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Confronting Foreign “Blocking” Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation

A. Introduction

With increasing frequency, parties involved in litigation in American courts have invoked foreign legislation in an effort to excuse, limit or condition compliance with routine pretrial disclosure obligations under the Federal Rules of Civil Procedure and analogous provisions of state law. The recent proliferation of so-called blocking legislation has confronted litigants seeking disclosure from a foreign party—or from a domestic party whose documents, information or witnesses are located in another nation—with a unique set of practical problems which bear significantly on the ability effectively to prosecute the litigation. Conversely, of course, the blocking statutes provide parties whose nations have enacted them with new and potentially significant opportunities to impede or even foreclose discovery.

This article examines foreign concealment legislation from the standpoint of the litigant for whom it is essential to pursue the most effective and efficient means of obtaining disclosure from a party invoking foreign law. After describing the procedural context in which the discovery dispute will most frequently arise, the article explores in detail several of the more prominent foreign blocking statutes, including their legislative history, and then discusses the prevailing U.S. case law treatment of the predominant issues.

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B. The Procedural Context

The procedural context in which most issues relating to foreign blocking legislation will arise is of classic simplicity: shortly after the commencement of the litigation, a party serves on its adversary any one of the disclosure demands which the Federal Rules of Civil Procedure and related state statutes authorize. The most typical disclosure devices utilized at the earlier stages of litigation include interrogatories, requests for production of documents and notices of deposition. The adverse party, if it is a foreign national whose country has enacted blocking legislation, typically then responds to the discovery requests with a document stating essentially that no disclosure will be provided because compliance with the discovery requests might lead to the imposition of criminal sanctions under foreign law.¹

When served with this type of responsive document, the American litigator is confronted essentially with a choice among three alternatives:

1. the utilization of a motion to compel, pursuant to Rule 37 of the Federal Rules of Civil Procedure or analogous state rule, as a vehicle for mounting a frontal attack on the scope and effectiveness of the particular blocking legislation invoked and the particular party's right to invoke it;
2. the assessment of the foreign party's relationship with related U.S. entities, such as subsidiaries, which might have access to the same information sought from the party claiming immunity under the blocking legislation; or
3. particularly in the case of a multidefendant lawsuit, the avoidance of the costly, time-consuming and perhaps futile quest for information from the nondisclosing party by looking to other similarly situated adverse parties to secure the evidence needed to implicate the nondisclosing party as well as the parties who are making disclosure.

The use of any one of these alternatives obviously does not preclude consideration of any of the others. Typically, however, a litigant's crucial strategy in the pretrial phase of any action is to exert on the defendants as much pressure, in terms of document demands, interrogatories and deposition discovery, as possible. An adverse party which has elected to invoke a foreign blocking statute has attempted, by the use of a single device, to circum-

¹Among the most frequently cited foreign blocking statutes are those enacted by Canada, Uranium Information Security Regulations, Stat. O. & R., 76-644 (P.C. 1976-2368, Sept. 21, 1976), promulgated under authority of Atomic Energy Control Act, CAN. REV. STAT. (1970) c.A-19; Australia, Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Austl. Acts. No. 121; England, Protection of Trading Interests Act, 1980, c.187; France, Law No. 80-538, dated July 16, 1980, Journal Officiel de la Republique Francaise (July 17, 1980); and South Africa, Atomic Energy Act, § 30A(1)(a), 1978. The use of the nomenclature "blocking statute" to describe foreign laws which purport to qualify, interdict or control disclosure in United States litigation has obtained wide acceptance in recent years and is routinely utilized in the relevant cases. See, e.g., *F.T.C. v. Compagnie de Saint-Gobain-Point-A-Mousson*, 636 F.2d 1300, 1326, fn. 145 (D.C. Cir. 1980).

vent the burdens of providing discovery at the outset of the lawsuit, relying on the specter of potentially complicated foreign law questions to chill the enthusiasm of a plaintiff or counterclaimant to pursue pretrial disclosure. For strategic reasons, then, a party confronted with the invocation of a foreign "blocking" statute should not turn away from the peremptory challenge presented by the initial nondisclosing response. Beyond the strategic reasons for engaging directly a foreign concealment response is, of course, the elemental fact that the need for disclosure is essential for the proof of a plaintiff's claim.²

As a general matter, American courts, confronted with a party relying on blocking legislation, have turned aside claims to exemption from disclosure and compelled production of documents and answers to interrogatories. To this extent, the decision to mount a frontal attack on the particular foreign blocking statute at issue has firm ground in terms of the likelihood of a favorable result, albeit the cost of reaching that result can be extremely high.

Notwithstanding the general tendency of recent decisions of U.S. courts to overrule claims of exemption based on foreign law, additional difficulties have developed when the party which has secured the order compelling disclosure is faced with continued noncompliance and then seeks to enforce that order against its foreign adversary. In general, the case law discloses an unwillingness on the part of the courts to impose effective sanctions to enforce orders of disclosure. There is thus a discontinuity between the general position of U.S. courts that foreign blocking legislation will not excuse disclosure and the extent to which the courts are prepared to fashion genuinely effective sanctions orders.

C. The More Significant Foreign Blocking Statutes

Two principal types of blocking legislation have emerged in recent years: those which, like recently enacted French legislation, attempt to condition discovery on the American party's compliance with foreign proce-

²This article treats exclusively the situation in which discovery demands are served upon a foreign party with respect to whom no substantial issue of jurisdiction exists. As applied to parties to the litigation, pretrial disclosure under the Federal Rules of Civil Procedure extends to any nonprivileged information "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26. Provision is made under FED. R. CIV. P. 33 for the use of interrogatories addressed to parties, while document production by parties to the suit is controlled by FED. R. CIV. P. 34. In *F.T.C. v. Compagnie de Saint-Gobain-Pont-A-Mousson*, *supra*, 636 F.2d 1300, 1309, fn. 37 (D.C. Cir. 1980), the U.S. Court of Appeals for the District of Columbia said: "An American court has the power to compel a person *over whom it has personal jurisdiction* . . . to produce documents outside the court's jurisdiction. . . ." [Emphasis in original.] In the event a party interposes an objection to disclosure in response to discovery requests under FED. R. CIV. P. 26, 33 or 34, the requesting party is entitled to move for an order to compel responses pursuant to FED. R. CIV. P. 37(a). The rules applicable to discovery requests directed at nonparty witnesses appear in FED. R. CIV. P. 45 and 37, as well as at 28 U.S.C. § 1783 (1976). This article does not address the unique issues relating to compliance with subpoenas addressed to nonparty witnesses who are citizens or residents of foreign nations.

dural law and international treaties, and those which purport to interdict disclosure entirely in connection with certain subject matters. The first type of concealment legislation, which, in the French version, extends to all commercial litigation, is the more recent and the more sophisticated of the two forms. For that reason, the terms of that type of legislation, particularly the French statutory scheme, are explored in greater detail below than the other type of foreign blocking statutes, which were enacted by several nations, including Australia and Canada, in the middle of the last decade to prohibit completely disclosure of information relating primarily to uranium and uranium production.

1. *The French Legislation: Obstruction of Pretrial Disclosure by Reference to French Procedural Rules and International Treaties*

(A) THE LANGUAGE OF THE LEGISLATION

Enacted on July 16, 1980, and entitled "Law concerning the communication of documents or information of an economic, commercial, industrial, financial or technical nature to aliens, whether natural or artificial persons," the French blocking statute contains four sections. The first section declares it unlawful, with certain qualifications, for a French national to disclose to a foreign entity any information which might impair France's sovereignty, security, or its "basic economic interests." Fully translated, the operative provision of Article 1 of the statute is as follows:

Without prejudice to international treaties or agreements, a natural person of French nationality or customarily residing on French territory, or director, representative, agent or official of an artificial person with headquarters or an establishment on French territory, shall not communicate in writing, orally, or in any other form, regardless of place, to the public authorities of another country, documents or information of an economic, commercial, industrial, financial or technical nature where such communication is liable to threaten France's sovereignty, security or basic economic interests or the public order, as defined by the administering authority when necessary.³

The second principal section of the statute, Article 1a, declares it unlawful for anyone, including an American litigant, to seek disclosure from French sources other than through means prescribed by French law:

Without prejudice to international treaties or agreements and to current laws and regulations, a person shall not ask for, seek or communicate in writing, orally, or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature that may constitute proof with a view to legal or administrative proceedings in another country or in the framework of such proceedings.

Article 2 requires any person within the scope of Articles 1 and 1a to notify the "competent" French minister of any request for information,

³This translation of the French statute was adopted by the United States Court of Appeals for the District of Columbia in *F.T.C. v. Compagnie de Saint-Gobain-Pont-A-Mousson*, *supra*, 636 F.2d 1300, 1326 (D.C. Cir. 1980).

including the service on a French party involved in U.S. litigation of interrogatories, document demands or deposition notices. Finally, Article 3 purports to impose criminal sanctions which would apply to a violation of the legislation:

Without prejudice to more serious penalties provided by law, any violations of articles 1 and 1a of this law shall be punishable by two to six months' imprisonment and a fine of from 10,000 to 120,000 francs [\$2,500 to \$30,000] or either one of these two penalties alone.

(B) LEGISLATIVE HISTORY

The legislative history of the blocking statute discloses that the law was clearly designed as an effort to preclude pretrial discovery of French nationals involved as parties in American litigation. Report No. 1814 of the French National Assembly dated June 19, 1980 (the Report), which explains the background, purpose and intended impact of the blocking statute, is premised on the French perception of the "abuse" inherent in all pretrial discovery in American courts. The Report is candid in its articulation of the purpose of the blocking statute to immunize French corporations from the need to comply with discovery obligations in American courts. Indeed, the Report contains such a remarkable glimpse of French legislative antipathy toward U.S. pretrial disclosure that any American party seeking an order to compel should consider attaching the Report to the motion papers, in order to provide the judge with a comprehensive display of the extent to which the legislation is designed to thwart disclosure in American litigation.⁴

Briefly described, the Report reveals the fundamental antagonism of the French legislature to pretrial disclosure as conducted under U.S. law:

The American system for determining evidence is greatly different from ours. In the United States, in fact, these procedures are essentially left to the care of the parties and rather readily lend themselves to abuse, as these investigations generally do not require authorization or judicial control.⁵

In explaining the genesis of the blocking statute, the Report condemns the practice of American attorneys who "collect depositions, evidence and documents ultimately intended to serve the interests of their clients Our law does not clearly focus on these practices contrary to our public order and prejudicial to French nationals."⁶ Clearly identifying what the French perceived as the irreconcilable difference between routine American

⁴No translation of the Report into English is generally available. The Report is officially entitled *Rapport Fait au Nom de la Commission de la Production et des Echanges (1) sur le Projet de Loi Adopté par le Sénat relatif à la Communication de Documents et Renseignements d'ordre Economique, Commercial ou Technique à des Personnes Physiques ou Morales Etrangères*. The author will make available to any interested person a copy of a translation of the Report, which exceeds 60 pages in length, prepared by the Translation Company of America, Inc., 500 Fifth Avenue, New York, New York.

⁵Report at 10. (References to page numbers in the Report are to the French original.)

⁶*Id.*

pretrial discovery devices and French procedures, the Report in addition states:

[T]he so-called pretrial phase of suits in countries with "common law" . . . permits one party to conduct an initial investigation for evidence of a possible infraction which will be prejudicial to him. As the accusatory procedure is contrary to even the spirit of our procedural law, it is not possible to assimilate this phase to an element of [French] judicial procedure.⁷

Further describing American "pretrial discovery" as "a sort of prejudicial phase," the Report asserts categorically that France does "not recognize the pretrial procedure in force in the United States."⁸ In this context, the central purpose of the blocking legislation was described as "the protection of French companies against abusive investigations by foreign authorities." And, as justification for enactment of the blocking statute, the Report contended that "many examples demonstrate that French companies are not protected from manifestly discriminatory practices which do not respect business secrecy."⁹

Given these views, the vehicle selected by the French legislature to provide "protection" to French corporations was the 1980 blocking statute. The Report states:

Because of the weak protection of business secrecy in the United States, these actions [relating to pretrial disclosure] made it possible to disclose information relating to business and also to manufacturing procedures. According to all the evidence, it is therefore desirable to expand the protective provisions of [French legislation] to all economic sectors.¹⁰

Consequently, as described by the Report, the blocking statute

[W]ill offer our nationals a juridical weapon which will at least make it possible for them to gain time. The conflict thus created will block matters for a time and will make it possible to raise the conflict to an intergovernmental level.¹¹

Viewed in its totality, the legislative history of the blocking statute demonstrates that its impetus was a perception of the impropriety which the French legislature regarded as inherent in all American pretrial disclosure. In terms of its purported impact, the French legislation seeks to eliminate pretrial discovery by relieving French corporations of any obligation to provide discovery in American courts in accordance with procedures and practices such as those contained in the Federal Rules of Civil Procedure. As the legislative history candidly concedes, the purpose of the statute is "to block matters" as far as providing pretrial disclosure in American litigation is concerned.

Significantly, in the context of a motion to compel disclosure from a party which has invoked the French statute, the legislative history also

⁷*Id.* at 11.

⁸*Id.* at 13.

⁹*Id.* at 29.

¹⁰*Id.*

¹¹*Id.* at 46.

frankly negates any threat that the criminal sanctions provision of the law is intended to operate against French nationals. The Report reveals that the provisions on sanctions were included primarily to enable a French party to create the illusion of potential exposure to punishment. After setting forth the text of the sanctions provisions (which purport to provide for imprisonment and fines for violation of the statute), the Report makes it clear that they were included solely to produce an *in terrorem* effect when invoked in the context of American litigation:

[I]t is necessary not to misunderstand the actual scope of these penalties, which does not clearly appear on the simple reading of the statute These penalties are applied only on the improbable assumption that the companies would refuse to make use of the protective provisions offered to them. In all other cases, *these potential fines will assure foreign judges of the judicial basis for the legal excuse which the companies will not fail to make use of.* [Emphasis supplied.]¹²

As disclosed by this legislative record, the sanctions provisions were apparently intended to have a prophylactic effect based on the French legislature's belief that the specter of criminal liability will stay the hand of an American court in ordering disclosure from a French national.

(C) THE FRENCH RESERVATION UNDER THE HAGUE CONVENTION RELATING TO PRETRIAL DISCOVERY

Both the United States and France are signatories to the "Convention on the Taking of Evidence Abroad in Civil or Commercial Matters" (hereinafter the Hague Convention).¹³ The Hague Convention contains certain procedures, such as letters of request and commissions, which can be utilized in certain cases for the purpose of taking evidence abroad.

A sophisticated and superficially appealing linkage exists between the Hague Convention and the blocking statute. Read literally, the blocking statute appears to require nothing more than an American litigant's use of the Hague Convention techniques in order to obtain evidence from a French national. Again at an ostensible level, the blocking statute criminalizes disclosure only to the extent such disclosure occurs in a context other than that of the Hague Convention. A French party which refuses to answer traditional American interrogatories or document demands thus is in a position to assert to a U.S. court that satisfactory disclosure can be obtained from it *if* the American litigant merely complies with the Hague Convention's mechanisms, thus foregoing use of traditional discovery devices such as interrogatories and document demands.

Notwithstanding the surface appeal of this position, it merits emphasis that the blocking statute, in seeking to preclude pretrial disclosure, is

¹²*Id.* at 48. [Emphasis supplied].

¹³The text of the (Hague) Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *done* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (1972) appears in 7 Martindale-Hubbell Law Directory 4509 (1980), together with a listing of signatory nations and their reservations.

designed to work in conjunction with the French version of the Hague Convention, which expressly prohibits the use of the letters of request procedure to obtain pretrial disclosure. Article 23 of the Hague Convention, a provision which enables an adopting nation to exempt cooperation on pretrial discovery matters from the terms of the treaty, provides as follows:

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law Countries.

When it became a signatory to the treaty in 1974, France elected to make an Article 23 reservation to the Hague Convention:

[I]n application of Article 23, it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law Countries.

The consequence of the application of the Article 23 reservation made by France is readily apparent. Since virtually all discovery in American litigation is "pretrial," the Hague Convention offers no meaningful assistance to American litigants seeking pretrial disclosure from French individuals or corporations.¹⁴

As the legislative history demonstrates, the Article 23 reservation and the blocking statute were designed to function in unison for the ultimate purpose of erecting barriers to obtaining meaningful pretrial discovery, in any form, from French nationals. The Report accompanying the enactment of the blocking statute demonstrates that a basic reason for its adoption was to ensure the more complete effectiveness of the Article 23 prohibition on the use of the Hague Convention in France for purposes of pretrial disclosure. As the Report states:

The Convention has therefore been found to be insufficient to avoid excessive orders for the communication of documents abroad as well as demands for evidence collected under abusive conditions without application of the elementary rights of justice.¹⁵

In a revealing conclusion, the Report explains that the blocking legislation "has the purpose of filling in the gaps" which the French perceived to have existed under the Hague Convention. The Report underscored that the Article 23 reservation adopted by France "*was directed at excluding pretrial proceedings*"¹⁶ from the scope of France's participation in the Convention.

¹⁴Indicative of the negative effect of France's reservation relating to pre-trial disclosure is the report of two commentators on the French experience under the Hague Convention that, by the middle of 1978, the treaty had been used to obtain evidence in France in only one (1) commercial matter. J. Borel & S. Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 45 (1979). A further impediment to the effective use of the Hague Convention derives from the provision of Article 12 that a signatory nation can refuse to execute a letter of request if the letter would infringe the "sovereignty or security" of the executing state. 23 U.S.T. at 2568.

¹⁵Report at 21.

¹⁶*Id.* at 17. [Emphasis supplied.]

In summary, an American litigator seeking to compel answers from a nondisclosing French party is in a position to place before the court a French legislative history which lays bare the fact that the enactment of the blocking statute, coupled with France's Article 23 reservation, is calculated to foreclose pretrial disclosure from French corporations by French legislative fiat. Viewed against this background, a French defendant's assertion that the U.S. party should be required to resort to the procedures of the Hague Convention and French law is, arguably, an invitation to engage in a futile quest for pretrial disclosure. The legislation, in effect, constitutes a clear challenge to the operation of pretrial disclosure devices in U.S. courts as applied to parties who are French nationals. Equipped not only with the language of the 1980 statute but with its legislative history as well, an American litigator can frame for the court, in sharp terms, the conflict between American disclosure rules and the French legislation. As a general matter, it will be to the advantage of the party seeking disclosure to provide the court with the underlying legislative history and French statutory scheme.

2. *The British Trading Interests Act*

Enactment of the French blocking legislation followed by only a few months the adoption of British legislation designed to "provide protection from requirements, prohibitions, and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom."¹⁷ The British legislation's explicit scope is significantly broader than that of the French legislation,¹⁸ but the statute also contains a discovery-related provision whose consequences can clearly include the circumvention of U.S. pretrial disclosure devices by British nationals or others seeking exemption under British law. Like the French statute, the British law does not purport to involve a complete interdiction of discovery, but is similarly available for broad use as a means of circumventing disclosure.

The discovery provision of the British Trading Interest Act¹⁹ grants to the British Secretary of State the ability to prohibit persons or corporations in the United Kingdom from furnishing commercial information or producing commercial documents for use in a foreign country. Broad discretionary authority is accorded to the Secretary of State to provide a British entity with immunity from disclosure. The power to preclude compliance with U.S. discovery orders or requests is so expansive that the Secretary of

¹⁷Protection of Trading Interests Act, 1980, c.187 (hereinafter "Trading Interests Act"). See Rosen, *Protection of Trading Interests Act*, 15 INT'L LAW. 213 (1981) [hereinafter cited as Rosen].

¹⁸Rosen at 213. The "clawback" provisions of the statute, for example, would enable a British corporation cast in liability by an American court to recover from its adversary all elements of the damage award other than those for compensatory damages. The "clawback" provision has particular significance in the area of antitrust judgments and treble damage awards.

¹⁹Trading Interests Act § 2(1).

State can overrule compliance with any pretrial discovery device precisely and solely on the ground that it is a "pretrial disclosure" device.²⁰

As is the case with the French legislation, the American litigator seeking disclosure can place before the U.S. court the expansiveness of the British legislation's attempt to preclude compliance with U.S. discovery devices directed against British parties to American litigation. The demonstration of the actual impetus for the blocking statute of a particular nation may have significance in influencing a U.S. judge's decision on whether to compel disclosure. Perhaps because both the French and British statutes are so recent, no reported decision in the United States apparently has yet resolved a motion to compel discovery from a party which has invoked either statute as an excuse for nondisclosure. However, U.S. decisions have addressed blocking statutes of the second general type—most of which have been in existence since the middle of the last decade—and decisions with respect to those earlier, more narrowly drawn statutes may foreshadow the disposition of motions involving the French and British law.

3. *Concealment by Complete Interdiction:* *Canada, Australia and South Africa*

(A) THE CANADIAN REGULATIONS

Enacted on September 21, 1976, the Canadian government's "Uranium Information Security Regulations" are representative of several of the foreign blocking statutes which were targeted on the complete interdiction of disclosure relating to uranium production. Extensive litigation was generated by the Canadian and similar regulations, and the resolution of those disputes forms the framework in which the later, more sweeping and more sophisticated statutes of the French and British type will be litigated.

The Canadian regulations were enacted after a federal grand jury in the United States had commenced an investigation of a cartel which had allegedly been formed among domestic and foreign suppliers and producers of uranium to fix prices, allocate markets and boycott certain customers in the United States. In broad and stark language, the Canadian regulations purported to forbid any person to release documents "related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person in relation to the exporting from Canada or marketing for use outside Canada of uranium or its derivatives"²¹

At the time of the adoption of the prohibitory regulations, the Canadian Minister of Energy, Mines & Resources, Alastair Gillespie, stated frankly that:

²⁰*Id.* § 5(1)(2). Moreover, Britain, in adopting the Hague Convention, also implemented the reservation under Article 23 which excludes from the scope of the treaty letters of request involving pre-trial discovery of documents.

²¹S.O.R./76-644, Canada Gazette Pt. II, Vol. 110, No. 19, Oct. 13, 1976.

The action was taken in the light of the sweeping demand for such information [relating to uranium marketing activities during 1972-75] by U.S. subpoenas, which, while served upon officers of U.S. companies, call for the presentation of information in the possession of subsidiary or affiliate companies "wherever located."²²

Another Canadian official, J.S. Stanford of the Canadian Department of External Affairs, acknowledged that his government sought, by enactment of the legislation, "to accord what protection it can to private firms prosecuted abroad" as a result of participation in uranium production and allocation of activities.²³

(B) THE AUSTRALIAN STATUTE

The Australian government enacted a similar statute in November 1976 which contains, like the Canadian regulation, a sweeping prohibition on disclosure of activities related to uranium production. Explaining the purpose of the Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Australia's Attorney-General advised the House of Representatives:

The immediate need for this Bill has arisen out of certain legal proceedings that are being taken in the United States of America under the antitrust legislation of that country. The operation of the Bill, however, is not confined to matters arising out of those proceedings. The U.S. proceedings relate to arrangements alleged to have been made for the marketing of uranium in 1972.

...

I shall indicate briefly the nature of the proceedings that have been instituted in the United States. First, there is a grand jury inquiry to establish a case for criminal prosecution of the parties alleged to have been involved in the marketing arrangements. Secondly, civil proceedings claiming treble damages—which could be of the order of \$7 billion—have been instituted by Westinghouse Electric Corporation against 29 United States and foreign uranium producers, including four Australian companies. Thirdly, proceedings have been instituted against the Westinghouse Corporation by sixteen United States utilities in respect of the nonsupply of uranium under contracts entered into with Westinghouse, and Westinghouse is resisting those claims on grounds that involve allegations of contraventions of the anti-trust laws by the uranium producers. Finally, and perhaps for present purposes most urgently, letters of request have been issued to the Supreme Court of New South Wales in connection with the last mentioned proceedings. These letters of request seek the taking of evidence from persons in this country and relating to documents located here.

...

In connection with the present dispute concerning uranium, Canada has recently made a regulation indicating that it rejects the jurisdiction being asserted by the U.S. authorities as an unjustified invasion of its sovereignty. This is substantially the purpose of the Bill that I am now presenting.²⁴

²² *Id.*

²³ Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195, 206 (1968).

²⁴ 102H Parliamentary Debates, House of Representatives, Thirtieth Parliament, 1st Sess., 2d Period, 2909-10 (1976).

Under the Act, the Australian Attorney-General issued at least one order which sought to throw a blanket of secrecy over all documents pertaining to conversations, discussions or meetings concerning the uranium industry, all conduct resulting from such communications, and all contracts, agreements or arrangements resulting from such communications.²⁵

(C) THE SOUTH AFRICAN LEGISLATION

In 1978, South Africa, also seeking to expand its secrecy legislation, added a new Section 30A to the Atomic Energy Act, barring disclosure of any information "which is in any manner whatsoever connected with conversations, discussions, meetings or negotiations of any nature whatsoever, which took place between 1 January 1972 and 31 December 1975, between producers of source material or any derivatives or compounds thereof, whether in or outside the Republic, in connection with the production, importation, exportation, refinement, possession, ownership, use or sale thereof"²⁶

The Canadian, Australian and South African statutes have been at issue in U.S. litigation. Each of the statutes represented the respective government's attempt to provide a barrier against the extraterritorial application of U.S. procedural and substantive law. The judicial response in the United States to these and related foreign efforts provides critical guidance to the American litigant confronted with similar claims by an adversary seeking protection under the same laws or the more sophisticated variety recently adopted by France and Britain.

D. The U.S. Judicial Response to the Invocation of Foreign Concealment or Blocking Legislation

If the litigation decision has been reached to mount a frontal attack on an adversary's invocation of any form of foreign blocking or concealment statute, the papers submitted in support of the motion should, at a minimum;

1. demonstrate the relevancy to the litigation of the information sought;
2. set forth the particular statute involved and its legislative history; and
3. describe the relevant judicial precedents which have led to orders of disclosure by other courts confronted with similar claims.²⁷

²⁵Order of the Attorney-General, Austl., Govt. Gazette, No.S.239 (Dec. 24, 1976).

²⁶Atomic Energy Act, § 30A(1)(a).

²⁷Rule 37 of the Federal Rules of Civil Procedure establishes a two-step approach to motions to compel discovery. The first step involves the obtaining of the disclosure order itself. The second step develops in the context in which the nondisclosing party persists in failing to provide discovery and the party which has obtained the order seeks to obtain sanctions. See, e.g., *Halverson v. Campbell Soup Co.*, 374 F.2d 810, 812 (7th Cir. 1967); *United States v. Mensik*, 381 F. Supp. 672, 680 (N.D. Ill. 1974) ("The sanctions set out in Rule 37 come into operation only upon the refusal of a party to obey an order of the court under Rule 37(a)"); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 40 F.R.D. 96, 108 (N.D. Ill. 1966). The unique problems associated with the imposition of sanctions for failure to comply with discovery orders when foreign concealment statutes are involved are discussed later in this article.

1. *The Predominance of American Disclosure Devices in the Contest with Foreign Blocking Statutes*

At issue in *In re Uranium Antitrust Litigation*²⁸ were the statutes of Canada, South Africa and Australia which purported to block all information relating to uranium and uranium production activities in those nations. As described by the court in *In re Uranium Antitrust Litigation*, the foreign blocking statutes at issue "generally prohibit the production of any document relating to uranium marketing activities from 1972 through 1975 and also prohibit communications that would result in the disclosure of the contents of such documents."²⁹ Like the French blocking legislation, the foreign statutes at issue in *In re Uranium Antitrust Litigation* purported to "impose criminal penalties for their violation, including fines and imprisonment."³⁰

In rejecting the claims of exemption from disclosure, the court in the *Uranium Antitrust Litigation* established a frequently cited approach to the disposition of foreign exemption claims by a nondisclosing party:

Once personal jurisdiction over the person and control over the documents by the person are present, a U.S. court has the power to order production of the documents. *The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power.*³¹

In reaching its determination to order production, the court in the *Uranium Antitrust Litigation* rejected defense arguments that American courts "should balance the vital national interests of the United States and the foreign countries to determine which interests predominate."³² As the legislative history of the French blocking legislation demonstrates, the interest which the French sought to advance was to exempt French business from what were perceived as the abuses which routine American pretrial discovery devices entail. Likewise, the blocking legislation at issue in *In re Uranium Antitrust Litigation* sought to conceal documents of foreign firms from disclosure in order to protect interests which the foreign nations involved regarded as important. The court in *In re Uranium Antitrust Litigation*

²⁸480 F. Supp. 1138 (N.D. Ill. 1979).

²⁹480 F. Supp. at 1143.

³⁰*Id.*

³¹480 F. Supp. at 1145. [Emphasis supplied.] The court in *In re Uranium Antitrust Litigation* reiterated the same principle later in the decision: "To summarize the preceding discussion, we have concluded that we possess the power to enter an order against defendants under Rule 37(a) compelling them to produce documents located abroad if the particular defendant is within the personal jurisdiction of this court and has control over the requested documents." 480 F. Supp. at 1148.

³²*Id.* at 1148. Defendants in *In re Uranium Antitrust Litigation* had asserted that the court should assess, under Section 40(a) of the *Restatement (Second) Foreign Relations Law of the United States*, the competing economic and social policies of the United States and the foreign nations involved. *Id.* The court declined to apply the "national interests" tests under Section 40(a) of the *Restatement*. As will be described later in this article, the tests under Section 40(a) of the *Restatement* have received more attention by other courts, but have not significantly varied the results.

explicitly refused to engage in the balancing tests urged by the parties invoking the foreign nondisclosure statutes:³³

Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.

Similarly, the opinion of the U.S. Court of Appeals for the Tenth Circuit in *Arthur Andersen & Co. v. Finesilver*³⁴ emphasizes the tendency of recent decisions to turn aside claims of exemption under foreign blocking legislation, even when the foreign legislation purports to impose criminal sanctions. In *Arthur Andersen*, the district court overruled objections to disclosure based on provisions of foreign law which contained criminal sanctions. The party against which the disclosure order was granted then sought review of the district court's order in the Tenth Circuit. Affirming the lower court's determination, the Tenth Circuit in *Arthur Andersen* said:

An anomalous situation with great potential effect would result from recognition of the right of a litigant to avoid discovery permitted by local law through the assertion of violation of foreign law. *Foreign law may not control local law*. It cannot invalidate an order which local law authorizes. [Emphasis supplied.]³⁵

One of the most recent (and widely publicized) decisions overruling foreign blocking legislation was rendered by Judge Pollack of the U.S. District Court for the Southern District of New York in *Securities and Exchange Commission v. Banca Della Svizzera Italiana*.³⁶ The decision draws on the decisions in *In re Uranium Antitrust Litigation*, *Finesilver* and other cases, and represents still another precedent in the line of cases which has declined to defer to foreign legislation to displace disclosure in accordance with the routine U.S. mechanisms.

In *Banca Della Svizzera*, a civil action brought by the SEC seeking an injunction and an accounting for violations of the insider trading provisions of the federal securities laws, the Commission moved for an order pursuant to Federal Rules of Civil Procedure at 37 compelling disclosure because of the refusal of defendant Banca Della Svizzera to provide the Commission with information relative to the identities of the principals for whom it purchased stock and stock options on American securities exchanges. The

³³*Id.* at 1148.

³⁴546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

³⁵546 F.2d at 341-342.

³⁶92 F.R.D. 111 (S.D.N.Y. 1981).

defendant, whose principal offices were located in Switzerland, had failed to make any disclosure whatsoever on the ground that under Swiss law its engaging in pretrial discovery in the American litigation would subject it "to criminal liability in its home country."³⁷

In reaching his decision to order full disclosure consistent with American procedural rules, Judge Pollack noted that the SEC had engaged in various, less formal efforts to secure disclosure from the foreign defendant. In this connection, Judge Pollack noted that the SEC had endeavored by "one or another procedural means, here and abroad," to obtain the identities of those who were involved in the particular securities purchases at issue in the litigation. According to Judge Pollack, notwithstanding the SEC's efforts to accommodate the demands of the foreign party, "no disclosure was forthcoming."³⁸

The foreign defendant in *Banca Della Svizzera* engaged in a pattern of conduct typical of defendants invoking foreign law; these efforts have included suggestions that disclosure—in forms other than answers to interrogatories and production of documents—will be made available. When confronted with the same proposals, which were advanced by the nondisclosing party in *Banca Della Svizzera* purportedly as a means of accommodation, Judge Pollack ultimately concluded that the suggestions made by the bank as to the appropriate means of pursuing disclosure from it "were doomed to failure."³⁹ Judge Pollack further said:

It appeared to the Court that the proposals would only send the SEC on empty excursions, with little to show for them except more delay, more expense, more frustration, and possibly also, the inexorable operation of time bars against the claims by statutory limits for the assertion thereof. *The proposed alternatives were not viable substitutes for direct discovery.*⁴⁰

Judge Pollack concluded his decision in words which may be applicable to virtually any foreign corporate defendant involved in American litigation which has engaged in substantial business in the United States:

It would be a travesty of justice to permit a foreign company to invade American markets, violate American laws if they were indeed violated, withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law.⁴¹

³⁷*Id.* at 112.

³⁸*Id.* at 113.

³⁹*Id.*

⁴⁰*Id.* [Emphasis supplied.] The decision in *Banca Della Svizzera*, rendered on November 16, 1981, has led to discussions between representatives of the Swiss and U.S. governments designed to prevent further use of Swiss bank secrecy laws to conceal illegal insider trading on U.S. securities markets. *Wall Street Journal*, Feb. 26, 1982, at 44, col. 6.

⁴¹*Id.* at 119. Other disclosure orders in litigation involving foreign blocking statutes have been entered in *United Nuclear Corp. v. General Atomic Co.*, 1980-81 Trade Cas. (CCH) ¶ 63, 639 (D.N.M. 1980); *United States v. Ciba Corp.*, 1972 Trade Cas. ¶ 74, 026 (D.N.J. 1972); *In re Investigation of World Arrangements with Relation to the Prod., Transp., Ref. & Dist. of Petroleum*, 13 F.R.D. 280, 285 (D.D.C. 1952); *In re Grand Jury Proceedings (United States v. Field)*, 532 F.2d 404 (5th Cir. 1976); *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978).

2. *Certain of the Emerging Defenses to Orders of Production*

As the decisions in *In re Uranium Antitrust Litigation* and *Banca Della Svizzera* suggest, a foreign defendant's bare assertion that it might face exposure to criminal sanctions if it were to comply with a traditional U.S. discovery demand will rarely persuade a court.⁴² Since the invocation of the possibility of criminal liability, without more, has proven generally ineffective as a means of sustaining the foreign law claim, certain more sophisticated lines of defense have evolved. One of the initial lines of defense on any motion seeking to compel disclosure will include reliance on certain precedents, rendered primarily in the U.S. Court of Appeals for the Second Circuit, which refused to grant orders compelling disclosure when a claim of foreign illegality was raised. For reasons explained below, reliance on these older precedents, decided between 1958 and 1966, has become increasingly unpersuasive, in part because of the Second Circuit's own abandonment of its earlier position.

Another emerging line of defense will arise with respect to litigation in which the foreign country whose blocking statute is invoked is, like France, also a signatory to the Hague Convention. The other central emerging defense is grounded on Section 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965).

(A) EARLY SECOND CIRCUIT PRECEDENTS: DEFERRAL TO FOREIGN LAW

The judicial reaction to the more recent foreign blocking statutes—such as the Canadian, Australian and South African laws at issue in *In re Uranium Antitrust Litigation*—is considerably more disclosure-oriented than the treatment reflected in a line of earlier cases, decided particularly in the Second Circuit, in which a conflict arose between American discovery rules and foreign nondisclosure statutes.⁴³

In *In re Chase Manhattan Bank*,⁴⁴ the Second Circuit, without extensive discussion of the reasons underlying its decision, refused enforcement of an Internal Revenue Service subpoena for documents held by a New York bank at one of its branches in Panama. The bank had presented an opinion of its Panamanian counsel that production of the documents "would violate Panamanian law," which purportedly prohibited removal of the documents from that nation.⁴⁵

Relying solely on the opinion of Panamanian counsel to the nondisclosing bank, the Second Circuit refused to compel production pursuant to the subpoena, asserting that enforcement would "scarcely reflect the kind of

⁴²See, e.g., *United States v. Vetco, Inc.*, 644 F.2d 1324, 1333 (9th Cir. 1981) ("Possible criminal liability in Switzerland does not preclude enforcement and sanctions.")

⁴³As one commentator has noted, the earlier decisions were "characterized by an almost automatic deference to such nondisclosure laws." Note, *Foreign Nondisclosure and Antitrust Discovery*, 88 YALE L.J. 612, 615 (1979).

⁴⁴297 F.2d 611 (2d Cir. 1962).

⁴⁵297 F.2d at 612.

respect which we should accord to the laws of a friendly foreign sovereign state."⁴⁶

Similar deference to foreign nondisclosure law was displayed by the Second Circuit in *Ings v. Ferguson*.⁴⁷ In *Ings*, a party to an American lawsuit subpoenaed certain nonparty banks to produce documents located in Canada.⁴⁸ The banks resisting disclosure submitted conflicting legal affidavits, prepared by Canadian counsel, as to whether Canadian law prohibited disclosure of the requested documents.

The Second Circuit in *Ings* declined to "interpret" Canadian law to determine which theory was correct.⁴⁹ Instead, the court passed the entire issue of disclosure to the Canadian judicial system, ruling that, "under fundamental principles of international comity, our courts . . . should not take such action as may cause a violation of the laws of a friendly neighbor, or, at the least, an unnecessary circumvention of its procedures. Whether removal of records from Canada is prohibited is a question of Canadian law and is best resolved by Canadian courts."⁵⁰

The Second Circuit ultimately retreated from its deference to foreign nondisclosure laws. In *United States v. First National City Bank*,⁵¹ the Second Circuit affirmed the ruling of a federal district court that a foreign nondisclosure statute did not excuse compliance with a *subpoena duces tecum* issued in connection with a grand jury investigation. The Second Circuit in *First National City Bank* emphasized that the risk of foreign criminal liability did not resolve the issue of disclosure, noting that a "state having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct."⁵²

In rejecting the claims of the nondisclosing party, which had invoked the threat of criminal and civil liability if a disclosure order were entered, the Second Circuit in *First National City Bank* said that the party seeking a shield under foreign law "must confront the choice" of the "need to 'surrender to one sovereign or the other the privileges received therefrom' or, alternatively, a willingness to accept the consequences."⁵³

The earlier line of Second Circuit cases will continue to provide precedent for nondisclosing parties, notwithstanding the fact that, as Judge Pollock has recently noted, the "Second Circuit has clearly moved to a more

⁴⁶*Id.* at 613.

⁴⁷282 F.2d 149 (2d Cir. 1960).

⁴⁸*Id.* at 150.

⁴⁹*Id.* at 151.

⁵⁰*Id.* at 152.

⁵¹396 F.2d 897 (2d Cir. 1968).

⁵²396 F.2d at 901.

⁵³*Id.* at 905; (quoting *First National City Bank of New York v. Internal Revenue Service*, 271 F.2d 616, 620 (2d Cir. 1959) [analyzing and rejecting City Bank's contention that enforcement of a federal court order would require a violation of the law of Panama], *cert. denied*, 361 U.S. 948 (1960)).

flexible position.”⁵⁴ The earlier Second Circuit precedents are routinely cited in support of the nondisclosing party’s position in recent cases, but have not, for the most part, successfully sustained claims of nondisclosure. Indeed, several other circuits have rejected the application of the earlier cases.⁵⁵ In short, the American litigant seeking disclosure is in a position to discredit the conflicting precedents established by the earlier Second Circuit cases, in which, for a period of almost a decade, deference to foreign law was a talisman for nondisclosure.

(B) THE ROLE OF THE HAGUE CONVENTION

Because the French blocking statute, read literally, appears to permit evidence-gathering in accordance with the terms of the Hague Convention, a nondisclosing party served with a traditional discovery request may assert that disclosure is available simply by the use of the Hague Convention. A French party consequently can argue that it is willing to provide information within the framework of the Hague Convention but that it should be relieved of complying with routine U.S. disclosure devices because of possible exposure to French criminal sanctions.

The American litigant seeking disclosure through interrogatories and document production must meet this possible defense by illustrating, as previously described in this article, that the French version of the Hague Convention is clearly and specifically calculated to preclude the use of its mechanisms for the purpose of obtaining pretrial disclosure, as that term is routinely applied in U.S. practice. An explanation to the American court of the relationship between the blocking statute and the Hague Convention might be useful in persuading the court that the nondisclosing party’s strategy of citing the Hague Convention is merely a means of continuing to refuse to provide meaningful disclosure.

A nondisclosing party may also interpose an argument that the Hague Convention, as a treaty of the United States, provides the mandatory mechanism for obtaining evidence from a foreign party. A corollary of this argument—particularly where litigation in state courts is involved—is that the Hague Convention must be used because the treaty represents the supreme law of the land under the Supremacy Clause of Section 2 of Article VI of the U.S. Constitution. Authority for such a position can be found in a decision of an intermediate appellate court in the state of California. *Volkswagenwerk, A.G. v. Superior Court, Alameda County*,⁵⁶ in fact required an American litigant to make prior resort to the procedures under the Hague Convention in seeking disclosure from a West German corporation which had appeared in the state court action. However, the *Volkswagenwerk* court was careful to disclaim that its decision in that case to

⁵⁴ *Banca Della Svizzera, supra*, 92 F.R.D. at 115.

⁵⁵ See, e.g., *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir. 1981); *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833 (1978).

⁵⁶ 163 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1st Dist. 1981).

require resort in initially to the terms of the Hague Convention was a matter of constitutional mandate. As the California court said in *Volkswagenwerk*:

We could perhaps read the Hague Convention, broadly, as a preemptive and exclusive rule of international evidence-gathering, binding upon us as the supreme law of the land under Section 2 of Article VI of the Federal Constitution, but we prefer to believe that the Hague Convention establishes not a fixed rule⁵⁷

In meeting an adversary's argument that initial resort must be made to the procedures of the Hague Convention, an American litigant can also point to the fact that nothing in the terms of the treaty itself explicitly requires the use of letters of request or commissions—the two principal vehicles of evidence-gathering under the treaty—in lieu of answers to interrogatories and production of documents. Significantly, not a single provision of the Hague Convention mandates its use in the context of discovery sought from a party which has appeared in an action pending in the United States, and which may have, in addition, affirmatively invoked the jurisdiction of the American court through the pleading of counterclaims and itself sought disclosure. In addition, Article 27 of the Hague Convention specifies that the treaty is neither mandatory nor exclusive, providing, in pertinent part:

The provisions of the present Convention shall not prevent a contracting state from . . . (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

The treaty thus appears to make plain that it is not intended to displace traditional discovery procedures when disclosure is sought from a party to an American litigation.

Moreover, in withstanding claims of the nondisclosing party that the Hague Convention provides the exclusive mechanism for disclosure from a foreign entity, the American litigant can demonstrate that the legislative history—albeit not extensive—accompanying the adoption of the Hague Convention by the United States tends to negate any inference that the treaty was intended, by either the executive branch of the federal government or the Senate in giving its advice and consent, to provide an exclusive mandatory mechanism for discovery of foreign parties involved in American litigation. Instead, the available legislative history indicates that the treaty is designed to facilitate access to foreign information in cases where such information was ordinarily not available by subpoena or traditional process.⁵⁸

⁵⁷ 176 Cal. Rptr. at 885. The court in *Volkswagenwerk* was careful to limit its decision to the facts of that particular case (*id.*), and to characterize its preference for initial use of the Hague Convention procedures as discretionary. Also of significance is the fact that West Germany has not executed an Article 23 reservation to the Hague Convention—which would have had the effect of eliminating the use of letters of request to obtain pre-trial disclosure—nor has it adopted legislation similar to the French blocking statute.

⁵⁸ The legislative history of the Convention, which appears at 12 I.L.M. 323 (1972), is embodied primarily in a letter of transmittal dated February 1, 1981 from President Nixon to the U.S.

(C) THE ROLE OF SECTION 40 OF THE RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES

A common strategy of a nondisclosing foreign party attempting to justify its position is the invocation of Section 40 of the Restatement Second of Foreign Relations Law of the United States (1965), which provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction in the light of such factors as (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 the territory of the other state, (d) the nationality of the person, and (e) the extent which enforcement by action of either state could reasonably be expected to achieve compliance with the rule prescribed by that state.

The nondisclosing defendant will routinely invoke the provisions of Section 40 of the *Restatement* to argue that disclosure should not be ordered since the foreign party will violate the law of its country. These claims are likely to be accompanied by the foreign party's raising the specter of criminal sanctions. The response of the American litigant seeking full traditional disclosure has been to concede that the foreign governments involved undoubtedly have a strong commercial interest in protecting their domestic corporations from the expense and hazards of defending American litigation.⁵⁹ That interest, however, cannot justify their attempt to conceal the facts as to activity by private corporations from courts of competent jurisdiction in the United States. The means these governments have employed to seek to protect their commercial interests—threatening to punish those who give evidence—run counter to the basic premise of the judicial system in the United States. It is in this context that the "national interest" component of the Section 40 test is most sharply framed.

A substantial amount of the litigation in which disputes over concealment legislation have developed involves the federal antitrust laws. In this

Senate which sought the Senate's advice and consent for the ratification of the treaty. Accompanying the President's letter of transmittal to the Senate was a letter of submittal dated November 9, 1971 to the President from then Secretary of State William P. Rogers. Secretary Rogers, in his letter of submittal to the President, makes it clear that the Convention was not presented to the Senate for its advice and consent as a substitute for traditional pre-trial discovery. According to Secretary Rogers, the Convention was intended to fill the gap in situations where litigants in American actions sought to obtain evidence in foreign countries from persons not subject to the court's jurisdiction, thus necessitating cooperation of a foreign court to compel the giving of evidence. The letter of submittal specifically states that the Convention was intended as a "model" of a system "to bridge differences between the common law and civil law approaches to the taking of evidence abroad." President Nixon, in his letter to the Senate, described the Hague Convention as a "significant step forward in the field of international judicial cooperation" but not an exclusive means of obtaining evidence.

⁵⁹See, e.g., *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979); *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968).

context, American litigants have argued that the case law demonstrates that the United States has a strong national interest in enforcement of its antitrust laws, which "have long been considered among the cornerstones of this nation's economic policies."⁶⁰ Antitrust is clearly "an interest such as national security or general welfare to which a state attaches overriding importance." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, *supra* Section 40, Comment b.

Particularly in the case of antitrust disputes, the American litigant seeking disclosure has tended to assert that it does not appear in the action as a mere private litigant but, instead, as a private attorney general seeking to enforce laws of high public importance. The Supreme Court has repeatedly stressed the belief of Congress "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."⁶¹

For purposes of the Section 40 test, the high water-mark of the primacy of the United States "national interest" in its antitrust laws may have passed, as a result of certain recent decisions involving the extraterritorial application of U.S. antitrust law. In *Timberlane Lumber Co. v. Bank of America*,⁶² and *Mannington Mills v. Congoleum Corp.*,⁶³ the courts began a process which has resulted in the retrenchment of the extraterritorial reach of U.S. antitrust statutes. The decisions, in lessening the emphasis on the central importance of enforcement of U.S. antitrust law by private litigants, have attempted to formulate a "rule of reason" approach to determine when, and under what circumstances, substantive American antitrust law should apply to foreign parties and extraterritorial conduct.

Notwithstanding the recent retrenchment reflected in *Timberlane* and *Mannington Mills*, the American litigant contesting a blocking statute still can rely on the "national interests" factor of the Restatement when antitrust litigation is at issue; that reliance, however, may not carry the burden it has in the past. In addition, the "national interest" component of the Section 40 test has vitality in areas other than antitrust. In *Banca Della Svizzera*, for example, Judge Pollack assessed the interest of the Securities and Exchange Commission in enforcing the federal securities laws, declaring that "the strength of the United States interest in enforcing its securities laws to insure the integrity of its financial markets cannot seriously be doubted."⁶⁴

⁶⁰United States v. First National City Bank, *supra*, 396 F.2d at 903. See also United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972); Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958).

⁶¹Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).

⁶²549 F.2d 597 (9th Cir. 1976).

⁶³595 F.2d 1287 (3d Cir. 1979).

⁶⁴92 F.R.D. at 117. It merits emphasis that certain decisions, such as *In re Uranium Antitrust Litigation*, *supra*, 480 F. Supp. 1138 (N.D. Ill. 1979), have declined to engage in any balancing tests under Section 40 of the Restatement. As the court declared in *In re Uranium Antitrust Litigation*, "the decision whether to exercise that power [to override a foreign nondisclosure statute] is a discretionary one which is informed by three main factors: (1) the importance of the policies underlying the United States statute which forms the basis for the

As far as the "hardship" issue is concerned under Section 40, the litigant seeking enforcement may also note that the countries in question, such as France, have enacted concealment laws in order to protect their nationals, not to punish them. If it becomes apparent that the concealment scheme will not be effective to protect the foreign corporation, those countries may well elect not to punish those whom they have sought to protect.⁶⁵

An even more compelling rebuttal of a defense predicated on Section 40 of the Restatement will apply in a situation where the nondisclosing defendant itself bears responsibility for the enactment of the concealment legislation. Particularly in the case of those companies which invoked the uranium concealment legislation, the American litigant seeking disclosure will probably be able to show that the foreign defendant itself courted the impediment to disclosure.

E. The Issue of Sanctions

The securing of an order compelling disclosure may not mark the end of the struggle. A significant number of cases in which orders of disclosure have been entered have had subsequent histories, engendered by the continued refusal of the foreign party to answer interrogatories or otherwise provide disclosure. While recent U.S. decisions have evidenced a judicial tendency to order disclosure and override claims under foreign blocking statutes, the courts' approach to the imposition of sanctions for continued failure to disclose has been significantly more fragmented. As a result, foreign parties which have lost the initial battle may enjoy a substantial likelihood of successfully continuing to withhold disclosure without suffering the consequence of material sanctions.

U.S. courts have broad discretion with regard to the imposition of sanctions, depending upon the reasons asserted for failure to comply with discovery orders, the plaintiff's need for the requested information, and the express purpose of the broad discovery mandated by the Federal Rules of Civil Procedure—to enable the trier of fact to make an informed, fair and just determination of the issues in the litigation. Indeed, due process may well require the court to fashion appropriate sanctions if a defendant per-

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 non-disclosure laws." 480 F. Supp. at 1148.

⁶⁵The hardship component of the Section 40 test has involved primarily questions of potential criminal and financial exposure of the party resisting disclosure. The reported decisions have tended to minimize such claims of exposure to liability. Moreover, the reported decisions have not addressed arguments, in support of nondisclosure, based on concepts such as foreign government compulsion or common law duress. *See, e.g.,* S.E.C. v. Banca Della Svizzera, *supra*, 92 F.R.D. 111 (S.D.N.Y. 1981); *In re Grand Jury Proceedings*, 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"); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1969); *Inter-American Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

sists in its failure to produce documents that are essential for a plaintiff to prove its case and refute the affirmative defenses.

Under the Federal Rules of Civil Procedure and most analogous provisions of state law, there are a number of sanctions which the court may ultimately consider, including: 1. default judgment; 2. striking affirmative defenses; 3. making specific adverse findings of fact regarding illegal meetings, agreements and concerted action which a plaintiff can show by independent evidence; 4. instructing the jury it can draw inferences from the failure of defendants to produce documents or testify; 5. admitting into evidence documents regarding the illegal acts of defendants that were obtained from other sources; and 6. precluding defendants from offering evidence or explanations with respect to certain issues.

Most decisions require some showing of "willfulness" to support imposing the extreme sanctions of default judgment or dismissal of actions.⁶⁶ The Supreme Court decision in *Societe Internationale v. Rogers*,⁶⁷ establishes the framework in which the issue of sanctions relating to foreign blocking statutes is generally considered.

Societe Internationale involved a claim under the Trading with the Enemy Act for recovery of assets seized by the United States during World War II. When the plaintiff failed to comply with a pretrial order directing production of certain Swiss banking records, the district court dismissed the action. The plaintiff objected that disclosure of the records would violate Swiss law, and indeed Swiss authorities had "confiscated" the records by specifically barring their transmission to third parties. A special master had found that the plaintiff had made good faith efforts to comply with the discovery request and that there was no evidence of collusion between the plaintiff and the Swiss authorities in barring production.⁶⁸

Although upholding the district court's authority to direct production of the documents, the Supreme Court reversed its dismissal of the action for failure to comply with the order. The Court first rejected the plaintiff's contention that it was not in control of the records, noting that the plaintiff had physical control over the records; that production of the records was important to fulfill the congressional policies underlying the Trading with the Enemy Act; and that the plaintiff "is in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order"⁶⁹

In explaining its decision to order disclosure but not to sanction the failure to comply with dismissal (generally regarded as the most extreme sanc-

⁶⁶E.g., *Flaks v. Koegel*, 504 F.2d 702, 709 (2d Cir. 1974); *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858, 860 (5th Cir. 1970); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1211 (8th Cir. 1973); *Sapiro v. Hartford Fire Ins. Co.*, 452 F.2d 215, 216-17 (7th Cir. 1971).

⁶⁷357 U.S. 197 (1958).

⁶⁸357 U.S. at 201.

⁶⁹*Id.* at 205.

tion), the Court emphasized the overriding constitutional due process limitations on the authority of courts to dismiss actions without affording hearings on the merits. The Court suggested that serious constitutional questions would be posed by a dismissal for failure to comply with a court order where that failure was due to the party's inability to comply, despite good faith efforts to do so.⁷⁰

As a result, the Court held that dismissal for failure to comply with a discovery order was not warranted "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the party]." ⁷¹ Stressing a case-by-case approach to the issue of sanctions, the Court said that, even if a foreign party made a specific showing of its good faith in seeking to comply with a discovery order, it should not be permitted to "profit through its inability to tender the records called for."⁷² The case was remanded for further proceedings in the district court's "wide discretion," which could include "drawing inferences unfavorable to defendant as to particular events."⁷³ Significantly, the Court left no doubt that if the facts showed that the defendant had "deliberately courted legal impediments to discovery, then the most severe sanctions would be appropriate."⁷⁴

Most of the subsequent cases have treated foreign blocking statutes as relevant only to a decision whether to impose sanctions for failure to produce evidence, rather than as bearing on the decision whether to order production in the first instance.⁷⁵ In addition, most courts have excused nonproduction only upon a showing of both a direct conflict with a foreign law imposing criminal penalties and a good faith effort to obtain a waiver.⁷⁶

Even absent a showing of bad faith on the part of a foreign defendant, U.S. courts have the power to make evidentiary rulings designed to secure compliance with its discovery orders or to remedy the prejudice arising from nondisclosure of relevant evidence. Besides the "willfulness" of defendants, the significance of the evidence being withheld, the commercial motives underlying the foreign laws, and the need to present an accurate picture to the jury would support the imposition of alternative sanctions. A normal sanction is an order determining unfavorably to defendants those

⁷⁰*Id.* at 209.

⁷¹*Id.* at 212.

⁷²*Id.* at 212.

⁷³*Id.* at 213.

⁷⁴*Id.* at 208-09.

⁷⁵*See, e.g.,* Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976).

⁷⁶*Compare* In re Westinghouse Electric Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977), and FMC v. DeSmedt, 268 F. Supp. 972 (S.D.N.Y. 1967) (nonproduction excused on showing of conflict with foreign law and good faith attempt to obtain waiver) with Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1975), and United Nuclear Corp. v. General Atomic Co., 1980-81 Trade Cas. (CCH) 63, 639 (N.M. 1980) (failure to produce not excused and sanctions imposed).

issues as to which there is a failure of discovery.⁷⁷

F. Conclusion

Foreign concealment and blocking legislation is becoming an increasingly significant aspect of current civil litigation in which nonresident defendants are involved. When devising its litigation strategy, an American party pursuing a claim against a foreign defendant must give consideration to the possibility that the ability to prosecute the litigation may well be hampered—or the costs of litigation significantly increased—by the assertion of foreign concealment legislation.

In the event the litigation decision is reached that disclosure from a foreign party is essential to the effective prosecution of the claim, the American party should give serious consideration to mounting a frontal attack on the foreign blocking statute and the right of the foreign party to invoke it.

As this article has demonstrated, the U.S. litigant should consider including in its motion papers a description of the foreign statute, as well as a description of its legislative history, in order to frame for the court the conflict between U.S. disclosure rules and the antagonism toward those rules evidenced by virtually all foreign blocking statutes. The American court is then in a position to assess the interests to be served by traditional American disclosure devices, on the one hand, and by the application of the foreign blocking statute, on the other hand. Assuming that the American litigant can display the relevance of the information sought, the prevailing tendency of the American courts, at least at the stage of considering whether to issue an order of disclosure, is to override the foreign blocking statute in the interest of providing an American litigant information relevant to the prosecution of its claim.

⁷⁷*Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 19 (E.D. Pa. 1970). Such orders have been entered where the refusal to make discovery was justified. *E.g.*, *Independent Productions Corp. v. Loew's Inc.*, 30 F.R.D. 377 (S.D.N.Y. 1962) (Fifth Amendment privilege); *Oregon-Washington R. & Nav. Co. v. Strauss & Co.*, 38 F. Supp. 229 (D. Ore. 1940) (documents lost "due to some mishap").

