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Privacy of Financial Information and Civil Rights Issues: The Implications for Investigating and Prosecuting International Economic Crime*

Richard T. Preiss*

I. Introduction: The Two Key Tensions

Bank secrecy laws and the individual civil right of financial privacy generally, originated decades ago in a simpler time, when the electronic wire transfer did not exist and sophisticated economic criminals did not regularly take advantage of the international bank payments system. Today, however, when most countries are linked together in what is known as the global economy, bank secrecy laws and the related sovereignty, political, and economic concerns of individual nations all too often impede and frustrate legitimate criminal investigations and prosecutions of money laundering¹ and other international economic crime. The problem that bank secrecy poses for law enforcement was identified twenty-five years ago by Robert M. Morgenthau, currently the District Attorney of

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1. Money laundering is defined in different jurisdictions in different ways. Conceptually, money laundering is nothing more than the disguising, or concealing, of the illegal origin of the proceeds of crime. The motivations behind money laundering are as multifaceted as the individual laws of sovereign governments. The proceeds come from all kinds of illegal activity. Proceeds of fraud, theft, narcotics trafficking and the concealment of income and other assets from taxing authorities, are a few examples.

the County of New York and former United States Attorney for the Southern District of New York. He was testifying before the United States Senate Committee on Banking and Currency when he said that,

[A]buse of secret foreign accounts is no longer limited to members of organized criminal syndicates and hoodlums. Although the use by the organized underworld of these accounts is substantial, to an ever increasing extent they are now being used by wealthy and otherwise respectable persons in the business and financial world to cheat on taxes, to trade in securities in violation of our securities laws . . . to perpetuate corporate and other frauds, and to hide the fruits of other white collar crimes²

This article is not so much an effort to solve the bank secrecy problem, but rather a focus on the civil rights issues that arise when investigating and prosecuting economic crime, and specifically when the documentary evidence is in a foreign country. This article addresses the tension existing between the legitimate needs of law enforcement, on the one hand, and the desire for confidentiality of an individual's financial affairs on the other. Additionally, this article addresses the tension existing between law enforcement of one country versus the political, economic, and sovereignty concerns of other foreign governments. Ultimately, this article concludes that confidentiality and financial privacy rules in the area of bank secrecy are founded less upon a concern for a right of privacy and more upon economic, political, and sovereignty concerns. Today, the global community of nations, by their lack of concerted action, has chosen to value the free flow of capital above an interest in effectively combatting the spread of international economic crime. This article proposes using an asset-based, model multilateral agreement by which governments may agree to assist each other with cross-border criminal investigations and prosecutions in an effective and expeditious fashion, while preserving privacy where privacy should be preserved.

2. *Hearing On Bank Records and Foreign Transactions Before the Senate Comm. on Banking and Currency*, 91st Cong., 2nd Sess. (June 10, 1970) (Testimony of Robert M. Morgenthau).

II. The Origins of the Bank Secrecy Laws and Their Development

When speaking of a civil right of privacy in the context of bank secrecy laws, one does not describe an internationally respected human right. There is no internationally recognized financial privacy right. Instead, one must discuss a value judgment which has meaning only after examining the laws and traditions of an individual nation³ and the result when that value judgment of financial privacy runs up against another important domestic interest in that country. Whether, when, and how the financial privacy right gives way to another domestic interest within a country permits an evaluation of the degree of respect ascribed to the financial right of privacy.

Modern bank secrecy laws trace their origin to the events occurring after World War I.⁴ The economies of many countries suffered from hyper-inflation and imposed exchange restrictions which limited the freedom of their citizens to move capital out of those countries.⁵ Some of these governments were totalitarian.⁶ Persons of means wanted to hold their assets in safe places outside of their home countries. As a result, countries like Switzerland made bank secrecy the law of the land.⁷ Many other countries followed the Swiss example.⁸

With the end of World War II and the rise of socialist governments, the Iron Curtain, currency restrictions, and heavy income taxes, more and more capital flowed toward countries with bank secrecy laws.⁹ There was also a rise in the criminalization of income tax evasion in the United States and elsewhere, providing additional motivation for citizens to hide their assets from their home governments by placing them in countries where favorable local laws provided protection.¹⁰ Small soft currency¹¹ countries

3. For a discussion of the history and evolution of bank secrecy and blocking laws, and an examination of foreign laws and financial mechanisms used to protect the right to financial privacy, see C. Todd Jones, *Compulsion Over Comity: The United States' Assault On Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 455-64 (1992).

4. *Id.* at 455.

5. *Id.* (citations omitted).

6. For instance, the Nazis required all German nationals to report all assets held outside of Germany upon pain of death. *Id.* at 455 (citations omitted).

7. *Id.*

8. Jones, *supra* note 3, at 456-457.

9. *Id.* at 456 (citations omitted).

10. *Id.*

lacking hard currency¹² sought the deposits of persons of means by enacting bank secrecy laws in Latin America, the Caribbean, and elsewhere.¹³

Because such laws provide the opportunity to engage in criminal activity, law enforcement, including United States law enforcement, has viewed bank secrecy and blocking laws with suspicion, and often outright hostility.¹⁴ U.S. prosecutors have made many attacks upon foreign bank secrecy laws in their attempts to enforce U.S. criminal law.¹⁵ Their efforts have often met with success.¹⁶

This aggressive approach by U.S. prosecutors can subject the United States to charges of arrogance and disrespect for the sovereign rights of other governments. The contrary view is that bank secrecy laws are a free market response to limitations upon the free movement of capital, which merely facilitate the free movement of capital from one place to another. The argument is that the United States and other home countries have no right to expect other host countries to impose home country fiscal requirements and financial laws upon host country financial institutions. Sovereign nations have the right to provide a civil right of financial privacy if they choose. The argument continues that economies that are over-regulated, over-taxed, and/or impose currency exchange restrictions upon their citizens should not be surprised when other countries choose to provide an opportunity to move assets elsewhere.

In some countries, the recognized right of financial privacy prevents governmental intrusion into the private financial matters

11. As used in this article, the term soft currency means a currency which is not widely accepted and freely convertible into other currencies.

12. As used in this article, the term hard currency means a currency which is widely accepted and freely convertible into other currencies. The currencies of Canada, France, Germany, Great Britain, Japan, Switzerland and the United States are examples of hard currencies.

13. Jones, *supra* note 3, at 456 n.8.

14. *Id.* at 457 (citations omitted).

15. *Id.* at n.10.

16. *See, e.g.*, U.S. v. Bank of Nova Scotia, 691 F.2d. 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983). In that decision, a Canadian chartered bank, with offices in forty-five countries including the United States and the Bahamas, was the subject of a grand jury *subpoena duces tecum* served at an office in Miami, Florida and which called for the production of bank records. *Id.* at 1386. The Bank asserted that production of the documents would violate Bahamian bank secrecy law and subject it to criminal prosecution in the Bahamas. *Id.* at 1387. The court held that the subpoena was enforceable against the Bank, considerations of comity notwithstanding. *Id.* at 1391.

of individuals and companies.¹⁷ In others, it prevents such intrusion by private individuals.¹⁸ In still other countries, the financial privacy right prevents intrusion by the government and private individuals.¹⁹ Rarely will a right of financial privacy be absolute. The variations are best illustrated by example.

In the United States, there are statutes which prohibit certain government agencies from gaining access to an individual's financial records absent specific authorization or certain judicial orders.²⁰ There are other statutes prohibiting the Internal Revenue Service and its employees from disclosing the financial information contained in a citizen's tax return,²¹ even to another government agency, unless, for example, there is reason to believe that a citizen has evaded taxes.²² The violation of this prohibition is a felony punishable by up to five years in prison.²³ In still other instances, consumer credit reporting agencies are prohibited from disclosing financial account information to other private individuals, or the government, absent legal authorization or a court order.²⁴ As is often the case, in each of the examples set forth, there are exceptions provided when important government interests are at stake.

In Germany, the right of financial privacy is founded less upon any specific regulation²⁵ than upon tradition and an implied contractual relation between the banking customer and his banker.²⁶ The breach of this contractual relationship can result in an assessment of civil damages against the banker.²⁷ The right is limited and gives way in criminal cases and other situations where the law deems it important.²⁸

17. See, e.g., 12 U.S.C. § 3402 (1978).

18. See generally INTERNATIONAL BANK SECRECY (Dennis Campbell ed., Sweet & Maxwell 1992).

19. *Id.*

20. See, e.g., 12 U.S.C. § 3402 (1978).

21. 26 U.S.C. § 6103(a) (1993).

22. 26 U.S.C. § 6103(h) (1993).

23. 26 U.S.C. § 7213(a) (1990). The statute also provides that an Internal Revenue Service officer or employee convicted of this offense must be discharged from the Internal Revenue Service. *Id.*

24. 15 U.S.C. § 1681(b) (1995).

25. For a general discussion of German law as it relates to banking secrecy, and examples of when it must give way to other important laws and rules, see HARALD JUNG, INTERNATIONAL BANK SECRECY 213-30 (Dennis Campbell ed., Sweet & Maxwell 1992).

26. *Id.* at 214.

27. *Id.* at 230.

28. *Id.* at 213-30.

In classic bank secrecy countries, a high value is placed upon the privacy of an individual's financial affairs. This right of financial privacy is strictly enforced against all, foreign or domestic, including the domestic taxing authorities.

A person's financial affairs ought, in general, to be a private matter between that person and his banker. However, this proposition does not, and should not, amount to an absolute, unconditional right. To be sure, an individual's bank balances, his other assets and his liabilities are not the business of his friends, neighbors, colleagues or in some instances, even family members, unless he chooses to make them their business. He should, and normally does, have the right to keep his non-public financial affairs private from those persons with no legitimate reason to know this information. Here we speak only of privacy against intrusion by private individuals. However, what happens when important law enforcement interests of the home country²⁹ come into play, and the sovereign, economic, and political concerns of host countries³⁰ enter the fray?

III. Law Enforcement Interests: A Hypothetical Case

An example of the manner in which these tensions arise is the hypothetical case of the trader who is a British citizen, working for a British bank in Singapore, and falsifies trading records in order to conceal losses or garner extra profits.³¹ The home country law enforcement authorities possess enough information and evidence to give them cause for investigating the trader, but when they make a request of that foreign host country, they confront a maze of bank secrecy laws, privacy laws, and other concerns which often have the same effect as bank secrecy laws.

The hypothetical example demonstrates the impact of bank secrecy and other confidentiality laws on the effective detection, investigation, and prosecution of economic crime and related abuses. It also illustrates the civil rights and other issues that arise in international criminal cases. What financial privacy rights exist where a government reasonably suspects that a crime has been committed in the home country? What privacy rights should attach to bank account records, or other financial records, in the host

29. The country conducting the criminal investigation or prosecution.

30. Countries where the financial account records are kept.

31. *E.g.*, engages in improper trades in one country and deposits the stolen proceeds in a foreign bank account.

foreign country if the home country prosecutor requests access to records located in the host country? Finally, what sovereignty, political, and economic issues are intertwined with the foreign bank secrecy jurisdiction's laws against disclosure?

A return to our hypothetical trader example³² is illustrative of the two tensions and the implications of how the tensions are resolved. Suppose that the trader falsifies the records of his trades in Singapore, wire transfers some of the stolen money to the United States, and invests it in an account at a brokerage firm in New York. By use of dollar drafts³³ drawn on a Singapore bank, he sends the rest of the money from Singapore to an account in Bank Number One in Bank Secrecy Jurisdiction (BSJ).³⁴ His banker at Bank Number One in BSJ uses some of these funds to purchase a villa in the Bavarian Alps in preparation for the trader's imminent arrival from Singapore. Pursuant to the dishonest trader's instructions, the U.S. brokerage firm wire transfers some of the funds to another dollar bank account at Bank Number Two in BSJ and invests the rest of the money in publicly traded shares of stock in the United States. As often happens in these kinds of cases, the fraud comes to light and the Singapore authorities begin their criminal investigation, although by now the trader has fled Singapore and is safely living in his German villa. We will assume that our trader has never set foot in the United States or in BSJ.

Singapore has a legitimate interest in investigating to determine if a crime has taken place in Singapore and determining whether there is sufficient evidence to prosecute the trader. Under the international principle of territoriality,³⁵ Singapore has jurisdiction over everything that happens within its territory. Singapore

32. The hypothetical example has been simplified for illustration purposes. In a typical case involving money laundering of large amounts of funds, there would be many more banks and host countries or way-stations through which funds would be laundered.

33. Like a check, a dollar draft is an order for the payment of dollars drawn upon a bank.

34. BSJ is a hypothetical bank secrecy country. There are many bank secrecy jurisdictions which could have been chosen to illustrate the various laws and practices of such countries and their effects upon international criminal investigations and prosecutions. Rather than single out any one bank secrecy jurisdiction's laws and practices, the writer has chosen to create a hypothetical bank secrecy country which has some typical bank secrecy laws and rules. In constructing the laws and rules for the hypothetical country BSJ, the writer acknowledges reliance upon *INTERNATIONAL BANK SECRECY* (Dennis Campbell ed., 1992) and its survey of the laws of various bank secrecy countries.

35. See, e.g., *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW* §§ 17-18 (1965).

might also be concerned that, should the international financial community perceive a lack of transparency and effective regulation of its financial markets, international business could choose to move elsewhere or not come to Singapore in the first instance. Presumably, the authorities in Singapore will locate the relevant bank accounts of the trader in Singapore, but now they must trace the movement of the stolen funds, either to prove their case, recover the money, or for other reasons under Singapore law. They cannot wait too long to locate the fraudulently obtained assets, because the longer they wait, the greater the opportunity for the trader to move the assets around the world. Once the dishonest trader learns that Singapore is on his trail, he will have every motivation to move the assets to other hospitable jurisdictions.

The Singapore authorities might choose to ask the United States for help in their search for the proceeds of the crime. Singapore law may require that the law enforcement authorities go through their foreign office to contact the United States government. They will discover that it is not easy to acquire the records from the brokerage firm, that this will all take time, and time is not the friend of the criminal investigator in a case such as this. Various international protocols will have to be followed. The brokerage firm will not turn over their records without a valid subpoena. The State Department in the U.S. will direct the Singapore request to the United States Department of Justice Office of International Affairs³⁶ and eventually a federal grand jury subpoena might be issued and the brokerage records obtained. However, because the records were obtained by use of a grand jury subpoena, the federal prosecutor may not turn over those records to Singapore without the written permission of a federal judge, who may or may not be inclined to grant the request.³⁷

What has happened so far has less to do with a concern for the privacy of the trader's records, than for observing principles of American sovereignty and complying with American laws restricting access to private financial records³⁸ and grand jury evidence.³⁹

36. The United States Department of Justice is the central authority for the handling of requests for assistance made of the United States by foreign governments. The Office of International Affairs (OIA) is a division within the Department of Justice. OIA processes all of these incoming requests and the formal requests for assistance made by federal and state law enforcement agencies in the United States to foreign governments.

37. FED. R. CRIM. P. 6(e). See also N.Y. CRIM. PROC. L. § 190.25(4)(a).

38. 12 U.S.C. § 3402 (1978).

Here lies the tension between the need for the records by one country and the sovereignty concerns of another country where evidence is located.

The United States authorities might well take the view that the British⁴⁰ trader's crimes in Singapore, and the use of U.S. financial institutions to launder part of the proceeds, is a crime serious enough to merit a United States investigation and prosecution, independent and apart from the Singapore investigation. The territoriality principle⁴¹ of international law grants jurisdiction to the United States because our trader wired money into the United States.

In the United States generally, and in the jurisdiction of the State of New York, it is relatively easy for the prosecutor to acquire domestic financial information in a criminal case because the law tips the scales in favor of disclosure.⁴² The tension between the ordinary right of individual privacy versus the legitimate needs of law enforcement is eased, but not eliminated.⁴³ However, even where, as here, the United States is willing to commence an independent investigation, it will take time to process the request of the Singapore authorities, hence, the second tension between the needs of Singapore's law enforcement and the sovereignty concerns of the United States remains. The Singapore

39. FED. R. CRIM. P. 6(e).

40. Great Britain could also choose to prosecute our trader based upon the nationality principle of international law because our trader is a British subject. *See, e.g.*, RESTATEMENT, *supra* note 35, § 30(1)(a).

41. *See, e.g.*, RESTATEMENT, *supra* note 35, §§ 17-18.

42. The United States has financial privacy laws that generally limit access by the government to an individual's account in a financial institution absent a court order. *See, e.g.*, 12 U.S.C. § 3402 (1995). These laws rarely apply to a prosecutor who obtains the appropriate subpoena. A prosecutor must obtain a subpoena, either from a grand jury or from a court, and the financial institution must provide the demanded evidence under pain of contempt and its accompanying sanctions. The prosecutor who obtains the evidence by grand jury subpoena is not permitted, and is indeed forbidden, to make public disclosure of such evidence unless authorized by law. *See, e.g.*, N.Y. CRIM. PROC. L. § 190.25(4) (providing that grand jury proceedings are secret); N.Y. PENAL L. § 215.70 (providing that unlawful grand jury disclosure is a felony). If the prosecutor obtains a court subpoena calling for the production of the evidence, a protective order might be issued or a statute might limit what use can be made of the materials. *See, e.g.*, N.Y. CRIM. PROC. L. § 240.50. That usually means the prosecutor may use it and disclose it only in court proceedings which are necessarily public. There is a frank recognition that at a public trial, in a free and open society, a person's private financial affairs will become public if there is sufficient evidence justifying the bringing of charges and the ensuing public court proceedings. The first tension is resolved in favor of the law enforcement interest.

43. *See generally id.*

authorities may never learn of the BSJ bank account in Bank Number Two or the investment in shares of stock unless and until they obtain the financial records of the U.S. brokerage firm and the bank in the United States which wire-transferred the funds to BSJ.

There are some jurisdictions which have blanket rules of bank secrecy that apply to everyone, whether it is a foreign prosecutor seeking financial information, a domestic prosecutor, a domestic taxing authority seeking to collect taxes due, or an aggrieved civil party seeking to collect a debt.⁴⁴ BSJ is an example of such a jurisdiction but there are many others which have similar blanket rules of bank secrecy. Here is an example where both of the two direct tensions are present. They are the individual desire for financial privacy versus the legitimate desire of Singapore to investigate crime on the one hand, and the desire of Singapore to investigate versus the BSJ government's sovereignty concern on the other.

Let us assume that Singapore's authorities nevertheless choose to approach the BSJ government for assistance in acquiring the bank records of the trader's account in Bank Number One in BSJ, which received the transfer of stolen funds by dollar draft directly from the Singapore bank. In BSJ, the Penal Code forbids disclosure of bank account information and contains the rule of bank secrecy. A banker called to testify cannot be forced by the court to disclose confidential information. BSJ's taxing authorities are not permitted to require financial institutions to disclose account information. The BSJ Central Bank, which is responsible for regulating banks in BSJ, can obtain access to secret bank account information, but it must observe bank secrecy. BSJ will not cooperate with an international request for assistance unless the case involves acts that are crimes under BSJ law.

The Singapore authorities should expect a long wait for the evidence they seek in BSJ, even assuming that the laws in BSJ permit cooperation. The Singapore government must transmit the request for assistance to the Foreign Ministry of BSJ, which will, in turn, forward the request to the BSJ Justice Minister. The Justice Minister will examine the request for assistance very carefully, in view of the strict bank secrecy tradition in that country. The Minister will look for legal authority to cooperate with the request for assistance. If that authority is lacking, the request will be

44. See generally INTERNATIONAL BANK SECRECY, *supra* note 25 and accompanying text.

rejected as unlawful. Any suspicion that the matter is unimportant, or somehow involves a criminal tax investigation, could result in a refusal to cooperate. If the Minister of Justice finds the requisite BSJ legal authority, he will review the request to ensure it complies with each and every rule, and to see that it is not overly broad in scope. This process takes time. If the request is granted, a BSJ government official will be directed to review the bank records to ensure that no more is given than has been authorized by the BSJ government. At some point, Singapore may get the bank records but they might not obtain them in time to be useful in their investigation.

Perhaps the Singapore government will learn of the other account at Bank Number Two, assuming that the legal hurdles in the United States have been overcome, and they have been able to consolidate their request with the one for the account records at Bank Number One. Regardless, the legal landscape has not changed. If BSJ refuses the request for cooperation and assistance, not only will Singapore never learn about the villa in Germany, they might not ever learn that the trader is living in Germany.⁴⁵

IV. Analyzing Bank Secrecy Laws

BSJ's established legal tradition of bank secrecy is founded upon the notion that bankers in BSJ have no business disclosing private bank account information. BSJ is a sovereign nation with its own political and economic concerns, not the least of which is that banking is the number one industry and source of employment in that country. Bank secrecy countries like BSJ profit from international trade at the expense of those countries that enact and seek to enforce their money laundering and other criminal laws. In many bank secrecy countries, developed and less developed, banking is at least an important industry in the local economy. In either case, the privacy interest and resulting confidentiality rules are frequently asserted on behalf of an individual who does not, and perhaps never has, resided in the country, as well as a citizen or resident of the country. Here, the trader is neither a citizen nor a resident of BSJ, but he receives the protection of BSJ's bank secrecy rules.

It will not be helpful to the economies of BSJ or other bank secrecy countries should the criminals become aware that these

45. Whether and how Singapore may cause the extradition of our hypothetical trader from Germany to Singapore is beyond the scope of this article.

governments are providing foreign prosecutors with evidence that can be used to convict them. Stated another way, the illicit deposits will go elsewhere, as will the jobs that depend upon them. Thus, rules ostensibly in place to protect the financial privacy of individuals might well be motivated by more parochial bread and butter concerns. Moreover, the political implications of a government cooperating with a foreign government's criminal investigation might be more than the local political officials are willing to bear, especially where the focus of the investigation is upon a citizen of that country who is alleged to have committed an economic crime in the foreign country making the inquiry.

It is also common for corporate bank accounts to be kept confidential under the bank secrecy rules of BSJ and other bank secrecy jurisdictions. If the dishonest trader chooses to form a corporation to further conceal the identity and origin of the stolen assets, he may gain that protection. What civil right does a legal fiction like a corporation possess, as against an inquiry or request for assistance from a foreign government conducting a legitimate criminal investigation? Is BSJ protecting a legitimate expectation of privacy when it bars access to the accounts of a corporation, or is it providing a safe harbor, enabling that corporation and its shareholders to evade legitimate scrutiny by an interested government?

No matter how the request by Singapore to BSJ is resolved, the reality here is that the balance struck by BSJ law might be on the side of financial privacy within the first tension, and on the side of sovereignty within the second tension. Such a tipping of the balance demonstrates that financial privacy borders on an absolute civil right in BSJ.

There are countries where there is no bank secrecy law forbidding access by a prosecutor to the financial records of an individual or corporation, but these nations, nevertheless, will have the same sovereignty concerns of every other country. In Germany, for example there are no bank secrecy laws as such⁴⁶ and the first tension between the desire for individual privacy versus the legitimate interest of a foreign government conducting a criminal investigation is of less importance. But the German authorities will not simply hand over, or cause to be handed over, evidence from a financial institution in Germany upon request, nor will they hand over the property records for the villa the hypothetical trader has

46. See generally INTERNATIONAL BANK SECRECY, *supra* note 25, at 213-30.

purchased in Germany. They will not allow Singapore's police officers to enter Germany to search the local property registries or interview witnesses. Germany will require that the appropriate paperwork and other formalities be completed first. In the meantime, the clock is ticking, and is not for the benefit of the Singapore criminal investigation.

The initial refusal by Germany is based upon important basic principles of sovereignty. The authorities might feel obliged to say no, at least initially, for no other reason than because the foreign prosecutor is from another country. Germany may also feel it owes a duty to protect its own citizens, residents and institutions from the inquiring eyes of another government. Certainly Germany, like every other sovereign nation, does not want agents of a foreign government crossing its borders and engaging in unauthorized foreign law enforcement activity. Absent a bilateral or multilateral agreement requiring cooperation, Germany might feel compelled to deny access simply because it is a sovereign nation. Thus, a country with no bank secrecy law could, in effect, become a financial privacy jurisdiction for no reason other than principles of sovereignty. Germany's behavior here is not unreasonable, nor is it significantly different from that of the United States in our hypothetical illustration, because both countries seek to preserve their sovereignty by requiring that their laws be observed.

When a criminal investigator or prosecutor seeks evidence in the form of financial documents, and when that evidence is located in another country, the investigator will confront one or both of the two tensions. He must hope that his country has a treaty that permits the host country's government to cooperate and which will result in cooperation. He must hope that the authorities are inclined to cooperate. Absent such a treaty, rarely will there be a legitimate mechanism to obtain access to the account information.⁴⁷ Instead of conducting an investigation and gathering evidence, the prosecutor in the international criminal investigation spends his time filling out treaty or mutual assistance requests and waiting for the host country authorities' response. However, they may not respond, even if the treaty allows them to do so. Or they

47. This article assumes that the investigator will not obtain financial information by illegitimate means, i.e. by bribing corrupt officials inside a foreign bank. If the information is available only through corrupt means but is unavailable as evidence obtained by legal means, the bank secrecy laws might have the adverse effect of contributing to the corruption of bank officials in host countries.

might return the request for assistance with demands for more information. Suffice it to say that the use of bilateral agreement requests, even when they are in place, is far from efficient when it comes to gathering the needed evidence within a reasonable time.⁴⁸

The hypothetical example of the dishonest trader illustrates the present lack of a uniform, workable, expedient, and multilateral approach to combatting international economic crime. This is the price the international community now pays for permitting governments to ascribe differing values to privacy interests and related sovereignty rights. At present, the global community, by its lack of concerted action, has chosen to value the free flow of capital above an interest in effectively combatting the spread of international economic crime.

The principle of bank secrecy may have proceeded from noble origins in some countries but the realities of modern banking, the magnitude of international economic crime, the societal consequences of money laundering,⁴⁹ and the number of bank secrecy

48. For a review of the present mechanisms and limits of international cooperation, see Jones, *supra* note 3, at 471-83.

49. Matthew B. Comstock writes:

The mechanism of money laundering permits profitable criminal activity. "Without laundering, the risk/reward ratio for the underlying crime is unattractive . . . Efficient laundering renders the underlying crime lucrative, and therefore perpetuates it." Thus money laundering represents the keystone to successful organized crime.

Legitimizing illegal profits also poses a threat to the licit economy. First, as noted previously, organized criminals view real estate as the injection method of choice. In the real estate example given, the buyer paid three million dollars for property with a fair market value of two million dollars. Such a scheme effectively "legitimizes" criminal profits by making them appear to be real estate profits; however, the scheme also inflates local real estate values. Banks approve loans which utilize inflated property as collateral. Often borrowers purchase additional real estate, given that the market appears to be lucrative. In economic terms, an inflated market such as this is known as a "speculative bubble." Speculative bubbles inevitably burst. Money laundering, therefore, may lead to a real estate market crash.

Second, use of the legitimate financial institutions to "wash" illicit profits threatens the integrity of the entire system. "The fear of financial regulators is that when credit and financial institutions are used to launder proceeds from criminal activities . . . the soundness and stability of the [particular] institution concerned and confidence in the financial system as a whole could be seriously jeopardized." When a legitimate financial institution launders illegal profits, knowingly or not, that institution supports illegal drug trafficking, prostitution, and illegal arms sales throughout the world.

jurisdictions today,⁵⁰ have increased the two tensions addressed in this article. In a global economy, where most of the economies of various countries are linked, we can no longer afford to pursue the outmoded methods of nineteenth century cooperation (or non-cooperation) when international criminals are practicing twenty-first century methods. The only distinction between money laundering and the ordinary legitimate financial transaction is the illicit source of the money. Thus, it is all the more important for countries to seek a multilateral solution, fighting international economic crime effectively while respecting legitimate expectations of privacy.

A person's financial affairs should not be available to any and all who would desire access. What must be determined is the appropriate balance to be struck between the legitimate interest of a government conducting an investigation or prosecution of international crime on the one hand, and protecting the individual's legitimate expectation of privacy on the other. One cannot avoid finding the proper balance between a foreign law enforcement request versus the sovereignty concerns of host countries if there is to be an effective mechanism for combatting international economic crime.

V. Forward: Resolving the Tensions

Any approach to determining what is, or should be, private requires an examination of what is genuinely private financial information and what is, at least *de facto*, public or quasi public information and the concerns that come into play. From whom is it desired that the financial information is kept confidential? Do bank secrecy countries, *de jure* or *de facto*, seek to keep financial information private for the sake of privacy, or because they do not wish to endure the loss of deposits when foreign governments are granted access to the evidence located in those bank secrecy countries? What recognition should the international community give to the value judgments made by bank secrecy countries when they grant a civil right of privacy to financial records? The best analysis begins with an examination of which asset is, or should be, protected from government scrutiny due to a legitimate expectation of privacy, and which should not. One should also examine the

Matthew B. Comstock, *Gatt and Gats: A Public Morals Attack on Money Laundering*, 15 NW. J. INT'L L. & BUS. 139, 144-45 (1994) (footnotes omitted).

50. One need only examine the advertisements in a respected international magazine like the *Economist* to understand that bank secrecy and shielding assets from the inquiring eyes of a government are big business today.

specific financial assets and determine whether there is a legitimate sovereignty concern. When this is done, it is obvious that, for most asset categories, the answer is no.

In many countries, the identity of a nominal owner of real estate is public or quasi public information. One need only proceed to the local property registry to learn the identity of the owner, whether he has borrowed money to purchase the property, how much debt is on the property and so on. There can be no reasonable expectation of privacy by the owner of the real estate. Any nation that denies access to such information, or cooperation, to a foreign prosecutor making an inquiry about such assets is not basing its decision on any privacy concern. More likely, the decision is based purely upon a political or sovereignty consideration. The hypothetical trader cannot have any legitimate expectation of privacy in public records.

In the case of drafts or checks, multitudes of persons inside and outside of the bank have access to these documents because they must be cleared and settled among the banks that come into possession of them in the ordinary course of business. Thus, a person who deposits a dollar draft in a European bank should know that the draft will find its way through the international bank payments system, through the clearinghouse in New York and, eventually, back to the bank issuing the draft. Here too, there is no *de facto* privacy attached to the transaction nor any reasonable expectation of privacy.⁵¹ Any government through whose territory any part of the transaction passes, which denies access to a foreign prosecutor, is *de facto* basing that decision upon something other than a concern for the civil right of privacy.

Wire transfers and their use in the international bank payments system are very similar to the check/draft example given above. A host of persons having no relationship whatsoever to the sending or receiving party or his banker will know of and be privy to the details of the transfer. Is making confidential the details of the wire transfer based upon the civil right of privacy or are there other forces at work here? Does one deny access to a government

51. The Supreme Court of the United States has held that there is no reasonable expectation of privacy in the contents of checks and deposit slips held as records at a bank. *United States v. Miller*, 425 U.S. 435, 442 (1976). The Court recognized the realities of the banking business when it stated that "The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.*

conducting a legitimate criminal investigation because the information has been kept private, or is it because one does not want that foreign government to see it and use it for reasons having nothing to do with the civil right of privacy?

Real estate purchases, the use of drafts and last but not least, the wire transfer, are a few of the tools used by criminals to launder illicit funds. Yet, as has been demonstrated above, if a foreign prosecutor is denied access to this information, it cannot be because the information is really private information that has been kept private. More likely, it is based upon sovereignty, political, or economic considerations.

Any discussion of financial privacy rights versus the interest of governments in investigating and prosecuting international crime would not be complete without addressing the traditional personal bank account located in a foreign bank. Clearly that information is, and should remain, private from ordinary disclosure. There is a reasonable expectation of privacy by that account holder. But should the account be kept confidential if there is reason to believe that it has been used as a vehicle for committing crime or laundering the proceeds of crime? Should a country be permitted to benefit from international trade while implementing a bank secrecy policy that frustrates cross-border battles against international crime? The answer to this question lies in an examination of national and international priorities.

If nations believe that the privacy rights of the individual holder of a bank account or any other account in a financial institution should prevail over governments, then governments will continue protecting financial privacy rights and related sovereignty concerns which vary from country to country. On the other hand, if one could devise a *uniform, workable, and expedient* multilateral mechanism for international cooperation, which contains adequate safeguards against unreasonable fishing expeditions, and grants due deference to legitimate privacy and sovereignty concerns, then perhaps the right balance may be found.

Governments from hard currency countries⁵² could begin the process by agreeing to discuss the interest in privacy and the common interest in detecting and prosecuting international crime. After all, it is the hard currency countries and their bank payment systems that are used as the means for money laundering and other international crime. Too often it is also these countries which are

52. See *supra* note 12 and accompanying text.

deprived of legitimate tax revenues when bank secrecy countries permit individuals and corporations to hide their income from those governments. The commonly held view that the fiscal laws of one country need not, and should not, be supported or enforced by other countries is too often the loophole through which the entire money laundering industry is driven.

There are various forums for such discussions. The Bank for International Settlements (BIS), the International Monetary Fund (IMF), and the Group of Seven (G-7) are all possible forums. Each forum possesses expertise in dealing with international transfers of assets, economics, banking issues, and international law. Unfortunately, the use of such well established groups is problematic because they are slow in arriving at decisions or taking positions on international issues. Moreover, these kinds of forums tend to make recommendations which may or may not be adopted by members and, therefore, lack any enforcement mechanisms which mandate implementation of recommendations.

Regardless of which forum is chosen, there must be a frank recognition that financial privacy is only one of the concerns that arise when a foreign government seeks information and evidence in the host country, and that there are other forces at work when governments profess an inability to cooperate with each other in international criminal investigations and prosecutions. After all, bank secrecy laws were a reaction to restrictions upon the free flow of capital and governments profit from the movement of that capital from one country to another. Stated another way, governments must recognize that benefits realized by individual countries provide a strong motivation to continue their bank secrecy traditions.

Governments must agree at the outset that the existence of confidentiality laws blindly applied can and does frustrate legitimate criminal investigations and prosecutions. There should be more of a focus upon what reasonable expectations of privacy exist with respect to the ownership of assets, and less of a focus upon rules for the sake of rules. That includes a reexamination of the sovereignty rule⁵³ as it applies to the enforcement of bank secrecy

53. Professor Janis writes:

A sovereign state is one that is free to independently govern its own population in its own territory and set its own foreign policy.

MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 177 (2d ed. 1974).

laws and other financial privacy rules affecting home country investigations and prosecutions of international economic crime.⁵⁴

The solution to the problem must be multilateral,⁵⁵ along the lines of the General Agreement on Tariffs and Trade (GATT).⁵⁶ A multilateral agreement should contain at least six key provisions that relate to international criminal investigations and prosecutions.

First, the agreement must provide that information which is public or quasi public under the laws of one country must not be withheld from another signatory country, and should be disclosed promptly. For example, in the case of real estate where the laws of the host country provide that the information in the property registry is public within the host country, the host country must provide that information upon the request of a signatory country. Other examples might include ownership information for motor vehicles, ships, shares of stock, and other asset vehicles for laundering funds. In the case of the hypothetical trader, there seems to be no legitimate reason to refuse prompt and expeditious disclosure to Singapore of the location and ownership of the villa. Standing upon the naked right of sovereignty when public or quasi

54. Janis sets forth the inherent tension between sovereignty and international law. He writes:

In the real world, neither sovereignty nor international law could reign absolutely without vanquishing the other. The lesson of history seems to be that in practice neither sovereignty nor international law ever completely beats its opponent. Rather, a balance is struck between sovereignty and international law, an accommodation that makes up an essential aspect of international politics at any point in time.

Id. at 151-52.

It is precisely this balance which must be struck in the area of bank secrecy and financial privacy laws as they affect the investigation and prosecution of international economic crime.

55. The unilateral solution to the problem is obvious — simply deny access to the international payments clearing mechanism to bank secrecy jurisdictions. A refusal to cooperate with an investigation or prosecution by a hard currency country would result in the inability of that bank secrecy country to clear its financial transactions in the currency of the home country. The difficulty with this approach is that it is unilateral. Unilateral approaches to international problems rarely result in effective solutions. Here the implementation of such a unilateral solution might result in another free market response — avoidance of the use of the home country's currency for international commercial transactions.

One writer has suggested an international trade solution and advocated that the Group of Seven Countries ought to impose tariffs on certain goods and services of nations that refuse to criminalize money laundering. *See generally* Comstock, *supra* note 49. Comstock suggests that international law would support the imposition of such trade sanctions. *Id.* at 172.

56. General Agreement of Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

public records are involved is arbitrary and irresponsible to the international community in a global economy filled with economic crime.

Second, any financial transaction, including drafts and wire transfers, that crosses international boundaries must not be considered confidential as between any originating or receiving jurisdiction, or as to any intermediary jurisdiction, where any one of them is conducting a criminal investigation or prosecution. As was demonstrated above, there is no reasonable expectation of privacy when an account holder chooses to move funds across borders by use of the international bank payments system and when many persons apart from an individual's banker have access to that information. If private individuals can be made privy to such information, there is no reason to withhold such information from governments conducting criminal investigations and prosecutions for violations of their laws when a financial transaction has crossed its territorial boundaries. Such a provision would go a long way toward defeating the incentive for money launderers to route their transactions through multitudes of jurisdictions and banks.

Third, corporate financial accounts, in whatever form, should not be held private against a request for assistance by a signatory country conducting a criminal investigation or prosecution, if there is a nexus established by the home country between the matter under investigation or prosecution and the corporate financial accounts. Corporations and other limited liability companies are legal fictions and, as such, have no reasonable expectation of privacy against governments attempting to enforce their criminal laws in countries where corporations choose to do business. Nevertheless, corporations and limited liability companies are legitimate forms of doing business and are used appropriately by private, law-abiding individuals to avoid civil liability and for other legitimate purposes. The nexus requirement respects the legitimacy of the use of such entities while enabling a home country prosecutor to obtain legitimate access when required.

Fourth, governments should protect private, individual accounts in financial institutions held by natural persons from disclosure to foreign governments conducting criminal investigations or prosecutions, if the host country finds no nexus to the matter under investigation by the home country prosecutor. After all, there is a clear expectation of privacy in a personal financial account. Under this provision, the good faith of the host country where the account is located will be critical because private bank accounts are commonly used to harbor the fruits of crimes and to

launder illegally obtained funds. This provision will protect the reasonable expectation of privacy of an individual account holder, while at the same time mandating sincere cooperation between the host country and the home country where the nexus to the crime in the home country is established. It will also accommodate the traditional sovereignty concerns of governments. It is envisioned that the host country authorities would examine the account records of the individual account holder. Should the host country authorities determine a nexus between the crimes under investigation or prosecution and the private financial account records, they should make disclosure to the requesting government upon the ground that the improper use of the account is an offense against domestic and international public order. If no nexus is found, the request can be denied and the legitimate expectation of privacy is respected.

Fifth, any multilateral agreement must provide for expeditious cooperation, mandatory, not permissive compliance by signatories, and the bar of nations refusing to sign on from the international bank payments system. Signatory nations failing to honor their obligations should, after an appropriate adjudication by an international tribunal,⁵⁷ be barred from the bank payments clearing systems in every signatory country. The realities of international commerce being what they are, once the hard currency countries agree to such a multilateral mechanism, virtually every other nation will be forced to sign on and observe their international obligations if they wish to engage in international commerce.

Sixth, there should be agreement upon which generic crimes will require cooperation. At the very least, crimes involving theft, fraud, murder, narcotics trafficking, illegal arms smuggling, terrorism, and related money laundering should be included. More problematic are offenses such as insider trading and tax evasion by individuals. Insider trading is not an offense in some countries.

57. Any multilateral agreement must provide for a formal dispute resolution mechanism. One such mechanism could provide for a series of steps designed to resolve any dispute arising from the failure or refusal of a signatory nation to comply with a proper request from another signatory nation. The first step could be bilateral consultations. If such consultations are unsuccessful, the next step could be formal proceedings conducted by an international tribunal, which would render a report and decision. Finally, and if there were no compliance with the decision of the tribunal, bilateral or multilateral retaliation could be authorized. A similar mechanism is provided for the *Uruguay Round Understanding on Rules and Procedure Governing the Settlement of Disputes, Uruguay Round Trade Agreement*, H.R. DOC. No. 316, 103d Cong., 2d Sess. 1 at 339 (1994).

Inclusion of tax evasion would conflict with the international principle of law that one country need not enforce the fiscal laws of another but perhaps the time has come for a reevaluation of this principle. Ironically, the tax rates in the hard currency countries are not insignificant and those countries have the most to gain if tax evasion was a listed crime requiring cooperation. The refusal to cooperate in criminal tax investigations may have outlived its usefulness in a global economy. Lack of agreement on this question should not be an obstacle to adopting an agreement which covers the suggested list of crimes above.

The proposed model multilateral agreement presupposes that requests for assistance are made in good faith, and that requests from countries are not politically motivated or constitute a disguised violation of human rights or international law. Requests for international assistance that constitute nothing more than a fishing expedition, a political vendetta, or something other than a *bona fide* request for assistance should be rejected. The provision setting forth a list of generic crimes along the lines suggested will go a long way toward avoiding bad faith requests.

The model's purpose is to facilitate acquisition of documentary evidence in criminal cases, not to compel a citizen of a host country to travel to the home country making the request. Any mechanism that compels a host country citizen to travel and give evidence in the home country is problematic. Most countries would find such a mechanism unacceptable as upon basic and important notions of sovereignty and protection of their nationals from undue burdens.

Finally, the model requires that in all cases of requests for international assistance, a sufficient nexus be established by the home country between the crimes in the home country and the documentary evidence located in the host country. It is not intended that any country should provide the financial account information upon a mere oral request. The home country should be required to certify, whether in the form of a court proceeding pending in the home country or some other formal forum, that an investigation or prosecution is underway and state, with reasonable particularity, the connection between the home country investigation or prosecution, and the requested documents believed to exist in the host country. These kinds of safeguards should preclude baseless "fishing" expeditions.

Any multilateral agreement will require individual nations to compromise their sovereign interests and change some of their laws before any effective multilateral mechanism for international

cooperation in criminal investigations and prosecutions can be adopted. Such compromises are not without precedent.

The history of the GATT is a concrete example of how nations have recognized that they have a common interest in resolving important international issues and conflicts. Many nations had to change long established trade laws and related rules in order to live up to their obligations in GATT. If nations can agree on a framework for multilateral uniform approaches to international trade, surely a multilateral approach to cross-border crime is possible.⁵⁸ GATT was adopted because individual nations recognized their mutuality of interest. It remains to be seen whether such a recognition will ever be forthcoming in combatting cross-border crime.

The European Community (EC) took a useful first step with the European Directive on Money Laundering of 1991.⁵⁹ The Directive is another example of nations recognizing their mutuality of interest in combatting international economic crime. The Money Laundering Directive represents a compromise of sovereign, political, and economic interests by EC Member States and represents an attempt to deal with and prevent money laundering. It defines money laundering⁶⁰ broadly and the definition is not limited to narcotics money laundering.⁶¹ The Directive requires Member States to take various steps to penalize and combat money laundering,⁶² and provides that anyone reporting suspected money laundering to the authorities within a Member State shall be free from liability of any kind.⁶³ Finally, the Directive encourages

58. Indeed the United Nations has taken a step in this direction. The United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, Dec. 19, 1988, 28 I.L.M. 493, was completed in Vienna in 1988 [hereinafter the Vienna Convention]. The Vienna Convention requires, *inter alia*, that signatory nations make certain changes in their domestic laws, criminalize certain conduct relating to drug trafficking and mandates certain international cooperation in narcotics cases. For a general discussion of the Vienna Convention and its provisions, see generally Bhala et al., *Legal Aspects of Money Laundering*, 3 MALAYAN L.J. 33, 35-37 (1991). The Vienna Convention pierces bank secrecy laws by prohibiting signatory nations from refusing mutual legal assistance in narcotics cases based upon bank secrecy.

59. Council Directive 91/308/EEC, 1991 (O.J. L166/77 28.6.91) [hereinafter Money Laundering Directive].

60. The definition of money laundering in the Directive is taken from that adopted in the Vienna Convention. Vienna Convention, *supra* note 58, pmbl.

61. *Id.* art. 1. Criminal activity is defined in such a way that crime is that specified in the Vienna Convention and "[A]ny other criminal activity designated as such for the purpose of this Directive by each Member State." *Id.*

62. *Id.* art. 2-18.

63. *Id.* art. 9. This provision appears directed against bank secrecy laws.

Member States to cooperate with each other in preventing and investigating money laundering.⁶⁴ The Money Laundering Directive is of value to Member States within the EC in their attempt to combat money laundering, but it does not address the global problem of investigating and prosecuting international economic crime.⁶⁵

The hard currency countries stand to benefit under the proposed model. They are all democratic societies where tax rates are significant and important financial centers are located, and where the opportunities for misdeeds are greatest. Their currencies are used most often to launder the proceeds of crime. This is not to suggest that only the hard currency countries will benefit from the proposed model. Soft currency nations and lesser developed countries have an interest in improving the integrity, transparency, and regulation of their markets. Such improvements will result in the attraction of additional capital and international business to those countries. All countries stand to benefit from any mechanism that requires expeditious international cooperation in criminal cases, especially those countries that are rapidly being forced to confront the drug problem spreading throughout the world. It appears irrational for democratic societies in a position to influence international law and conduct to stand by and allow bank secrecy jurisdictions to profit at their expense, while those very countries are permitted to benefit from international trade.

Returning to the example of the hypothetical trader, he will possess far fewer options should he commit the crime. Under the proposed multilateral model, he cannot hope to escape detection for any extended time. Singapore⁶⁶ will obtain expedient cooperation in tracing the trail of funds, and perhaps when faced with all of the obstacles to laundering the stolen funds, he might choose to engage in more honest, safe and lawful financial activity.

64. *Id.* pmb1.

65. The United Kingdom has gone one step further in cases of serious or complex fraud. It has enacted legislation permitting the Secretary of State to refer requests for assistance from foreign governments to the Director of the Serious Fraud Office (SFO). Criminal Justice (International Cooperation) Act of 1990, § 4 as amended by Criminal Justice and Public Order Act of 1994, § 164. The Director of the SFO may assist foreign governments conducting investigations or prosecutions of serious or complex frauds and the authorization is not limited to Member States of the European Union. *Id.*

66. Before anyone sheds a tear for the frustrating quest of the Singapore authorities in the hypothetical example, it should be noted that Singapore is also a bank secrecy jurisdiction. *See generally* ANGELINE YAP, INTERNATIONAL BANK SECRECY, *supra* note 25, at 577-618.

VI. Conclusion

The international investigation and prosecution of economic crime gives rise to two tensions. The first tension is between the legitimate needs of law enforcement versus the desire for confidentiality of an individual's financial affairs. The second tension is between law enforcement in a home country versus the political, economic, and sovereignty concerns of governments in host countries. The present *ad hoc* approach to international cooperation will not facilitate effective cross-border investigations and prosecutions in criminal cases. The international community of governments should look behind the ostensible privacy rationale for financial privacy laws and examine the *de facto* economic rationale for such laws, along with sovereignty and political concerns lying behind such laws. The proposed multilateral approach provides an effective and expeditious mechanism by which governments may agree to assist each other in criminal cases which cross international borders. The asset-based model preserves privacy where privacy should be preserved. It comports with the realities of cross-border financial transactions and cross-border economic crime by recognizing that, in both circumstances, there are no effective geographic boundaries. The model requires governments to recognize their mutuality of interest in combatting international crime and to compromise their sovereign interests. There is precedent for such compromises, but there must be the political will to make them.

