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Extraterritorial Jurisdiction and International Banking: A Conflict of Interests

Silvia B. Piñera-Vazquez

Extraterritorial Jurisdiction and International Banking: A Conflict of Interests

I. INTRODUCTION

The international nature of modern commercial activity gives rise to an array of international business crimes.[1] Consequently, offshore banking facilities are frequently used as a conduit for channeling illegal profits.[2] Efforts by United States federal courts to exercise extraterritorial jurisdiction over foreign bank accounts is the source of considerable conflict. Viewing these expansive jurisdictional attempts as an invasion of their sovereign rights, foreign governments enact legislation to counter United States efforts,[3] often creating a jurisdic-

1. A report from the House Committee on Banking and Currency stated that secret foreign bank accounts permit a proliferation of "white collar" crimes. H.R. REP. NO. 975, 91st Cong., 2d Sess. 12 (1970). Examples of this type of international "white collar" crime include: violation of United States antitrust laws, securities fraud (insider trading), evasion of income taxes, and the laundering of money from narcotics smuggling. *See infra* notes 103-107 and accompanying text.

2. H.R. REP. NO. 907, 98th Cong., 2d Sess. 2 (1984). "[A]lmost any kind of international crime, if it has the goals of profit, continuing operations, and avoidance of detection and prosecution, will run a critical phase of its business through the offshore haven bank, trust, and company system . . . ." R. BLUM, OFFSHORE HAVEN BANKS, TRUST, AND COMPANIES at xiii (1984).

3. *See, e.g.*, Foreign Proceedings (Prohibition of Certain Evidence) Act 1976, Austl. Acts No. 121, *amended by* Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, Austl. Acts No. 202, *repealed and replaced* by Foreign Proceedings (Excess of Jurisdiction) Act, 1984, Austl. Acts No. 3 (Austl.); Uranium Information Security Regulations, CAN. CONS. REGS. ch. 366 (1978), implementing the Atomic Control Act, R.S.C. ch. A-19 (1970). Foreign Extraterritorial Measures Act, Can. Stat. ch. 49 (1984) (Can.);

tional deadlock, whereby the subject of the proceeding is forced to choose which forum to obey.

This Comment examines the implications of compelling the production of evidence from a foreign state under the grand jury subpoena *duces tecum*.[4] It will focus specifically on the subpoena directed at a nonparty witness, namely, the bank.[5] Branches of multinational banks[6] "doing business" in the United States must abide by

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Confidential Relationships (Preservation) Law (Law 16 of 1976) and the Confidential Relationships (Preservation) (Amendment) Law, 1979 (Law 26 of 1979) (Cayman Islands); Law No. 68-678 of July 26, 1968, Relating to the Transmission of Documents and Information To Foreign Authorities in the Area of Maritime Trade, J.O. 7267, D.S.L. 248 (Fr.); Shipping Contracts and Commercial Documents Act 1964, ch. 87 (Gr. Brit.). For a further discussion of foreign legislation, see *infra* notes 92-115 and accompanying text.

4. Rule 17 of the Federal Rules of Criminal Procedure governs the issuance of subpoenas in criminal cases. FED. R. CRIM. P. 17. A subpoena *duces tecum* is issued to ensure the production of evidence. *See* United States v. Nixon, 418 U.S. 683, 709 (1973). The procedure for issuing a subpoena *duces tecum* is outlined in Rule 17(c). FED. R. CRIM. P. 17(c). It states:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Id.

The forcefulness of the subpoena *duces tecum* can be witnessed in United States v. Nixon, 418 U.S. 683 (1973). Pursuant to Rule 17(c), a subpoena was issued upon President Nixon to produce certain tape recordings and documents. *Id.* at 686. The President, claiming executive privilege, filed a motion to quash the subpoena. *Id.* The Supreme Court compelled the production of the tapes and documents stating: "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id.* at 709.

Once the court has jurisdiction over a party, it may order the production of evidence from a witness in a foreign country through a subpoena *duces tecum*. 28 U.S.C. § 1783 (1982). *See infra* note 81.

5. Questions of personal jurisdiction through service of process over a party will not be addressed in this Comment.

6. This Comment will focus on both foreign-owned banks with branches in the United States and banks registered in the United States with branches in a foreign state. It will not discuss the situation presented by a foreign state requesting documents from a United States bank. In such a case the foreign country must follow the procedures outlined in 28 U.S.C. § 1782 (1982). A recent Eleventh Circuit decision, *In re Request For Assistance From Ministry of Legal Affairs of Trinidad and Tobago ("Trinidad")*, addressed a subpoena issued under the authority of section 1782. In re Request For Assistance From Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988). In *Trinidad*, the Minister of Legal Affairs of Trinidad and Tobago asked the United States Attorney General to help obtain the bank records of one of its nationals from a Florida bank. *Id.* at 1152. The Minister sought the records in connection with an investigation of Trinidad and Tobago nationals involved in violations of the Exchange Control Act. *Id.* The Department of Justice, under Section 1782, moved the district court to issue the subpoena for the bank records. *Id.* The district court

the laws of this jurisdiction.[7] Thus, when served with a subpoena, the bank must comply with the order or face a contempt of court charge.[8] Problems arise, however, when the subpoenaed documents are in a foreign jurisdiction that enacts legislation making it a crime to disclose any banking information. The bank is then faced with the choice of violating either a court order or a foreign nondisclosure law.[9]

The federal courts considering the issue have failed to develop a common doctrinal method to balance the interests of the conflicting jurisdictions. Some courts follow the test established by the only decision of the Supreme Court of the United States to face the issue, *Societe Internationale v. Rogers*,[10] while others apply the Restatement of Foreign Relations,[11] or develop their own method of analysis.[12] *Societe Internationale* establishes a good faith standard to measure the validity of the extraterritorial jurisdiction, while the Restatement of

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granted the subpoena and the customer moved to quash the subpoena on the grounds that section 1782 requires a proceeding to be pending in the foreign country. *Id.* The court denied the motion concluding that under Section 1782, the requested documents were "for use in a foreign tribunal." In re Request for Assistance From Ministry of Legal Affairs of Trinidad and Tobago, 648 F. Supp. 464, 467 (S.D. Fla. 1986), *aff'd*, 848 F.2d 1151 (11th Cir. 1988).

The Eleventh Circuit, in a case of first impression, affirmed. 848 F.2d at 1156. Analyzing the history of Section 1782, the court determined that Section 1782 reflects a congressional desire to increase the power of the district court to respond to requests for international assistance. *Id.* at 1154. The court further concluded that the records are discoverable under the laws of Trinidad and Tobago, thus enhancing the vitality of the subpoena. *Id.* at 1156. It cautioned, however, that courts should not decide whether the evidence would be admissible in the foreign court. *Id.* It is noteworthy that a foreign country is generally required to adhere to the statute when requesting documents, while United States courts, when issuing subpoenas directed at foreign banks, usually refuse to follow any such requirement.

7. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958). An individual who purposefully avails himself of conducting activities within a jurisdiction is subject to the benefits and the burdens of its laws. *Id.*

8. Federal Rule of Criminal Procedure 17(g) states: "Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued . . . ." FED. R. CRIM. P. 17(g).

9. *See generally* Comment, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320 (1983); Note, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal*, 37 N.Y.U. L. REV. 295 (1962); Note, *Jurisdiction-Limitation of Concurrent Jurisdiction*, 20 VA. J. INT'L. L. 925 (1980); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

10. 357 U.S. 197 (1958).

11. The Restatement of Foreign Relations is not law, but the opinion of the American Law Institute (ALI). RESTATEMENT (THIRD) OF FOREIGN RELATIONS at IX (1987) [hereinafter RESTATEMENT (THIRD)]. The ALI is a a private organization, not affiliated with the United States government or any of its agencies. *Id.* The Restatement is "in no sense an official document of the United States." *Id.* It may be persuasive, however, in jurisdictions where there is no established law.

12. *See infra* Section IV.

Foreign Relations provides a factor analysis. Among the various approaches applied by the United States Courts of Appeals, of primary importance is the analysis developed by the United States Courts of Appeals for the Second Circuit. The Second Circuit employs judicial restraint when compelling the production of documents, thus reflecting its awareness of the hardship imposed on the non-party witness and the international implications of exercising extraterritorial jurisdiction.[13] This approach requires a close examination of the foreign law, and a showing that the foreign law prohibits disclosure, before the non-party bank is excused from production. The evolution of a strong national interest to adjudicate international criminal activity, however, seems to influence the majority of circuits of the United States Courts of Appeals to require disclosure without regard to the international concerns mentioned by the Second Circuit.[14] Only recently, in a decision from the United States Court of

13. *See infra* notes 172-212 and accompanying text.

14. This Comment will focus solely on the exercise of extraterritorial jurisdiction in the course of a criminal investigation, as opposed to civil litigation. In certain instances, however, it may be necessary to discuss civil case law as a tool of comparison. The exercise of a broad discovery power in civil matters has also caused much controversy. Primary disputes arose in response to the differences in the taking of evidence between common law and civil law countries. *See* Compagnie Francaise v. Phillips Petroleum Comp., 105 F.R.D. 16, 25-26 (S.D.N.Y. 1984) (Neither the defense of privilege nor French law shielded the plaintiffs from discovery of documents within their control.). For a brief discussion on the differences between civil and common law, see *infra* note 82.

In an attempt to solve these problems, the Multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was adopted. Multilateral Convention on the Taking of Evidence in Civil or Commercial Matters, March 18, 1970. 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter Hague Convention]. The Hague Convention is presently in force among Barbados, Cyprus, Czechoslovakia, Denmark, Finland, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom and the United States. Offices of the Legal Advisor, United States Dept. of State, Treaties in Force 261-62 (1986). The convention prescribes certain procedures for litigants in one contracting State to obtain evidence in another contracting State. Societe Nationale Industrielle Aerospatiale v. United States Dist. Court For The S. Dist. of Iowa, 107 S. Ct. 2542, 2545 (1987). As stated in the recent *Aerospatiale* decision, "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." *Id.* at 2553.

In *Aerospatiale*, the court found that the procedures of the Convention are not mandatory, but that courts should exercise care in addressing any special problem confronted by the foreign litigant and should consider any sovereign interest expressed by a foreign state. *Id.* at 2557. It refused, however, to articulate any rules to guide the lower courts. *Id. Compare Aerospatiale*, 107 S. Ct. at 2557-58 (Blackmun, J, dissenting) ("The Court ignores the importance of the Convention by relegating it to an 'optional' status, without acknowledging the significant achievement in accommodating divergent interests that the Convention represents.") *with* In re Anschuetz and Co., 754 F.2d 602, 615 (5th Cir. 1985), *vacated*, 107 S. Ct. 3223 (1987) (The Hague Convention does not supplant application of discovery provisions of the federal rules over foreign, Hague Convention state nationals subject to in personam jurisdiction in a United States court.); Graco v. Kremlin, Inc., 101 F.R.D. 503, 519 (1984) (It

Appeals for the District of Columbia, *In re Sealed*,[15] did a court once again recognize the implications of imposing our discovery laws on foreign states.

Section II of this Comment discusses the *In re Sealed* decision in order to present the main issues posed by the exercise of extraterritorial jurisdiction. Section III analyzes how exercising jurisdiction in this manner infringes upon sovereign and due process rights. The analysis of sovereignty involves a general discussion of international law and the various concerns United States courts should address when entering the territory of another state. The due process discussion focuses on the specific interests that are in conflict: the interests of the United States in grand jury investigations, the foreign interests in enacting nondisclosure laws, and the individual (the bank) subject to the proceeding. This analysis establishes the foundation to later examine the developing judicial doctrines. Section IV discusses the inconsistent methodology that has shaped the judicial doctrine by examining the Supreme Court's decision in *Societe Internationale* and the Restatement of Foreign Relations Law. It will then analyze the various methods developed by courts attempting to resolve the conflict. Finally, the Comment concludes with a proposal for a uniform analysis among the circuits of the United States Courts of Appeals.

II. AN ANALYSIS OF *IN RE SEALED*

The United States Court of Appeals for the District of Columbia, in a case of first impression, recently considered the conflicting national interests and foreign state interests in the context of grand jury subpoenas issued in the face of foreign banking secrecy laws. *In re Sealed*[16] involved a branch of a worldwide bank, owned by country *X*,[17] "doing business" in the United States.[18] During a grand jury investigation of an alleged scheme by a number of United States citizens to launder money, the court issued a subpoena *duces tecum* to

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is a mistake to view the convention as an international agreement to protect foreign nationals from discovery procedures in the United States when they are parties before United States courts.). For a more extensive discussion of foreign discovery matters in civil litigation and the Hague Convention, see S. SEIDEL, EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION 248 (1984); 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).

15. 825 F.2d 494 (D.C. Cir.), *cert. denied*, 108 S. Ct. 451 (1987).

16. *Id.*

17. The parties in the appeal were not identified in order to maintain the secrecy of the grand jury proceeding. *Id.* at 495.

18. *Id.*

the bank and its manager.[19] The subpoena sought bank documents

19. *Id.* The court of appeals was asked to determine the validity of two contempt charges: one against the bank for failure to produce the requested documents, and the other against the manager for refusing to give testimony about the target's banking activities. *Id.* This Comment will solely examine the issues presented by the subpoena directed at the bank. The manager, who prepared the documents in Country *Y*, and who is a citizen of Country *X*, based his refusal to testify on fifth amendment and comity grounds. *Id.* at 496. Specifically, he claimed that the very act of testifying would subject him to criminal sanctions in Country *Y*, thus "cloak[ing] his refusal to testify with fifth amendment protection." *Id.* He refused to testify even after being granted immunity by the United States government, as he could not be immunized from criminal prosecution for violating laws of Country *Y*. *Id.*

The *Sealed* court did not find it necessary to address the constitutional (fifth amendment) issue. Relying on the standard established in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972) that the defendant have "a real and substantial fear prosecution," the District of Columbia court found that the manager's fear was not real because he could only be prosecuted if he *voluntarily* returned to Country *Y*. *Id.* at 497. It thus held that, as there was no real fear of prosecution, the fifth amendment was inapplicable. *Id.* In the brief submitted to the Supreme Court, the manager argued that this holding would force him to forgo other constitutional rights—the right to travel and the right to hold and enjoy property in Country *Y*. Brief for Petitioner at 23-25, In re Sealed, 825 F.2d 494 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 41. *See also* In re Sealed Case, 832 F.2d 1268, 1283 (D.C. Cir. 1987) (The fifth amendment does not protect against dangers voluntarily assumed.).

The Supreme Court has yet to determine whether real fear of prosecution in a foreign country is sufficient to invoke the fifth amendment privilege. Courts that have considered the issue are divided. *Compare* United States v. Under Seal, 794 F.2d 920, 926 (4th Cir.), *cert. denied*, 107 S. Ct. 331 (1986) (the fifth amendment is only applicable if the foreign jurisdiction has a similar privilege.); Nigro v. U.S., 705 F.2d 1224, 1227 (10th Cir. 1982) (The secrecy of a grand jury proceeding is sufficient to eliminate any reasonable concerns a witness may have as to foreign prosecution.); *with* In re Cardassi, 351 F. Supp. 1080, 1086 (D. Conn. 1972) (Values expressed by fifth amendment bar compulsion of testimony that could be used in any foreign prosecution.); Mishima v. U.S., 507 F. Supp. 131, 135 (D. Alaska 1981) (The fifth amendment privilege may be validly asserted, but only to specific questions that tend to incriminate.).

In a recent case, *Doe v. United States*, the Supreme Court did decide the controversial fifth amendment issue regarding compelled disclosure of foreign bank records. Doe v. United States, 108 S. Ct. 2341 (1988). Pursuant to a subpoena, the target of a federal grand jury investigation produced some records in foreign banks, but when questioned about the existence or location of additional bank records, the target invoked his fifth amendment privilege against self-incrimination. *Id.* at 2343. The United States branches of the banks were also served with subpoenas to produce the records. *Id.* When the banks refused to comply, citing their government's bank secrecy laws which prohibited disclosure without consent, the government filed a motion that the court order Doe to sign consent forms. *Id.* at 2343-44. The district court denied the motion finding that the forms were not testimonial in nature. *Id.* at 2344. On remand, the district court ordered Doe to sign the consent directives. *Id.* at 2345. After refusing, the court held him in civil contempt, and the court of appeals affirmed. *Id.*

Focusing on the testimonial nature of the form, the Court found that the phraseology in the consent directive was not testimonial in that it did not relate a factual assertion. *Id.* at 2350-51. Specifically, it viewed the directive as expressing no opinion about the existence or his control over any bank records, thus making the fifth amendment privilege inapplicable. *Id.* at 2351. The Court then reasoned that if the executed directive is effective under local law, then the recipient bank can comply with the Government's request without violating any secrecy laws. *Id.* at 2351-52. The Court noted that the government of the Cayman Islands maintains that a compelled consent, such as the one at issue, is not sufficient to authorize the release of confidential records. *Id.* at 2351 n.16. While refusing to decide the effectiveness of the directive under foreign law as it had no bearing on the constitutional issue, the Court

created and held in one of the bank's branch offices in Country *Y*.[20] The bank refused to produce the documents alleging that disclosure would violate Country *Y*'s banking secrecy laws, and subject the bank to criminal prosecution in Country *Y*.[21]

While urging the government to use other means to obtain the documents, the bank cooperated as much as possible with the investigation.[22] Country *X*, in an attempt to block further proceedings, delivered a *note verbale* to the Department of State requesting that "no compelling means" be ordered against its bank.[23] Despite these actions, the district court, after several hearings, held the bank in contempt and fined it $50,000 per day until it complied with the order.[24] The Bank appealed.[25]

The court of appeals, in a per curium opinion, reversed the district court's contempt order against the bank.[26] Expressly limiting its decision to the "peculiar facts of this case," the court found that the bank acted in good faith and was, therefore, not compelled to comply with the subpoena.[27] The court, however, plainly refused to decide whether a court may order the delivery of bank documents in violation of foreign law.[28] Nevertheless, *In re Sealed* brought to the forefront the two primary concerns facing the courts when multinational

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succinctly stated: "[W]e are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation." *Id.* at 2351-52 n.16. The Court, however, was not faced with the issue.

20. *In re Sealed*, 825 F.2d at 495. Country *Y* is a foreign nation with banking secrecy laws that make it a crime for a bank or person to reveal information about banking transactions or bank documents created in Country *Y* that relate to a customer and his transactions to anyone other than the customer. *Id.*

21. *Id.*

22. *Id.* The bank demonstrated cooperation by the fact that the bank manager traveled to Washington several times to meet with prosecutors and testified before the grand jury regarding his personal knowledge of the targets and their activities. *Id.*

23. *Id.* at 496. A *note verbale* is "[a] memorandum or note, in diplomacy, not signed, sent when an affair has continued a long time without any reply, in order to avoid the appearance of an urgency which perhaps is not required." BLACK'S LAW DICTIONARY 1397 (5th ed. 1979).

24. *In re Sealed*, 825 F.2d at 496.

25. *Id.*

26. *Id.* at 499. The civil contempt order issued by the district court against the manager was affirmed. *Id.* For a discussion of the subpoena directed at the bank manager, see *supra* note 19 and accompanying text.

27. *In re Sealed*, 825 F.2d at 498. For a discussion of the "good faith" analysis, see *infra* notes 126-147 and accompanying text.

28. *In re Sealed*, 825 F.2d at 498. The court stated:

> We do not decide here the general issue of whether a court may ever order action in violation of foreign laws, although we should say that it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question.

Id.

banks "doing business" in the United States are served with a grand jury subpoena: due process and sovereignty.

III. PREVAILING ISSUES

Due process concerns arise when the bank, as a non-party witness, is placed in the fundamentally unfair position of having to choose which law to follow.[29] If it complies with the grand jury subpoena and discloses the requested information located in the foreign country, the bank is forced to violate that country's banking secrecy laws, thus exposing itself to criminal prosecution. Conversely, if it refuses to comply with the subpoena, the bank faces severe civil penalties in the United States. The sovereignty issue centers around the customary right of a state to promulgate any laws it desires and to define the sanctions it will impose on those who violate them within its territorial boundary.[30] This issue focuses primarily upon comity and other basic international law principles.

The due process and jurisdictional sovereignty issues have given rise to a complex dichotomy of jurisprudence. This dichotomy is evident when relevant court decisions prioritize one of these issues over the other, reaching inconsistent results. A court's attitude toward the relative importance of each issue becomes outcome determinative to the case's disposition. Accordingly, a prerequisite to understanding the divergent case law is a close examination of these underlying issues and their constituent elements. In this context, an understanding of the due process issue is predicated upon an understanding of the sovereignty concept, therefore, sovereignty will be discussed first.

A. *The International Concerns Of Sovereignty*

The sovereignty issue is predicated upon the classic notion of territorial sovereignty. Simply stated, a state has exclusive authority over the exercise of governmental power within its borders.[31] Furthermore, absent a state's consent, no law has any effect beyond the limits of the sovereign from which its authority is derived.[32] Thus,

29. The due process clause affords substantive protection of life, liberty, and property. U.S. CONST. amend. V.

30. The Supreme Court, in an early decision, The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812), articulated the customary right a nation possesses as an independent sovereign. Then, Chief Justice Marshall stated: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . . ." *Id.* at 136.

31. *Id.*

32. *Id.*

where a potential jurisdictional conflict exists, a court should look beyond the *lex fori*[33] and consider a foreign state's interest.[34] In such instances, United States federal courts may be bound not only by domestic law, but by international law as well.[35] The international principle that sets the standard for resolving these conflicting jurisdictional issues is commonly called "the comity of nations."

Comity, recognized by the Supreme Court in 1895,[36] originated

33. The principle of *lex fori* states that a domestic forum controls its own procedure and reflects the broader policy concern of affording litigants a full and fair opportunity to prove their claims. *See* Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 614 (1979); Societe Internationale v. McGranery, 111 F. Supp. 435, 444 (D.D.C. 1953) ("Procedures of the law of the forum customarily govern law suits."), *modified*, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

34. *See* Note, *Marc Rich*, 11 BROOKLYN J. INT'L L. 149, 160 (1985).

35. *Id.* The judicial doctrine which addresses these conflicts is the act of state doctrine. This doctrine originated in *Underhill v. Hernandez*, 168 U.S. 250 (1897). The Supreme Court stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252. It is based on the principle of judicial restraint and aimed at preventing judicial interference with foreign relations by discouraging judicial questioning of a foreign law's validity. RESTATEMENT (THIRD), *supra* note 11, at § 443 comment a. The doctrine has primarily been applied to cases involving the taking of property by a foreign state where the property is located. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1963). *Sabbatino* involved a claim by Banco Nacional for proceeds from a sugar shipment against the court appointed receiver. *Id.* at 405-06. The receiver claimed title on behalf of the former owners on the ground that Cuba's seizure of the sugar estate was contrary to international law. *Id.* at 406. While holding that the act of state doctrine did not permit review of acts of a foreign state done within its own territory, the Court cautioned that "[w]hile historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence." *Id.* at 421. It noted that "international law does not require application of the doctrine" and that its "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Id.* at 421, 427-28. *See also* Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments . . . . ' "; Callejo v. Bancomer, S.A., 764 F.2d 1101, 1115 (5th Cir. 1985) (Under the act of state doctrine, the court refused to judge the validity of public acts of a sovereign state performed within its own territory.); *c.f.* Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 516, 522 (2d Cir. 1985) ("Acts of foreign governments purporting to have extraterritorial effect—and consequently, by definition, falling outside the scope of the act of state doctrine—should be recognized by the courts only if they are consistent with the law and policy of the United States."); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (refused to extend the act of state doctrine to acts committed by a foreign sovereign in the course of their commercial activities); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972) (Where the executive branch expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, the doctrine should not be applied by the courts.). For a discussion of the act of state doctrine, see *Note, Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327 (1983).

36. Hilton v. Guyot, 159 U.S. 113 (1895).

as an extension to the territorial sovereignty principle.[37] Today, it is generally defined as "the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum."[38] Furthermore, comity is not a rule of law, but rather a principle of "practical convenience and expediency based on [the] theory that a court that first asserts jurisdiction will not be interfered with in [the] continuance of its assertion by a court of a foreign jurisdiction unless it is desirable that one give way to the other."[39] Judicial recognition and application of this principle fosters international cooperation and encourages reciprocity, thereby promoting predictability through the satisfaction of mutual expectations.[40]

In a recent decision, the Supreme Court stressed that comity requires "a more particularized analysis of the respective interests of the foreign nation and the requesting nation."[41] In any jurisdictional conflict, courts should look at both the domestic and foreign interests at stake in order to maintain an adequate level of predictability and stability among nations. This involves two steps of analysis. First, the court must determine whether there is a true conflict between domestic and foreign law.[42] If a conflict does exist, the court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws.[43] This second step requires consideration of the foreign interests, the interests of the United States, and the mutual interests of all nations in the context of international harmony. Application of comity's principles in United States courts will promote a smoothly functioning global, legal regime.[44]

The principle of comity does have limitations, however. Foreign law may be applied as a favor and a courtesy, and not as a matter of right. No domestic forum has an absolute obligation to enforce foreign interests when they are fundamentally adverse to their own interests.[45] Additionally, the above analysis should be undertaken only

37. *Id.* at 163. In *Hilton*, the Court defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, with 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." *Id.* at 164.

38. Laker Airways v. Sabena, 731 F.2d 909, 937 (D.C. Cir. 1984).

39. Neal v. State, 135 So.2d 891, 895 (1961).

40. *Laker Airways*, 731 F.2d at 937.

41. Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa, 107 S. Ct. 2542, 2555 (1987).

42. *Id.* at 2561-62 (Blackmun, J., concurring in part and dissenting in part).

43. *Id.* at 2562 (Blackmun, J., concurring in part and dissenting in part).

44. *Id.*

45. *Laker Airways*, 731 F.2d at 937; *See* Comment, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1328 (1983) (Comity ignores the strong national interest in deciding cases on the basis of all relevant information.).

when there are strong international concerns at stake. To determine the international concerns involved when a federal court exercises extraterritorial jurisdiction, it is necessary to understand the individual state interests. The due process issue encompasses these interests.

B. *Due Process: A Balance Of Competing Interests*

The due process issue entails a discussion of the competing interests that place the bank in a "fundamentally unfair position." In this discussion of competing interests, three factors are considered. The first factor considered is the national interests of the United States in investigating crime beyond its territory. This requires an understanding of the traditional value common law has placed upon grand jury investigations and the extraterritorial reach of its subpoena power. Additionally, recent congressional attempts to combat offshore criminal activity will be discussed.[46] The second factor considered is the interests of foreign countries in maintaining the secrecy of their banking transactions and keeping them beyond the reach of other jurisdictions. An examination of nondisclosure laws, and their place in the international economic and financial community, will be undertaken. Finally, this subsection will analyze the nature and extent of the hardships that a bank is subject to when these countervailing factors cannot be reconciled.

1. NATIONAL INTERESTS

Historically, the grand jury's role in investigating possible criminal activity has been considered essential to the function of the criminal justice system.[47] It serves the dual function of determining if there

46. *See infra* notes 83-91 and accompanying text.

47. Long before the creation of the American colonies, the grand jury's authority to compel witnesses to appear and testify had been recognized in England. Blair v. United States, 250 U.S. 269, 279 (1919). As early as 1612, Lord Bacon declared that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but their knowledge and discovery." *Id.* at 279-80. By the time the Constitution was adopted, "the grand jury was a revered institution not simply because it served as a buffer between the state and the individual, but equally for its service as a watchdog against public corruption and its capacity to ferret out criminal activity that local officials either chose to ignore or were unable to investigate. W. La Fave & J. Israel, Criminal Procedure 350-51 (1985). The grand jury was embedded in the Constitution under the fifth amendment. It provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . " U.S. CONST. amend. V. *See* Costello v. United States, 350 U.S. 359, 362 (1956) (The establishment in the Constitution of the grand jury "as the sole method for preferring charges in serious criminal cases shows the high place it [holds] as an instrument of justice."). *But see* Hurtado v. California, 110 U.S. 516 (1884) (State grand jury requirements may be abolished by legislation, as the fifth amendment provision concerning indictments does not apply to the states.).

is "probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions."[48] The Supreme Court has traditionally granted the grand jury wide discretion in seeking evidence through the subpoena power.[49] As clearly stated in an early Supreme Court decision, "the public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege."[50] A grand jury may compel the production of evidence or the testimony of a witness it considers appropriate even if there is no charge against the person.[51] The witness is generally not permitted to have counsel present while testifying.[52] The Federal Rules of Evidence, except for those concerning privilege, do not apply to grand jury proceedings.[53] More importantly, the exclusionary rule does not apply in the grand jury context.[54] Therefore, there is no requirement that one demonstrate

48. Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972).

49. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 343-44 (1974) (A grand jury proceeding is an *ex parte* investigation to determine whether a criminal proceeding should be instituted against any person, thus its investigative authority must be broad if it is going to discharge its public responsibility adequately.); *Branzburg*, 408 U.S. at 688 (As the grand jury's task is to inquire into possible criminal conduct and to return only well-founded indictments, its investigative powers are broad.). The Supreme Court rejected any fourth or fifth amendment limitations on the grand jury's power to subpoena a witness in United States v. Dionoso, 410 U.S. 1 (1973). Holding that the grand jury possesses broad authority to determine if a crime has been committed, and who has committed it, the Court refused to require any showing that the state demonstrate the reasonableness of the subpoena issued. *Dionoso*, 410 U.S. at 15. The Court reasoned that "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would . . . impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Id.* at 17. *But see* Hale v. Henkel, 201 U.S. 43, 76 (1905) (A grand jury subpoena will be quashed if it is too sweeping in its terms to be regarded as reasonable under the fourth amendment.).

50. *Branzburg*, 408 U.S. at 668 (quoting in part United States v. Bryan, 339 U.S. 323, 331 (1950)).

51. *Blair*, 250 U.S. at 282. *See also* Kastigar v. United States, 406 U.S. 441, 443 (1972) (The power of a federal court to compel persons to testify is firmly established.).

52. United States v. Mandujano, 425 U.S. 564, 581 (1976). In *Mandujano*, a party was informed that he could have the assistance of counsel, but counsel could not be in the jury room as criminal proceedings had not been instituted. *Id.* Hence, the sixth amendment right to counsel was inapplicable. *Id. See also* Kirby v. Illinois, 406 U.S. 682, 688 (1972) (A person's sixth and fourteenth amendment right to counsel attaches only after an adversary proceeding has been initiated against them.); *In re* Groban, 352 U.S. 330, 333 (1957) (There is no constitutional right of a witness being represented by counsel during a grand jury proceeding.). But see the proposal for change in the separate opinion of Justice Brennan and Justice Marshall in *Mandujano*, 425 U.S. at 602-609.

53. FED. R. EVID. 1101(d)(2). *See, e.g.*, Costello v. United States, 350 U.S. 359, 363 (1956) (The Court rejected an attack on an indictment which was concededly based entirely on hearsay evidence.).

54. United States v. Calandra, 414 U.S. 338, 350 (1973). In *Calandra*, the Court determined that extending the exclusionary rule to grand jury proceedings would "unduly interfere with the effective and expeditious discharge of the grand jury's duties." *Id.*

the reasonableness of a subpoena.[55]

This broad investigative power of the grand jury has come under close scrutiny in recent years. Critics have come to question the historic position of the grand jury in today's system of justice.[56] Specifically, the courts are divided over the expansive role played by the prosecutor.[57] Critics argue that the grand jury should be treated solely as an investigatory and procedural arm of the executive branch of government.[58] The Supreme Court has refused to accept this position, and has continued to follow the precedent granting wide latitude to the grand jury in its investigations.[59] Notwithstanding, many lower

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55. *See* United States v. Dionoso, 410 U.S. 1, 15 (1973). In *Dionoso*, the Supreme Court held that the grand jury possessed broad authority to investigate a crime and, thus, refused to require any showing of reasonableness by the state. *Id.*

56. *See, e.g.*, La Fave, *supra* note 47, at 350-52 (1985) (The eighteenth century grand jury is no longer relevant in today's highly urbanized society.). Arnella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 469 (1980) (The pretrial process virtually adjudicates the individual accused.); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1169-72 (1960) (describes the changes in emphasis in the grand jury during the last decade); Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 57 (1979) (The grand jury no longer serves the role the constitutional drafters envisioned.).

57. The role of the prosecutor has been characterized as follows:

> Working with the police, the prosecutor determines what witnesses will be called and when they will appear. He examines the witnesses and advises the grand jury on the validity of any legal objections the witnesses might present. If a witness refuses to comply with a subpoena, it is the prosecutor who seeks a contempt citation. If a witness refuses to testify on grounds of self-incrimination, it is the prosecutor who determines whether an immunity grant will be obtained. The grand jury must, almost of necessity, rely upon the prosecutor's leadership.

La Fave, *supra* note 47 at 351. *Compare* United States v. Doulin, 538 F.2d 466 (2d Cir.) (The grand jury is a law enforcement agency serving the investigative and prosecutorial arms of the executive branch.), *cert. denied*, 429 U.S. 895 (1976); United States v. Smith, 687 F.2d 147, 149 (6th Cir. 1982) (grand juries are an investigative prosecutorial arm of the executive branch of government) *with* United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir.) ("Under the constitutional scheme the grand jury is not and should not be captive to any of the three branches."), *cert. denied*, 434 U.S. 825 (1977).

58. *See Prosecutorial Misconduct In The Grand Jury: Dismissal Of Indictments Pursuant To The Federal Supervisory Power*, 56 FORDHAM L. REV. 129 (1987); *The Grand Jury Subpoena: Is it the Prosecutor's "Ultimate Weapon" Against Defense Attorneys and Their Clients?*, 13 PEPPERDINE L. REV. 791 (1986); Vaira, *The Role of the Prosecutor Inside the Grand Jury Room: Where is the Foul Line?*, 75 J. CRIM. L. & CRIMINOLOGY 1129 (1984).

59. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 343 (1974) (The grand jury is accorded wide latitude to inquire into violations of criminal law.); Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (The public has a right to everyman's evidence.); Costello v. United States, 350 U.S. 359, 362 (1956) (The grand jury has broad power to institute criminal proceedings.); United States v. Dionoso, 410 U.S. 1, 15 (1973) (The grand jury possesses broad authority to determine whether a crime has been committed.). The Supreme Court, in *Dionoso*, cautioned: "This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections . . . . The Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms to be regarded as reasonable." *Dionoso*, 410 U.S. at 11 (citation omitted).

courts have begun to exercise their supervisory power over the administration of criminal justice, and impose investigatory limits.[60]

The first court to exercise its supervisory power and depart from the Supreme Court dicta was the United States Court of Appeals for the Third Circuit in the two *Schofield* cases (I and II).[61] In *Schofield I*, Schofield, a potential investigatory target, was subpoenaed to appear before the grand jury.[62] Schofield appeared but was not asked to testify.[63] Rather, she was directed by the United States Attorney to submit to handwriting exemplars, and allow her photograph and fin-

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The wide latitude traditionally granted to grand jury investigations has initiated a new controversy in recent years. This controversy revolves around the secrecy afforded to all grand jury investigations and the possible disclosure of materials to attorneys for civil litigation. There is a long established policy of secrecy in the grand jury proceedings. *See* United States v. Procter and Gamble, 356 U.S. 677, 681 (1957); *Costello*, 350 U.S. at 362.

In recent years this policy has come under close scrutiny. The Court addressed this in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). In *Sells*, the defendants, under a plea bargaining arrangement, pleaded guilty to one count of conspiracy to defraud the Government by obstructing an IRS investigation. *Id.* at 421. Thereafter, the Government moved to disclose all of the grand jury materials to attorneys in the Justice Department's Civil Division for use in preparing a possible civil suit against the defendants. *Id.* The defendants opposed the disclosure alleging fear of grand jury misuse for civil purposes. *Id.* at 422. The district court granted the request, concluding that attorneys in the Civil Division are entitled to disclosure as a matter of right under Federal Rule of Criminal Procedure 6(e)(3)(A)(i), which authorizes disclosure of grand jury materials without a court order to "an attorney for the government for use in the performance of such attorney's duty." *Id.* at 422. The United States Court of Appeals for the Ninth Circuit vacated and remanded the case, holding that the attorneys could only obtain disclosure upon a showing of particularized "need" under Rule 6(e)(3)(C)(i). *Id.* In a 5-4 decision, the Supreme Court affirmed the particularized need standard. *Id.* at 443. Specifically, a party seeking disclosure must show that the material sought is required in order to avoid possible injustice in another judicial proceeding, that the need for the disclosure is greater than the need for continued secrecy, and that the request is structured to cover only the necessary materials. *Id.* Although the standard in *Sells* appears to be a narrow one, when taken a step further, it opens the door for defendants to be held liable in civil proceedings on the basis of illegally seized evidence.

60. Federal courts possess the power to supervise the administration of criminal justice by "establishing and maintaining civilized standards of procedure and evidence." McNabb v. United States, 318 U.S. 332, 340 (1942). *See In re* Special Grand Jury No. 81-1, 676 F.2d 1005, 1012 (4th Cir. 1982) (Courts have supervisory power over the conduct of the grand jury proceeding, and they have the power to fashion rules to further the administration of justice when such rules are necessary.). For a more thorough discussion of the court's supervisory power, see Beale, *Reconsidering Supervisory Powers in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

61. *In re* Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973) (Schofield I) and *In re* Grand Jury Proceedings, 507 F.2d 963 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975) (Schofield II).

62. *Schofield I*, 486 F.2d at 87. The subpoena solely commanded Mrs. Schofield to appear at the time and place designated "to testify in the above-entitled case." *Id.* It did not contain any information about the proceeding. *Id.*

63. *Id.*

gerprints to be taken.[64] After conferring with her attorney, she refused, and the district court held her in contempt.[65] The Third Circuit reversed stating:

> [W]e think it reasonable that the Government be required to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose. We impose this requirement both pursuant to the federal courts' supervisory power over grand juries and pursuant to our supervisory power over civil proceedings brought in the district court pursuant to 28 U.S.C. § 1826(a).[66]

Schofield II raises questions concerning the district court's application of the holding in *Schofield I* on remand.[67] The appellate court affirmed the district court's finding on remand that the affidavit submitted by the government met the *Schofield I* requirements.[68] Justifying its decision in *Schofield I*, the *Schofield II* court explained that it did not interpret *Schofield I* as a major deviation from previous Supreme Court decisions.[69] It reasoned that *Schofield I* "did not intend to impede the grand jury process by requiring hearings in every case."[70] Rather, "it merely restated [the] district court's authority to deal individually with the facts of each subpoena."[71] Thus, in the Third Circuit, the *Schofield* three-prong requirement of relevancy, proper jurisdiction, and proper purpose must be shown.[72]

The *Schofield* requirement has received much criticism and few federal appellate circuits have chosen to follow the Third Circuit's reasoning.[73] Today, the grand jury's power to obtain evidence

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64. *Id.* at 87.

65. *Id.* at 88.

66. *Id.* at 93.

67. *Schofield II*, 507 F.2d at 964.

68. *Id. Schofield I* did not require a showing of reasonableness or probable cause, or a hearing in every case. *Id.* at 966. What it did require was a minimum showing that the item sought was (1) relevant to the investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought for another purpose. *Id.* The court took specific notice of United States v. Dionoso, 410 U.S. 1 (1973), United States v. Mara, 410 U.S. 16 (1973), and Branzburg v. Hayes, 408 U.S. 665 (1972), in which affidavits were also supplied to the district courts although there was no mention of them in the opinions. *Id.* at 966.

69. *Id.* at 965.

70. *Id.* at 966.

71. *Id.* The court emphasized that the decision to require additional information is committed to the sound discretion of the judge. *Id.* at 965.

72. The *Schofield II* court defined relevancy as follows: "Relevancy, in the context of a Grand Jury proceeding is not a probative relevancy, for it cannot be known in advance whether the document produced will actually advance the investigation. It is rather a relevancy to the subject matter of the investigation." *Id.* at 967 n.4 (quoting *In re* Morgan, 377 F. Supp. 281, 285 (S.D.N.Y. 1974).

73. *See* United States v. McClean, 565 F.2d 318, 320-21 (5th Cir. 1977) ("In the absence of

remains virtually unlimited, and the grand jury may investigate any crime that is within the jurisdiction of the court.[74] The jurisdiction of the court has extended beyond the territorial boundaries of the United States, thus enhancing the power of the grand jury. This extraterritorial reach is governed by principles of international law.

International law distinguishes between three general categories of jurisdiction: jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.[75] Jurisdiction to prescribe is relevant in any instance where a grand jury is attempting, through its subpoena power, to require a bank to produce documents located in another jurisdiction. There are five principle bases of jurisdiction to prescribe: principles of territoriality, nationality, universality, and the protective and passive personality principles.[76] The territorial principle is the most common basis.[77]

Territorial jurisdiction is founded upon two premises. First, as explained earlier, it allows states to regulate the conduct or status of individuals physically within the territory.[78] Second, and perhaps more significantly, territorial jurisdiction applies to activity that occurs outside a state's territorial boundary, but which has, or is intended to produce, substantial effects within it.[79] Under the latter

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a witness asserting harassment or prosecutorial misuse of the system, we will not impose upon the government or the district courts any preliminary requirements or procedures which would impede the grand jury's investigative powers."); *In re* Grand Jury Proceedings, 555 F.2d 686 (9th Cir. 1977) ("In view of the presumption that the government obeys the law, we see no reason to inject into routine grand jury investigations the delay and imposition upon district courts that will be opened up by a rule institutionalizing these disclaiming affidavits."). *Cf.* In re Pantojas, 628 F.2d 701, 705 (1st Cir. 1980) (The court refused to adopt *Schofield* unless some convincing demonstration that the requirements were necessary to prevent systematic abuse, but went on to say that district courts could freely require the showings as a means of assuring themselves that the grand jury is not overreaching.). *But see In re* Special Grand Jury No. 81-1, 676 F.2d 1005, 1012 (4th Cir. 1982) ("[I]n exercise of our supervisory power over federal grand jury proceedings in this circuit, the preliminary showing described is appropriate to protect a person's interest in maintaining a proper attorney-client relationship.").

74. Marc Rich v. United States, 707 F.2d 663, 666 (2d Cir.) (The court explained that it would be strange if the United States could punish a foreign corporation for violating criminal laws upon a theory that the corporation was constructively present in the jurisdiction at the time the event occurred, and a federal grand jury could not investigate to ascertain if a crime had been committed.), *cert. denied*, 463 U.S. 1215 (1983).

75. RESTATEMENT (THIRD), *supra* note 11, at § 401. For a detailed discussion on the various bases of jurisdiction, see Zagaris & Rosenthal, *United States Jurisdictional Considerations in International Criminal Law*, 15 CAL. W. INT'L L. J. 303 (1985).

76. For purposes of this discussion, the only relevant principle is territoriality. For an extensive discussion on the other principles see the RESTATEMENT (THIRD), *supra* note 11, at § 402 and the comments following.

77. *Id.* at § 402 comment c.

78. *See supra* notes 31-35 and accompanying text.

79. This is commonly referred to as the "effects test" and was established in S.S. Lotus (Fr.

premise, a government may prescribe the conduct of an individual in the same manner as if he were present in the jurisdiction where the detrimental effect occurred.[80] Grand juries may use this "effects doctrine" as a basis for expanding the exercise of the subpoena power abroad.[81] This principle, however, should be applied with caution in light of the inherently different discovery procedures between civil law and common law countries.[82]

In addition to its broad investigatory power, Congress provides the grand jury wide discretion in obtaining evidence regarding banking activities.[83] The Bank Secrecy Act,[84] promulgated in 1970, allows prosecutors to circumvent foreign secrecy laws if they can trace the flow of illegal funds to foreign accounts. This is made possible

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v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7, 1927). In *Lotus*, the Permanent Court of International Justice stated:

> [T]he first and foremost restriction imposed by international law upon a State is 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 . . . . It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad . . . .

Id. at 18-19.

80. *See Marc Rich*, 707 F.2d at 666. In *Marc Rich*, the court stated:

> [I]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.

Id. at 666 (quoting 2 MOORE'S INTERNATIONAL LAW DIGEST § 202, at 244 (1986)).

81. The effects doctrine is partially embodied in 28 U.S.C. § 1783 (1982). Under section 1783 a court may order the appearance of a witness who is in a foreign country or require the production of documents, if the court determines that these are necessary in the interests of justice. 28 U.S.C. § 1783(a). If a witness, served in the foreign country, does not comply, he may be held in contempt under 28 U.S.C. § 1784 (1982). The constitutionality of Section 1783 was upheld in *Blackmer v. United States*. 284 U.S. 421 (1931). The Court stated "[t]hat the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal." *Id.* at 437.

82. The civil law system is one of the two major legal systems of the Western world. In civil law countries, evidence is obtained by a judicial officer. *Aerospatiale*, 107 S. Ct. at 2562 (Blackmun, J., concurring in part and dissenting in part). Thus, as discovery is primarily a job for the courts, it is considered to be closely tied to sovereignty rights. *Id.* Conversely, in common law practice, the litigants have the duty of privately obtaining evidence to be presented at trial. *Id.* Specifically, the scope of discovery in the United States is much broader than in other jurisdictions. *Id.* at 2554. For a discussion of the civil-law system see A. VON MEHREN AND J. GORDLEY, THE CIVIL LAW SYSTEM (2d ed. 1977).

83. *See, e.g.*, Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114-36 (codified as amended in scattered sections of 12 U.S.C. and 31 U.S.C.).

84. *Id.*

through elaborate record keeping[85] and reporting[86] techniques required of banks in the United States.

Recent concern over the use of offshore banks to launder proceeds of criminal activities and to evade taxes prompted the enactment of two Acts: The Comprehensive Crime Control Act of 1984[87] and the Money Laundering Act.[88] The Crime Control Act is designed to make foreign-kept business records more accessible for admission into evidence in criminal trials.[89] The Money Laundering Act permits the Secretary of Treasury to summon a foreign bank's officers and employees to testify under oath and produce documentary evidence.[90] The success of these acts, however, will depend on the ability of the federal courts to enforce the orders under international law.

The domestic interests of the United States in investigating criminal activities are great. Taken alone, they appear to override all other interests. With the economic reality of the interdependence of nations, however, foreign interests must be acknowledged and respected.[91]

2. FOREIGN INTERESTS

Foreign response to attempts by federal courts in the United States to exercise their broad subpoena power is hostile. Protests to the extraterritorial reach is primarily expressed through a state's legislation.[92] In an attempt to prevent any extraterritorial exercise of jurisdiction in their territory, many enact nondisclosure laws, that prevent the disclosure of any specified information.[93] Generally, there are two types of nondisclosure legislation: secrecy laws and "blocking statutes."[94] Although the underlying reason behind the enactment of each statute is different, their effect of prohibiting disclosure is the

85. 12 U.S.C. § 1829b (1982).

86. 31 U.S.C. §§ 5312-5316 (1982).

87. 31 U.S.C. § 5316 (1982), *as amended* by the Comprehensive Crime Control Act of 1984, ch. 9, § 901(c)(2), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2135.

88. Money Laundering Control Act, 31 U.S.C. §§ 1512-1516, 18(a) (1986).

89. 18 U.S.C. §§ 3292, 3504-3507 (1982).

90. *See supra* note 88.

91. As early as 1960, banks cautioned that the extraterritorial reach of subpoenas presented important policy questions of branch banking throughout the world. Ings v. Ferguson, 282 F.2d 149, 153 (2d Cir. 1960). More specifically, banks cautioned that a subpoena served on a branch operating in the United States that requires a search for records in a bank located in a foreign country might have the effect of causing retaliatory laws to be enacted to the detriment of American business interests. *Id.*

92. *See supra* note 3.

93. *See generally* RESTATEMENT (THIRD), *supra* note 11, at § 442 note 4 (1987).

94. *Id.*

same. Thus, most courts do not attempt to distinguish between the two.

Secrecy laws are commonly recognized in the banking and financial communities.[95] Their purpose is to protect the confidentiality of client transactions and thereby attract foreign investors.[96] Bank secrecy laws find their origin in the privacy laws that are a part of the codes of most civil law countries.[97] The secrecy laws are predicated upon the right to personal privacy that persons who hire a professional are entitled.[98] Any breach of confidentiality, unlike in common law countries, is considered a crime.[99] Thus, the banker, a professional, is subject to penal sanctions if he discloses any private customer information. Most jurisdictions throughout the world have some type of banking secrecy law.[100]

Countries view their secrecy laws not only as a sovereign right to protect individual privacy, but as a source of profit for the country.[101] Additionally, with the expanding international markets, these laws serve to meet the legitimate needs of both individual and multinational businesses.[102] Unfortunately, in recent years, these secrecy

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95. *See* Comment, *U.S. Enforcement in International Cases,* 16 CAL. W. INT'L L.J. 13, 19 (1986).

96. *Id.*

97. *See* Comment, *The Effect of Swiss Bank Secrecy on the Enforcement of Insider Trading Regulations and the Memorandum of Understanding Between the United States and Switzerland,* 7 B.C. INT'L & COMP. L. REV. 541, 544-45 (1984).

98. *Id.*

99. *Id.* at 545. Common law countries often prescribe only professional discipline for breaches of professional secrecy. *Id.*

100. STAFF OF SENATE COMM. ON GOV'T AFFAIRS, 98TH CONG., 1ST SESS., CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES 230 (Comm. Print 1983). For a discussion on Swiss bank secrecy laws, see Comment, *supra* note 97; B. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States,* 14 NEW ENG. L. REV. 18 (1978); *see also* Minpeco v. Conticommodity Services, 116 F.R.D. 517, 524 (S.D.N.Y. 1987) (explaining the Swiss national interest).

101. *See, generally,* R. JOHNS, TAX HAVENS AND OFFSHORE FINANCE (1983) for a discussion on the financial advantages and disadvantages of secrecy jurisdictions.

102. *See* Comment, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example,* 20 TEX. INT'L L.J. 133, 134-35 (1985). The author stated:

> There are at least [five] legitimate reasons justifying individual use of bank secrecy jurisdictions: (1) capital flight from political, religious, and racial persecution; (2) freedom from oppressive government, confiscatory taxes and the risks of war; (3) freedom from unwanted popularity and threats to one's reputation; (4) protection from legal judgment; and (5) protection from the increasing domestic threat of robbery . . . .

Id. at 134 n. 5. The author further stated that domestic companies use offshore banks for various purposes:

> (1) to avoid taxation; (2) to avoid regulation; (3) to profit from higher interest rates when lending; (4) to enjoy lower interest rates when borrowing; (5) to enjoy

jurisdictions have been manipulated by those seeking to circumvent United States laws and frustrate criminal investigations.[103] Among the most common illegal activities are insider trading,[104] criminal fraud,[105] and tax evasion.[106] Particularly acute has been the laundering of profits by high-level narcotics traffickers.[107]

Blocking statutes,[108] unlike secrecy laws, are directly intended by foreign countries to thwart foreign discovery in their territory.[109] Most were enacted after the United States began exercising its subpoena power abroad. Specifically, these statutes grew in response to the enforcement of United States antitrust laws overseas.[110] Countries use these statutes as a way to block the United States legislation and protect their territorial sovereignty. Some statutes cover all documents, while others prohibit the disclosure of certain categories of information.[111] Usually, all provide for penal sanctions if information is disclosed.[112]

Both the secrecy laws and the blocking statutes comprise what is known as the foreign government compulsion defense.[113] It is this type of defense that a bank uses as a shield from grand jury investiga-

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> the protections of confidentiality when engaged in activities which, if known to others in advance, might hazard business success or profit margins; and (6) to hedge and enjoy such other risk allaying methods as offshore diversification, liquidity and forward speculations.

Id. at 135 n. 6 (citation omitted). *See generally* R. BLUM, OFFSHORE HAVEN BANKS, TRUSTS, AND COMPANIES (1984) (analyzing the risks and benefits of the offshore financial community).

103. *See generally* Blum, *supra* note 102; Meyer, *supra* note 100.

104. *See, e.g.,* S.E.C. v. Banca della Svizzera Italiana, 92 F.R.D. 111-12 (S.D.N.Y. 1981) (A Swiss corporation purchasing stock traded on the Philadelphia stock exchange based on insider information.).

105. *See, e.g.,* United States v. Lemire, 720 F.2d 1327, 1332-33 (D.C. Cir. 1983) (Defendants in a scheme to defraud used secret bank accounts in a number of secrecy havens to hide illegally obtained shipping profits.), *cert. denied,* 467 U.S. 1226 (1984).

106. *See, e.g.,* Marc Rich v. United States, 707 F.2d 663-65 (2d Cir.) (A subsidiary diverted taxable income to the Swiss parent in order to evade United States income tax.), *cert. denied,* 467 U.S. 1215 (1983).

107. *See generally* Comment, *supra* note 102.

108. As defined in section 442 of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, "[b]locking statutes are designed to take advantage of the foreign government compulsion defense . . . by prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities." RESTATEMENT (THIRD), *supra* note 11, at § 442 note 4 (1987).

109. For a general discussion of the history and effects of blocking statutes see Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation,* 17 INT'L LAW 61 (1983).

110. RESTATEMENT (THIRD), *supra* note 11, at § 442 note 4 (1987). *See, e.g.,* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

111. RESTATEMENT (THIRD), *supra* note 11, at § 442 note 4 (1987).

112. *Id.*

113. *Id.* at § 442 note 5.

tion attempts.[114] On the other hand, this legislation also represents legitimate attempts by countries to protect their privacy and sovereign rights.[115] When viewed in this manner, they pose a difficult issue for courts reviewing government motions to compel disclosure. Similarly, they place the bank in the more difficult position of choosing which law to follow.

3. THE HARDSHIP ON THE BANK AS A NON-PARTY WITNESS

In their attempts to operate in the international marketplace and provide a valuable service, multinational banks doing business in the United States endure a considerable amount of hardship. They are in a position where they must violate another country's laws, or be held in contempt of court. Some courts arbitrarily reconcile these conflicting interests by simply declaring that a man cannot serve two masters and, thus, should surrender to the the jurisdiction of one sovereign.[116] This stance is particularly alarming when the bank is a non-party witness.

The situation presented by a non-party witness is fundamentally different from a situation involving actual parties. Traditionally, witnesses have been afforded greater protection from discovery orders than have parties. Since the bank is a mere witness, courts generally reason that it should not incur any criminal liability for noncompliance with the subpoena.[117] In recent years, courts have neglected this important distinction and justified compulsion based on the reasoning that if you choose to operate in the United States, you must abide by the laws of the jurisdiction.[118] This reasoning is without foresight, as the commercial world is interdependent, and the United States is subject to the jurisdictions of other forums.

Thus, the Comment will now examine how courts reconcile the national interests of the United States in investigating criminal activity and the foreign interests in protecting their privacy laws. This will be done in light of the important sovereignty issues involved.

IV. JUDICIAL DOCTRINE

The judicial doctrine attempting to accommodate the often conflicting due process and sovereignty issues is complex and controver-

114. *Id.* at § 442 note 4.

115. *See Id.* at § 441.

116. *See* First National City Bank of New York v. IRS, 271 F.2d 616, 620 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

117. Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960).

118. *See* United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); *see also supra* note 7.

sial. A uniform approach does not yet exist that deals with the multitude of problems posed by the extraterritorial exercise of the grand jury subpoena power. Courts considering the issues apply an ad hoc criterion analysis. Two standards that have gained general acceptance are the *Societe Internationale*[119] good faith test and the Restatement factor analysis.[120] Although neither criterion is dispositive among the federal appellate circuits, most courts consider their application. The inconsistency arises, however, when courts apply different amounts of leverage to the various factors. This is what places the cases in a confusing and contradictory paradigm, attributed to the lack of guidance by the Supreme Court and the Legislature.

The only Supreme Court decision that dealt directly with these issues was, *Societe Internationale v. Rogers*[121] decided in 1958. *Societe Internationale* established the "good faith" standard by which courts measure the validity and effect of extraterritorial jurisdiction.[122] The Court, in *Societe Internationale*, however, failed to define what could be considered "good faith" efforts, thus allowing lower courts to manipulate the standard to produce their own desired results. Hence, it is necessary to first analyze the facts of *Societe Internationale* and its underlying concern for international comity, in order to understand its limited precedential value. In light of advances in computer technology and transportaion, distinctions must be drawn between the commercial world as the *Societe Internationale* Court saw it forty years ago, and as it is today. Due to this technologically advanced environment, the Supreme Court should readdress this important controversy in order to alleviate the pressures placed upon members of the international financial community.

The Restatement of Foreign Relations Law has developed a factor analysis that examines the various competing interests.[123] This method provides a more acceptable solution to the problem but still leaves many questions unanswered. While this analysis was first propounded by the Restatement (Second) in 1965,[124] a third edition has recently been published that expands upon the simple analysis established in the second edition.[125] Both of these standards will be dis-

119. Societe Internationale v. Rogers, 357 U.S. 197 (1958).

120. *See infra* notes 148-171 and accompanying text.

121. 357 U.S. 197 (1958).

122. *Id.* at 208-09.

123. RESTATEMENT (THIRD), *supra* note 11, at §§ 403, 441, 442 (1987).

124. RESTATEMENT (SECOND) OF FOREIGN RELATIONS (1965) [hereinafter Restatement (Second)].

125. *Compare* RESTATEMENT (SECOND) *supra* note 124, at § 40 *with* RESTATEMENT (THIRD) *supra* note 11, at §§ 403, 441, 442 (1987).

cussed in order to understand how courts in subsequent cases have attempted to develop a consistent answer.

A. *The Good Faith Test and* Societe Internationale

The good faith test in *Societe Internationale* holds that a party's good faith efforts to comply with a production order is the key factor in considering whether foreign law actually prohibits the disclosure of documents.[126] In *Societe Internationale*, a subpoena was directed at a party litigant, as opposed to a non-party witness.[127] Most courts applying this test have failed to make this important distinction, thus placing the bank, a non-party witness, in the same position as the party litigant.[128] Another important distinction that should have been addressed by subsequent courts analyzing extraterritorial jurisdiction is that *Societe Internationale* involved a civil suit.[129] These unrecognized distinctions have resulted in what might be considered unjust decisions.

In *Societe Internationale*, a Swiss holding company brought an action to recover property seized during World War II.[130] The company claimed that the property was wrongfully seized because it was the property of a corporation of a neutral nation.[131] During discovery, the government moved for an order to make the Swiss bank records of the company available, alleging that the company had conspired with a German corporation.[132] The government claimed these records would reveal the true ownership of the seized property.[133] The company refused to comply with the subsequent court order, asserting that it did not control the records, as disclosure would violate Swiss banking law.[134] Faced with this conflict, the district court referred

126. *Societe Internationale,* 357 U.S. at 208-09.

127. *Id.* at 199-200.

128. *See, e.g., infra* notes 213-44.

129. *See* United States v. Vetco Inc., 691 F.2d 1281, 1287 (9th Cir.) ("We have no finding that appellants have made good faith efforts to comply with the summonses."), *cert. denied,* 454 U.S. 1098 (1981); SEC v. Banca della Svizzera Italiana, 92 F.R.D. 111, 118-19 (S.D.N.Y. 1981) (found the defendant had not shown good faith efforts to comply); *cf.* Garpeg, Ltd. v. United States, 588 F. Supp. 1240-42 (S.D.N.Y. 1985) (despite the preliminary injunction of a Hong Kong court, and the fact that Chase's good faith efforts were not disputed, the court, nevertheless imposed a fine.).

130. *Societe Internationale,* 357 U.S. at 198-99.

131. *Id.* at 199.

132. *Id.* at 199-200. The government moved for an order under Rule 34 of the Federal Rules of Civil Procedure, which, in conjunction with Rule 26(b), allows the court, upon a showing of good cause, to compel a party to produce the documents relevant to the subject matter pending in the litigation. *Id.* at 200.

133. *Id.* at 200.

134. *Id.* The plaintiff did not dispute the relevancy of the documents. *Id.*

the matter to a special master for a finding as to the mandates of Swiss law.[135]

The special master concluded that Swiss law prohibited disclosure and found no collusion between the company and the Swiss government.[136] Additionally, he found that the bank used good faith efforts to comply with the subpoena.[137] Despite these findings, the district court dismissed the claim, holding that Swiss law did not furnish an adequate excuse for the company's failure to comply with the court order.[138] The Court of Appeals for the District of Columbia affirmed.[139]

A unanimous Supreme Court reversed.[140] Balancing the interests of both parties, Justice Harlan determined that Swiss law prohibited disclosure and as there was no showing of bad faith on the part of the company, the district court was not justified in dismissing the case.[141] The Court expressly refused, however, to hold that fear of punishment under the laws of a sovereign precludes courts from finding that the company had "control"[142] over the documents, a finding that would operate as a complete bar to a discovery order.[143] Rather, the Court limited its reasoning to a balance of interests applied to the "exigencies of [the] particular litigation."[144] The Court remanded the case noting that the absence of complete disclosure goes to the adequacy of the company's proof and does not preclude the plaintiff from being able to contest the subpoena on the merits.[145]

The Supreme Court in *Societe Internationale* left a confusing precedent. It held succinctly that a party cannot be penalized for good faith efforts to comply with a discovery order. The Court failed, however, to define what constitutes a "good faith" effort. Consequently, lower courts addressing the good faith issue have developed their own

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135. *Id.* at 201.

136. *Id.*

137. *Id.*

138. *Id.* at 201-02. During the interim period, between the trial court decision and the appellate court review, many documents were submitted by the plaintiff with the consent of the Swiss government demonstrating cooperative efforts. *Id.* at 202-03.

139. *Id.* at 202.

140. *Id.* at 213.

141. *Id.* at 204-05.

142. The control argument has been continually rejected by most federal appellate circuits, the basis being that the parties have chosen to do business in the United States, and they are voluntarily placing themselves within the jurisdiction of the court. *See, e.g.*, United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

143. *Societe Internationale*, 357 U.S. at 205.

144. *Id.* at 206.

145. *Id.* at 213.

criterion, thus causing differing standards to be created.[146] *Societe Internationale*, however, did leave one clear precedent. By giving considerable weight to Swiss law, it established that in any jurisdictional conflict, an analysis of the applicable foreign law is essential.[147]

B. *Restatement of Foreign Relations Law*

In 1987, the American Law Institute published the Restatement (Third) of Foreign Relations.[148] While adhering to the factor analysis established in earlier publications, a more detailed and thorough examination of those factors was introduced.[149] Before discussing the analysis suggested by the latest Restatement, it is important to understand the factors established in Section 40 of the Restatement (Second) of Foreign Relations, for it is under this factor analysis that most decisions are predicated.

The Restatement (Second) of Foreign Relations requires a balance of various factors in order to determine which law will apply when there is a jurisdictional conflict.[150] The five nonexclusive factors listed in § 40 are as follows:

> (a) vital national interests of each of the states; (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person; (c) extent to which the required conduct is to take place in the territory of another state; (d) the nationality of the person; and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[151]

All of these factors are considered by states adopting the Restatement approach.

The Restatement (Third) goes beyond the factors stated in Section 40 and offers a more complex and elaborate factor analysis. It includes both a reasonableness and good faith standard.[152] Primarily, three sections are relevant for purposes of the analysis: Section 403

146. For a more complete discussion on the good faith test see Meyer, *supra* note 100; Comment, *supra* note 102; and R. Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999 (1984).

147. *Societe Internationale*, 357 U.S. at 204. The Court stated: "We approach this question in light of the findings below that the Swiss penal laws did in fact limit petitioner's ability to satisfy the production order because of the criminal sanctions to which those producing records would have been exposed." *Id.*

148. RESTATEMENT (THIRD), *supra* note 11 (1987).

149. *See infra* notes 153-155 and accompanying text.

150. *See In re* Grand Jury Proceedings, 532 F.2d 404-07 (5th Cir.) (one of the first cases to adopt the Restatement analysis), *cert. denied*, 429 U.S. 940 (1976).

151. RESTATEMENT (SECOND), *supra* note 124, at § 40.

152. RESTATEMENT (THIRD), *supra* note 11, at §§ 403, 442.

entitled Limitations on Jurisdiction to Prescribe,[153] Section 441 entitled Foreign State Compulsion,[154] and Section 442 entitled Requests For Disclosure: Law of the United States.[155] Each will be discussed separately.

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153. *Id.* at § 403. Limitations on Jurisdiction to Prescribe are listed as follows:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Id.

154. *Id.* at § 441. Section 441 defines Foreign State Compulsion as follows:

(1) In general, a state may not require a person

(a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or

(b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.

(2) In general, a state may require a person of foreign nationality

(a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or

(b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.

Id.

155. *Id.* at § 442. Section 442 describes Requests for Disclosure: Law of the United States as follows:

Section 403, which serves as the premise for Sections 441 and 442, is where the factors of Section 40 are incorporated and expanded upon.[156] In addition, Section 403 specifically limits Section 402,[157]

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(1) (a) A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.

(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party.

(c) In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

(2) If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,

(a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

Id.

156. *See* RESTATEMENT (THIRD), *supra* note 11, at § 403 note 10 (1987).

157. *Id.* at § 402. Section 402 describes Bases of Jurisdiction to Prescribe as follows:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1) (a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is

which provides the basis of jurisdiction for a state to prescribe law.[158] At the outset, Section 403 establishes that reasonableness is the underlying criterion in determining the jurisdiction of a state to prescribe law when seeking documents located in a foreign jurisdiction.[159] In deciding what is reasonable, the court should evaluate "all relevant factors," that were outlined in Section 40.[160] Even if it is determined that the exercise of jurisdiction would not be unreasonable, Section 403 imposes a burden upon courts in the United States to go one step further if the laws of the two states are in conflict. Specifically, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction . . . ."[161] This further requirement forces the court to determine the position of the foreign law. Ultimately, this mode of analysis fosters the notion of comity among nations.[162]

The Restatement (Third) of Foreign Relations goes beyond the general provisions of Sections 402 and 403 and specifically addresses the foreign state compulsion defense in Sections 441 and 442. These two Sections, which are new to the Restatement,[163] are based on the principles of reasonableness and conflict avoidance set forth in Section 403.[164]

Section 441 addresses the defense of foreign state compulsion in relation to the regulation of activities generally.[165] The Section focuses on the position of "persons" caught between conflicting demands, as in the case of a non-party bank, and attempts to afford protection to such "persons" by applying the principles in Section 403.[166] A comment to Section 441, however, makes it clear that the defense is available only when the other state's requirements are embodied in binding laws or regulations subject to penal or other

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directed against the security of the state or against a limited class of other state interests.

Id.

158. Section 403 states that even if a basis for the exercise of jurisdiction is present, it is limited by Section 402. *Id.*

159. *Id.* at § 403(1).

160. *Id.* at § 403(2)(a)-(h).

161. *Id.* at § 403(3).

162. *Id.* at § 403 comment a.

163. *Compare* RESTATEMENT (SECOND), *supra* note 124 at § 40 with RESTATEMENT (THIRD), *supra* note 11, at §§ 403, 441, 442. The fact that Sections 441 and 442 were added to the Restatement demonstrates the pervasiveness of the problem.

164. RESTATEMENT (THIRD), *supra* note 11, at pt. IV, ch. 4 introductory note. It is important to note that the defense is recognized in instances where the exercise of jurisdiction by the territorial state would be unreasonable under Section 403. *Id.* at § 441 comment a.

165. *Id.* at pt. IV, ch. 4 introductory note.

166. *Id.* at § 441 comment a.

severe sanctions.[167]

Section 442 sets forth the law of the United States on foreign state compulsion in relation to requests for the disclosure of information located in one state and sought in connection with a legal proceeding in another.[168] In its two subsections, Section 402 substantially departs from the previous analysis in this area. It enumerates a new set of factors — beyond those stated in Section 403 — to be considered by the courts when a party is attempting to obtain records from abroad and it incorporates the *Societe Internationale* good faith test.[169] Furthermore, the Restatement adopts a relevancy standard stating, "[I]t is ordinarily reasonable to limit foreign discovery to information necessary to the action — typically, evidence not otherwise readily obtainable — and directly relevant and material."[170] This may be interpreted as imposing a *Schofield*-like requirement upon a subpoena that requests documents in a foreign state that prohibits disclosure.[171]

In general, the Restatement (Third) more adequately attempts to deal with these conflicts of jurisdiction by providing more extensive guidelines. It is still too early, however, to determine how its application will effect the case law.

C. *Case Analysis*

1. THE SECOND CIRCUIT: AN EARLY ANALYSIS

In the years immediately following *Societe Internationale*, the Second Circuit of the United States Courts of Appeals established the precedent for analyzing discovery orders directed to non-parties in foreign countries. The majority of these cases did not require disclosure when criminal prosecution was probable in the foreign country. Only when the interests of the United States were significantly greater than those of the foreign country, or where there was no real danger of criminal prosecution, did the court enforce a grand jury subpoena requiring disclosure. In accordance with *Societe Internationale*, all of the cases held that a showing of probable criminal prosecution was required before the foreign interests would be considered.

Two of the earliest cases that set the standard to analyze subsequent cases involving grand jury subpoena orders did not involve

167. *Id.* at § 441 comment c (qualifying what courts have defined as real fear of prosecution).

168. *Id.* at pt. IV, ch. 4 introductory note.

169. *Id.* at §§ 442(1)(c), 442(2)(a).

170. *Id.* at § 442 comment a.

171. *See supra* notes 61-74 and accompanying text.

criminal charges: *First Nat'l Bank v. Internal Revenue Serv.*,[172] concerning an IRS summons, and *Ings v. Ferguson*,[173] involving corporate litigation. In *First Nat'l Bank*, one year after *Societe Internationale*, the court undertook a factual analysis of the foreign law involved. In that case, the IRS, while investigating a Panamanian corporation with offices in New York and Panama, ordered the production of certain bank records.[174] The bank produced the records located in its New York branch but refused to produce the documents located in Panama.[175] The bank argued that the documents were physically located in the Republic of Panama, and that, as such, they were beyond the reach of the subpoena.[176] Specifically, the bank contended that nonproduction was justified because the bank was not "in control" of the documents and also because production of the documents would violate Panamanian law.[177] The court rejected the bank's arguments, holding that the bank did have control over the documents in question, and that there was no showing that the laws of Panama prevented production.[178] Having made that determination, the court ordered production.[179] The court went on to explain, however, that had there been a showing of possible violation, it would "agree that the production of the Panama records should not be ordered."[180]

Following the express language of *First Nat'l Bank*, the Second Circuit, in *Ings*, modified a district court order requiring the production of certain documents located in Canada.[181] While calling into doubt the control analysis in *First Nat'l Bank*, the court undertook a more detailed factor analysis.[182] It paid particular attention to the fact that the bank was not a party.[183] More importantly, the court relied heavily upon the opinions of Canadian counsel, that were supplied in affidavits explaining that Canadian law prohibited disclo-

172. 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

173. 282 F.2d 149 (2d Cir. 1960).

174. *First Nat'l Bank*, 271 F.2d at 618.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 618-19.

179. *Id.* at 620.

180. *Id.* at 619.

181. *Ings*, 282 F.2d at 153.

182. *Id.* at 152. The court found it unnecessary to resolve questions as to whether the manager of the New York agency has the power to direct officers of the Canadian branch to send out bank records in violation of Canadian law because of "other factors present." *Id.*

183. *Id.* The court carefully stated: "Every reason exists for careful scrutiny here. No claim is being made against either bank by any litigant." *Id.*

sure.[184] The court, however, in the interests of comity, chose not to interpret the Canadian law and stated, "Whether removal of records from Canada is prohibited is a question of Canadian law and is best resolved by Canadian courts."[185]

Although reaching opposite conclusions, both *First Nat'l Bank* and *Ings* applied the same reasoning to the particular facts in each case. Each court gave considerable weight to the laws of the foreign state, in order to determine whether a violation of that state's laws would occur should disclosure be compelled. Thus, although it is odd that no mention was made of *Societe Internationale*, the only Supreme Court case on the subject, both cases applied the analysis established by it.[186] More importantly, these cases laid the foundation for the more difficult analysis involving subpoenas issued in furtherance of a criminal investigation, and in violation of foreign nondisclosure laws.

Confronted with a conflict between a grand jury subpoena and a foreign nondisclosure law, the court, in *Application of Chase Manhattan Bank*,[187] gave considerable deference to a showing of foreign law as urged by the two previous cases.[188] In *Chase*, a subpoena *duces tecum* was directed to the Chase Manhattan Bank to produce records located in the Republic of Panama.[189] Rather than complying with the subpoena, the bank made a showing that if disclosure were compelled, divulgence of the information would constitute a violation of Panamanian law.[190] The government did not offer any evidence to the contrary.[191] After balancing the real interest of the United States in obtaining this evidence against the obligation of the United States to respect the laws of other sovereign states, the court modified the subpoena to exclude those documents whose production would violate Panamanian law.[192]

A similar issue was presented in *United States v. First Nat'l City Bank*[193] where the Second Circuit labeled the issue as one "of considerable importance to American banks with branches or offices in for-

184. *Id.* at 151.

185. *Id.* at 152.

186. *See supra* notes 126-47 and accompanying text. Perhaps one reason why *Societe Internationale* was not mentioned is that *Societe Internationale* did not involve a nonparty witness, whereas these cases did. *Societe Internationale*, 357 U.S. 197 (1958).

187. 297 F.2d 611 (2d. Cir. 1962).

188. *Id.* at 613.

189. *Id.* at 611.

190. *Id.* at 612. A Panamanian attorney testified as to the status of Panamanian law on the subject. *Id.*

191. *Id.*

192. *Id.* at 613.

193. 396 F.2d 897 (2d Cir. 1968).

eign jurisdictions."[194] *First Nat'l City* involved a grand jury subpoena *duces tecum* issued to a non-party bank as part of an investigation of antitrust law violations by the bank's customers.[195] The subpoena requested documents possessed by the bank in New York and Germany.[196] The bank refused to produce the documents located in Germany, alleging that German law prohibited their disclosure.[197]

The district court, after conducting an extensive examination of German law, concluded that the bank would not be subject to criminal sanctions or their equivalent in that country.[198] In addition, the court found that the bank did not act in good faith in refusing to comply with the subpoena.[199] With these factors present, the court ordered disclosure.[200] The court of appeals affirmed, explicitly undertaking the task of developing rules to govern the exercise of extraterritorial power.[201] First, the court confirmed the district court's finding that the bank had failed to provide an adequate justification for its noncompliance with the subpoena, since German law did not prohibit disclosure.[202] Second, the court balanced the national interests of the United States and Germany as well as the interests of the bank itself.[203] In determining that the interests of the United States in this case outweighed the foreign concerns, the court found it noteworthy that neither the Department of State nor the German Government had expressed a view on the case thus suggesting that Germany did not consider its national interests threatened.[204]

The significant aspect of *First Nat'l City* is the court's extensive analysis of the foreign law, and its awareness of the international implications an arbitrary decision might have on branch banking throughout the world.[205] Additionally, while not citing to the

194. *Id.* at 898.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 899-900. The court heard testimony of various attorneys who testified that secrecy laws were not part of a statute, but like a privilege, they can be waived by the customer or the bank. *Id.* at 900.
199. *Id.* at 900. The district court made a specific finding of lack of good faith based upon the failure by the bank to make a simple inquiry into the nature and extent of the records available in the German branch. *Id.* at 900 n.8.
200. *Id.*
201. *Id.* at 901.
202. *Id.* at 902.
203. *Id.* at 902-05.
204. *Id.* at 904.
205. As the court of appeals concisely stated: "The complexities of the world being what they are, it is not surprising to discover nations having diametrically opposed positions with respect to the disclosure of a wide range of information." *Id.* at 901. *Cf.* Trade Dev. Bank v. Continental Insurance, 469 F.2d 35-40 (2d Cir. 1972) (After a careful analysis of the

Restatement (Second) of Foreign Relations, it appears to adopt the factor analysis.

These issues were addressed in the more recent opinion of *United States v. Davis*.[206] During an investigation into the payment of illegal kickbacks to executives of a corporation, defendant Davis was served with a subpoena requesting documents located in the Cayman Islands.[207] Davis objected, claiming that under Cayman law, disclosure was permitted only if the customer consented, or if the Cayman Grand Court directed disclosure.[208] The bank and the Cayman government were ready to comply, but Davis continued to decline production.[209] He asserted that as the bank would be subject to criminal prosecution in the Cayman Islands, the court could not compel production.[210]

The court, conducting a Restatement (Second) factor analysis, rejected this argument.[211] Paying particular attention to the fact that there was no objection by the Cayman government against the compulsion of the documents, Davis was ordered to turn over the documents.[212] In its decision, the court implicitly said that it will not tolerate the manipulation of foreign laws to shield illegal activities. This appears to be equivalent to a finding of bad faith.

The Second Circuit developed an acceptable method to accommodate the interests of United States' law and foreign statutes. It recognizes the inherent unfairness of subjecting a neutral nonparty to criminal liability. When a subpoena is issued upon a nonparty bank in actual contravention of a foreign nondisclosure statute, the court will compel production only where it appears that the foreign law is used in bad faith. The court will determine this by examining the national interests of the United States and those of the foreign state. This requires an inquiry as to the status of the foreign law, in order to determine if there is a real threat of prosecution. Of great importance is any statement by a governmental body on the disposition of the

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competing interests, the court held that as a matter of comity, deference should be given to Swiss law.).

206. 767 F.2d 1025 (2d Cir. 1985).

207. *Id.* at 1032. Requests were also made for documents located in Switzerland and Canada. *Id.* For this discussion, however, only the documents requested from the Cayman Islands are important.

208. *Id.* at 1032.

209. *Id.* Davis was ordered to cease litigation in the Cayman Islands, blocking the production of bank records. *Id.* at 1033.

210. *Id.* at 1033.

211. *Id.* at 1034. The court explicitly cited to section 40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS. *Id.* at 1033. *See supra* note 151 and accompanying text.

212. *Davis*, 767 F.2d at 1035.

case. If there is no objection, and no real fear of criminal prosecution, then the burden falls upon the bank to show that there were good faith efforts to comply.

This analysis must be distinguished from a strict Restatement factor analysis which generally tends to favor the national interests of the United States. The emphasis of this analysis is upon the foreign law, and if applicable, the fact that the witness is not a party. It allows for the recognition of foreign law when circumstances dictate, such as the possibility of international repercussions.

2. THE *NOVA SCOTIA* CASES

The Eleventh Circuit of the United States Courts of Appeals, when confronted with the same issue, twice failed to follow or even consider, the respective concerns within the Second Circuit's analysis. Both cases involved the Bank of Nova Scotia. In *United States v. Bank of Nova Scotia*[213] (*Nova Scotia I*), a federal grand jury conducting a tax and narcotics investigation issued a subpoena *duces tecum* upon a branch of a Canadian bank in Miami, Florida.[214] The subpoena called for the production of records maintained in the bank's Bahamas and Antigua offices.[215] The bank refused to produce the documents, asserting that compliance would violate Bahamian secrecy law.[216] The bank presented affidavits with regard to such impending violations but demonstrated that the government could obtain judicial assistance from the Supreme Court of the Bahamas.[217] Additionally, the bank argued that it was fundamentally unfair to require a mere stakeholder to incur criminal liability in the Bahamas.[218] The district court, nevertheless, entered a civil contempt order and refused to acknowledge whether the documents were relevant to the grand jury investigation.[219]

Using an ad hoc factor analysis, the United States Court of Appeals for the Eleventh Circuit affirmed.[220] Citing *United States v. McClean*,[221] the court refused to adopt the Third Circuit's *Schofield* rule that requires the government to show that the documents sought are relevant to the investigation.[222] Next, the court looked at both the

213. 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).
214. *Id.* at 1386.
215. *Id.*
216. *Id.* at 1387.
217. *Id.*
218. *Id.* at 1388.
219. *Id.* at 1387.
220. *Id.* at 1391.
221. 565 F.2d 3181 (5th Cir. 1977).
222. 691 F.2d at 1387. *See supra* notes 61-73 and accompanying text. In *Bonner v.*

Societe Internatioanale good faith test and the Restatement factor analysis. The court, without explanation, found that the bank did not demonstrate good faith efforts to comply with the subpoena.[223] After concluding that the case was controlled by *United States v. Field*,[224] the court applied the Restatement factors, relying on the concept of comity.[225] *Field* held that the managing director of a foreign bank must comply with a grand jury subpoena despite probable prosecution in the foreign jurisdiction.[226] This case, however, can be factually distinguished from *Nova Scotia I*, as it involves a subpoena issued upon the director of a bank that was itself the target of a criminal investigation.[227] Additionally, the *Nova Scotia I* court failed to recognize that the *Field* court essentially followed the reasoning of the Second Circuit. Only after establishing that Cayman officials could obtain the information, did the court enforce the subpoena.[228] Thus, like the Second Circuit, the court refused to allow the manipulation of foreign law to shield criminal activity.

The *Nova Scotia I* court, however, failed to inquire as to whether there was a real threat of prosecution in the foreign country. Furthermore, it never completed the Restatement factor analysis it initially set out to apply.[229] Rather, it arbitrarily concluded that "the crucial importance of the collection of revenue to the 'financial integrity of the republic' outweighed the Cayman Islands' interest in protecting the right of privacy incorporated into its bank secrecy laws."[230]

United States v. Bank of Nova Scotia[231] (*Nova Scotia II*) concerned the branches in the Bahamas, Antigua, and Cayman Islands.[232] While *Nova Scotia I* was on the Supreme Court's docket, the bank was served with another grand jury subpoena *duces tecum*.[233] Again, the bank refused to comply.[234] Despite the bank's efforts to comply, the court found that it did not meet the good faith

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Prichard, the Eleventh Circuit adopted as precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981. Bonner v. Prichard, 661 F.2d 1206 (11th Cir. Nov. 1981).

223. *Nova Scotia I*, 691 F.2d at 1389.

224. 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

225. *Nova Scotia I*, 691 F.2d at 1389 (citing United States v. Field, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976)).

226. 532 F.2d at 410.

227. *Id.* at 405.

228. *Id.* at 408.

229. *Nova Scotia I*, 691 F.2d at 1389.

230. *Id.* at 1391.

231. 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 462 U.S. 1119 (1985).

232. *Id.* at 820.

233. *See* Comment, *supra* note 102, at 158.

234. *Nova Scotia II*, 740 F.2d at 820.

test and, therefore, enforced the subpoena.[235]

The Eleventh Circuit, after a lengthy factual discussion, affirmed.[236] Once again the court of appeals made an ad hoc analysis of the factors it considered important. Reiterating the district court's findings as to lack of good faith, the court added that as the materiality requirement of *Schofield* was not accepted in the jurisdiction, the banks efforts were concentrated on something that it was not entitled to receive.[237] Subsequently, the court conducted the Restatement factor analysis examining the foreign interests involved.[238] It determined that the national interests in stemming illegal drug trade was more vital than any foreign interest.[239] The court, however, never bothered to reach a complete determination as to the status of the foreign law.[240] Rather, it turned to complete the factor analysis, failing to consider the fact that the bank was not a party.[241]

The court also rejected arguments in the *amicus curiae* briefs filed by the United Kingdom and the Cayman Islands.[242] These *amici* briefs represent an important part of the analysis. They demonstrate that compulsion in this case would have international ramifications. The *Nova Scotia II* court did not consider these inherent implications, however, and lightly dismissed them.[243] Though claiming to undertake an analysis involving international comity, it failed to consider these *amici* briefs, demonstrating reasoning to the contrary.

The *Nova Scotia* decisions, using ad hoc analyses, foreclosed the availability of the good faith defense for nonparty banks operating in the Eleventh Circuit. The court appears willing to enforce a subpoena without due regard for international relations, simply because the bank is operating within the jurisdiction.[244]

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235. *Id.* The bank corresponded continually with the U.S. Attorney General requesting the government to send letters rogatory regarding the materiality and necessity of the subpoenaed documents. *Id.* at 820. Also, the bank unsuccessfully filed a petition with the Cayman court for permission to disclose the information. *Id.*

236. *Id.* at 825.

237. *Id.* at 826.

238. *Id.* at 827.

239. *Id.*

240. *Id.* at 827-28.

241. *Id.* at 828.

242. *Id.* at 829-32. The Eleventh Circuit rejected the argument that the United States is bound to follow a "gentleman's agreement" because it claimed that it was not applicable or binding. *Id.* at 829-30. The court also rejected the argument that the subpoena was void because it was contrary to the provisions of the Single Convention on Narcotic Drugs, 1961. *Id.* at 831. Finally, the court rejected that the act of state doctrine should be applied. *Id.* at 832.

243. *Id.* at 829-32.

244. For a complete analysis of the *Nova Scotia* decisions, see Paikin, *Bank of Nova Scotia II: The American Subpoena and the Multinational Enterprise,* 9 CAN. BUS. L.J. 497 (1984)

3. THE REMAINING CIRCUITS

Two months after the first *Nova Scotia* decision, the United States Court of Appeals for the Seventh Circuit recognized the need to make a factual analysis regarding the foreign state's interest and followed the Second Circuit's method. In *United States v. First Nat'l Bank of Chicago*,[245] the court developed a two-step analysis to deal with the noncompliance of a production order issued to a nonparty witness.[246] The bank, claiming that Greek law prevented disclosure of the requested documents, refused to comply with the subpoena for fear of criminal prosecution in Greece.[247] The court of appeals examined first whether the bank had sufficiently shown that Greek law forbade disclosure of the information and second, if so, whether it should, nonetheless, be compelled to comply.[248] The second step entails a Restatement factor analysis of the competing interests.[249]

After a detailed analysis of the Greek statute, along with consideration of the letters submitted by various attorneys, the court concluded that the bank had adequately shown that Greek law forbade disclosure of the information requested.[250] Under the Restatement analysis, the court balanced the competing interests.[251] The court noted that "[a]lthough the interest of the United States in collecting taxes is of importance to the financial integrity of the nation, the interests of Greece, served by its bank secrecy law is also important."[252] Recognizing this, and the fact that the bank was only a "neutral source," it refused to order the bank employees to commit an unlawful act by complying with the subpoena and thereby exposing themselves to criminal liability.[253]

The Seventh Circuit acknowledged the Eleventh Circuit's contrary decision in *Nova Scotia I*.[254] The appellate court in *Nova Scotia I* found that the bank had not made good faith efforts to comply with the subpoena.[255] It then distinguished *First National* from the *Nova*

(Canadian response to the *Nova Scotia* decision); Note, *International Law—Comity of Nations Fails to Justify a Showing of Relevance Prior to Enforcement of Grand Jury Subpoena, Grand Jury Proceedings v. Bank of Nova Scotia*, 7 SUFFOLK TRANSNAT'L L.J. 565 (1983).

245. 699 F.2d 341 (7th Cir. 1983).
246. *Id.* at 343.
247. *Id.* at 342.
248. *Id.* at 343.
249. *Id.* at 345.
250. *Id.* at 344-45.
251. *Id.* at 346.
252. *Id. But See Nova Scotia I*, 691 F.2d at 1391.
253. *First Nat'l Bank of Chicago*, 699 F.2d at 346.
254. *Id.* at 345-47.
255. *Nova Scotia I*, 691 F.2d at 1389.

Scotia cases on the basis that, in *First National* no finding was made as to whether the bank acted in good faith.[256] As such, the court remanded the case for a determination of good faith efforts.[257]

The Seventh Circuit, however, went beyond the analyses in both of the *Nova Scotia* cases. Specifically, it focused upon the fact that the bank, as a nonparty witness, should be afforded a greater amount of protection.[258] Additionally, unlike the *Nova Scotia* cases, it gave a certain amount of deference to the foreign law by considering its effect upon the parties.[259] Under its two-step analysis the Seventh Circuit followed the reasoning of the Second Circuit. The court recognized that it is fundamentally unfair to hold a nonparty witness to the same standard as an actual party, and force it to face criminal liability in a foreign state.

These important factual distinctions were further acknowledged recently by the United States Court of Appeals for the Eighth Circuit, in *United States v. Rubin.*[260] In *Rubin*, the district court, while investigating the defendant for securities fraud, issued a subpoena *duces tecum* upon the managers of a Cayman Islands bank.[261] The subpoena encompassed eight bank account records in the Cayman Islands.[262] Operating under the strict bank secrecy laws of the Cayman Islands, the manager refused to reveal any bank information without waivers of the secrecy laws.[263] Waivers were obtained for six of the eight accounts, and therefore, the manager did not testify as to the remaining two.[264] A motion filed by the manager and the government to quash the remaining subpoenas was sustained by the district court.[265] The defendant argued that this order violated his constitutional right to present a defense.[266]

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256. *First Nat'l Bank of Chicago,* 699 F.2d at 346-47.

257. *Id.* at 346.

258. *Id.*

259. *Id.* at 343-45.

260. 836 F.2d 1096 (8th Cir. 1988).

261. *Id.* at 1098-99. The indictment charged that the fraud of the defendant Rubin involved $51 million obtained from two public offerings of securities and bank loans. *Id.* at 1098. One of the primary issues at trial concerned the revenues of the corporations. *Id.* According to the financial records, the company had an account at Barclay's Bank, on Grand Cayman Island, containing $8 million in profits from the group air charter operations. *Id.* The subpoena requested information regarding the $8 million. *Id.*

262. *Id.*

263. *Id.* at 1098.

264. *Id.* at 1099.

265. *Id.* The district court held that the subpoena was oppressive and unreasonable. *Id.* at 1100. The court reasoned that if the manager produced the banking records for those accounts without waivers, he would be subject to criminal sanctions in the Cayman Islands. *Id.* Further, the defendant could have, himself, obtained the information requested. *Id.*

266. *Id.* at 1100.

In reviewing the subpoena that sought information from a foreign jurisdiction with banking secrecy laws, the Eighth Circuit explicitly adopted the Restatement (Second) factor analysis.[267] The court distinctly stated that a major factor to consider was whether the government was seeking bank records of parties, targets of grand jury criminal investigations, or nonparties.[268] After analyzing the competing interests, the court found that the Cayman Islands' interest in preserving the right of privacy that is incorporated in its bank secrecy laws is greater than the interests of the United States.[269]

The importance of considering whether foreign law actually prohibits disclosure was demonstrated in two cases in the United States Court of Appeals for the Tenth Circuit: *State of Ohio v. Andersen*[270] and *In re Westinghouse*.[271] Although both cases involved discovery orders directed at actual defendants, and not neutral parties, the court's emphasis upon the position of foreign law was significant. In both of these cases, the discovery order requested information from corporations operating abroad.[272] The parties in both cases refused to comply, claiming that foreign law prohibited disclosure.[273] As a decisive factor, the Tenth Circuit applied the "proof of foreign law violation" standard to the facts of each case, and yet, the court reached different conclusions in each case.

In *Andersen,* the court enforced the subpoena because the defendant failed to supply the specific statute in Swiss law that prohibited the disclosure.[274] It found that the defendant acted in bad faith by delaying the action, and by failing to determine whether Swiss law did, in fact, apply.[275]

The defendant in *Westinghouse*, on the other hand, made an adequate showing of foreign law and, therefore, was not compelled to comply with the production order.[276] The court, using a factor analysis, determined that the interests of the parties were equal.[277] How-

267. *Id.* at 1101.

268. *Id.* at 1102.

269. *Id.* The court specifically stated: "We are persuaded that if [the manager] were required to testify absent account waivers, the hardship to him would be great. He would be subject to criminal penalties which include a fine and incarceration." *Id.*

270. 570 F.2d 1370 (10th Cir.), *cert. denied,* 439 U.S. 833 (1978).

271. 563 F.2d 992 (10th Cir. 1977).

272. *Andersen,* 570 F.2d at 1372; *Westinghouse,* 563 F.2d at 994.

273. *Id.*

274. *Andersen*, 570 F.2d at 1374.

275. *Id.* at 1376. The court stated concerning Andersen's delay in investigating the applicability of Swiss law: "The record before us shows both flagrant bad faith and callous disregard." *Id.*

276. *Westinghouse*, 563 F.2d at 996.

277. *Id.* at 998-99.

ever, because the defendant in *Westinghouse* demonstrated that disclosure would violate Canadian law, and that he had used good faith efforts to comply with the subpoena, the Tenth Circuit reversed the district court's sanctions for noncompliance.[278]

The significance of these Tenth Circuit cases, especially with regard to the showing of probable foreign law violations, is that they followed the reasoning of the Second, Seventh, and Eighth Circuits. In questioning the validity of the "probable foreign law violation" defense, the court established that in foreign compulsion cases, some form of foreign law analysis must be undertaken.

In the midst of these concerns, *In re Sealed* was decided by the United States Court of Appeals for the District of Columbia.[279] Although the court found it unnecessary to consider whether a court may ever order action in violation of foreign law, it succinctly focused upon the international ramifications of ordering such an action.[280] Specifically, while discussing the issue of comity, the court stated, "We have little doubt . . . that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders."[281]

Under a due process analysis, the *In re Sealed* court, while briefly considering the competing national and foreign interests, placed particular emphasis upon the position of the bank as a nonparty witness.[282] Noting that the government conceded that it would be impossible for the bank to comply with the contempt order without violating the laws of the foreign country, the court cautioned: "[I]t causes us considerable discomfort to think that a court of law should order a violation of law . . . ."[283] Finally, it concluded that although the grand jury's investigation may be significantly hampered, under the facts of this case, it could not uphold the contempt order against the bank.[284] Thus, after establishing that foreign law did in fact prohibit disclosure, the court found that the interest in maintaining comity among the nations outweighed national interests.

As this analysis demonstrates, there is no uniform approach to reconcile the divergent interests at stake. Although many of the cases seem to apply the same underlying reasoning, the methods under-

278. *Id.* at 996, 999.

279. 825 F.2d 494 (D.C. Cir.), *cert. denied*, 108 S. Ct. 451 (1987). For discussion of the facts of the case, see *supra* notes 16-28 and accompanying text.

280. *Id.* at 498.

281. *Id.* at 498-99.

282. *Id.* at 498.

283. *Id.*

284. *Id.* at 499.

taken to analyze this reasoning are significantly different. Neither the *Societe Internationale* good faith test, nor the Restatement factor analysis, is used consistently among the federal appellate courts. Rather, most courts apply the various elements of each standard, formulating their own ad hoc criteria. This inconsistency places the nonparty bank in a fundamentally unfair position. It further permits a court to arbitrarily establish a standard that may not acknowledge the significant sovereignty interests at stake. A predictable, concise framework is needed so that international banks operating in the United States may be aware of their liability when undertaking certain actions, and so that there will be no threats to a commercial system dependent upon notions of sovereignty.

V. CONCLUSION: A FRAMEWORK FOR ANALYSIS

In response to the various approaches that developed since the Supreme Court addressed this issue in 1958, an appropriate reconciliation of these methods must be considered before formulating an acceptable framework of analysis. Immediately following *Societe Internationale*, the United States Court of Appeals for the Second Circuit established a method of analysis with regard to production orders directed at a nonparty witness.[285] These early cases demonstrated a unique deference to the foreign interests at stake and the position of the non-party. Primarily, it viewed this issue as a question of sovereignty, better resolved by the executive branch. Hence, it ordered production only when it determined that the foreign laws were being used as a shield for criminal activity. In order to reach this determination, the federal courts undertook an analysis of the foreign law and the competing interests. This type of foreign law examination is crucial to a fair determination of the issue. Recently, this reasoning was recognized by the United States Court of Appeals for the Seventh Circuit's "two-step" analysis.[286] Additionally, the Seventh Circuit recognized the fundamental difference when the bank is a "neutral source."

The United States Court of Appeals for the Eleventh Circuit focused its analysis upon a different factor.[287] It placed primary emphasis on the national interests of the United States and ignored both the foreign interests at stake and the position of the bank. The court based its decisions upon a "good faith" analysis but failed to define good faith. The reasoning behind the *Nova Scotia* cases was

285. *See supra* notes 172-212 and accompanying text.
286. *See supra* notes 247-59 and accompanying text.
287. *See supra* notes 213-44 and accompanying text.

that if the bank is operating in the United States, it must abide by the laws of this jurisdiction, regardless of the foreign interests at stake.

The Court of Appeals for the District of Columbia, recognizing the implications of such reasoning, addressed the issue in dictum.[288] As the issuing of a subpoena that seeks documents located in the territory of another state has international ramifications, a court analyzing the issue must give a great deal of consideration to the foreign interest.

The framework proposed in this Comment involves a three part analysis. The primary determination for any court faced with a jurisdictional conflict should be whether disclosure of the requested information would *actually* constitute a violation of the foreign law. This requires an in-depth examination of the foreign statute at issue. Under this type of examination, the interests of the sovereign necessarily will be considered.

Assuming that disclosure would violate the foreign statute and subject the nonparty witness to criminal liability in the foreign country, the second factor entails an analysis of the individual interests of each nation, and more importantly, the hardship upon the nonparty witness. At this point, the court should determine the purpose behind the country's non-disclosure law and any responses from the government. If the court determines that the interesets of the United States are significantly greater, compulsion should be required. If the court concludes that the competing interests are equally important, however, it can proceed to the third step. The third step places the burden on the government to establish that the bank acted in bad faith by not complying with the subpoena. If the government fails to prove bad faith, compulsion should not be required.

Assuming that the court determines that there is no violation of foreign law, it has two choices. It can simply compel production, as there is no valid defense for not complying with the subpoena, or it can take cognizance of this fact and continue to analyze the competing interests in light of the nonviolation. The latter choice would be in accordance to the concept of international comity.

This analysis will greatly reduce due process concerns. The bank will not be placed in the fundamentally unfair position of having to choose which law to follow, as the result of a standard that is arbitrarily applied. In addition, sovereignty concerns are addressed, since every subpoena for the production of documents located in a foreign country would be based upon an examination of the foreign law. In

288. *See supra* notes 279-84 and accompanying text.

light of the important interests at stake, this analysis should only be undertaken when the bank is a nonparty witness and there are no bilateral agreements between the countries for the production of evidence. The exercise of extraterritorial jurisdiction by the courts of the United States has come to the forefront as an issue of international relations. As no consistent method of exercising such jurisdiction has been established, foreign countries have protested vigorously against discovery attempts in their territory. A viable standard must be developed in order to afford international banking a more stable base of operations in the United States. If the United States wishes to remain at the center of world commercial activity, the courts may have to exercise restraint in asserting extraterritorial jurisdiction.

SILVIA B. PIÑERA-VÀZQUEZ