E-Discovery in Cross-Border Litigation: Taking International Comity Seriously

*By Edmund M. O'Toole and David N. Cinotti**

With the possible exception of civil jury trials, no feature of the U.S. legal system is treated with as much apprehension abroad as pretrial document discovery. Most other national legal systems do not permit the kind of party-conducted and intrusive pretrial document discovery that U.S. litigators believe is essential to a full and fair settlement of disputes. Other countries restrict or prohibit parties from obtaining documents and often place pretrial investigation in the hands of judges. Differing fundamental views on the nature of state sovereignty and the proper balance of competing values in dispute resolution account for these differences in practice. The divergent value judgments have long been apparent in cases involving foreign litigants or witnesses in U.S. courts and have led foreign states to object to executing requests for documentary evidence for use in U.S. proceedings, sometimes frustrating the effective functioning of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.[1] But the gulf between the United States and other countries when it comes to discovery practices has further widened with the rapid expansion of e-discovery in the United States.

This article discusses the ways in which the discovery of electronically stored information ("ESI") poses special challenges to foreign litigants (both parties and nonparty witnesses) in U.S. courts – who are often stuck between conflicting legal obligations – and strains the channels of international judicial cooperation. We suggest that international comity, which the Supreme Court has explained should play a prominent role in district courts' regulation of international discovery and should have heightened application when it comes to requests for ESI because unfettered e-discovery is so offensive to many foreign legal systems' concepts of fairness, privacy, and sovereignty. Faithful adherence to comity would lead more judges to order e-discovery from foreign nationals through the Hague Evidence Convention rather than the Federal Rules of Civil Procedure. This would allow foreign states to determine whether requests for ESI can be fulfilled consistent with the Convention and their national policies. It would also further international judicial cooperation by demonstrating the United States' respect for other countries' interests and, perhaps, lead to a greater international dialogue in an effort to reduce the conflict between broad U.S. discovery rules and foreign states' opposition to U.S.-style document discovery.

Part I of the article discusses the competing values at play in national rules on discovery; explains how the Federal Rules of Civil Procedure generally favor truth-seeking over other interests such as privacy, cost-containment, and sovereignty; and outlines how other nations' balancing of these interests can subject foreign litigants in U.S. proceedings to conflicting legal obligations. Part II discusses the principle of international comity and its application to discovery disputes. Finally, Part III outlines the considerations that courts should take into account when deciding whether to order a foreign litigant to produce ESI located abroad.

I. The Nature of the Conflict: E-Discovery and Foreign Law

The evolution of rules of evidence and procedure has required rulemakers to balance often competing values. Pretrial document discovery obviously advances the truth-seeking function; the parties are required to produce to one another requested documents bearing on the strengths and weaknesses of their claims and defenses. A system that favors truth-seeking above all else would provide for broad disclosure of facts and evidence and would permit few privileges to prevent such disclosure. The U.S. civil-litigation system has developed in accordance with this model. Other systems, however, put greater emphasis on values such as the privacy rights of companies and their employees and what might be called "cost-containment"[2] – protection from the sometimes enormous costs associated with strict rules to preserve, locate, and produce in litigation all potentially relevant documents. In addition, U.S. discovery orders and party-conducted discovery might offend other nations' views of sovereignty, including, in civil-law jurisdictions, the central role played by the court or investigating magistrate. All three of these interests – privacy, cost-containment, and sovereignty – can come into conflict with the U.S. system's emphasis on truth-seeking that allows virtually unbridled access to vast amounts of ESI.

A. The U.S. System Favors Truth-Seeking Over Other Interests

The baseline rule of the U.S. evidentiary system is that "the public . . . has a right to every man's evidence."[3] As the U.S. Supreme Court has stated, the "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[4] Accordingly, U.S. discovery rules are designed

---

* Edmund M. O'Toole is a Partner in the Commercial Litigation Practice Group of Venable LLP. David N. Cinotti is an Associate at Venable LLP and a member of the ABA Section of International Law's International Litigation Committee. The authors would like to thank Emily M. Tortora, a Summer Associate at Venable LLP, for her research assistance with this article. They would also like to thank Maja Groff, Legal Officer in the Permanent Bureau of the Hague Conference on Private International Law, for her advice on issues pertaining to the Hague Evidence Convention and cross-border judicial cooperation.

1 Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter, Hague Evidence Convention or Hague Convention].

2 *See* Jan. W. Bolt & Joseph K. Wheatley, *Private Rules for International Discovery in U.S. District Court: The U.S.-German Example,* 11 UCLA J. INT'L L. & FOREIGN AFF. 1, 6 (2006) (noting that German procedure, as compared to U.S. procedure, "is more concerned with cost-containment, swiftness, and the privacy of litigants").

3 *Jaffee v. Redmond,* 518 U.S. 1, 9 (1996) (internal quotation marks omitted).

4 *United States v. Nixon,* 418 U.S. 683, 709 (1974).

"for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[5] Privileges to prevent disclosure are therefore limited under U.S. law.

This general preference for open discovery applies to ESI. Pursuant to Rule 26, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."[6] Discovery requests need only be "reasonably calculated to lead to the discovery of admissible evidence."[7] Rule 34 of the Federal Rules of Civil Procedure was amended in 2006 to "confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents."[8] Parties are not merely required to produce ESI and other documents that they physically possess; Rule 34 requires production of documents in a party's "possession, custody, or control," which under some circumstances has been held to reach a party's related companies located abroad.[9] Rule 45 also provides that parties may seek ESI from nonparties.[10]

Recognized privileges for withholding documents and ESI under U.S. law are limited. A general right to privacy is not among them, and business or trade secrets are ordinarily not shielded from production, though courts may limit disclosure beyond the parties and/or counsel in the litigation.[11]

Although U.S. courts have the power to protect parties and nonparties from unduly burdensome requests for e-discovery,[12] the liberal federal disclosure rules, obligation to preserve evidence, and rapid expansion of modes of electronic communication – such as e-mail, text messaging, and instant messaging-combine to make U.S. e-discovery expensive, intrusive, and time-consuming, especially for business and governmental entities that have large amounts of data. As Judge Posner has commented, "[w]ith the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery . . . has become in many cases astronomical. And the cost is not only monetary; it can include . . . the disruption of the [entity's] operations."[13]

Due to its enormous costs, litigants, litigators, judges, nonprofit entities, and other stakeholders have expressed dissatisfaction with e-discovery in the United States. According to the Sedona Conference:

> The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of [ESI]. In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether . . . .[14]

Other groups have expressed similar views. In May 2010, the Federal Judicial Conference Advisory Committee on Civil Rules sponsored a conference on proposed amendments to the Federal Rules of Civil Procedure at Duke Law School to which it invited representatives from five legal organizations.[15] Many of these organizations expressed concern with the costs associated with e-discovery.[16] The costs of modern discovery also contributed to the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*[17] to narrow its interpretation of the pleading requirements to survive a motion to dismiss.[18]

Given these acknowledged problems with the U.S. e-discovery system, it is not so surprising that other national legal systems take into account, and even favor, values other than truth-seeking when it comes to disclosure of documentary evidence.

B. Other Nations Put Greater Emphasis on Different Values

Truth-seeking is not necessarily the predominant value driving other nations' procedural rules. For example, English procedural rules emphasize proportionality in pretrial disclosure of information. Litigants must show that requested documents are directly relevant to the case, and requests for

---

5 *Hickman v. Taylor,* 329 U.S. 495, 501 (1947).
6 FED. R. CIV. P. 26(b)(1).
7 *Id*.
8 *Id*. RULE 34(a) advisory committee's notes to 2006 amendment.
9 *See, e.g., PCI Parfums et Cosmetiques Int'l v. Perfumania, Inc.,* No. 93 Civ. 9009, 1998 WL 646635, at *2 (S.D.N.Y. Sept. 21, 1998).
10 *See* FED. R. CIV. P. 45(A)(1)(C), (3)(d).
11 *See id.* RULE 26(C).
12 *See id.* RULE 26(b)(2)(B)-(C), (c), 45(c).
13 *Swanson v. Citibank, N.A.,* 2010 U.S. App. LEXIS 15761, at *29 (7th Cir. July 30, 2010) (Posner, J., dissenting).
14 The Sedona Conference, *Cooperation Proclamation,* 10 SEDONA CONF. J. 331, 331 (2009).
15 The organizations were the American Bar Association Litigation Section, American College of Trial Lawyers, New York City Bar Federal Courts Committee, Lawyers for Civil Justice, and Lawyers for Constitutional Litigation. *See* Advisory Comm. on Civil Rules, Summary Comparison of Bar Association Submissions to the Duke Conference Regarding the Federal Rules of Civil Procedure i (Apr. 26, 2010), *available* at http://civilconference.uscourts.gov (follow "Empirical Research, Part 1" hyperlink).
16 *See id.* at iii (stating view of the ABA Litigation Section that advances in communications and information storage "have increased exponentially the costs and burdens on the litigants, particularly defendants who must preserve, identify, review for privilege and produce relevant electronic data"), iv (stating view of New York City Bar Federal Courts Committee that "[c]ivil litigation has become too cumbersome, expensive and time consuming, and the exponential growth of [ESI] over the past decade has simply added strains to an already overburdened system"), 1 (stating view of American College of Trial Lawyers that courts rarely apply proportionality in discovery rulings "because of the longstanding notion that parties are entitled to discover all facts, without limit"); 26 (stating view of Lawyers for Civil Justice that "the repeated efforts to address the catastrophic costs, burdens, and abuses of discovery through judicial intervention . . . ha[ve] not served to solve the problems").
17 550 U.S. 544 (2007).
18 *See id.* at 558-59 (holding that district courts may "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," citing statistics showing that discovery accounts for as much as 90 percent of litigation costs in federal cases that make it to discovery, and noting "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side" (internal quotation marks omitted)).

information to third parties must identify specific documents.[19] Civil-law jurisdictions are even more limited in the amount of discovery permitted, which dramatically reduces the costs and burdens on litigants.[20] These rules flow from the civil-law view that "[i]t is for the party to the litigation to offer evidence in support of its case. Should the other side require information, the burden is upon them to be able to know and identify it."[21]

Two important values other than truth-seeking apparent from these more limited procedural rules are the privacy of litigants, witnesses, and third parties, and economic efficiency or cost-containment. A third competing interest also arises in international litigation – territorial or judicial sovereignty. All nations have an interest in protecting their nationals from the imposition of unreasonable burdens by a foreign sovereign. Civil law takes an especially dim view of foreign discovery orders because the investigation of civil claims and defenses is a public, not private, function in the civil-law system. A conflict can arise between the obligation of a party or nonparty to produce documents located abroad in U.S. proceedings because of other nations' objection to the burdens of document discovery, greater protection of individual rights such as privacy, or greater emphasis on sovereignty or national security, as compared to the United States.

1. Privacy

Other nations, including European states, view privacy as a fundamental human right.[22] The European Court of Human Rights has held that employees have a privacy right in the e-mails and telephone calls that they send or make from the workplace.[23] The United States takes a more limited view of privacy, especially when it comes to privacy in the workplace.[24] European Parliament and Council Directive 95/46 imposes complex obligations on data "collectors" to protect the personal data of their employees, customers, and other third parties.[25] The Directive also prohibits, with some exceptions, transfers of personal data to third countries that do not "ensure[] an adequate level of protection" of the data.[26]

As recognized by the E.U. Article 29 Working Party, established as an independent advisory board under Article 29 of Directive 95/46,[27] "[t]here is tension between the disclosure obligations under US litigation or regulatory rules and the application of the data protection requirements of the EU."[28] This tension is exacerbated when it comes to ESI because there is simply more personal data to store and hence to seek in a discovery request.[29] Sensitive data, such as bank account information, personal identification numbers, credit card numbers, and healthcare information, are all likely to be found among a company's ESI.

In order to search for and collect personal data in response to a U.S. discovery request, persons subject to the Directive must either obtain the consent of those whose data will be transferred, show that processing the data "is necessary for compliance with a legal obligation to which the controller [of the data] is subject," or demonstrate that processing of the data "is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject."[30] Consent is not always possible when the data pertain to lower-level employees or third parties such as vendors and customers. The Working Party has suggested that in many cases consent will not be a possible option for processing data in response to a U.S. discovery request.[31]

The Working Party also noted that "[a]n obligation imposed by a foreign legal statute or regulation may not qualify as a legal obligation by virtue of which data processing in the EU would be made legitimate."[32] The Working Party left open the possibility, however, that in some cases those subject to the Directive could justify compliance with a U.S. discovery order by reference to this provision.[33] Compliance in order to defend or prosecute a case in the Untied States might also qualify as a "legitimate interest[]" under the Directive, but processing personal data pursuant to this exception can only occur if the requested party's interest is not outweighed

---

19 Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context,* 53 AM. J. COMP. L. 709, 715 (2005).
20 *See, e.g.,* Bolt & Wheatley, *supra* note 2, at 6 (noting that under German law "parties' right to information is sharply limited, there are no depositions, and only the court may order the production of documents").
21 Art. 29 Data Prot. Working Party, *Working Doc. 1/2009 on Pre-trial Discovery for Cross Border Civil Litigation* 4-5, Doc. No. 00339/09/EN WP 158 (Feb. 11, 2009) [hereinafter, *Art. 29 Working Party Report 158*].
22 *See, e.g.,* Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, C.E.T.S. No. 005 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").
23 *See Copland v. United Kingdom,* 62617/00 [2007] Eur. Ct. H.R. 253 ¶¶ 41- 42 (Apr. 3); *see also* Erica M. Davila, *International E-Discovery: Navigating the Maze,* 8 U. PITT. J. TECH. L. & POL'Y 5 nn.32-35 (2008).
24 *See, e.g.,* Alan Charles Raul et al., *Reconciling European Data Privacy Concerns with US Discovery Rules: Conflict and Comity,* 2009 GLOBAL COMPETITION L. REV. 119-20 ("Whereas EU law identifies privacy as a fundamental human right, US law conceives of privacy as one interest among others.").
25 *See* Parliament & Council Directive 95/46/EC, 1995 O.J. (L 281).
26 *Id.* art. 25.
27 *Id.* arts. 29-30.
28 *Art. 29 Working Party Report 158, supra* note 21, at 2. The Working Party has produced a series of reports interpreting Directive 95/46. See European Comm'n, Documents Adopted by the Data Protection Working Party, http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/ (last visited August 17, 2010).
29 *See Art. 29 Working Party Report 158, supra* note 21, at 3 ("The ease with which electronic records can be downloaded, transferred or otherwise manipulated has meant that the discovery process in litigation often gives rise to a vast amount of information which the parties need to manage . . . .").
30 Directive 95/46, art. 7(a), (c), (f); *see also Art. 29 Working Party Report 158, supra* note 21, at 8.
31 *Art. 29 Working Party Report 158, supra* note 21, at 8-9.
32 *Id.* at 9; *see also* Raul et al., *supra* note 24, at 120 (suggesting that the "European Union has not generally regarded US discovery as either a sufficient 'legal obligation' or a 'legitimate interest' for EU data protection purposes").
33 *See Art. 29 Working Party Report 158, supra* note 21, at 9.

"by the interests for fundamental rights and freedoms of the data subject."[34]

Entities subject to the Directive would also need to establish a basis under Article 26(1) of the Directive to transfer the data to the United States, a country that does not provide the same level of protection as required under E.U. law.[35] A number of exceptions might allow transfer to the United States of ESI for litigation purposes.[36] These exceptions include transfers that are "necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims."[37] However, the Working Party has explained that this and other exceptions in Article 26(1) "must be interpreted restrictively" and that member states "may provide for the exemptions not to apply in particular cases."[38] In addition, the Working Party has stated that "this exception can only be applied if the rules governing criminal or civil proceedings applicable to this type of international situation have been complied with, notably as they derive from the Hague [Evidence] Convention[]."[39] It therefore appears that, in the Working Party's view, the data must be requested through the Hague Convention for it properly to be transferred for use in a legal proceeding in the United States, although the basis for such an interpretation of the Directive is not clear.

In addition to general privacy laws, some countries have enacted, or protect by privilege, sector-specific data such as banking information.[40] Switzerland, for example, notably protects banking information.[41] Other countries such as Israel also have bank-confidentiality laws to protect bank customers' privacy.[42]

2. Cost-containment

One English judge observed long ago, "Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much . . . ."[43] It may be said that other nations' pretrial disclosure law, especially in civil-law jurisdictions, reflects acceptance of this adage more than modern U.S. discovery rules, which impose broad requirements to preserve and produce ESI. Indeed, e-discovery has changed business and legal practice in the United States. General counsels throughout the country oversee multidisciplinary teams established to prepare for, and respond to, e-discovery requests. Many U.S. litigators spend more time working with e-discovery vendors and technology staff than they do writing briefs, researching the law, advising clients, and trying cases. Document discovery can take months and can involve the page-by-page review of literally millions of documents, with sometimes mind-boggling costs to the parties. A sub-industry of e-discovery vendors has emerged to assist in the complex, expensive, and time consuming process of collecting, searching, processing, reviewing, and producing ESI. These e-discovery tasks inevitably distract "people who should be conducting a business, running a government agency, or otherwise contributing to the public weal . . . ."[44]

While these costs are part and parcel of modern U.S. business and discovery, they are foreign to the commercial and legal systems of other nations. Indeed, fear of U.S. discovery costs continues to be a major driving force in the popularity of international arbitration to resolve commercial disputes when the United States is a potential venue for litigation.[45]

3. Sovereignty

"Discovery for use in a judicial or administrative proceeding is an exercise of jurisdiction by the state."[46] While the United States may not view a discovery order to a foreign entity over which it has, pursuant to U.S. law, personal jurisdiction to be the exercise of extraterritorial authority, other nations disagree. The American Law Institute has noted, "The common theme of foreign responses to United States requests for discovery is that, whatever pretrial or investigative techniques the United States adopts for itself, they may be applied to persons or documents located in another state only with permission of that state."[47] A number of nations took the position before the Supreme Court in *Société Nationale Industrielle Aéreospatiale v. U.S. District Court for the Southern District of Iowa* (discussed in more detail below) that U.S. discovery orders aimed at the production of documents located within their territories violate their sovereignty. Germany, for example, argued that "only a German court has the legal power to enforce compliance with an order to produce documents located in Germany," and that "[e]ven though issued in the United States, such [an] order constitutes an extraterritorial assertion of sovereignty, because it requires acts to be performed in the Federal Republic of Germany where the evidence must be gathered."[48]

---

34 *Id*.
35 *Id*. at 13; *see also* Directive 95/46, art. 26 (providing that, when a country to which data will be transferred does not provide an adequate level of data protection, a transfer may only take place under enumerated circumstances).
36 *See Article 29 Working Party Report 158, supra* note 21, at 13-14.
37 Directive 95/46, art. 26(1)(d).
38 Art. 29 Data Prot. Working Party, *Working Doc. on a Common Interpretation of Article 26(a) of Directive 95/46/EC of 24 October 1995* 7, Doc. No. 2093/05/EN WP 114 (Nov. 25, 2005).
39 *Id*. at 15.
40 *See* Davila, *supra* note 23, at nn.47-52.
41 *See, e.g.,* Raul et al., *supra* note 24, at 121.
42 *See Linde v. Arab Bank,* 262 F.R.D. 136, 148-49 (E.D.N.Y. 2009).
43 *Pearse v. Pearse,* [1846] 63 Eng. Rep. 950, 957, *cited in A. v. Sec'y of State,* [2005] UKHL 71 ¶ 13 (Op. of Lord Cornwall), *reprinted in* 45 I.L.M. 503 (2005).
44 Mem. from Hon. Mark R. Kravitz, Chair of Advisory Comm. on Fed. R. Civ. P., to Hon. Lee H. Rosenthal, Chair of Standing Comm. on Rules of Practice & Procedure, May 17, 2010, at 7, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf (last visited Aug. 8, 2010).
45 *See, e.g.,* Loukas Mistelis, *International Arbitration – Corporate Attitudes & Practices – 12 Perceptions Tested: Myths, Data, and Analysis Research Report,* 15 AM. REV. INT'L ARB. 525, 539 (2004).
46 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 cmt. a (1987).
47 *Id*. reporters' note 1.
48 Brief of Federal Republic of Germany as Amicus Curiae, *Société Nationale Industrielle Aéreospatiale v. U.S. Dist. Ct.,* 482 U.S. 522 (1987), *reprinted in* 25 I.L.M. 1539 (1986).

Switzerland similarly informed the Court, "If a U.S. court unilaterally attempts to coerce the production of evidence located in Switzerland, without requesting governmental assistance, the U.S. court intrudes upon the judicial sovereignty of Switzerland."[49]

Accordingly, foreign nations oppose compliance with U.S. discovery requests based on their view that evidence-gathering is a function of the nation in which the evidence is located; and extraterritorial application of U.S. law, including discovery law, offends their rights to "control . . . [their] territory generally to the exclusion of other states . . . to govern in that territory, and . . . to apply law there."[50] These foreign states can point to the "first and foremost restriction imposed by international law upon a State . . . that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State."[51]

U.S. discovery requests or orders issued directly to citizens of civil-law countries also contravene the role of the judge in civil-law procedure. In the civil-law tradition, "the central task . . . is for the judge to identify the legal and factual issues involved and to decide them correctly."[52] Because common-law pretrial discovery is meant to inform the parties, not the judge, and is carried out by the litigants themselves, civil-law judges and advocates may view it as an usurpation of the judicial role.[53] Thus, "an American discovery demand . . . addressed directly to a foreign party, . . . comes across as an attempt to circumvent the judiciary."[54]

Moreover, inherent in the concept of territorial sovereignty is the right to provide for national security. This process also involves striking a balancing among different values. China, for example, strikes a balance between individual rights and collective authority in a manner that favors collective security. Chinese secrecy laws are broad and prohibit disclosure by Chinese nationals of technological and economic data that might be requested during discovery.[55]

4. Expressions of Foreign Interests

Foreign states have expressed their interest in shielding their nationals from U.S. pretrial document discovery without their permission in two important ways: (a) declarations pursuant to Article 23 of the Hague Evidence Convention, and (b) so-called blocking statutes.

(a) Article 23

One obvious and explicit expression of opposition to U.S. discovery lies in Article 23 of the Hague Evidence Convention. That provision states: "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." In 2003, a Special Commission of the Hague Conference explained that "Article 23 was intended to permit States to ensure that a request for the production of documents must be sufficiently substantiated so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding."[56] Despite this intended meaning, many parties to the Hague Convention have issued unqualified declarations that they will not execute letters of request to provide pretrial document production.[57] Some of these countries may have done so out of the mistaken belief that "pre-trial discovery" means disclosure of information before a suit has been filed.[58] These declarations, if understood to prohibit all letters of request for pretrial document discovery, stand as an impediment to one of the major purposes of the Hague Convention: to provide "a bridge between common law and civil law procedures."[59]

The United Kingdom, the original proponent of Article 23, has issued an Article 23 declaration but has clarified that its declaration is limited to requests "to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in [the requested person's] possession, custody or power."[60] The Hague Conference has encouraged other countries to follow the United Kingdom's lead, and some have done so; however, many countries appear to retain their blanket rejection of requests for the pretrial disclosure of documents.[61] France has also made a declaration under Article 23, but it will only allow the execution of letters of request for documents that are specifically identified and have a precise link to the

---

49 Brief of Government of Switzerland as Amicus Curiae, *Société Nationale Industrielle Aéreospatiale v. U.S. Dist. Ct.,* 482 U.S. 522 (1987), *reprinted in* 25 I.L.M. 1549 (1986).
50 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 206 cmt. b (defining sovereignty).
51 S.S. Lotus (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).
52 Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions,* 73 NOTRE DAME L. REV. 1017, 1021 (1998).
53 *Id.* at 1022.
54 *Id.*
55 *See* Cong.-Exec. Comm'n on China, Law of the People's Republic of China on Guarding State Secrets, http://www.cecc.gov/pages/newLaws/ protectSecretsENG.php (last visited Aug. 15, 2010) (reproducing translation of Chinese state-secrets law); *Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1473-74 (9th Cir. 1992) (discussing Chinese company's argument that discovery requests for information about assets would violate Chinese state-secrets law).
56 HAGUE CONF. ON PRIVATE INT'L LAW, CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE CONVENTIONS ¶ 29 (Nov. 2003), *available at* http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf [hereinafter, 2003 SPECIAL COMMISSION REPORT].
57 *See* Hague Evidence Convention Status Table, at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=82 (collecting treaty declarations and reservations) (last visited Aug. 15, 2010).
58 2003 SPECIAL COMMISSION REPORT, *supra* note 56, ¶ 31.
59 *Id.* ¶ 27.
60 *Id.* ¶ 29.
61 TO THE EVIDENCE CONVENTION, WITH ANALYTICAL COMMENTS 9, 52 (Jan. 2009), *available at* http://hcch.e-vision.nl/upload/wop/2008pd12e.pdf [hereinafter, HAGUE CONF. 2009 REPORT].

litigation.[62] The requesting party must describe the documents with a reasonable degree of specificity using things like the date, nature, and author of the documents.[63]

(b) Blocking Statutes

As one commentator has put it, "[v]arious episodes of expansionism in American law, largely antitrust and securities law, have led to the adoption in many countries of 'blocking' statutes designed to frustrate American discovery."[64] U.S. courts have frequently encountered blocking statutes that would prevent foreign nationals' acquiescence in U.S. courts' discovery orders.[65] The statutes vary in their scope and enforcement.[66] Seven parties to the Hague Evidence Convention and the European Community recently reported to the Permanent Bureau of the Hague Conference that they have some form of blocking statute that prevents those subject to their jurisdiction from giving evidence under defined circumstances to foreign courts, though the nature of these statutes varies.[67]

Perhaps the most well-known is the French blocking statute, which imposes criminal penalties on French nationals and residents for "communicating...to foreign public authorities, economic, commercial, industrial, financial, or technical documents or information, the communication of which [would] infringe upon the sovereignty, security, or essential economic interests of France or upon the public order."[68] Although U.S. courts have noted that the French blocking statute has not regularly been enforced,[69] a French lawyer was convicted and fined €10,000 for violating the statute by providing documents in response to an order of the U.S. District Court for the Eastern District of New York.[70] The French Cour de cassation upheld the conviction.[71]

The Supreme Court has held that blocking statutes "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[72] However, the Court also noted that blocking statutes are evidence of foreign "sovereign interests in non-disclosure of specific kinds of material."[73]

C. ESI Escalates the Conflicts

Conflicts between U.S. discovery rules and foreign interests in protecting privacy, ensuring the efficient functioning of businesses and government agencies, and preventing encroachments on territorial sovereignty can arise to a greater degree when the requesting party seeks ESI from a foreign national. Developments in technology have made electronic communication easier and faster to complete and to store, and more difficult to purge completely. Thus, foreign parties and third-party witnesses are often likely to possess ESI that is potentially relevant to disputes before U.S. courts and that contains sensitive business and personal information. The sheer volume of data that needs to be searched, collected, and reviewed imposes a greater risk of expense and intrusion.

Moreover, employees use e-mail both to conduct their employers' business and for personal communications, thereby implicating the privacy of the employees. Finally, U.S. litigators have come to rely on ESI as the primary means of proving their case, and U.S. courts have become accustomed to ordering the production of ESI despite its sometimes heavy costs and to sanctioning parties for spoliation when such information has not been adequately preserved. Thus, in nearly all commercial disputes in U.S. courts, a substantial amount of ESI is demanded and, if necessary, ordered to be produced. ESI, more than traditional paper-based document discovery, has the potential to place foreign litigants in the position of violating U.S. court orders or their own country's law.

II. International Comity

The U.S. Supreme Court has long-recognized international comity as a principle of federal law that calls for recognition of "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."[74] Comity is relevant when there is a true conflict between domestic and foreign law.[75] What U.S. courts call comity, however, is closely related to a principle of customary international law that prevents unreasonable efforts by states

---

62 *Art. 29 Working Party Report 158, supra* note 21, at 6.
63 HAGUE CONF. 2009 REPORT, *supra* note 61, at 52.
64 Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?,* 7 TUL. J. INT'L & COMP. L. 153, 155 (1999) [hereinafter, *Retooling American Discovery*].
65 *See, e.g., Compagnie Francaise d'Assurance Pour le Commerce Exteriur v. Phillips Petrol. Co.,* 105 F.R.D. 16, 16-17 (S.D.N.Y. 1984) (French blocking statute prohibiting communication of certain information to foreign officials); *Westinghouse Elec. Corp. v. Rio Algom Ltd.,* 480 F. Supp. 1138, 1143 (N.D. Ill. 1979) (Canadian, Australian, and South African blocking statutes prohibiting production of evidence relating to uranium marketing); *Minpeco, S.A. v. Conticommodity Servs., Inc.,* 116 F.R.D. 517, 523 (S.D.N.Y. 1987) (collecting cases on blocking statutes).
66 *See Art. 29 Working Party Report 158, supra* note 21, at 5.
67 HAGUE CONF. 2009 REPORT, *supra* note 61, at 25 & n.73. The seven states are Australia, France, Lithuania, Luxembourg, Mexico, Sweden, and the United Kingdom. *Id.* n.73. Switzerland also reported that some of its laws place limits on evidence-taking. *Id.* at 25.
68 *Compagnie Francaise,* 105 F.R.D. at 16 (quoting English translation of French Law No. 80-538).
69 *See, e.g., Strauss v. Credit Lyonnais S.A.,* 242 F.R.D. 199, 221 (E.D.N.Y. 2007); *In re* Vivendi Universal, S.A. Secs. Litig., No. 02 Civ. 5571 (RJH), 2006 WL 3378115, at *2-3 (S.D.N.Y. Nov. 16, 2006); *Minpeco,* 116 F.R.D. at 527-28.
70 *See Strauss,* 242 F.R.D. at 85, 96-97 (ordering defendant to produce documents located in France even though doing so would violate various French laws including the blocking statute because, among other things, there was no "indication that civil or criminal prosecutions by the French government . . . are likely"); *Art. 29 Working Party Report 158, supra* note 21, at 5 n.3 (noting the French lawyer's conviction).
71 *See In re* Advocat Christopher X, No. 07-83228, Cour de cassation [supreme court for judicial matters] crim., Dec. 12, 2007, Bull. crim., No. 309 (Fr.), *available at:* http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017837490&fastReqId=269628442&fastPos=1 (last visited Aug. 12, 2010).
72 *Société Nationale Industrielle Aéreospatiale v. U.S. Dist. Ct.,* 482 U.S. 522, 544 n.29 (1987).
73 *Id.*
74 *Hilton v. Guyot,* 159 U.S. 113, 163-64 (1895).
75 *See Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 798 (noting that comity applies if there is a true conflict between domestic and foreign law); *Maxwell Commc'n Corp. v. Societe Generale,* 93 F.3d 1036, 1049 (2d Cir. 1996) ("International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.").

to prescribe law outside their borders.[76] Indeed, the Supreme Court suggested that the comity analysis is aimed at determining whether a U.S. court's compulsion of foreign discovery would be reasonable.[77]

As discussed below, the Supreme Court has made clear that district courts must take into account the interests of foreign nations and the requirements of foreign law when deciding whether, and the manner in which, to order foreign nationals to produce documents located abroad.

A. *Aéreospatiale*

In a decision that has a continuing effect on international judicial cooperation, the U.S. Supreme Court held in *Société Nationale Industrielle Aéreospatiale v. U.S. District Court for the Southern District of Iowa* that the Hague Evidence Convention is not the exclusive means for parties in U.S. litigation to obtain evidence located abroad. The Court held that the Hague Convention does not deprive a district court "of the jurisdiction it otherwise possesse[s] to order a foreign national party before it to produce evidence physically located within a signatory nation."[78] Thus, a court may order a foreign national over which it has personal jurisdiction to produce discovery under the Federal Rules of Civil Procedure. The Court also rejected a rule that would require a U.S. party requesting discovery from a foreign litigant to first use the Hague Evidence Convention. Such a "rule of first resort" would be, in the Court's view, "unwise" because the Convention's procedures might sometimes "be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules."[79]

The Court did acknowledge, however, that the principle of international comity requires courts to examine "the particular facts, sovereign interests, and likelihood that resort to [the Hague Evidence Convention] procedures will prove effective" before deciding whether a party must request evidence through the Hague Convention or can do so through the Federal Rules.[80] The Court cited the Third Restatement of Foreign Relations Law for factors that might be useful in this comity analysis, although it did not mandate that district courts adhere to any particular test.[81] These factors are:

> (1) the importance to the litigation of the evidence sought;
> (2) the degree of specificity of the request;
> (3) whether the information originated in the United States;
> (4) the availability of alternative means of securing the information; and
> (5) the extent to which noncompliance with a discovery request would undermine important U.S. interests, or compliance would undermine important interests of the state where the evidence is located.[82]

The Court also noted that the nature of the discovery request should be considered because "[s]ome discovery procedures are much more 'intrusive' than others."[83]

Whether to order a party to submit a Hague request rather than a request for documents under Rule 34 or a subpoena under Rule 45 is a matter for the trial court to determine "based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke."[84] But the Court issued an admonition to lower courts:

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position . . . . When it is necessary to seek evidence abroad . . . the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses . . . . Objections to 'abusive' discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, . . . American courts should . . . demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.[85]

B. Lower Courts' Application of *Aéreospatiale*

Despite the Supreme Court's direction to examine closely discovery demands on foreign nationals, U.S. courts have sometimes given short shrift to privacy and burden arguments made by foreign litigants, often because U.S. judges disfavor the procedures that the Hague Convention requires. In one commentator's view, lower courts after *Aéreospatiale* "have generally placed the burden on those urging resort to the [Hague] Convention and appear to assume that Convention procedures will be less effective than American discovery."[86] This preference for the Federal Rules over the Hague Convention, which would allow a foreign state to assert its interests by limiting or refusing to execute the request, also "emphasizes the centrality of discovery to the American world view."[87]

---

76 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. a.
77 *See Aéreospatiale,* 482 U.S. at 545-46.
78 *Id.* at 539-40.
79 *Id.* at 543.
80 *Id.* at 544.
81 *See id.* at 544 n.28.
82 *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §437(1)(c) (Tentative Draft No. 7)). These factors are now found in Section 442 of the Third Restatement of Foreign Relations Law.
83 *Id.* at 545.
84 *Id.* at 546.
85 *Id.*
86 Marcus, *Retooling American Discovery, supra* note 64, at 191.
87 *Id.*

Lower courts have concluded that *Aéreospatiale* requires them to consider the particular facts of the case, the sovereign interests of the United States and the foreign states, and the likelihood that discovery through the Hague Convention will be effective to determine whether a requesting party should be ordered to use the Hague Convention rather than the Federal Rules of Civil Procedure. To carry out this analysis, most courts have looked to the factors set out in Section 442 of the Third Restatement of Foreign Relations Law:[88] (1) the importance of the information to the litigation, (2) the degree of specificity of the request, (3) whether the information originated in the United States, (4) the availability of alternative means to secure the information, and (5) the interests of the United States and the state where the documents are located.[89]

Although these courts have applied a comity analysis, many of them have failed to consider adequately the interests of foreign sovereigns. For example, the Third Circuit in *In re Automotive Refinishing Paint Antitrust Litigation*[90] rejected German companies' argument that ordering discovery of documents located in Germany would offend German sovereignty.[91] The court rather unpersuasively reasoned that, because the case involved allegations of price-fixing and German law prohibited such conduct, "presumably Germany . . . would welcome investigation of such antitrust violation to the fullest extent."[92] Whether the German government would welcome investigation into price-fixing involving its nationals simply fails to respond to the argument that Germany considers it a violation of its sovereignty for a *U.S. court* to order those German nationals to turn over information for use in a U.S. proceeding. Courts have also found that discovery under the Federal Rules instead of the Hague Convention was appropriate due to a foreign state's domestic laws that would prevent disclosure or Article 23 declaration, or due to the general inefficiency of the Convention.[93]

These and other cases support the observation of Judge Roth in *Automotive Refinishing* that "many courts are simply discarding the [Hague Convention] as an unnecessary hassle" and have failed to "exercise[] the 'special vigilance to protect foreign litigants' that the Supreme Court anticipated."[94]

III. Refocusing on Comity

At a time when stakeholders throughout the U.S. legal system are questioning the wisdom of U.S. e-discovery practices, U.S. courts should be even more solicitous of the interests and values of foreign legal systems when regulating e-discovery in cases involving foreign litigants. Courts should do more than pay lip service to international comity and should not reject foreign nations' interests, especially those explicitly stated by the foreign state, merely because the U.S. legal system balances privacy, truth-seeking, and cost-containment differently than other states in crafting procedural rules. Courts must take seriously the Supreme Court's direction that international comity is a principle of U.S. law that must be rigorously applied to determine the appropriate scope of cross-border discovery. The increased and sometimes outlandish burdens imposed by the identification and production of foreign ESI require even closer scrutiny of e-discovery requests than requests for other types of discovery. Importantly, the Court in *Aéreospatiale* recognized that the comity analysis depends in part on the intrusiveness of the requested discovery.[95]

The Supreme Court has held that other interests sometimes outweigh the "search for truth" in civil proceedings, and has contrasted the interests and checks present in criminal cases with those in civil actions.[96] Moreover, document discovery required judicial approval prior to 1970.[97] It would therefore not be wholly alien to the administration of civil justice in the United States to balance the quest for truth with other values such as comity and respect for the interests of other nations.

Based on these propositions, we suggest that U.S. courts more thoroughly scrutinize requests for ESI located abroad. This scrutiny should lead courts to deny or limit such requests under the Federal Rules of Civil Procedure or require that the requesting party utilize the Hague Evidence Convention when a foreign litigant demonstrates that it will violate foreign law if it complies with a request for ESI, even when the foreign law at issue might be described as a blocking statute. The Court in *Aéreospatiale* made clear that district courts may consider blocking statutes to be expressions of foreign nations' interest in preventing or regulating disclosure of information from within its territory.[98] U.S. courts should view blocking statutes, even if passed directly in response to U.S. law, as sovereign "no trespassing" signs asserting the legitimate interest of a foreign sovereign in protecting its rights to maintain exclusive legal control within its territory.

Consistent with Federal Rule of Evidence 44.1, courts should consider any evidence of foreign law, including expert declarations, to support a party's argument that the discovery request would require it to violate foreign law.

---

88 *See, e.g., In re* Global Power Equip. Grp., 418 B.R. 833, 847 (Bankr. D. Del. 2009); *Strauss,* 242 F.R.D. at 210; *Reino de Espana v. Am. Bureau of Shipping,* No. 03 Civ. 2573, 2005 WL 1813017, at *3 (S.D.N.Y. Aug. 1, 2005).
89 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c).
90 358 F.3d 288 (3d Cir. 2004).
91 *See id.* at 304.
92 *Id.*
93 *See, e.g., First Am. Corp. v. Price Waterhouse LLP,* 154 F.3d 16, 23 (2d Cir. 1998); *In re* Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 55 (D.D.C. 2000).
94 *Auto. Refinishing,* 358 F.3d at 307 (Roth, J., concurring).
95 *See* 482 U.S. at 545.
96 *See Cheney v. U.S. Dist. Ct.,* 542 U.S. 367, 384 (2004) (explaining that "the need for information in the criminal context is much weightier" than in civil proceedings).
97 *See* FED. R. CIV. P. 34(a) advisory committee's note to 1970 amendment (noting that amendment eliminated need for requesting party to show "good cause" for obtaining documents in possession of requested party).
98 482 U.S. at 544 n.29.

Such an argument would fit within Federal Rules of Civil Procedure 26(c) and 45(c), which allow courts to limit or deny requests for documents that would subject the requested party to an undue burden. Of course, courts must retain the discretion to weigh the particular circumstances of the case, including whether the foreign party is a plaintiff and thus has willfully invoked the court's jurisdiction.[99]

Courts also should not order discovery pursuant to the Federal Rules merely because of a belief that the foreign state would deny a letter of request for the information sought. The foreign state might conclude that production would not in fact violate domestic law or that the state's obligations under the Hague Convention trump domestic legal restrictions. For those nations that have asserted blanket Article 23 declarations, it is possible that, in practice, they will not interpret their declaration as broadly as worded. If the request is denied and the information is specifically identified and essential to the case, the district court can craft remedies other than ordering the foreign litigant to violate its nation's laws, such as restricting the discovery rights of the foreign litigant so that neither side is at a competitive disadvantage.

Finally, it cannot be denied that execution of a letter of request under the Hague Convention is more time-consuming than simply serving ordinary requests for the production of documents. But until a more efficient means of cross-border evidence-gathering is devised, U.S. courts should accept the delay as necessary to further the important interest in demonstrating respect for foreign sovereignty, which will in turn make other nations more likely to respond favorably to U.S. requests for evidence located abroad.

In sum, international judicial cooperation would be better served if courts paid as much attention to *Aéreospatiale's* admonition to weigh carefully discovery requests directed to foreign litigants as courts pay to the Supreme Court's holding that the Hague Evidence Convention is not mandatory. Courts should take into account the ways in which e-discovery poses special challenges to foreign litigants and has the potential to offend the interests of foreign states, which arise because of these states' emphases on values other than truth-seeking. While it is true that the Hague Evidence Convention is often inefficient, at present it provides the most assurance that a U.S. discovery request for ESI does not violate another nation's views of the right to privacy, the need to protect its nationals against the high costs associated with U.S. e-discovery, and territorial or judicial sovereignty. At the same time, however, foreign states must reconsider blanket denials of pretrial document discovery under Article 23 of the Hague Evidence Convention. Without compromises on both sides, it is likely that U.S. courts will continue to order foreign nationals to produce ESI located abroad under U.S. domestic law. ■

[99] *See, e.g.,* Reino de Espana, 2005 WL 1813017, at *9 (ordering Spain to produce documents after comity analysis despite claim that doing so would violate Spanish law because, among other reasons, Spain chose to sue in a U.S. court and therefore should have to comply with the court's procedural law).