

1982

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### Recommended Citation

Thomas Scott Murley, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 Fordham L. Rev. 877 (1982).

Available at: <https://ir.lawnet.fordham.edu/flr/vol50/iss5/5>

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# COMPELLING PRODUCTION OF DOCUMENTS IN VIOLATION OF FOREIGN LAW: AN EXAMINATION AND REEVALUATION OF THE AMERICAN POSITION

## INTRODUCTION

Many nations have promulgated nondisclosure laws that prohibit the production of documents requested for use in foreign legal proceedings.<sup>1</sup> The United States, however, maintains a liberal discovery

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1. Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 Austl. Acts 1125, *amended by* 1976 Austl. Acts 1743; Uranium Information Security Regulations, Can. Stat. O. & Regs. 76-644 (1976); Law Relating to the Communication of Documents or Information to Foreign Authorities Regarding Maritime Commerce, 1968 Journal Officiel de la République Française Recueil Dalloz [J.O.] 7267, 1968 Bulletin Législatif Dalloz [B.L.D.] 438, *amended by* Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, 1980 J.O. 1799, 1980 B.L.D. 285 (English translation at 75 Am. J. Int'l L. 382 (1981)); Evidence Amendment Act, [1980] 1 N.Z. Stat. 34; I Código de Comercio, tit. III, art. 89 (Pan. 1961); Protection of Businesses Act, 1978, No. 99, *as amended by* Act of 1979, No. 114 (S. Afr.); Atomic Energy Act, 1967, No. 90, § 30A, *as amended by* Atomic Energy Amendment Act, 1978, No. 46 (S. Afr.); Protection of Trading Interests Act, 1980, ch. 11 (U.K.); Law of May 24, 1965, Bundesgesetzblatt, Teil II [BGB 2] 835 (W. Ger.); *cf.* Business Records Protection Act, Ont. Rev. Stat. ch. 54, § 2(1) (1970); Business Concerns Records Act, Que. Rev. Stat. ch. 278 (1964). Some nondisclosure laws provide that a designated government official may prohibit the production of a certain category of documents, *e.g.*, Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 Austl. Acts 1125, *amended by* 1976 Austl. Acts 1743; Evidence Amendment Act, [1980] 1 N.Z. Stat. 34; Protection of Trading Interests Act, 1980, ch. 11 (U.K.), while others provide that no documents may be produced to foreign tribunals unless such documents are normally sent out of the province in the ordinary course of business. *E.g.*, Business Records Protection Act, Ont. Rev. Stat. ch. 54, § 1 (1970); Business Concerns Records Act, Que. Rev. Stat. ch. 278, §§ 1-3 (1964). The recently amended French Statute, Law Relating to the Communication of Documents or Information to Foreign Authorities Regarding Maritime Commerce, 1968 J.O. 7267, 1968 B.L.D. 438, *amended by* Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, 1980 J.O. 1799, 1980 B.L.D. 285 (English translation at 75 Am. J. Int'l L. 382 (1981)), not only prohibits any disclosure of documents or information that would "threaten the sovereignty, security, or essential economic interests of France or public order, as defined by the government authorities to the extent deemed necessary," *id.* art. 1, but also makes the very act of requesting *any* documents or information of the nature specified without following French judicial procedures an offense. *Id.* art. 1*bis*; B. Hawk, United States, Common Market and International Antitrust: A Comparative Guide 75 (Supp. 1981). It provides: "Except when international treaties or agreements or laws and regulations in force provide otherwise, no person may request, seek to obtain or transmit, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, intended for the constitution of evidence in connection with pending or prospective foreign judicial or administrative proceedings." *Id.* The primary purpose of the amendment was to ensure that foreign counsel comply with the judicially supervised French discovery procedures. *See* Address by M. Guillaume,

policy.<sup>2</sup> In accordance with that policy, United States courts have consistently ordered parties to produce documents located abroad even when production would subject the party to liability under a foreign nondisclosure law.<sup>3</sup> When such orders have not been obeyed,

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Director of Legal Affairs of the French Ministry of External Affairs, *Chambre de Commerce Internationale*, Paris (Apr. 1981) (on file with the *Fordham Law Review*): Advisory Opinion of the French Ministry of Justice, 1981 J.O. 373 question 35.893. Serving a Federal Rule of Civil Procedure 34 request on a French party requiring it to produce documents located in France is, therefore, an offense under French law. Still other countries maintain more general business secrets legislation that may prohibit the production of documents deemed to contain business secrets. *E.g.*, The Bank of Jamaica Law, 1961, ch. 6, § 34 (Cayman Islands 1963); Economic Competition Act, 1956 *Staatsblad voor het Koninkrijk der Nederlanden* [Stb.] 401, art. 39, *amended by* Act of July 16, 1958, Stb. 413 (Neth.) (English translation at 5 OECD, *Guide to Legislation on Restrictive Business Practices* 1, 18-19 (June 1972)); *Schweizerisches Strafgesetzbuch*, Code pénal suisse, Codice penale svizzero [STGB, C.P., Cod. Pén.] § 273 (Switz. 1971). Great Britain's Protection of Trading Interests Act, 1980, ch. 11, § 6, not only prevents the production of documents, but also has a "clawback" provision that allows United Kingdom subjects, corporations or persons carrying on business in the United Kingdom to sue the prevailing party in foreign litigation to recover punitive damages awarded by foreign courts. Note, *The Protection of Trading Interests Act of 1980—Britain's Latest Weapon in the Fight Against United States Antitrust Laws*, 4 *Fordham Int'l L.J.* 341, 374 (1981). Background information on the French statute was supplied by Alexandre Carnélutti, legal counsel in the French Ministry of External Relations.

2. See *United States v. Procter & Gamble*, 356 U.S. 677, 682 (1958); *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977); C. Wright, *Handbook of the Law of Federal Courts* § 81 (3d ed. 1976); Address by M. Handler, *Antitrust: A Worldwide Phenomenon—With an Emphasis on Extraterritoriality*, Institute of International Business Law-Tokyo, at 19-21 (May 20, 1981) (unpublished manuscript on file with the *Fordham Law Review*).

3. *Societe Internationale v. Rogers*, 357 U.S. 197, 204-05 (1958); *United States v. Vetco Inc.*, 644 F.2d 1324, 1329-33 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952-53 (D.C. Cir. 1979); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *SEC v. Banca Della Svizzera Italiana*, [Current Developments] *Fed. Sec. L. Rep. (CCH)* ¶ 98,346, at 92,146-49 (S.D.N.Y. Nov. 16, 1981); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-49 (N.D. Ill. 1979); *American Indus. Contracting, Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 880-81 (W.D. Pa. 1971); *United States v. Standard Oil Co. (New Jersey)*, 23 F.R.D. 1, 4 (S.D.N.Y. 1958); *In re Investigation of World Arrangements*, 13 F.R.D. 280, 286 (D.D.C. 1952); *cf.* *United States v. Field*, 532 F.2d 404, 407-09 (5th Cir.) (compelling testimony in violation of foreign law), *cert. denied*, 429 U.S. 940 (1976). *But see* *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 40-41 (2d Cir. 1972); *In re Chase Manhattan Bank*, 297 F.2d 611, 612-13 (2d Cir. 1962); *Ings v. Ferguson*, 232 F.2d 149, 152-53 (2d Cir. 1960); *In re Equitable Plan Co.*, 185 F. Supp. 57, 60 (S.D.N.Y. 1960), *modified sub*

United States courts have imposed sanctions on the parties resisting compliance.<sup>4</sup>

Nondisclosure laws are often reactions to the extraterritorial application of United States laws. The Ontario Business Records Protection Act<sup>5</sup> was enacted in response to grand jury subpoenas directed to Canadian paper companies in 1947 regarding possible antitrust violations.<sup>6</sup> The Netherlands nondisclosure law<sup>7</sup> was prompted by the 1952 investigation of the world petroleum industry.<sup>8</sup> West Germany<sup>9</sup> and Great Britain<sup>10</sup> enacted nondisclosure laws in reaction to the 1960 grand jury investigation of multinational shipping conferences.<sup>11</sup> The recent litigation surrounding the activities of an international uranium cartel<sup>12</sup> prompted Australia,<sup>13</sup> Canada<sup>14</sup> and South Africa<sup>15</sup> to

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*nom.* Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); *cf.* First Nat'l City Bank v. IRS, 271 F.2d 616, 618 (2d Cir. 1959) (dictum) (production would not have been ordered if it would have violated foreign law), *cert. denied*, 361 U.S. 948 (1960).

4. *E.g.*, United States v. First Nat'l City Bank, 396 F.2d 897, 900 (2d Cir. 1968); General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 308-09 (S.D. Cal. 1981); Ohio v. Crofters, Inc., 75 F.R.D. 12, 19-20 (D. Colo. 1977), *aff'd sub nom.* Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978).

5. Ont. Rev. Stat. ch. 54 (1970).

6. Int'l Law Ass'n, Report of the Fifty-First Conference 566-67 (Tokyo 1964) (extract from debate in Ontario House of Commons); Note, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. Chi. L. Rev. 791, 805 n.55 (1964) [hereinafter cited as *Ordering Production*]. The subpoenas were issued by the Southern District of New York and are discussed in *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

7. Economic Competition Act, 1956, Stb. 401, art. 39, *amended by* Act of July 16, 1958, Stb. 413 (Neth.) (English translation at 5 OECD, Guide to Legislation on Restrictive Business Practices 1, 18-19 (June 1972)).

8. Int'l Law Ass'n, Report of the Fifty-First Conference 572-73 (Tokyo 1964) (extract of letter from Netherlands Ambassador to the United States); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L.J. 613, 613 n.5 (1979) [hereinafter cited as *Foreign Nondisclosure*]; *see* Riedweg, *The Extra-Territorial Application of Restrictive Trade Legislation—Jurisdiction and International Law*, in Int'l Law Ass'n, Report of the Fifty-First Conference 357, 406-07 (Tokyo 1964). For a discussion of the investigation, *see In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952).

9. Law of May 24, 1965, BGB2 835 (W. Ger.).

10. Shipping Contracts and Commercial Documents Act, 1964, ch. 87, *repealed and superseded by* Protection of Trading Interests Act, 1980, ch. 11. (U.K.).

11. B. Hawk, *supra* note 1, at 319. The investigation is discussed in *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298 (D.D.C. 1960).

12. Litigation commonly referred to as the "uranium cartel litigation" consists of many cases involving breach of contract, for failure to deliver uranium, and antitrust actions against uranium cartel members. *See* Westinghouse Elec. Corp. v. Rio Algom Ltd., 617 F.2d 1248 (7th Cir. 1980) (finding jurisdiction over cartel activities); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977)

promulgate nondisclosure laws.<sup>16</sup> The circumstances attendant to promulgation suggest that nondisclosure laws are part of a larger conflict between the policies underlying the United States law sought to be enforced and the policies sought to be promoted by the foreign nondisclosure law.<sup>17</sup> While the United States courts have fashioned specific approaches to deal with nondisclosure laws,<sup>18</sup> these approaches fail to address the underlying conflict between United States and foreign policies.<sup>19</sup> Given the new wave of nondisclosure laws<sup>20</sup> and frequent foreign resistance to United States discovery abroad,<sup>21</sup> a reevaluation of the present approaches is needed.

(vacating sanctions for failure to comply with discovery order); *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290 (S.D. Cal. 1981) (imposing sanctions for failure to comply with discovery order); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138 (N.D. Ill. 1979) (ordering production of documents in violation of foreign law); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 473 F. Supp. 382 (N.D. Ill. 1979) (entering default judgments against cartel members); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 473 F. Supp. 393 (N.D. Ill. 1979) (denying dismissal of counterclaims by cartel members); *In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223 (J.P.M.D.L. 1978) (consolidating four antitrust cases for pre-trial proceedings); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 405 F. Supp. 316 (J.P.M.D.L. 1975) (consolidating 13 contract actions for pre-trial proceedings); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231 (N.M. 1980) (entering default judgment in state antitrust action), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981).

13. Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 Austl. Acts 1125, *amended by* 1976 Austl. Acts 1743.

14. Uranium Information Security Regulations, Can. Stat. O. & Regs. 76-644 (1976).

15. Atomic Energy Act, 1967, No. 90, § 30A, *as amended by* Atomic Energy Amendment Act, 1978, No. 46 (S. Afr.).

16. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1143 (N.D. Ill. 1979); *Re Westinghouse Elec. Corp. & Duquesne Light Co.*, 78 D.L.R.3d 3, 12-14 (Ont. 1977); B. Hawk, *supra* note 1, at 321.

17. *See* 2 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 15.01 (2d ed. 1981); B. Hawk, *supra* note 1, at 319-20.

18. *See infra* pt. II.

19. *See infra* pt. III.

20. Seven nondisclosure laws have been promulgated since 1975. Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 Austl. Acts 1125, *amended by* 1976 Austl. Acts 1743; Uranium Information Security Regulations, Can. Stat. O. & Regs. 76-644 (1976); Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, 1980 J.O. 1799, 1980 B.L.D. 285 (France) (English translation at 75 Am. J. Int'l L. 382 (1981)); Evidence Amendment Act, [1980] 1 N.Z. Stat. 34; Protection of Businesses Act, 1978, No. 99, *as amended by* Act of 1979, No. 114 (S. Afr.); Atomic Energy Act, 1967, No. 90, § 30A, *as amended by* Atomic Energy Amendment Act, 1978, No. 46 (S. Afr.); Protection of Trading Interests Act, 1980, ch. 11 (U.K.).

21. Resistance may take the form of denials of United States letters rogatory requesting the production of documents. *E.g.*, *Re Westinghouse Elec. Corp. & Duquesne Light Co.*, 78 D.L.R.3d 3 (Ont. 1977); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 All E.R. 434 (H.L. 1977). A letter rogatory is a

This Note examines the well-established authority of United States courts to order production even when production is prohibited by foreign law.<sup>22</sup> It also assesses the conflicting approaches employed by United States courts and rejects both the ability of treaties to alleviate the problem and an approach suggested by a recent commentator. This Note contends that the propriety of a production order should turn on an evaluation of the relative strengths and weaknesses of the interests underlying the United States law sought to be enforced and those underlying the nondisclosure law. It also argues that full consideration of these interests should be made prior to the entry of a production order. It is concluded that United States courts should exercise greater restraint and demonstrate greater respect for foreign interests when ordering production that would violate foreign law or imposing sanctions for noncompliance with a production order. Incorporating these contentions, this Note proposes a new approach for resolving disputes involving nondisclosure laws.

## I. INTERNATIONAL JURISDICTION AND DISCOVERY POLICIES

### A. *International Jurisdiction of Nations*

A nation must have the requisite international jurisdiction to apply its laws extraterritorially.<sup>23</sup> There are two types of international jurisdiction: prescriptive and enforcement.<sup>24</sup> Prescriptive jurisdiction refers to the authority of a State "to enact laws governing the conduct, relations, status or interests of persons, or to things," whether by

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request from a court in one country to the court of another country to perform some judicial act. Stern, *International Judicial Assistance Part I: Service and Discovery Abroad*, Prac. Law., Dec. 1968, at 22. Foreign countries have also filed diplomatic protests over United States discovery requests with the State Department, several of which are reproduced in Int'l Law Ass'n, Report of the Fifty-First Conference 565-92 (Tokyo 1964). In the recent uranium cartel litigation, several protests were filed with the State Department. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979).

22. *See Societe Internationale v. Rogers*, 357 U.S. 197, 204-05 (1958); *United States v. Vetco Inc.*, 644 F.2d 1324, 1329-30 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-48 (N.D. Ill. 1979).

23. *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1315-22 (D.C. Cir. 1980); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 609 (9th Cir. 1976).

24. *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1315 (D.C. Cir. 1980); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979); Restatement (Second) of the Foreign Relations Law of the United States § 6 (1965); B. Hawk, *supra* note 1, at 19. For a detailed discussion of international jurisdiction with respect to document production, see Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 Nw. U. L. Rev. 487, 489-501 (1969).

executive, legislative, administrative or judicial act.<sup>25</sup> A State has plenary power to prescribe within its territory,<sup>26</sup> and limited power to prescribe outside of its territory.<sup>27</sup> With respect to the discovery of documents, in the United States the prescriptive rule is that a party must produce non-privileged documents in its custody or control.<sup>28</sup> This rule applies when the documents are sought from a party under rule 34 of the Federal Rules of Civil Procedure,<sup>29</sup> from a nonparty witness pursuant to a subpoena served under rule 45,<sup>30</sup> or from a witness in a grand jury<sup>31</sup> or administrative investigation.<sup>32</sup> When a party fails to produce the requested documents, the court may enter an order compelling production pursuant to rule 37(a).<sup>33</sup> Similarly, if

25. Restatement (Revised) of the Foreign Relations Law of the United States § 401 (Tent. Draft No. 2, 1981); *accord* *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1315-16 (D.C. Cir. 1980); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979); Restatement (Second) of the Foreign Relations Law of the United States § 6 & comment a (1965).

26. *The Schooner Exchange v. McFaddon*, 11 U.S. 74, 86, 7 Cranch 116, 136, (1812) (Marshall, C.J.); Restatement (Second) of the Foreign Relations Law of the United States § 17 (1965); Restatement (Revised) of the Foreign Relations Law of the United States § 402(1)(a) & (b) (Tent. Draft No. 2, 1981).

27. Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965); Restatement (Revised) of the Foreign Relations Law of the United States §§ 402(1)(c), 403 (Tent. Draft No. 2, 1981). The foremost exception to the territorial limitation is the effects doctrine, which grants a nation jurisdiction over acts that have or are intended to have a substantial effect within the nation's territory. See *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 608-16 (9th Cir. 1976); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945); Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965); Restatement (Revised) of the Foreign Relations Law of the United States § 402 (Tent. Draft No. 2, 1981).

28. See *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979); *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947). Although these cases do not address the question of privilege, it is clear that privilege is a limitation on the rule. See Fed. R. Civ. P. 26(b)(1).

29. Fed. R. Civ. P. 34. Rule 34(a) provides in part that "[a]ny party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served." *Id.*

30. *Id.* 45(b). The rule provides that "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein." *Id.*

31. See *id.* 81(a)(3). The rule provides that "[t]hese rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings." *Id.*

32. *Id.*

33. *Id.* 37(a). The rule provides that "[a] party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . . if a party, in response to a request for inspection submitted under Rule 34, fails

a person fails to comply with a subpoena, the court may order compliance.<sup>34</sup>

When a court enters such orders, it exercises enforcement jurisdiction.<sup>35</sup> Enforcement jurisdiction refers to the authority of a State to compel compliance, or impose sanctions for noncompliance, with its prescriptive rules.<sup>36</sup> If a party fails to comply with a production order, the court may invoke rule 37(b), which provides a panoply of sanctions for failure to cooperate in discovery.<sup>37</sup> If a person fails to comply with a subpoena, the court may hold him in contempt.<sup>38</sup> Unlike prescriptive jurisdiction, enforcement jurisdiction is limited to

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to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order . . . compelling inspection in accordance with the request." *Id.* The party resisting production because of a nondisclosure law may move for a protective order under Fed. R. Civ. P. 26(c), which provides that "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or a person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.*

34. See *United States v. Vetco Inc.*, 644 F.2d 1324, 1333 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947).

35. *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1316 (D.C. Cir. 1980); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979); *Onkelinx*, *supra* note 24, at 495. An exercise of enforcement jurisdiction without a prior showing of prescriptive jurisdiction is contrary to international law and gives rise to a claim by the State adversely affected. *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1316-17 (D.C. Cir. 1980); *Restatement (Second) of the Foreign Relations Law of the United States* § 8 & comments d-e (1965); *Onkelinx*, *supra* note 24, at 499. This is of particular importance when the documents are sought to prove jurisdiction under the effects doctrine. When the court enforces such a discovery order it is exercising enforcement jurisdiction before prescriptive jurisdiction is shown to exist. *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1317 (D.C. Cir. 1980); *Onkelinx*, *supra* note 24, at 498-99.

36. *Restatement (Second) of the Foreign Relations Law of the United States* § 6 & comment a (1965); *Restatement (Revised) of the Foreign Relations Law of the United States* § 401(2) (Tent. Draft No. 2, 1981).

37. Fed. R. Civ. P. 37(b)(2). The rule provides that "[i]f a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." *Id.*

38. *Id.* 45(f).



a nation's territory.<sup>39</sup> A court cannot extend "its process into another state to make effective or to enforce its decree there."<sup>40</sup>

That one nation has jurisdiction to prescribe a rule of law does not preclude another State from prescribing a contrary rule.<sup>41</sup> The existence of a nondisclosure law, therefore, does not prevent a United States court from ordering the production of documents subject to that nondisclosure law or from imposing sanctions for noncompliance with such an order.<sup>42</sup> When a court's enforcement actions would subject the person resisting production to liability in a foreign nation, however, the Second Restatement of the Foreign Relations Law of the United States urges the court to moderate its enforcement actions.<sup>43</sup>

This principle of moderation has been extended in the recent tentative draft of the Restatement of Foreign Relations Law.<sup>44</sup> The draft provides that exercises of prescriptive jurisdiction be reasonable;<sup>45</sup> it also provides that an otherwise reasonable exercise of jurisdiction may be unreasonable if it would cause a person to violate foreign law.<sup>46</sup> The tentative draft appears to treat the issuance of a production order as an exercise of prescriptive jurisdiction<sup>47</sup> and therefore subject to the requirement of reasonableness. Regardless of whether a production order is termed an exercise of enforcement or prescriptive jurisdiction, it is clear that the drafters intended that principles of moderation and restraint guide the court's determination of whether production should be compelled.

39. *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1316 (D.C. Cir. 1980); Restatement (Second) of the Foreign Relations Law of the United States § 20 & illustrations 1-3 (1965); Onkelinx, *supra* note 24, at 496.

40. G. Stumberg, Principles of Conflict of Laws 100 (3d ed. 1963) (footnote omitted); see Mann, *The Doctrine of Jurisdiction in International Law*, [1964-1] *Recueil des Cours* 1, 128, 138 (1964).

41. Restatement (Second) of the Foreign Relations Law of the United States § 39(1) (1965).

42. See *supra* note 22 and accompanying text.

43. Restatement (Second) of the Foreign Relations Law of the United States §§ 39(2), 40 (1965); cf. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (balancing of interests approach applied to extraterritorial application of antitrust laws); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613-15 (9th Cir. 1976) (same).

44. Restatement (Revised) of the Foreign Relations Law of the United States § 403 (Tent. Draft No. 2, 1981).

45. *Id.*; accord *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613-15 (9th Cir. 1976).

46. Restatement (Revised) of the Foreign Relations Law of the United States § 403 (Tent. Draft No. 2, 1981).

47. See *id.* § 415 comment f (judicial decree exercise of prescriptive jurisdiction); *id.* introductory note, at 91-92 (nondisclosure disputes covered in discussion of prescriptive jurisdiction).

### B. Discovery Practices: Foreign and Domestic

Traditionally, the conflict surrounding nondisclosure laws has been viewed as one between the policies underlying the United States discovery rules and the principle of international comity.<sup>48</sup> In the United States, a court may order the production of documents that are in the custody or control of a party subject to the court's jurisdiction<sup>49</sup> regardless of the location of the documents.<sup>50</sup> It is not ground for objection that the documents will be inadmissible at trial as long as the documents sought "[appear] reasonably calculated to lead to the discovery of admissible evidence."<sup>51</sup> The conflict of laws principle of *lex fori* holds that the law of the forum governs procedural matters.<sup>52</sup> The production of documents is a procedural matter.<sup>53</sup> The principle of *lex fori* thus permits United States courts to compel production of documents despite the existence of nondisclosure laws.<sup>54</sup>

Under the traditional approach, the only factor militating against discovery is the principle of international comity.<sup>55</sup> Comity provides

48. See *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997 (10th Cir. 1977); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); B. Hawk, *supra* note 1, at 318-19; *Foreign Nondisclosure*, *supra* note 8, at 614; Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 Va. J. Int'l L. 747, 748 (1974) [hereinafter cited as *Recent Developments*]; *Ordering Production*, *supra* note 6, at 796.

49. See *supra* note 28 and accompanying text. A parent corporation has control over the documents of its subsidiary, foreign or domestic, if the parent "has power, either directly or indirectly, through another corporation or series of corporations, to elect a majority of the directors of" the subsidiary. *In re Investigation of World Arrangements*, 13 F.R.D. 280, 285 (D.D.C. 1952) (emphasis omitted).

50. *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979); *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947).

51. Fed. R. Civ. P. 26(b)(1).

52. *Societe Internationale v. McGranery*, 111 F. Supp. 435, 444 (D.D.C. 1953), *modified sub nom. Societe Internationale v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956); see *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Restatement of Conflict of Laws § 585 (1934); J. Beale, *A Treatise on the Conflict of Laws* 1600 (1935).

53. *In re Investigation of World Arrangements*, 13 F.R.D. 280, 286 (D.D.C. 1952).

54. *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976) ("Foreign law may not control local law. It cannot invalidate an order which local law authorizes."), *cert. denied*, 429 U.S. 1096 (1977); *Societe Internationale v. McGranery*, 111 F. Supp. 435, 444 (D.D.C. 1953) ("Procedures of the law of the forum customarily govern law suits . . . It seems obvious that foreign law cannot be permitted to obstruct the investigation and discovery of facts in a case."), *modified sub nom. Societe Internationale v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

55. See *supra* note 48 and accompanying text.

that one nation must respect the laws of other nations so that its laws will be accorded reciprocal respect.<sup>56</sup> To that end, one nation ought not compel acts that violate the laws of another State.<sup>57</sup> The *lex fori*/comity analysis fails to focus on the underlying substantive conflict between United States and foreign policies generated by the extraterritorial application of United States laws.

The nondisclosure law problem is exacerbated by the difference between United States and foreign discovery practices. American discovery rules are far more liberal than their foreign counterparts.<sup>58</sup> Contrary to American discovery practices, which have been condemned abroad as "fishing expeditions,"<sup>59</sup> most common-law and civil-law countries allow only the discovery of evidence that would be admissible at trial.<sup>60</sup> Because discovery in civil-law jurisdictions is normally conducted by the judiciary,<sup>61</sup> "American counsel conducting an unsupervised deposition or the inspection of documents in American fashion in a Civil-Law country may be improperly performing a public judicial act which is seen as infringing the foreign State's judicial sovereignty."<sup>62</sup> The proper method of obtaining evidence from abroad is a letter rogatory<sup>63</sup>—a formal request by the court of one country to the court of another asking that the foreign court lend its aid in securing some act in the foreign country.<sup>64</sup> In addition, some nations consider American production orders an infringement on their sovereignty.<sup>65</sup> By compelling a party to produce documents situated abroad, the court attempts to accomplish indirectly that which it could not do directly<sup>66</sup> because it cannot extend its process abroad.<sup>67</sup>

56. *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923); J. Story, *Conflict of Laws* § 35 (1872).

57. *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960); Restatement (Second) of Conflict of Laws § 53 comment d (1969); Restatement of Conflict of Laws § 94 (1934); see J. Story, *supra* note 56, § 35.

58. See 2 J. Atwood & K. Brewster, *supra* note 17, § 15.10; Carter, *Existing Rules and Procedures*, 13 Int'l Law. 5, 5-6 (1979).

59. *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 All E.R. 434, 442 (H.L. 1977); *RCA v. Rauland Corp.*, [1956] 1 All E.R. 549, 554 (Q.B.).

60. See sources cited *supra* note 58.

61. 2 J. Atwood & K. Brewster, *supra* note 17, § 15.10.

62. Carter, *supra* note 58, at 7.

63. *Ings v. Ferguson*, 282 F.2d 149, 151 (2d Cir. 1960); Fed. R. Civ. P. 28(b); Stern, *supra* note 21, at 22.

64. Stern, *supra* note 21, at 22; see *Ings v. Ferguson*, 282 F.2d 149, 151 (2d Cir. 1960); Fed. R. Civ. P. 28(b)(3).

65. 2 J. Atwood & K. Brewster, *supra* note 17, § 15.10; Riedweg, *supra* note 8, at 403.

66. Riedweg, *supra* note 8, at 403; see 2 J. Atwood & K. Brewster, *supra* note 17, § 15.10.

67. See *supra* note 40 and accompanying text.

## II. EXISTING STANDARDS FOR ORDERING PRODUCTION IN VIOLATION OF FOREIGN LAW

United States courts have employed three approaches when faced with nondisclosure laws. Under the "good faith" approach, nondisclosure laws do not bar a court from ordering production of documents located abroad,<sup>68</sup> and the nondisclosure law and the efforts to comply with the production order are relevant only to the determination of sanctions.<sup>69</sup> In contrast, the "balancing of national interests" approach requires the court to consider United States and foreign interests when ordering production,<sup>70</sup> and to moderate its actions in light of those interests.<sup>71</sup> In the early 1960's, the Second Circuit adopted the "international comity approach," which provided that production would not be ordered if it would violate foreign law.<sup>72</sup> The circuit later abandoned this approach in favor of the balancing of national interests approach.<sup>73</sup> Regardless of the approach utilized, a court will impose sanctions for noncompliance with a production order if the party resisting production has acted willfully or in bad faith,<sup>74</sup> or has

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68. *Societe Internationale v. Rogers*, 357 U.S. 197, 204-05 (1958); *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952-53 (D.C. Cir. 1979); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-48 (N.D. Ill. 1979); *see American Indus. Contracting, Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 880 (W.D. Pa. 1971).

69. *Societe Internationale v. Rogers*, 357 U.S. 197, 208 (1958); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979).

70. *United States v. Vetco Inc.*, 644 F.2d 1324, 1330 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968); *SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346, at 92,146-48 (S.D.N.Y. Nov. 16, 1981); *cf. United States v. Field*, 532 F.2d 404, 407 (5th Cir.) (compelling oral testimony), *cert. denied*, 429 U.S. 940 (1976); *Restatement (Second) of the Foreign Relations Law of the United States* § 40(a) (1965).

71. *Restatement (Second) of the Foreign Relations Law of the United States* §§ 39-40 (1965).

72. *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *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), *cert. denied*, 361 U.S. 948 (1960).

73. *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968); *SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346, at 92,146 (S.D.N.Y. Nov. 16, 1981).

74. *United States v. Vetco Inc.*, 644 F.2d 1324, 1330 & n.6 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *United States v. First Nat'l City Bank*, 396 F.2d 897, 900 (2d Cir. 1968); *Ohio v. Crofters, Inc.*, 75 F.R.D. 12, 15 (D. Colo. 1977), *aff'd sub nom. Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th

"deliberately courted legal impediments to production" of the documents.<sup>75</sup>

The Second,<sup>76</sup> Fifth<sup>77</sup> and Ninth<sup>78</sup> Circuits embrace the balancing approach for determining the propriety of production orders and sanctions. The Tenth Circuit follows the good faith approach with respect to production orders,<sup>79</sup> but follows the balancing of national interests approach when imposing sanctions.<sup>80</sup> The D.C. Circuit appears to follow the Tenth Circuit.<sup>81</sup> The Northern District of Illinois,<sup>82</sup> the Southern District of California,<sup>83</sup> the Western District of Pennsylvania<sup>84</sup> and the Supreme Court of New Mexico<sup>85</sup> have all embraced the good faith approach.

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Cir.), *cert. denied*, 439 U.S. 833 (1978); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 329 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981).

75. *Societe Internationale v. Rogers*, 357 U.S. 197, 208-09 (1958). A party deliberately courts legal impediments to the production of documents if it places them abroad to make them unavailable in anticipation of litigation, *id.* at 208-09; *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 307 (S.D. Cal. 1981); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 308-09 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981), acts to evade United States laws with intent to use the nondisclosure law as a shield, *Societe Internationale v. Rogers*, 357 U.S. 197, 208-09 (1958); *SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346, at 92,148 (S.D.N.Y. Nov. 16, 1981), or induces the foreign government to enact or to enforce a nondisclosure law. *See Societe Internationale v. Rogers*, 357 U.S. 197, 201, 208 (1958).

76. *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968); *see SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346, at 92,146-47 (S.D.N.Y. Nov. 16, 1981).

77. *United States v. Field*, 532 F.2d 404, 407 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

78. *United States v. Vetco Inc.*, 644 F.2d 1324, 1330-31 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981).

79. *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

80. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997 (10th Cir. 1977).

81. *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1326 n.148 (D.C. Cir. 1980); *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 953 (D.C. Cir. 1979).

82. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-49 (N.D. Ill. 1979).

83. *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 295-96 (S.D. Cal. 1981).

84. *American Indus. Contracting, Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 880-81 (W.D. Pa. 1971).

85. *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 268-69 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981).

A. *The Good Faith Approach: Societe Internationale v. Rogers*

The good faith approach was first articulated by the Supreme Court in 1958 in *Societe Internationale v. Rogers*.<sup>86</sup> In *Societe*, the plaintiff Swiss holding company sought to recover assets seized by the United States under the Trading with the Enemy Act<sup>87</sup> during World War II.<sup>88</sup> To determine whether the plaintiff was an enemy within the meaning of the Act, the government requested that the plaintiff produce its Swiss banking records.<sup>89</sup> The Swiss Federal Attorney determined that production of the documents would violate Swiss law<sup>90</sup> and placed an interdiction on their release.<sup>91</sup> The plaintiff moved to be excused from production because production would subject it to liability under Swiss law<sup>92</sup> and contended that Swiss law deprived it of control over the documents.<sup>93</sup> After the district court denied the motion,<sup>94</sup> the plaintiff obtained waivers for a substantial number of the requested documents.<sup>95</sup> Because full compliance was impossible,<sup>96</sup> however, the district court dismissed the action.<sup>97</sup> On review of the court of appeals' affirmance,<sup>98</sup> the Supreme Court reversed, holding that due process bars dismissal when the plaintiff's failure to comply with a production order is not willful, in bad faith or fostered by its own conduct,<sup>99</sup> and remanded the case to the district

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86. 357 U.S. 197 (1958). For a detailed discussion of the facts of *Societe* and its complicated procedural history, see Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 Colum. L. Rev. 1441, 1458 n.159 (1963).

87. 40 Stat. 419 (1917) (current version at 50 U.S.C. app. § 9(a) (1976)).

88. 357 U.S. at 199.

89. *Id.* at 199-200.

90. *Id.* at 200.

91. *Id.* at 200-01.

92. *Id.* at 200.

93. *Id.*

94. *Societe Internationale v. McGranery*, 111 F. Supp. 435, 448 (D.D.C. 1953), *modified sub nom.* *Societe Internationale v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

95. 357 U.S. at 202-03.

96. *Id.* at 202.

97. *Societe Internationale v. McGranery*, 111 F. Supp. 435, 438 (D.D.C. 1953) (dismissal conditioned on failure to comply with production order within three months), *modified sub nom.* *Societe Internationale v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955) (grace period extended to six months), *cert. denied*, 350 U.S. 937 (1956). Upon the expiration of the six-month period, the district court dismissed the action and the circuit court affirmed. *Societe Internationale v. Brownell*, 243 F.2d 254 (D.C. Cir. 1957), *rev'd sub nom.* *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

98. *Societe Internationale v. Brownell*, 243 F.2d 254 (D.C. Cir. 1957), *rev'd sub nom.* *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

99. 357 U.S. at 209-12.

court for consideration of alternative sanctions.<sup>100</sup> In so holding, however, the Supreme Court acknowledged the propriety of the production order.<sup>101</sup>

Three factors were relevant to the Court's determination that the nondisclosure law did not preclude the issuance of the production order.<sup>102</sup> First, the Court emphasized the importance of the congressional policies underlying the law upon which the action was brought.<sup>103</sup> The Court stated that to hold that "fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had 'control' over [the documents] . . . and thereby from ordering their production, would undermine congressional policies."<sup>104</sup> Second, the Court determined that the documents were vital to the effectuation of those policies.<sup>105</sup> Third, the Court was influenced by the plaintiff's ability to secure waivers from the Swiss government for many of the documents.<sup>106</sup> The Court stated that district courts should be free to require those who face legal impediments to the production of documents to make efforts "to the maximum of their ability" to comply with the order.<sup>107</sup>

The Supreme Court did not examine the foreign interests behind the nondisclosure law, nor did it balance them against the United States interests. Under *Societe*, therefore, the determination of whether to order production rests solely upon a consideration of the United States interests and not on those of the foreign sovereign. Further, the Court determined that nondisclosure laws and efforts to achieve compliance with the order were relevant only to the determination of sanctions for noncompliance with the order, stating that "[w]hatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner,

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100. *Id.* at 212-13.

101. *Id.* at 204-06.

102. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-48 (N.D. Ill. 1979); see *Societe Internationale v. Rogers*, 357 U.S. 197, 204-05 (1958).

103. 357 U.S. at 204-06. The Court stated that the "possibility of enemy taint of nationals of neutral powers, particularly of holding companies with intricate financial structures . . . was of deep concern to the Congress." *Id.* at 204-05.

104. *Id.* at 205.

105. *Id.* It has been suggested that the requirement that the documents be vital to the litigation replaces the normal rule 26(b) standard that they be reasonably calculated to lead to admissible evidence. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146 (N.D. Ill. 1979); see *Recent Developments, supra* note 48, at 751.

106. 357 U.S. at 205. The Court noted that "[p]etitioner is in a most advantageous position to plead with its own sovereign for a relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order, and indeed to that end it has already made significant progress." *Id.*

107. *Id.*

can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply."<sup>108</sup>

In reversing the dismissal, the Court relied heavily on the good faith demonstrated by the plaintiff in seeking waivers of the Swiss law.<sup>109</sup> Although the Court determined that good faith efforts do not excuse noncompliance,<sup>110</sup> it held that they did prevent the imposition of the harshest rule 37(b) sanctions.<sup>111</sup> The Court adopted a two-pronged approach to determining good faith. First, the party resisting production must have made efforts "to the maximum of [its] ability" to achieve compliance,<sup>112</sup> and second, it must not have "deliberately courted legal impediments" to the production of documents.<sup>113</sup>

The Supreme Court limited its holding to the facts of *Societe*.<sup>114</sup> This limitation may be responsible for the conflicting positions taken by United States courts after *Societe*.<sup>115</sup> While a few courts cite the decision as support for a balancing approach,<sup>116</sup> others interpret it as inconsistent with a balancing approach.<sup>117</sup> Most courts, however, do not address this issue, but instead cite *Societe* as support for narrower propositions.<sup>118</sup> *Societe* does not call for a balancing of interests approach.<sup>119</sup> Two commentators contend that nothing in *Societe* precludes district court judges from balancing competing interests in their role as overseers of the discovery process.<sup>120</sup> The Supreme

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108. *Id.* at 208.

109. *Id.* at 211.

110. *Id.* at 208.

111. *Id.* at 212-13.

112. *Id.* at 205, 211-12.

113. *Id.* at 208-09; *see supra* note 75.

114. 357 U.S. at 205-06.

115. *See supra* notes 76-85 and accompanying text.

116. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997 (10th Cir. 1977); *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972).

117. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-48 (N.D. Ill. 1979); *see Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

118. *E.g.*, *United States v. Vetco Inc.*, 644 F.2d 1324, 1329 (9th Cir. 1981) (*Societe* only prevents dismissal where party makes extensive efforts at compliance), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 953 (D.C. Cir. 1979) (*Societe* requires good faith efforts to comply with subpoena); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976) (*Societe* implies that nondisclosure laws are relevant only to sanctions), *cert. denied*, 429 U.S. 1096 (1977); *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 156 (D.C. Cir. 1961) (*Societe* requires good faith effort to seek waiver of nondisclosure law); *United States v. Standard Oil Co.*, 23 F.R.D. 1, 4 (S.D.N.Y. 1958) (*Societe* requires good faith effort to achieve compliance with production order).

119. *See supra* notes 103-08 and accompanying text.

120. *See* 2 J. Atwood & K. Brewster, *supra* note 17, § 15.17.



Court's failure to examine the foreign interests, however, suggests that the relevant inquiries are to the strength of the American interests and the need for production to effectuate those interests.<sup>121</sup> It further suggests that nondisclosure laws and the efforts to achieve compliance are relevant only to the determination of sanctions.<sup>122</sup>

B. *The Balancing of National Interests Approach:  
The Second Restatement of the Foreign Relations Law  
of the United States*

Since its introduction in 1965, the balancing of national interests approach of the Second Restatement of the Foreign Relations Law of the United States<sup>123</sup> has often been employed by United States courts faced with nondisclosure laws.<sup>124</sup> The Restatement provides that one nation's having jurisdiction to prescribe or enforce a rule of law does not preclude another nation also having jurisdiction from prescribing or enforcing a contrary rule.<sup>125</sup> The Restatement urges, however, that a State moderate its enforcement actions in light of five factors when its law requires a person to engage in conduct that is contrary to the law of another nation:

- (a) [the] vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.<sup>126</sup>

Unlike the good faith approach, the balancing of national interests approach, therefore, calls for an inquiry into the foreign interests as well as those of the United States.<sup>127</sup> Further, because entering an

121. See *supra* notes 103-07 and accompanying text.

122. See *supra* note 108 and accompanying text.

123. Restatement (Second) of the Foreign Relations Law of the United States §§ 39-40 (1965). Section 39 of the Restatement provides: "(1) A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct. (2) Factors to be considered in minimizing conflicts arising from the application of the rule stated in Subsection (1) with respect to enforcement jurisdiction are stated in § 40." *Id.* § 39. Section 40 specifies limitations on enforcement jurisdiction. *Id.* § 40; see *infra* text accompanying note 126.

124. See *supra* notes 76-78, 80-81 and accompanying text.

125. Restatement (Second) of the Foreign Relations Law of the United States § 39 (1965).

126. *Id.* §§ 40(a)-(e).

127. See sources cited *supra* note 70.

order compelling production or enforcing a subpoena is treated as an exercise of enforcement jurisdiction,<sup>128</sup> a court employing the balancing approach should consider these five factors at the order stage as well as at the sanction stage.<sup>129</sup>

In *United States v. First National City Bank*,<sup>130</sup> in 1968, the Second Circuit applied the balancing approach and explored the foreign and domestic interests. Citibank was subpoenaed by a grand jury to produce documents relating to alleged antitrust violations by its customers.<sup>131</sup> Citibank produced the documents located in its New York office,<sup>132</sup> but for fear of liability under German law,<sup>133</sup> refused to produce the documents located in its German branch.<sup>134</sup> The district court enforced the subpoena and held Citibank in contempt.<sup>135</sup>

In affirming the district court's decision, the Second Circuit considered several of the Restatement factors. The court discussed the nationality of Citibank and its customers who were under investigation<sup>136</sup> and emphasized the unlikelihood of hardship to Citibank under German law.<sup>137</sup> The court's principal focus, however, was on the national interests of the United States and Germany.<sup>138</sup> With respect to the United States interests, the Second Circuit stated that the antitrust laws "have long been considered cornerstones of this

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128. See *supra* notes 34-35 and accompanying text.

129. See, e.g., *United States v. Vetco Inc.*, 644 F.2d 1324, 1330 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *United States v. Field*, 532 F.2d 404, 407 (5th Cir.), cert. denied, 429 U.S. 940 (1976); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968); *SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346, at 92,146-48 (S.D.N.Y. Nov. 16, 1981).

130. 396 F.2d 897 (2d Cir. 1968).

131. *Id.* at 898.

132. *Id.*

133. *Id.* at 898-99. Production of the documents would expose Citibank to civil suit in Germany by the customers whose records were produced. *Id.* The government argued that foreign liability had to be criminal to prevent enforcement of the subpoena, but the court rejected this argument, stating that "[w]e would be reluctant to hold . . . that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena . . . . The vital national interests of a foreign nation . . . can be expressed in ways other than through the criminal law." *Id.* at 901-02.

134. *Id.* at 898-99.

135. *In re First Nat'l City Bank*, 285 F. Supp. 845, 848-49 (S.D.N.Y.), *aff'd sub nom.* *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968). The district court held the bank in contempt because it had not made good faith efforts to comply with the subpoena. *Id.*

136. 396 F.2d at 904-05. The court found that the likelihood of Citibank incurring damages was speculative because of its defenses under German law and the latitude accorded German courts in awarding damages. *Id.*

137. *Id.* at 905. The court noted that Citibank was an American corporation, and that one of its customers who threatened to sue Citibank in Germany was a New York corporation. *Id.*

138. *Id.* at 902-04.

nation's economic policies, have been vigorously enforced and the subject of frequent interpretation by our Supreme Court."<sup>139</sup> Turning to the German interest in bank secrecy, the court found that the German law provided only a privilege that could be waived by the customer and that the law's enforcement was left to the "vagaries of private litigation."<sup>140</sup> The court also noted the conspicuous absence of banks from other German secrecy legislation.<sup>141</sup> Additionally, the court was influenced by the absence of German government or United States Department of State indications that the investigation would affect the relations between the two countries.<sup>142</sup> The court found that the German interest in secrecy was less substantial than the American interest in enforcing its antitrust laws<sup>143</sup> and, therefore, affirmed the production order.<sup>144</sup>

The Second Circuit, however, had not always so thoroughly considered the United States and foreign interests. Prior to its adoption of the balancing approach in *First National City Bank*, the Second Circuit had followed an approach that emphasized international comity.

### C. *The International Comity Approach*

In three cases decided by the Second Circuit between 1959 and 1962, it was determined that production should not be ordered if it would violate foreign law.<sup>145</sup> The primary focus was on international comity<sup>146</sup> and the use of diplomatic channels to obtain evidence.<sup>147</sup> This emphasis may be attributable to the circumstance that in all three cases, the documents were sought from nonparty witnesses.<sup>148</sup>

139. *Id.* at 903.

140. *Id.*

141. *Id.* at 903-04.

142. *Id.* at 904.

143. *See id.* at 903-04.

144. *Id.* at 905.

145. *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *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), *cert. denied*, 361 U.S. 948 (1960). Only in *Ings* was the subpoena actually modified so as not to violate Canadian law. 282 F.2d at 152-53. In *Chase Manhattan*, the subpoena was left in effect to ensure that the bank would cooperate with United States officials in obtaining the documents. 297 F.2d at 613. In *First National City Bank*, the court remanded the case to determine whether production would violate Panamanian law. 271 F.2d at 620.

146. *See In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *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), *cert. denied*, 361 U.S. 948 (1960).

147. *See In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149, 152-53 (2d Cir. 1960).

148. *In re Chase Manhattan Bank*, 297 F.2d 611, 611-12 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149, 150 (2d Cir. 1960); *First Nat'l City Bank v. IRS*, 271 F.2d 616, 617-18 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

The court in *Ings v. Ferguson*<sup>149</sup> stated that "it seems highly undesirable that the courts of the United States should countenance service of a subpoena upon [a corporation] which is not a party to the litigation"<sup>150</sup> and whose country will entertain letters rogatory seeking the production of documents.<sup>151</sup> The court determined that letters rogatory should be used to obtain the evidence in order that the Canadian courts be afforded the opportunity to determine whether the production would violate Canadian law.<sup>152</sup>

The international comity approach, in stark contrast to the good faith approach, suffers from an overemphasis on comity in that it automatically defers to foreign law without consideration of the underlying United States or foreign interests.<sup>153</sup> For example, in *In re Chase Manhattan Bank*,<sup>154</sup> the bank was served with a grand jury subpoena to produce documents located in its Panamanian branch.<sup>155</sup> The Panamanian nondisclosure law<sup>156</sup> provided only a minimal fine for its violation,<sup>157</sup> indicating that the Panamanian interest in secrecy was not of vital national importance. Nevertheless, the court held that it would not compel the bank to violate Panamanian law.<sup>158</sup> Such deference to foreign law may only encourage the use of foreign laws to evade domestic discovery. The Second Circuit abandoned this approach in 1968 in favor of the more flexible balancing of interests approach.<sup>159</sup>

### III. THE FAILURE OF THE EXISTING APPROACHES TO PROVIDE ADEQUATE MEANS FOR CONFRONTING THE NONDISCLOSURE LAW DILEMMA

The existing approaches have not solved the nondisclosure law dilemma. On four occasions, nondisclosure laws have been enacted in reaction to the extraterritorial application of United States laws.<sup>160</sup>

149. 282 F.2d 149 (2d Cir. 1960).

150. *Id.* at 152. The posture of the resisting party with respect to the litigation is a proper, indeed important, factor. See *infra* text accompanying note 253.

151. 282 F.2d at 151-52.

152. *Id.* at 152-53.

153. See *In re Chase Manhattan Bank*, 297 F.2d 611, 612 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149, 152-53 (2d Cir. 1960); *First Nat'l City Bank v. IRS*, 271 F.2d 616, 619-20 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

154. 297 F.2d 611 (2d Cir. 1962).

155. *Id.* at 611.

156. I Codice de Comercio, tit. III, art. 89 (Pan. 1961).

157. *Id.*, discussed in 297 F.2d at 612 (2d Cir. 1962) (violation of the statute was the equivalent of a misdemeanor, with a maximum fine of 100 balboas).

158. 297 F.2d at 613.

159. *SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346, at 92,147 (S.D.N.Y. Nov. 16, 1981) (citing *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968)).

160. See *supra* notes 5-16 and accompanying text.

Moreover, three nondisclosure laws have recently been enacted, not in response to pending litigation, but in anticipation of future litigation.<sup>161</sup> The continued promulgation of nondisclosure laws reflects the failure of the existing approaches to provide a means to resolve the problem.

The good faith approach fails to require a full consideration of the foreign interests,<sup>162</sup> and what consideration they are given is delayed until the sanctions hearing,<sup>163</sup> a point at which the potential for avoiding international conflict is minimal.<sup>164</sup> The emphasis is on discovery to effectuate United States policies rather than on attempting to accommodate the conflicting United States and foreign interests.<sup>165</sup>

The most recent application of the good faith approach was in the litigation surrounding the activities of the international uranium cartel.<sup>166</sup> In response to the litigation, the Canadian government promulgated the Uranium Information Security Regulations, which prohibited the disclosure of cartel-related information.<sup>167</sup> Canada contended that the United States uranium policies, in contravention of the General Agreement on Tariffs and Trade,<sup>168</sup> had caused a depression in the market for non-United States uranium, adversely affecting the Canadian uranium industry.<sup>169</sup> To alleviate the problem, Can-

161. Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, 1980 J.O. 1799, 1980 B.L.D. 285 (France) (English translation at 75 Am. J. Int'l L. 382 (1981)); Evidence Amendment Act, [1980] 1 N.Z. Stat. 34; Protection of Trading Interests Act, 1980, ch. 11 (U.K.).

162. See *Societe Internationale v. Rogers*, 357 U.S. 197, 204-05 (1958); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-49 (N.D. Ill. 1979); *American Indus. Contracting, Inc. v. Johns-Manville Corp.*, 326 F. Supp. 879, 880-81 (W.D. Pa. 1971); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 268-69 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981); *supra* notes 103-07 and accompanying text.

163. *Societe Internationale v. Rogers*, 357 U.S. 197, 208 (1958); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-49 (N.D. Ill. 1979); see *supra* note 108 and accompanying text.

164. *Foreign Nondisclosure*, *supra* note 8, at 617; see 2 J. Atwood & K. Brewster, *supra* note 17, § 15.06.

165. See *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-49 (N.D. Ill. 1979); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 264-66 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981); *supra* notes 103-07 and accompanying text.

166. See *supra* note 12.

167. Can. Stat. O. & Regs. 76-644 (1976).

168. General Agreement on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, 61 Stat. pt. 5, T.I.A.S. No. 1700, 55 U.N.T.S. 188.

169. *Re Westinghouse Elec. Corp. & Duquesne Light Co.*, 78 D.L.R.3d 3, 11-13 (Ont. 1977); *International Uranium Supply and Demand: Hearing Before the Sub-*

ada initiated discussions with other producer nations which ultimately led to an informal marketing arrangement.<sup>170</sup>

Westinghouse instituted an antitrust action against the alleged cartel members, some of which were Canadian corporations.<sup>171</sup> Westinghouse requested that the Canadian defendants produce their cartel-related documents.<sup>172</sup> When the defendants failed to produce the requested documents, Westinghouse moved for an order compelling production.<sup>173</sup> In the related breach of contract actions brought against Westinghouse by several public utilities,<sup>174</sup> the Ontario High Court refused to enforce United States letters rogatory.<sup>175</sup> The Ontario Court determined that it would be inappropriate to release documents that would also be used in the antitrust action to determine whether actions taken by or on behalf of the Canadian government were contrary to the laws of the United States.<sup>176</sup>

In three major discovery-related decisions in the cartel litigation,<sup>177</sup> the good faith approach was employed.<sup>178</sup> In the initial antitrust action, *Westinghouse Electric Corp. v. Rio Algom Ltd.*,<sup>179</sup> the District Court for the Northern District of Illinois found the Restatement balancing approach to be "inherently unworkable"<sup>180</sup> and held that the numerous foreign protests were relevant only to determining the likelihood that the foreign law would be waived.<sup>181</sup> The court or-

*comm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 13-15 (1976) (background paper on the Canadian uranium industry's activities in international uranium marketing, prepared by the Canadian Minister of Energy, Mines and Resources).

170. See sources cited *supra* note 169.

171. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 617 F.2d 1248 (7th Cir. 1980).

172. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1142 (N.D. Ill. 1979).

173. *Id.* at 1142-43.

174. See *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977).

175. *Re Westinghouse Elec. Corp. & Duquesne Light Co.*, 78 D.L.R.3d 3, 21-22 (Ont. 1977).

176. *Id.*; accord *Gulf Oil Corp. v. Gulf Canada Ltd.*, 111 D.L.R.3d 74, 86 (Can. 1980).

177. *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290 (S.D. Cal. 1981); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138 (N.D. Ill. 1979); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981).

178. *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 295-96 (S.D. Cal. 1981); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-48 (N.D. Ill. 1979); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 268-69 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981). *But see In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997-99 (10th Cir. 1977) (balancing approach employed in evaluating sanctions, but good faith approach left intact for assessing production orders).

179. 480 F. Supp. 1138 (N.D. Ill. 1979).

180. *Id.* at 1148.

181. *Id.* at 1149.

dered production<sup>182</sup> and reserved any further consideration of foreign interests until the sanction stage of the proceedings,<sup>183</sup> arguing that then "the potential moderation of the exercise of their conflicting enforcement jurisdictions can be meaningfully considered."<sup>184</sup> Although the case was settled,<sup>185</sup> given the court's conclusion that a balancing approach was inherently unworkable,<sup>186</sup> it is doubtful that the foreign interests would have been meaningfully addressed.

In *United Nuclear Corp. v. General Atomic Co.*<sup>187</sup> and *General Atomic Co. v. Exxon Nuclear Co.*,<sup>188</sup> subsequent antitrust actions, the balancing approach was also not employed. In *United Nuclear*, the New Mexico Supreme Court employed the good faith approach to affirm both a production order and a default judgment.<sup>189</sup> The court held that the nondisclosure law was not revelant to the production order,<sup>190</sup> and citing General Atomic's bad faith in resisting production, affirmed the default judgment.<sup>191</sup> In *Exxon Nuclear*, the Southern District of California found that Gulf Oil had made good faith efforts to produce the requested documents.<sup>192</sup> Nevertheless, because Gulf had previously courted legal impediments to the production of the documents,<sup>193</sup> the court precluded Gulf from introducing evidence in support of certain defenses and designated that certain facts be taken as established.<sup>194</sup>

Because good faith is determined on a case-by-case basis,<sup>195</sup> the party resisting discovery cannot be certain what efforts will be considered good faith efforts. Some courts appear to equate partial compliance with a finding of good faith,<sup>196</sup> while others have found good faith despite noncompliance where efforts had been made to obtain

182. *Id.* at 1156.

183. *Id.* at 1149, 1156.

184. *Id.* at 1156.

185. See N.Y. Times, June 18, 1981, § 4, at 4, col. 6; N.Y. Times, Mar. 18, 1981, § 4, at 5, cols. 5-6; N.Y. Times, Mar. 15, 1981, § 3, at 22, cols. 5-6.

186. See *supra* note 180 and accompanying text.

187. 629 P.2d 231 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981).

188. 90 F.R.D. 290 (S.D. Cal. 1981).

189. 629 P.2d at 268-69.

190. *Id.*

191. *Id.* at 329.

192. 90 F.R.D. at 294-95.

193. *Id.* at 296-99.

194. *Id.* at 308. Although these sanctions were warranted in this case, they should generally be avoided. See *infra* notes 255-58 and accompanying text.

195. *Foreign Nondisclosure*, *supra* note 8, at 618-19; see *Societe Internationale v. Rogers*, 357 U.S. 197, 205-06 (1958).

196. *Societe Internationale v. Rogers*, 357 U.S. 197, 202-03, 211 (1958); *Calcutta E. Coast of India & E. Pakistan/U.S.A. Conference v. Federal Maritime Comm'n*, 399 F.2d 994, 997 & n.5 (D.C. Cir. 1968).

waivers of the foreign law.<sup>197</sup> Further, delaying consideration of the foreign interests to the sanction stage is inefficient. It is no easier to assess the foreign interests at the sanction stage, which is dominated by consideration of the efforts made to comply with the order.<sup>198</sup> Finally, by neither emphasizing the use of letters rogatory nor exploring alternate means of compliance, the good faith approach shows inadequate respect for international comity.

The uranium cartel litigation reveals these shortcomings. By encouraging the formation and activities of the international uranium cartel,<sup>199</sup> the Canadian government had become a principal in the underlying controversy. The passage of the Uranium Information Security Regulations<sup>200</sup> and the denial of letters rogatory<sup>201</sup> indicated that the Canadian government considered the litigation an infringement on its sovereignty. It was, therefore, exceedingly clear that the production orders placed the resisting parties in a no-win position and exacerbated an already significant international conflict. Under the circumstances, application of the abandoned international comity approach would surely have precluded the issuance of the production orders. It is not clear, however, whether the conflict would have been alleviated by the use of the balancing of national interests approach.

The balancing approach is superior to the good faith and international comity approaches as a means to confront the nondisclosure law problem. It calls for some consideration of the foreign interests at the order stage and for moderation of enforcement actions in light of those interests.<sup>202</sup> Despite providing a better means by which nondisclosure law problems may be resolved, the balancing approach, too, has its shortcomings.

The Restatement does not recognize that the propriety of production orders should turn upon a weighing of the relative strengths and weaknesses of the underlying interests sought to be enforced. Section 40 of the Restatement lists the "vital national interests of each of the states" as one of five factors to be considered when compelling con-

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197. *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 998 (10th Cir. 1977); *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 294 (S.D. Cal. 1981).

198. *See, e.g., Societe Internationale v. Rogers*, 357 U.S. 197, 202-03, 211-12 (1958); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 995-96 (10th Cir. 1977); *Ohio v. Crofters, Inc.*, 75 F.R.D. 12, 19-20 (D. Colo. 1970), *aff'd sub nom. Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1372-74 (10th Cir. 1977), *cert. denied*, 439 U.S. 833 (1978); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 280-302 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981). *But see Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1156 (N.D. Ill. 1979).

199. *See supra* notes 168-70 and accompanying text.

200. *Can. Stat. O. & Regs.* 76-644 (1976).

201. *See supra* notes 175-76 and accompanying text.

202. *See supra* notes 126-29 and accompanying text.



duct contrary to foreign law.<sup>203</sup> A careful reading of the Restatement and its comments and illustrations reveals that the drafters were more concerned with the plight of individuals subject to conflicting demands than with the impact of exercises of jurisdiction on the underlying policies of foreign states.<sup>204</sup> Furthermore, the Restatement defines the term "vital national interests" narrowly<sup>205</sup> and emphasizes that a vital national interest is "a factor favoring the exercise of jurisdiction, even though it interferes with such exercises by another state."<sup>206</sup> Because the Restatement, upon a finding of such an interest of the forum State, fails to require accommodation of the other nation's interests, the United States interests have consistently prevailed.<sup>207</sup> If the Restatement approach had been employed in the

203. Restatement (Second) of the Foreign Relations Law of the United States § 40(a) (1965).

204. Section 40 of the Second Restatement addresses the problem of requiring "inconsistent conduct upon the part of a person," rather than the impact of the required conduct on the interests of the foreign state. *Id.* § 40. Section 40(b) requires courts to make an inquiry into "the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person." *Id.* § 40(b). Comment c to § 40 further indicates that this factor is to be accorded "special weight." *Id.* comment c. Illustration 5, which deals with compelling conduct that is a criminal offense in a foreign state, specifies that the hardship on the individual must be considered, but makes no mention of the policies underlying the criminal law. *Id.* illustration 5. Further, § 31 of the Tentative Draft of the Restatement, the predecessor to § 40, provided that one nation must consider "the rules and interests of the other state having jurisdiction." Restatement of the Foreign Relations Law of the United States § 31 (Tent. Draft No. 6, 1961). Similarly, one of the factors to be considered was the "extent to which the vital national interests of the respective states are affected." *Id.* § 31(a). This language, requiring an inquiry into the foreign rules and interests and the extent to which they would be affected by an exercise of jurisdiction, was dropped from the present version of § 40. Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965).

205. A vital national interest is defined as "an interest such as national security or general welfare to which a state attaches overriding importance." Restatement (Second) of the Foreign Relations Law of the United States § 40 comment b (1965). The three illustrations following the definition pit one nation's interest in defense against another nation's interest in maintaining its monopoly position with respect to a defense commodity. The interest of the State concerned with defense is treated as vital, whereas the interest of the other State in maintaining its monopoly power is not. *Id.* illustrations 3-5.

206. *Id.* § 40 comment b (emphasis added).

207. See *United States v. Vetco Inc.*, 644 F.2d 1324, 1330-33 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *United States v. Field*, 532 F.2d 404, 407-09 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); *United States v. First Nat'l City Bank*, 396 F.2d 897, 903-05 (2d Cir. 1968); *SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346, at 92,148-49 (S.D.N.Y. Nov. 16, 1981). *But cf. In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997-99 (10th Cir. 1977) (contempt sanction vacated under balancing approach, but the primary reason for vacating the sanction was the appellant's good faith efforts at compliance); *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972) (production not ordered under the balancing approach when the information was irrelevant to the case).

situation presented by the uranium cartel litigation, the conflict might well have been perceived as between the United States interests in discovery and enforcement of its antitrust laws and the hardship to the parties resisting discovery. Therefore, the significant infringement on the Canadian economic policies that prompted the passage of the nondisclosure law may have been glossed over. That the balancing approach can lead to the failure to focus on the real conflict is well illustrated by its application in *United States v. Field*.<sup>208</sup>

In *Field*, the director of a Cayman Islands bank, while in the United States, was subpoenaed to testify before a grand jury investigating the use of foreign banks to evade United States tax laws.<sup>209</sup> The director refused to testify on the ground that testifying would violate Cayman bank secrecy law,<sup>210</sup> but the court ordered him to testify nonetheless.<sup>211</sup> The focus of the court's inquiry was on the necessity of providing grand juries with information and the enforcement of United States tax laws.<sup>212</sup> The court's inquiry into the Cayman interests only went so far as to determine that Cayman officials could have compelled the director to testify in a domestic investigation.<sup>213</sup> The court used this determination to support its own assertion of jurisdiction on the ground that it made no difference that the inquiring body was that of a foreign government.<sup>214</sup> The court did not examine the policies underlying the Cayman law. The court also failed to consider any of the other factors outlined in the Restatement. In particular, the court gave little weight to the harsh penalties to which the director would be subject under Cayman law.<sup>215</sup>

The Restatement was designed to apply not only to nondisclosure laws, but to all instances of conflicting concurrent jurisdiction.<sup>216</sup> As such, it does not address all the considerations peculiar to the nondisclosure law dilemma. Some courts have sought to remedy this failure by including one or more of the following factors in their Restatement analyses: the necessity of the documents,<sup>217</sup> the availability of alterna-

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208. 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

209. *Id.* at 405.

210. *Id.* at 406; *see* Bank of Jamaica Law, 1961, ch. 6, § 34 (Cayman Islands 1963).

211. 532 F.2d at 410.

212. *Id.* at 407-09.

213. *Id.* at 408.

214. *Id.*

215. Bank of Jamaica Law, 1961, ch. 6, § 34 (Cayman Islands 1963) (£200 fine or six-months imprisonment with or without hard labor).

216. *See* Restatement (Second) of the Foreign Relations Law of the United States §§ 39-40 (1965).

217. *United States v. Vetco Inc.*, 644 F.2d 1324, 1332 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977); *cf.* *Trade Dev. Bank v.*

tive means of compliance<sup>218</sup> and the existence of foreign protests.<sup>219</sup> The courts' varying inclusions of factors beyond those enumerated by the Restatement suggest that even the Restatement fails to provide a comprehensive approach to the resolution of the nondisclosure law dilemma.

The rationale behind the defense of foreign governmental compulsion provides further support for the assertion that the foreign policies should be fairly weighed. The defense is premised on the principle that acts carried out in obedience to the mandate of a foreign government should be accorded special deference.<sup>220</sup> Developed in the anti-trust field, the defense shields such acts from liability as if they were the acts of the foreign government.<sup>221</sup> Although the defense should not act as an absolute bar to ordering production or imposing sanctions, when noncompliance with a discovery request is compelled to protect foreign sovereign interests, an inquiry should be made into those interests by United States courts in determining whether to compel production.

Two commentators, recognizing the failure of the existing approaches to resolve the nondisclosure law dilemma,<sup>222</sup> have suggested alternatives. One advocates the increased use of international treaties respecting the production of documents.<sup>223</sup> The controversy surrounding the uranium cartel litigation, however, suggests that the possibility of negotiating such treaties is remote. In addition, treaties relating to discovery often provide that a foreign nation may withhold documents that it considers vital to protect its sovereign interests.<sup>224</sup>

Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1971) (requested information apparently not maintained in documentary form).

218. *United States v. Vetco Inc.*, 644 F.2d 1324, 1332-33 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346, at 92,145 (S.D.N.Y. Nov. 16, 1981).

219. *United States v. Vetco Inc.*, 644 F.2d 1324, 1330 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *United States v. First Nat'l City Bank*, 396 F.2d 897, 904 (2d Cir. 1968).

220. *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 606-07 (9th Cir. 1976); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297 (D. Del. 1970).

221. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 606 (9th Cir. 1976); McLaughlin, *The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis*, 46 *Fordham L. Rev.* 1071, 1105 (1978).

222. *Foreign Nondisclosure*, *supra* note 8, at 617-19, 621; *Recent Developments*, *supra* note 48, *passim*.

223. *Recent Developments*, *supra* note 48, at 770-74.

224. *E.g.*, Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-West Germany, art. 3, 27 U.S.T. 1956, 1958, T.I.A.S. No. 8291; Treaty on Mutual Assistance in Criminal Matters, May 25,

Another commentator has suggested a four-step approach designed to avoid conflicts: (1) require a prompt showing of a conflict with the foreign law; (2) limit the request to documents that are directly relevant to the litigation in order that the request is more in line with the discovery practices abroad; (3) use letters rogatory to obtain the documents; and (4) if the letters rogatory procedure fails, require the party resisting discovery to attempt to obtain a waiver of the foreign law.<sup>225</sup> This commentator concluded that if conflict was unavoidable, a court ought to be reluctant to impose sanctions on the noncomplying party.<sup>226</sup>

The use of the first three steps should be encouraged. The requirement that the party seek a waiver of the foreign law, however, is in effect no different than ordering the party to produce the documents.<sup>227</sup> More importantly, the four-step approach fails to consider the underlying competing interests, thereby demonstrating concern for international comity on a procedural level only.

#### IV. PROPOSAL

The following suggested approach to the nondisclosure law dilemma is designed to minimize the potential for conflicts. To that end, it advocates use of letters rogatory to obtain the evidence, exploration of alternative methods of obtaining the same information, and thorough examination and weighing, at the order stage of the litigation, of the policy interests underlying both the nondisclosure law and the United States law sought to be enforced.

The first three steps of the four-step approach<sup>228</sup> discussed above should be employed. First, the court should determine that an actual conflict with the nondisclosure law exists.<sup>229</sup> The party resisting production should be required to allege the existence of the nondisclosure law promptly and show that the documents withheld are subject to the law.<sup>230</sup> Such a requirement would eliminate the use of nondisclo-

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1973, United States-Switzerland, art. 3, 27 U.S.T. 2019, 2028, T.I.A.S. No. 8302; Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, art. 12, 23 U.S.T. 2555, 2562, T.I.A.S. No. 7444, 847 U.N.T.S. 241.

225. *Foreign Nondisclosure*, *supra* note 8, at 623-27.

226. *Id.* at 627.

227. When a party is ordered to produce documents located abroad, its first step is usually to seek waivers of the foreign law. *See, e.g.*, *Societe Internationale v. Rogers*, 357 U.S. 197, 202-03 (1958); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 996 (10th Cir. 1977).

228. *See supra* note 225 and accompanying text.

229. *Foreign Nondisclosure*, *supra* note 8, at 624.

230. *Id.*

sure laws as a dilatory tactic.<sup>231</sup> Second, the court should employ letters rogatory to enlist the aid of the foreign government in securing the documents.<sup>232</sup> The Antitrust Division of the Department of Justice has adopted an approach which similarly uses diplomatic channels in an attempt to address the concerns of foreign governments.<sup>233</sup> Such an approach is more likely to meet with success than ordering production without enlisting the aid of the foreign government,<sup>234</sup> particularly when the foreign government is likely to consider the issuance of a production order an infringement on its sovereignty.<sup>235</sup>

If the foreign nation declines to enforce the letters rogatory, the court must then decide whether to compel production. Three basic principles should guide the court's inquiry: (1) that nondisclosure laws often are designed to protect legitimate foreign policies which are deserving of judicial respect;<sup>236</sup> (2) that it should not lightly compel acts that violate the laws of another country; and (3) that its assertion of enforcement jurisdiction must be based on reasonableness. With these principles guiding the inquiry, the court should consider the following five factors:

(1) *Importance of the documents to the resolution of key issues in the litigation.* A party should not be required to produce unnecessary documents.<sup>237</sup> This point was recognized in *Trade Development Bank v. Continental Insurance Co.*,<sup>238</sup> where the identity of bank account holders was deemed irrelevant to an action on a fidelity bond arising out of mismanagement of the customers' accounts.<sup>239</sup>

(2) *Alternative means of obtaining the information contained in the documents.* The court should explore whether a party not subject

231. Nondisclosure laws have been used to delay discovery in several cases. *E.g.*, *United States v. Vetco Inc.*, 644 F.2d 1324, 1330 & n.6 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 301-03 (S.D. Cal. 1981); *Ohio v. Crofters, Inc.*, 75 F.R.D. 12, 16-17 (D. Colo. 1977), *aff'd sub nom. Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 292-93 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981). In *Ohio v. Crofters, Inc.*, the defendant used the Swiss nondisclosure law to delay compliance with the production order affirmed in *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977), and it was not until one year later that it became apparent that the applicability of the Swiss law was doubtful and its enforcement unlikely. 75 F.R.D. at 16-17.

232. *Foreign Nondisclosure*, *supra* note 8, at 625-26.

233. See U.S. Dep't of Justice, Antitrust Division, Antitrust Manual, at VII-17 to -18 (1979).

234. 2 J. Atwood & K. Brewster, *supra* note 17, § 15.12(c).

235. See *supra* note 65 and accompanying text.

236. See 2 J. Atwood & K. Brewster, *supra* note 17, § 15.17.

237. *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972); *Onkelinx*, *supra* note 24, at 532-33; *Foreign Nondisclosure*, *supra* note 8, at 624-25.

238. 469 F.2d 35, 41 (2d Cir. 1972).

239. *Id.* at 37, 41.

to the nondisclosure law has copies of the needed documents, or whether the same information is obtainable from other sources, such as oral testimony.<sup>240</sup> The exploration of alternative means of compliance before the entry of the production order would have been particularly helpful in the uranium cartel litigation. In the antitrust action,<sup>241</sup> the District Court for the Northern District of Illinois ordered the release of grand jury transcripts to offset the failure to comply with the production order.<sup>242</sup> Similarly, in the related contracts actions,<sup>243</sup> the Tenth Circuit refused to hold a party in contempt for failure to comply with the order because some of the information sought, though of potential significance, was duplicative.<sup>244</sup> Had these alternatives been considered prior to the entry of the production order, the conflict might have been lessened.

(3) *Importance of the underlying interests.* If the court finds that the documents are necessary and that there are no alternative means of obtaining the same information, it should evaluate the competing interests to determine whether a production order should issue. The court's inquiry should go beyond the threshold discovery conflict and focus upon the policies underlying the United States law sought to be enforced and those underlying policies intended to be furthered by the nondisclosure law. The propriety of the production order should turn on a weighing of the relative strengths and weaknesses of these interests within their respective domestic frameworks. In assessing the importance of the foreign interests, the court should make the following inquiries.

First, the court should examine any available legislative history of the foreign nondisclosure law and the historical setting in which it was enacted. Second, the court should consider the likelihood of the law's enforcement in the instant case, taking into account the circumstances under which it has been enforced or waived in the past. Third, the court should consider whether the law is enforced by the State, as in *Societe*,<sup>245</sup> or by private action, as in *United States v. First National City Bank*.<sup>246</sup> Fourth, the court should look at the severity of the penalties imposed for the law's violation. For example, violation of

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240. See *United States v. Vetco Inc.*, 644 F.2d 1324, 1332 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981); Onkelinx, *supra* note 24, at 532-33; *Ordering Production*, *supra* note 6, at 801-02.

241. *In re Uranium Antitrust Litig.*, [1981-1] Trade Cas. (CCH) ¶ 63,917 (N.D. Ill. Dec. 17, 1980).

242. *Id.*

243. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977).

244. *Id.* at 999.

245. 357 U.S. 197, 200-01 (1958) (interdiction placed on release of documents).

246. 396 F.2d 897, 903 (2d Cir. 1968).

the Panamanian law at issue in *In re Chase Manhattan Bank*<sup>247</sup> was punishable only by a minimal fine.<sup>248</sup> In contrast, violation of the Canadian Uranium Information Security Regulations<sup>249</sup> was punishable by a maximum fine of \$10,000 and up to five years imprisonment.<sup>250</sup> Finally, the court should note any protests that the foreign government has made, either to the Department of State or directly to the court.

In determining the importance of the foreign interests, the court should require the person resisting production to provide the court with information regarding the foreign interests and the statute.<sup>251</sup> The court should also urge foreign governments to make their positions known to the court by filing *amicus curiae* briefs, a practice encouraged by the Department of State.<sup>252</sup>

(4) *Identity of the party resisting production.* If the party resisting discovery is a defendant, the court should exercise greater restraint when ordering production or imposing sanctions than when a plaintiff resists production, because, as a plaintiff, that party has invoked the process of the United States courts to adjudicate its claim. If the party is an American, the court should consider how the documents came to be abroad because the courts should not countenance acts intended to make documents unavailable in anticipation of litigation.<sup>253</sup>

(5) *Where the acts giving rise to the cause of action occurred.* If the acts occurred abroad, the court should moderate its actions in light of what foreign governments may consider to be an illegal extraterritorial application of United States laws.<sup>254</sup> If the acts giving rise to the cause of action occurred within the United States, however, the court should be more willing to order production.

Finally, the court should exercise restraint when imposing rule 37(b) sanctions for failure to comply with discovery orders. Except when a party has acted willfully or has deliberately courted legal impediments to the production of documents, the court may not, consistent with due process, enter dismissals<sup>255</sup> or default judg-

247. 297 F.2d 611 (2d Cir. 1962).

248. I Código de Comercio, tit. III, art. 89 (Pan. 1961) (100 balboas).

249. Can. Stat. O. & Regs. 76-644 (1976).

250. Atomic Energy Act, Can. Rev. Stat. ch. A-19, § 19 (1970).

251. Cf. Fed. R. Civ. P. 44.1 (court may take evidence from parties or conduct own investigation when determining foreign law).

252. Letter from Associate Attorney General John H. Shenefield to District Judge Prentiss Marshall (May 6, 1980), reprinted in 1980 Trade Reg. Rep. (CCH) ¶ 50,416.

253. See *supra* notes 74-75 and accompanying text.

254. See *Gulf Oil Corp. v. Gulf Canada Ltd.*, 111 D.L.R.3d 74, 86-87, 91-92 (Can. 1980); *Re Westinghouse Elec. Corp. & Duquesne Light Co.*, 78 D.L.R.3d 3, 21-22 (Ont. 1977); Int'l Law Ass'n, Report of the Fifty-First Conference 565-92 (Tokyo 1964) (collection of diplomatic protests).

255. *Societe Internationale v. Rogers*, 357 U.S. 197, 208-13 (1958); cf. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977) (vacating contempt sanction for failure to comply with production order).

ments.<sup>256</sup> Similarly, the court should avoid designating facts as established or precluding the assertion of defenses or claims when such action would be tantamount to decreeing a default or a dismissal.<sup>257</sup> Using rebuttable presumptions, shifting the burden of proof or employing greater or lesser standards of proof should be the favored sanctions.<sup>258</sup>

The advantages of this five-step approach are several. First, the emphasis on the use of letters rogatory and exploration of alternative means of compliance may help to avoid conflicts. Second, this approach removes the problem from the discovery-oriented *lex fori*/international comity analysis, and recognizes that the real conflict is between the underlying interests of the two nations. Third, the approach identifies all of the relevant factors leading to a better understanding of the problem. Emphasizing restraint, reasonableness and respect for foreign interests may also aid in its resolution.

Moreover, examining the relevant issues at the order phase, rather than at the sanction phase, will help to minimize conflicts. In some instances, it will become apparent that the foreign interests prevail and that production should not be ordered. Consideration of the foreign interests at the order phase may also lead to quicker production.<sup>259</sup> Such action also demonstrates greater respect for the laws of the foreign sovereign, because the order is entered only after an attempt has been made to accommodate its interests. Foreign nations, however, may view United States courts as not being in a position to evaluate their interests and may consider any evaluation of their interests as infringing on their sovereignty, preferring to settle discovery disputes through diplomatic channels.<sup>260</sup> That temporary fluctuations in the political climate could affect the due process rights of claimants<sup>261</sup> compelled Congress to remove determinations of foreign

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256. See *Societe Internationale v. Rogers*, 357 U.S. 197, 208-13 (1958).

257. 2 J. Atwood & K. Brewster, *supra* note 17, § 15.21.

258. *Id.*

259. In *SEC v. Banca Della Svizzera Italiana*, [Current Developments] Fed. Sec. L. Rep. (CCH) ¶ 98,346 (S.D.N.Y. Nov. 16, 1981), the court indicated that it would enter an order and impose sanctions for noncompliance, which prompted the Swiss government to grant the defendant a waiver. *Id.* at 92,145, 92,148-49.

260. B. Hawk, Report on Seven Springs Symposium, United States Antitrust Laws and Multinational Business (manuscript to be published in 1982) (symposium held Dec. 1981).

261. See Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 Ad. L. Rev. 159, 170-71 (1964); Note, *The Sovereign's Immunity and Private Property: A Due Process Problem*, 50 Geo. L.J. 284, 303 (1961); cf. *Martin v. Hunter's Lessee*, 14 U.S. 141, 152, 1 Wheat. 304, 329 (1816) (courts' declining to exercise judicial power might defeat the Constitution).



sovereign immunity from the Department of State to the judiciary.<sup>262</sup> Similarly, the judiciary should not leave resolution of international discovery conflicts to the political expediencies that may attend the use of diplomatic channels.

#### CONCLUSION

In cases like those comprising the uranium cartel litigation, the solution will be neither simple nor ideal. The accommodation of conflicting policies that are on the same plane of national importance is difficult, but that is no reason to ignore the conflict and look only to United States interests. The courts must be willing to exercise greater restraint than they have in the past, even if it means compromising American policies. Ultimately, both the United States and foreign nations need to compromise their enforcement actions. The first move, however, appears to be with the United States; nondisclosure laws are directed against extraterritorial application of United States laws and ensuing discovery requests that many nations, including some of our closest allies, consider infringements on their sovereignty. In the end, the ability of the United States courts to obtain documents located abroad in order to enforce its laws with respect to extraterritorial conduct will depend upon the ability of the United States to accommodate and respect the policies of other nations.

*Thomas Scott Murley*

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262. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6606; Hill, *A Policy Analysis of the American Law of Foreign Sovereign Immunity*, 50 Fordham L. Rev. 155, 197-98 (1981). The provision is located at 28 U.S.C. § 1602 (1976), which was enacted as part of the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 90-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).