CIVIL PROCEDURE — PROTECTIVE ORDERS — NINTH CIRCUIT HOLDS THAT GRAND JURY CAN SUBPOENA PROTECTED FOREIGN DOCUMENTS. — *In re Grand Jury Subpoenas (White & Case LLP)*, 627 F.3d 1143 (9th Cir. 2010).

Rule 26(c) of the Federal Rules of Civil Procedure authorizes courts to issue protective orders limiting disclosure of evidence produced in civil discovery.[1] While circuits agree that courts may modify protective orders for good cause,[2] they split on the question of whether protective orders should automatically yield to grand jury subpoenas. At one end of the spectrum, the Second Circuit treats a subpoena for protected evidence essentially the same way it treats a motion for modification, requiring the government to show compelling reasons why the protective order should be breached.[3] At the other end, the Ninth Circuit has held that subpoenas should prevail over protective orders as a matter of course, reasoning that history, law, and policy require courts to accord grand juries special solicitude.[4] Recently, in *In re Grand*

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[1] FED. R. CIV. P. 26(c). By barring or limiting disclosure of such evidence to third parties, protective orders serve to curb abuse of the Rules' liberal provisions for pretrial discovery, *see* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34–35 (1984), and also to ensure the "just, speedy, and inexpensive determination of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant," Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 295 (2d Cir. 1979) (citation omitted) (quoting FED. R. CIV. P. 1) (internal quotation mark omitted).

[2] The Second Circuit does not permit modification absent "improvidence in the grant of a . . . protective order," "compelling need," or "extraordinary circumstance." *Martindell*, 594 F.2d at 296. While not all circuits have adopted the Second Circuit's rigorous standard for modification, all require some showing of good cause. *See, e.g.*, Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002) ("[T]he party seeking disclosure [of a protected document] must present . . . compelling reasons why the sealed discovery document should be released."); AT&T Co. v. Grady, 594 F.2d 594, 597 (7th Cir. 1978) (per curiam) ("[Only] exceptional considerations warrant[] the alteration of an agreed protective order . . . ."); Murata Mfg. Co. v. Bel Fuse, Inc., 234 F.R.D. 175, 179 (N.D. Ill. 2006) ("It should be no surprise that, there having been good cause to enter the protective order in the first place, there must be good cause shown before it can be vacated."); *see also* Alexander v. FBI, 186 F.R.D. 99, 100 (D.D.C. 1998); Union Carbide Corp. v. Filtrol Corp., 278 F. Supp. 553, 558 (C.D. Cal. 1967). Good cause for modification may exist where the protective order is overly broad, *see, e.g.*, *Murata*, 234 F.R.D. at 179, where a court granted the order without requiring the party petitioning for the order to show why the evidence at issue merited protection, *see, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 147–48 (2d Cir. 1987), or where the party seeking modification could not otherwise obtain the protected evidence, *cf. Murata*, 234 F.R.D. at 184–85 (upholding protective order on grounds that party moving for modification could obtain evidence by other means).

[3] *See* United States v. Doe (*In re* Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991), 945 F.2d 1221, 1224–25 (2d Cir. 1991) (applying *Martindell*'s "extraordinary circumstance" test to determine whether a grand jury can subpoena protected evidence).

[4] United States v. Janet Greeson's A Place for Us, Inc. (*In re* Grand Jury Subpoena Served on Meserve, Mumper & Hughes), 62 F.3d 1222, 1226–27 (9th Cir. 1995). The Ninth Circuit relied heavily on the reasoning of the Fourth and Eleventh Circuits, *see id.* at 1224–26, both of which have also adopted a per se rule in favor of the subpoena. *See, e.g.*, Williams v. United States (*In re* Grand Jury Proceedings), 995 F.2d 1013, 1015 (11th Cir. 1993); United States v. (Under Seal) (*In re* Grand Jury Subpoena), 836 F.2d 1468, 1477 (4th Cir. 1988).

Jury Subpoenas (White & Case LLP),[5] the Ninth Circuit extended this per se rule to an issue of first impression, holding that a grand jury's subpoena overrides a civil protective order on foreign documents brought into the United States in prior civil litigation.[6] While the Ninth Circuit's deference to the grand jury may be generally appropriate, the *White & Case* court should not have extended this deferential approach to these novel circumstances. With regard to foreign documents such as those at issue in *White & Case*, the Ninth Circuit's justifications for permitting grand juries to ignore protective orders are not compelling. It is thus appropriate to require the government to show good cause to reach the protected evidence.

In 2006, a Department of Justice (DOJ) criminal antitrust investigation into the allegedly anticompetitive conduct of foreign producers of TFT-LCD panels became public.[7] Within days, "the class-action bar filed dozens of putative class actions" against the producers, seeking damages and injunctive relief for the producers' alleged violations of U.S. antitrust laws.[8] The class actions were consolidated before Judge Illston of the Northern District of California.[9] On December 10, 2007, the parties to the civil litigation negotiated a protective order to ensure the confidentiality of the documents produced in discovery.[10]

In 2009, the DOJ sought the court's permission to copy all documents produced in the civil litigation, including those foreign-based documents that litigants had brought into the United States solely to comply with civil discovery orders.[11] Judge Illston referred the issue to a Special Master, who determined that the DOJ should not be permitted to make copies of the foreign-originated documents.[12] The Special Master reasoned that giving the DOJ full access to such documents would effectively extend the grand jury subpoena beyond its traditionally domestic reach.[13] Judge Illston agreed and adopted the Special Master's findings in an order filed on October 20, 2009.[14]

The DOJ then moved to obtain the foreign documents directly by serving grand jury subpoenas on the U.S. law firms that held copies of

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5 627 F.3d 1143 (9th Cir. 2010).

6 *Id.* at 1144.

7 *Id.*; Petition for a Writ of Certiorari at 4, 6, White & Case LLP v. United States, No. 10-1147 (filed Feb. 25, 2011) [hereinafter Petition for Certiorari].

8 Petition for Certiorari, *supra* note 7, at 4.

9 *White & Case*, 627 F.3d at 1144.

10 Statement of Reasoning Involved in Court's Order of February 11, 2010 at 2, *In re* TFT-LCD (Flat Panel) Antitrust Litigation, No. M 07-1827 SI (N.D. Cal. Mar. 29, 2010) [hereinafter Statement of Reasoning].

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 3.

the documents.[15] The law firms moved to quash the subpoenas,[16] and in an order dated February 11, 2010, Judge Illston granted the motion.[17] Though Judge Illston recognized that *United States v. Janet Greeson's A Place for Us, Inc.* (*In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes)*[18] (*Meserve*) held that subpoenas categorically take precedence over civil protective orders, she reasoned that "*Meserve* did not address the grand jury's authority to subpoena foreign evidence that would otherwise be outside its subpoena power, or the interplay between criminal grand jury proceedings and ongoing civil proceedings involving unindicted foreign defendants."[19] Judge Illston noted that "[i]t often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and [that] related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery."[20] She indicated that applying the *Meserve* rule here would have the effect of expanding the grand jury subpoena power "outside [its] geographic scope."[21] Moreover, she suggested that such a move would be unprecedented, pointing to the methods grand juries "[o]rdinarily" use to obtain foreign-based evidence, including issuing letters rogatory or requesting evidence pursuant to mutual legal assistance treaties.[22]

The DOJ appealed Judge Illston's order to the Ninth Circuit, which reversed.[23] Writing for the panel, Judge Noonan[24] issued a terse opinion holding that *Meserve*'s per se rule was directly applicable to the instant facts: "By a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury."[25] To support his conclusion, Judge Noonan noted only that "[n]o collusion between the civil suitors and the government has been established or even suggested by the Law Firms."[26]

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15 *White & Case*, 627 F.3d at 1144; Petition for Certiorari, *supra* note 7, at 11–12.

16 *White & Case*, 627 F.3d at 1144.

17 Statement of Reasoning, *supra* note 10, at 3.

18 62 F.3d 1222 (9th Cir. 1995).

19 Statement of Reasoning, *supra* note 10, at 3.

20 *Id.*

21 *Id.*

22 *Id.*

23 *White & Case*, 627 F.3d at 1144.

24 Judge Noonan was joined by Judge Paez and District Judge Duffy of the Southern District of New York, sitting by designation.

25 *White & Case,* 627 F.3d at 1144.

26 *Id.*

Instead of reflexively applying *Meserve*'s rigid per se rule[27] to an issue of first impression, the *White & Case* court should have reevaluated *Meserve*'s reasoning to ascertain whether such an extension was warranted. *Meserve* dealt with the question of whether a grand jury subpoena trumped a civil protective order on evidence of *domestic* origin.[28] The justifications *Meserve* offered for permitting grand juries to ignore protective orders are inapplicable where the evidence the grand jury seeks would have remained outside of its geographic reach but for prior civil litigation. Accordingly, the *White & Case* court should have distinguished *Meserve*, upholding the protective order unless the DOJ could show good cause why that order should be modified.[29]

Meserve's categorical deference to the grand jury rested in part on the observation that enforcing a protective order against a subpoena would be inconsistent with the grand jury's "historical" status and powers, as well as with courts' traditional reluctance to "interfere in the operations of a grand jury."[30] While these historical arguments may be generally appealing, they have no purchase in *White & Case*.

First, upholding a protective order in the narrow situation at issue here would not impinge upon the historic scope of the grand jury's subpoena power. The DOJ has not traditionally attempted to obtain foreign documents by subpoenaing the fruits of civil litigation.[31] Instead, it has relied on both formal and informal cooperation with for-

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[27] Though the *Meserve* court acknowledged the important interests that protective orders serve, *see* United States v. Janet Greeson's A Place for Us, Inc. (*In re* Grand Jury Subpoena Served on Meserve, Mumper & Hughes), 62 F.3d 1222, 1223 (9th Cir. 1995), it concluded that subpoenas must prevail "as a matter of course," *id.* at 1226.

[28] *See id.* at 1223; Statement of Reasoning, *supra* note 10, at 3.

[29] *Meserve* rejected a good cause requirement as "inherently unworkable," arguing that it fails to provide courts with clear guidance regarding when a protective order should yield to a subpoena. 62 F.3d at 1226. This argument is rather odd, given that the Ninth Circuit itself requires a showing of good cause where a private party seeks modification of a valid protective order. *See, e.g.*, Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002) ("[T]he party seeking disclosure [of protected evidence] must present . . . compelling reasons why the sealed discovery document should be released."); Union Carbide Corp. v. Filtrol Corp., 278 F. Supp. 553, 558 (C.D. Cal. 1967) ("For good cause to be present the moving party must make a showing . . . that the documents sought are necessary for proof of the case and either cannot readily be obtained in any other way or [cannot otherwise be obtained without] tremendous expense . . . ."). Courts have shown that they can administer a good cause standard in a principled manner. *See, e.g.*, AT&T Co. v. Grady, 594 F.2d 594, 597 (7th Cir. 1978) (per curiam) (granting government's motion for modification on the ground that the government could not have otherwise obtained important evidence except at great cost); *In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 147–48 (2d Cir. 1987) (permitting modification of blanket protective order in part because the district court granted the order without requiring the requesting party to show why the evidence at issue merited protection).

[30] *Meserve*, 62 F.3d at 1225–26.

[31] *See* Petition for Certiorari, *supra* note 7, at 10–12, 29–31.

eign governments to obtain such evidence.[32] In other words, upholding the protective order would merely have required the grand jury to continue longstanding practice. Indeed, as Judge Illston suggested, allowing the subpoena to reach the protected foreign documents at issue in this case is *inconsistent* with the subpoena's traditionally limited geographic reach.[33] As the *White & Case* court acknowledged, foreign-located documents are generally "outside the grasp of the grand jury."[34] The DOJ's new policy makes an end run around this principle, taking advantage of the fact that its announcement of an antitrust investigation inevitably spurs civil litigation that, given the global reach of civil discovery,[35] is likely to bring incriminating foreign-based evidence into the United States.

Second, though it is true that courts have traditionally avoided interfering with domestic grand jury investigations,[36] judicial oversight over subpoenas like the one at issue in *White & Case* is proper. In the rare cases in which U.S. courts have permitted grand jury subpoenas to extend extraterritorially, they have taken an active oversight role, carefully weighing the United States's interest in enforcement against foreign countries' interests in noncompliance.[37] The Restatement (Third) of Foreign Relations Law endorses this approach, noting that "[n]o aspect of the extension of the American legal system [abroad] has given rise to so much friction as the requests for documents in investigation . . . in the United States."[38] The Restatement emphasizes that "[a]ttorneys representing the United States . . . do not always undertake the [comity] evaluation called for, particularly on issues of discovery," and concludes that they should thus be required "to come before the court with a reasoned justification for [an extraterritorial]

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[32] These cooperative methods of evidence gathering have proven highly effective; indeed, the government's recent success in antitrust enforcement is due largely to its success in eliciting the aid of foreign governments. *See, e.g.*, Donald C. Klawiter, *Criminal Antitrust Comes to the Global Market*, 13 ST. JOHN'S J. LEGAL COMMENT. 201, 213–16 (1998).

[33] *See* Statement of Reasoning, *supra* note 10, at 2–3.

[34] *White & Case*, 627 F.3d at 1144.

[35] In civil litigation, a court can compel discovery abroad as long as the court has personal jurisdiction over the party holding the documents. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 553 n.4 (1987) (Blackmun, J., concurring in part and dissenting in part).

[36] *See, e.g.*, United States v. Williams, 504 U.S. 36, 47 (1992).

[37] *See, e.g.*, *In re* Sealed Case, 825 F.2d 494, 498–99 (D.C. Cir. 1987) (per curiam) (refusing to enforce subpoena requiring bank to produce foreign-located documents, reasoning that the foreign country's interest in bank secrecy outweighed the government's interest in enforcement); United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 722 F.2d 657 (11th Cir. 1983) (per curiam) (remanding for further proceedings district court's order enforcing government's subpoena of bank's foreign-located documents, reasoning that district court did not give sufficient consideration to the foreign countries' interests in noncompliance).

[38] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 reporters' note 1 (1987) [hereinafter RESTATEMENT].

discovery request."[39] This need for judicial supervision is particularly acute in the area of criminal antitrust investigations: international hostility toward U.S. discovery practices is due in large part to dislike of the United States's substantive antitrust laws,[40] which provide for extraordinarily harsh criminal penalties for corporations and individuals convicted of violations.[41] Under *White & Case*, the DOJ is able to evade this comity-driven judicial oversight of extraterritorial investigations by subpoenaing the fruits of civil discovery. But commentators suggest that the DOJ's end run raises the same complicated issues of reciprocity as extraterritorial subpoenas do.[42] Given these comity concerns, it is consistent with historical practice for courts to exercise oversight of the grand jury where it seeks to subpoena protected foreign documents such as those at issue in *White & Case*.

Meserve also justified its special solicitude toward the grand jury on statutory grounds. Observing that federal law gives the executive the power to determine whether to compel a witness to testify in exchange for immunity, *Meserve* reasoned that permitting courts to quash a subpoena of protected civil depositions would improperly shift this power to the judiciary.[43] Whatever the merits of this argument were in *Meserve*,[44] it has little salience in *White & Case*. The depositions at issue in *White & Case* were taken abroad from foreign nationals located abroad.[45] The government cannot compel such individuals to testify in the United States,[46] so its statutory power to compel testi-

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[39] *Id.* § 442 reporters' note 9.

[40] *Id.* § 442 reporters' note 1.

[41] *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 4, 7 (2007).

[42] Eric Gannon, a partner at White & Case not involved in the subject litigation, notes that "[t]he basis for the [former] DOJ policy [of not subpoenaing protected foreign documents brought into the United States solely to comply with civil discovery orders] is international comity and reciprocity: We don't want foreign governments doing this to U.S. companies." Mike Scarcella, *DOJ Presses Law Firms in LCD Price-Fixing Probe*, LAW.COM (May 10, 2010), http://www.law.com/jsp/article.jsp?id=1202457916545&slreturn=1&hbxlogin=1 (internal quotation marks omitted); *see also* Petition for Certiorari, *supra* note 7, at 33 ("DOJ's disregard of sovereignty . . . provokes concern about reciprocal treatment of U.S. natural and legal persons . . . .").

[43] United States v. Janet Greeson's A Place for Us, Inc. (*In re* Grand Jury Subpoena Served on Meserve, Mumper & Hughes), 62 F.3d 1222, 1224 (9th Cir. 1995) (citing 18 U.S.C. §§ 6002, 6003 (2006)).

[44] The Second Circuit has noted that this argument ignores the critical fact that protective orders can be modified, whereas grants of immunity are immutable. United States v. Doe (*In re* Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991), 945 F.2d 1221, 1224–25 (2d Cir. 1991).

[45] *See* Petition for Certiorari, *supra* note 7, at 29 ("[T]here is no dispute that the foreign documents in question were generated and maintained entirely overseas . . . ."); Statement of Reasoning, *supra* note 10, at 3 (explaining why the court denied the government's request to copy "deposition transcripts of foreign national employees").

[46] *See, e.g.*, United States v. Drogoul, 1 F.3d 1546, 1553 (11th Cir. 1993) (citing 28 U.S.C. § 1783 (2006)) (noting that the government cannot compel "foreign nationals located outside the United States" to testify in the United States).

mony in return for immunity cannot apply to them. Thus, enforcing the protective order in *White & Case* would not have shifted any extant executive power to the judiciary.

Meserve's final justification for its per se rule rested on policy grounds. According to the court, enforcing protective orders against a grand jury would "significant[ly] imped[e]" the grand jury's investigative function[47] while providing only "limited" benefits to civil litigants.[48] Regardless of whether the *Meserve* court's policy analysis was correct on the facts before it,[49] extending that case's per se rule to the novel facts of *White & Case* has the potential to impede the efficient resolution of civil litigation without providing commensurate benefits to grand jury investigations. As the client advisories issued by U.S. law firms in the wake of *White & Case* suggest,[50] the threat of the United States's severe criminal penalties for antitrust violations — which include lengthy terms of incarceration for individual corporate directors and officers[51] — will compel civil litigants to devote greater resources to keeping potentially inculpating foreign-located documents out of the United States. Multinational litigants will presumably en-

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[47] *Meserve*, 62 F.3d at 1224 (quoting United States v. (Under Seal) (*In re* Grand Jury Subpoena), 836 F.2d 1468, 1475 (4th Cir. 1988)) (internal quotation marks omitted).

[48] *Id.*

[49] One of *Meserve*'s primary policy concerns was that enforcing a protective order against a grand jury would prevent the grand jury from reaching civil depositions critical for witness impeachment. *See id.* at 1224. However, permitting modification for good cause fully addresses this problem. A court responding to a modification request can review protected evidence in camera. *See, e.g.*, *In re* Gabapentin Patent Litig., 312 F. Supp. 2d 653, 657 (D.N.J. 2004). If such review suggests that a witness's testimony before a grand jury is inconsistent with statements the witness made in prior civil depositions, a court would almost certainly release the depositions. *Cf.* AT&T Co. v. Grady, 594 F.2d 594, 597 (7th Cir. 1978) (per curiam) (granting government's motion to modify protective order where government could not have otherwise obtained important evidence except through "long and costly discovery").

[50] These advisories inform clients that they can no longer assume that protected foreign-based documents brought into the United States during civil litigation are outside the grasp of the grand jury. *See, e.g.*, *Advisory: Ninth Circuit Decision on Grand Jury Subpoenas Shows Risks for Civil Defendants*, ARNOLD & PORTER LLP (Dec. 2010), http://www.arnoldporter.com/resources/documents/Advisory-Ninth_Circuit_Decision_on_Grand_Jury_Subpoenas_Shows_Risks_for_Civil_Defendants_121610.pdf [hereinafter ARNOLD & PORTER, *Advisory*]; *Hogan Lovells Client Alert: Order Enforcing Criminal Subpoenas for Foreign-Originating Evidence Possessed by U.S. Counsel May Have Far-Reaching Implications*, HOGAN LOVELLS (Dec. 20, 2010), http://ehoganlovells.com/ve/ZZ9561i31926197j7527Q715; Roscoe C. Howard, Jr., *The Ninth Circuit Rules that Foreign Documents Brought into the Country Are Subject to Federal Grand Jury Demands*, ANDREWS KURTH LLP (Jan. 4, 2011), http://www.andrewskurth.com/assets/pdf/article_755.pdf; *Ninth Circuit Holds that in a Criminal Investigation, the Government Can Subpoena US Law Firms for Documents Obtained Abroad as Part of Discovery in Civil Litigation*, MAYER BROWN (Dec. 14, 2010), http://www.mayerbrown.com/publications/article.asp?id=10149&nid=6.

[51] Individuals convicted of antitrust violations face up to ten years in prison, while corporations face fines as high as $100 million. ELHAUGE & GERADIN, *supra* note 41, at 7. Few other countries impose criminal sanctions (let alone incarceration) for antitrust violations. *Id.* at 4, 58.

hance their document review processes[52] and move those processes to locations outside of the United States.[53] Rational multinationals will also become more willing to engage in bad-faith discovery obstruction.[54] *White & Case* will thus make it more difficult for civil plaintiffs to obtain foreign-based evidence while at the same time compromising defendants' ability to communicate candidly and cost-effectively with their U.S.-based counsel. As a corollary, future grand jury raids on the protected fruits of civil litigation will likely yield less actionable foreign evidence.

White & Case should have upheld the protective order absent a DOJ showing that there was good cause to modify the order. *Meserve*'s categorical deference to the grand jury is misplaced where the grand jury seeks to subpoena protected foreign evidence brought into its geographic reach solely due to prior civil litigation. In such circumstances, enforcing protective orders against the grand jury comports with the historical scope of the grand jury's powers, the judiciary's traditional role in overseeing those powers, and the executive's statutory prerogative to immunize witnesses. Moreover, permitting the grand jury to categorically ignore protective orders in such circumstances has the potential to encumber civil litigation without providing commensurate benefits to grand jury investigations.

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[52] *Cf.* ARNOLD & PORTER, *Advisory*, *supra* note 50, at 3 (advising clients to invest more in document review to minimize overlap between relevant and inculpating foreign evidence).

[53] *Cf. id.* (urging clients to "consider having foreign documents reviewed for privilege and responsiveness outside the US prior to production" despite the extra cost of "'overseas' review").

[54] Litigants' tolerance for civil sanctions will presumably rise with the increased expected costs now associated with bringing foreign-based documents into the United States. Indeed, as the aforementioned client advisories suggest, litigants facing requests for extraterritorial evidence have unique opportunities to disguise bad-faith discovery obstruction as bona fide objections. Traditional objections to discovery requests, such as burden and relevance, are much stronger where "the documents sought are found in remote foreign locations and/or are written in languages other than English." *Id.* Moreover, litigants can seek out "alternative protections [afforded by the countries in which the documents are situated] that may be asserted in making decisions to bring documents into the country [in response to discovery requests]." Howard, *supra* note 50. At least fifteen foreign legislatures have enacted "blocking statutes" that specifically criminalize the disclosure of information to foreign courts, and many other countries have general data protection laws. RESTATEMENT, *supra* note 38, § 442 reporters' notes 1, 4. U.S. courts are likely to reject requests for foreign-based evidence when parties can show that production conflicts with foreign laws. Karen A. Feagle, Other International Issues, *Extraterritorial Discovery: A Social Contract Perspective*, 7 DUKE J. COMP. & INT'L L. 297, 308–09 (1996).