1980

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A Methodology for Discovery of Documents Subject to a Foreign Nondisclosure Law

INTRODUCTION

Many documents subject to discovery by American courts are located in foreign countries¹ whose laws prohibit discovery.² In such an instance, American courts have encountered the difficult task of determining whether to order the discovery of such documents in the face of the foreign nondisclosure law. This dilemma is increasingly prevalent, due in part to expanding commercial activity conducted by multinational corporations.

A resolution of this discovery conflict requires recognition and evaluation of various interests. The necessity of discovery is often pitted against the legitimate interests of a foreign domicile in prohibiting the disclosure of the requested documents.³ The American court must therefore consider the foreign interests promoted

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¹. In determining whether to order discovery which violates a foreign nondisclosure law, two preceding problems concerning courts' power to order production must be considered:

(1) Does an American court possess the personal jurisdiction necessary to order a party to produce documents located in a foreign country?

(2) Does the party to the order have the documents in his control?

For the purpose of this article the author assumes that both of these questions are answered in the affirmative. See United States v. First Nat'l City Bank, 396 F.2d 897, 900-901 (2d Cir. 1968); Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1144 (N.D. Ill. 1979); Lenzhoff, International Law and Rules on International Jurisdiction, 50 CORNELL L.Q. 5 (1964); Onkelinx, Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs, 64 N.W. L. Rev. 487 (1969).


(a) laws requiring an enterprise to keep its records available at all times for local inspection.

(b) laws which are designed to protect the confidential nature of business records.

(c) laws which forbid the removal of the originals or copies of business documents, if such removal is in response to a foreign government's order. Id. at 296.

Category (a) does not present a foreign discovery problem because copies can be sent while the originals remain available for inspection. This article is concerned with categories (b) and (c). For a discussion of various nondisclosure laws, see Societe Internationale v. Rogers, 357 U.S. 197 (1958); In Re. Westinghouse Elec. Corp., 563 F.2d 992 (10th Cir. 1977); Societe Internationale v. Brownell, 225 F.2d 532 (D.C. Cir. 1955).
by the foreign nondisclosure law, as well as the domestic interests promoted by broad discovery. Additionally, the American court must consider the impact of any resolution of this conflict on the litigants. The litigant ordered to produce documents subject to the foreign nondisclosure law is confronted with conflicting demands: to comply with a United States order to produce a document and suffer penalties under a foreign nondisclosure law, or to comply with a foreign government's law prohibiting disclosure and suffer sanctions under American law. Accordingly, the American court must address both the threshold question whether to order the production of documents notwithstanding foreign nondisclosure laws, and the secondary question whether sanctions should be imposed in the event of non compliance with such a production order. In resolving both issues conflicting considerations of international comity and *lex fori* must be carefully balanced.

4. *FED. R. CIV. P. 37(a)* provides in pertinent part: “(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . . .”

5. *FED. R. CIV. P. 37(b)* provides:

   (b) Failure to Comply with Order . . . .

   (2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may take such orders in regard to the failure as are just, and among others the following: . . .

   (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 party thereof, or rendering a judgment by default against the disobedient party; . . .

In order to confront the second question the court must answer the first in the affirmative, thus allowing discovery notwithstanding foreign law. See Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138 (N.D. Ill. 1979).


7. *Lex fori* literally means the law of the forum, or the court. BLA**ck's LAW DICTIONARY** 1055 (4th ed. 1968). It has come to be known as the doctrine that the forum law is supreme and that a foreign law cannot be permitted to obstruct the application of domestic law. See Societe Internationale v. McGranery, 111 F. Supp. 435, 444 (D.D.C. 1953), modified and aff'd, 225 F. 2d 532 (D.C. Cir. 1955), cert. denied, 350 U.S. 937 (1956); *Foreign Nondisclosure Laws, supra* note 2, at 614; Ehrenzweig, *The Lex Fori- Basic Rule in the Conflict of
The judicial approaches for determining the extent to which American discovery law should prevail over foreign nondisclosure law have been marked by inconsistencies and conflicts, thus rendering the law in this area vague and unsettled. Differing analyses have been proffered, each varying as to the relevant factors to be examined. Moreover, there has been conflicting views as to the appropriate discovery stage in which to apply these differing analyses. To date, the United States Supreme Court has spoken only once in the area. However, two recent decisions, one out of the Tenth Circuit and the other out of the Northern District of Illinois, may offer a novel approach to this foreign discovery problem.

This article will analyze the differing approaches to the problems which arise when otherwise permissible discovery conflicts with foreign nondisclosure laws. An examination will be made of a methodology which was first applied by the Supreme Court in 1958, and later interpreted and extended by the lower courts. Finally, the two most recent decisions in the area will be discussed and evaluated as models for the appropriate methodology for resolving such foreign discovery problems in the future.

**The Supreme Court's Approach:**

*Societe Internationale v. Rogers*

**Background**

*Societe Internationale v. Rogers,* the only Supreme Court
opinion concerning discovery in light of a foreign nondisclosure law, arose under the Trading with the Enemy Act. During World War II the United States, operating under this act, seized certain assets of a German firm called I.G. Farbenindustrie. Subsequently, in 1948 Societe International, claiming no involvement with Farbenindustrie, brought suit to recover the assets expropriated by the United States. The government contested this claim and moved for an order requiring the production of certain banking records to show Societe's unlawful involvement with Farbenindustrie. Although Societe produced substantial documentation, it failed to fully comply with the district court's order. Societe claimed that production of these ordered documents would subject it to criminal prosecution, because a Swiss banking law prohibited their disclosure. The district court subsequently granted the government's motion to dismiss petitioner's complaint for noncompliance pursuant to Rule 37b of the Federal Rules of Civil Procedure. The appellate court affirmed and the Supreme Court

14. 50 U.S.C. App. §5 (1946). This act allows the President during a time of war or "other period of national emergency" to prohibit the withdrawal of property located in the United States in which a foreign country has an interest.

15. 50 U.S.C. App. §9(a) (1946). Societe, also known as I.G. Chemi and Interhandle, brought suit under this provision of the Trading with the Enemy Act, to recover general Aniline stock. This asset along with others was seized from Farbenindustrie by the United States. Section 9(a) of the Act allows recovery by a person not an enemy, or an ally of an enemy, of the expropriated assets, to the extent of such person's interest in them. Id.

16. FED. R. Civ. P. 34. Rule 34 provides that upon a motion showing good cause a court may order a party to produce for inspection nonprivileged documents relevant to the subject matter of pending litigation which are in his possession, custody, or control. Id.

17. The government alleged that these records were necessary to show the true ownership of the General Aniline Stock. 357 U.S. at 200.

18. Although the records were within the physical possession of H. Sturzenegger, a Swiss banking firm, the government alleged that they were within petitioner's control, because petitioner and Sturzenegger were "substantially identical." 357 U.S. at 200. The Supreme Court agreed with this contention. Id. at 204-205. See generally note 1 supra.

19. The Swiss federal attorney claimed that disclosure would violate two Swiss laws, namely:

(a) Article 273 of Swiss Penal Code prohibiting economic espionage.

(b) Article 47 of the Swiss Bank laws relating to secrecy of banking records.

357 U.S. at 200.

20. Societe Internationale v. McGranery, 111 F. Supp. 435 (D.D.C. 1953). Here the court said: "It seems obvious that foreign law cannot be permitted to obstruct the investigation and discovery of facts in a case, under rules established as conducive to the proper and orderly administration of justice in a court of the United States." Id. at 444.

21. Societe Internationale v. Brownell, 243 F.2d 254 (D.C. Cir. 1957). The Appellate Court did, however, allow the petitioners six months to comply before dismissal took effect. Although during this period substantial documents were produced, the court still upheld dismissal. See Societe Internationale v. Brownell, 225 F.2d 532 (D.C. Cir. 1957).
The Court first considered whether the district court was warranted in ordering the production of documents in the face of a Swiss nondisclosure law. Answering this question affirmatively, the Court examined the Trading with the Enemy Act and its importance to American interests. Concluding that the Act was of fundamental importance to the United States, the Court stated that refusal to order the production of requested documents "would undermine congressional policies made explicit in the [Act]." Thus, the Supreme Court concluded that the district court was justified in issuing its production order.

The second question that the Supreme Court addressed in Societe was whether the dismissal sanction was erroneously imposed upon the plaintiff for noncompliance with the discovery order. The Court, in holding that the dismissal sanction was not warranted, adopted a good faith analysis in dealing with the imposition of sanctions. The Court noted that petitioner had attempted to obtain a waiver of the nondisclosure law from the Swiss authorities. Thus, petitioner's inability to comply had not been fostered by "its own conduct nor by circumstances within its control." Since petitioner had acted in good faith the dismissal sanction was unwarranted. In rendering the dismissal order inappropriate the Court did not preclude the imposition of less stringent sanctions. Moreover, the Court stated that the dismissal sanction would be appro
priate upon a finding that a petitioner deliberately courted legal impediments to discovery.

Prior to Societe, many courts espoused the doctrine that "upon fundamental principles of international comity, our courts . . . should not take such action as may cause a violation of the laws of a friendly neighbor . . . ." Referred to as the Per Se Doctrine, a discovery order pursuant to F.R.C.P. Rule 37(a) would always be inappropriate according to this doctrine if the order would result in a violation of foreign law.

The per se doctrine has been criticized as deficient in that it fails to recognize the interests of the United States in maintaining the integrity of its judicial system by assuring the full disclosure of probative facts on disputed issues. Moreover, vital Congressional policies may be frustrated by a blind allegiance to international comity. For instance, the United States Antitrust laws could be circumvented by secreting documents of an incriminatory nature under the protection of a foreign country's nondisclosure law.

The Supreme Court in Societe thus implicitly recognized the vital interests of the United States by suggesting that a foreign nondis-
closure law did not necessarily preclude discovery.37

Some courts and commentators have misconstrued Societe as holding that a foreign nondisclosure law is only relevant in the sanction stage and should never be considered in the "ordering discovery" stage.38 This interpretation, however, fails to recognize that Societe expressly stated that a foreign nondisclosure law may bar a discovery order.39 However, the Court did not elaborate on the specific circumstances which would create such a bar. Rather, the Court seemed to incorporate an open case-by-case analysis into this question.40 Such an approach has raised considerable questions and has generated differing interpretations as to the appropriate guidelines to be used in determining whether to order discovery notwithstanding a conflicting foreign law.

Upon closer examination two factors can be identified as having influenced the Supreme Court's determination that the discovery order was proper. First, the Court acknowledged the importance of the Congressional policies underlying the Trading with the Enemy Act.41 The Court thus implied that policies which did not affect vital American interests may not warrant a Rule 37(a) discovery order in the face of a foreign nondisclosure law.42 Secondly, the Court recognized that the records sought by Societe had a "vital influence upon the litigation."43 This might suggest that if the in-

37. E.g., In re Westinghouse Elec. Corp. 563 F.2d 992 (10th Cir. 1977). The court here states: "In our view Societe holds that . . . a local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions in the foreign country . . . ." Id. at 997.


39. The Court states: "We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents . . . ." 357 U.S. at 205.

40. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon circumstances of a given case, and we hold only that accommodation of the rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing the production order. Id. at 205.

41. The Court stated:

[The] possibility of enemy taint of materials of neutral powers, particularly of holding companies with intricate financial structures, which asserted rights to American assets was of deep concern to the Congress when it broadened the Trading with the Enemy Act in 1941 . . . to reach enemy interests which masqueraded under those innocent fronts.

Id. at 204-205 (quoting from Clark v. Uebersee Finanz-Korp., 332 U.S. 480, 485 (1947)).

42. Id. at 206.

43. The Court said: "United States courts should be free to require claimants of seized
formation sought is not crucial to the litigation a court should not issue a discovery order.\(^4\)

Although ruling that the District court was justified in ordering discovery, the Supreme Court determined that the dismissal sanction was inappropriate under the circumstances. In so holding, the Court focused on the good faith of Societe in attempting to comply with the discovery order. Such good faith, the Court stated, rendered the dismissal sanction unduly harsh and inappropriate.\(^5\) However, the Court neglected to elaborate on the role of good faith in the imposition of less stringent sanctions. Additionally, uncertainty remains as to what additional factors, if any, should be considered in determining the proper sanctions for noncompliance with a discovery order.\(^6\)

### THE AFTERMATH OF SOCIETE

**Restatement Balancing Approach**

In 1965 the American Law Institute adopted the *Societe* holding.\(^7\) In addition the Institute extended the *Societe* analysis by setting forth explicit factors for a court to consider when evaluating whether to order discovery notwithstanding a foreign nondisclosure law. These factors are:

(a) 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 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

assets who face legal obstacles under the laws of their own countries to make all such efforts to the maximum of their ability where the requested records promised to bear out or dispel any doubt the Government may introduce as to true ownership of the assets.” *Id.* at 205.


44. See notes 112-114 infra and accompanying text.

45. For an argument concerning constitutional limitations on the use of dismissal sanctions, see note 25 supra.

46. See notes 125-130 infra and accompanying text.

47. “A state having jurisdiction to rescribe or to enforce a rule of law is not precluded from exercising the 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.” *Restatement (Second) of Foreign Relations Law of United States* §39 (1965).
prescribed by that state.\textsuperscript{48}

Although the Restatement thus provides specific factors for a weighing process, it is not clear whether this balancing process was meant to be conducted in the initial production stage\textsuperscript{49} or at the sanction level of discovery.\textsuperscript{60} Indeed, some jurisdictions apply the

\textsuperscript{48} Restatement (Second) of Foreign Relations Law of United States §40 (1965).
\textsuperscript{49} In Trade Development Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972), the court held that the balancing analysis is the proper test to be used in the initial ordering of production when a foreign nondisclosure law exists. In affirming the district court's decision not to order discovery because of the presence of a foreign nondisclosure law the Second Circuit stated that the lower court's decision "appears to have been based on a careful analysis and balancing of all relevant interests." \textit{Id.} at 42. The Second Circuit reasoned that "after balancing the interests" a court may defer to the foreign nondisclosure law. \textit{Id.} at 41.

A contrary position was taken in \textit{Arthur Andersen & Co. v. Finesilver}, 546 F.2d 338 (10th Cir. 1976). In this action, the State of Ohio, claimed that the defendant, an accounting firm, fraudulently misrepresented the financial condition of Key Resources Company. Ohio sought to obtain documents that Anderson had in its office in Switzerland. The defendant refused to comply on the ground that production of the requested documents would violate Swiss law.

The Tenth Circuit affirmed the district court's order of discovery and in so doing implied that the balancing analysis was inappropriate in the order stage of discovery. Rather, the court held that the presence of a foreign law is not at all relevant to the initial production question. In so holding, the court construed \textit{Societe} as indicating that consideration of a foreign law is relevant only at the imposition of sanctions for noncompliance stage, not at the stage of issuance of a discovery order. \textit{Id.} at 342.

The court's position blindly invoked the doctrine of \textit{lex fori}, without considering the valid countervailing considerations of international comity. \textit{Id.} Furthermore, the Tenth Circuit's approach seemed to run afoul of the reasoning in \textit{Societe} which implied that a foreign law may be considered in determining whether to order discovery. 357 U.S. at 205-06. Instead of merely yielding to one principal over the other the court should strive to achieve an effective accommodation of both concerns.

\textit{Cf.} \textit{Ohio v. Arthur Andersen & Co.}, 570 F.2d 1370 (10th Cir. 1978). This case involves the sanction stage of the discovery proceedings.

\textsuperscript{50} In \textit{United States v. First Nat'l City Bank}, 396 F.2d 897 (2d Cir. 1968) the court also adopted the balancing approach in determining whether sanctions imposed for noncompliance with a discovery order were valid. Here the defendant bank, citing a foreign nondisclosure law, refused to comply with a valid subpoena and court order requiring the production of documents in possession of its foreign branch. Judge Pollack of the district court imposed sanctions of $2,000.00 per day until compliance.

In affirming these sanctions the court held that the proper analysis was a careful balancing of the interests. \textit{Id.} at 900. In this regard the court focused on the public policy of the German government in protecting these documents against the national interests of the United States in the enforcement of a subpoena. \textit{Id.} at 903. The court concluded that the interests of the United States in the discovery of the documents outweighed Germany's interest in preventing disclosure. \textit{Id.}

\textit{Accord}, \textit{In re Grand Jury Proceedings}, 532 F.2d 404 (5th Cir. 1976). Here the court was also faced with the issue of what sanctions to impose for noncompliance with a valid discovery order. In this action Field, director of a bank and trust company, refused to testify on the grounds that the bank secrecy laws of the Cayman Islands would be violated. The district court, although finding that defendant would indeed be subject to criminal penalty
Restatement analysis in both stages of discovery.51

A convincing argument may be made that the Restatement factors merit full consideration only at the later, sanctions stage.52 The use of the Restatement balancing analysis in the production stage of discovery would unduly impinge upon a court's ability to gain access to foreign documents. In the production stage a court cannot properly measure the hardships and conflicting demands faced by a party from a foreign country.64 Use of the Restatement analysis in the ordering stage to measure the validity and importance of the conflicting concerns therefore would be premature.54 Indeed, such an analysis would force a court to choose between ordering discovery and not ordering discovery prior to ascertaining whether the foreign law actually presents a conflict to production. It is only after a discovery order is rendered that a court will be able to determine whether a party, in good faith, sought alternatives and utilized full efforts towards compliance with the order. Only after presenting a party with the full measure of judicial power will a court best be able to determine whether a bona fide nonetheless ordered discovery. Upon Field's continued refusal to testify the district court imposed sanctions.

The circuit court, in affirming, stated that the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF U.S. §40 requires a balancing of several factors in determining whether "the United States or, in this case, the Cayman Islands' legal command will prevail." Id. at 407.

The court concluded that "[t]o defer to the laws of the Cayman Islands . . . would significantly restrict the essential means that the grand jury has of evaluating whether to bring an indictment." Id. at 408.


51. See, e.g., Trade Development Bank v. Continental Ins. Co., 469 F.2d 31 (2d Cir. 1972) (balancing used in production stage); U.S. v. First Nat'l City Bank, 396 F.2d 987 (2d Cir. 1968) (balancing used in the sanction stage.)

52. See Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979); Notes 102-103 infra and accompanying text.


In the present case, each defendant seeks to differentiate itself from its co-defendants on the basis of a variety of factors including the volume of the documents it is withholding, the extent of its culpability in securing passage of the foreign laws, its good faith in seeking to comply with document requests, the amount of hardship it might suffer by disclosure, and the breadth of its interpretation of foreign laws. A decision to grant or withhold a production order under Rule 37(a) does not provide a means of tailoring relief to the individual circumstances of each defendant.

See notes 134-136 infra and accompanying text.

54. Id.
conflict exists. If a party fails to comply with a discovery order, it is likely that a court must rule upon appropriate sanctions. It is arguable that the Restatement balancing analysis more appropriately applies at this stage where the concerns of the foreign country and the hardships imposed upon the noncomplying party may be measured. Based on the balancing of these Restatement factors sanctions can range from no penalty to a dismissal of the party's actions. Accordingly, in the sanction stage the Restatement analysis can be used to accommodate the concerns of comity and lex fori. Appropriate sanctions may then be imposed based on this accommodation.

Nevertheless, many gaps remain in approaches to ordering foreign discovery after Societe and the Restatement. The courts variously and inconsistently fill these gaps depending on the manner in which Societe is interpreted and extended. Indeed, the absence of a unified methodology creates an enigma for both practitioners and

55. See Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138 (N.D. Ill. 1979). Here the district court in ordering production notwithstanding a foreign law stated:

We do not seek to force any defendant to violate foreign law. But we do seek to make each defendant feel the full measure of each sovereign's conflicting commands, so that, in the words of Chief Judge Kaufman of the Second Circuit, it not 'must confront . . . the need to surrender to one Sovereign or the other the privilege received therefrom,' or, alternatively, a willingness to accept the consequences.

Id. at 41 (quoting from United States v. First Nat'l City Bank, 396 F.2d 897, 905 (2d Cir. 1968)).

56. Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979). "Rule 37(b) is flexible and offers a variety of sanctions, if necessary, which the court may incorporate into such orders 'as are just.'"

57. Problems are evident even in the application of the Restatement balancing analysis in the sanction proceedings stage. Although a judicial system may be adequately equipped to judge our national interest, it may be ill-equipped to judge the national interests of a foreign country. A court in certain instances could not possibly foresee the effect a conflicting order would have on the international relations between the United States and the foreign country. Thus, instead of giving sufficient weight to the little understood concerns of the foreign government a court often will simply conclude that the United States' interests are greater. See Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138 (N.D. Ill. 1979); Foreign Nondisclosure Law, supra note 2, at 621.

One possible solution would be to have the court consult the executive branch as to the importance and legitimacy of the foreign nondisclosure law. See American Indus. Contr. Inc. v. Johns-Manville Corp., 326 F. Supp. 879 (W.D. Penn. 1971). Here Canadian defendants claimed that a Canadian law prohibited their compliance with an interrogatory. The court in refusing to reconsider its order requiring an answer stated: "We do not believe we are involved in matters of international relations between the United States and Canada, but if we are, we should receive some representation from the United States Department of State to this effect." Id. at 880-881; Note, Ordering Production of Documents from Abroad in Violation of Foreign Law, 31 U. Chi. L. Rsv. 791, 804 (1964).
their clients. Proper guidelines are urgently needed to bring stability to this volatile area.

THE WESTINGHOUSE LITIGATION: A CURRENT APPROACH

Two recent decisions may shed light upon and fill the gaps in the Societe analysis. In In Re Westinghouse Electric Corp.58 (Westinghouse I) the Tenth Circuit in a breach of contract action vacated the district court's imposition of sanctions for noncompliance with a discovery order. According to that Court of Appeals, the foreign country's prevailing national interest behind its nondisclosure law as well as the noncomplying party's demonstrated good faith rendered the district court's sanction improper.

In contrast, in Westinghouse Elec. Corp. v. Rio Algom59 (Westinghouse II) the district court for the Northern District of Illinois ordered discovery under Rule 37(a) notwithstanding the same foreign nondisclosure law.

On the surface these decisions present conflicting results. However, upon closer examination both decisions are fully reconcilable based on the separate analysis applied in the production stage in Westinghouse II and the analysis used at the sanction stage in Westinghouse I.60 Together, the decisions present a viable answer to the problem of balancing the opposing concerns of international comity and lex fori, in the ordering of discovery and the sanctioning of discovery noncompliance.

Westinghouse I: The Restatement Balancing Analysis in the Sanction Stage

Background

In 1971 Westinghouse Electric Corporation entered into several contracts agreeing to supply uranium in both the long and short term to several utility companies. At the time the contracts were executed the price of uranium was low and the supply plentiful. Westinghouse surmised that it would be successful in obtaining adequate uranium supplies to meet the contract demands at a favorable profit.61 However, beginning in 1973, the price of ura-

60. See notes 61-121 infra and accompanying text.
61. Westinghouse did not produce its own uranium but merely acted as middleman,
nium increased dramatically. As a result of this increase, Westinghouse alleged that it was unable to honor the contracts. Accordingly, Westinghouse sent letters to the utility companies claiming that due to prevailing market factors, the contracts would not be honored. Subsequently the utility companies filed suit against Westinghouse for a private breach of contract.

As an affirmative defense to this action, Westinghouse asserted that several uranium producers, through a cartel, artificially increased the price of the commodity, therefore rendering it commercially impracticable for Westinghouse to fulfill the terms of the contract. To establish this claim Westinghouse sought to obtain several documents from uranium producers located in foreign bridging the gap between utility companies and producers. At the time it entered into the contract it had not, as of yet, procured the uranium. International Uranium Cartel, supra note 58, at 63.

Westinghouse claimed that it undertook a study at the time of the contract and determined that adequate supplies would be available until the end of 1980 at prices ranging from $6.00 to $8.00. Id. at 68.

Westinghouse argued that fulfillment of the contract demands would threaten its corporate viability. It surmised that the estimated loss on the contract would be over two billion dollars. Such a loss, argued Westinghouse, would increase the difficulty in obtaining financing and reduce its ability to attract long term customers. Westinghouse further maintained that if the contract loss reached 2.5-3.0 billion dollars the company would be forced into bankruptcy. Id. at 79-80.

In this letter Westinghouse took the position that the uranium price increase was caused by successful OPEC boycotts and a general increase in the cost of all forms of energy. The existence of an oil cartel was not brought up by Westinghouse at this time. Id. at 77-78.


These companies filed suit in thirteen separate districts throughout the United States. Westinghouse subsequently moved to transfer these actions to one district pursuant to 28 U.S.C. § 1404(a) (1962), and 28 U.S.C. §1407 (1968). See generally Comment, Search for the Most Convenient Federal Forum: Three Solutions to the Problem of Multidistrict Litigation, 64 N.W. L. Rev. 188 (1969).

The court, agreeing with Westinghouse, held that all these actions involve common questions of fact, and that transfer to the United States District Court for the Eastern District of Virginia would be the forum most convenient to the litigants. In re Westinghouse Elec. Corp., 405 F. Supp. 316, 318 (Jud. Pan Mult. Lit. 1975).

The thrust of Westinghouse's argument was that U.C.C. §2-615, applied which provides in part:

Except so far as a seller may have assumed a greater obligation . . . delay in delivery or nondelivery in whole or in part by a seller . . . is not a breach . . . if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.
countries. Rio Algom, the Canadian Producers, failed to procure the requested documents, and claimed that Canadian law prohibited their disclosure. In response to this refusal, Westinghouse sought a court order compelling the president of Rio Algom to comply with a subpoena. The district court entered a rule 37(b) order, and based upon Rio's continuing refusal to comply, imposed a $10,000.00 per diem penalty. Rio appealed to the Tenth Circuit.

66. In the Virginia action Westinghouse requested documents from certain uranium producers located in Canada, United Kingdom, Australia, and South Africa. Westinghouse argued that such documents were necessary to show that the uranium producers, through a cartel, artificially increased the price of uranium thus rendering it commercially impracticable for Westinghouse to perform the terms of the contract. International Uranium Cartel, supra note 58, at 93.

67. The Canadian regulations provide:

No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings, that took place January 1, 1972-December 31, 1975 involving that person or any government crown corporation, agency or other organization in respect to the production, import, export, transportation, refining, possession, ownership, use, or sale of uranium or its derivative or compound shall:

(a) release any note, document, or material, or communicate the contents thereof to any person government, crown, corporation, agency, or other organization unless:

(i) he is required to do so by law of Canada.

(ii) he does so with the consent of the minister of energy, mines and resources; or

(b) fails to guard against or take reasonable care to prevent the unauthorized release of any such note, document, or material or the disclosure or communication of the contents thereof.

SOR/77-836 (1977). Penalty for violation is $500 and/or two years imprisonment. Penalty upon conviction is $10,000 and/or five years imprisonment.

68. Westinghouse also attempted to obtain the requested documents through the use of letters rogatory. A letter rogatory is a formal request from the forum court asking the foreign court to perform a judicial act in aid of litigation pending in the forum court. Under Fed. R. Civ. P. 28(b) a party must apply to a district court of the United States for the issuance of a letter rogatory. See note, Taking Evidence outside of the United States, 55 B.U. L. Rev. 368, 372 (1975).

Upon Westinghouse's request the District Court of Richmond issued letters rogatory to Canada. Upon Rio Algom's continued refusal to produce the documents Westinghouse applied to the Supreme Court of Ontario for enforcement of the letters rogatory. In re Westinghouse Elec. Corp., 16 Ont. 2d 273 (1972), the court maintained that the Uranium Information and Security Regulations promulgated pursuant to the Atomic Energy Control Act, precluded the granting of the letters. The court stated that "this court will not compel persons to testify and produce documents in breach of the law and the express public policy of this state." Id. at 275.

69. Westinghouse filed suit in the District Court of Utah to compel Rio Algom, a Delaware Corporation with corporate offices in Canada, to comply with the subpoena notwithstanding the foreign nondisclosure law.
The Decision: *In Re Westinghouse Electric Corp.*

The Tenth Circuit reversed the lower court’s imposition of sanctions. In reaching this conclusion the appellate court maintained that *Societe* must be the “starting point in our analysis of the matter.” In the sanction stage, the court reasoned, “*Societe* calls for a 'balancing approach' on a case-by-case basis.” The Tenth Circuit intimated that a rigid formula is unworkable in sanctioning noncompliance with a discovery order on the ground of a foreign nondisclosure law, instead, the court stated, various factors must be weighed in imposing, modifying, or removing sanctions under rule 37(b).

The Tenth Circuit thus extended the *Societe* sanction analysis. The decision borrowed the good faith consideration from the Supreme Court’s decision, and also incorporated the additional factors enumerated in the Restatement balancing test. According to the appellate court, Rio Algom’s conduct manifested good faith because “the record indicates that Rio Algom has made diligent effort to produce materials not subject to the Canadian regulation. Further, Rio Algom has sought a waiver from the Canadian authorities.” The court concluded that Rio did all within its means to comply with the production order, short of violating the Cana-

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70. *In re Westinghouse Elec. Corp.*, 563 F.2d 992 (10th Cir. 1977).
71. *Id.* at 996.
72. *Id.* at 997.
73. *Id.* at 998.
74. *Id.*
75. *Id.* at 998.
76. *Id.*
77. *Id.* at 999.
78. *Id.*
79. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (where the court stated, “Rule 37(b) is flexible and offers a variety of sanctions, if necessary, which the court may incorporate into such orders ‘as are just.’ ”).
70. The court stated that in determining sanctions an accommodation between *lex fori* and international comity must be achieved. Guidance to the appropriate factors to be considered in balancing these interests is found in the Restatement of the Law. 563 F.2d at 997.
71. *Id.*
72. *Id.* at 999.
73. *Id.* at 998.
74. *Id.*
dian nondisclosure law.

Unlike the Court in Societe, however, the Tenth Circuit did not limit the sanction analysis to an inquiry of the good faith of the noncomplying party. The court implied that regardless of good faith, certain factors may necessitate the imposition of sanctions notwithstanding a foreign nondisclosure law. Additional factors which the court deemed relevant were the competing national interests of Canada and the United States. The court posited that the Canadian national interest was best articulated by the opinion of the Ontario Supreme Court in refusing to give effect to Letters Rogatory issued by Westinghouse. The Ontario opinion expressed the important contribution which the nondisclosure law made to Canada's control and regulation of atomic energy. Consequently, the Court of Appeals determined that it was not "unreasonable that the Canadian Government should have something to say about how those records will be made available to interested outsiders."

Furthermore, the Tenth Circuit weighed the countervailing consideration of America's national interest. Finding that no vital Congressional policy belied the plaintiff's cause of action, the court noted that the instant matter was simply a breach of contract. The court conceded that even in a private action, discovery may be

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Cf. Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978). In this sanction hearing the court used the good faith analysis and the balancing test in upholding sanctions imposed upon the defendant. The court distinguished Westinghouse by saying: "In the instant case Andersen acted in bad faith and the balancing was heavily on Ohio's side." Id. at 1373. See note 81 infra.

78. 563 F.2d at 998-999. The Court however did not preclude the use of additional Restatement factors. Id. at 997.

79. The Canadian court focused on a letter from the Honourable Alastair Gillespie, Minister of the Department of Energy, Mines, and Resources, to show the importance of the Canadian regulations. This letter discussed the importance that the nondisclosure law had to Canadian interests.

80. 563 F.2d at 998-999.

81. Id. at 998. Contra, 563 F.2d at 1001 (Doyle, J., dissenting). In examining the Canadian regulations Judge Doyle states that there is reason to infer that the Canadian regulations were passed to "counteract the present discovery efforts." Id. But see Memorandum of defendant and Counterclaimant Gulf Oil Corp. and Gulf Mineral Ltd. Canada, Westinghouse Elec. Corp. v. Rio Algom Ltd., No. 76 C 3830 (N.D. Ill. 1979) for a contrary argument that the Canadian government did in fact have a strong national interest in passing the regulations.

Here the Canadian defendant claimed that the Canadian government enacted the legislation in response to U.S. actions in harming the uranium industry. Id. at 5.

82. "We are not here concerned with any grand jury investigation or the enforcement, as such, of antitrust laws." 563 F.2d at 999. See notes 137-139 infra and accompanying text.
important. However, in a balancing of the private cause of action against the Canadian public law, the foreign interests were paramount. Based on the good faith of Rio Algom, and the importance of Canada’s national interest, the imposition of sanctions was not proper.

Westinghouse II: The Effects of a Foreign Nondisclosure Law on a Rule 37(a) Order for Production

Background

As an outgrowth of the defenses argued in the breach of contract litigation, Westinghouse filed a treble damage action under the antitrust laws in the Northern District of Illinois against twelve foreign and seventeen domestic producers of uranium. Westinghouse contended that the defendants, through a complex uranium cartel, entered into illegal combinations and conspiracies to restrain both interstate and foreign commerce in the United States. Through the establishment of the cartel, Westinghouse argued, the

83. 563 F.2d at 999. The court suggests that even though the national interest of the United States is understandable and legitimate, Westinghouse’s defenses do not stand or fall on the procurement of discovery.

But Cf. Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138, 1154-1155 (N.D. Ill. 1979) (where the court said that the Canadian documents are likely to be the “heart and soul” of Westinghouse’s case). For a reconciliation of these seemingly conflicting statements, see notes 131-139 infra and accompanying text.

84. 563 F.2d at 999. Contra Id. at 1003 (Doyle, J., dissenting). The dissent states, “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.” Id.


price of uranium increased dramatically, rendering it impossible to obtain supplies at reasonable prices. Accordingly, Westinghouse contended that the value of its business as a seller of uranium and other products in the atomic power market was thereby greatly reduced.

During discovery Westinghouse requested a large number of documents located in foreign countries. Ten defendants, however, raised foreign law objections to the production of such documents. Westinghouse subsequently moved for production under Rule 37(a).

The Decision: Westinghouse Elec. Corp. v. Rio Algom Ltd.

Three-factor Modified Analysis for the Production Stage

Judge Prentice Marshall, of the District Court for the Northern

88. Westinghouse alleged that the unlawful conduct of the uranium producers included price fixing, setting of terms and conditions of sale, and a concerted boycott conducted against Westinghouse. International Uranium Cartel, supra note 58, at 81.


Westinghouse accordingly pled for injunctive relief, treble monetary damages and attorney's fees under the Sherman and Clayton acts. Id. at 2, 45-46.

90. This article focuses only on the foreign discovery issues raised in the proceedings. In addition the defendants have raised many affirmative defenses, including lack of subject matter, jurisdiction, lack of personal jurisdiction over the defendants, improper venue, failure to state a claim for which relief can be granted, insufficient service of process, plaintiff's lack of standing because no injury was sustained from violation of the antitrust laws, doctrine of laches, failure to join indispensable parties, doctrine of pari delicto, act of state and sovereign compulsion doctrines, Noer Pennington doctrine, and an argument that primary jurisdiction was vested in the National Regulatory Commission. See International Uranium Cartel, supra note 77, at 89-90.


Five sets of foreign laws were involved. Three from Canada, Australia and South Africa were enacted during 1976-1978 for the express purpose of thwarting investigation of the international oil cartel. Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F. Supp. 1138, 1143 (N.D. Ill. 1979). Two other sets from Canada and Switzerland are inapplicable.

93. Judge Marshall stated: "We have delayed this ruling in the hope that the question here might be amicably resolved among the parties to these actions and the foreign governments involved . . . . But our hope has turned to despair. This litigation must proceed."
Discovery and Foreign Nondisclosure

District of Illinois, ruled that notwithstanding the foreign nondisclosure laws, production should be ordered. In reaching this decision Marshall grappled with the appropriate analysis to be used in a Rule 37(a) decision. In this regard the court considered several suggestions offered by the parties to the action.

Westinghouse argued that a foreign nondisclosure law is only relevant in the sanction stage of discovery, and is of no concern in the production stage. Marshall, however, rejected this approach. He reasoned that the question of whether a discovery order should issue is not solely a matter of American law, but that "a number of factors must be considered before issuing a production order." Certain defendants urged the court to accept the per se analysis, as previously adopted by the Second Circuit. Thus, they argued, discovery was per se precluded by virtue of the foreign nondisclosure law's existence. However, Marshall held that this analysis contravened the principles espoused in Societe and thus rejected it.

Several defendants alternatively contended that the Restatement balancing of interests approach should be applied. They argued that because the Restatement analysis was recently utilized in the Westinghouse I\textsuperscript{90} sanctions case, the same analysis was applicable in the instant production stage case as well. Thus, citing

\begin{itemize}
  \item Id. at 1156.
  \item Cf. Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976) (court also adopted this approach in the ordering stage of discovery). For criticism of this approach, see note 49 supra.
  \item Defendants Gulf Oil Co. and Gulf Mineral Canada Ltd., claim that it is appropriate for a court to decline to enter an order which would cause a violation of the laws of a "friendly neighboring nation." Memorandum of Defendants and Counterclaimants Gulf Oil Corp. and Gulf Mineral Canada Ltd. in opposition to plaintiff's motion to compel production or identification of certain foreign documents, Westinghouse Elec. Corp. v. Rio Algom Ltd., No. 76 C. 3830 at 51 (N.D. Ill. 1979) (hereinafter cited as Memorandum of Defendants). See notes 31 - 37 supra and accompanying text.
  \item 357 U.S. 197 (1958).
  \item See notes 47 - 51 supra and accompanying text.
  \item Memorandum of Defendants, supra note 81, at 52. The defendants argue that none of the cases cited by plaintiffs hold that a balancing approach is not proper in the initial ordering stage of discovery. Id. See notes 52 - 57 supra and accompanying text.
  \item Several defendants also raise the act of state doctrine as an effective bar to the discovery of the foreign documents. Memorandum of Defendants, supra note 97, at 47. The act of state doctrine provides that "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the
the Tenth Circuit's decision, the defendants argued that in balancing all the factors a Rule 37(a) order should not be entered.

Judge Marshall rejected the balancing analysis, however. He noted the difficulty in evaluating a foreign country's policies and stated that the balancing test was "inherently unworkable" in the instant case.

Rather than embracing any of the proffered alternative approaches, the court enunciated a three-factor analysis founded on the principles espoused in Societe. Marshall reasoned that Societe presented an open-ended approach to the initial ordering of discovery. However, the court stated, the Supreme Court envisioned some limits on the inquiry. Accordingly, the District Court held that the decision of whether to render a Rule 37(a) order turns on three factors:

1. The importance of the policies underlying the United States statutes which form the basis for the Plaintiff's claims;
2. The importance of the requested documents in illuminating key elements of the claims; and
3. The degree of flexibility in the foreign nation's application of its nondisclosure laws.

Marshall analyzed the strength of the Congressional policies un-
derlying the plaintiff's actions\textsuperscript{107} and stated that the United States antitrust laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."\textsuperscript{108} Furthermore, the court suggested that Congressional concern about the alleged activities of the defendants was evidenced by the subcommittee investigations\textsuperscript{109} into the uranium cartel.\textsuperscript{110}

Marshall then applied the second factor of his announced test, and weighed the contributive value of the documents to the litigation.\textsuperscript{111} In analyzing Societe, Marshall suggested that the normal standard "relevance" does not apply.\textsuperscript{112} He concluded instead that a higher standard than mere relevancy should be used when a foreign nondisclosure law is involved.\textsuperscript{113} Employing this standard, the court determined that Westinghouse's need for these documents was "overwhelming."\textsuperscript{114} The court thus concluded that this second

\textsuperscript{107} Marshall notes that Societe did not hold that American law should be balanced against foreign law in the production stage of discovery. Rather, Marshall reasons, the only inquiry is the strength of the three-factor analysis. \textit{Id.} at 1146.

\textsuperscript{108} \textit{Id.} at 1154. (quoting from United States v. Topco Assoc. Inc., 405 U.S. 596, 610 (1972)).

\textit{Cf.} American Indus. Contracting Inc. v. Johns-Manville Corp., 326 F. Supp. 879, 880 (W.D. Penn. 1971) (where the court in ordering discovery stated: "[I]n view of the fact that this action involves the antitrust laws of the United States which are a matter of important public policy to the United States . . . the public policy of this country demands that these interrogatories be answered if at all possible.").


\textsuperscript{111} \textit{Cf.} In re Westinghouse Elec. Corp., 563 F.2d 992 (10th Cir. 1977) (notes 70-84 \textit{supra} and accompanying text); Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976) (court ordered discovery in a matter concerning the violation of state security laws).


\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.} at 1154-1155.

\textit{Id.} Marshall states that the actions of the defendants show Westinghouse's need for the documents:

First, Gulf has admitted the "establishment of an international uranium cartel under which price controls and market allocations were established for at least some sales of uranium." (Gulf Brief, p. 18). Second, the information which plaintiffs seek is of such exceptional significance that three foreign governments have sought to authorize defendants to withhold that information . . . . Third, ten defendants withheld documents under their control which are said to be within the scope of the secrecy legislation.

\textit{Id.} at 1155. \textit{But see} Memorandum of Defendants, \textit{supra} note 97, at 56, where the defendants make the distinction that "this case does not stand or fall on the present discovery order." This is the same rationale utilized in \textit{In re} Westinghouse Elec. Corp., 563 F.2d 992,
factor weighed heavily in favor of Westinghouse.

The final factor which the court considered was the flexibility in a country's application of its nondisclosure law. Once again using Societe as a guideline, the court suggested that the greater the flexibility in the application of a country's nondisclosure laws, the lesser the resultant intrusion on the sovereign's policies by the issuance of a production order. Hence, where the foreign law is applied with flexibility, a production order will more likely issue. Marshall conceded that although South Africa and Australia demonstrated leniency in applying their laws, Canada has been totally inflexible. Though many diplomatic notes were sent to the United States, Canada continually maintained that disclosure would be detrimental to her own national interest. The court recognized that this position has remained constant and shows no sign of abating. Notwithstanding Canada's unyielding position, Marshall ordered discovery based on the two preceding factors.

Applying this three-factor analysis, the court concluded that a Rule 37(a) order was required. The extreme importance of the policies underlying the antitrust laws, and the vital nature of the requested documents to the litigation outweighed Canada's inflexible application of its laws. In so ruling the court noted its unwillingness to arbitrarily compel any defendant to violate foreign law. However, when the three-factor analysis is satisfied the principles of lex fori dictate that a party should be driven to attempt full compliance by the imminent conflicting commands of each state.

999 (10th Cir. 1977). See notes 137-139 supra and accompanying text.
116. Id. at 1155. Marshall stated:
  
  South Africa has taken the most flexible position. It has allowed Westinghouse to inspect Utah's uranium-related documents in that country . . . .
  
  Australia has rejected all past requests for a waiver of its regulations, but interprets its laws as authorizing the Attorney General to grant such waivers. The Attorney General is presently considering requests for waivers from Engelhard, Getty and Utah [defendants].
117. Id. "The Canadian Government is deeply concerned that an order has been issued by a United States court, the effect of which would be to compel the identification and production of documents in Canada contrary to Canadian law, a result which could be inconsistent with international comity." Diplomatic note No. ECP-25 from Hon. Don Jamieson, Secretary of State for External Affairs, to Mr. Thomas Enders, United States Ambassador to Canada (Nov. 8, 1978).
119. Id. at 1156.
120. See note 55 supra.
Only after this juncture can the court fully evaluate a party’s reasons for noncompliance.121

**The Westinghouse Litigations: Analysis and Reconciliation**

The Marshall decision offers a fair and equitable approach to the determination of whether to order the production of documents notwithstanding a foreign nondisclosure law. The analysis achieves an effective balance between international comity and *lex fori*, a conflict which predecessor courts had unsatisfactorily addressed.122

Contrary to earlier decisions, Marshall considered the valid policies underlying international comity. Before subjecting a party to sanctions for disobeying conflicting laws the Marshall analysis provides a vehicle to evaluate three paramount factors: whether the American policies are strong, whether the documents are crucial to the litigation, and whether the foreign laws are flexible in their applications.123 Without assuring absolute protection to a party124 the analysis seems to avoid unwarranted discovery requests which demand unnecessary violations of foreign law. Although each factor in the analysis is subject to some discretion, the evaluation should serve as a powerful deterrent of overreaching in ordering production.

1. Analysis of Westinghouse I

The Tenth Circuit decision in Westinghouse I presents a well-reasoned methodology for determining whether to impose sanctions for noncompliance with a discovery order notwithstanding a foreign nondisclosure law. The Tenth Circuit suggests a two-pronged analysis.125 First, the noncomplying party must establish that he has exercised utmost good faith in attempting to comply with the discovery order.126 If he fails in this showing, further con-

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121. See note 52 through 57 **supra** and accompanying text.
122. See, e.g., Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976); In re Chase Manhattan Bank, 297 F.2d 611 (1st Cir. 1962); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); First Nat’l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959); SEC La Minas de Artenisa, 150 F.2d (9th Cir. 1945); See also notes 31-37 **supra** and accompanying text.
123. See notes 93-118 **supra** and accompanying text.
124. In formulating the appropriate analysis Marshall recognized that the full Restatement balancing approach is inherently unworkable in the initial production stage. See note 53 **supra**. Accordingly the three-factor analysis does not consider the validity of the various conflicting demands imposed upon a party, nor the strength of the national interests in effectuating the foreign law. Inquiry into these factors is premature.
125. See Foreign Nondisclosure Laws, **supra** note 2, at 615.
126. See In re Westinghouse Elec. Corp., 563 F.2d 992 (10th Cir. 1977): “The record
sideration is unnecessary.187 According to the Tenth Circuit failure to demonstrate good faith alone justifies the imposition of sanctions.188 However, the second prong of the analysis is triggered once such a showing is made. This phase of the test balances the competing factors enumerated in the Restatement.189 Such factors can be used to adequately consider and weigh a party’s reasons for noncompliance.190 Thus, the court’s balancing analysis logically extends Societe by articulating an additional analysis to be used in imposing sanctions notwithstanding the exercise of good faith by the noncomplying party.

2. Reconciliation

Although the conclusions reached in Westinghouse I and II appear to be in conflict, both decisions are fully reconcilable on two grounds. First, each court was confronted with entirely distinct questions requiring different analyses. In Westinghouse II Judge Marshall was presented with an initial production question191 whereas in Westinghouse I the Court of Appeals considered the propriety of sanctions for noncompliance.192 Marshall properly declined to consider the good faith of the noncomplying party in his production stage analysis. In the three-factor analysis good faith was correctly deemed irrelevant, because a party has not been afforded at that stage the opportunity to comply.193 Only at the sanction stage, after the party has been given this opportunity, can a court fairly assess efforts at compliance and subsequently measure good faith.

Furthermore, the national interests underlying the foreign non-disclosure law are rightly excluded from the Marshall analysis,194

187. See Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978). Here the court upheld preclusionary sanctions imposed upon Andersen on the basis that Andersen acted in bad faith, and the balancing was heavily on the side of plaintiff. Id. at 1373.
188. 563 F.2d at 996.
189. See notes 47-51 supra and accompanying text.
190. See notes 56-57 supra and accompanying text.
191. See notes 61-84 supra and accompanying text.
192. See note 85-118 supra and accompanying text.
193. See Societe Internationale v. Rogers, 327 U.S. 197 (1958): “[The] good faith of petitioner 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.” Id. at 208.
194. Westinghouse v. Rio Algom, Ltd., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979): “A production order is only the first step in the process of resolving discovery disputes...
and included in the Tenth Circuit approach. After an issuance of a discovery order a foreign country may encounter a violation of its nondisclosure law. At this point, the foreign country may elaborate on the importance of the law to its national interest. Written correspondence and documentation in connection with this elaboration may aid an American court’s understanding of the foreign national interest.

The second basis for reconciliation of the two Westinghouse decisions turns on the law upon which the cause of action is based. When suit is predicated on state contract law, as in Westinghouse I, no important overriding congressional policy exists. Therefore, weighed against significant foreign interests, the private action does not necessitate an intrusion on international comity. However, when the American cause of action reflects strong public policies, as in Westinghouse II, such interest may outweigh the foreign national concerns.

CONCLUSION

With the increase in the number of American corporations doing business overseas, the problems associated with obtaining evidence from foreign countries will not diminish. A methodology is sorely needed to deal with these problems. The Supreme Court, in Societe International v. Rogers, laid the foundation for that methodology when it held that a court may consider factors beyond the existence of the foreign nondisclosure law when determining whether to impose sanctions for noncompliance with a discovery order. However, various interpretations have followed Societe thus hindering the development of a uniform methodology in the area.

The courts in the future must be sensitive to the legitimate concerns of the United States, the foreign country, and the litigants should not be prematurely burdened by a comprehensive inquiry into all ramifications of the controversy.”

135. See notes 128-130 supra and accompanying text.
136. See In re Westinghouse Elec. Corp., 16 Ont. 2d 273 (1977); Note 68 supra.
137. See notes 107-111 supra and accompanying text.
138. An argument can be made that under the Marshall three-factor analysis Westinghouse I would have not reached the sanction stage. Rather, production would not have been ordered.
139. See American Indus. Const., Inc. v. Johns-Manville Corp., 326 F. Supp. 879 (W.D. Penn. 1971). The court expressed the view that, “the antitrust laws have long been a cornerstone of this nation's economic policies and the securing of information in a suit involving them should not be frustrated if it was at all possible to secure the information by any means.” Id. at 880.
involved. The decisions in the Westinghouse litigations reflect such a well-reasoned approach and together stand as logical extensions of the principles enunciated in Societe. The approaches adopted in these decisions together yield the long awaited uniform methodology for resolving problems associated with the discovery of documents located overseas.

It is suggested that the courts utilize this methodology, carefully weighing both the distinctive considerations which exist when a party seeks a discovery order, and the additional factors which are triggered when a party seeks the imposition of sanctions for non-compliance premised on a foreign nondisclosure law.

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