign them into law.¹⁹⁵ The executive branch normally decides when a course of action is important enough to risk offending another nation. The courts are not equipped to balance the interests of the foreign nations against the interests of the United States because they have not developed that expertise through diplomatic negotiations.¹⁹⁶

The Hague Convention is the result of the best efforts of the executive and legislative branches to balance opposing international interests.¹⁹⁷

191. *See id.*

192. *See id.*

193. *See id.* at 565 n.21 (citing Gouguenheim, *Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale*, 96 JOURNAL DU DROIT INTERNATIONAL 315, 319 (1969)).

194. *See id.* at 551–52. *See also* Jack Garvey, *Judicial Foreign Policy Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 485–87 (1993).

195. *See* U.S. Const. art. I, § 8 cl. 3.

196. *See Aérospatiale*, 482 U.S. at 552–53 (Blackmun, J., concurring in part, dissenting in part). *See also* Margaret A. Niles, Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327, 345 (1983) (“The resources of the State Department and other arms of the President and Congress are designed specifically to gather and evaluate information, and to create and implement foreign policy. The expertise gained from the regular gathering and analyzing of large amounts of information thus favors deference to the political branches in cases that bear upon foreign affairs.”).

197. *See Aérospatiale*, 482 U.S. 552–53 (Blackmun, J., concurring in part, dissenting in part).

When the parties in a suit are already signatories to the Hague Convention, there is no need to engage in a comity analysis because those concerns have already been resolved by the negotiation of the treaty.¹⁹⁸ It might be appropriate to apply an international comity analysis when there is no treaty in place to decide the issues, but when there is a treaty on point, it is inappropriate to weigh the issues already considered in the treaty to decide whether the treaty should be applied in the first place. The United States government's interests are much broader than those of U.S. courts. The executive branch is responsible for and best equipped for balancing those interests because the executive branch has been handling international issues since its inception.¹⁹⁹ The executive branch has more experience than the courts in weighing the pros and cons of a diplomatic position. One circuit court even acknowledged that the interest balancing approach was an example of the judiciary "grasping in the political sphere, incompatible with the function of [A]rticle III courts."²⁰⁰ The court refused any argument that the judiciary had the ability to refuse to apply established U.S. law.²⁰¹

There is also a risk of bias against the United States when a balancing test is used. Courts will often defer to the more familiar procedures of their local rules.²⁰² The tendency of courts is to view a problem from a local perspective.²⁰³ Thus, a large number of courts resort to the FRCP for discovery when the Hague Convention is an option. Ignoring the Hague Convention and resorting to the FRCP can hurt foreign relations.²⁰⁴ As Justice Blackmun said in his dissent in *Aérospatiale*, "Foreign acquiescence to orders that ignore the Hague Convention however is likely to carry a price tag of accumulating resentment, with

198. *See id.*

199. *See id.* *See also* Niles, *supra* note 196, at 345–47.

200. *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990).

201. *See id.* at 1279.

202. *See* Garvey, *supra* note 194, at 485 ("As courts and commentators have more recently observed in reviewing the results under interest-balancing tests, whether these tests are applied to decide extraterritorial jurisdiction or forum non-conveniens, U.S. courts have shown a parochial bias. They decide in favor of a U.S. forum except where U.S. interests are de minimis.").

203. *See Aérospatiale*, 482 U.S. at 553 n.4 (Blackmun, J., concurring in part, dissenting in part) (citing *Pour Participation Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204–06 (1968)).

204. *See* discussion *supra* Part IV.C.

the predictable long-term political cost that cooperation will be withheld in other matters.”²⁰⁵

The balancing test is also unwieldy, inconsistent, and difficult to apply.²⁰⁶ For example, the test for international comity has not been consistently applied across federal courts.²⁰⁷ Some courts use three factors, some use five, some use seven or eight.²⁰⁸ In addition, neither the Restatement of Foreign Law Relations or the courts have given any guidance on how much weight to apply to the factors.²⁰⁹ This lack of predictability makes it very difficult for litigants to prepare a case and accurately forecast what a court will do in any given situation. The balancing test is not any easier for judges to apply than it is for litigants to argue. Judge Easterbrook declared in *Reinsurance Co. of America* that “[he] would be most reluctant to accept an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste.”²¹⁰

C. Litigants are Forced to Choose Between Sanctions in United States or Criminal Liability at Home

The last major problem with the state of international discovery in U.S. courts is that litigants can often be faced with the choice between being sanctioned by U.S. courts for refusing to comply with discovery or being subject to criminal liability at home for violating statutes preventing discovery.²¹¹ The court will issue protective orders on some occasions when the foreign interest is legitimate, but there is no guarantee.²¹² Even if protection is guaranteed, it still results in inequities to foreign litigants whose countries do not have statutes protecting them from discovery. Protective orders are also unfair to U.S. litigants who need the information to adjudicate their cases.

Data protection statutes have generally enjoyed greater protection from U.S. discovery orders than other statutes impeding discovery, but there

205. *Aérospatiale*, 482 U.S. at 568 (Blackmun, J., concurring in part, dissenting in part).

206. *See* Cohan, *supra* note 135, at 1024–27.

207. *See* discussion *supra* Part IV.A.

208. *See* discussion *supra* Part IV.A.

209. *See Aérospatiale*, 482 U.S. at 544 n.28 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 437 (Tent. Draft No. 7, 1987) (current version at § 442)).

210. *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring).

211. *See* discussion *supra* Part IV.C.

212. *See* discussion *supra* Part IV.C.

is no guarantee the court will always find that there is a legitimate interest.²¹³ There are still inequities to litigants whose countries do not have data protection statutes. If the court chooses not to recognize a data protection statute as a legitimate interest, there are not many options for obtaining the data without violating the statute and subjecting the litigant to penalties. One option would be to convince the E.U. that the information was needed for a legal proceeding, but that option involves using the Hague Convention, which is not routinely used in U.S. courts.²¹⁴ The other options, such as safe harbor, consent, contractual rules, and binding corporate rules, are all impractical for discovery because those options were intended for the exchange of information between companies, not litigants.²¹⁵

Convincing a U.S. court that a protective order is appropriate is more difficult when a litigant faces liability because of a blocking statute, as opposed to when a litigant faces liability because of a data protection statute. U.S. courts have given two reasons for refusing to grant protective orders for discovery of data when the French blocking statute controls the data at issue. First, the French blocking statute is not a legitimate interest of a foreign state because the sole purpose of the statute is to frustrate discovery.²¹⁶ There is no legitimate interest like the privacy interest that data protection statutes protect.²¹⁷ Second, courts have refused to give the French blocking statute weight in the balancing test because it lacks authority over French citizens. U.S. courts have said, since the French blocking statute was only meant as a bargaining chip, it was never likely to be enforced by the French Government against its own citizens.²¹⁸

Recently, in 2007, France began to enforce its blocking statute.²¹⁹ A French case, involving the French mutual insurance company, MAAF, and the California Insurance Department gave the statute more authority.²²⁰

213. See discussion *supra* Part IV.C.

214. See discussion *supra* Part IV.C.

215. See discussion *supra* Part III.B.

216. See discussion *supra* Part IV.C.

217. See discussion *supra* Part IV.C.

218. See discussion *supra* Part IV.C.

219. See *French Blocking Statute Still Gets No Respect from U.S. Court*, MORGAN, LEWIS & BOCKIUS LLP (Dec. 15, 2009), http://www.morganlewis.com/pubs/eData_FrenchBlockingStatute_LF_15dec09.pdf.

220. See Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 12, 2007, Bull. crim., No. 07-83228 (Fr.), available at <http://www.legifrance.gouv.fr/affich>

In *MAAF*, a French lawyer, working with an American law firm representing the California Department of Insurance, made a telephone call in an attempt to informally obtain information from MAAF. MAAF was a defendant in the then-pending Executive Life litigation in federal court in Los Angeles.²²¹ The French court found that the lawyer had violated the blocking statute and fined him 10,000 Euro.²²²

The current enforcement of blocking statutes gives French litigants in U.S. courts stronger arguments for the issuance of protective orders. However, the current enforcement creates a problem because the underlying reason for the statute still frustrates the discovery process. In *Compagnie*, a case decided before *MAAF*, the court implied even if the blocking statute was enforced, the risk of criminal penalty would not weigh heavily enough for the “interest of the foreign country” factor to weigh in favor of France.²²³ Since *MAAF*, there has been at least one instance where a U.S. court followed the reasoning of *Compagnie* and refused to issue a protective order in the face of possible liability under the French blocking statute.²²⁴

French litigants do not have clear guidance for what to do when faced with document production requests. If the litigants choose to give up the documents, it is possible that they will be subject to criminal liability. However, if the litigants refuse to provide the data, it is still possible that they could face sanctions and dismissal by U.S. courts.

Even if the United States allows the French blocking statute to preclude evidence production in U.S. courts in some instances, which seems unlikely, this preclusion will still lead to inequity for litigants whose data resides in a country without an enforced blocking statute. There is an incentive for companies to keep their data in France if they have that ability or luxury if courts start recognizing the statute as a valid excuse for document production. Companies or litigants who cannot store their data in France will have to produce all of their data.²²⁵ Finally, it would be unfair to U.S. litigants who will have to go through a

JuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017837490&fastReqId=1676592451&fastPos=1.

221. *See id.*

222. *See id.*

223. *See Compagnie Française D’assurance pour le Commerce v. Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984).

224. *See In re Global Power Equip. Grp., Inc.*, 418 B.R. 833, 851 (Bankr. D. Del. 2009) (holding that a comity analysis weighed in favor of compliance with the FRCP, even at the cost of possible penalties under the French Blocking Statute).

225. Foreign litigants who do not reside in countries with blocking statutes will have no choice but to comply with discovery requests or risk dismissal.

more cumbersome and expensive process anytime they want to enter into litigation with a French litigant.

VI. POSSIBLE SOLUTIONS

*A. Convince the Supreme Court to Overrule *Aérospatiale**

If the Supreme Court overruled *Aérospatiale* and held that the Hague Convention must be applied first in taking discovery abroad, it would solve the problems of the subjectivity of the balancing tests and the unpredictability of when a U.S. court will choose to apply the Hague Convention. Then litigants could ascertain ahead of time what standards will be used for discovery and plan accordingly. Applying the Hague Convention first would also eliminate the separation of powers and application problems courts face when applying the balancing test.

However, overruling *Aérospatiale* is not a perfect solution. One problem with overruling *Aérospatiale* is that it would be difficult to achieve. It is difficult to overturn a major Supreme Court case because of the doctrine of stare decisis. In addition, none of the Court's underlying reasonings will have changed. The wording of the Hague Convention and the legislative history are still the same which would likely lead to the same result; the Hague Convention is only an option. The current Supreme Court Justices would have to be convinced that it should look to the intent of the Hague Convention and the difficulty it faces in achieving its stated purpose to overcome the plain language of the treaty.

Overruling *Aérospatiale* causes a second problem; it falls short in addressing all the problems with the current state of international discovery. The end result would make it simpler for litigants as they would know what to expect, but there would still be problems. U.S. litigants still have no solution for situations where discovery imposes on France's right to opt out of pre-trial discovery procedures. Also, it is unclear whether a litigant would still be able to convince the E.U. that discovery through the Hague Convention is in line with the Data Privacy Directive.

B. Bright Line Rule for Protection from Criminal Sanctions

Another possible judicial solution to address the difficulty in applying the current balancing test is for the Supreme Court to implement a bright line rule that protective orders are to be issued whenever a foreign

litigant in U.S. court faces criminal sanctions at home. Implementation of the rule would eliminate the problem created by France enforcing its blocking statute. A French litigant would no longer have to be concerned about whether to comply with a U.S. discovery order or the French blocking statute.

The problem with a bright line rule is that it would still result in inequities to litigants who do not reside or cannot store data in a country that does not have a blocking statute protecting data from discovery. The solution would be just as incomplete as overruling *Aérospatiale* due to these inequities. A bright line rule also fails to advance the goal of promoting cooperation between civil and common law systems through the Hague Convention. The free flow of information is essential to resolving disputes. If a litigant cannot obtain information stored in a country with a blocking statute or data protection statute, many international suits in U.S. courts will be partially hindered or completely useless.

C. Modify the Balancing Test

A commentator on the issue suggested that the solution is to modify the balancing test.²²⁶ He proposed using the “specificity of the request” and “availability of alternatives” factors alone to decide whether to issue a discovery order.²²⁷ Then he suggested not considering the “foreign interests factor” until it comes time to decide whether to issue sanctions, and if sanctions are issued, which ones to impose. This suggestion is clearly better than the inconsistent variety of factors that courts are currently using because it simplifies the balancing test and makes the test more predictable for litigants. In addition, delaying the application of the foreign interest factor until production has been ordered, limits the instances where U.S. courts have to perform a sensitive foreign versus U.S. interest balancing. The major problem with this approach is it still does not give proper respect to the executive and legislative branches and the Hague Convention. It also does not offer much protection to parties who are subject to criminal penalties from being subject to sanctions beyond their control.

226. See Cohan, *supra* note 135, at 1033–36.

227. *Id.* at 1033–34.

VII. PROPOSED SOLUTION: MODIFY THE HAGUE CONVENTION

The best option for addressing the current problems with international discovery is to attack the problem at its source by altering or amending the Hague Convention. The Hague Convention could be rewritten to be mandatory instead of permissive. This revision would avoid the issue of the possibility of the Supreme Court overturning precedent. The revision would also address any separation of powers issues with the balancing test because the concerns for balancing the needs of different countries would again be in the hands of the executive and legislative branches. The French blocking statute would also no longer be a concern because France allows for discovery through the Hague Convention.²²⁸

Rewriting the treaty will not be easy. One difficulty is that rewriting the treaty is more of a long-term solution than any other options. Rewriting a treaty is not as simple as modifying a balancing test or imposing a bright-line rule. Although this process will be lengthy, it will more fully address the issues than any of the other proposed solutions. The long-term solution will address problems at their source and be effective for a long time into the future. Another problem will be convincing countries to give up criminal liability for blocking and data protection statutes. Foreign governments are likely to be willing to do this if they know that all countries will be required to resort to the Hague Convention first in matters of international discovery. There are also issues with the time and expense of using the Hague Convention as opposed to the FRCP. Using a letter of request might take more time than it takes to implement a party-to-party request, but the benefits will be worth it if using Hague Convention procedures fosters a sense of trust among civil and common law countries that leads to more cooperation in the future. Also, using a letter of request might not even be significantly more time consuming than the FRCP and, therefore, using the Hague Convention instead of the FRCP may prove less problematic in practice. The dissent in *Aérospatiale* argued that the majority assumed resorting to the Hague Convention takes more time, but no data was ever offered to back it up.²²⁹ The dissent also pointed out that the majority only discussed using letters of

228. See discussion *supra* Part II.B.

229. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 554–55 (1987) (Blackmun, J., concurring in part, dissenting in part).

request but never evaluated using the second option in the Hague Convention: consuls from the requesting country take the evidence in the foreign land.²³⁰

The final and possibly the greatest problem with rewriting the treaty is the seeming lack of incentive for the United States to rewrite the treaty. On the surface there may not appear to be any incentive for the United States to agree to rewriting the Hague Convention when courts can just require all litigants to abide by the FRCP, but there are diplomatic reasons for agreeing to rewrite the Hague Convention. First, when the United States originally entered into the Hague Convention the United States had reasons for wanting to cooperate with European countries, such as providing U.S. litigants with a guaranteed way to gain access to data residing in foreign countries. At the time the Hague Convention was entered into, the U.S. executive and legislative branches could easily have not entered into the treaty and let courts require the imposition of the FRCP on foreign litigants subject to sanctions and dismissal. The United States attempted to cooperate with foreign methods of discovery for diplomatic reasons. Those same diplomatic reasons most likely still exist today. A second incentive for rewriting the Hague Convention is that if the United States respects foreign and international discovery practices, foreign businesses will feel more secure doing business with the United States, resulting in increased international trade and global economic output.²³¹ Finally, by agreeing to the Hague Convention as a first resort, the United States increases the likelihood that U.S. litigants in E.U. courts will be treated fairly and consistently.

A. Explicitly Specify the Hague Convention be Used First

The Hague Convention needs to be the option of first resort for all international discovery requests. This alteration solves a number of problems with the current situation. First, it addresses all of the problems when the Hague Convention was optional. By making the Hague Convention the first resort, it will achieve the cooperation originally intended. Second, it eliminates the balancing test, which will solve both the application problems and the separation of powers issues. Making the Hague Convention the first resort will also dispel with most of the problems with the French blocking statute since discovery is allowed

230. *See id.* at 563. Having consuls take evidence takes less time because the consul doesn't have to wait for a foreign authority to do its job the consul can gather evidence by his or her self. *See discussion supra Part II.B, II.C.*

231. Elaborating on the specific economic benefits to the U.S. is outside of the scope of this article and probably outside US courts' ability to measure and determine.

under the statute when the Hague Convention procedures are used. Finally, it also allows the United States a safety net to impose the FRCP if a country refuses to supply data through the Hague Convention.

B. Rewrite or Eliminate Article 23

Next, Article 23 needs to be rewritten or eliminated. If rewritten, it needs to reflect that pre-trial discovery in the Hague Convention means discovery before a suit has taken place. If not rewritten, it should be eliminated, which is the only way that the United States can be expected to abide by the Hague Convention as a first resort. U.S. courts need to be sure that a country cannot just opt out of a major portion of discovery that the United States sees as vital to our judicial system. This could be difficult for other countries to agree to implement, but they are likely to be swayed by the guarantee that the United States will resort to Hague Convention procedures.

C. Release Litigants from Liability

Finally, the Hague Convention requires a clause stating that all signatories to the Hague Convention agree to release litigants from liability related to disclosure of data as long as the data is disclosed through the procedures of the Hague Convention. This clause would eliminate litigants from having to convince the E.U. on a case-by-case basis that their discovery request is related to litigation and therefore, an exception to the data privacy statutes. Though the French blocking statute does not apply when the Hague Convention is used, this clause would clarify that there is no liability. The clause would also prevent future blocking statutes attempting to interfere with Hague Convention procedures from being enacted.

VIII. CONCLUSION

There has always been tension between European countries and the United States on the topic of evidence gathering. Much of that tension stems from the inherent differences between common and civil policies and methods. Until the Hague Convention, the process for obtaining evidence abroad was cumbersome and unreliable. The Hague Convention sought to change that by providing signatory countries more effective methods of cooperating with each other in international litigation.

However, the Hague Convention has not been able to achieve its purpose, at least not in the United States. U.S. courts have interpreted the Hague Convention as optional, meaning it is rarely used. In addition, litigants in the E.U. often face stiff penalties for producing data in U.S. discovery. Article 23 also makes it difficult for common law countries to accept that the Hague Convention protects their discovery goals.

The combination of all the different laws and underlying policies is both confusing and complex. Fixing the problem is not hopeless, though. The solution can be addressed by making the Hague Convention mandatory, rewriting Article 23, and releasing litigants who use the Hague Convention from liability. By addressing the problem at its source, the text of the Hague Convention, many of the issues can be dealt with and the Hague Convention can achieve its originally intended purpose.