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Resolving Conflicts with Foreign Nondisclosure Laws: An Analysis of the *Vetco* Case

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The conflict between U.S. discovery rules and foreign nondisclosure laws is, and has been, one of the most perplexing issues for U.S. courts.[1] The court must consider, on the one hand, the need for a strong policy in favor of discovery procedures.[2] This need is perhaps greatest in the international setting where witnesses and documents are beyond the easy reach of the adversary who seeks discovery. On the other hand, the court subconsciously, if not consciously, recognizes that it is a denial of due process to impose penalties on a litigant for failing to produce documents which another nation genuinely and legitimately forbids him to disclose.[3]

The seemingly insoluble nature of the dilemma begs for some kind of structured analysis that will guide the court in reaching a fair and equitable resolution of the discovery conflict. The need for a more ordered form of analyzing the conflict with foreign nondisclosure laws is highlighted by

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1. The issue has been the subject of a number of provocative commentaries. *See, e.g.*, Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U. L. REV. 487 (1969); Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 COLUM. L. REV. 1441 (1963); Note, *Ordering Production of Documents From Abroad Contrary to Foreign Law*, 31 U. CHI. L. REV. 791 (1964); Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning Foreign Illegality Excuse for Nonproduction*, 14 VA. J. INT'L L. 747 (1969); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

2. *See, e.g.*, Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); Freeman v. Seligson, 405 F.2d 1326 (D.C. Cir. 1968); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

3. In Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 210 (1958), the Court stated that the striking of a complaint due to plaintiff's legal inability to comply with a production order provoked "substantial constitutional questions." However, where constitutional objections were made as one of the major defenses against enforcement of a grand jury subpoena contrary to foreign law, these objections were rejected. *See* In re Grand Jury Proceedings, 532 F.2d 404 (5th Cir. 1976).

the recent Ninth Circuit decision in *United States v. Vetco, Inc.*[4] There is little doubt that the Ninth Circuit was correct to enforce an Internal Revenue Service subpoena of documents allegedly barred from disclosure by Swiss law. However, by employing the wrong reasoning in reaching the decision, substantial confusion may be created in the future if the same general issue is relitigated, but with different facts.

I. THE SUBPOENA IN *Vetco*

Vetco is a U.S. corporation which manufactures offshore drilling equipment. Vetco International, A.G. (VIAG) is a wholly owned Swiss subsidiary of Vetco which sold Vetco's product. If the product were shipped to and sold directly to VIAG by Vetco, then Vetco would suffer substantial additional tax liability due to the creation of Subpart F income.[5] To avoid this result, Vetco shipped the product to two other Swiss companies: Wiedex, A.G. and Zanora, A.G.[6]

The Internal Revenue Service (IRS) argued that the interposition of these two intermediary companies was but a subterfuge for avoiding the taxing rules of Subpart F of the Internal Revenue Code, and that the two companies should be ignored for serving no business purpose. In order to prove its contention, the IRS subpoenaed certain business records of Vetco located in Switzerland, and it also subpoenaed certain records of the Swiss office of Deloitte, Haskins, & Sells (DH&S), one of Vetco's accountants. Vetco refused to comply with the subpoena and ordered DH&S to refuse to comply as well.[7]

The basis for Vetco's refusal to comply with the subpoena was Swiss nondisclosure law. Vetco alleged that to reveal the documents in question would be a violation of article 273 of the Swiss Penal code.[8] That provision, as it was quoted in *Vetco*, provided in part:

> Whoever makes available a manufacturing or business secret to a foreign governmental agency or a foreign organization or private enterprise or to an agent of any of them; shall be subject to imprison-

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4. 644 F.2d 1324 (9th Cir. 1981).

5. I.R.C. § 954(b)(3)(A) & (d)(1)(1954 & Supp. 1981). Subpart F income is certain income of a foreign corporation controlled by certain U.S. persons which is imputed back to the U.S. shareholder regardless of whether the foreign corporation has made any distributions to the U.S. shareholder. How and to what extent these rules apply is perhaps one of the most complex portions of the Internal Revenue Code. A number of articles, books and treatises analyze these provisions. An appropriate source for aid in understanding these rules is R. RHOADES & M. LANGER, INCOME TAXATION OF FOREIGN RELATED TRANSACTIONS (1981). The general purpose of the Subpart F rules is to minimize the use of foreign corporations in low-tax jurisdictions for the principal purpose of tax avoidance.

6. Income earned from the sale of products purchased from these independent Swiss companies would not be Subpart F income and would therefore create no immediate adverse tax consequences to Vetco.

7. 644 F.2d at 1327.

8. *Id.* at 1329; Schweizerisches Strafgesetzbuch (STGB); Code pénal suisse (C.P.); Codice penale svizzero (COD. PÉN.), art. 273.

> ment and in grave cases to imprisonment in a penitentiary. The imprisonment may be combined with a fine.[9]

Swiss law defined the term "business secret" to include "all facts of Swiss life to the extent that there are interests worthy of protection in keeping them confidential."[10]

The crux of the Ninth Circuit's decision to enforce the subpoena despite Swiss law is based upon a reliance on the balancing test. Like a number of courts before it, *Vetco* applied the rules of sections 39 and 40 of the *Restatement (Second) of the Law of Foreign Relations*. Section 39(1) of the *Restatement* provides that "A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct."[11]

The U.S. courts have the international jurisdiction to enforce discovery procedures in matters over which the court has subject matter jurisdiction where the person against whom discovery is sought is under the personal jurisdiction of the court, and that person has control over the documents or data which are being sought by the court.[12] On the other hand, a foreign government has enforcement jurisdiction to bar release of documents or data located within the territorial jurisdiction of that government.[13] When the IRS sought documents from Vetco which allegedly could not be released under Swiss law, the conflict in enforcement jurisdiction described in section 39 of the *Restatement* becomes applicable.

Section 39(2) of the *Restatement* directs inquiry to section 40 of the *Restatement* for factors to consider in minimizing the conflict in enforcement jurisdiction. Section 40 sets forth a general rule of international comity and then amplifies that with five factors to evaluate:

> 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,

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9. 644 F.2d at 1329.

10. *Id. See also* Swiss Federal Attorney v. A., 98 BG IV 209 (Sept. 7, 1972).

11. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 39 (1965).

12. United States v. First Nat'l City Bank, 396 F.2d 897, 901 (2d Cir. 1968); In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1145 (N.D. Ill. 1979); In re Grand Jury Subpoena Duces Tecum, 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947). *See also* SEC v. Minasde Artemisa, S.A., 150 F.2d 215 (9th Cir. 1945).

13. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965); The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[14]

The *Vetco* court did a most admirable job in attempting to fit the facts of the *Vetco* case into the framework of the factors of the *Restatement*. With respect to national interests, the court noted the strong U.S. interest in collecting taxes; the court also noted the interest of the Swiss Government in preserving the secrecy of business documents.[15] The court found, however, that the interest of U.S. law was superior. First, the court noted that the persons from whom documents were sought are subsidiaries of U.S. companies, not Swiss parent companies. Second, the court noted that the penalties of the law are not imposed where the information concerned involves only private interests, and the party whose business secret is being divulged consents to the disclosure. Presumably, Vetco could have consented to the disclosure or could have otherwise obtained the necessary consents. The court also noted that the IRS is under a duty to keep information confidential and therefore no real "disclosure" is occurring.[16] With respect to hardship, the court expressed serious doubts whether Vetco would suffer any penalties under Swiss law for disclosing the information in question.[17] The court concluded as well that interests of nationality and location did not weigh in favor of the Swiss law.[18] Also to be considered was the importance of the documents to the IRS investigation.[19]

Finally, the court considered the availability of alternate means of compliance. A tax treaty was then, and is now, in force between the United States and Switzerland.[20] This treaty provides for mechanisms whereby the two Governments can exchange information relevant to tax investigations. The treaty would seem to provide a reasonably efficient means for the IRS to obtain its information without having to resort to enforcing a subpoena in alleged violation of Swiss law.

However, the court noted that in the Swiss-U.S. treaty, Switzerland reserved the right not to disclose business secrets.[21] The court also stated that the Swiss were notoriously reluctant to assist U.S. authorities in the

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

15. 644 F.2d at 1331.

16. *Id.*

17. *Id.* at 1331-32.

18. *Id.* at 1332.

19. *Id.*

20. Convention for the Avoidance of Double Taxation with Respect to Income, Sept. 27, 1951, United States-Switzerland, 2 U.S.T. 1751; T.I.A.S. No. 2316, art. XVI [hereinafter cited as Income Tax Convention].

21. 644 F.2d at 1333.

investigation of tax fraud cases.[22] Therefore, the court ruled that the treaty provided an inadequate alternative means for obtaining the documents.[23] Other alternative means of discovery were likewise rejected as impractical.[24] By applying the factors of *Restatement* section 40, the court concluded that it was appropriate for the court to impose sanctions on Vetco for failing to comply with the IRS subpoena. Having balanced the relevant factors in view of the interests of comity, the U.S. interest in enforcing the subpoena proved superior.[25]

Unfortunately, the Ninth Circuit reached the correct result but for the wrong reason. There was no need to employ a balancing test as there was never any showing by Vetco that a conflict with Swiss law existed. Moreover, where there is a genuine conflict between U.S. discovery procedures and foreign nondisclosure laws, the so-called balancing test of *Restatement* section 40 is, in most instances, ill-equipped to resolve the conflict. Additionally, by analyzing the case as if a conflict of law existed, the Ninth Circuit made the strong implication that the provisions of existing treaties are not the exclusive means for obtaining discovery. The Ninth Circuit implied that the IRS can go beyond treaty procedures even when to do so would require the person subject to discovery to violate the law of the foreign state which signed the treaty. Under the balancing test, a treaty must be considered whenever a genuine conflict of law takes place.

II. THE RULES OF *Société*

Before any kind of balancing need take place, a determination must first be made whether a genuine conflict of law exists. The rules developed by the United States Supreme Court in *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*[26] are designed to force the party subject to discovery to determine if a genuine

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22. *Id.* The complaint of the *Vetco* court concerning the lack of Swiss cooperation in tax investigations is perhaps exaggerated. The court cites X & Y Bank v. Swiss Fed. Tax Admin., 76-1 U.S.T.C. 9452 (Swiss Fed. Sup. Ct., May 16, 1975). In that case the IRS had requested information concerning the dealings of a certain American citizen with a Swiss bank. The Swiss Federal Tax Administration conducted an investigation and summarized its results in an official report that was transmitted to the IRS. The IRS, however, considered the official report to be inadequate as evidence in U.S. courts and requested certified originals of the documents in question. The Swiss Supreme Court ruled that the IRS request should be rejected. The obligations of the Swiss Government under the treaty were to supply information, not to provide legal assistance in the prosecution of foreign tax fraud cases.

Perhaps the Swiss Supreme Court's decision evidences a reluctance to prosecute foreign tax fraud cases. However, the court only ruled that original documents would not be provided. The information desired by the IRS had been provided pursuant to the terms of the treaty. *See* X v. The Fed. Tax Admin., 711 U.S.T.C. 9435 (Swiss Fed. Sup. Ct., Dec. 23, 1970).

23. 644 F.2d at 1333.

24. *Id.* at 1332-33.

25. *Id.* at 1333.

26. 357 U.S. 197 (1958).

conflict with foreign law exists.[27] If the burdened party makes a good faith effort to comply with the discovery order, and yet is still barred by foreign law, the approach of the courts seems to have been to engage in a balancing of necessity. However, it is the rare case which reveals a genuine conflict with foreign law. In most instances the conflict, if any, is superficial, and can be resolved if the party subject to discovery makes reasonable efforts to obtain permission to disclose the documents in question.

The situation posed in *Société* presents the dilemma of what to do where foreign nondisclosure law is in direct conflict with a U.S. discovery order. The plaintiff in *Société* brought suit to recover assets confiscated by the U.S. Government pursuant to the Trading with the Enemy Act[28] that was imposed during World War II. The issue was whether a Swiss holding company, Chemie, was so intimately connected with German interests that the U.S. Government had the right to confiscate assets owned by it in the United States.[29]

The United States sought discovery in Switzerland of certain banking records that the United States thought would prove the German affiliation of Chemie. Chemie sought to comply, but many of the records were "confiscated" by Swiss authorities. The Swiss Government ordered that these documents could not be delivered to the U.S. courts. Because of the plaintiff's consequent inability to comply with the court's discovery order, the district court ordered that plaintiff's complaint be dismissed.[30]

The Supreme Court reversed the district court and the court of appeals which had affirmed.[31] Where Chemie was legally unable to comply with the production order, dismissal of its suit was inappropriate. If sanctions were to be imposed, lesser sanctions had to be chosen.[32] In so concluding, *Société* developed a two-part rule. The first rule is that the mere existence of foreign nondisclosure laws does not preclude the issuance of a discovery order by the court.[33] It might seem that this rule provides the

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27. *See, e.g.*, In re Investigation of World Arrangements, 13 F.R.D. 280, 286 (D.D.C. 1952).

28. 357 U.S. 198 (1958); Trading with the Enemy Act, 40 U.S.C. § 5(b) (1941), *amended by* 50 U.S.C. App. § 5(b) (Supp. 1981).

29. Société Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery, 111 F. Supp. 435 (D.D.C. 1953).

30. *Id.* at 437-38.

31. Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Brownell, 225 F.2d 532 (D.C. Cir. 1955).

32. 357 U.S. at 212-13.

33. *Id.* at 204-05; 644 F.2d at 1329-30. "*Société* implies that consideration of foreign law problems in a discovery context is required in dealing with sanctions to be imposed for disobedience and not in deciding whether the discovery order should issue." Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 341 (10th Cir. 1976).

> 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.

district courts with a carte blanche to ignore the consequences of foreign law in issuing discovery orders. However, such is not the case. It should always be remembered that the court in *Société* ruled in favor of the burdened party subject to the foreign nondisclosure law. The result in *Société* limits the powers of the court regarding discovery in conflict with foreign nondisclosure laws. The purpose of the rule stating that no foreign nondisclosure law will preclude the issuance of a discovery order is to shift the burden of proof. By permitting the discovery order to issue, a duty has been placed on the burdened party to determine if a genuine conflict of law exists.[34]

The second rule of *Société* is that if a burdened party makes a good faith effort to comply with the order and to eliminate or minimize conflict with foreign law, yet the foreign government still forbids compliance with the discovery order, then the burdened party will not be unduly penalized for his noncompliance.[35]

It might, perhaps, be instructive to compare the efforts at compliance made by Chemie, the burdened party, in *Société* with the efforts at compliance made by Vetco. In *Société*, Swiss authorities seized the documents in question and barred their production, although physical possession of the documents remained with Chemie. In order to ascertain whether or not Chemie made a good faith effort to comply with the production order, the court appointed a Special Master. That Special Master made the following findings: (1) Chemie had indeed made a good faith

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In re Uranium Antitrust Litig., 480 F. Supp. 1133, 1145 (N.D. Ill. 1979). *See also* In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 997 (10th Cir. 1977).

34. In Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), the appellate court ruled that the lower court could properly issue an order of discovery despite contrary foreign law. The court also noted that, if a violation of Swiss public policy is claimed, it is up to the burdened party to bring forward evidence that the Swiss Government objects to these specific disclosures. *Id.* at 342. Ultimately the court of appeals determined that the alleged conflict with Swiss law was more imaginary than real. Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978).

Earlier cases which suggested that discovery orders could not issue contrary to foreign law are no longer followed in this regard. *Compare* United States v. Vetco, 644 F.2d 1324 (9th Cir. 1981) (courts must balance competing interests in determining whether foreign illegality ought to preclude enforcement of an IRS summons.); In re Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979) (once personal jurisdiction over the person and control over the documents by the person are present, a U.S. court has power to order production of the documents.); *and* Arthur Andersen & Co. v. Finesilver, 546 F.2d 388 (10th Cir. 1976) (the court could properly issue an order of discovery despite contrary foreign law when alleged conflict is more imaginary than real.) *with* Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1961) (where compliance with subpoena duces tecum is shown to violate foreign law, the court could modify the subpoena, leaving it outstanding to insure that the bank would continue to cooperate with the government, if the government asked the foreign government to authorize production of the document.) *and* Ings v. Ferguson, 282 F.2d 149, 153 (2d Cir. 1960) (process of courts of any sovereign state cannot cross international boundary lines and be enforced in a foreign country.).

35. 357 U.S. at 210-13; In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992 (10th Cir. 1977).

effort at compliance; (2) there was no evidence of collusion between Chemie and the Swiss Government; (3) Chemie's officers did their best to obtain Swiss approval for releasing the documents; (4) there was a substantial legal basis under Swiss law for the seizure of the documents by the Swiss Government; and (5) obtaining waivers would not have procured the release of the documents. The report of the Master was accepted by the district court.[36]

In ruling that sanctions would not be imposed for failing to comply with the discovery order, the Supreme Court relied heavily on the Special Master's findings.[37] The Court also noted Chemie's successful efforts to obtain the release of some documents, and its unsuccessful efforts to obtain waivers permitting release of other documents.[38] Chemie also obtained Swiss approval of a plan whereby, through the use of a neutral expert, certain relevant documents would be identified and released to the Court.[39] Because of the extensive efforts made at compliance, the dismissal of plaintiff's action for failure to comply with the discovery order was an improper exercise of the court's powers under Rule 37.[40] Although the Court left open the door for the imposition of less stringent sanctions, the strong implication of the Court's decision is that no sanctions should be imposed, aside from drawing inferences unfavorable to plaintiffs.[41]

In *Vetco* the Swiss Government made no effort to seize the documents as it did in *Société*.[42] There was no indication that Vetco sought a waiver from the Swiss Government for the production of the documents.[43] There were, moreover, substantial indications that to release the documents would not be a violation of Swiss law.[44] Finally, the alleged limitation of Swiss law was entirely avoidable by Vetco.[45] The Internal Revenue Code required Vetco to maintain, in the United States, records regarding its controlled foreign corporations.[46] Had Vetco done so, there would have been little or no need to obtain records from Switzerland. Vetco gave every indication that it actively sought to use Swiss law as a shield against IRS inquiry. Although there is no published court record to ex-

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36. 111 F. Supp. at 439-40.
37. 357 U.S. at 201.
38. *Id.* at 202.
39. *Id.* at 203.
40. *Id.* at 212.
41. *Id.* at 213.
42. "In *Société* the Swiss Government enjoined the plaintiff from complying with the summons. There has been no comparable action taken by the Swiss government in this case, even though the letters and affidavits filed reveal that the Swiss are not unaware of these proceedings." 644 F.2d at 1330.
43. "We have no finding that appellants have made good faith efforts to comply with the summonses." 644 F.2d at 1330. "By contrast, the district court stated at a hearing on April 1, 1980 that the appellants were conducting 'one of the greatest delaying actions of my recent memory.' " 644 F.2d at 1330 n.6.
44. 644 F.2d at 1330 n.7, 1332, and accompanying text.
45. I.R.C. § 964(c) (1954); Treas. Reg. § 1.9643 (1978).
46. 644 F.2d at 1332.

amine, the facts at hand indicate that Vetco did not make a good faith effort to comply with the discovery order, and since it was entirely unclear whether a true violation of Swiss nondisclosure law was at issue, it was entirely proper to impose sanctions on Vetco for its noncompliance with the discovery order.[47]

In such circumstances it was inappropriate for the Ninth Circuit to apply a balancing test as if a conflict of law existed. If, because of the district court's failure to make findings of fact and conclusions of law, the circuit court did not feel competent to conclude that no violation of Swiss law was at issue,[48] the proper course for the court would have been to remand to the district court for such findings. The *Vetco* decision illustrates an overreliance on the balancing test by the courts, the effect of which is to create unnecessary confusion regarding the state of the law.

III. THE LIMITATION OF THE BALANCING TEST

The balancing test of *Restatement* section 40 has a useful, but limited, role in resolving the discovery versus nondisclosure conflict. The first rule is that a production order should issue whenever the information sought is relevant to the suit. The effect of the production order is to force the burdened party to make a good faith effort at compliance. This production will reveal where genuine conflicts of law exist. Only after a burdened party's good faith efforts have failed to produce the requested documents is it appropriate to apply the balancing test. The balancing test is used to determine if equivalent policy interests are at stake. If the public policy of one government is not counterbalanced by a competing public policy of the other government, section 40 can resolve the conflict.

If, however, the public policy of one government dictates disclosure, and the public policy of the other government dictates nondisclosure, the balancing test is incapable of providing a solution since equivalent interests are at stake. In such a case the court assesses the importance of the information. If the information is necessary to the prosecution of the case, the court applies the law of the forum and imposes severe sanctions for noncompliance with the discovery order. If, however, the information sought is not of critical importance, then the court is obliged to moderate its sanctions accordingly.

The limits of the balancing test are aptly illustrated in the Illinois district court decision in *In re Uranium Antitrust Litigation*.[49] The court in *Uranium* considered only the preliminary question of whether a discovery order could issue against certain defendants for documents which were barred from production by foreign nondisclosure laws. The case had not yet reached the stage where the court had to decide what sanction to

47. Ohio v. Finesilver, 570 F.2d 1370 (10th Cir. 1978).

48. The Ninth Circuit felt constrained to characterize the validity of the contempt sanctions as a question of law rather than as a question of fact. 644 F.2d at 1327-28.

49. 480 F. Supp. 1138 (N.D. Ill. 1979).

impose, if any, in the event of noncompliance.

Following the rule in *Société*, there would be little doubt that the discovery order would issue, and indeed the *Uranium* court so ruled. However, unlike the situation in *Société*, the court was not faced with a discovery order in conflict with a nation's general policy of secrecy, but rather the court faced nondisclosure laws that were drafted for the specific purpose of thwarting the litigation in question. Westinghouse, obligated to supply uranium at fixed prices to certain customers, had sued a number of uranium producers, arguing that an international cartel had been formed to fix the price of uranium. In order to protect their valuable uranium natural resource, a number of countries passed laws forbidding the disclosure of documents related to the industry. The principal impact of such laws was to severely restrict the ability of plaintiffs, such as Westinghouse, to obtain the data necessary to prove their cases.[50] Unlike *Société*, the conflict with foreign law did not have to be sharpened by requiring the burdened party to attempt good faith compliance. In *Uranium* the conflict was obvious. The defendants who sought to avoid discovery orders argued that no such orders could issue as it would require action contrary to foreign law. The defendants argued that, under the rules of comity expressed in section 40 of the *Restatement*, deference had to be given to the foreign nondisclosure rules.[51]

The *Uranium* court refused to balance the relative interests of the United States and the foreign governments. In fact, the *Uranium* court concluded that the balancing test was impossible to apply as "the competing interests . . . display an irreconcilable conflict on precisely the same plane of national policy."[52] On the one hand, Westinghouse sought to enforce long established U.S. antitrust policy by requesting the documents at issue. On the other hand, certain foreign governments consciously sought to negate such legislation by prohibiting the disclosure of those very same documents. The court concluded that "it is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions."[53]

Uranium sets forth the principle that once a genuine conflict with foreign law has been identified, use of the balancing test is often impractical. Who is to say which nation's law has a superior interest over another nation's law? It is an accepted principle of international law that the sovereign rights of nations vis-a-vis each other are equal.[54] No nation has more rights under international law than another. If one nation exercises its right to make public policy and directs that documents be dis-

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50. *Id.* at 1148. *See* Judge Doyle's dissent in Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 1000 (10th Cir. 1977).

51. 480 F. Supp. at 1148.

52. *Id.*

53. *Id.*

54. Sovereigns of nations are equal and their independence is absolute. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812).

closed, while another nation exercises its public policy and directs that the same documents be kept hidden, and each nation has jurisdiction to enforce its order, how can any true balancing take place?

IV. THE "BALANCING" OF NECESSITY

Although it appears on the surface that the balancing test is widely employed, in actual practice what occurs is an evaluation of necessity. If the discovery sought is necessary to enforce a public law of the United States, and the party burdened is properly before the court, then discovery is enforced. The court in essence applies the law of the forum whenever the relative interests of the two sovereigns are in balance and the documents are truly needed.[55] If, however, it is determined that the prosecution of the U.S. action can reasonably proceed without the requested documents, then sanctions for failure to comply with the discovery order are moderated, if not eliminated altogether. The necessity of the information will dictate the sanctions to be imposed.

Société is once again an instructive example for analysis. The Supreme Court made particular mention that the plaintiff in *Société* would not profit by reason of his failure to comply with discovery. In that suit the burden of proof was upon the plaintiff to establish the true ownership of the stock at issue. The plaintiff's inability to produce certain ownership records would only tend to cast doubt upon the true ownership of the stock and jeopardize his case. Indeed, the Court noted that it was perhaps appropriate to make inferences unfavorable to the plaintiff because of its failure to procure the documents.[56] However, any sanction to be imposed had to be moderated to fit the information at issue. The unavailable documents were not essential to the prosecution of the case, and therefore it was improper to dismisss the plaintiff's action because of his legal inability to comply with the U.S. court's discovery order. In remand-

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55. Procedures of the law of the forum customarily govern law suits. Neutrals as well as citizens of the United States must meet the requirements of these procedures. 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 power and orderly administration of justice in a court of the United States. Even if a foreign government were itself a party, it must conform to the law of the forum and make discovery upon order of the court.

Société Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery, 111 F. Supp. 435, 444 (D.D.C. 1953).

In Ghana Supply Comm'n v. New England Power Co., 83 F.R.D. 586, 589 n.3 (D. Mass. 1979), the court applied the discovery rules of the forum to require a plaintiff of Ghana, an agency of the Ghanaian Government, to produce documents and testimony contrary to Ghanaian law. The information sought by the defendant was essential to its defense. The court applied the law of the forum and required that Ghana comply with discovery. In so doing the court noted that, as plaintiff, the Government of Ghana had a choice: either make an exception from its own nondisclosure law, or withdraw its suit. *See generally* Gillies v. Aeronaves de Mexico, S.A., 468 F.2d 281 (5th Cir. 1972); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 614-15 (1979).

56. 357 U.S. at 213.

ing, the Supreme Court granted the district court wide discretion in resolving the case, taking into consideration genuine conflicts with Swiss nondisclosure law.[57]

In reaching its decision in *Société*, the Supreme Court did not engage in a balancing test of relative interests, nor did the Court suggest that a balancing test should take place. It did, however, mention that different facts and circumstances may require the balancing test to be employed.[58]

The Fifth Circuit's decision in *In re Grand Jury Proceedings* [59] illustrates the fact that the balancing test can at times be but a mask for the application of the rule of necessity. Anthony R. Field was the managing director of Castle Bank and Trust Company in the Cayman Islands. While in the lobby of the Miami International Airport he was subpoenaed to appear before a federal grand jury investigating criminal violations of U.S. tax law.

Field objected to testifying, based in part on his argument that any testimony he would give would violate the bank secrecy laws of the Cayman Islands.[60] Field submitted an affidavit by an expert on Cayman Islands law which stated that Field would be subject to criminal prosecution in the Cayman Islands, with penalties including imprisonment, if he testified before the grand jury. The Government did not dispute this claim. Therefore, for the purpose of the evidence presented to the court, a clear conflict between U.S. and Cayman Islands law was presented.[61]

After rejecting Field's contention that his testimony was protected by his Fifth Amendment rights,[62] the court addressed the conflict of law question. The Fifth Circuit duly applied the "balancing" test required by the *Restatement*. The court examined first and foremost the relative interests of the countries involved. On the one hand, the United States had an interest in enforcing its tax laws, while on the other hand, the Cayman Islands had an interest in protecting the privacy of its citizens.

In balancing these interests the court found that the U.S. interest in enforcing its tax law was superior. The court noted that, under the law of the Cayman Islands,[63] the information which Field could not reveal to foreign authorities could be obtained by certain officials of the Cayman Islands Government. Since the information could have been revealed, it was not really "secret." The court reasoned: "Since the general rule appears to be that for domestic investigations such information would be obtainable, we find it difficult to understand how the bank's customers'

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57. *Id.*

58. *Id.* at 205-06.

59. 532 F.2d 404 (5th Cir. 1976).

60. *Id.* at 460.

61. The circuit court quoted a statement by the district court predicting that Mr. Field would be exposed to criminal charges in the Cayman Islands by reason of his testimony before the U.S. grand jury. 532 F.2d at 406.

62. 532 F.2d at 406-07.

63. *Id.* at 409.

rights of privacy would be significantly infringed simply because the investigating body is a foreign tribunal."[64]

In this fashion the Fifth Circuit conveniently contorted the facts so that it could apply the balancing test and have the U.S. interest emerge as superior. When the government's interest in pursuing criminal violations of the tax laws is weighed against bank customers' interests in having information revealed only to Cayman Islands authorities and not to the federal grand jury, it would certainly seem that section 40 of the *Restatement* would require the court to enforce the grand jury subpoena.

However, the purpose of the Cayman Islands law is not merely to provide bank secrecy. The Cayman Islands is a widely publicized and notorious tax haven.[65] Only the most naive observer would believe that the purpose of the secrecy law was anything other than an effort by the Cayman Islands Government to limit the ability of foreign governments to impose taxes on assets located in the Cayman Islands. On the one hand, the United States has established a public policy of taxing its citizens and residents on their worldwide income.[66] The Cayman Islands has a policy that assets located in its country should not be taxed by foreign governments. To enforce its policy, the Cayman Islands has established laws which effectively prohibit Cayman Islands banks from assisting foreign taxing authorities.[67]

The situation in *Grand Jury Proceedings* is directly analogous to the situation in *Uranium* where U.S. policy requires discovery, and, as a policy decision, the foreign government determines that such discovery should not take place. In such cirumstances, "totally contradictory and mutually negating"[68] commandments are involved. As each government has exercised its sovereign jurisdiction to effect contradictory results, there is no room for balancing. Rather, the question is: Does the U.S. court need the information so badly that it is willing to exercise its power over the person burdened with the discovery order and enforce discovery in repudiation of valid foreign law to the contrary? The fact is that the

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64. *Id.*

65. *See generally* 1 W. DIAMOND & D. DIAMOND, TAX HAVENS OF THE WORLD (updated continuously). Sanctions should be limited to fit the needs of the court. Principles of comity require that the foreign law be recognized except in those instances where it is necessary to employ the contrary law of the forum in order to uphold the interests of the forum. Comity principles can be ignored, but only in cases of necessity.

> Although more than mere courtesy and accomodation, comity does not achieve the force of an imperative or an obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.

Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

66. *Id.*

67. *Id.*

68. *Id.*

subpoena was enforced as a matter of necessity. Without the testimony of an official such as Field, it would have been virtually impossible for the grand jury to obtain certain information regarding transactions in the Cayman Islands. Without that information it would have been extremely difficult for the grand jury to make informed conclusions.[69]

The importance of the necessity of the information to the U.S. proceeding is further highlighted by another of the uranium litigation cases. In *In re Westinghouse Electric Corporation Uranium Contracts Litigation*,[70] the Tenth Circuit faced, at the sanctions stage, the same conflict of law addressed by the Illinois district court in *Uranium* at the stage where it issued its discovery order. As directed by the rule of *Société*, the Tenth Circuit properly assessed the good faith efforts of the burdened party to comply with discovery orders. The court noted a decision of the Supreme Court of Ontario which forbade the disclosure of the business records of the Rio Algom Corporation.[71] The Rio Algom Corporation was incorporated in Delaware, and operated a uranium mine and maintained its corporate offices in Canada. The court mentioned the efforts of Rio Algom to obtain the permission of the Canadian Government for the release of the documents requested. The court also cited Rio Algom's diligent efforts to produce documents and materials that were not subject to the restriction of Canadian nondisclosure laws.[72] The Tenth Circuit concluded that Rio Algom had made a good faith effort at compliance with the discovery order under the general principles set forth in *Société*.[73]

Having therefore determined that a genuine conflict of law existed, the court proceeded to apply the "balancing" test. To reach the conclusion it desired, the court downplayed the U.S. interest involved. Whereas the *Uranium* court described U.S. antitrust policies as of primary importance,[74] the Tenth Circuit chose to describe the case as an ordinary suit by a private litigant.[75] When the interest of the private litigant was balanced against an official opinion of the Supreme Court of Ontario which barred discovery, the interest favoring nondisclosure prevailed.[76]

Uranium indicates however, that a balancing test does not work well

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69. "To defer to the law of the Cayman Islands and refuse to require Mr. Field to testify would significantly restrict the essential means that the grand jury has of evaluating whether to bring an indictment." 532 F.2d at 408.

70. 563 F.2d 992 (10th Cir. 1977).

71. *Id* at 995. *See* Re: Westinghouse Electric Corp. and Duquesne Light Co., 16 Ont. 2d 273 (1977).

72. 563 F.2d at 996.

73. *Id.*

74. 480 F.2d at 1148. Indicative of the importance of the antitrust laws to U.S. public policy is the eagerness with which they are applied extraterritorially. *See, e.g.*, THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 10.04 (V. Nanda ed. 1981).

75. Rather than describing the interest as the enforcement of the U.S. antitrust law, the court described the interest at stake as the private litigant's desire for adequate discovery. 563 F.2d at 999.

76. *Id.*

when the public policies of two nations are in direct conflict. Judge Doyle in his dissent in *Westinghouse* applied the balancing test to virtually the same facts and concluded that Rio Algom should not be relieved of the penalties imposed by the district court for noncompliance with the discovery order.[77] By weighing the importance of one interest against another, a court can reasonably reach almost any conclusion it desires. As any interest ultimately can be cloaked with national policy, the court is free to make any interest emerge victorious merely by the description it puts on the interests involved.

Nonetheless, the majority in *Westinghouse* probably reached the correct result—but not by applying the balancing test of *Restatement* section 40. *Westinghouse* did not rule that Canadian interests in nondisclosure took precedence over U.S. antitrust laws.[78] Rather, *Westinghouse* weighed the need for the information against the prohibitive foreign law and concluded that the information sought was really not that important. In its brief analysis of the factors to be balanced, the court made the following important comment:

> We do note that Westinghouse's defense in the . . . litigation does not stand or fall on the present discovery order. Westinghouse has deposed the officers of various other uranium companies, and the present discovery, though admittedly of potential significance, is still in a sense cumulative. We are not here concerned with any grand jury investigation, or the enforcement, as such, of the antitrust laws.[79]

Westinghouse's suit was to prove a restraint of trade in regard to uranium production and sales. Westinghouse was not trying to prove, necessarily, that Rio Algom committed a criminal violation of the antitrust law. As Westinghouse was successful in obtaining information from a number of other sources regarding the alleged uranium cartel, the court determined that the information sought from Rio Algom was not really essential to Westinghouse's case. Because the information was "cumulative," the court chose to defer to the Canadian nondisclosure law.[80]

Future litigants seeking information barred from disclosure by foreign law should take heed of the result in *Westinghouse*. Westinghouse lost its claim for discovery not so much because the foreign interest proved superior to its own, but because it failed to convince the court that the information sought was essential to the prosecution of its action. If Westinghouse had successfully convinced the court that the information sought was critical in proving its allegations regarding the cartel, per-

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77. *Id.* at 1003. (Doyle, J., dissenting).

78. So long as there is a violation of the antitrust laws it should be irrelevant if the law is sought to be enforced by a private litigant or by the Department of Justice. In fact the antitrust law provides for treble damages so as to encourage the private litigant to enforce the public policy contained in the antitrust law. 15 U.S.C. § 15 (1970 & Supp. IV 1981).

79. 563 F.2d at 999.

80. *Id.*

haps the result in *Westinghouse* would have been different.[81]

It would be wise for the litigant to emphasize the importance of the information even before the discovery order issues. In *Trade Development Bank v. Continental Insurance Co.*,[82] the Second Circuit ruled that it was proper for the district court to defer to foreign law and refuse to order the disclosure of the customers of a Swiss bank, an act that would have been contrary to the Bank Secrecy Act of Switzerland.[83] The district court had determined that the information sought was of only marginal relevance and unnecessary to the proceeding.[84] Based upon this finding, it was proper for the district court to exercise its discretion in favor of the foreign law.[85]

The defendant insurance company complained that the district court should have at least required the Swiss bank to make a good faith effort to obtain waivers of the Swiss secrecy law. The circuit court determined that, although it would have been proper for the district court to require the bank to seek waivers, the district court was not obligated to do so, particularly when the defendant failed to request that the court make such an order.[86] Again, the party seeking discovery bears the burden of demonstrating to the court that the information sought is of sufficient importance to justify interference with the foreign nondisclosure law.

By recognizing that the factors outlined in section 40 of the *Restatement* are for the most part inadequate for deciding discovery versus nondisclosure conflicts, the following general rules emerge: As set forth in *Société*, and as further refined in a number of decisions which are not discussed here, the court always, if it chooses, has the power to issue an order for discovery of foreign information, regardless of the nature of foreign law. The burden shifts to the person subject to discovery either to comply with the order or demonstrate to the court that, despite every good faith effort to comply, the discovery sought remains precluded by foreign law. If a burdened party fails to make this good faith showing, penalties for noncompliance will be imposed regardless of how the foreign law ostensibly is applied. The purpose of these rules is to force the burdened party, through its efforts at compliance, to prove and clarify exactly what the conflicts are between the discovery order and the foreign

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81. Even absent such a showing it is hard not to have some sympathy for Judge Doyle's view that perhaps the law of the forum should apply and the sanctions be upheld. Unlike *Société*, the party burdened here by the discovery order directly profited from the nondisclosure rules of the foreign government. In fact the Canadian Government had passed those laws for the express purpose of thwarting litigation like the suit brought by Westinghouse. Perhaps the American court should have given the American plaintiff stronger support in fighting these restrictions. *See* United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980).

82. 469 F.2d 35 (2d Cir. 1972).

83. *Id.* at 39-40.

84. *Id.* at 40.

85. *Id.* at 41.

86. *Id.* at 40-41.

nondisclosure law.[87]

If, despite the burdened party's good faith efforts to comply, the foreign government still bars the disclosure of certain information sought by the U.S. court, then the court must apply a form of "balancing" test. Despite the language in court opinions, the court does not balance the relative interests of the parties concerned. Where the public policies of two nations are in conflict, there is nothing to balance, as there is a "standoff." Rather, the court weighs the need for the information or discovery procedure sought against its knowledge that enforcing discovery will offend a public policy of a foreign sovereign, and will subject the burdened party to sanctions in that foreign country. If the information is truly necessary to the court's proceeding, sanctions must be imposed in order to try to compel discovery. When everything else is equal, the law of the forum should prevail.

However, if the information is not truly necessary to the proceeding, if substantial justice can be done without the information sought, then the court should defer to the foreign law. In so deferring, the court makes no finding that the policy interest of another country is superior to that of the United States in the matter concerned. The court merely concludes that, since the policies of the United States can be effected without the information sought, deference to the foreign law will be permitted.

V. APPLICATION OF THE BALANCING TEST

The balancing test is not always ignored. Recall that the balancing test cannot resolve situations where the public policies of two nations are in direct conflict. But *Restatement* section 40 can yield results where the public policy of one government is not at stake or where the public policies within one government are in conflict so that no clear policy opposing the other government's policy emerges. In such instances there is no standoff between mutually opposing public policies and the balancing test yields a clear result.

United States v. First National City Bank[88] presented a situation where the public policy of the United States in favor of nondisclosure was not opposed by a foreign public policy in favor of nondisclosure. First National City Bank of New York (Citibank) was served with a subpoena requesting documents from its German branch. The subpoena was issued by a federal grand jury investigating alleged violations of the antitrust laws.[89]

Citibank declined to comply with the subpoena. The bank claimed

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87. *See, e.g.*, Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978). *See* United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980). *Cf.* First Nat'l City Bank v. Internal Revenue Service, 271 F.2d 616 (2d Cir. 1959) (the bank failed to show that Panamanian law would prevent discovery.).

88. 396 F.2d 897 (2d Cir. 1968).

89. *Id.* at 898.

that to comply with the subpoena would subject the bank to civil claims by its customers based upon the bank secrecy laws of Germany. To comply with the subpoena would leave the bank open to economic reprisals and a potential loss of business.[90]

The Second Circuit rejected Citibank's pleas and enforced the subpoena. The court's construction of German law was crucial to its decision. The court determined that whatever rule may have developed in favor of bank secrecy was not so important that the German Government was willing to enforce it. It was up to the bank customer whose secrets were revealed to bring a civil suit. This civil suit would not be based upon the statutory law of Germany, but rather would be based upon an implied contractual obligation between the bank and its customers.[91] The court expressly concluded that the subpoena did not "conflict with the public policy of a foreign state as expressed in legislation."[92]

Since the public policy of Germany was not at stake the court appropriately applied *Restatement* section 40 and concluded that the U.S. interest in disclosure should be enforced. Private parties could not defeat the efforts of a U.S. grand jury through use of a "contract" for secrecy.[93]

As might be expected in cases such as *First National City Bank*, where the public policy of the foreign sovereign is not really at stake, the decision could also have also been based upon Citibank's failure to make a good faith effort to comply with the subpoena. The district court judge found that the bank had failed to make such good faith efforts, neglecting to make even ordinary inquiries as part of discovery.[94] Such a lack of good faith alone justifies enforcement of the subpoena.

The balancing test can also be applied when the public policy of one government conflicts internally with itself. But for the defendant's failure to make good faith efforts to comply with the discovery order, the *Vetco* case would have presented such a situation. Ordinarily, once the burdened party's efforts reveal a genuine conflict between discovery and nondisclosure, the U.S. policy in favor of discovery emerges as superior when the information is truly necessary to the U.S. litigation. However, where there is in existence a treaty between the United States and the foreign government regarding the issue for which discovery is sought, and that treaty provides mechanisms for the exchange of information, the treaty must be viewed as the exclusive means for obtaining information whenever a genuine conflict of law exists. The existence of the treaty creates a policy contrary to the U.S. interest in discovery and thereby tips the scales of the balancing test in favor of the foreign nondisclosure law.

The mere existence of a tax treaty providing for the exchange of in-

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90. *Id.* at 899, 904.
91. *Id.* at 899, 901, 903.
92. *Id.* at 901.
93. *Id.* at 905.
94. *Id.* at 900 n.8.

formation does not mean that in all cases only treaty procedures may be used to obtain information from the foreign territory.[95] Treaty procedures should not be exclusive unless the treaty so provides. The Swiss-U.S. tax treaty does not provide that the methods for information exchange are to be exclusive.[96] Therefore, in *Vetco* it was entirely proper for the IRS to issue its subpoena.

Issuance of the subpoena was proper despite the apparent conflict with Swiss law. As the rule has developed, discovery orders should always issue so that the burden to attempt to eliminate any conflict with the foreign law is placed on the party subject to discovery. If the burdened party fails to make such good faith efforts, as Vetco apparently failed to do, then penalties must issue for noncompliance with the discovery order. Such penalties are proper regardless of what the foreign law is claimed to be. However, in the court's eagerness to apply the balancing test and find for the government, the court stated that treaty procedures are not the exclusive mechanism for obtaining discovery in tax matters.[97] Although often true, such a statement is incorrect whenever a genuine conflict with foreign law is present. If Vetco had demonstrated to the court that it had made good faith efforts to comply with the subpoena, it would have been entirely improper for the court to impose sanctions because of Vetco's failure to comply with the discovery sought.

Section 40 of the *Restatement* explains this rule. It calls for a balancing of interests and other factors of lesser significance.[98] The *Restatement's* balancing test yields no result in a discovery versus nondisclosure conflict, where the national interests at stake are in balance and contradict each other. However, section 40 does yield a result when the matters subject to discovery are covered by a treaty which establishes discovery procedures.

Where a treaty exists, the balancing test is applied as follows. On the one hand, there is the foreign interest in nondisclosure. On the same side of the scale is that foreign government's reasonable expectation that another nation will not ignore established treaty procedures, when to do so would be to create a conflict with that government's disclosure policies. On the other hand, there is the U.S. policy in favor of disclosure. However, offsetting that policy is the U.S. policy which favors upholding the reasonable expectations of signatories to treaties with the United States. It is contrary to the spirit, if not the actual terms, of a treaty to seek enforcement of a discovery order contrary to foreign law where a treaty provides procedures for releasing the desired information. If the specific information sought cannot be released pursuant to the terms of the treaty, and the information sought cannot be released under the foreign

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95. *See, e.g.*, United States v. Phillips, 479 F. Supp. 423, 433 (M.D. Fla. 1979).

96. Income Tax Convention, *supra* note 20, at art. XVI.

97. 644 F.2d at 1328. *See also* United States v. Phillips, 479 F. Supp. 423, 433 (M.D. Fla. 1979).

98. *See* note 14 *supra* and accompanying text.

law, then it must be presumed that the parties intended that such information is not to be disclosed. Any other interpretation would require a substantial degradation of the authority of treaties as U.S. law.

The Ninth Circuit in *Vetco* recited the long-established rule that a statute and a treaty are to be read consistently, to the greatest extent possible.[99] Although correct, this rule does not require that all ambiguities be interpreted in favor of the U.S. law. Where application of U.S. law would require conduct directly contrary to the foreign law, great deference must be given to the provisions of the treaty, as that treaty establishes the common agreement of the two sovereigns whose laws are in conflict.

VI. CONCLUSION

The proper role of treaties in U.S. law is a subject of much interest and complexity. A comprehensive evaluation of the subject cannot be accomplished within these pages. However, for purposes of applying the balancing test, it is not necessary to define that role. It is only necessary to point out that the existence of the treaty weighs against U.S. disclosure rules that are contrary to the reasonable expectations of the other signatory to the treaty.[100]

The existence of a treaty reconciles the standoff between equally legitimate policy concerns of two sovereigns. In favor of nondisclosure is the public policy of the foreign sovereign and that sovereign's reasonable expectations of an agreement made with the United States. Balanced against those interests is the public policy of the United States favoring disclosure, diminished by its implied agreement with the foreign sovereign whose law is sought to be circumvented. In such a situation the interests of the two governments are not on the same plane of policy; the interests of the foreign sovereign in nondisclosure are clearly superior. If a conflict with the foreign disclosure law exists, after a discovery order has been issued and a good faith effort at compliance has been made, then that foreign law must be given deference whenever a treaty makes provision for the disclosure of information related to the subject of the litigation.[101]

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99. 644 F.2d at 1328 (Cases cited therein stand for the same proposition.)

100. The intent of the parties is persuasive in interpreting treaty provisions. Maximov v. United States, 373 U.S. 49 (1963); Bacardi Corp. v. Domenech, 311 U.S. 150 (1940); Wright v. Henkel, 190 U.S. 40 (1903).

101. Illustrating this principle is the case of Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300 (D.C. Cir. 1980). The issue in that case was whether it was proper for the Federal Trade Commission (FTC) to serve an investigatory subpoena by use of registered mail. *Saint-Gobain* is different from the cases discussed in the text in that the issue there was not whether certain documents were discoverable, but whether the method of obtaining the personal jurisdiction necessary to discovery was proper.

In ruling that the FTC acted improperly, the circuit court relied in part on two principle facts. First, the French Government objected strenuously to the method of service em-

It is most important to recognize that, in the situation described, where the existence of a treaty permits the application of the balancing test, the question of the U.S. need for the information is never reached. The *Vetco* court placed some importance on the reluctance of authorities to cooperate in tax investigations.[102] The court also noted that in the Swiss-U.S. tax treaty, Switzerland had reserved the right not to transmit business secrets pursuant to the information exchange provisions of the treaty.[103] In the court's view, the anticipated inability to obtain the cooperation of Swiss authorities emphasized the need of the court to enforce the discovery order.

However, the need for the information is only relevant when the policies of the two governments are mutually contradictory. Where, because of a treaty, the balance of interests is upset and the foreign interest in nondisclosure emerges as superior, the need of the U.S. court for the information becomes irrelevant. There is no legitimate basis to enforce the discovery order regardless of what the perceived need for the information might be.[104]

In fact, the comments of the court in *Vetco* highlight the role of the treaty in tipping the scales in favor of the foreign nondisclosure law. The U.S.-Swiss tax treaty specifically provides that the Swiss Government reserved the right not to reveal business secrets.[105] When the United States accepted the treaty, the obvious implication was that the United States promised not to require tax information over the objections of the Swiss

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ployed by the FTC. In other words, in the French view the method of service was contrary to French law. 636 F.2d at 1306 n.18, 1325-27. Second, in examining whether or not Congress intended that the FTC issue subpoenas contrary to foreign law, and possibly contrary to international law (*See* 636 F.2d at 1315-18), the court interpreted the powers of the FTC as granted by Congress as requiring in part that the agency use established diplomatic procedures. 636 F.2d at 1323. The court implied that where an existing convention applies to the procedural matter at issue, it is improper to go beyond that convention. 636 F.2d at 1313 n.69.

The *Saint-Gobain* case has been cited as requiring adherence to conventions regarding discovery when a deviation from the procedures established in the convention would conflict with the law of the country where the requested documents are located. Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980). *Cf.* Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960) (Subpoena for bank documents located in Canada would not be enforced as the Canadian law provided for procedures in Canadian courts whereby these documents could be sought and disclosed, subject to the disclosure limitations imposed by Canadian law.).

102. *See* note 22 *supra*.

103. Income Tax Convention, *supra* note 20, art. XVI (1)&(3).

104. "Unless it unmistakenly appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it." The Over the Top, 5 F.2d 838, 842 (D.Conn. 1925). "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . . " Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). *Cf.* Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962) (deference should be given to foreign nondisclosure law once a true conflict with that law has been presented.).

105. Income Tax Convention, *supra* note 20, art. XVI (1)&(3).

Government. Given the clear implications of the treaty regarding disclosure of business secrets, the interest of the Swiss nondisclosure law must clearly prevail over the interest of a U.S. court or agency in obtaining the information. The United States was under no obligation to sign the tax treaty with Switzerland. Once it did so, the reasonable expectations of the Swiss Government arising from that treaty had to be given deference. Where the policies of the two governments are otherwise in direct conflict, the implied recognition of the Swiss law of business secrets by the U.S. Government pursuant to the treaty requires that the Swiss secrecy law take precedence.[106]

The task of a court in resolving a discovery versus nondisclosure conflict need not be overly complex. The court is always permitted to issue its discovery order and require the burdened party to make a good faith effort to obtain release of the requested information. If it is determined that an irreconcilable conflict with foreign law exists, the typical approach of the court is to evaluate the need for the information sought. Where the court cannot reasonably proceed without the requested information, the law of the forum is applied and discovery is ordered.

There are exceptions to this general rule, however. The court evaluates the necessity because the competing interests of the sovereigns are in balance. Where a public policy of a foreign sovereign is not at stake, or where the information sought is subject to treaty procedures for disclosure, the competing interests are no longer in balance. In such instances the balancing test applies in favor of that sovereign whose public policy is unambiguously involved.

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106. The Supreme Court has stated: "Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them." Factor v. Laubenheimer, 290 U.S. 276, 293 (1933). Applying this rule to the Swiss-U.S. tax treaty, where the Swiss Government has preserved in the treaty its right to withhold information protected under Swiss law, that treaty must be liberally construed to prevent the attempted enforcement of U.S. subpoenas contrary to that Swiss secrecy law. The obligations of equality and reciprocity imply this respect for Swiss law. *Cf.* United States v. Burbank, 525 F.2d 9 (2d Cir. 1975) (tax treaty regarding discovery of documents liberally construed in favor of local law of state in which documents were sought.