Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation

Because antitrust litigation has increasingly involved foreign commerce, much of the evidence in these cases consists of documents physically located outside of the United States. Orders issued by a United States court requiring the production of documents for inspection and copying, however, may entail the violation of the law


The Supreme Court's decision that foreign nations have standing to sue under the Sherman Act, Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), may also lead to increased antitrust litigation involving foreign commerce. Such litigation is likely to produce conflicts with foreign nondisclosure laws, because the Supreme Court has previously decided that plaintiff nations are required to respond to discovery requests. Guaranty Trust Co. v. United States, 394 U.S. 126, 134 n.2 (1938). Problems with foreign nondisclosure laws have also arisen in the context of litigation under state antitrust statutes. See United Nuclear Corp. v. General Atomic Co., No. 50,827 (Dist. Ct., Santa Fe County, N.M. Mar. 2, 1978), appeal filed, No. 11,988 (Sup. Ct. N.M. May 3, 1978) (judgment based on N.M. Stat. Ann. §§ 49-1-1 to -6 (1953)).


3. Fed. R. Civ. P. 26 allows the discovery of any nonprivileged information “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 34 and its state law counterparts require the production of relevant documents that are in the “possession, custody or control of the party upon whom the request is served.” It is established that a foreign nondisclosure law does not interfere with control over documents within the meaning of the Rule. See United States v. Ciba Corp., 1972 Trade Cas. ¶ 74,026 (D.N.J. 1971) (subsidiary doing business in United States required to produce documents held by foreign parent); In re Investigation of World Arrangements with Relation to the Prod., Transp., Ref. & Distribution of Petroleum, 13 F.R.D. 280, 285 (D.D.C. 1952) (American parent company required to produce documents in possession of foreign subsidiary) [hereinafter cited as In re Investigation of World Arrangements].

If there is an objection to discovery, the requesting party may move for an order to compel discovery under Fed. R. Civ. P. 37(a). The production of documents by witnesses in civil litigation is governed by Fed. R. Civ. P. 45(b). Rules 45 and 37 both provide that a subpoena requiring the production of specified documents may be issued to a national or resident of the United States who is in a foreign country. See 28 U.S.C. § 1783 (1976). Failure to comply with a subpoena is punishable by civil contempt. See id. § 1784.

A number of cases discussed in this Note concern grand jury subpoenas governed by Fed. R. Crim. P. 17. Compared with discovery in civil litigation, criminal discovery is narrowly circumscribed by Fed. R. Crim. P. 16. See I C. Wright, Federal Practice &
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of a foreign nation\(^4\) prohibiting the disclosure of such documents.\(^5\)
In the past, conflicts between domestic discovery orders and foreign nondisclosure laws have generated considerable international contro-

\(^4\) Such statutes are of two basic types. The first type provides that a government official may on his own initiative prohibit production of a class of documents. See, e.g., Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Austl. Acts No. 121, § 5; Shipping Contracts and Commercial Documents Act, 1964, c. 87, § 2 (United Kingdom). The British statute also imposes a duty on all persons engaged in maritime affairs to report to the government any documents requested by foreign authority. Id. § 1(2)(a).

\(^5\) A number of foreign nondisclosure laws have been enacted in direct response to antitrust litigation in American courts in order to prevent what has been perceived abroad as an American invasion of the territorial integrity of foreign nations. The order issued in In re Grand Jury Subpoenas Duces Tecum Addressed to Can. Int'l Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1947), requiring Canadian paper companies doing business in New York to produce documents located in Canada, evoked protest from the government of Canada. See INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST CONFERENCE HELD AT TOKYO 565 (1965) [hereinafter cited as ILA, FIFTY-FIRST CONFERENCE REPORT]. The subpoenas were withdrawn after a conference between representatives of the Canadian paper industry and the United States Department of Justice. See 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 167 (1968). However, the incident prompted the Province of Ontario to pass legislation making it a criminal offense to remove business documents ordered by foreign authority. See Business Records Protection Act, 1947, Ont. Rev. Stat. c. 54 (1970).

Orders for the production of documents of foreign oil companies issued in In re Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952), resulted in orders from the governments of the United Kingdom, the Netherlands, France, and Italy prohibiting removal of the documents. See ILA, FIFTY-FIRST CONFERENCE REPORT, supra, at 569-73. At the instigation of the United States National Security Council, the subpoenas were vacated and the grand jury proceedings terminated. See In re Investigation of World Arrangements, 1952-1953 Trade Cas. 76,480 (D.D.C. 1953) (vacating subpoenas); 6 M. WHITEMAN, supra, at 173-74. Nevertheless, the Netherlands later enacted legislation prohibiting compliance with the decisions of courts of foreign nations when such compliance would affect economic competition. See Economic Competition Act of June 28, 1956, art. 39, Stb. 401, as amended by Act of July 16, 1958, Stb. 413 (Netherlands); SrGB, C.P., Cod. Pen. § 271 (1971) (Switzerland).

The significant number of nations that have enacted such laws, and the policy of the United States government to enforce domestic antitrust laws in international commerce, suggest that conflicts with foreign nondisclosure laws will continue to pose an important problem for domestic courts.

The two basic principles governing conflicts between domestically issued discovery orders and foreign nondisclosure laws are contradictory. The principle of lex fori holds that a domestic forum controls its own procedure and reflects the broader policy concern of affording litigants a full and fair opportunity to prove their claims.

The principle of international comity, on the other hand, holds that domestic courts should not take action that may cause the violation of another nation's law. This principle reflects the broader policy concern that each member of the family of nations should do "justice that justice may be done in return."

Just as found that these regulations prohibited enforcement of an American letter rogatory requesting documents. "A letter rogatory is a formal request, made by a court in which an action is pending, to a foreign court to perform some judicial act." Stern, International Judicial Assistance (pt I), Prac. Law., Dec. 1968, at 22. See generally note 83 infra.

Immediately following the issuance of these and other letters rogatory in the Westinghouse uranium contracts litigation, the Australian Parliament passed legislation providing criminal penalties for the production of any documents concerning subjects designated by the attorney general. Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Austl. Acts No. 121. The Attorney General immediately designated uranium as a protected subject. See In re Westinghouse Elec. Corp. & Duquesne Light Co., 16 Ont. 2d 273, 283 (1977).


7. See notes 4 & 5 supra.


9. See In re Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962) (interest in obtaining evidence conflicts with respect for law of foreign states).


11. In an American forum, it is generally stated that there is a duty of the highest order to "attend and disclose all that is needed for the ascertainment of truth." 8 J. Wigmore, Evidence § 2193, at 68 (3d ed. 1940). Such a duty applies to the production of documents as well as to testimony, id., and all claims of exemption from the general rule are disfavored, id. § 2192, at 67.


The case law fails to provide an adequate means for resolving this policy conflict. In *Societe Internationale v. Rogers*, the Supreme Court eschewed reliance on either the principle of *lex fori* or international comity. Instead, it called for a case-by-case decision about whether sanctions should be imposed for noncompliance with a domestic discovery order despite the interdictions of a foreign nondisclosure law. But some subsequent cases have nevertheless been characterized by an almost automatic deference to such nondisclosure laws. This Note will assess the current doctrines and existing proposals that attempt to reconcile the principles of *lex fori* and international comity. It will then argue that neither the courts nor the commentators have succeeded in suggesting a meaningful rule to resolve the conflict in policies. The Note will suggest that because this conflict is essentially intractable, it should be minimized by the use of flexible procedures at the discovery phase of litigation. In order to guide the discretion of federal courts in employing such flexible procedures, the Note will conclude by suggesting four basic steps that should be taken.

I. Scope of the Problem and Current Doctrine

A. The Problem

Conflicts between domestically issued discovery orders and foreign nondisclosure laws have emerged in contexts other than antitrust litigation. But, for a number of reasons, antitrust litigation is the most demanding test case for any procedural innovation to minimize conflicts with foreign nondisclosure laws. It has been observed that "[t]he heart of any American antitrust case is the discovery of business documents," and the great majority of cases involving foreign prohibitions on discovery have been concerned with requests for such

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15. Id. at 206; see *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992, 997 (10th Cir. 1977) (discussing *Societe Internationale*).
18. Note, supra note 2, at 747.
business records and documents from large multinational companies. The importance of documentary discovery to antitrust plaintiffs has encouraged them to utilize fully the liberal discovery provisions of the Federal Rules of Civil Procedure in order to reach documents located abroad, and has tempted defendants to use contrived excuses of foreign illegality as a dilatory tactic. More importantly, foreign nations have been sensitive to discovery when documents are sought for use in domestic antitrust litigation, "because, among other reasons, such legislation reflects national economic policy which may not coincide, and may be indirectly in conflict, with that of other states." This continuing international hostility to the application of American antitrust laws to international transactions underscores the importance of devising procedures to minimize conflicts with foreign nondisclosure laws in antitrust litigation.

Since the Supreme Court's holding in *Societe Internationale*, domestic courts have rejected a per se rule and have attempted to reach a decision on sanctions by a case-by-case accommodation of the policies underlying the principles of *lex fori* and comity. Courts have recognized that the imposition of sanctions for noncompliance with a domestic discovery order places the party in a difficult situation since any course of action will entail possible punishment by one country or the other. On the other hand, deference to foreign law may encourage persons to violate domestic law by maintaining records in nations that prohibit their release.

Despite the difficulties presented by conflicts between domestic


23. See, e.g., *In re Grand Jury Proceedings (United States v. Field)*, 532 F.2d 404, 410 (5th Cir. 1976) ("We regret that our decision requires Mr. Field to violate the legal commands of the Cayman Islands, his country of residence.")

24. For example, in *United Nuclear Corp. v. General Atomic Co.*, No. 50,827 (Dist. Ct. Santa Fe County, N.M. Mar. 2, 1978), *appeal filed*, No. 11,988 (Sup. Ct. N.M. May 3, 1978), the court found that the defendant had followed a deliberate policy of maintaining documents in Canada where they would be shielded by Canadian law. *Id.* slip op. at ¶¶ 37-40.
discovery orders and foreign law, domestic courts have been too willing to adopt a position that requires them to confront this problem. Current doctrine suggests that the question whether a discovery order should issue is solely a matter of American law; foreign nondisclosure laws are only relevant in deciding whether sanctions should be imposed for disobedience. Thus, the problem has generally been considered in the context of a contempt or sanctions hearing. At this late stage of the litigation, the potential for avoiding conflicts is minimal.

The decisions suggest two possible rules to guide a court in deciding whether to impose sanctions in a given case. The first focuses on the issue of whether there was a "good faith" effort by the party resisting discovery to avoid the limitations of the foreign law; the second involves a judicial "balancing" of the competing interests of the parties and jurisdictions. Neither rule provides any real guidance for a court's decision about sanctions, and conflicts between domestic discovery orders and foreign nondisclosure laws have continued to be problematic.

B. Good Faith

The Supreme Court articulated the good faith test in Societe Internationale, which arose when a Swiss holding company sued under section 9(a) of the Trading with the Enemy Act to recover enemy-owned property seized by the United States government during World War II. The district court dismissed the suit because of plaintiff's failure to produce documents, release of which was prohibited by Swiss law. The Supreme Court reversed, suggesting that a crucial factor in deciding whether to impose sanctions for noncompliance with a discovery order was whether there was a good faith effort to

25. Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 341 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977) ("Societe implies that consideration of foreign law problems in a discovery context is required in dealing with sanctions to be imposed for disobedience and not in deciding whether the discovery order should issue."); Wright, Discovery, 35 F.R.D. 39, 81 (1963) (foreign law only at issue in determining sanctions for noncompliance).


avoid the limitations of the foreign nondisclosure law.\textsuperscript{30} The Court contrasted the existence of a good faith effort with the active courting of legal impediments.\textsuperscript{31} But despite the fact that plaintiff's good faith was established,\textsuperscript{32} the subpoena was not quashed,\textsuperscript{33} and the effect of the good faith test was left unclear.\textsuperscript{34}

The requirement of good faith has subsequently been used to punish the use of dilatory tactics in discovery. For example, in United Nuclear Corp. v. General Atomic Co.,\textsuperscript{35} a New Mexico district court entered a default judgment against the defendants under New Mexico Rule of Civil Procedure \textsuperscript{37} for failure to produce documents located in the files of Gulf Minerals Canada, Ltd. In the face of two sets of interrogatories requesting the identification of documents located in Canada, defendant General Atomic refused to identify the documents and filed unresponsive answers. Since several orders directing discovery had been issued and an agreement between the parties to produce the documents had been made prior to the adoption of the Canadian uranium security regulations prohibiting production,\textsuperscript{37} the court held that the defendant had deliberately delayed production and courted legal impediments to the production of the documents.\textsuperscript{38} Accordingly, it imposed sanctions for the defendant's failure to produce by granting a default judgment on liability in favor of the plaintiffs, and later awarded damages.\textsuperscript{39}

Neither Societe Internationale nor United Nuclear, however, specify what steps must be taken by a party resisting discovery to satisfy the requirements of "good faith," because such a determination is

\textsuperscript{30} Societe Internationale v. Rogers, 357 U.S. 197, 208 (1958). See In re Investigation of World Arrangements, 13 F.R.D. 280, 286 (D.D.C. 1952) (postponing motion to quash subpoena for documents located abroad pending bona fide attempt of foreign companies to obtain governments' consent to produce).

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} However, the litigation was finally settled. See Note, supra note 28, at 1458 n.159.

\textsuperscript{34} The Supreme Court suggested that, despite plaintiff's good faith, the district court might draw inferences unfavorable to the plaintiff with reference to specific events. 357 U.S. at 209.

\textsuperscript{35} No. 50,827 (Dist. Ct. Santa Fe County, N.M. Mar. 2, 1978), appeal filed, No. 11,988 (Sup. Ct. N.M. May 3, 1978) (action for fraud, breach of fiduciary duty, and state antitrust law violations).


\textsuperscript{37} STAT. O. & R. 76-644 (1976). The normal penalty for violation of the regulations is a fine of $5,000 and two years' imprisonment and the maximum penalty is a fine of $10,000 and 5 years' imprisonment. CAN. REV. STAT. c. A.-19, § 19.


\textsuperscript{39} The court ordered specific performance of defendants' uranium supply contracts. Id. No. 50,827 (Dist. Ct. Santa Fe County, N.M. May 17, 1978), appeal filed, No. 12,052 (Sup. Ct. N.M. June 15, 1978).
made on a case-by-case basis when a court decides whether or not to impose sanctions. It is not even clear whether a good faith effort that meets with failure is, by itself, a sufficient excuse for nonproduction. But even if the notion of "good faith" could be meaningfully defined, a test excusing noncompliance with a domestic discovery order because of the "good faith" of a party is unsatisfactory. Such a test, by allowing the concern for fairness to one party to dominate all other concerns, gives insufficient weight to the principle of lex fori. For this reason the "good faith" test has been supplanted by the "balancing of interests" test.

C. "Balancing of Interests"

In 1965, the American Law Institute adopted a "balancing of interests" approach to conflicts with foreign nondisclosure laws in section 40 of the Restatement (Second) of Foreign Relations Law of the United States. Section 40 acknowledges that when two states exercise jurisdiction, each may require inconsistent conduct by the same person. It suggests that each state is required by international law to moderate the exercise of its enforcement jurisdiction in light of the following factors: (a) the vital national interests of each of the states, (b) the nature of the hardship that inconsistent enforcement actions would impose upon a 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 an enforcement action can be expected to achieve compliance.

Section 40 has been very influential. In United States v. First National City Bank, the Second Circuit affirmed a judgment of civil contempt against the bank and one of its officers for failure to produce documents located in Germany as required by a subpoena duces

40. See note 34 supra. In some cases, courts seem to have viewed the requirement of good faith as being coextensive with substantial compliance with the discovery order. See, e.g., 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) (good faith found when waivers sought and obtained for most documents). But see In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992, 998 (10th Cir. 1977) (good faith found when waiver sought, but not obtained).

41. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).


43. 396 F.2d 897 (2d Cir. 1968).

tecum issued by a federal grand jury investigating possible violations of the antitrust laws. The bank introduced evidence that compliance with the subpoena would subject it to liability in contract or tort; in "balancing" the interests of the United States and Germany under the Restatement test, the court found the American interest of greater weight since the antitrust laws were the "cornerstones of this nation's economic policies."

The Tenth Circuit also employed the "balancing of interests" test in In re Westinghouse Electric Corporation Uranium Contracts Litigation. There, the court reversed a contempt order against a Delaware corporation and its Canadian president for refusing to produce documents relating to uranium production located in Canada. The contemptors claimed that compliance would be a violation of Canadian criminal law. In balancing the interests of the United States and Canada under the Restatement test, the Tenth Circuit concluded that Canada had a legitimate national interest in controlling atomic energy, and this interest was entitled to greater weight than the interest of the United States in affording litigants adequate discovery. The court, however, was careful to point out that it was not dealing with any "enforcement, as such, of antitrust laws." The dissenting judge used the same "balancing of interests" test to reach the opposite conclusion: "When the strong underlying policy reasons in connection with the discovery rules are pitted against the Canadian policy of protecting its local industries from insufficient prices, no real contest exists."

The Westinghouse and First National City Bank cases indicate that the balancing test offers no real principles for resolving the basic

44. Id. at 900. The bank was fined $2,000 per day and its officer sentenced to 90 days' imprisonment. Id.
45. Id. at 900 n.6. Each party provided sharply conflicting expert testimony on the effect of German law, and the court found the prospect of liability "remote and speculative." Id.
46. Id. at 903.
47. 563 F.2d 992 (10th Cir. 1977).
48. The district court, in an unreported order, fined the corporation until such time as it complied with the subpoena. Id. at 994.
50. 563 F.2d at 998-99. The court relied, in part, on the opinion of the Ontario Supreme Court denying the enforcement of letters rogatory that Westinghouse had caused to be issued in the same action. In re Westinghouse Elec. Corp. & Duquesne Light Co., 16 Ont. 2d 273 (1977).
51. 563 F.2d at 999.
52. Id.
53. Id. at 1003 (Doyle, J., dissenting). The dissent relied on a Canadian government press release expressing a policy in support of the uranium industry, which was "suffering from an oversupply and low price situation." Id. at 1001.
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policy conflict between *lex fori* and international comity. The balancing test provides that a good faith effort to produce, in itself, is not a sufficient excuse for nonproduction. But it fails to specify what an adequate excuse would be. Instead of focusing on the behavior of the party resisting discovery, the balancing test forces a federal judge to make a decision on applicable law based upon ill-defined notions of competing national interests. Judicial respect for the national policies embodied in the United States antitrust laws also supports a general agreement among the courts that excuses for failure to produce documents are entitled to little, if any, weight in litigation seeking to enforce those policies.\(^5\) Instead of giving sufficient weight to the principle of international comity in the context of domestic antitrust litigation, the balancing test usually allows the concern for full discovery to dominate over all other concerns.

II. Inadequacy of Existing Proposals

Proposed solutions to the problems raised by the foreign nondisclosure laws fall into three basic categories: international treaties, domestic legislation, and the use of a conflicts-of-law approach. Most commentators who have recently addressed the problem propose an international treaty as a solution.\(^5\)\(^5\) Two types have been suggested: treaties dealing with the substance of the antitrust laws and treaties dealing with discovery procedures. Neither, however, appears to be a realistic possibility. Although there have been a number of proposals for international coordination of antitrust laws,\(^5\)\(^6\) it has been observed that such proposals “stand little chance of implementation in the short run.”\(^5\)\(^7\) The reaction of foreign governments to the

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The Fulton-Rogers Agreement, an informal arrangement made in 1969 under which the United States and Canada agreed to consult before extraterritorial enforcement of the antitrust laws, was in force during the *Westinghouse* litigation. See [1970] *Can. Y.B. Int'l L.* 268. But the opportunity for consultation did not resolve the problems posed by Canadian prohibitions on discovery, and the matter was left to the American courts.

57. Note, supra note 2, at 771 n.102; see p. 616 supra.
Westinghouse litigation, for example, indicates that the prospects for international agreement are remote. Similarly, an international treaty on obtaining evidence or on pretrial discovery is unlikely to be of any utility in the antitrust area, because foreign laws on nondisclosure often reflect specific hostility to United States antitrust enforcement in the international sphere. Negotiations on the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters began in 1965, and the treaty was finally ratified in 1972. Yet its provisions fall far short of those necessary to resolve the conflict between foreign nondisclosure laws and American discovery orders. The fact that the most important international agreement in this area required nearly a decade to be accepted, and failed to address the major problems, suggests that there is little merit to the view that the treaty alternative is a practical way to resolve the problem.

A second possible solution would be for Congress to enact a law requiring that foreign companies transacting business in this country and United States companies doing business abroad produce for use in the United States records located abroad or keep duplicates in the United States available on demand for production. Such a bill was introduced before Congress in 1951 and again before two subsequent sessions, but was never passed. The same international hostility that has prevented the successful negotiation of a treaty would tend to interfere with the enactment of domestic legislation.

60. See Note, supra note 2, at 771-74.
63. Article 23 of the agreement specifically provides that a state may declare that it will not enforce a letter rogatory for pretrial discovery, and Article 12 allows a refusal to execute a letter rogatory if the letter would infringe the “sovereignty or security” of the executing state, 23 U.S.T. at 2568.
64. H.R. Res. 7399, 82d Cong., 1st Sess. (1951). The bill would have amended the Clayton Act, 15 U.S.C. §§ 12-13, 14-21, 22-27, 44 (1976) (as amended), to require production of documents abroad from United States corporations and to require foreign corporations to enter into an agreement to produce documents related to their business.
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The third type of solution that has been proposed is the adoption of a conflict-of-laws approach to foreign nondisclosure laws. In essence, however, such proposals differ little from the “balancing of interests” test embodied in section 40 of the Restatement. Both approaches require a court to weigh undefined policies and incommensurable statutes in a way that may bear little relationship to the behavior of the parties before the court. A conflict-of-laws approach thus offers no principles for resolving the conflict between domestic discovery orders and foreign nondisclosure laws. A per se rule about sanctions, even if it could be developed, would necessarily compromise one of the important policies embodied in the doctrines of lex fori and comity. More is required than simply an exhortation to district judges to “exercise good judgment and common sense.” Instead, clear, well-defined standards are needed to guide the discretion of courts in ordering the production of documents and imposing sanctions for noncompliance when foreign nondisclosure laws are involved.

III. Guiding Judicial Discretion in Ordering Discovery and Imposing Sanctions for Noncompliance

Rather than resolving the conflict between domestic discovery orders and foreign nondisclosure laws at a late stage in the litigation on an essentially standardless case-by-case basis, courts should avoid the conflict by the use of more flexible procedures. The problems of foreign nondisclosure laws are best dealt with in the discovery phase of litigation when judges have considerable discretion under the Federal Rules of Civil Procedure. This would enable courts to avoid the large majority of conflicts between their discovery orders and foreign nondisclosure laws.

A. A Suggested Procedure for Avoiding Conflicts

Beginning at the discovery stage, there are four steps that courts should follow.


68. See, e.g., p. 620 supra (example of “balancing test”).

69. Metzger, supra note 42, at 19.
Step 1: The party resisting discovery on the ground of a foreign nondisclosure law should be required to make a prima facie showing that there is a conflict between the foreign law and the court's discovery order. Such a requirement is necessary in order to prevent the use of claims of foreign illegality as a dilatory tactic in discovery. For example, in Ohio v. Arthur Andersen & Co., the defendant delayed the ultimate production of the documents for over a year "on the contrived excuse, eventually abandoned, of the Swiss secrecy laws." In imposing sanctions for the delay, the district court suggested the criteria that a party must meet if it wishes to raise a foreign nondisclosure law as an excuse for nonproduction: (a) the foreign nondisclosure law must be alleged promptly and with particularity; (b) the requested documents must be promptly identified; and (c) there must be a prompt showing that the documents fall within the scope of the foreign law. The initial imposition of such requirements would probably have avoided the problem of dilatory tactics in both United Nuclear and First National City Bank.

Step 2: Once a prima facie showing that a conflict exists has been made, a domestic court should determine whether the failure of one party to produce the requested evidence will significantly prejudice the other. It has been observed that "[i]t makes little sense to interfere with another State's jurisdiction to obtain irrelevant documents." This is not a problem in grand jury investigations or criminal antitrust litigation because the subpoena is narrowly limited to the discovery of documentary evidence for use at trial. However, in civil antitrust litigation, courts should use a standard of direct relevancy,
which standard would be stricter than that currently set by the Federal Rules of Civil Procedure, when foreign nondisclosure laws are involved. This principle has been recognized and applied in a number of cases. For example, the Second Circuit considered the issue of relevancy in upholding a decision not to compel the production of documents revealing the identity of Swiss bank account holders, when production was illegal under Swiss law, on the ground that the identity of the bank's customers was "relatively unimportant" to the proceeding. The use of a direct relevancy standard would restrict the scope of discovery in civil litigation, and might create some additional incentives to maintain records in countries that prohibit their release. Such a standard, however, would often be essential for Step 3 of the suggested procedure, and it would bring American practices more into line with prevailing standards in the international community.

Step 3: Once the court has determined that a conflict may exist and that the documents in question are directly relevant, there may still be an issue as to the scope of the foreign law. In such cases, recourse should be had to the letters rogatory procedure, by which a foreign tribunal is requested to use its good offices to obtain evidence for a domestic proceeding. Some countries will not enforce a letter rogatory, and in such cases, the court may have to resort to other means of obtaining evidence. 

78. Fed. R. Civ. P. 26 allows the discovery of any nonprivileged information "relevant to the subject matter involved in the pending action," as long as it appears "reasonably calculated to lead to the discovery of admissible evidence."
79. Von der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir.), cert. denied, 370 U.S. 916 (1962), provides an illustration of the "direct relevancy" standard. There, the Court of Appeals for the District of Columbia affirmed the dismissal of an action by a Swiss citizen under the Trading with the Enemy Act for his failure to comply with a discovery order of the court, because the documents not produced were directly relevant to the government's defense that the plaintiff was "enemy-tainted." Id. at 460. See also Calcutta E. Coast of India & E. Pakistan/U.S.A. Conference v. Federal Maritime Comm'n, 399 F.2d 994 (D.C. Cir. 1968) (agency sanction for noncompliance with administrative subpoena set aside in absence of showing that requested information was necessary for proceeding).
81. See p. 627-28 infra.
82. See, e.g., United States v. First Nat'l City Bank, 396 F.2d 897, 899-900 (2d Cir. 1969) (scope of German law unclear).
rogatory that appears to be a discovery order issued under the liberal standards of the Federal Rules of Civil Procedure. Greater use of the letters rogatory procedure should avoid many otherwise difficult conflicts, particularly in situations in which the scope of the foreign nondisclosure law is not clear.

**Step 4:** Once the applicability of a foreign law is established either by foreign authority or a letter rogatory, the court should require that the party resisting discovery seek a waiver of foreign law. Waivers obtained from the Swiss government, for example, permitted substantial compliance in the *Societe Internationale* litigation. An important advantage of the requirement that the resisting party seek a waiver is that it allows the foreign government to determine whether it wishes to pursue its nondisclosure policy in the context of a particular litigation. Furthermore, the request for a waiver may help avoid unfair results. For example, in *In re Grand Jury Proceedings (United States v. Field)*, the Fifth Circuit affirmed an order of contempt entered against a resident of the Grand Cayman Islands, British West Indies, for refusing to testify before a federal grand jury investigating possible tax violations. Under the Cayman Bank Secrecy Act such testimony could carry criminal penalties of up to six months' imprisonment. Apart from the serious Fifth Amendment questions
involved, the wisdom of this contempt order is highly questionable; the conflict between the grand jury subpoena and bank secrecy law of the Cayman Islands might well have been avoided through an order to the witness to seek a waiver from the foreign government.

B. Suggested Guidelines When Conflict is Unavoidable

The procedure suggested above represents a means of reconciling the principles of lex fori and international comity by using flexible procedures to avoid conflict between domestic discovery orders and foreign nondisclosure laws. Inevitably, however, some such conflicts will still arise, and courts must decide whether to impose sanctions for noncompliance with a discovery order.

As a general rule, a domestic court should be extremely reluctant to impose sanctions in an international antitrust case, since the discovery rules and substantive laws of the United States are at odds with those of its major trading partners. In the last analysis, the barriers placed on discovery abroad reflect a continuing international hostility to an American theory of jurisdiction that mandates the application of our antitrust law to transactions that seriously affect foreign national economies. Non-antitrust litigation that touches foreigners may involve issues that are less controversial in the international communi-

90. In affirming, the Fifth Circuit rejected arguments that the contempt order violated the constitutional prohibition against self-incrimination. Id. at 406-07. The court noted that the defendant did not argue that the content of his answers would subject him to criminal prosecution in the Cayman Islands, and concluded that "[t]he Fifth Amendment simply is not pertinent to the situation where a foreign state makes the act of testifying a criminal offense." Id. at 407 (emphasis supplied). In Societe Internationale, the Supreme Court made a similar distinction. 357 U.S. at 211.

Since all of the foreign nondisclosure law cases have involved statutes that make the act of production a crime, it remains an open question whether the mere revelation of facts that would lead to incrimination under the laws of a foreign jurisdiction is within the scope of the Fifth Amendment. Cf. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1963) (witness may not be compelled to give testimony in one domestic jurisdiction that would be used to convict him in another domestic jurisdiction).

91. One criticism of this approach is that by "coercing" waivers, legal institutions are in a sense converted into political and diplomatic policymakers and enforcers. Note, supra note 2, at 770. Yet, this is precisely the role that any court plays in a case involving conflicts between the laws of different nations. The requirement that a party resisting discovery attempt to obtain a waiver of foreign law facilitates a form of international judicial diplomacy in resolving inconsistent national policy objectives within the context of a narrow legal dispute.


93. See Whitney, supra note 92, at 660.
ty, and contempt orders may be appropriate in such cases. But in antitrust litigation, contempt orders should be used only for refusals to follow the procedures proposed here. When forced to choose between imposing sanctions for noncompliance and recognizing a foreign nondisclosure law in litigation that is international in scope, American judges must bear in mind that their decisions will inevitably be measured against prevailing standards in the community of nations.

94. For example, the Fifth Circuit upheld a contempt citation against a party who failed to respond to a subpoena issued in a grand jury investigation of income tax evasion; the court pointed out that the United States was not exceptional in granting wide powers to investigators to obtain information concerning tax evasion from foreign financial institutions. In re Grand Jury Proceedings (United States v. Field), 532 F.2d 404, 408 (4th Cir. 1976) (citing English authority).