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The Recognition of Foreign Privileges in United States Discovery Proceedings

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ARTICLES

The Recognition of Foreign Privileges in United States Discovery Proceedings

*Kurt Riechenberg**

CONTENTS

I. INTRODUCTION	81
II. PROCEDURAL DEVICES FOR OBTAINING EVIDENCE	82
III. GENERAL REQUIREMENTS FOR DISCOVERY ORDERS AGAINST FOREIGN PARTIES	84
IV. DEFINITION OF PRIVILEGE	85
V. DISCOVERY PRINCIPLES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE	89
VI. THE PRIVILEGE EXCEPTION IN UNITED STATES LAW ...	90
VII. CONFLICT OF LAWS RULES	94
VIII. SUPREME COURT DECISIONS	96
IX. CASE LAW CONCERNING THE RECOGNITION OF FOREIGN PRIVILEGES	98

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A.	Bank Secrecy Laws	103
B.	Attorney-Client Privilege.....	108
C.	Transactional Communications	111
D.	Medical Records	114
E.	Foreign Government Secrets	115
X.	COMMENTS REGARDING THE RECOGNITION OF PRIVILEGES.....	118
A.	The Restatement of Foreign Relations Law	119
B.	Securities and Exchange Commission	120
C.	American Bar Association	121
D.	International Agencies	124
XI.	REJECTION OF INTEREST BALANCING	125
XII.	PROPOSAL FOR THE RECOGNITION OF FOREIGN PRIVILEGES.....	129
XIII.	CONCLUSION	136

I. INTRODUCTION

Discovery of evidence that is not available in the United States is a frequent problem in international litigation before United States courts. A common element of international litigation in such complex cases is that key witnesses reside abroad or crucial business documents belonging to foreign litigants are located in other jurisdictions.¹ Due to the fact-dependent nature of these cases, courts in the United States have been confronted with numerous legal and practical obstacles in their attempts to obtain evidence, whether written or oral, from foreign litigants or non-party witnesses. Discovery orders of United States courts relating to testimonial or documentary evidence situated in foreign countries have generated a great deal of legal and political controversy, not only in the area of private suits but also in the field of agency and grand jury investigations.

¹ "[T]he heart of any United States antitrust case is the discovery of business documents. Without them, there is virtually no case." *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1155 (1979). See also *Laker Airways Ltd. v. Pan United States Airways*, 103 F.R.D. 42, 49 (D.D.C. 1974) ("the absence of necessary foreign discovery would sound the death knell of a plaintiff's case"); Hollmann, *Problems of Obtaining Evidence in Antitrust Litigation*, 11 TEX. INT'L L.J. 461 (1976); Light, *Discovery Abroad and the Consequence When Discovery is not Possible*, 50 ANTITRUST L.J. 577 (1981); Newman, *Potential Havens from United States Jurisdiction and Discovery Laws in International Antitrust Enforcement*, 33 U. FLA. L. REV. 240 (1980); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 615 (1979)[hereinafter *Foreign Nondisclosure Laws*]; Rahl, *Enforcement and Discovery Conflicts in Foreign Trade*, in FIFTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE 343 (B. Hawk ed. 1979).

As early as 1956, attempts by United States courts to obtain evidence in foreign countries were met with adverse reactions:

I am certainly not prepared to hold that persons or corporations within the jurisdiction of the English courts should be subjected to a wider form of inquisition in relation to an action pending in a foreign court than that to which they would be liable if the action were being tried . . . in this country.²

The reasons for these conflicts are numerous and have given rise to an abundance of legal writing.³ Nevertheless, no guidelines as to how these international discovery disputes could be resolved have emerged. As will be demonstrated, one of the reasons for the continuing uncertainty is the insufficient evaluation of foreign laws opposing United States discovery proceedings.

II. PROCEDURAL DEVICES FOR OBTAINING EVIDENCE

As regards the procedural devices for obtaining evidence in international litigation, United States courts have two basic options to order discovery.⁴ First, international treaties as well as bilateral agreements, such as the Exchange of Notes between the United States and the Federal Republic of Germany relating to diplomatic and consular depositions,⁵ provide for legal mechanisms through which foreign authorities respond to discovery requests emanating from the United States.⁶ The most important international legal instrument in this field is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.⁷ This Convention provides a standardized procedure for obtaining evidence in a foreign country. It makes letters of request the principal means for judicial assistance between two countries.⁸ In addition, the Convention provides for the taking of evidence by diplomatic officers,

² *Radio Corp. of Am. v. Rauland Corp.*, 1 Q.B. 618, 634 (1956) (Barry, J.). See also Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 35 INT'L & COMP. L.Q. 765, 770-71 (1986).

³ McKay, *Compelling Discovery and Disclosure in Transnational Litigation*, A Selected Bibliography, 16 N.Y.U.J. INT'L L. & POL. 1217 (1984).

⁴ Cf. Rogers, *On the Exclusivity of the Hague Evidence Convention*, 21 TEX. INT'L L.J. 441, 442-43 (1986).

⁵ 32 U.S.T. 4181, T.I.A.S. No. 9938 (1980).

⁶ Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465, 478-79 (1983).

In the area of antitrust enforcement, the United States and several other countries, among them the Federal Republic of Germany, have entered into bilateral cooperation agreements concerning the exchange of information. See, e.g. 27 U.S.T. 1956, T.I.A.S. No. 8291 (1976). See generally Ramsey, *The United States-Australian Antitrust Cooperation Agreement*, 24 VA. J. INT'L L. 127 (1983). Other bilateral agreements are listed in 5 Trade Reg. Rep. (CCH) ¶ 50,283 (1976).

⁷ *Opened for signature*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (1972).

⁸ *Id.* arts. 1-14.

consular agents and commissioners.⁹ The details of the Convention procedures have been described in numerous articles.¹⁰

Second, United States courts may order discovery pursuant to Rules 26 to 37 of the Federal Rules of Civil Procedure.¹¹ In this context, the question as to whether and, if so, to what extent and under which circumstances United States courts have recognized privileges based upon foreign law in international discovery proceedings will be examined.¹² The analysis will focus on civil litigation. However, frequent references will also be made to discovery conflicts in the fields of administrative and grand jury investigations.

The question of whether the Hague Evidence Convention preempts the application of the Federal Rules of Civil Procedure, and qualifies as the exclusive or the primary legal mechanism by which United States discovery proceedings relating to testimonial or documentary evidence situated in another jurisdiction have to be conducted, has been at issue in a great number of cases both in federal¹³ and state courts.¹⁴ The Supreme Court has held recently that the Convention does not establish exclusive or mandatory procedures for obtaining information located in another signatory country.¹⁵

⁹ *Id.* arts. 15-22.

¹⁰ Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104 (1973); Note, *Obtaining Testimony Outside the United States: Problems for the California Practitioner*, 29 HASTINGS L.J. 1237 (1978); Carter, *Existing Rules and Procedures*, 13 INT'L LAW. 5 (1979); Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States — A Practical Guide*, 16 INT'L LAW. 575 (1982); Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733 (1983); Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461 (1984); Note, *Gathering Evidence Abroad - The Hague Convention Revisited*, 16 L. & POL'Y INT'L BUS. 963 (1984); Wasserman, *Conflicts of Laws: Discovery Abroad under Provisions of the Hague Convention*, 26 HARV. INT'L L.J. 201 (1985); Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT. L. 239 (1986).

¹¹ FED. R. CIV. P. 26-37.

¹² See Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1053-54 (1961).

¹³ See *Lowrance v. Michael Weinig GmbH & Co.*, 107 F.R.D. 386 (W.D. Tenn. 1985); *Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985); *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984); *Philadelphia Gear Corp. v. United States Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *McLaughlin v. Fellows Gear Shaper Co.*, 102 F.R.D. 956 (E.D. Pa. 1983); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983).

¹⁴ See *Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443 (Tex. App. 1st Dist. 1984); *Vincent v. Ateliers de la Motobecane S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984); *Gebr. Eickhoff Maschinenfabrik v. Starcher*, 328 S.E.2d 492 (W. Va. 1985); *Wilson v. Lufthansa German Airlines*, 489 N.Y.S.2d 575, 108 A.D.2d 393 (A.D. 2 Dept. 1985).

¹⁵ *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 107 S. Ct. 2542 (1987). In this Article, frequent references will be made to several

III. GENERAL REQUIREMENTS FOR DISCOVERY ORDERS AGAINST FOREIGN PARTIES

This Article will not discuss the various legal prerequisites relating to United States discovery proceedings against foreign litigants or non-party witnesses.¹⁶ It is therefore assumed that the legal requirements concerning statutory competence over the subject matter of the suit¹⁷ are fulfilled, that service of process either according to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters¹⁸ or on the basis of Rule 4 of Federal Rules of Civil Procedure has been properly performed,¹⁹ and that personal jurisdiction over the foreign person subpoenaed is present.²⁰

As the title indicates, this Article will not examine the whole range

briefs submitted to the Supreme Court in this case. See 25 INT'L LEGAL MATERIALS 1475 (1986). See also Note, *International Discovery United States-Style, and the Hague Evidence Convention*, 19 N.Y.U.J. INT'L L. & POL. 87, 94-97 (1986)(comprehensive survey of earlier federal and state court decisions)[hereinafter *International Discovery*].

¹⁶ As to discovery against United States citizens residing abroad, see *Blackmer v. United States*, 284 U.S. 421 (1932):

[A] citizen of the United States . . . continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country . . . [O]ne of the duties of such absent citizens to the United States is that of attending its courts to give testimony when properly summoned . . . And the Congress may provide for the performance of this duty and prescribe penalties for disobedience.

Id. at 436, 438.

¹⁷ See Norton, *Extraterritorial Jurisdiction of United States Antitrust and Securities Laws*, 28 INT'L & COMP. L.Q. 575 (1979); Feinberg, *The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U.L. REV. 323 (1981); Sornarajah, *The Extraterritorial Enforcement of United States Antitrust Laws*, 31 INT'L & COMP. L.Q. 127 (1982); Brewster, *Jurisdictional Conflicts Arising from Antitrust Enforcement, Panel Discussion*, 54 ANTITRUST L.J. 729 (1985).

The following cases have dealt with the statutory scope of agency subpoena powers concerning the production of evidence located abroad: *Commodity Futures Trading Comm'n. v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); *SEC v. Zanganeh*, 470 F. Supp. 1307 (D.C. Cir. 1979); *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951 (D.C. Cir. 1979); *Fed. Trade Comm'n. v. Texaco Inc.*, 555 F.2d 862 (D.C. Cir. 1977); *Montship Lines v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1959).

¹⁸ *Opened for signature*, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (1969); Rogers, *supra*, note 4 at 443-44.

¹⁹ Smit, *International Cooperation in Civil Litigation: Some Observations on the Roles of International Law and Reciprocity*, 9 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAL RECHT 137, 139-40 (1962); See also *Fed. Trade Comm'n. v. Compagnie de Saint Gobain Pont à Mousson*, 636 F.2d 1300 (D.C. Cir. 1980); Oliver, *International Law and Foreign Investigatory Subpoenas Sought to Be Served Without the Consent or Cooperation of the Territorial Sovereign*, 19 SAN DIEGO L. REV. 409 (1982); Victor & Hood, *Personal Jurisdiction, Venue and Service of Process in Antitrust Cases Involving International Trade*, 46 ANTITRUST L.J. 1063 (1978).

²⁰ *Int'l Shoe Corp. v. Washington*, 326 U.S. 310, 316 (1945)(due process requires that a non-resident defendant must "have certain minimum contacts" with the forum so that the exercise of jurisdiction "does not offend traditional notions of 'fair play and substantial justice'"); *Hansen v. Denckla*, 357 U.S. 235, 253 (1958)("[I]n each case it is essential that there be some act by which the

of foreign legal obstacles which might be invoked by foreign parties or witnesses against United States discovery orders based upon the Federal Rules of Civil Procedure, but will focus on the problem of foreign privileges. This legal concept, which has not yet received a great deal of scholarly attention, must be distinguished from other objections based upon foreign law and designed to oppose discovery orders of United States courts relating to oral testimony or written evidence connected with that legal system.²¹ In order to illustrate the differences between the United States and foreign discovery procedures frequent references will be made to the West German ("German") Codes of Civil and Criminal Procedure, the legal system with which the author of this Article is most familiar.²²

IV. DEFINITION OF PRIVILEGE

Four legal concepts designed to prevent the taking of testimonial or documentary evidence from foreign nationals will be briefly described so as to distinguish them from the notion of privilege. Most conflicts in the field of international discovery proceedings have been caused by foreign "blocking statutes."²³ This term has never been defined, because the different statutes vary widely in their scope and applicability.²⁴ They have

defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.").

See also Comment, *Personal Jurisdiction Over Alien Corporate Parents and Affiliates in Antitrust Actions*, 5 SYRACUSE J. INT'L L. 149 (1977); Thompson, *United States Jurisdiction Over Foreign Subsidiaries*, 15 L. & POL'Y INT'L BUS. 319 (1983).

²¹ See Friedman & Wilson, *Representing Foreign Clients in Civil Discovery and Grand Jury Proceedings*, 26 VA. J. INT'L L. 327, 379 (1986)(survey of discovery defenses based on foreign law).

²² See Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 750 (1986); Gottwald, *Simplified Civil Procedure in West Germany*, 31 AM. J. COMP. L. 687 (1983); Heck, *Transnational Litigation II: Federal Republic of Germany and the E.E.C.*, 18 INT'L LAW. 793 (1984); Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1443, 1471 (1958)[hereinafter Kaplan]; Martens, *German Civil Procedure and the Implementation of the Hague Evidence Convention*, 1 INT'L LIT. Q. 115 (1985). See also Collins, *supra* note 2, at 767-69 (brief description of the differences between United States and British discovery principles).

²³ See Batista, *Confronting Foreign Blocking Legislation: A Guide to Securing Disclosure from Non-Resident Parties to United States Litigation*, 17 INT'L LAW. 61 (1983); Bishop, *International Litigation in Texas: Obtaining Evidence in Foreign Countries*, 19 HOUS. L. REV. 361 (1982); Blythe, *The Extraterritorial Impact of the Antitrust Laws: Protecting British Trading Interests*, 31 AM. J. COMP. L. 99 (1983); Cira, *The Challenge of Foreign Laws to Block United States Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982); Comment, *Secrecy and Blocking Laws: A Growing Problem as the Internationalization of Securities Markets Continues*, 18 VAND. J. TRANSNAT. L. 809 (1985); Note, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11 GOLDEN GATE U.L. REV. 577 (1981).

²⁴ See Friedman & Wilson, *supra* note 21, at 327, 338 n.32 (list of blocking statutes).

been enacted for various reasons²⁵ although the primary goal of these laws is to thwart the exercise of extraterritorial jurisdiction and to prevent the production of confidential business information to foreign judicial or administrative authorities.²⁶ The main feature of blocking statutes, i.e., the general or specific prohibition to comply with foreign discovery orders, is rarely distinguished from the concept of privilege, i.e., the right to refuse disclosure of certain information or communications arising from a particular relationship.²⁷

Privileges may overlap statutory obligations accompanied by criminal or administrative sanctions against disclosure of certain evidence, whether directed against discovery orders issued by foreign courts or law enforcement authorities²⁸ or equally designed to protect confidential information in a purely domestic context.²⁹ To a certain extent prohibi-

²⁵ INT'L LAW ASS'N, REPORT OF THE FIFTY-FIRST CONFERENCE, TOKYO, 1964, at 561-62 [hereinafter FIFTY-FIRST CONFERENCE]. See also *Gen. Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290 (S.D. Cal. 1981); *In Re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 311-14, 317-21 (D.D.C. 1960); *In re Grand Jury Subpoena Duces Tecum*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

²⁶ Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U.L. REV. 487, 506 (1969). See also Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005 (1976); Comment, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320 (1983); Note, *Reaching for Documents in a Foreign Country*, 8 HOUS. J. INT'L L. 119 (1985).

A prominent example is the British Protection of Trading Interests Act (reprinted in 21 INT'L LEGAL MATERIALS 834, 839 (1982)), which vests power in the Secretary of State for Trade to prevent disclosure when it appears that foreign measures pose a threat to British trading interest. Born, *Recent British Responses to the Extraterritorial Application of United States Laws: The Midland Bank Decision and Retaliatory Legislation Involving Unitary Taxation*, 26 VA. J. INT'L L. 91 (1985). See also Canada's Business Records Protection Act, Ont. Rev. Stat. ch. 56 (1980) (prohibiting the taking, sending, or removing of certain types of business records from Ontario).

²⁷ *Armed Force, Peaceful Settlement, and the United Nations Charter: Are There Alternatives to a "New International Anarchy,"* American Soc'y of Int'l Law, Proceedings, 77th Annual Meeting, 1983, at 67, 69 (Remarks by J. Schmertz); Comment, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of the Situs Prohibits Removal*, 37 N.Y.U.L. REV. 295, 297 (1962); Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 22 COLUM. J. TRANSNAT. L. 233, 236 (1984).

²⁸ See Act No. 80-538 July 16, 1980, J.O. 1799 (Fr.) (on the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons); see also Herzog, *The 1980 French Law on Documents and Information*, 75 AM. J. INT'L L. 382 (1981); Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585 (1982).

Article 273 of the Swiss Penal Code states: "A person who, through searching, secures a manufacturing or business secret, in order to make it accessible to a foreign official agency, or to a foreign organization, or to a private business enterprise, or to their agents, a person who makes accessible a manufacturing or business secret to a foreign official agency, or to a foreign organization, or to a private business enterprise, or to their agents, shall be punished. . . ."

²⁹ See Section 404 of the German Corporation Act, September 6, 1965, BGBl. I 1089, 1183 (obligation of corporate executives and employees not to reveal business secrets); von Huelsen, *Kanadische und Europäische Reaktionen auf die US pre trial discovery*, 28 RECHTTDER INTERNATIONALEN

tions relating to the disclosure of business secrets on grounds of public policy, such as national security considerations, may also be in the private interest with regard to competitive aspects, but these two concepts are to be distinguished.³⁰

Some countries which have not enacted general blocking laws, such as the Federal Republic of Germany,³¹ have nevertheless objected to United States discovery orders requiring the production of evidence located abroad on the ground of "judicial sovereignty."³² This doctrine has not gone unchallenged by United States courts, which have rejected the suggestion that the discovery of documentary material abroad could affect other judicial systems.³³ Indeed, the notion of "judicial sovereignty" has never been defined.³⁴ In any event, German government authorities have never argued that such a violation of "judicial sovereignty" created a public policy privilege for German defendants capable of being invoked against United States discovery orders.

Moreover, it is important to distinguish a privilege from a claim that disclosure of the requested evidence would entail civil liability or other disadvantages in the area of private commercial relations. Such a claim

WIRTSCHAFT 537, 552 (1982); see also Restrictive Trade Practices Act, 1976, ch. 34, 41 (prohibition of disclosure of confidential business information); Note, *Foreign Nondisclosure Laws*, *supra* note 1, at 612-13 n.4, 5.

³⁰ See *Pain v. United Technologies Corp.*, 637 F.2d 775, 789 (D.C. Cir. 1980)(Wilkey, J.), *cert. denied*, 454 U.S. 1128 (1981). A good example of this important distinction is provided by Section 53 of the West German ("German") Code of Criminal Procedure, and Section 203 of the West German ("German") Criminal Code. A juxtaposition of these two provisions reveals that, under Section 53, a certain number of persons, such as reporters, enjoy a privilege not to disclose confidential information received in their professional capacity, although there is no criminal sanction if the reporter none the less discloses the information. In contrast, according to Section 203, members of other professions, such as psychologists, are liable to criminal sanctions if they disclose information entrusted to them in their occupational capacity. However, they do *not* enjoy a privilege to refuse testimony at trial.

³¹ But see Federal Maritime Shipping Act, May 24, 1965, § 11 (1965) BGBl II, 833, 835 (following the British Shipping Contracts and Commercial Documents Act, 1964, ch. 870)(exception for shipping information).

³² *Schroeder v. Lufthansa*, 18 Av. Cas. (CCH) 17,222, 17,223 (N.D. Ill. 1983); See also *Cooper Indus. Inc. v. British Aerospace*, 102 F.R.D. 918 (S.D.N.Y. 1984); *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435 (S.D.N.Y. 1984); *Société Nationale Industrielle Aérospatiale*, Brief for Petitioner, 25 INT'L LEGAL MATERIALS 1475, 1482-83 (1986); Brief for the Federal Republic of Germany, 25 INT'L LEGAL MATERIALS 1540, 1546-48 (1986).

³³ *Slauenwhite v. Bekum Maschinenfabriken GmbH*, 104 F.R.D. 616, 618 (D. Mass. 1985); *In re Anschuetz & Co. GmbH*, 754 F.2d 602, 605 (5th Cir. 1985); *In re Messerschmidt Boelkow Blohm GmbH*, 757 F.2d 729, 732 (5th Cir. 1985); *Société Nationale Industrielle Aérospatiale*, Brief for Respondent, 25 INT'L LEGAL MATERIALS 1568, 1574-75 (1986).

³⁴ *Rogers*, *supra* note 4, at 450-51; *Société Nationale Industrielle Aérospatiale*, Brief of the Securities and Exchange Commission, 25 INT'L LEGAL MATERIALS 1515 (1986). See also Note, *The Hague Service Convention and Agency Concepts: Lamb v. Volkswagenwerk Aktiengesellschaft*, 20 CORNELL INT'L L.J. 391, 401 (1987).

was unsuccessfully made by the defendant in *United States v. First National City Bank*.³⁵ Similarly, in another case where a German bank challenged grand jury subpoenas requiring the production of customer bank records, inter alia, on the ground that compliance with the subpoenas would subject the bank to penalties for breach of confidentiality under German law, the court held that the United States interest in enforcing its criminal laws outweighed any countervailing interests or hardships asserted by the bank.³⁶ Thus, the mere interest of a person in withholding certain evidence because of a private duty and the possibility of civil liability or unfavorable economic consequences without the presence of a constitutional, statutory or common law right to refuse disclosure cannot be qualified as a privilege.

Finally, mere variations in matters of procedure between two legal systems do not create substantive rights for those foreign defendants whose legal system provides for more restrictive discovery procedures. For example, under the German Code of Civil Procedure, (which has no counterpart to United States pre-trial discovery), parties are not under an unqualified obligation to answer interrogatories and may not be compelled to testify.³⁷ This basic rule is well illustrated by a decision of the Bundesgerichtshof (Federal Supreme Court) which held that "a party is under no obligation to help its opponent win a trial by providing material which is not available to the other party."³⁸ This principle has been affirmed in the context of a letter of request procedure under the Hague Evidence Convention. The court stated that the "prohibition against fishing expeditions in German procedural law is designed for the protection of the adversary who is not required to make available to the opposing party the weapons for the conduct of the lawsuit."³⁹

Also, under Section 422 of the German Code of Civil Procedure, a party may be compelled to furnish documentary evidence only if there is a legal obligation based upon substantive law or if the party concerned

³⁵ 396 F.2d 897, 900, 904-05 (2d Cir. 1968).

³⁶ *In re Grand Jury* 81-2, 550 F. Supp. 24, 26, 29 (W.D. Mich. 1982).

³⁷ Martens, *Erfahrungen mit Rechtshilfeersuchen aus den USA*, 27 RECHT DER INTERNATIONALEN WIRTSCHAFT 725, 729-30 (1981); Gamp, *Die Bedeutung des Ausforschungsbeweises im Zivilprozess*, 60 DEUTSCHE RICHTERZEITUNG 165 (1982); Judgments of July 9, 1974 and of February 18, 1970, Bundesgerichtshof ("BGH"), 27 Neue Juristische Wochenschrift ("NJW") 1710, and BGH, 27 NJW 751. See also Kaplan, *supra*, note 22, at 1241-42.

³⁸ Judgment of May 4, 1964, BGH, 17 NJW 1414; see also judgment of February 29, 1968, BGH, 21 NJW 1233.

³⁹ *Corning Glass Works v. Int'l Tel. and Tel. Corp.*, Judgments of October 31 and November 27, 1980, Oberlandesgericht Muenchen, 36 JURISTENZEITUNG 538, 540-41 (1981), translated in 20 INT'L LEGAL MATERIALS 1049 (1981). See also judgment of June 10, 1981, Landgericht Muenchen, 95 Zeitschrift fuer Zivilprozess 362 (1982), affirming the trade secret privilege under Section 384(3) of the German Code of Civil Procedure in the same letter of request proceedings.

has cited the documents in question in support of the pleadings.⁴⁰ In addition, if documents are in possession of a non-party witness, a separate action has to be brought against that third person pursuant to Section 429 of the German Code of Civil Procedure.⁴¹ This legal concept is evidenced by the Declaration made by the Federal Republic of Germany pursuant to Article 23 of the Hague Evidence Convention that "it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."⁴²

V. DISCOVERY PRINCIPLES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The discovery principles established by the United States Federal Rules of Civil Procedure are designed to "secure the just, speedy, and inexpensive determination of every action."⁴³ Parties can discover in advance of trial all facts and issues underlying the controversy.⁴⁴ This policy was stated by Justice Murphy in *Hickman v. Taylor*⁴⁵ as follows:

(C)ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. . . . (T)he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.⁴⁶

In *United States v. Bryan*,⁴⁷ the Supreme Court emphasized "the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures" from which exemptions may be granted only for "a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the

⁴⁰ Judgment of December 15, 1965, BGH, 1966 Betriebsberater 99; Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT. L. 231, 244-45 (1986); Kaplan, *supra* note 22, at 1240; Note, *International Discovery*, *supra* note 15, at 119; Platto, *supra* note 10, at 583.

⁴¹ German Civil Code § 810 (substantive legal obligation to produce documents); Judgment of September 25, 1979, Oberlandesgericht Frankfurt, 34 Monatsschrift fuer Deutsches Recht ("MDR") 228. See also Stuermer, *Rechtshilfe nach dem Haager Beweisuebereinkommen fuer Common Law Laender*, 36 JURISTENZEITUNG 521 (1981); Shemanski, *supra* note 6, at 481-83.

⁴² Announcement on the Ratification of the Evidence Convention, June 21, 1979, BGBl.II 780; West German Implementing Act, December 22, 1977 § 14, BGBl I 3105, 3106.

⁴³ FED. R. CIV. P. 1.

⁴⁴ *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 944-46 (1961)[hereinafter *Developments*].

⁴⁵ 329 U.S. 495 (1947).

⁴⁶ *Id.* at 501, 507.

⁴⁷ 339 U.S. 323 (1949).

search for truth.”⁴⁸ In *United States v. Procter & Gamble Co.* the Supreme Court stated that, “Modern instruments of discovery serve a useful purpose. . . . They together with pretrial procedures make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. . . . Only strong public policies weigh against disclosure.”⁴⁹

According to the Supreme Court, privilege exceptions to the principle of full disclosure of all relevant testimonial and documentary evidence “must not be lightly created nor expansively construed.”⁵⁰ As Judge Learned Hand noted with regard to administrative or grand jury investigations, “strong public policy . . . favors techniques and procedures designed to reach the truth. The power of subpoena is an essential instrument of evidence-locating and fact-finding. Only when that policy is in conflict with weightier policy is privilege against disclosure granted.”⁵¹

VI. THE PRIVILEGE EXCEPTION IN UNITED STATES LAW

The most important limitation to the discovery powers of the courts is the privilege exception. Privileges may be invoked both in civil litigation and in agency investigations, as well as in grand jury proceedings.

For example, in the area of administrative investigations the Anti-trust Civil Process Act stipulates with regard to civil investigative demands by the Department of Justice that:

No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony, if such material, answers, or testimony would be protected from disclosure under -

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure⁵²

Similarly, a person may object to civil investigative demands made by the Federal Trade Commission on the ground that he “is entitled to refuse to answer the question on grounds of any constitutional or other

⁴⁸ *Id.* at 331-32.

⁴⁹ 356 U.S. 677 (1958).

⁵⁰ *United States v. Nixon*, 418 U.S. 683, 710 (1974); Friedman & Wilson, *supra* note 21, at 352, 356-57.

⁵¹ See also *In re Equitable Plan Co.*, 185 F. Supp. 57, 60 n.2 (S.D.N.Y. 1960), *modified sub. nom. Ings. v. Ferguson*, 282 F.2d 149 (2d Cir. 1960). See also *McMann v. SEC*, 87 F.2d 377, 378 (2d Cir. 1937) (Hand, J.), *cert. denied*, 301 U.S. 684 (1937).

⁵² 15 U.S.C. § 1312(c) (1982).

legal right or privilege, including the privilege against self-incrimination.”⁵³ Also in other areas of federal administrative law, courts have recognized that agency investigations are “subject to the same testimonial privileges as judicial proceedings.”⁵⁴

Discovery in civil litigation is restricted according to the Federal Rules of Civil Procedure, which stipulate that “parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery.”⁵⁵

It is important to distinguish a privilege established under the Federal Rules from the legal possibility of restricting discovery by means of a protective order.⁵⁶ For example, trade secrets⁵⁷ or other confidential research, development, or commercial information conferring a competitive advantage is listed as one of the legitimate interests entitled to a protective order. However, this kind of information does not enjoy a privilege under the Federal Rules.⁵⁸ Since the granting of a protective order is vested in the discretion of the judiciary, the grounds upon which such an order may be issued do not qualify as an absolute right to refuse testimony.⁵⁹

⁵³ 15 U.S.C. § 57(b)-1(C)(12)(D)(ii). See also 16 C.F.R. §§ 2.7(d), 2.8(A).

⁵⁴ *McMann v. SEC*, 87 F.2d at 378; *In re Fed. Trade Comm’n Line of Business Report Litig.*, 595 F.2d 685 (D.C. Cir. 1977); Comment, *Privileged Communications Before Federal Administrative Agencies: The Law Applied in the District Courts*, 31 U. CHI. L. REV. 395 (1964). See also *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963) (attorney-client privilege in administrative proceedings); Peterson, *Attorney-Client Privileges in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67 (1967).

⁵⁵ FED. R. CIV. P. 26(b)(1).

⁵⁶ See, e.g. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1650 (1985). Census material collected pursuant to the Census Act, 13 U.S.C. §§ 8, 9 (1982), was held to be privileged by the Supreme Court, *Baldrige v. Shapiro*, 455 U.S. 345 (1982).

⁵⁷ The most widely cited definition is from the RESTATEMENT OF TORTS, § 757, Comment (b)(1939):

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

The Freedom of Information Act exempts “trade secrets and commercial or financial information which is obtained from a person and privileged or confidential” from disclosure. 5 U.S.C. § 552(b)(4)(1982). According to the REPORT OF THE SENATE JUDICIARY COMMITTEE, S. REP. N 813, 89th Cong., 1st Sess. 9 (1965), exemption No. 4 of the Act includes business sales statistics, inventories, customer lists, and manufacturing processes as well as information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges.

⁵⁸ *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 362 (1978); *Nat’l Util. Serv. Inc. v. Northwestern Steel & Wire Co.*, 426 F.2d 222, 227 (7th Cir. 1970); *Davis v. General Motors Corp.*, 64 F.R.D. 420, 422 (N.D. Ill. 1974).

⁵⁹ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1983). Connelly, *Secrets and Smokescreens*:

As used in the Federal Rules the term "not privileged" refers to the notion of privilege as it is understood in the law of evidence.⁶⁰ A matter is privileged from discovery if it would be privileged at trial under the applicable rules of evidence.⁶¹ The Federal Rules of Evidence provide that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.⁶²

The Federal Rules of Evidence as proposed by the Advisory Committee and approved by the Supreme Court contained provisions recognizing and defining nine non-constitutional privileges.⁶³ Congress, however, preferred to adopt one general provision so as to leave room for new judicial developments and allow flexibility in the application of traditional privileges on a case-by-case basis. This legislative intent was later confirmed by the Supreme Court.⁶⁴

Similarly, the Federal Rules relating to the execution of foreign letters rogatory by which United States courts grant judicial assistance to foreign and international tribunals do not provide a list of privileges upon

A Legal and Economic Analysis of Government Disclosures of Business Data, 1981 WIS. L. REV. 207, 231 (Trade secrets are not privileged in the law of evidence: Rule 26(c)(7) of the Federal Rules of Civil Procedure authorizes the courts to order that a "trade secret or other confidential . . . commercial information not be disclosed or be disclosed only in a designated way."). See also Trade Secrets Act, 18 U.S.C. § 1905 (prohibiting the disclosure of trade secrets by government officials).

⁶⁰ *Lincoln Am. Corp. v. Bryden*, 375 F. Supp. 109,111 (D. Kan. 1974); *Robinson v. Magovern*, 83 F.R.D. 79, 84 (D. Pa. 1974). See also *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 64 (N.D. Ohio 1964)(reference to Rule 34 as it incorporates notion of privilege from Rule 26 (b)).

⁶¹ *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953).

⁶² FED R. EVID. 501.

⁶³ Deleted Rules 502 to 510 (56 F.R.D. 234-58). The privileges included required reports, attorney-client, psychotherapist-patient, husband-wife, clergyman-communicant, political vote, trade secrets, secrets of state and other official information, and identity of informer.

⁶⁴ *Trammel v. United States*, 445 U.S. 40, 47 (1980). Rule 501 allows the judicial creation of new privileges: *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981). See also *United States v. Mackey*, 405 F. Supp. 854, 857-58 (E.D.N.Y. 1975)(Weinstein, J.) ("Despite their deletion by Congress, the privilege rules promulgated by the Supreme Court remain of considerable utility as standards. Congress expressed no disagreement with their substance; it eliminated them primarily because they were considered substantive in nature and not a fit subject for rule making.").

which discovery of documentary evidence may be refused.⁶⁵ The rules stipulate that a person "may not be compelled . . . to give his testimony or statement or to produce a document or other thing in violation of *any legally applicable privilege*."⁶⁶

Although the differences between United States and foreign legal systems with respect to the number and the scope of privileges will be examined in detail, it should be noted that civil law systems in general provide for broader protection of privileges. As opposed to trade secrets in the United States, business privacy enjoys privilege protection under the German Code of Civil Procedure.⁶⁷ Consequently, United States discovery orders are often considered by German litigants as intrusive and damaging to their competitive position.⁶⁸ In contrast, no privileges are available under United States federal law to accountants,⁶⁹ brokers,⁷⁰ bankers⁷¹ or reporters.⁷²

⁶⁵ Augustine, *Obtaining International Assistance Under the Federal Rules of Civil Procedure and the Hague Convention*, 10 GA. J. INT'L & COMP. L. 101, 104 (1980).

⁶⁶ 15 U.S.C. § 1782(a) (1982)(emphasis added); Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1032 (1965). According to a congressional Report, the above-mentioned provision applies to all proceedings conducted pursuant to section 1782 and provides for the recognition of *all* privileges to which the person may be entitled, *including privileges recognized by foreign law*. 2 U.S. CODE CONG. & ADMIN. NEWS 3782, 3790 (1964). The privileges extend beyond the protection against self-incrimination, but their exact scope was left open for future determination.

⁶⁷ German Code of Civil Procedure § 384.

⁶⁸ The "artistic and commercial secrets" privilege in civil proceedings has been interpreted very broadly by German courts. Privileged information extends to all technical, financial or commercial data whose confidential treatment is in the legitimate interest of the person concerned. See Stuermer, *Die gewerbliche Geheimsphaeret im Zivilprozess*, 1985 JURISTENZEITUNG 453, 454; Judgment of April 21, 1977, OLG Hamburg, 1977 MDR 761; Judgment of September 15, 1977, OLG Dueseldorf, 1978 MDR 147; Gottwald, *Zur Wahrung von Geschäftsgeheimnissen im Zivilprozess*, 1979 BETRIEBSBERATER 1780; Shemanski, *supra* note 6, at 480; Heck, *supra* note 40, at 243-44; Schlosser, *Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen*, 94 ZEITSCHRIFT FUER ZIVILPROZESS 369, 402-04 (1981). See also *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2563 (Blackmun, J., dissenting) describing the constitutional protection of personal privacy, commercial property and business secrets under German law.

⁶⁹ *Couch v. United States*, 408 U.S. 322, 335 (1973); *FTC v. St. Regis Paper Co.*, 304 F.2d 731, 734 (7th Cir. 1962)("We are not persuaded that the relationships between several members of a trade association and the association accountant should be considered a relationship equally valued, for the same reason, as the personal relationship between husband and wife, priest and penitent, physician and patient, when to do so would result in frustration of the Federal Government's performance of a necessary investigatory function."). See also *Falsone v. United States*, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953).

⁷⁰ *McMann v. SEC*, 87 F.2d at 378.

⁷¹ *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 39, 52-54 (1974) (Bank Secrecy Act not violative of the Fourth Amendment); *Fisher v. United States*, 425 U.S. 391, 407-11 (1975)(Fifth Amendment protection *not* applicable to documentary summons); *United States v. Miller*, 425 U.S. 435, 437 (1976)(no "legitimate expectation of privacy" concerning bank records).

The Supreme Court has also held that foreign bank secrecy laws do not make foreign bank

VII. CONFLICT OF LAW RULES

If a litigant or a witness refuses to testify or to produce documentary evidence invoking a privilege different from the law of the forum, a conflict of laws question arises. According to a long-standing principle of conflict of laws, the law of the forum governs *procedural* matters.⁷³

The *lex fori* doctrine has come under increasing scrutiny regarding both interstate and international discovery proceedings. Various attempts have been made in the law of evidence to distinguish between rules amounting to substantive law and provisions with mere procedural character.⁷⁴ Modern legal doctrines recognize that the law of evidence

records subject to Fourth Amendment protection. See *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980) ("We are not persuaded by respondent's suggestion that the Bahamian law of bank secrecy creates an expectation of privacy not present in *United States v. Miller*."). See also *United States v. Prevatt*, 526 F.2d 400, 402 (5th Cir. 1976); Comment, *Is There a Right of Privacy in Bank Records?* 10 LOY. L.A.L. REV. 378 (1977); Note, *Business Records and the Fifth Amendment Right Against Self-Incrimination*, 38 OHIO ST. L.J. 351 (1977).

⁷² *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

⁷³ *Developments*, *supra* note 44, at 1050. *In re Investigation of World Arrangements*, 13 F.R.D. 280, 286 (D.D.C. 1962); *Arthur Anderson Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) ("Foreign law may not control local law.") See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122, 127 (1971):

§ 122 Issues Relating to Judicial Administration: A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.

§ 127 Pleading and Conduct of Proceedings: The local law of the forum governs rules of pleading and the conduct of proceedings in court.

Comment (a): The local law of the forum governs . . . pre-trial practice, including the taking and use of depositions, discovery and penalties for refusal to comply with proper request for information.

See Comment, *Compelling Production of Documents in Violation of Foreign Law*, 50 FORDHAM L.REV. 877, 885 (1982); Note, *Foreign Nondisclosure Laws*, *supra* note 1, at 614; Friedman & Wilson, *supra* note 21, at 339. See also 3 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 493-94 (2d ed. 1964); *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. McGranery*, 111 F. Supp. 435, 444 (D.D.C. 1953), *modified and affirmed*, *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956), *revised on other grounds sub nom. Société Internationale v. Rogers*, 357 U.S. 197, 213 (1958) ("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 proper 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.").

⁷⁴ Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957); Hay, *Interstate Versus International Conflicts Law in the United States*, 35 RABELS ZEITSCHRIFT 429 (1971); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today*, 31 TUL. L. REV. 101 (1956); Smit, *supra* note 66, at 1034 ("The conflict of laws rules prevailing in this area are far from settled."); Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 361, 370-71 (1969) (distinguishing three types of evidence rules, one of them being privilege rules).

contains a certain number of substantive rules which are not subject to the *lex fori* because they go beyond regulating the conduct of the lawsuit.⁷⁵ Privileges have been identified as evidentiary rules which are designed to foster certain interests and values that are extrinsic to the litigation context.⁷⁶ Privileges may determine the outcome of lawsuits, but they are not intended to achieve such a result because they do not have a procedural purpose. They are normally based upon common law or legislatively determined policies promoting certain confidential relationships or the protection of privacy.⁷⁷

The Supreme Court has refused to establish a general distinction between *substantive* and *procedural* questions⁷⁸ emphasizing that this dichotomy "implies different variables depending upon the particular problem"⁷⁹ and that the definition of substance and procedure "shifts as the legal context changes."⁸⁰ In *Guaranty Trust Co. v. York*, Justice Frankfurter stated:

Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants.⁸¹

⁷⁵ Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 712-13 (1967); Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 483-84 (1957).

⁷⁶ *Ex Parte Sparrow*, 14 F.R.D. 351, 353 (N.D. Ala. 1953) (newspaper privilege protecting the identity of the source of certain information as a pronouncement of public policy); see also *In re Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964). Dunham, *Testimonial Privileges in State and Federal Courts: A Suggested Approach*, 9 WILLAMETTE L. REV. 26, 42, 47 (1973); Louisell & Cuppin, *Evidentiary Privileges*, 40 MINN. L. REV. 413 (1956); Miller, *supra* note 75, at 746; Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L. REV. 461, 488 (1977); Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 535-36, 548 (1956).

⁷⁷ *Massachusetts Mut. Life Ins. Co. v. Brei*, 311 F.2d 463, 465-66 (2d Cir. 1962) (Waterman, J.) ("[S]ince it goes to relationships established and maintained outside the area of litigation, and 'affect[s] people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive . . .'). See also *Palmer v. Fisher*, 228 F.2d 603, 608 (7th Cir. 1955), *cert. denied* 351 U.S. 965 (1956); *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 407-09 (5th Cir. 1960); *Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 43 (4th Cir. 1963); Kaminski, *State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923 (1975); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1248 (1962).

⁷⁸ *Guaranty Trust Co. v. York*, 326 U.S. 99 (1944); *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965).

⁷⁹ *Guaranty Trust*, 326 U.S. at 108.

⁸⁰ *Hanna v. Plumer*, 380 U.S. at 471, 472 ("uncertain area between substance and procedure").

⁸¹ *Guaranty Trust*, 326 U.S. at 108.

VIII. SUPREME COURT DECISIONS

Two Supreme Court decisions have so far dealt with international discovery conflicts. The problem concerning the recognition of foreign privileges, however, was not directly at issue in these cases. It should be noted that the Supreme Court in both instances expressly rejected any rigid approach to resolve conflicts between the discovery principles of the Federal Rules of Civil Procedure on the one hand and foreign as well as international law on the other.

In *Société Internationale v. Rogers*,⁸² the Supreme Court had to determine the effect of a foreign legal prohibition (Article 273 of the Swiss Penal Code prohibiting "economic espionage") which prevented the foreign litigant from complying with a United States discovery order regarding the production of business documents. The Supreme Court expressly stated that its opinion was limited to the facts of the case⁸³ and the question of whether dismissal of the complaint with prejudice was justified. The Court emphasized that no general rule was established in the area of international discovery conflicts.⁸⁴ Further, the problem of privilege recognition did not arise because the foreign plaintiff conceded in the proceedings before the Supreme Court that it was subject to the United States procedural rules and asserted "no immunity from them."⁸⁵

It should be noted, however, that the Swiss litigant had initially asserted a banker-customer privilege.⁸⁶ The District Court rejected this privilege relating to the plaintiff's bank records.⁸⁷ In addition, the Court held:

No man can sue in the courts of any country, whatever his rights may be,

⁸² *Société Internationale v. Rogers*, 357 U.S. 197 (1958). For detailed descriptions of the *Rogers* case, see Friedman & Wilson, *supra* note 21, at 341; Comment, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 844-45 (1986); Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 COLUM. L. REV. 1441, 1458-59 (1963)[hereinafter Note, *Limitations*]; Note, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. CHI. L. REV. 791 (1964); Note, *Discovery of Documents Located Abroad in United States Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747, 749 (1974).

⁸³ *Société Internationale v. Rogers*, 357 U.S. at 205-06 ("We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control.")

⁸⁴ *Id.* at 213 ("We decide only that on this record dismissal of the complaint with prejudice was not justified.").

⁸⁵ *Id.* at 211-12 ("Petitioner has sought no privileges because of its foreign citizenship which are not accorded domestic litigants in United States courts. . . . It does not claim that Swiss law protecting bank records should here be enforced. It explicitly recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its *inability* to comply because of foreign law.").

⁸⁶ *Société Internationale v. McGranery*, 111 F. Supp. 435, 438-39 (D.D.C. 1953).

⁸⁷ *Id.* at 443.

unless in conformity with the rules prescribed by the laws of that country . . . A claimant must take the law as he finds it; he cannot place himself in a better position than other litigants by invoking the laws and procedures of a foreign sovereign.⁸⁸

On appeal, the plaintiff abandoned the challenge to the Court's refusal to grant a foreign privilege not available under United States law to a foreign plaintiff.⁸⁹ The Court of Appeals upheld the District Court's ruling and rejected any suggestion that a foreign plaintiff could avail himself of rights not recognized under United States law.⁹⁰

The other Supreme Court opinion in the area of international discovery conflicts dealt with the relationship between the Federal Rules of Civil Procedure and the Hague Evidence Convention.⁹¹ Although the Supreme Court refused to accord primacy to this international treaty over United States discovery rules,⁹² the opinion contains numerous admonitions addressed to United States courts to exercise their discretionary power in such a way that "intrusive" discovery orders are avoided.⁹³ This accommodating approach adopted by the Supreme Court⁹⁴ seems to stop short of a recognition of foreign privileges, but privileges were not directly at issue in this case.⁹⁵ Article 11 of the Hague Evidence Convention expressly provides for a recognition of foreign privileges in the context of a letter rogatory procedure:

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence (a) under the law of the State of execution; or (b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority. A Contracting State may

⁸⁸ *Id.* at 444. See also *Société Internationale v. McGrath*, 9 F.R.D. 680, 681 (D.D.C. 1950) (The court ordered the *plaintiff* to answer certain questions holding that "foreign law or foreign privilege is not a valid excuse for a refusal to answer the questions.").

⁸⁹ *Société Internationale v. Brownell*, 225 F.2d at 536, n.13 (D.C. Cir. 1955). See also Weinstein, *supra* note 76, at 538; *Guaranty Trust*, 326 U.S. at 133-35; *Friedman & Wilson*, *supra* note 21, at 332, 346.

⁹⁰ *Société Internationale v. Brownell*, 225 F.2d at 541.

⁹¹ *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. 2542.

⁹² *Id.* at 2555-56.

⁹³ *Id.* at 2556.

⁹⁴ *Société Nationale Industrielle Aérospatiale*, Brief for the Securities and Exchange Commission, 1986 INT'L LEGAL MATERIALS 1504, 1507 ("Certain foreign interests merit accommodation, among them policies safeguarding substantive liberty, property or privacy interests.").

⁹⁵ Petitioners' Brief to the Supreme Court in *Anschuetz & Co. GmbH v. Mississippi River Bridge Auth. and Messerschmidt Boelkow Blohm GmbH v. Walker* (Nos. 85-98 and 85-99), app. 4; Meessen, *The International Law on Taking Evidence From, Not In, a Foreign State*, 1986 INT'L LEGAL MATERIALS 816, 832, at 845: ("The comparison of privileges under German law and under U.S. law is *not* at issue."). See also *Pain v. United Technologies Corp.*, 637 F.2d 775, 788-90 (D.C. Cir. 1980), *cert. denied* 454 U.S. 1128 (1981).

declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.⁹⁶

The willingness of the Supreme Court to take into account foreign substantive law opposing United States discovery orders coincides with a great number of lower court opinions with regard to the applicability of the Hague Evidence Convention as the primary instrument to obtain evidence in international litigation.⁹⁷ Several of these courts relied upon the principle of comity as the legal basis for ordering discovery pursuant to the Convention.⁹⁸

IX. CASE LAW CONCERNING THE RECOGNITION OF FOREIGN PRIVILEGES

This Article will examine how courts have addressed the problem of privilege claims raised by foreign parties and witnesses and to what extent the courts have been prepared to recognize foreign privileges not

⁹⁶ Radvan, *The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning its Scope, Methods and Competence*, 16 N.Y.U.J. INT'L L. & P. 1031, 1047 (1984).

⁹⁷ *Cooper Industries v. British Aerospace*, 102 F.R.D. 918 (S.D.N.Y. 1984); *Schroeder v. Luft-hansa German Airlines*, 18 Av. Cas. (CCH) 17,222, 17,223 (N.D. Ill. 1983); *Philadelphia Gear Corp. v. America Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 48 (D.D.C. 1984); *Gebr. Eickhoff Maschinenfabrik u. Eisengies-serei v. Starcher*, 328 S.E.2d 492, 497-501 (W. Va. 1985). In *Volkswagenwerk AG v. Superior Court*, 176 Cal. Rptr. 874 (1981), and *Pierburg GmbH & Co. v. Superior Court*, 186 Cal. Rptr. 876 (1982), the courts reversed lower court orders for on-site inspections in West Germany and directed the plaintiffs to proceed under the Hague Convention. See also *Volkswagenwerk AG v. Superior Court*, 109 Cal. Rptr. 219, 221 (1973) ("A foreign corporation's amenability to local suit does not signal automatic subjection of its internal affairs to courts of the forum, because the latter have no jurisdiction over persons or property outside their territory.").

In *Vincent v. Ateliers de la Motobecane S.A.*, 475 A.2d 686 (N.J. Super. A.D. 1984), the Convention was held to provide the primary discovery procedure. See also *S & S Screw Machine Co. v. Cosa Co. & Gildemeister A.G.*, Sl. op. No. 2-85-0-0036, p.18-19 (M.D. Tenn. 1986); Note, *The Hague Convention: A Practical Guide to the Convention, United States Case Law, Convention-Sponsored Review Commissions, and Responses of Other Signatory Nations*, 16 GA. J. INT'L & COMP. L. 73 (1986); Struve, *Discovery from Foreign Parties in Civil Cases before U.S. Courts*, 16 N.Y.U.J. INT'L L. & P. 1101, 1109 n.35.

⁹⁸ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) ("Comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.")

Similarly, the Court of Appeals for the Second Circuit, in *Ings v. Ferguson* 282 F.2d 149, 152-53 (2d. Cir. 1960), emphasized that upon fundamental principles of international comity courts should not order "such action as may cause a violation of the laws of a friendly neighbor, or at least, an unnecessary circumvention of its procedures." See also Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982).

available under United States law. The caselaw will be supplemented by a summary of comments dealing with the problem of privilege recognition from the Restatement of Foreign Relations Law, the Securities and Exchange Commission and the American Bar Association. In addition, resolutions by two international organizations concerning the protection of confidential business information in transnational antitrust investigations will be examined. Finally, an attempt will be made to extract from these different sources a certain number of general principles as to whether and, if so, to what extent, foreign privileges should be recognized in discovery conflicts before United States courts.

One of the earliest cases dealing with foreign rights opposing an United States discovery order dates back to 1914. In *Munroe v. United States*,⁹⁹ the plaintiff challenged a criminal contempt fine for nonproduction of documents to a grand jury pursuant to a subpoena duces tecum. The documents concerned were located in France and in joint possession of the plaintiff and his partners.¹⁰⁰ The partnership, which was composed of one French and four United States partners, was organized under French law, but transacted business both in the United States and France. Although the main question at issue was whether Munroe was entitled to demand from his partners the removal of the documents from France to the United States, the court recognized a right to refuse production of documents on the following grounds:

As to this refusal the request was correct, because, the right being a joint right, and the papers referred to, as well as the partners referred to, being in a foreign country, where the business to which the papers related was transacted, it was plain that the partners who resided there, and had the papers in their possession had the privilege of objecting to their being forwarded to a foreign country if they desired so to do. This is plain law, as was stated by Vice Chancellor Shadwell in *The Attorney General v. Wilson*, 9 Simons, pages 526 and 530. It may be added that this proposition is so clear that there is no necessity of citing any authorities in reference thereto. It is true that the court observed that if Munroe had been insistent upon a request for the papers they would have been forwarded to this country; but there is no evidence to that effect.¹⁰¹

The *Rio Tinto Zinc v. Westinghouse* litigation in the United Kingdom provides an interesting example of the differences between United States and English privilege law.¹⁰² This case is of particular interest because of the involvement of a United States judge in the privilege deter-

⁹⁹ 216 F. 107 (1st Cir. 1914).

¹⁰⁰ *Id.* at 108.

¹⁰¹ *Id.* at 109.

¹⁰² *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, 2 W.L.R. 81, 1 All E.R. 434 (1978)(House of Lords), reprinted in 17 INT'L LEGAL MATERIALS 38 (1977).

mination. Letters rogatory were issued by a United States District Court to the English judiciary seeking confidential business information from an English corporation as well as from individuals raised the issue of a privilege against self-incrimination.¹⁰³

According to Section 14(1) of the British Civil Evidence Act of 1968¹⁰⁴ in connection with Section 3(1)(b) of the Evidence (Proceedings in Other Jurisdictions) Act of 1975, both private individuals, and corporate bodies enjoy a right to refuse testimony if, as a result of such testimony, they would risk criminal prosecution and penalties including those provided under the antitrust provisions of the Rome Treaty establishing the European Economic Community. The comparable United States privilege, based upon the Fifth Amendment of the Constitution, is limited to individuals and does not apply to corporation or other corporate entities.¹⁰⁵ The protection of the Fifth Amendment (as compared to German law¹⁰⁶) does not include the incrimination of close relatives nor does it apply to the production of documents.¹⁰⁷ The United States privilege against self-incrimination is also not available if immunity from prosecution has been granted.¹⁰⁸ In addition, the notion as to what con-

¹⁰³ See Wood & Carrera, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEXAS INT'L L. J. 59, 92-100 (1979); Merhige, *The Re Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1979); Note, *Power to Reverse Foreign Judgments: The British Clawback Statute under International Law*, 81 COLUM. L. REV. 1097, 1104 (1981); Blythe, *supra* note 23, at 112-17.

¹⁰⁴ Section 14(1) providing in relevant parts: "The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty . . . shall apply only as regard criminal offences under the law of any part of the United Kingdom and penalties provided for by such law. . . ." Wilson, *The Implementation of the Hague Evidence Convention by the Judicial Authorities of the United Kingdom*, 1 INT'L LIT. Q. 356 (1986); Collins, *supra* note 2, at 778.

¹⁰⁵ *United States v. Morton Salt*, 338 U.S. 632, 652 (1950); *Bellis v. United States*, 417 U.S. 85, 94 (1974). In *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972), the Supreme Court held that a "real and substantial fear of foreign prosecution" must exist with regard to the Fifth Amendment. See also *United States v. (Under Seal)*, 794 F.2d 920 (4th Cir. 1986); Note, *Extending the Self-Incrimination Clause to Persons in Fear of Foreign Prosecution*, 20 VAND. J. TRANSNAT'L L. 699 (1987).

¹⁰⁶ Section 52 of the German Code of Criminal procedure grants an unqualified right to refuse testimony that might incriminate the fiancée, the spouse, or certain close relatives. Section 53 provides a privilege for a limited number of persons maintaining confidential relationships, such as doctors and lawyers. However, this privilege may not be invoked if the client has consented to disclosure. Section 384 of the German Code of Civil Procedure provides that testimony can be refused if it might cause direct pecuniary damage to the witness or to a person to whom the witness stands in a close blood relationship. A witness is also entitled to refuse testimony if this might dishonor or incriminate the witness. Shemanski, *supra* note 6, at 485.

¹⁰⁷ *Fisher v. United States*, 425 U.S. 391, 408 (1974). See also *Wild v. Brewer*, 329 F.2d 924 (9th Cir. 1964).

¹⁰⁸ 18 U.S.C. §§ 6002, 6003 (1970); Merhige, *supra* note 103, at 25.

stitutes a criminal offense very often differs from one legal system to the other.¹⁰⁹

As to the individual witnesses' claims of Fifth Amendment privilege against giving oral evidence, the House of Lords ruled that, since it was a claim for privilege under United States law, its validity had to be determined "as if it had been made in civil proceedings in the United States."¹¹⁰ With respect to this privilege question, Federal District Court Judge Merhige, after the individual witnesses had refused to give oral testimony before the consular officer designed to take evidence under the letters rogatory, ruled that, as British subjects residing outside the territorial jurisdiction of the United States, they were entitled to claim the privilege against self-incrimination under the Fifth Amendment of the United States Constitution.¹¹¹

The interesting aspect of this ruling is that Judge Merhige relied upon United States constitutional law to determine whether a privilege against self-incrimination was available. Judge Merhige applied United States constitutional law even though the witnesses concerned were British subjects outside United States jurisdiction, and compliance with the evidentiary request was required exclusively in the United Kingdom. Although this ruling as well as the decision of the House of Lords were given under relatively unusual circumstances,¹¹² they show that both courts were aware of the importance of the privilege question and the implication of substantive rather than procedural rights.¹¹³ The questions at issue in this case are related to the problem of reverse privilege conflicts in international discovery proceedings, i.e. the admissibility in United States courts of evidence obtained in foreign countries under violation of United States constitutional rights.¹¹⁴

The only appellate court opinion dealing with a conflict between United States discovery rules and a *non-blocking* foreign legal system was the 1968 decision of the Court of Appeals for the Second Circuit in *United States v. First National City Bank*.¹¹⁵ The case concerned an anti-

¹⁰⁹ For the definition of criminal offenses under United States law, see *United States v. Ward*, 448 U.S. 242 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

¹¹⁰ 1 All E.R. at 445 (1978).

¹¹¹ Merhige, *supra* note 103, at 24-25 (ruling of June 14, 1977). On June 22, 1977, the UK High Court of Justice upheld the RTZ companies privilege claim; this ruling was affirmed on July 11, 1977, by the Court of Appeal, (1977) 3 All. E.R. 717. See also Lever, *Aspects of Jurisdictional Conflict in the Field of Discovery*, in FIFTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE, 358, 371 (B. Hawk ed. 1979); see also Wood & Carrera, *supra* note 103, at 98.

¹¹² Merhige, *supra* note 103, at 24-25.

¹¹³ Lever, *supra* note 111, at 368-79.

¹¹⁴ Paikin, *supra* note 27, at 240-41.

¹¹⁵ 396 F.2d 897. See *supra* text accompanying note 35.

trust investigation several customers of the defendant. The main question was whether a grand jury subpoena duces tecum requiring a bank to produce documents containing confidential business information, which were in possession of the bank's foreign branch in the Federal Republic of Germany, could be enforced despite the fact that compliance with the subpoena might subject the bank to economic loss or civil liability under German law. The Court of Appeals held that the potential for civil liability was not a justification for disobeying the subpoena.¹¹⁶ With respect to the recognition of a privilege under German law, the Court of Appeals approached the problem in two steps.

First, the court went beyond general statements concerning the resolution of conflicts between United States law and foreign blocking statutes and acknowledged that other conflicts, such as those resulting from different levels of protection of certain interests, may exist and have to be resolved. The court expressed its approach in the following terms:

We would be reluctant to hold, however, that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena. Such a rule would show scant respect for international comity; . . . a court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign State affected by its decision. . . . The vital national interests of a foreign nation, especially in matters relating to economic affairs, can be expressed in ways other than through criminal law.¹¹⁷

On this basis the court proceeded to an analysis of the relevant German law. After distinguishing between civil and criminal procedure,¹¹⁸ the court correctly found that Section 53 of the German Code of Criminal Procedure (as opposed to the German Code of Civil Procedure) does not furnish to banks a right to refuse disclosure of confidential business information relating to their clients.¹¹⁹

The court examined in great detail the relevant provisions of German law in order to determine whether the bank could avail itself of a privilege. One can assume that the court was prepared to recognize a German privilege against disclosure of bank records in criminal proceedings if such a privilege had been available to the defendant. Otherwise, the thorough analysis of German law would not have been necessary. This conclusion is confirmed by the fact that the court referred to the

¹¹⁶ *Id.* at 904-05.

¹¹⁷ *Id.* at 902.

¹¹⁸ *Id.* at 903-04.

¹¹⁹ *Id.* See also Friedman & Wilson, *supra* note 21, at 412; For the privilege of bankers under Sections 383 and 384 of the German Code of Civil Procedure, see Judgment of July 13, 1968, Oberlandesgericht Koeln, 1968 MDR 931; Judgment of November 25, 1953, Landgericht ("LG") Frankfurt, 1954 NJW 688, 690; Judgment of January 10, 1978, LG Hamburg, 1978 NJW 958-59; S. SICHTERMANN, BANKGEHEIMNIS UND BANKAUSKUNFT (3rd ed. 1984), at 210, 211, 223, and 224.

privilege of bankers in civil proceedings under the German Code of Civil Procedure¹²⁰ as distinguished from criminal proceedings.

A. Bank Secrecy Laws

Conflicts between United States discovery proceedings and foreign laws protecting the confidentiality of certain financial information have arisen in a number of antitrust cases as well as in criminal prosecutions relating to tax evasion or securities fraud. The most recent examples are investigations by United States law enforcement authorities designed to gain information on foreign bank accounts used to handle illegal profits from trade in narcotics. In these cases, foreign banking statutes have been regularly invoked to justify the refusal to comply with United States discovery orders.

The concept of bank secrecy, which is normally invoked by foreign banks and/or their customers, is not a uniform one.¹²¹ Considerable differences exist among the various foreign legal systems providing for protection of bank secrets.¹²² United States law furnishes relatively little protection to bank records, because no constitutional or other privilege exists as to the confidentiality of bank records.¹²³ The question therefore arises as to whether United States courts have recognized claims that bank records located abroad were privileged evidence under the foreign law and thereby immune from United States discovery proceedings, and, if so, to what extent the privilege would be granted.

In 1959 the Court of Appeals for the Second Circuit was one of the first appellate courts to address a foreign privilege challenge to an investi-

¹²⁰ *United States v. First National City Bank*, 396 F.2d at 903 n.10.

¹²¹ Haseltine, *International Regulation of Securities Markets: Interaction Between United States and Foreign Laws*, 36 INT'L & COMP. L.Q. 307, 312-14 (1987)(emphasizing the distinction between bank secrecy and blocking laws). While secrecy laws forbid the disclosure of records or the identity of bank customers, blocking laws prohibit the disclosure, inspection or removal of documents located in the enacting state in compliance with orders of foreign authorities. Secrecy laws protect personal rights and can be waived only by the individuals. On the other hand, blocking laws protect national rather than private interests and cannot be waived by a private party. *Id.*

See also Fedders, Wade, Mann & Beizer, *Waiver by Conduct—A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. MARKET L. 1, 30-39, Apps. A&B (1984)(overview of secrecy and blocking laws); Comment, *Secrecy and Blocking Laws: A Growing Problem as the Internationalization of the Securities Markets Continues*, 18 VAND. J. TRANSNAT'L L. 809, 820-21 (1985)(brief history of bank secrecy).

¹²² See Fedders, *Policing Internationalized United States Capital Markets—Methods to Obtain Evidence Abroad*, 18 INT'L LAW. 89 (1984); Horowitz, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Island Example*, 20 TEX. INT'L L.J. 133 (1985); Moessle, *The Basic Structure of United States Securities Law Enforcement in International Cases*, 16 CASE W. INT'L L.J. 1 (1986).

¹²³ Bank Secrecy Act, 12 U.S.C. §§ 3401-22 (1982).

gative subpoena seeking the production of bank records located in Panama.¹²⁴ In its opinion, the court distinguished the bank's privilege from the customer's privilege to refuse disclosure of financial information:

Assuming that this provision [Article 29 of the Panama Constitution stipulating the inviolability of correspondence and other private documents] affords privilege against disclosure in favor of those whose affairs are the subject matter of the disclosure . . . there is no showing that the bank may invoke [the customer's] constitutional privilege as it seeks to do. Assuming, on the other hand, that this provision affords a privilege against disclosure to bystanders, such as the Bank, who have information relating to the affairs of others, there is no showing that criminal sanctions will attach if the bank waives its privilege either voluntarily or at the command of its sovereign.¹²⁵

The court thereby acknowledged that a privilege based upon the law of Panama was entitled to recognition under United States discovery rules. However, the court concluded that the privilege was not available in this case because the constitutional exception to the right of nondisclosure applied. The court stated that the "Constitution did not specify that the prohibition extended to the sovereign, either Panama or a foreign sovereign, or that the exception was limited to a *Panamanian* authority or *Panamanian* legal formalities. Nor was there evidence that such was its effects."¹²⁶

In 1962, in a case which also involved the applicability of Panama law,¹²⁷ the Court of Appeals for the Second Circuit affirmed the previous holding. The question of privilege recognition, however, was not addressed as clearly as in the earlier opinion. Instead, the court referred to the broad principle of comity stating that the "Government, as well as other litigants, has a real interest in civil and criminal cases in obtaining evidence wherever located. However, we also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own."¹²⁸

Ten years later, the Court of Appeals for the Second Circuit, in a civil action for the recovery of damages resulting from fraudulent investment activities again had to deal with the question as to whether Swiss bank secrecy law bars the disclosure of customers' identities in federal discovery proceedings.¹²⁹ The court's opinion reveals two interesting ap-

¹²⁴ *First National City Bank of New York v. Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

¹²⁵ *Id.* at 619.

¹²⁶ *Id.* at 620.

¹²⁷ *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962).

¹²⁸ *Id.* at 613.

¹²⁹ *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35 (2d Cir. 1972).

proaches to the problem of privilege recognition. First, the court, by examining the Code of Civil Procedure of the Swiss Ticino Canton, seemed to embrace the principle that the privilege provisions contained in that code, if applicable, had to be recognized under United States law.¹³⁰ Since the Ticino Code did not provide for a banker's privilege, the court would have been entitled to reject a privilege claim based upon Ticino law. Expert testimony, however, supported the conclusion that the Ticino Code did not apply to proceedings in a United States court.¹³¹

Second, the court briefly referred to "the idea of seeking waivers" from the bank's customers.¹³² The court reasoned that because Swiss bank secrecy law was designed to protect the privacy of customers, the client is the holder of the secret and may consent to a disclosure of his identity by the bank. This proposition implies a recognition of the foreign customer's right to retain the confidentiality of certain financial information.

As regards the legal protection of confidential information provided by the laws of the Cayman Islands, the Court of Appeals for the Fifth Circuit upheld contempt penalties against a nonresident alien. Having been subpoenaed to testify before a grand jury while present in the United States, the nonresident alien refused to answer questions relating to an investigation into possible tax law violations.¹³³ After examining the relevant provisions of the foreign statute protecting the privacy of financial transactions, the court found that under Cayman law no privilege against the disclosure of bank records was available "in investigations instituted by legal authority."¹³⁴ The court then refused to recognize the alien's privilege claim because the information sought by the grand jury would have been obtainable by Cayman public authorities for their own investigations. The court concluded that "[s]ince 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 customer's right of privacy would be significantly infringed simply because the investigating body is a foreign tribunal."¹³⁵ The court thereby rejected the suggestion to extend a foreign privilege beyond its statutory

¹³⁰ *Id.* at 40.

¹³¹ *Id.*; Hauser, *Aktuelle Fragen zum schweizerischen Bankgeheimnis*, 1985 JURISTENZEITUNG 871, 875-76 (the majority of Swiss cantons do not recognize a banker's privilege in civil proceedings). See also Fedders, Wade, Mann & Beizer, *supra* note 121, at 34.

¹³² Trade Dev. Bank v. Continental Ins. Co., 469 F.2d at 41.

¹³³ United States v. Field, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 946. See also Note, *Federal Judicial Compulsion of an Alien Testimony Contrary to the Mandate of the Laws of his Native Land*, 16 COLUM. J. TRANSNAT'L L. 357 (1977).

¹³⁴ United States v. Field, 532 F.2d at 408.

¹³⁵ *Id.* A similar case in which the limitations of the Cayman Islands secrecy laws were empha-

scope under the legal system concerned only because disclosure was sought by a United States court.

This test was affirmed by the Court of Appeals for the Eleventh Circuit in a case concerning a discovery conflict between a United States tax and narcotics investigation and the secrecy laws of the Bahamas.¹³⁶ The court examined the privilege claim under the Bahamian Banks and Trust Companies Regulations Act¹³⁷ and held that a court of the Bahamas would be able to order production of the confidential documents sought by the grand jury. The court emphasized that "[i]t is incongruous to suggest that a United States court afford greater protection to the customer's right of privacy than would a Bahamian court," and concluded that the statute in question was "hardly a blanket guarantee of privacy."¹³⁸

In *United States v. First National Bank of Chicago*,¹³⁹ the defendant challenged an Internal Revenue Service summons on the ground that compliance with the summons would subject the bank's employees in Greece, who were to provide the requested documents, to substantial criminal penalties under Greek law. Although the main issue in this case was the question of whether criminal law sanctions under Greek law were a bar to the United States discovery proceedings, the court held that the Greek Bank Secrecy Act prevailed over the Internal Revenue Service summons. The court thereby recognized the relevance of the foreign law with respect to United States discovery rules.¹⁴⁰ Since Article 2, Section 3, of the Greek act furnishes an unqualified privilege to bank employees to refuse testimony concerning bank deposits even if the depositor consents to disclosure,¹⁴¹ the court's decision implies a recognition of this foreign privilege with regard to United States discovery proceedings.

In a case involving grand jury proceedings concerning violations of United States narcotics laws,¹⁴² the Court of Appeals for the Eleventh Circuit reaffirmed the principle that secrecy privileges are to be recognized only within the limits provided by the foreign law.¹⁴³ The court

sized is described in Crinion, *Information Gathering on Tax Evasion in Tax Haven Countries*, 20 INT'L LAW. 1209, 1232-33 (1986).

¹³⁶ *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

¹³⁷ *Id.* at 1386 n.2.

¹³⁸ *Id.* at 1391.

¹³⁹ 699 F.2d 341 (7th Cir. 1983).

¹⁴⁰ *Id.* at 346.

¹⁴¹ *Id.* at 344 n.2.

¹⁴² *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

¹⁴³ *Id.* at 827 n.15.

emphasized two important qualifications to the recognition of foreign privileges. First, the court excluded a recognition in those cases where foreign secrecy laws are used to conceal criminal activities and to shield incriminating evidence related to these activities from United States courts and law enforcement authorities.¹⁴⁴ Second, the court rejected the argument that United States nationals, as distinguished from foreign nationals, could rely upon these legal protections. The court stated that:

[E]ven if the Cayman Islands had an absolute right to privacy, this right could not fully apply to American citizens. The interest of American citizens in the privacy of their bank records is substantially reduced when balanced against the interests of their own government engaged in a criminal investigation since they are required to report those transactions to the United States. . . .¹⁴⁵

These principles were subsequently affirmed by the Court of Appeals for the Second Circuit.¹⁴⁶

In 1984, the District Court for the Southern District of New York addressed a discovery dispute relating to Hong Kong bank secrecy rights and proceedings against foreign defendants.¹⁴⁷ The court also considered, *inter alia*, a motion to compel a party "to waive any rights it may have under Hong Kong bank secrecy laws."¹⁴⁸ The court rejected this motion, holding that "no court has ever compelled a foreign citizen or corporation to waive rights conferred upon it by foreign law."¹⁴⁹

Finally, various federal courts have affirmed the position that denies the protection of foreign privileges to United States citizens under investigation for violation of United States laws. These cases have been decided in connection with a new legal concept formulated by United States law enforcement authorities in the field of tax investigations. In order to overcome the resistance of foreign banks to reveal information about their United States customers, the United States government has been successful in compelling United States citizens to sign "consent directives." These "consent directives" authorize foreign banks to comply with discovery orders designed to obtain confidential bank records for the purposes of investigations in the United States. The first appellate court that addressed this "forced waiver" concept was the Court of Appeals for the Eleventh Circuit.¹⁵⁰ In this case, the government sought to

¹⁴⁴ *Id.* at 827, 829.

¹⁴⁵ *Id.* at 828.

¹⁴⁶ *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985).

¹⁴⁷ *Garpeg Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984).

¹⁴⁸ *Id.* at 797.

¹⁴⁹ *Id.* at 799.

¹⁵⁰ *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); *Friedman & Wilson, supra* note 21, at 407-09.

obtain the production of bank records located in the Cayman Islands for the purposes of an investigation into possible violations of United States tax laws. The Cayman Islands Confidential Relationships (Preservation) Law¹⁵¹ raised the question as to whether the subpoena was enforceable. The government, however, obtained a District Court order compelling the plaintiff to sign a directive instructing his foreign bank to comply with United States discovery orders relating to his bank accounts.¹⁵² The Court of Appeals upheld this order and rejected the plaintiff's claim of privilege under the foreign legal system. The plaintiff cited the Supreme Court decision in *United States v. Payner*: "foreign bank secrecy laws provide no privacy rights for United States citizens that are not otherwise present under the Constitution and laws of the United States."¹⁵³

Following this decision, the District Court for the Northern District of New York held, in a similar case, that the United States plaintiff had not acquired "any rights under foreign bank secrecy laws . . . cognizable in United States courts."¹⁵⁴ The same conclusion was reached the same year by the Court of Appeals for the Fifth Circuit in two other tax investigation cases.¹⁵⁵

B. Attorney-Client Privilege

Even the almost universally recognized *attorney-client privilege* has given rise to discovery disputes in international antitrust cases. The reason is that the scope of this privilege may differ from one legal system to the other. For example, the work product of the attorney, i.e. the material gathered in anticipation of litigation or in preparation for trial,¹⁵⁶ enjoys only qualified immunity under United States law and the protection ceases with the termination of the litigation.¹⁵⁷ Further, under United States law, the privilege to refuse disclosure of confidential communications made by the client ceases to exist as soon as it is waived by the client.¹⁵⁸ In contrast to this rule, under French law, the attorney retains the privilege to refuse disclosure of information received in his

¹⁵¹ *Id.* at 816.

¹⁵² *Id.* at 815.

¹⁵³ *Id.* at 817 n.5.

¹⁵⁴ *United States v. Browne*, 624 F. Supp. 245, 249 (N.D.N.Y. 1985).

¹⁵⁵ *United States v. Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985); *In re Grand Jury Proceedings Thier*, 767 F.2d 1133 (5th Cir. 1985).

¹⁵⁶ See FED. R. CIV. P. 26(b)(3).

¹⁵⁷ *Developments, supra* note 44, at 1027-46. In addition, *work product immunity* does not "apply to the names and addresses of persons having knowledge of relevant facts . . . [n]or does it apply to existence, description, nature, custody, condition or location of documents." *Butler v. United States*, 226 F. Supp. 341, 343 (D. Mo. 1964).

¹⁵⁸ See *Upjohn Co. v. United States*, 449 U.S. 383 (1981). A frequently cited formulation of the

professional capacity even when the client has waived his rights.¹⁵⁹ The notion of an independent privilege is especially important,¹⁶⁰ but generally overlooked. Even in case of a waiver of the privilege by the client, the attorney for competitive or other reasons may have an independent interest in maintaining the confidentiality of certain communications. Also, the foreign attorney-client privilege may extend to the identity of the person seeking legal advice as well as to the fact of the consultation, as is the case under German law.¹⁶¹

The issue of a foreign attorney-client privilege in United States anti-trust discovery proceedings was briefly addressed in one of the Uranium

parameters of the United States attorney-client privilege is set forth in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

See also *Benckiser GmbH v. Hygrade Food Corp.*, 253 F. Supp. 999, 1001-02 (D.N.J. 1966); Merri-field, *Investigations by the Securities and Exchange Commission*, 32 BUS. LAW. 1583, 1609-10 (1977)(United States attorney-client privilege in a corporate setting).

¹⁵⁹ *A.M. & S. v. Comm'n*, 1982 E. Comm. Ct. L. Rep. 1616, 1632 para. (ii)(Opinion of Advocate General Warner). Under French law, the attorney is the holder of the secret and is entitled to decide according to his/her conscience and interests whether, and if so, to what extent confidential communications are revealed. The attorney retains the privilege even if the client consents to disclosure (Report by D.A.O. Edward, Q.C.). Under German law the privilege extends also to the identity of the client and the fact of the consultation as well as to knowledge relating to documents. Report by D.A.O. Edward, Q.C., *Commission Consulative des Barreaux de la Communauté Européenne*, at 18-19. Under English law, the attorney-client privilege extends to information received by the attorney, in his or her professional capacity, from third parties. *In re Sarah Getty Trust*, [1985] 3 W.L.R. 302, 307, 310 (Q.B.).

For a discussion of the legal professional privilege under Irish law see *Silver Hill Duckling v. Minister for Agriculture*, 1987 ILRM 516. For the legal professional privilege under European Community law, see Burkhard, *The Attorney-Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel*, 20 INT'L LAW. 677 (1986). For a discussion of the *A.M. & S.* decision of the Court of Justice of the European Communities, see Kreis, *Commission Procedures in Competition Proceedings, Recent Reforms in Practice and Law*, ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 145 (B. Hawk ed. 1983).

¹⁶⁰ Another example for an independant privilege is the catholic clergyman privilege under German law. Catholic ministers may still refuse to testify even if the communicant has given consent to disclosure: Concordat between the German Reich and the Holy See, Sept. 12, 1933, 2 RGBL 681 Art. 9.

¹⁶¹ Judgment of November 29, 1950, Oberlandesgericht, Duesseldorf, 5 MDR 681 (1951); Judgment of March 2, 1966, Oberstes Landesgericht, Bavaria, 19 NJW 1664; Judgment of December 28, 1984, Oberlandesgericht Duesseldorf, 38 MDR 507 (1985).

Notaries: Judgment of July 13, 1965, Oberlandesgericht Saarbruecken, 18 NJW 2114 (1965); Judgment of May 12, 1981, Oberlandesgericht Muenchen, 35 MDR 853-54 (1981). Tax advisers: Judgment of April 20, 1983, BGH, 38 MDR 48; Judgment of October 18, 1982, Oberlandesgericht Stuttgart, 37 MDR 236 (1983).

cases.¹⁶² The District Court, however, deferred consideration of the defendants' objections to the production of the confidential documents concerned.¹⁶³ The court's ruling on that privilege claim, if ever made, has not been reported.

In another antitrust case,¹⁶⁴ the United States plaintiff moved for an order compelling production of certain confidential documents which were withheld by Remy Martin on the ground of an attorney-client privilege. The evidence at issue consisted of business and legal communications between officials of the defendant and employees who were identified as the defendant's French in-house counsel. In its opinion, the District Court distinguished the documents located in the defendant's French offices from those located in its office in New York.¹⁶⁵ Regarding the documents located in France, the District Court applied the Hague Evidence Convention and held that, according to Article 11 of the Convention, both United States and French law relating to the attorney-client privilege were applicable. However, for the documents located in the United States, the court did not simply apply the law of the forum to determine whether the communications were privileged under United States law. Rather, the court relied upon choice-of-law principles in order to determine whether United States or French privilege law applied.¹⁶⁶ The court held that the United States had the most significant relationship with the communications and concluded therefore that the confidential documents in question were privileged under United States law.¹⁶⁷

Whether the approach taken by the District Court as to the documents located in the United States was correct may be open to question. The significant aspect of this opinion is that the court recognized the existence of the privilege problem and the necessity to make a choice as to the level of legal protection to be accorded to certain foreign confidentiality interests.

The accommodating approach taken by United States courts towards assertions of attorney-client privileges based upon foreign law is further evidenced by the decision in *Graco v. Kremlin*.¹⁶⁸ In this patent

¹⁶² *Westinghouse Electric Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1153 (N.D. Ill. 1979).

¹⁶³ *Id.* at 1156.

¹⁶⁴ *Renfield Corp. v. Remy Martin S.A.*, 98 F.R.D. 442 (D. Del. 1982).

¹⁶⁵ *Id.* at 443.

¹⁶⁶ *Id.* at 444.

¹⁶⁷ *Id.* at 445.

¹⁶⁸ 101 F.R.D. 503 (N.D. Ill. 1984). The court emphasized the principle of comity in transnational discovery proceedings: "Even where there is no conflict with a foreign law, courts are well advised to proceed cautiously any time they order discovery involving activity within another country." *Id.* at 510 n.9.

infringement suit the United States plaintiff moved to compel answers to interrogatories and production of documents. Among the objections raised by the French defendant against these discovery requests was the attorney-client privilege.¹⁶⁹ While the District Court ordered the defendant to comply with most of the discovery requests¹⁷⁰ including an interrogatory concerning "legal advice [the defendant] may have received,"¹⁷¹ the court's ruling on the various discovery devices were "subject to a successful assertion . . . of the attorney-client privilege."¹⁷² Although it is not clear whether the privilege claim was based upon French or United States law, the arguments advanced by the defendant against disclosure indicated a reliance on principles of French law.¹⁷³ This proposition was not rejected by the court because it gave the defendant "one more opportunity to perfect its assertion of privilege."¹⁷⁴ The recognition of the French attorney-client privilege that can be implied from this ruling placed the burden on the defendant to substantiate and specify the privilege claim on both factual and legal grounds. The principle that a party who raises "an issue concerning the law of a foreign country"¹⁷⁵ carries the burden of proof on that account has been emphasized by United States courts on various occasions.¹⁷⁶

C. Transactional Communications

Patent litigation is another area where discovery conflicts have arisen because of different levels of legal protection accorded under United States and foreign law as regards confidential business communications between patent advisers and their clients. As the cases described show, United States courts have consistently refused to extend the attorney-client privilege to patent agents. Contrary to the restrictive doctrine of professional adviser privileges under United States law,¹⁷⁷ Section 104 of the British Patent Act of 1977 grants privilege protection to patent

¹⁶⁹ *Id.* at 507.

¹⁷⁰ *Id.* at 527-30. The District Court set a deadline so as to allow the defendant to perfect its claim of attorney-client privilege.

¹⁷¹ *Id.* at 529.

¹⁷² *Id.* at 516.

¹⁷³ *Id.* Upon Graco's request that assertion of privilege be supported by some identification of the documents claimed to be protected, Kremlin took the position that the identifying information itself was privileged. *Id.*

¹⁷⁴ *Id.* at 517.

¹⁷⁵ See FED. R. CIV. P. 44.1.

¹⁷⁶ *In re Investigation World Arrangements*, 13 F.R.D. 280, 285 (D.D.C. 1952); *Bamberger v. Clark*, 390 F.2d 485, 488 (D.C. Cir. 1968); *Ohio v. Arthur Anderson*, 570 F.2d 1370, 1374 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978).

¹⁷⁷ Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1227 (1962).

agents. The same rule applies in Germany according to Section 383 of the German Code of Civil Procedure. This provision contains, *inter alia*, a privilege to refuse testimony on matters entrusted to a person in an official, occupational or professional capacity provided that the facts in question are confidential either by virtue of a statutory rule or because of their nature. The code does not mention any profession in this provision, but it has never been contested that this privilege applies to lawyers, bankers, accountants, insurance agents, investment and tax advisers, as well as other independent professions which maintain confidential relationships with their clients.¹⁷⁸

In *Duplan Corporation v. Deering Milliken Inc.*,¹⁷⁹ an antitrust case, requests were made for the production of confidential business communications in possession of a French patent adviser. These discovery requests were challenged on the ground that the documents were privileged because they contained professional advice relating to the preparation and the conduct of patent litigation.¹⁸⁰ The District Court did not reject this claim on the ground that such a privilege was not available under United States law. Instead, the Court looked to French law in order to determine whether the facts alleged justified the claim of an attorney-client privilege.¹⁸¹ The District Court concluded that the requirements for this privilege under French law were not satisfied¹⁸² and that the documents had to be disclosed.¹⁸³

Two years later, the same District Court had to deal with similar problems raised by the same litigants.¹⁸⁴ Again, the claim was made that written communications with French and British patent agents were protected from disclosure because of the privileges provided by Article 378 of the French Penal Code and Section 15(1) of the British Civil Evidence Act.¹⁸⁵ Initially, the District Court rejected the availability of the United States attorney-client privilege to these foreign advisers (who were not members of the French or British bar) as being "in contravention of the public policy of the United States as enunciated in the Federal Rules of

¹⁷⁸ Kaplan, *supra* note 22, at 1238; Shemanski, *supra* note 6, at 486; Stuermer, *supra* note 68, at 453-54.

¹⁷⁹ 370 F. Supp. 761 (D.S.C. 1972).

¹⁸⁰ *Id.* at 763-64.

¹⁸¹ *Id.* at 765.

¹⁸² *Id.* at 766.

¹⁸³ *Id.* at 768.

¹⁸⁴ *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974). See also Henry, *Pretrial Discovery in USA: Extraterritorial Einfluss auf Durchsetzung und Benutzung von gewerblichen Schutzrechten*, 1983 GRUR Int. 82, 85.

¹⁸⁵ *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. at 1170.

Civil Procedure.”¹⁸⁶ The court’s decision, however, distinguished two different kinds of documents as regards their protection by a patent adviser privilege. The court stated that “any communications touching base with the United States will be governed by the federal discovery rules while any communications related to matters solely involving France or Great Britain will be governed by the applicable foreign statute. The principle of comity applies.”¹⁸⁷ Accordingly, the District Court proceeded to an examination of the different types of communications which were claimed to be privileged and distinguished between documents relating to United States patent proceedings and those concerning patent applications in foreign countries.¹⁸⁸

In 1978, another District Court followed this distinction in an anti-trust case where discovery of patent agent communications was sought relating to patent activities both in the United States and in the United Kingdom.¹⁸⁹ The court refused to apply foreign privilege rules regarding patent activities in the United States, but recognized that British privileges were applicable with respect to patent activities in the United Kingdom. The court concluded that:

Because the communications involving patent agents relate to patent activities in different countries, the Court must determine which patent agent privilege rule governs for each particular communication. For this determination, the Court will follow the well-accepted rule that while no law has of its own force any effect outside the territory of the state or nation from which its authority is derived, foreign laws may, within certain limits, be given effect. . . . Comity, however, will not be extended to foreign law if it is contrary to the public policy of the forum. . . . Therefore, because the United States has a strong interest in regulating activities that involve its own patent laws, all communications relating to patent activities in the United States will be governed by the American rule. However, the United States has no such strong interest for patent agent communications relating to patent activities in Great Britain, so that deference will be given to the British rule. For communications relating to patent activities in other countries, no privilege will be granted as the defendants have failed to indicate what the applicable privilege is, if indeed any exists.¹⁹⁰

The court then examined the British Civil Evidence Act of 1968¹⁹¹ and determined the scope of the patent agent privilege according to the

¹⁸⁶ *Id.* at 1169 (emphasizing that United States patent advisers do not enjoy the attorney-client privilege and that therefore the same rule applies to foreign patent advisers).

¹⁸⁷ *Id.* at 1169-70.

¹⁸⁸ *Id.* at 1170-71.

¹⁸⁹ *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D.D.C. 1978).

¹⁹⁰ *Id.* at 391 (citations omitted).

¹⁹¹ *Id.* at 392.

provisions of the foreign statute.¹⁹² Two years later, the principles underlying this ruling were adopted by the District Court for the Southern District of Ohio.¹⁹³ This case concerned two patent actions. The United States plaintiff sought a discovery order compelling the production of confidential business documents which had been generated by a chartered British patent agent advising a British company on questions relating to intellectual property rights. The court's holding that no privilege could be claimed to oppose the discovery order was based upon an analysis of whether the Civil Evidence Act of 1968 or the Act of 1977¹⁹⁴ of the United Kingdom provided a privilege for the communications concerned.¹⁹⁵ Since no privilege attached to the communications under British law, no privilege was available for recognition.¹⁹⁶

These decisions established the principle that privileges enjoyed by foreign patent advisers are to be recognized in United States discovery proceedings. However, the limitation regarding communications not "touching base with the United States"¹⁹⁷ and "patent activities" abroad¹⁹⁸ raises the problem of how to define United States and foreign advisory functions. The courts seemed to be prepared to examine in detail the documentary material in question so as to make this determination.

D. Medical Records

The doctor-patient privilege is another example of divergent levels of confidentiality protection in discovery proceedings. For example, under French law the doctor enjoys an absolute privilege to refuse disclosure of evidence relating to patients even if the person concerned has waived the protection accorded to this relationship. In addition, the privilege extends to the identity of the patient.¹⁹⁹ In a United States tort

¹⁹² *Id.* at 394.

¹⁹³ *Mead Digital Systems v. A.B. Dick Co.*, 89 F.R.D. 318 (S.D. Ohio 1980). *See also* *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954 (N.D. Ill. 1982).

¹⁹⁴ Patent Act, 1977, ch.37, § 104; Myrick & Love, *Obtaining Evidence Abroad for Use in United States Litigation*, 35 Sw. L.J. 585, 603-04 (1981).

¹⁹⁵ *Mead Digital Systems*, 89 F.R.D. at 320.

¹⁹⁶ *Id.* at 321.

¹⁹⁷ *Deering Milliken*, 397 F. Supp at 1169.

¹⁹⁸ *Ampicillin Antitrust*, 81 F.R.D. at 391.

¹⁹⁹ Report of the U.S. Delegation to the 11th Session of the Hague Conference on Private International Law, 8 INT'L LEGAL MATERIALS 785, 811-12 (1969); Nagel, *Das Berufsgeheimnis der Aerzte im Zivilprozess auf internationaler Ebene*, 55 DEUTSCHE RICHTERZEITUNG 33, 34 (1977); Note, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters - A Comparison with Federal Rules Procedures*, 7 BROOKLYN J. INT. L. 365, 394 n.130 (1981). *See also* Struve, *supra* note 97, at 1112.

For the German doctor-patient privilege see judgment of April 10, 1956, LG Koeln, 1956 NJW

action for asbestos poisoning, the plaintiff's motion to compel the production of confidential documents relating to medical examinations of employees was opposed by the defendant corporation on the ground of a medical records privilege.²⁰⁰ The medical files were located in Canada. As regards this privilege claim, the court held that Pennsylvania law "would look to the privilege law of Quebec where the doctor-patient relationships . . . arose." Under Pennsylvania privilege law, the information requested was not privileged.²⁰¹ The court concluded, however, that the defendant, who carried the burden of proving the foreign privilege, was unable to establish a medical records privilege under Quebec law.²⁰²

E. Foreign Government Secrets

Finally, the government secrets privilege has been at issue in a number of international discovery disputes. Under United States law, the government secrets privilege protects the state secrets involving military or diplomatic information,²⁰³ and government information including the identity of informers and internal management material relating to deliberative processes.²⁰⁴ In addition, executive officers may refuse to testify or to produce documentary evidence in certain situations.²⁰⁵

1112, and judgment of February 14, 1979, LG Hanau, 1979 NJW 2357. Protection extends to the doctor's documents: Judgments of July 4, 1984, May 31, 1983, and November 23, 1982, BGH, 1984, MDR 919, 1984 MDR 132-33 and 1983 MDR 298. Psychologists enjoy the same privilege, Kaiser, *Zeugnisverweigerungsrecht des Diplompsychologen*, 1971 NJW 491-94. The doctor-patient privilege has also been recognized by the Court of Justice of the European Communities. See *Moli v. Comm'n*, 1977 E. Comm. Ct. J. Rep. 1971, and *Mollett v. Comm'n*, 1978 E. Comm. Ct. J. Rep. 897.

²⁰⁰ *Petruska v. Johns-Manville*, 83 F.R.D. 32 (E.D. Pa. 1979).

²⁰¹ *Id.* at 35.

²⁰² *Id.*

²⁰³ In *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), Vinson, C.J., referring to the privilege against revealing military secrets, said: "Judicial experience with the privilege which protects military and state secrets has been limited in this country The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." See also *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963).

For protection of diplomatic secrets see *Kinoy v. Mitchell*, 67 F.R.D. 1, 8 (S.D.N.Y. 1975); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1966), *cert. denied* 389 U.S. 952 (1967).

²⁰⁴ For protection of the administrative process and government deliberations, see *Mobil Oil Co. v. Dep't of Energy*, 520 F. Supp. 414, 416 (N.D.N.Y. 1981).

The "deliberative process privilege" concerning administrative opinions, reasonings, and conclusions is a qualified privilege and the agency has to substantiate such a claim. *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26 (N.D. Tex. 1981). See also *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984).

²⁰⁵ *United States v. Nixon*, 418 U.S. 683 (1974); *Nader v. Butz*, 60 F.R.D. 381 (D.D.C. 1973). *Cox, Executive Privilege*, 122 U. PA. L. REV. 1383 (1974); *Hardin, Executive Privilege in the Federal Courts*, 71 YALE L.J. 879, 881 (1962).

In the context of international discovery proceedings where a "public interest" privilege is invoked, several situations have to be distinguished. First, a foreign government which is not subject to foreign sovereign immunity or which has waived the protection of sovereign immunity may still be entitled to claim a government secrets privilege with regard to certain information according to United States law or pursuant to a similar privilege granted by its own law.²⁰⁶ Second, foreign parties or non-party witnesses requested to testify or to produce documents in civil discovery proceedings in the United States may claim protection under a foreign government secrets privilege. Although the privilege is not private in nature under United States law, under some foreign legal systems private litigants enjoy the right to invoke this privilege in civil litigation. For example, in England and Canada, the Crown privilege may not only be claimed by the executive,²⁰⁷ but also by private litigants.²⁰⁸

Third, it is important to distinguish a state secret privilege claim raised by an United States defendant but based upon a foreign origin or source from a claim raised by a foreign defendant supported by the state secret law of another country. This distinction is emphasized in the ruling of the U.S. Court of International Trade in *Republic Steel Corp. v. United States*.²⁰⁹ In this countervailing duty case, the federal defendant invoked a state secret privilege with regard to administrative documents submitted by the Government of Brazil and the World Bank to the

²⁰⁶ The privilege of a foreign government to withhold official information or papers has been recognized in a number of cases: *Crosby v. Pacific S.S. Lines* 133 F.2d 470 (9th Cir. 1943), *cert. denied*, 319 U.S. 752; *Kessler v. Best*, 121 F. 439 (S.D.N.Y. 1903). In the latter case, documents which were part of the archives of the German consulate were held to be privileged. Upon motion to compel a witness to answer cross-questions, it was held that the privilege was that of the German government, not of the witness. See also Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 413-14 nn.150, 151 (1982).

Article 47 of the West German Constitution (*Grundgesetz*) gives members of Parliament a privilege to refuse disclosure of matters relating to their official activities.

²⁰⁷ Hardin, *supra* note 205, at 880 n.4 ("The British courts have supported the right of the executive or minister to decide what information should be kept secret in the public interest.")

²⁰⁸ For the Crown privilege in the United Kingdom and Canada see Comment, *Discovery in Great Britain: The Evidence (Proceedings in Other Jurisdictions) Act*, 11 CORNELL INT. L.J. 323, 337 (1978); Wood & Carrera, *supra* note 103, at 93.

In England, the Crown privilege is normally asserted by the executive department concerned but may be raised by the parties. The privilege is applicable where disclosure would be harmful to national defense or to good diplomatic relations. See House of Lords in *Conway v. Rimmer* (1968) A.C. 910. For a review of the history of the privilege, see *Burmah Oil Co. v. Bank of England*, (1979) 1 W.L.R. 473, 489-93. For the executive privilege under Irish law, see *Murphy v. Mayor of Dublin*, (1972) I.R. 215, 234.

²⁰⁹ 578 F. Supp. 409 (C.I.T. 1983). Taylor & Vermulst, *Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings Under United States Law*, 21 INT'L LAW. 43, 62-63 (1987).

United States Department of Commerce. The court applied United States principles relating to the state secret privilege and rejected the suggestion that a mere desire of a foreign sovereign or an international agency automatically qualified the information concerned as privilege under the standards and criteria of United States law.²¹⁰

The following case shows how those privilege conflicts have been resolved where foreign law was at issue. In the course of investigations concerning antitrust violations by world-wide operating oil corporations, a number of grand jury subpoenas were served on these corporations requiring, inter alia, the production of confidential communications between the defendants and foreign government authorities.²¹¹ The D.C. District Court rejected the corporation's claim of privilege and held that the privilege was "one that must be asserted by the foreign sovereign" and that it could "not be claimed by a party for his own benefit, particularly so when the party is not a national of the sovereign involved."²¹² This holding was affirmed in *Republic of China v. National Union Fire Insurance Co.*²¹³

These opinions, however, left the question unanswered as to whether a foreign sovereign or one of its instrumentalities, having consented to United States jurisdiction, or being amenable to local suit under the Foreign Sovereign Immunities Act²¹⁴ because of the commercial character of the action involved,²¹⁵ would still be entitled to claim a government secrets privilege based upon its own domestic law. The distinction between the question of whether there is jurisdiction, and of whether - once jurisdiction is established - a foreign sovereign is still entitled to claim privileges based upon its domestic legal system, is very important. The following decision has addressed this problem.

In 1984 the District Court for the Southern District of New York addressed a discovery dispute where the foreign plaintiff invoked a government privilege against the discovery of confidential documents concerning French interministerial, i.e., interdepartmental, deliberations sought by the United States defendant.²¹⁶ First, the court affirmed that such governmental deliberations may enjoy protection under United States law, but held that the claim was "neither described nor justified

²¹⁰ *Republic Steel Corp. v. United States*, 578 F. Supp. at 413.

²¹¹ *In re Investigation World Arrangements*, 13 F.R.D. 280 (D.D.C.1952).

²¹² *Id.* at 286.

²¹³ 142 F. Supp. 551, 556 (D. Md. 1956).

²¹⁴ 28 U.S.C. §§ 1330, 1332(a)(2),(4), 1391(f), 1441(d), 1602-1611 (1976).

²¹⁵ 28 U.S.C. § 1602 (1976).

²¹⁶ *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984).

with sufficient particularity.”²¹⁷ Second, as regards the objection to discovery on the ground of French law, the court held that no privilege could be asserted because the French statute in question concerned only the release of information to foreign public authorities.²¹⁸ The court thus distinguished between a privilege of general applicability and a blocking statute directed against foreign discovery requests. It implied that the former were to be recognized by a United States court. The court also supported this implication by its comments in a footnote that “even if the privilege had been properly invoked, the Court would likely have been inclined to find that COFACE [Campagne Francaise Assurance, the plaintiff], by instituting this action, waived the privilege.”²¹⁹ The court thereby reaffirmed the principle that a foreign plaintiff in a United States court may not avail himself of privileges not provided by the law of that forum.

It should also be noted that not only federal law but also state law has recognized the principle that foreign legal privileges not available under United States law may be asserted by a foreign litigant against United States discovery orders. In *Ghana Supply Commission v. New England Power Co.* (“NEPCO”),²²⁰ the Massachusetts District Court ruled on challenges raised by the foreign plaintiff to the defendant’s discovery motions on the ground of executive privilege.²²¹ The ruling of the court that no foreign executive privilege could be recognized was expressed in the following terms: “the Republic of Ghana, by instituting this civil action . . . , has waived any privilege it might have otherwise had to prevent disclosure of information sought by NEPCO that is material to NEPCO’s defense.”²²²

X. COMMENTS REGARDING THE RECOGNITION OF PRIVILEGES

The above described judicial opinions concerning the problem of privilege recognition were not based upon established legal doctrines or a comprehensive approach as to how foreign legal obstacles should be dealt with in United States discovery proceedings. Instead, they reflect a cautious case-by-case analysis. This judicial evolution towards a recognition of foreign privileges is partly reflected in the Restatement of Foreign Relations Law and coincides with positions taken by the Securities and Ex-

²¹⁷ *Id.* at 25.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ 83 F.R.D. 586 (D. Mass. 1979).

²²¹ *Id.* at 592.

²²² *Id.* at 594.

change Commission and the American Bar Association in two particular privilege areas. To complete this survey of non-judicial comments on foreign privileges two resolutions adopted by international organizations will be mentioned. They indicate general consensus as to the special nature of privileges in the field of transnational antitrust investigations. Again, none of these comments, propositions or positions attempts to suggest a legal theory regarding the problem of privilege recognition. Rather, they express specific concerns and evaluations of certain areas of discovery conflicts. However, taken together these sources provide academic and official support for the development of a comprehensive set of criteria upon which privilege recognition should be granted or refused.

A. The Restatement of Foreign Relations Law

The Restatement of Foreign Relations Law contains a brief reference to privileged matters.²²³ The Restatement mainly focuses on discovery conflicts arising from blocking statutes:

A communication privileged where made - for instance confidential testimony given to a foreign government investigation under assurance of privilege - would not be subject to discovery in a U.S. court, in the absence of waiver by those entitled to the privilege. If communications were made in more than one state - for instance, by letter or international telephone - the privilege would ordinarily be determined by the law of the state most closely linked to the subject of the communication.²²⁴

This statement is not further developed by the reporter's notes. It does not expressly address the general problem of whether foreign legal privileges which are not available under United States federal law may be recognized in United States discovery proceedings, but limits itself to certain kinds of confidential communications. The statement cited above does, however, answer the important question as to which country's privilege rules are to be applied if more than one country is concerned by a transnational communication.

As far as the problem of conflicts between foreign and United States privilege rules is concerned, the following statement relating to the more general question of how to determine the "relevant foreign and U.S. interests" should be cited:

In making its determination, the court or agency will look . . . to the way that confidentiality or disclosure fits into the regulation by the foreign state of the activity in question, and to reflections of the foreign state's concern for confidentiality in laws existing prior to the start of the controversy in

²²³ RESTATEMENT OF FOREIGN RELATIONS LAW § 437 comment d (1986) ("Discovery and Foreign Government Compulsion").

²²⁴ *Id.* § 437 comment c.

connection with which the information is sought.²²⁵

The Restatement's position, which is based upon an interest analysis, thereby embraces the principle that foreign privileges may be taken into account in United States discovery proceedings. The Restatement, however, gives no indication as to the circumstances under which foreign privileges not available in the United States are to be recognized.

B. Securities and Exchange Commission

As far as official statements of the United States Government on the problem of privilege recognition are concerned, the position taken by the Securities and Exchange Commission ("SEC") as regards foreign bank secrecy law opposing United States investigations into possible violations of United States securities laws is of particular interest. Even more than the law enforcement authorities in antitrust matters, the SEC has encountered increasing difficulties in obtaining documentary evidence located abroad and relating to fraudulent international securities transactions. In order to overcome legal challenges to its discovery subpoenas on the ground of foreign legal protections of confidential information, the SEC has suggested the "waiver by conduct" concept.²²⁶

This concept is related to the "forced waiver" doctrine which has been applied by United States courts to deal with refusals to provide evidence relating to bank accounts located in countries with special secrecy protection.²²⁷ It was held that judicial compulsion in order to force a holder of a foreign bank account to relinquish the privilege enjoyed under foreign laws does not amount to a violation of the Fifth Amendment of the United States Constitution.²²⁸

The "waiver by conduct" concept imposes an assumption that the purchase or sale of securities in the United States constitutes an implied waiver of the applicability of foreign secrecy laws protecting information relating to such a transaction. The person concerned, though enjoying foreign nondisclosure rights, would be regarded as consenting to any future discovery requests emanating from United States law enforcement authorities relating to investigations into securities transactions con-

²²⁵ *Id.* § 437 comment d.

²²⁶ Fedders, *supra* note 122, at 106-07; Request for Comments Concerning a Concept to Improve the Commission's Ability to Investigate and Prosecute Persons who Purchase or Sell Securities in the U.S. Markets from Other Countries, Release No. 21186, File No. S7-27-84, July 30, 1984, 16 SEC. REG. & L. REP. (BNA) 1305 (1984). *See also* Fedders, Wade, Mann & Beizer, *supra* note 121, at 3-4. Haseltine, *supra* note 121, at 310-11.

²²⁷ Friedman & Wilson, *supra* note 21, at 407-09.

²²⁸ *United States v. Ghidoni*, 732 F.2d at 819. Anwarter, *Compelled Waiver of Bank Secrecy in the Cayman Islands*, 9 FORDHAM INT'L L.J., 680, 700 (1986).

nected with the United States. An early formulation of this concept can be found in *United States v. The Watchmakers of Switzerland Information Center Inc.*²²⁹ In this case, Judge Walsh ordered Swiss companies doing business in the United States through affiliated organizations to answer interrogatories despite asserted penalties to which the defendants would be liable under the Swiss Penal Code. The court entered an order for the defendants to answer and held that:

Now that is the choice defendants must make (i.e., whether to subject themselves to the jurisdiction of a country by doing business there) and it is a choice which confronts all people who do business in foreign countries, and many times existing in the forum in which the litigation arises. After all, we can't be expected to yield to laws of all the various countries of the world, and we would not expect them to yield to ours.²³⁰

The "waiver-by-conduct" concept, i.e., the non-availability of foreign privileges in United States securities discovery proceedings, is based upon two premises. First, the SEC proposition recognizes implicitly foreign privileges based upon secrecy laws, because it assumes that unless such a privilege is waived, the foreign person under investigation is under no obligation to comply with United States discovery orders. At the same time, the concept purports to provide a legal basis for foreign banks or other institutions holding the confidential information to release the evidence requested without violating their contractual duties towards their customers. The implied recognition of the foreign national's privilege coincides with a great number of court decisions mentioned earlier.

Second, the SEC concept assumes that an implied waiver is valid under the foreign legal system concerned. Since the existence of a foreign privilege is determined by foreign law, the same legal system must answer the question of whether the privilege has been validly waived. If the foreign law concerned does not consider mere conduct as a sufficient declaration as regards the waiver of a legal right, the foreign privilege would continue to exist.

C. American Bar Association

As far as comments and opinions of private institutions on the issue of privilege recognition are concerned, the position taken by the Ameri-

²²⁹ Hansen, *The Enforcement of the United States Antitrust Laws by the Dept. of Justice*, 11 A.B.A. Sec. ANTITRUST 75, 86 (1957)(quoting *United States v. Watchmakers of Switzerland Information Center*, No. 96-170 (S.D.N.Y., Feb. 19, 1957)(order demanding answer to interrogatories). See also *Fontaine v. SEC*, 259 F. Supp. 880 (D.P.R. 1966); *Montship Lines, Ltd. v. Federal Maritime Comm'n.*, 295 F.2d 147 (D.C. Cir. 1961); *SEC v. Minas de Artemisa*, 150 F.2d 215 (9th Cir. 1945).

²³⁰ *Id.*

can Bar Association ("ABA") on the recognition of attorney-client privileges in an international context merits attention. The ABA statement followed the judgment of the Court of Justice of the European Communities in the case *A.M. & S. Europe Ltd. v. Commission*.²³¹ This case concerned the scope of the investigative powers of the Commission of the European Communities in antitrust matters according to article 14(1) of EEC Regulation No. 17.

Neither the Regulation nor the Statute of the Court of Justice contain provisions exempting confidential business information from compulsory disclosure on privilege grounds, not even regarding the privilege against self-incrimination. However, the Court of Justice held that the corporation under investigation was entitled to refuse disclosure of those business records that were covered by the attorney-client privilege. The court based its recognition of this privilege upon general principles of law common to the laws of all Member States²³² but limited the privilege to independent lawyers from Community Member States.²³³

The fact that in-house lawyers as well as lawyers from non-Community countries were excluded from the benefits of this judgment was criticized by the ABA. It requested the Commission to accord a client's written communications with a United States lawyer the same procedural protections against disclosure as a client's correspondence with a Community lawyer.²³⁴ Among the reasons invoked by the ABA the following argument is particularly interesting: the ABA states that United States courts and antitrust enforcement agencies draw no distinction between United States and foreign lawyers when faced with a claim of attorney-client privilege. Therefore, as a matter of comity, the Commission should accord clients with confidential communications to or from United States lawyers the same right.²³⁵ According to the ABA, "United States courts recognize that, to maintain order and stability within the international community, they must in appropriate circumstances accommodate the rights and privileges afforded by foreign legal

²³¹ 1982 E. Comm. Ct. J. Rep. 1575. Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, 1986 LEGAL ISSUES OF EUR. INTEGRATION 1.

²³² *A.M. & S. Europe Ltd. v. Comm'n*, 1982 E. Comm. Ct. J. Rep. at 1610, 1611.

²³³ *Id.* at 1611, 1612.

²³⁴ Report from the European Law Committee, ABA International Law and Practice Section (Feb. 1983)[hereinafter Report]. The exclusion of in-house from the protection of confidentiality has also been criticized by European observers. See Ghandi, *Legal Professional Privilege in European Community Law*, 1982 EUR. L. REV. 308, 313; Lasok, *AMaS—The Court Decides*, 1982 EUR. CT. L. REPORT 99, 102-03; Forrester, *Legal Professional Privilege*, 1983 COMMON MKT. L. REV. 75, 82.

²³⁵ Report, *supra* note 234, at 9. Under English law, foreign legal advisers are in the same position (for the purposes of legal professional privilege) as are English lawyers. *Law Reports—Court of Appeal, Great Atlantic Insurance Co. v. Hane Insurance Co.*, The Times (London), Feb. 3, 1981.

systems.”²³⁶

With regard to the recognition of an attorney-client privilege involving a foreign lawyer, the ABA report assumes that no court or antitrust enforcement agency would apply a different privilege rule to communications with a foreign lawyer who is not admitted to the bar of a State of the United States.²³⁷ On the other hand, the report assumes that the limitations as to the scope of the United States privilege that apply to a communication with a United States lawyer also apply to a communication with a foreign lawyer. As an example, the report cites the case where the client waives the protection of the privilege.²³⁸ This statement seems to be inconsistent with the preceding assertion that United States law would recognize a foreign attorney-client privilege. For example, in a case where according to foreign law the attorney retains his privilege not to disclose documentary evidence despite a waiver by his client, such an independent attorney privilege would not be recognized under United States law.

The case law cited by the ABA concerning privileged communications with foreign patent agents seems to be more consistent with the assertion that United States law is not hostile to the idea of recognizing foreign privileges.²³⁹ The report emphasizes that United States courts have refused to order the production of communications with foreign patent agents when the law of the foreign country provided a privilege for those communications.²⁴⁰ This favorable approach adopted by United States courts with regard to the recognition of foreign privileges in the field of patent counseling has been described earlier in this Article.

The question remains regarding how United States courts would deal with a situation in which the law of the country where the foreign attorney resides provides for a wider attorney-client privilege than is available under United States law. This is not a theoretical question, but an issue of considerable practical importance. Since the interests of the attorney and his client do not necessarily coincide, the attorney may have his or her own interest in maintaining the confidentiality of certain written communications even though the client has waived his or her privi-

²³⁶ Report, *supra* note 234 (citing *Hilton v. Guyot*, 159 U.S. 113 (1895)).

²³⁷ *Id.* at 14.

²³⁸ *Id.* at 14 n.53.

²³⁹ *Id.* at 14, 15.

²⁴⁰ See, e.g., *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 953-54 (N.D. Ill. 1982). See also BEUSCH & DECKER, *DER SYNDICUSANWALT* 17, 33 (1987) (The In-House Lawyer). The authors discuss the reverse problem, i.e., whether a United States court would grant privilege protection to international communications between lawyers if the foreign lawyers involved could not claim a privilege under foreign law. *Id.* at 35, 36.

lege. Given the wide variety of cases which have dealt with the problem of recognition of foreign privileges, it seems impossible to predict how a United States court would resolve this problem.

D. International Agencies

Both the United Nations and the Organization for Economic Cooperation and Development ("OECD") have discussed mechanisms through which the international cooperation in antitrust matters could be improved and have adopted resolutions regarding the exchange of business information between antitrust enforcement authorities. However, they have not addressed the discovery of confidential commercial data pertaining to enterprises in international judicial proceedings.

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the General Assembly of the United Nations provides as follows:

5. Where, for the purposes of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality. . . .

9. States should . . . supply to other States . . . publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of restrictive business practices.²⁴¹

These two subsections do not use the term privilege, but the reference to "business secrets" as protected by national laws indicate international consensus as to the substantive quality of foreign non-disclosure rights relating to confidential commercial information.

The OECD Guidelines for Multinational Enterprises calls on these enterprises "to consult and cooperate, including the provision of information, with competent authorities of countries whose interests are directly affected in regard to competition issues or investigations" emphasizing that the "provisions of information should be in accordance with safeguards normally applicable in this field."²⁴² This reference to normal safeguards reflects the difficulty of reaching an agreement among OECD Member States regarding a definition of those legal provisions granting a right to refuse the disclosure of confidential business information in the area of antitrust investigations.

However, the OECD Guidelines have been interpreted to cover

²⁴¹ 35th Session, Resolution 35/63, December 5, 1980, U.N. Doc. TD/RBF/CONF/10/Rev. 1 § E.

²⁴² Adopted Aug. 9, 1978, OECD Doc. C (78)(133)(Final); see also Christoforou, *supra* note 231, at 39.

"safeguards" available under United States law as well as the laws of the other OECD Member States,²⁴³ "[f]or example the confidentiality of trade secrets and competitively sensitive information, and evidentiary privileges such as the attorney-client privilege."²⁴⁴ A similar view was expressed by J. Davidow, the then head of the Foreign Commerce Section of the Antitrust Division, U.S. Justice Department.²⁴⁵

XI. REJECTION OF INTEREST BALANCING

The legal theory that foreign privileges not available under United States law should be capable of recognition in United States discovery proceedings raises the question as to the conditions and circumstances under which a conflict between the Federal Rules of Civil Procedure and foreign legal protections is to be resolved in favor of the latter. So far, most United States courts have resorted to a balancing of interests in order to determine whether foreign law should prevail over United States discovery principles. The Restatement of Foreign Relations Law has attempted to define this balancing test.²⁴⁶

This Article rejects the interest analysis as an unreliable, biased, impracticable, and counterproductive device to resolve international discovery conflicts, especially with regard to the problem of foreign privileges. Instead, it proposes a certain number of criteria which seem more appropriate to resolve conflicts between the Federal Rules of Civil Procedure and foreign legal protections concerning testimonial and documentary evidence.

The most prominent rejection of the often applied balancing test in the field of international discovery conflicts is contained in the dissenting opinion to the Supreme Court decision in *Société Nationale Industrielle Aérospatiale*: "[C]ourts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own. Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood."²⁴⁷

²⁴³ Hawk, *The OECD Guidelines for Multinational Enterprises*, 46 FORDHAM L. REV. 241, 274-75 (1977).

²⁴⁴ *Id.* at 275.

²⁴⁵ Davidow, *Some Reflections on the OECD Antitrust Guidelines*, 22 ANTITRUST BULL. 441, 455 (1977). See also Davidow, *Extraterritorial Antitrust Law and the Concept of Comity*, 15 J. WORLD TRADE L. 500 (1981).

²⁴⁶ RESTATEMENT OF FOREIGN RELATIONS LAW § 437.

²⁴⁷ *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2560 (Blackmun, J. dissenting). See also *id.* at n.3 (remark emphasizing that governmental interests are "far more complicated than can be represented by the limited parties before a court.").

This skepticism of the four dissenting Supreme Court Justices concerning the balancing of interests in order to resolve international discovery conflicts has been shared by other federal courts.²⁴⁸ This judicial reluctance to examine United States and foreign interests coincides with academic criticism emphasizing that courts have not been neutral and generally "balanced" in favor of the forum.²⁴⁹ Also, United States courts have not always distinguished between conflicts concerning the extraterritorial application and enforcement of substantive laws and the differences between legal systems in the area of discovery procedures.²⁵⁰

Apart from the pro-forum bias, the analysis evaluating the importance of the foreign element has been incomplete. The interest analysis in its emphasis on official expressions of foreign concern arbitrarily prejudices those foreign defendants or witnesses who are, for whatever reason, unable to muster their government's support for their opposition to United States discovery orders. As experience has shown, foreign governments are much more likely to intervene on behalf of the interests of large corporations. Smaller companies find it more difficult to obtain official interventions on their behalf, especially if only private interests are involved.²⁵¹ In addition, since statements of foreign governments focus on a particular international legal conflict, these positions are liable to

²⁴⁸ *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 951-55 (D.C. Cir. 1984)(Wilkey, J.); *Westinghouse Electric Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979)(Marshall, J.):

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 interest here display an irreconcilable conflict on precisely the same plane of national policy. . . . It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions.

See also *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 609 (9th Cir. 1975)(balancing as a "judicial nightmare"); *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 741 (C.D. Cal. 1975)("unanswerable enigma").

²⁴⁹ See also Kahn, *The British Protection of Trading Interests Act*, 2 NW. J. INT'L L. & BUS. 476 (1980); Anwarter, *supra* note 228, at 717-18; Note, *Foreign Nondisclosure Laws*, *supra* note 1, at 620-21; Bishop, *supra* note 23, at 402; Maier, *supra* note 98, at 296-97; Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 581-82 and 588-95 (1983)("The balancing of interests is nothing but the assertion of the primacy of United States interest in the guise of applying an international jurisdictional rule of reason.").

See also *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2560 n.4 (Blackmun, J. dissenting) (criticizing the "pro-forum bias" and the "local perspective" emerging from lower court decisions in international discovery conflicts).

²⁵⁰ Maier, *supra* note 98, at 298. Examples of cases where primacy of United States substantive interests were affirmed are given by Anwarter, *supra* note 228, at 720 (tax, antitrust, securities laws).

²⁵¹ The dissenting opinion in *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2560-61 (footnotes omitted), has emphasized this aspect as follows:

In addition, it simply is not reasonable to expect the Federal Government or the foreign state in which the discovery will take place to participate in every individual case in order to articulate the broader international and foreign interests that are relevant to the decision whether to use the Convention. Indeed, the opportunities for such participation are limited.

change in a different context. For this reason, the authority of such official interventions to define foreign law is considerably diminished. The interest test cannot be applied uniformly because official statements defining national interests are not always available and often subject to political considerations. The balancing test therefore implies the possibility that foreign litigants are treated unequally. Considering these facts it is surprising to see how readily many courts have accepted foreign government interventions as important factors regarding the resolution of international discovery conflicts.

An instructive example is the insufficient appreciation and disqualification of foreign privileges²⁵² as compared to foreign blocking statutes. However, it has never been explained why a foreign statute designed to obstruct United States discovery proceedings should command greater respect in United States courts than long-standing substantive rights protecting certain types of evidence.²⁵³ It would be indeed difficult to argue that foreign legal prohibitions concerning the taking of testimony or the production of documents should be more highly valued because they reflect a greater interest in the preservation of secrecy than does the vesting of a privilege. In fact, the Supreme Court has expressly rejected the idea that foreign litigants invoking a blocking statute might enjoy a "preferred status" in United States discovery proceedings²⁵⁴ as compared to those foreign parties or witnesses who invoke "only" a privilege applicable in their country but not available under United States law. Following a perception of such insufficient appreciation of foreign privileges, the enactment of a German blocking statute has been advocated so as obtain "quasi-diplomatic" protection and therefore "better chances" in United States discovery proceedings for the confidentiality concerns of German defendants.²⁵⁵

In addition, it should not be overlooked that the taking into account of foreign blocking statutes and government protests against United States attempts to obtain evidence abroad as a source of inspiration for

See Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 *FORDHAM L. REV.* 877, 894 (1981).

²⁵² *United States v. First National City Bank*, 396 F.2d at 903-04 ("simply a privilege that can be waived"). See also Note, *Limitations*, *supra* note 82, at 1458. See generally Wilkey, *Transnational Adjudication: A View from the Bench*, 18 *INT'L LAW.* 541, 543 (1984); Ristau, *Overview of International Judicial Assistance*, 18 *INT'L LAW.* 525, 531 (1984).

²⁵³ Schlosser, *supra* note 68, at 398 (describing privileges under French, British and German law); Gerber, *supra* note 22, at 764. See also Meessen, *supra* note 95, at 844-45 (privileges as part of constitutional rights protecting privacy and property).

²⁵⁴ *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2556 n.29.

²⁵⁵ STUERNER, LANGE & TANIGUCHI, *DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN*, 107 (1986)(comments of H. Golsong).

resolving discovery conflicts²⁵⁶ is liable to invite even more public interventions of this kind and to encourage further confrontation. It would thus punish those countries which so far have exercised restraint in international discovery conflicts and accord more favorable treatment to countries with more hostile attitudes towards United States discovery proceedings. Furthermore, the long-term discovery interests of United States plaintiffs are hardly served by the balancing of interests because this formula subjects international litigation to very uncertain criteria. Considering the history of international discovery conflicts with respect to privileges, it could be argued that it was also the inadequate examination of foreign legal protections concerning business secrets and other confidential information which has provoked foreign protests²⁵⁷ and contributed to the enactment of blocking statutes.²⁵⁸

The Supreme Court opinion in *Société Nationale Industrielle Aérospatiale* seems to recognize the equal value of foreign legal protections as opposed to blocking statutes which "need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States."²⁵⁹ Without mentioning privileges, the Supreme Court acknowledged that "some discovery procedures are much more 'intrusive' than others." The Court also commented that "American courts, in supervising pretrial proceedings, should exercise

²⁵⁶ Paikin, *supra* note 27, at 326 (examples of cases where foreign government intervention was given weight in the interest analysis). See also *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111, 118 (S.D.N.Y. 1981) ("Neither the United States nor the Swiss Government has suggested that discovery be halted."); *United States v. First National City Bank*, 396 F.2d at 904 ("[I]t is noteworthy that neither the Department of State nor the German Government has expressed any view on this case . . ."); *In re Grand Jury 81-2*, 550 F. Supp. 24, 28 (W.D. Mich. 1982) ("Neither am I convinced that the German Government has taken a position against disclosure of the records.")

²⁵⁷ These protests were especially pronounced in cartel cases. For a compilation of these interventions with texts of diplomatic notes, see Haight, *Extracts From Some Published Material on Official Protests, Directives, Prohibitions, Comments, Etc.*, in FIFTY-FIRST CONFERENCE, *supra* note 25, at 565-92.

²⁵⁸ *Société Nationale Industrielle Aérospatiale*, Brief of the Federal Republic of Germany, 1986 INT'L LEGAL MATERIALS 1539, 1542; Comment, *The Protection of Trading Interests Act of 1980—Britain's Latest Weapon in the Fight Against United States Antitrust Law*, 4 FORDHAM INT'L L.J. 341, 372 (1981); Note, *Compelling Production*, *supra* note 73, at 895-96 (blocking statutes enacted in anticipation of future litigation); Rahl, *supra* note 1, at 373.

²⁵⁹ *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2556 n.29, citing RESTATEMENT OF FOREIGN RELATIONS LAW, § 437, Reporter's Note 5. See also Brief of the Securities and Exchange Commission, 1986 INT'L LEGAL MATERIALS 1504, 1516:

(F)oreign nations will often have more specific and concrete interests that merit accommodation from United States courts. Foreign laws may provide particular protection to various liberty, property and privacy interests, according business secrets or confidential communications (for example) special immunity from disclosure. Foreign nations may also provide testimonial privileges that are generally absent in this Nation's courts. In these instances, a foreign government may have understandable concerns that unbridled United States discovery will infringe substantive protections provided to its citizens.

special vigilance to protect foreign litigants.”²⁶⁰

XII. PROPOSAL FOR THE RECOGNITION OF FOREIGN PRIVILEGES

It follows from these considerations that in United States discovery proceedings, recognition of foreign privileges as an expression of important values should be granted on the basis of judicial “self-restraint”²⁶¹ as regards the exercise of discovery powers against foreign parties or witnesses. Judicial respect for substantive rights enjoyed under foreign law is especially important in the stage of jurisdictional discovery. If *in personam* jurisdiction is challenged by a foreign party, principles of due process require that foreign legal privileges are respected.²⁶² Similar considerations apply to foreign witnesses who are not party to the dispute.²⁶³ The recognition of foreign privileges should not be limited to privileges which are similar to those established under United States law.²⁶⁴ A “shared values” test would limit privilege recognition to those cases where the same type of privilege exists under both legal systems but where the privilege in question differs in scope, for example as to the conditions under which the privilege is waived. Such a comparative analysis would finally lead to judicial determinations based upon United States privilege values and might lead to new legal difficulties.

Recognition of foreign privileges should be accorded on the basis of a certain number of easily identifiable criteria. These elements would assure a high degree of predictability in the field of evidentiary conflicts and thus enhance legal certainty.²⁶⁵ It should be noted that the Supreme

²⁶⁰ *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2557. See also *id.* at 2563 (Blackmun, J., dissenting), discussing “protection of certain underlying substantive rights.”

See also Maier, *supra* note 98, at 312-14; *Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 8-9 (1971). In this case where a forum selection clause was at issue, the Supreme Court rejected the “parochial concept” that all disputes must be resolved under United States law as follows: “We cannot have trade and commerce in world markets . . . exclusively on our terms governed by our laws and resolved in our courts.”

²⁶¹ *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2560 n.4 (Blackmun, J., dissenting). See also Gerber, *supra* note 22, at 764-67 (“privacy spheres”); Christoforou, *supra* note 231, at 40.

²⁶² Note, *The Use of Discovery to Obtain Jurisdictional Facts*, 59 VA. L. REV. 533, 546-47 (1973). See also *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1981). It is interesting to note that in this case the foreign defendant did not invoke a privilege to justify the refusal to produce confidential insurance policies but objected to discovery on the grounds of burdensomeness and lack of control over the documents in question. *Id.* at 698.

²⁶³ *Developments*, *supra* note 44, at 1050; Gerber, *supra* note 22, at 786; Struve, *supra* note 97, at 1103; Friedman & Wilson, *supra* note 21, at 334, 348-49; *Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corp.*, [1986] 2 W.L.R. 453, 460, 462 (Ch. D.).

²⁶⁴ Grossfeld & Rogers, *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law*, 32 INT’L & COMP. L.Q. 931, 941 (1983).

²⁶⁵ The Supreme Court has emphasized the principle of “predictability essential to any international business transaction” with regard to the enforcement of international arbitration agreements,

Court in *Société Nationale Industrielle Aérospatiale* expressly refrained from establishing criteria regarding the application of the Hague Evidence Convention.²⁶⁶ Recognition of foreign privileges in international discovery conflicts should be granted on the basis of criteria different from those established by the Restatement (Second) of Conflict of Laws concerning United States interstate privilege conflicts which states that:

Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.²⁶⁷

Foreign parties or witnesses invoking a privilege must raise this objection in time and substantiate their claim of protection. The person opposing discovery on privilege grounds carries the burden of establishing the existence of such a right both from a factual and legal point of view.²⁶⁸ If necessary, expert testimony is to be called.²⁶⁹ In those cases where expert opinion was contradictory or unclear United States courts have determined foreign law in their own judgment.²⁷⁰ Any remaining doubts as to the existence and the scope of a foreign privilege must go to the disadvantage of the person invoking the privilege.

This Article suggests the following exclusionary criteria according to which foreign privileges not available under United States federal law invoked by foreign litigants or non-party witnesses should not be recognized in United States discovery proceedings. Some of these criteria have been inferred from the above reviewed case law.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 507 (1974). The Supreme Court rejected the exclusive application of "United States standards of fairness" holding that such notion "demeans the standards of justice elsewhere in the world, and unnecessarily exalts the privacy of United States law over the laws of other countries." *Id.* at 517, n.11.

²⁶⁶ 107 S. Ct. at 2555-56.

²⁶⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2)(1971); Grossfeld & Rogers, *supra* note 264, at 940.

²⁶⁸ Miller, *supra* note 75, at 638; Graco v. Kremlin, 101 F.R.D. 503, 516-17 (N.D. Ill. 1984)(waiver of a privilege because of failure to assert it properly). See also Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMP. L. 97, 108-09 (1981).

²⁶⁹ Istituto per lo Sviluppo Economico v. Sperti Products, Inc., 323 F. Supp. 630 (S.D.N.Y. 1971); Miller, *supra* note 75, at 658; Peritz, *Determination of Foreign Law Under Rule 44.1*, 10 TEX. INT'L L.J. 67, 74-76 (1975); Note, *Limitations*, *supra* note 82, at 1442, 1464.

²⁷⁰ First National City Bank v. Compania de Aguaceros, S.A., 398 F.2d 799 (5th Cir. 1968); Ramsay v. Boeing, 432 F.2d 592 (5th Cir. 1970). In SEC v. Minas de Artemisa S.A., 150 F.2d 215 (9th Cir. 1945), the court modified a subpoena requiring the production in Arizona of corporate books located in Mexico, since compliance would have required a violation of Mexican law. As modified, the subpoena ordered the corporation to apply to Mexican fiscal authorities for permission to remove the books, or, in the alternative, to require the corporation to allow the SEC to copy the books in Mexico, thus avoiding a violation of Mexican law. See also *In re Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962).

As outlined earlier, *blocking statutes* designed to obstruct foreign discovery proceedings²⁷¹ cannot be qualified as conferring privileges. This applies not only to statutes which have been enacted recently as a reaction to United States discovery orders, such as the British Protection of Trading Interests Act,²⁷² but also to long-standing foreign legislation which distinguishes between disclosure requirements in a domestic context and foreign discovery orders.

Swiss law provides an example of the latter type of law.²⁷³ Although Swiss banking secrecy was established before the first international discovery disputes arose²⁷⁴ it should be noted that Article 273 of the Swiss Criminal Code applies only to the disclosure of business information to *foreign* persons or authorities.²⁷⁵ Article 47 of the Swiss Bank Act prohibits secrecy violations concerning financial information generally, not especially with regard to foreign subjects. However it provides also that federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority "*shall remain reserved*."²⁷⁶ A closer look at Swiss law relating to civil, criminal and administrative proceedings reveals that in domestic proceedings in Switzerland the bank secrecy privilege, i.e., the right of the bank to refuse disclosure of financial information to judicial or administrative authorities, is greatly restricted.²⁷⁷ While most cantonal codes of civil and criminal procedure grant privileges to clergymen, physicians and lawyers, bankers are excluded.²⁷⁸ Only a few cantons grant a bank secrecy privilege in civil proceedings.²⁷⁹

²⁷¹ Note, *Shortening the Long Arm of United States Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L.A.L. REV. 213 (1982). Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U.J. INT'L L. & POL. 417, 420-21 (1977).

²⁷² Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 1980, 75 AM. J. INT'L L. 257 (1981).

²⁷³ Meyer, *Banking Secret and Economic Espionage*, 28 GEO. WASH. L. REV. 284 (1954); Mueller, *The Swiss Banking Secret From a Legal View*, 18 INT'L & COMP. L.Q. 360 (1969); Kelly, *United States Foreign Policy: Efforts to Penetrate Bank Secrecy in Switzerland From 1940 to 1975*, 6 CAL. W. INT'L L. J. 211 (1976); Meyer, *Swiss Banking Secrecy and its Implications in the United States*, 14 NEW ENG. L. REV. 18 (1978)[hereinafter *Swiss Banking*].

²⁷⁴ Meyer, *Swiss Banking*, *supra* note 273, at 24.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 27. See also Comment, *Foreign Bank Secrecy and the Evasion of United States Securities Laws*, 9 N.Y.U.J. INT'L L. & POL. 1061, 1064-65 (1984)[hereinafter *Foreign Bank Secrecy*].

²⁷⁷ Meyer, *Swiss Banking*, *supra* note 273, at 30-31.

²⁷⁸ *Id.* at 31.

²⁷⁹ *Id.* at 32. See also Note, *Compelling Production*, *supra* note 73, at 901; *Société Nationale Industrielle Aérospatiale*, Brief for Switzerland, 1986 INT'L LEGAL MATERIALS 1549, 1554. The limits to Swiss secrecy provisions and the disclosure requirements in banking matters have been described by Aubert, *The Limits of Swiss Banking Secrecy Under Domestic and International Law*, 2

This Article suggests that foreign privileges should be recognized in United States discovery proceedings only to the extent they may be invoked in the same type of proceedings in the foreign country concerned.²⁸⁰ If under foreign law a privilege is only available in civil litigation but not in criminal cases, such a distinction should also apply in United States discovery proceedings. As outlined above, a banker's privilege is recognized under the German Code of Civil Procedure, but *not* under the German Code of Criminal Procedure.²⁸¹

Second, as far as the nature of the discovery proceedings is concerned, it should be noted that the courts have limited their willingness to recognize foreign privileges to *private* litigation, while privilege claims in administrative or grand jury investigations have been rejected. The more accommodating position towards the nondisclosure of privileged information in most of the above described civil cases represents a significant choice in favor of certain private interests protected by foreign substantive laws over conflicting interests of United States litigants in the full disclosure of confidential evidence.

In contrast, United States courts have refused to recognize foreign privilege claims which had been advanced by United States citizens as well as by foreign parties and witnesses against discovery orders by United States law enforcement authorities in tax and securities investigations. As far as United States citizens were concerned, these privilege claims were rejected on the ground that the subjection of United States subjects to United States tax and securities laws could not suffer an exception simply because certain commercial or financial information was located in a foreign jurisdictions where this evidence was privileged.

INT'L TAX & BUS. L., 273, 280-81 (1984). Olson, *Discovery in Federal Criminal Investigations*, 16 N.Y.U.J. INT'L L. & POL. 999, 1003, 1010 (1984)(citing examples of "inconsistent representation and legal theories about foreign law").

²⁸⁰ In *United States v. Field*, 532 F.2d 404, the defendant sought to prevent a grand jury from obtaining information in the Cayman Islands that would have been obtainable by officials there for their own investigatory purposes. The Court in denying the defence held that "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' rights of privacy would be significantly infringed simply because the investigating body is a foreign tribunal." *Id.* at 408. For a similar position with respect to the Bahamian bank secrecy law see *United States v. Bank of Nova Scotia*, 691 F.2d 1384 ("It is incongruous to suggest that a United States court afford greater protection to the customer's right of privacy than would a Bahamian court simply because this is a foreign tribunal." *Id.* at 1391 (citing *United States v. Field*, *supra*). See also *Foreign Bank Secrecy*, *supra* note 276, at 439.

²⁸¹ *United States v. First National City Bank*, 396 F.2d at 897. See S. SICHTERMANN, *supra* note 119, at 37-38 and 208-09. See also *Payner v. United States*, 447 U.S. 727, 732 n.4 (1980)(citing the Bahamian Banks Act and concluding, "The statute is hardly a blanket guarantee of privacy. Its application is limited; it is hedged with exceptions; and we have been directed to no authority construing its terms.").

As to investigative subpoenas addressed to foreign nationals, United States courts have affirmed the overriding importance of those fact-finding processes designed to ascertain infringements of United States laws. In *SEC v. Banca della Svizzera Italiana*, Judge Pollack ruled on the foreign defendant's claim of bank secrecy against a United States grand jury investigation concerning securities laws violations as follows: "[i]t 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."²⁸²

As to the trial position of the person claiming a privilege, rights of plaintiffs and defendants have to be distinguished. As to the former, United States courts have opposed attempts by foreign plaintiffs to rely upon privileges available under their domestic legal systems against discovery requests by United States parties. The courts have rejected the notion that foreign plaintiffs could avail themselves of privileges not recognized by the forum and have emphasized the principle that the plaintiff by his action subjects himself to the *lex fori*.²⁸³ A foreign *plaintiff* should therefore *not* be permitted to seek relief in another forum and rely upon a different legal system to refuse disclosure of evidence.²⁸⁴

Another limitation to the recognition of foreign privileges in United

²⁸² 92 F.R.D. 111, 119 (S.D.N.Y. 1981). See also *United States v. Bowe*, 694 F.2d 1256 (11th Cir. 1982)(attorney-client privilege under Bahamian law not applicable to grand jury discovery proceedings in another jurisdiction); Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U.J. INT'L L. & POL. 999 (1984).

²⁸³ Dunham, *supra* note 76, at 50, 51, 53; Weinstein, *supra* note 76, at 535-44; Bishop, *supra* note 23, at 404; Friedman & Wilson, *supra* note 21, at 332, 346; Gerber, *supra* note 22, at 786.

²⁸⁴ The International Law Association gave the following comment in its Report of the Fifty-Second Conference (1966):

Where a non-resident alien chooses to appear as claimant he must submit to the procedure of the court in which he applies, including its procedure of discovery; and again it is no answer merely that the documents are abroad, or that discovery is illegal by the *lex situs*. Where a non-resident alien fails to comply with a discovery order properly made, there is nothing in international law that would preclude the court from making inferences against him in accordance with its own law of evidence; or, from dismissing the claim or striking out the defense, as the case may be.

Id. at 112. See also *Soletanche & Rodio v. Brown & Lambrecht*, 99 F.R.D. 269, 271 (N.D. Ill. 1983).

As regards foreign sovereigns suing in United States courts, this principle was established by the Supreme Court in *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1937)(citations omitted):

It is true that upon the principle of comity foreign sovereigns and their public property are not to be amenable to suit in our courts without their consent. . . . But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. . . . By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that.

The Supreme Court cited various cases where it was held that "a foreign sovereign as suitor is

States discovery proceedings which can be derived from the cases discussed in this Article could be characterized as a *bad faith exception*.²⁸⁵ United States courts have emphasized their hostility to the recognition of foreign privileges in those cases where the defendant opposing disclosure of certain information transfers this evidence to another country with the express purpose to obstruct United States discovery proceedings. Commercial or financial documents can therefore not be protected from disclosure under a foreign privilege if the location of this evidence is not the result of normal business transactions²⁸⁶ but rather an attempt to evade United States law enforcement or to conceal information from the opponent.²⁸⁷ This bad faith exception has been summarized as follows:

Defendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad. Nor can it shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliate abroad. If defendant could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents.²⁸⁸

Another U.S. District Court has described this exception as the "deliberate courting of legal impediments to the production of documents."²⁸⁹

Under the principles of comity²⁹⁰ the mutual respect for other legal systems in international relations implies that United States courts are entitled to limit the recognition of privileges to persons of those countries whose courts are equally prepared to recognize United States privileges in a reverse situation. For example, the reciprocity principle is embodied in the above mentioned exchange of notes between the United States and the Federal Republic of Germany concerning diplomatic and consular depositions by which both countries accord each other privileged status as compared to the other signatories of the Hague Evidence Convention.²⁹¹ The necessity of reciprocal tolerance with a view to "a well functioning international order" has also been emphasized by the dissenting

subject to the local rules of the domestic forum as to costs" and that "the foreign sovereign suing as a plaintiff must give discovery." *Id.* at 134 n.2.

²⁸⁵ Dunham, *supra* note 76, at 53 (privileges used to "perpetrate harm"); Grossfeld & Rogers, *supra* note 264, at 943.

²⁸⁶ *In re Equitable Plan Co.*, 185 F. Supp. 57, 60 (S.D.N.Y. 1960) ("legitimate use").

²⁸⁷ *United States v. Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985); *In re Grand Jury Proceedings Thier*, 767 F.2d 1133 (5th Cir. 1985).

²⁸⁸ *Cooper Industries Inc. v. British Aerospace*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984).

²⁸⁹ *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 307 (S.D. Cal. 1981).

²⁹⁰ *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) ¶¶ 17,222, 17,223 (N.D. Ill. 1983); Maier, *supra* note 98, at 303-04 (comity implies the reciprocal tolerance of foreign legal values); Note, *Limitations*, *supra* note 82, at 1485.

²⁹¹ Shemanski, *supra* note 6, at 478; Maier, *supra* note 98, at 281-85; Christoforou, *supra* note 231, at 42; Smit, *supra* note 19, at 147.

opinion in *Société Nationale Industrielle Aérospatiale*.²⁹² Since United States discovery rules are generally much broader and provide for fewer privileges than those of most other Western nations, questions of reciprocity have not yet arisen, and are unlikely to arise very often.²⁹³

Recognition of foreign privileges should not be granted if there is lack of a *genuine connection* between the foreign statute invoked and the facts upon which the privilege claim is raised.²⁹⁴ Such a link is not present if the communication or relationship are not situated in the foreign legal system whose protection is sought or if the number and the nature of the contacts with that system is insignificant or fortuitous. Nationality alone would therefore not suffice to establish the requisite connection with foreign law. In the area of United States interstate privilege conflicts this requirement has been described as the most significant relationship test. The Restatement (Second) of Conflict of Laws enumerates four factors to be considered, among them (1) the number and nature of the contacts that the state of the forum maintains with the parties and the transaction involved:

The forum will be more inclined to give effect to a privilege if it was probably relied upon by the parties. Such reliance may be found if at the time of the communication the parties were aware of the existence of the privilege in the local law of the state of most significant relationship. Such reliance may also be found if the parties, although unaware of the existence of the privilege, made the communication in reliance on the fact that communications of the sort involved are treated in strict confidence in the state of most significant relationship. In this latter situation, the fact that the communication was of a sort treated in strict confidence in the state of most significant relationship was presumably a result of the existence of the privilege. Hence, in a real sense the parties could be said to have relied upon the

²⁹² *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2559, 2562 (Blackmun, J. dissenting). See also *id.* at 2560 n.3 regarding reciprocal protection of confidential information. "The United States is increasingly concerned, for example, with protecting sensitive technology for both economic and military reasons. It may not serve the country's long-term interest to establish precedents that could allow foreign courts to compel production of the records of United States corporations."

²⁹³ Smit, *supra* note 66, at 1033. For a similar doctrine in the area of recognition of foreign judgments, see Comment, *The Reciprocity Rule and Enforcement of Foreign Judgments*, 16 COLUM. J.-TRANSNAT'L L. 327 (1977); von Mehren, *Recognition and Enforcement of Sister State Judgments*, 81 COLUM. L. REV. 1044 (1981).

²⁹⁴ Grossfeld & Rogers, *supra* note 264, at 944-45. Friedman & Wilson, *supra* note 21, at 357-58. See also Smit, *supra* note 66, at 1032. This principle has been emphasized in United States interstate conflict situations. In *Mitsui & Co. v. Puerto Rico Water Resources Authority*, 79 F.R.D. 72, 79, 110 (D.P.R. 1978), the District Court held that an extrastate witness could rely upon a New York accountant-client privilege not available under the law of the forum because of the more significant relationship of the confidential communication with New York. See also *Hill v. Huddleston*, 263 F. Supp. 108 (D. Md. 1967); *Hyde Construction Co. v. Koehring Co.*, 455 F.2d 337, 340-41 (5th Cir. 1972) ("center of gravity" test).

privilege although ignorant of it.²⁹⁵

For example, if a witness claims the privilege against self-incrimination, there must be a serious risk for criminal prosecution in the foreign country to which the witness stands in a close relationship. As regards communicative privileges, the person invoking a right to refuse disclosure of evidence must be able to show reliance on this particular legal protection. Such legitimate expectations are not present if the communication took place in a jurisdiction where the advisory relationship in question is not privileged.

XIII. CONCLUSION

If none of the above enumerated exclusionary elements are present, there should be a presumption favoring recognition of foreign privileges against United States discovery orders. A similar approach has been advocated with respect to international tribunals in cases where defendants allege that judicial inquiry infringes protected private spheres.²⁹⁶ Both international and national courts must be sensitive to the danger that because of evidentiary incursions into protected areas the adjudication of transnational litigation is seriously disrupted. If judicial restraint in order to avoid the violation of foreign substantive rights implies procedural disadvantages to the plaintiff, the protection of confidentiality should prevail.²⁹⁷ Such a result would be justified because privileges are generated by a certain number of individual circumstances in connection with a general rule of law unrelated to the particular litigation.

On the basis of these eliminating criteria, a high degree of predictability and legal certainty as to the resolution of international discovery conflicts in the area of privileges should be guaranteed. The willingness of United States courts to examine privilege claims based upon foreign law and to recognize them on the basis of well-defined criteria would contribute to a reduction of international discovery disputes and avoid further "accumulation of resentment."²⁹⁸ United States courts would thus obtain increasing acceptance of their discovery orders relating to foreign parties or witnesses and diminish perceptions of United States "insensitivity to the interests safeguarded by foreign legal regimes."²⁹⁹ Since discovery proceedings remain subject to the provisions of the Fed-

²⁹⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2) comment d (1971).

²⁹⁶ Reisman & Friedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, 76 AM. J. INT'L L. 737, 738 (1982).

²⁹⁷ *Id.* at 753 ("The plaintiff's dilemma should be resolved against the plaintiff.").

²⁹⁸ *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. 2568 (Blackmun, J., dissenting); see also Maier, *supra* note 98, at 318-20.

²⁹⁹ *Société Nationale Industrielle Aérospatiale*, 107 S. Ct. at 2568.

eral Rules of Civil Procedure, the recognition of foreign privileges implies only a minor deviation from the legal principles established by the Federal Rules of Civil Procedure and much less restrictions of the discovery process than resort to the Hague Evidence Convention. The recognition of foreign privileges should not be regarded as a threat to United States discovery proceedings but rather as being in the long-term interest of United States litigants and the United States judicial system.³⁰⁰

³⁰⁰ *Id.* emphasizing the “larger context” of international discovery conflicts which goes beyond the immediate and narrow interests of the litigants and the necessity to satisfy “mutual expectations” in international legal relations.