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Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy

*C. Todd Jones**

“Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at least, an unnecessary circumvention of its procedures.”¹ Circuit Judge Leonard Moore’s statement in 1960 in one of the first U.S. bank secrecy cases evidences a respect for foreign nations and tribunals no longer present. Because of their physical proximities and tory secrecy laws, many nations have become bank secrecy havens, providing financial services and anonymity to people and business enterprises, both legitimate and illegitimate. In response, U.S. courts have systematically circumvented almost any challenge to the authority of our prosecutors and judicial procedures presented by nations that respect and uphold financial privacy. Unfortunately, efforts by other branches of the United States government to ease the friction created by the courts have proved to be only moderately effective and remain essentially unrecognized by the judiciary.

This paper first discusses the history and evolution of bank secrecy and blocking laws, providing a background on the original rationale behind the customs and the values underlying them. Second, it examines the foreign laws and financial structures used to protect the right to financial privacy. Next, the U.S. evidence gathering techniques, particularly those used by the government, and the bilateral and multilateral legal assistance efforts of the executive branch are explored; this section will also note the minimal constitutional barriers to evidence procure-

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¹ *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) [hereinafter *Ings*].

ment that restrain the government. The article then considers the Re-statement of Foreign Policy positions on balancing competing interests and the precedents of the U.S. judiciary used to solve conflicts outside international agreements. Finally, trends in U.S. judicial and executive branch policy are analyzed and the critical problems with those policies dissected.

I. HISTORICAL BANK SECRECY

While banking, money changing, and finance are as old as civilization, the practice of bank secrecy developed in recent centuries. Modern bank secrecy evolved after World War I when hyperinflation and exchange controls forced prudent individuals to hold assets outside of their home nations.² Other nations attempted to control their economies with restrictive monetary practices which enhanced the appeal of other more stable and friendly economic environments. The first major international conflict challenging the new bank secrecy order occurred during this post-war economic upheaval. In 1933, the Nazis published regulations requiring all German nationals to declare assets held outside of Germany. The penalty for noncompliance was the death sentence.³ The execution of three Germans one year later prompted the Swiss government to codify what until then had been only an unofficial secrecy practice among Swiss bankers. The new law provided for strong criminal penalties for violations.⁴

The first international counter-attack against the Swiss law, however, came not from Germany but from the United States. When the Germans invaded Poland, the Swiss kept their bank assets in U.S. financial institutions. After the fall of France, the Swiss, fearing an invasion, physically moved their national gold supply to New York. In mid-1941, U.S. government officials became convinced that Nazis were hiding their wealth in Swiss deposit accounts. Based on the personal jurisdiction over the Swiss branches located in the United States, the government attempted to obtain account holder names from the branches, only to discover that the holdings were in the names of the banks and not the clients. In response, the U.S. government blocked the expatriation of all

² See E. CHAMBOST, *BANK ACCOUNTS* 5 (1983).

³ *Id.* at n.7. Their modest statute declared, "Any German national who, deliberately or otherwise, activated by a base selfishness or any other vile motive, has amassed his wealth abroad or left capital outside the country, shall be punished by death." *Id.*

⁴ *Id.* at 6. See also STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, CRIME AND SECRECY, 98th Cong., 1st Sess., *THE USE OF OFFSHORE BANKS AND COMPANIES* 5-6 (Comm. Print 1983) [hereinafter STAFF REPORT].

Swiss assets and gold reserves.⁵ This plenary use of personal jurisdiction over both persons and property would later be repeated to obtain the secret bank information the United States desired.⁶

After World War II, the reasons for bank secrecy expanded. Currency and other government economic controls remained after the war while the expansion of socialism and, concomitantly, heavy income taxes drove money to secrecy havens.⁷ Criminal tax statutes, a new prosecutorial weapon, increased investors' desires for secret locales to hide assets from government investigation. The growth of international crime also facilitated the growth of banking centers that protected bank customers' identities and assets. Many small nations, given this currency flight and their own lack of hard currency, catered to such customers with favorable bank secrecy laws.⁸

⁵ E. CHAMBOST, *supra* note 2, at 6-7.

⁶ See, e.g., *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir.), *cert. denied sub. nom.*, 484 U.S. 963 (1987) [hereinafter *Sealed Case*]; *In re Marc Rich & Co.*, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *In re Grand Jury Proceedings, United States v. Field*, 532 F.2d 404, 405 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976) [hereinafter *Field*]; see also *infra* notes 248-56, 283-86 and accompanying text.

⁷ Cf. *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983) [hereinafter *First Chicago*]. These laws merely respond to the forces of the market:

The limits of banking secrecy only conform to the needs of the marketplace if they resist abuses and remain as diligent as they are expected to be. These expectations would be thrown over if banking secrecy was raised to help the legal authorities in other countries in the event that their exchange controls had been violated; the prohibition on exporting currency goes against those needs. Consequently banking secrecy must guarantee complete protection to currency and assets deposited and must observe the obligation to be diligent, even if that does not suit the financial rulings of other countries.

E. CHAMBOST, *supra* note 2, at 20-21 (citations omitted).

⁸ Typical is the view of Donald M. Fleming, President of a Bahamian bank, former Canadian Minister of Finance, and former President of the International Monetary Fund: "The secrecy attached to relations and transactions between financial institutions and their clients has been another factor essential in the attraction of financial business . . ." (*quoted in* E. CHAMBOST, *supra* note 2, at 196).

Hard currency needs are not limited to economic backwater islands and communist nations. Many of the Pacific Rim's newly industrialized countries attract capital with bank secrecy practices. Hong Kong and Singapore were both identified as secrecy havens, particularly for tax purposes, in STAFF REPORT, *supra* note 4, at 10-11. Switzerland, the classic secrecy jurisdiction, could hardly be classified as a non-democratic backwater. *Id.*

A number of jurisdictions are cited by the STAFF REPORT as secrecy or tax havens. They include Anguilla, Antigua, Austria, Bahamas, Barbados, Bahrain, Belize, Bermuda, British Virgin Islands, Canada, Cayman Islands, Channel Islands, Cook Islands, Costa Rica, Dominica, Falkland Islands, Gibraltar, Grenada, Guam, Hong Kong, Isle of Man, Ireland, Liberia, Liechtenstein, Luxembourg, Maldives, Mariana Islands, Mexico, Monaco, Montserrat, Nauru, Netherlands and Netherlands Antilles, Nevis, New Hebrides (Vanatu), Panama, Seychelles, Singapore, St. Lucia, St. Kitts, St. Vincent, Switzerland, and Turks and Caicos Islands. *Id.*

Such mass lists, however, are deceiving and incomplete because of the evolving nature of secrecy jurisdiction laws, politics, and the true practical value of particular nations. For example in the Americas, many nations are classified as havens but only five—Bermuda, Bahamas, Cayman Islands, Netherlands Antilles, and Panama—have developed into viable and successful havens. R.

The United States has taken a completely opposite view of the practice, viewing foreign bank secrecy as a mechanism to facilitate and promote illegal activity. As reported from the House Committee on Banking and Currency twenty-two years ago:

Secret foreign bank accounts and secret foreign financial institutions have permitted a proliferation of "white collar" crimes; have served as the financial underpinning of organized criminal operation in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for stock acquisitions, mergers and takeovers; have covered conspiracy to steal from the U.S. defense and foreign aid funds; and have served as the cleansing agent for 'hot' or illegally obtained monies. . . . The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost.⁹

While the report might have overstated the cause of such activities, it reflects many of the illegal uses of bank secrecy as well as the federal government's attitude toward enforcing its laws. Since that time, the government's passion for enforcing the laws most likely to implicate bank secrecy (*i.e.*, tax,¹⁰ economic regulation,¹¹ and narcotics laws¹²) and

JOHNS, TAX HAVENS AND OFFSHORE FINANCE 191 (1983). For a variety of reasons including foreign legal constraints, disreputable practices, political instability, remoteness, and lack of economic development, other nations failed to achieve the success of the former five. *Id.* at 191-194.

Lists like the STAFF REPORT's also remain inherently incomplete. Havens such as Guernsey, Jersey, and the United Arab Emirates were ignored in the STAFF REPORT list. *Id.* at 214. Other nations developed their systems later. See Duthie, *Malaysia Seeks to Turn Sleepy Island into a Prosperous Offshore Tax Haven*, Wall St. J., Aug. 20, 1990, at B4B, col. 3.

⁹ H. Rep. No. 975, 91st Cong., 2d Sess. 12 (1970), reprinted in *Field*, *supra* note 6, at 409. This report's heavy-handed language prompted one commentator to remark, "[S]uch a list of crimes makes you think rather more of scapegoats than bank secrecy. . . ." E. CHAMBOST, *supra* note 2, at 101.

¹⁰ See *In re Grand Jury Proceedings, Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) [hereinafter *Nova Scotia II*]; *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) [hereinafter *Nova Scotia I*]; *United States v. Vetco*, 644 F.2d 1324 (9th Cir. 1981) [hereinafter *Vetco*]; *Field*, *supra* note 6. See also Springer, *An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases*, 22 GEO. WASH. J. INT'L L. & ECON. 277, 330 (1988) ("Truly, the real issue is whether the United States should seriously enforce its tax laws, and not whether those laws overreach." Author James Springer, Senior Counsel for International Tax Matters, Tax Division, Department of Justice).

¹¹ "White-collar crime is 'the most serious and all-pervasive crime problem in America today.'" Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980), reprinted in *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988). "Conduct relating to U.S. import trade that harms consumers in the United States

blocking statutes¹³ has not diminished.

An institutionally separate but effectually similar legal device has arisen since World War II. Blocking laws were designed to prevent persons and enterprises from complying with orders of foreign tribunals and governments. These laws originated in Canada¹⁴ and have spread throughout the world as a means of protecting domestic interests from foreign legal interference.¹⁵ Nations generally enacted such laws in reaction to countries such as the United States whose aggressive litigation rules were considered by blocking law jurisdictions to be an infringement upon their sovereignty. The first Canadian law was created in 1947 due to a U.S. grand jury investigation of the Canadian paper industry.¹⁶ The Netherlands enacted a law in reaction to U.S. investigations of the petroleum industry.¹⁷ The broadest international response came when the United States conducted investigations of the international shipping industry¹⁸ and the world uranium cartel.¹⁹ The nations in the later cases viewed U.S. antitrust laws and discovery procedures as a means of protecting U.S. industry against foreign competition as well as enabling U.S.

may be subject to the jurisdiction of the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved." *U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations* (Nov. 10, 1988), [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1391, at S-20 (Nov. 17, 1988) [hereinafter *DOJ Int'l AT Guidelines*].

¹² A Congressional subcommittee report recommended "aggressively pursu[ing] international negotiations backed up by the threat of sanctions against banks and countries that do not cooperate" with U.S. efforts to combat drug money laundering. STAFF OF SENATE SUBCOMM. ON NARCOTICS, TERRORISM AND INTERNATIONAL OPERATIONS, 101ST CONG., 2D SESS., DRUG MONEY LAUNDERING, BANKS AND FOREIGN POLICY 32 (Comm. Print 1990) [hereinafter *BANKS AND FOREIGN POLICY*].

¹³ See *infra* notes 47-54 and accompanying text.

¹⁴ Ontario, Canada's Business Records Protection Act, 1974 ONT. REV. STAT. c. 54 is credited as being the first blocking statute. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 442 reporters' note 4 (1987) [hereinafter *RESTATEMENT THIRD*].

¹⁵ See, e.g., A. LOWE, EXTRATERRITORIAL JURISDICTION 79-225 (1983) (textual examples of major secrecy laws, cases arising from secrecy conflicts, and official communications and positions regarding secrecy laws).

¹⁶ In re Grand Jury, Subpoena Duces Tecum Addressed to Canadian International Paper Company, 73 F. Supp. 1013 (S.D.N.Y. 1947) (*cited in* A. LOWE, *supra* note 15, at xxi-xxii).

¹⁷ A. LOWE, *supra* note 15, at xxii, 123.

¹⁸ Belgium, Denmark, Finland, France, Norway, Sweden, the United Kingdom, and West Germany fashioned blocking laws in response to the investigation. See *id.* at 98-100, 114-20, 128, 134, 138-43. See also In re Investigations of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952).

¹⁹ RESTATEMENT THIRD, *supra* note 14, at § 442 reporters' note 4. For a list of the statutes in Australia, Canada, France, Great Britain, and South Africa spawned by the controversy, see *id.*; A. LOWE, *supra* note 15, at 129-31 (Philippine Presidential Decree in response to the investigation). See also In re Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979) [hereinafter *Uranium Antitrust*]; In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992 (10th Cir. 1977) [hereinafter *Westinghouse*]. A later Congressional report recognized this connection between U.S. government action and foreign government reaction. STAFF REPORT, *supra* note 4, at 13-14.

competitors to gain competitive advantages through litigation.²⁰

II. FINANCIAL PRIVACY

Financial privacy laws vary by nation;²¹ the nature and growth of these laws reflect both the nations themselves and their economic relationships. The countries vary the practices and design the laws to effectuate the goals sought. While the laws and practices could be divided by their common and civil law origins, conceptually simpler categories are the structural banking forms and impediments, the bank secrecy statutes effectuating those forms, and blocking laws.²²

A. Structural Bank Forms and Impediments

Anonymous (also known as numbered) accounts and accounts held under false names are the two most basic bank secrecy relationships. The account holder signs an agreement with a personal bank agent agreeing to the conditions of the relationship and receives a number or pseudonym.²³ Pseudonyms are generally used when a client wishes to avoid raising the suspicion of home government authorities.²⁴

These banking forms create two types of protection. First, they protect bank employees from third parties.²⁵ For example, before the Swiss created numbered accounts, Nazi agents would ask lower level employees about the accounts of specific individuals. Hesitation by the employee would give the agent enough evidence to investigate and prosecute that individual.²⁶ Numbered accounts solve this problem and eliminate the danger of a third party blackmailing a bank employee for secret information. Second, secret accounts protect account holders from unscrupulous employees.²⁷ Where a secret account holder's identity might tempt an unprincipled employee, limited access eliminates the exposure of such information.

Trust and corporate structures also provide protection for financial

²⁰ STAFF REPORT, *supra* note 4, at 13-14. Communist nations used blocking laws to similarly protect "state secrets." See, e.g., *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) [hereinafter *Administratia Asigurarilor*] (Communist Romanian government's secrecy law "appear[ed] to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery").

²¹ See E. CHAMBOST, *supra* note 2, at 12.

²² *Id.* at 39-67.

²³ For several examples of such agreements, see *id.* at 41-53.

²⁴ Bank correspondence will appear to be between actual persons, creating no suspicion among law enforcement investigators. *Id.* at 54.

²⁵ *Id.* at 40.

²⁶ *Id.* at 5.

²⁷ *Id.* at 40.

information.²⁸ Trusts are drafted with either an individual or corporate fiduciary holding assets in their own name for a beneficiary.²⁹ The trust, when combined with a confidential account, creates a triple level of security for investors. A potential investigator must discover the relationships involved, overcome possible legal confidentiality restraints on the fiduciary,³⁰ and then surmount the particular bank secrecy laws of the host nation.³¹

Private offshore banks provide another structural protection for bank secrecy. These private banks serve individuals or small groups of investors by creating a personal financial institution. This reduces the number of individuals with access to information³² and eliminates the possible coercion of the parent of a traditional bank's secrecy haven branch.³³ Most private banks, however, are formed because of the financial advantages in jurisdictions where financial privacy is otherwise the status quo.³⁴

B. Bank Secrecy Laws

Although secrecy is not always the primary consideration for investors using the facilities of havens,³⁵ secrecy remains an important element for the international financier's analysis. In financing cases, the various structural impediments would be meaningless without a legal

²⁸ Swiss law specifically distinguishes between the law regulating banking transactions such as trust relationships, generally covered by the Swiss Civil Code and Code of Obligations, and public legislation dealing with banks as institutions. See generally Kleiner, *Banking Law*, in INTRODUCTION TO SWISS LAW (F. Dessemontet & T. Ansay eds. 1981).

²⁹ E. CHAMBOST, *supra* note 2, at 58-59. See also *Salting It Away*, *The Economist*, Oct. 5, 1991, at 32.

³⁰ The Bahamas includes trusts in its financial secrecy laws while the Cayman Islands includes an even broader range of professionals in its secrecy laws, including real-estate and insurance agents, currency dealers, and commercial representatives and advisors whether or not they are licensed or entitled to act in such a capacity. *Id.* at 197, 205.

³¹ For a discussion of a variety of trust relationships, see *id.* at 58-67.

³² This would also eliminate the entire reason for extensive numbered and anonymous procedures. See *supra* notes 25-27 and accompanying text.

³³ See, e.g., *Nova Scotia I* and *Nova Scotia II*, *supra* note 10.

³⁴ Private banks create a captive source of loans for investors, provide additional funds at interbank rates, and eliminate many of the overhead costs of an ordinary bank. However, these advantages can be outweighed by government-imposed fees in those nations. For a discussion of captive banks, see E. CHAMBOST, *supra* note 2, at 68-75.

³⁵ Financiers also consider more general and major factors such as infrastructure and telecommunications facilities, geographical convenience, local political and economic stability, particular economic systems, banking and other financial laws, foreign exchange regulations and capital controls, company laws relating to incorporation and disclosure, and government fees in their analysis as well as a host of lesser, more particular elements. R. JOHNS, *supra* note 8, at 2-3, 22-23, 42-72, 193. See also W. BLACKMAN, SWISS BANKING IN AN INTERNATIONAL CONTEXT 48 (1989) ("Bank secrecy is . . . the one most important single ingredient of [customer] confidence.").

framework to support them. In general, the havens have a legal system in place that protects the relationship between banker and client or trustee and client, a concept which the United States rejects.³⁶ Bank secrecy statutes exist in a number of nations, but for ease of discussion, the three affecting U.S. practices the most will be considered in detail.

Switzerland,³⁷ the Bahamas,³⁸ and the Cayman Islands³⁹ specifically protect the banker-client privilege by criminalizing the revelation of information obtained from such a relationship. Switzerland's law repre-

³⁶ See *infra* note 60 and accompanying text. *Contra* Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961) [hereinafter *Peterson*].

³⁷ Bundesgesetz über die Banken und Sparkassen of Nov. 8, 1934 (Banking Law of 1934) [hereinafter *Swiss Bank Secrecy Law*], implemented in Verordnung of May 17, 1972 (Ordinance), and Vollziehungsverordnung of Aug. 30, 1961 (Implementing Ordinance). Article 47 of the 1934 Banking Law states:

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, authorized agent, liquidator or commissioner of a bank, as representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 Swiss francs [approximately U.S. \$35,000].
2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 Swiss francs [approximately U.S. \$21,000].
3. The violation of professional secrecy remains punishable even after termination of the official employment relationship or the exercise of the profession.

Reprinted in R. KINSMAN, *YOUR NEW SWISS BANK BOOK* 10 n.2 (revised ed. 1979). See also Kleiner, *supra* note 28, at 174 nn. 1, 2.

³⁸ Banks and Trust Companies Regulation Act of 1965, 1965 BAH. ACTS No. 64, art. 10, as amended by Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 BAH. ACTS No. 3 [hereinafter *Bahamian Bank Secrecy Statute*], reprinted in *Nova Scotia I*, *supra* note 10, at 1386 n.2. Section 10 states:

Preservation of secrecy

10-(1) No person who has acquired information in his capacity as

- (a) director, officer, employee or agent of any licensee or former licensee;
- (b) counsel and attorney, consultant or auditor of the Central Bank of the Bahamas . . . , or as an employee or agent of [the same];
- (c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of [the same];
- (d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;
- (e) the Inspector under the provisions of this Act, shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee . . . , except
 - (i) for the purposes of the performance of his duties or the exercise of his functions under this Act, if any; or
 - (ii) for the purpose of performance of his duties within the scope of his employment; or
 - (iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall

- (a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or
 - (b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.
- (3) Every person who contravenes the provisions of subsection (1) of this section shall be . . . liable on summary conviction to a fine not exceeding fifteen thousand dollars [U.S.\$ 15,000] or to a term of imprisonment not exceeding two years or to both

sents the codification of a previously informal bankers' practice while the Bahamian and Cayman laws turned prior judicial precedent into statutory norm.⁴⁰ The Swiss Banking Law of 1934 (Swiss Bank Law) established specific duties for bankers, their employees, and government inspectors. The law criminalized any disclosure of information obtained in the course of a professional relationship with the bank except as provided by Swiss law. Absolute secrecy, however, does not exist because banks must furnish pertinent information when the higher interest of the public or the state is involved, particularly in cases defined as crimes under Swiss law.⁴¹

The Bahamian Banks and Trust Companies Regulation Act (Bahamian Statute) requires a laundry list of individuals who have access to bank records⁴² in order to maintain confidentiality, except when performing their duties under the Bahamian statute, within the scope of their employment, or when required by a Bahamian court.⁴³ The Cayman Island's government based its Confidential Relationship (Preservation) Law (Cayman Law) on the Bahamian Statute.⁴⁴ The Cayman Law dictates that any person required by a court or tribunal to produce information held in a protected relationship must apply to a Judge of the

³⁹ Cayman Confidential Relationships Law (Law 16 of 1976), as amended (Law 26 of 1979) [hereinafter Cayman Bank Secrecy Law], *reprinted in* United States v. Davis, 767 F.2d 1025, 1032 n.14 (2d Cir. 1985) [hereinafter *Davis*]. In relevant part, the law states:

. . .
3. (2) This law has no application to the seeking, divulging, or obtaining, of confidential information

(a) in compliance with the directions of the Grand Court pursuant to section 3A;
(b) by or to

(i) any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal . . . ;

3A. (1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted.

(2) Application for directions under subsection (1) shall be made to, and be heard and determined by, a Judge of the Grand Court.

4. (1) Subject to the provisions of [section 3(2)], whoever

(a) being in possession of confidential information however obtained;

(i) divulges it; or

(ii) attempts, offers or threatens to divulge it to any person not entitled to possession thereof;

. . . is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000 [U.S. \$6024] or to imprisonment for a term not exceeding 2 years or both.

⁴⁰ See *supra* note 4 and accompanying text. See *infra* notes 55-56 and accompanying text.

⁴¹ R. KINSMAN, *supra* note 37, at 11.

⁴² Bahamian Bank Secrecy Statute, *supra* note 38, at § 10(1)(a)-(e).

⁴³ *Id.* at § 10(1)(e)(i)-(iii).

⁴⁴ Note, *Offshore Financial Centers in Caribbean Basin Secrecy Jurisdictions: Current Trends and Developments in United States Anti-Tax Haven Policy*, 12 SYRACUSE J. INT'L L. & COM. 520, 525-26 n.30 (1986) [hereinafter *Offshore Financial Centers*].

Grand Court of the Cayman Islands.⁴⁵ In each of these three countries, as with any nation that seriously implements a bank secrecy law, the breach of this statutory duty of confidentiality is met with stiff penalties.⁴⁶

C. Blocking Laws

Blocking laws “prohibit the disclosure, copying, inspection or removal of documents located in the host country in compliance with orders of foreign authorities,”⁴⁷ and are designed to take advantage of the foreign government compulsion defense.⁴⁸ There are two categories of blocking laws. The first prohibits production of documents or testimony before a foreign tribunal. Some of these statutes provide general protection of business and commercial documents while others are directed at protecting specific industries;⁴⁹ general business practice statutes prevent the disclosure of all business records, including bank records. Ontario’s Business Records Protection Act of 1947⁵⁰ and Swiss Penal Code section

⁴⁵ Cayman Bank Secrecy Law, *supra* note 39. The Cayman Bank Secrecy Law was expanded to include a broad range of relationships in a 1979 amendment enacted in response to the adverse decision in the United States. *Field, supra* note 6.

⁴⁶ Swiss Bank Secrecy Law, *supra* note 37, at art. 49(1), (2); Cayman Bank Secrecy Law, *supra* note 39, at § 4(a)(ii); Bahamian Bank Secrecy Statute, *supra* note 38, at § 10(3). Although one commentator noted the difference in maximum fines in the latter two nations and opined that this indicated each nation’s commitment to its respective laws, the significant prison terms in both are probably a better indicator of each nation’s commitment to the preservation of bank secrecy. Comment, *Sidestepping Foreign Bank Secrecy Laws: No Sanctuary in the Fifth Amendment and Little in the Interest of Comity*, 10 HOUS. J. INT’L L. 57, 57 n.1 (1987) [hereinafter *Sidestepping Foreign Bank Secrecy*]. In fact, the breadth of relationships covered by the Cayman Bank Secrecy Law might indicate the contrary. See Cayman Bank Secrecy Law, *supra*, at § 3(2)(b)(i).

⁴⁷ STAFF REPORT, *supra* note 4, at 13; RESTATEMENT THIRD, *supra* note 14, at § 442 reporters’ note 4.

⁴⁸ RESTATEMENT THIRD, *supra* note 14, at § 442 reporters’ note 4. The foreign state compulsion exception to jurisdiction is that “a state may not require a person 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.” *Id.* at § 441(1)(a).

⁴⁹ See A. LOWE, *supra* note 15, at xviii.

⁵⁰ The statute states:

1. No person shall, pursuant to or under or in a manner that would be consistent with compliance with any requirement, order, direction or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take . . . , send . . . or remove . . . from a point in Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material in any way relating to any business carried on in Ontario, unless such taking, sending, or removal,

a) is consistent with and forms a part of a regular practice of furnishing to a head office or parent company or organization outside Ontario material relating to a branch or subsidiary company or organization carrying on business in Ontario;

d) is provided for by or under any law of Ontario or of the Parliament of Canada.

2.-(1) Where the Minister of Justice and Attorney General or any person having an interest in a business as mentioned in section 1 has reason to believe that a requirement, order, direction, or

273⁵¹ exemplify this breed of blocking statute by prohibiting the disclosure of a "manufacturing or business secret" for any purpose.⁵² A second class of blocking statutes prohibits substantive compliance with foreign government orders.⁵³ Substantive statutes prevent parties from complying with the orders of foreign government officials.⁵⁴

Blocking laws usually provide an even stronger defense against foreign government action. While bank secrecy laws protect a range of banking relationships, blocking laws are designed either to protect certain industries or repel particular discovery techniques. Consequently, nations are more likely to selectively waive bank secrecy laws in a particular case than blocking laws.

III. THE UNITED STATES AND FINANCIAL PRIVACY

A. The Common Law

The U.S. treatment of banking relationships differs dramatically from many foreign nations. Under U.S. common law, the contractual relationship between banker and client can be sacrificed in only a handful of situations. *Tournier v. National Provincial and Union Bank of Eng-*

subpoena as mentioned in section 1 has been or is likely to be made, issued or given in relation to such business, he may apply to a judge or local judge of the Supreme Court in chambers for an order requiring any person . . . to furnish an undertaking and recognizance for the purpose of ensuring that such person will not contravene section 1 and the judge may make such order as he considers proper.

(2) Every person who, having received notice of an application under this section, contravenes this Act shall be deemed to be in contempt of court and is liable to one year's imprisonment.

(3) Every person required to furnish an undertaking or recognizance who contravenes this Act is in contempt of court and in addition to any penalty provided by the recognizance is liable to one year's imprisonment.

Reprinted in A. LOWE, *supra* note 15, at 101-02.

Although the statute was enacted in response to a specific grand jury antitrust investigation, the statute's breadth and future use made it a more general-use blocking statute. *Id.* at 100.

⁵¹ Swiss Penal Code Article 273 states:

Whoever explores a manufacturing or business secret to make it accessible to a *foreign authority* or a foreign organization or a foreign private business enterprise, or their agents, whoever makes a manufacturing or business secret accessible to a foreign authority or foreign organization or a foreign private business enterprise or their agents, shall be punished with imprisonment, in serious cases with penitentiary confinement. The deprivation of liberty can be combined with a fine.

Reprinted in A. LOWE, *supra* note 15, at 136 (emphasis added).

Article 271 forbids Swiss citizens from acting in cooperation with a foreign state without authorization from the Swiss government. Liguori, *Yossarian's Nightmare: A "Catch-22" Between American Grand Jury Powers and Swiss Nondisclosure Laws—A New Solution*, 2 AM. U. J. INT'L L. & POL'Y 229, 232-33 n.14 (1987).

⁵² *Id.*

⁵³ A. LOWE, *supra* note 15, at xviii.

⁵⁴ See *id.* at 98-100, 104-05, 123, 138-43, 186-93.

*land (Tournier)*⁵⁵ established the common law precedent for determining when the banker's duty to the client should be superseded. Under *Tournier*, a banker owes a client a contractual duty of secrecy except when: a) disclosures are compelled by law; b) there is a duty to the public to disclose; c) the interests of the bank require disclosure; or d) when disclosure is made with the express or implied consent of the customer. Courts in the United States follow this interpretation of contractual duties.⁵⁶

United States courts also recognize a variety of other legal bases for protecting the financial privacy of bank records.⁵⁷ Agency law has expanded to include the duty of the bank, as agent, to protect information held for the depositor (*i.e.*, the principal).⁵⁸ State constitutions have been construed to protect a privacy interest in bank records.⁵⁹ Previously, courts found a privacy right under property law theory⁶⁰ and considered but rejected a general right of privacy in the bank-client relationship;⁶¹ however, the continuing validity of the former theory is doubtful.⁶² Tort theory has also been noted as possibly providing some protection to an individual's right to financial privacy.⁶³ But U.S. legal doctrine provides only the baseline for protecting financial privacy and it can be circumvented by government investigators and private parties in the pursuit of justice. A combination of federal law and federal court interpretations of investigatory powers have allowed U.S. officials to exploit the first and fourth exceptions in *Tournier* for their maximum value.

⁵⁵ *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (C.A.) [hereinafter *Tournier*].

⁵⁶ See Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW. 69 (1988).

⁵⁷ For a discussion of the conflicting duties of bankers, see Huhs, *To Disclose or Not To Disclose Customer Records*, 108 BANKING L.J. 30 (1991).

⁵⁸ *Peterson*, *supra* note 36.

⁵⁹ For a discussion of two leading cases, *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), and *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975) [hereinafter *Valley Bank*], see Comment, *The Bank Secrecy Act: Privacy, Comity, and the Politics of Contraband*, 11 N.C.J. INT'L L. & COM. REG. 667, 682 (1986) [hereinafter *Politics of Contraband*].

⁶⁰ *Brex v. Smith*, 104 N.J. Eq. 386, 146 A. 34 (N.J. Ch. 1929). The court quoted *In re Pacific Ry. Comm'n*, 32 F. 241 (C.C.N.D. Cal. 1887) and cited *FTC v. American Tobacco*, 264 U.S. 298 (1924), decisions whose continuing validity is doubtful. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) [hereinafter *Oklahoma Press*]; see also *infra* notes 90-93 and accompanying text.

⁶¹ See, *e.g.*, cases rejecting the theory cited in *Politics of Contraband*, *supra* note 59, at 683 n.120.

⁶² See *Peterson*, *supra* note 36.

⁶³ "The tort theories of invasion of privacy and defamation, though containing fundamental deficiencies, may provide some protection of financial privacy." Plombeck, *supra* note 56, at 69 n.3, citing L. FISCHER, *THE LAW OF FINANCIAL PRIVACY* ¶ 5.04 (1983).

B. Federal Records Requirements

In 1970, Congress mandated the collection of banking instruments by banks under the Bank Secrecy Act (BSA).⁶⁴ Contrary to its noble name, the BSA's stated purpose was to provide government agencies with an individual's bank records to facilitate "criminal, tax and regulatory investigations and proceedings."⁶⁵ The BSA essentially required basic record keeping by banks and other financial institutions of account holders' names and financial instruments, and major currency and international transactions.⁶⁶ Despite the law's breadth, it provided little in procedural safeguards.⁶⁷

In 1978, Congress remedied some privacy deficiencies in the BSA with the Right to Financial Privacy Act (RFPA).⁶⁸ The RFPA restricts government access to individual or small partnership banking records meeting BSA requirements. The government must be authorized by the customer or have a judicial or administrative subpoena, search warrant, or a special RFPA formal written request to obtain those records.⁶⁹ In essence, the BSA turns financial institutions into clearinghouses for private financial transaction information subject only to the procedural safeguards of the RFPA. The law has been criticized for its limited breadth, governing only federal agencies instead of state and local agencies and private parties, and its limitation to individuals and small partnerships.⁷⁰

C. Investigatory Powers

Federal, state, and local governments and private parties possess significant power to discover private financial information in the United States. One of the most internationally controversial of these powers is the grand jury's investigatory power. Many nations do not recognize grand jury investigations as part of the judicial process.⁷¹ A subpoena issued under Rule 17 of the Federal Rules of Criminal Procedure can be

⁶⁴ Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1991)).

⁶⁵ 12 U.S.C. §§ 1829b(a)(1), 1951(a) (1991).

⁶⁶ 12 U.S.C. § 1829b(c)-(e) (1991). The BSA also granted subsequent rule-making power to the Secretary of the Treasury. 12 U.S.C. § 1829b(b) (1991). While currency and foreign transfer reporting is limited to large transactions in the United States, reporting and restrictions provide the basis of control for nations with soft currencies and central bank currency controls.

⁶⁷ See *infra* notes 90-93 and accompanying text.

⁶⁸ Right to Financial Privacy Act, Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified as amended at 12 U.S.C. §§ 3401-22 (1991)). See *infra* notes 90-93.

⁶⁹ 12 U.S.C. §§ 3402, 3408 (1991).

⁷⁰ *Politics of Contraband*, *supra* note 59, at 681. But see *supra* notes 58-63 and accompanying text (doctrines protecting such information from state authority).

⁷¹ See *supra* notes 47-54 and accompanying text.

served in the United States or abroad.⁷² Failure to comply without adequate excuse may be contempt of court.⁷³ Contempt can result in imprisonment for individuals⁷⁴ and substantial fines for banks and other corporations.⁷⁵ In the case of foreign service, the subpoena may "require the appearance [of or the] production of a specified document by [a national or resident of the United States], if the court finds [either is] in the interest of justice"⁷⁶

Federal and state agencies also possess broad discretion under civil investigative powers and administrative subpoenas. Many procedural rights for criminal subpoenas do not extend to agency demands.⁷⁷ The Interstate Commerce Act was the first statute to authorize administrative subpoenas, although other agencies have been given comparable investigatory powers;⁷⁸ demands can be made of both investigatory targets and third parties.⁷⁹ Subpoenas issued under these laws are both broad and powerful.⁸⁰ Administrative subpoenas raise enforcement questions simi-

⁷² FED. R. CRIM. P. 17(e). Foreign service is governed by 28 U.S.C. § 1783 (1991).

⁷³ FED. R. CRIM. P. 17(g).

⁷⁴ *Doe v. United States*, 487 U.S. 201, 205-206 (1988) [hereinafter *Doe*].

⁷⁵ *Westinghouse*, *supra* note 19, at 994 (company failing to comply with the District Court discovery order was required to pay \$10,000 per day and, upon failure of the company to pay the fine, the United States Marshal was authorized and directed to enter the company's uranium mine properties and seize any and all properties of sufficient value to satisfy the fine (reversed by appeals court)); *Nova Scotia II*, *supra* note 10, at 819-820 (court imposed a \$25,000 per day fine which reached \$1,825,000 (upheld by panel)); *Sealed Case*, *supra* note 6, at 499 (fine against bank was \$50,000 per day (reversed by court of appeals)).

⁷⁶ 28 U.S.C. § 1783(a) (1991).

⁷⁷ *Oklahoma Press*, *supra* note 60, at 214 ("Congress has authorized the Administrator. . . to determine the question of coverage in the preliminary investigation of possibly existing violations. . . ."); *see also infra* note 80.

⁷⁸ *See, e.g.*, 47 U.S.C. §§ 208, 403 (1991) (Federal Communications Commission); 15 U.S.C. §§ 49, 50 (1991) (Federal Trade Commission); 49 U.S.C. §§ 12, 13, 305, 916, 301, 1017 (1991) (Interstate Commerce Commission); 29 U.S.C. §§ 159, 160 (1991) (National Labor Relations Board); 15 U.S.C. §§ 77s, 77v, 78u, 79r, 80a-41, 80b-9 (1991) (Securities and Exchange Commission) (*cited in* J. STEIN, G. MITCHELL, & B. MEZINES, ADMINISTRATIVE LAW § 19.03, at 19-45 n.3 (1990)).

A variety of state agencies also possess significant civil investigatory powers. For example, 26 state and territorial antitrust law enforcement units have specific civil investigatory powers and 16 others have general investigatory powers. *See* W. HAYNES, STATE ANTITRUST LAWS 274-356 (1989).

⁷⁹ B. SCHWARZ, ADMINISTRATIVE LAW 137 (3d ed. 1991). *See, e.g.*, *Vanguard Int'l Manufacturing v. United States*, 588 F. Supp. 1229, 1231 (S.D.N.Y. 1984) ("The IRS's authority to issue third-party summonses is very broad." (citations omitted)); *Securities and Exchange Commission v. Banca della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981) [hereinafter *BSI*]. *But see First Chicago*, *supra* note 7, at 345-346; *see also infra* notes 268-271.

⁸⁰ Agencies do not need probable cause to issue their subpoenas. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (The "power to [administrative] inquisition . . . is more analogous to a Grand Jury, which . . . can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not."). *See, e.g.*, 15 U.S.C. § 78u(b) (1991) ("For the purpose of any such investigation, . . . any . . . officer designated by [the Securities and Exchange Commission]

lar to grand jury subpoenas for international comity purposes.⁸¹ Furthermore, state subpoenas are not subject to RFPA restrictions, thus eliminating the due process guarantees therein.⁸²

Private parties can obtain private bank information through civil discovery. The Federal Rules limit discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action,"⁸³ which need not itself be admissible as evidence at trial.⁸⁴ While "traditional" privileged material cannot be discovered,⁸⁵ it remains unclear whether a foreign banker-client privilege constitutes a traditional privilege. In enacting the Federal Rules of Civil Procedure, Congress left "it up to the courts to interpret the common law principles in light of reason and experience."⁸⁶ Commentators have noted an evolving "semi-privilege" for discovery "that would invade the privacy of persons not parties to the action,"⁸⁷ but the recent evolution of the semi-privilege leaves its status questionable, and federal courts have shown little inclination to broaden the traditional privilege categories.⁸⁸

D. Constitutional Privilege

The Constitution provides little protection for account holders. Courts describe the interest of the United States in enforcing its laws as overwhelming and the ability of prosecutors to uncover evidence of criminal conduct as essential.⁸⁹ That interest usually overwhelms any possible constitutional right of a bank customer. *United States v. Miller*⁹⁰ rejected the Fourth Amendment's Search and Seizure Clause⁹¹ as a basis for a privacy right in bank records. The Supreme Court held that in a case where the records were held pursuant to the BSA, "[t]he depositor

is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." (emphasis added).

⁸¹ See B. SCHWARTZ, ADMINISTRATIVE LAW, A CASEBOOK 187 (3d ed. 1988) (citing CFTC v. Nahas, 580 F. Supp. 245 (D.D.C. 1983)).

⁸² See *supra* note 70; see also *supra* note 78.

⁸³ FED. R. CIV. P. 26(b)(1).

⁸⁴ F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE § 5.3, at 231 (1985).

⁸⁵ FED. R. CIV. P. 26(b)(1).

⁸⁶ C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2016, at Supp. 54 (Supp. 1991).

⁸⁷ J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 7.4, at 386 n.13 (citing *Valley Bank*, *supra* note 59).

⁸⁸ C. WRIGHT & A. MILLER, *supra* note 86, § 2020, at 178.

⁸⁹ *Field*, *supra* note 6, at 408-409; *Nova Scotia I*, *supra* note 10, at 1391; *Nova Scotia II*, *supra* note 10, at 829.

⁹⁰ *United States v. Miller*, 425 U.S. 435 (1976) [hereinafter *Miller*].

⁹¹ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”⁹² Moreover, since the bank owned the records, there was, “no legitimate ‘expectation of privacy’ [by Miller] in [the checks and deposit slips].”⁹³ According to later decisions, Bahamian and Cayman protected bank records similarly fail to provide a legitimate expectation of privacy under the Fourth Amendment because of the exceptions to secrecy in the statutes themselves.⁹⁴

The status of the Fifth Amendment’s self-incrimination clause⁹⁵ remains unclear. In a grand jury investigation, the question of whether an individual can be compelled to testify when the testimony may result in foreign prosecution, rests upon whether the party has a “real fear” of prosecution.⁹⁶ This proves especially important where bank employees are required to testify about records in violation of foreign law.⁹⁷ The Courts of Appeal adopted different tests to determine if that real fear exists in foreign jurisdictions. While most circuits adopted a “case by case” approach to determine whether individuals subpoenaed before the grand jury must testify in spite of that fear,⁹⁸ one circuit limited the right not to testify to cases where an individual fears prosecution in another nation that guarantees protection similar to the Fifth Amendment.⁹⁹ The D.C. Circuit found that fear of prosecution is unfounded where a person is not a citizen of the prosecuting nation and does not fear extradition, almost regardless of other contacts, because the fear would only be speculative.¹⁰⁰

Another investigative technique used in grand jury investigations involves consent directives, as an apparent attempt to accommodate the

⁹² *Miller, supra* note 90, at 443. The decision failed to explain why the contractual relationship between banker and client was to be ignored. See *Tournier, supra* note 55.

⁹³ *Miller, supra* note 90, at 442.

⁹⁴ *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980) [hereinafter *Payner*] (Bahamian account); *United States v. Mann*, 829 F.2d 849, 852 (9th Cir. 1987) (Cayman Islands account). *But see generally infra* note 269.

⁹⁵ “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.

⁹⁶ *Zicarelli v. New Jersey State Comm’n of Investigation*, 406 U.S. 472, 478 (1972). Banks and other institutions cannot invoke the self incrimination clause of the Fifth Amendment. *Doe, supra* note 74, at 206 (*citing* *Braswell v. United States*, 487 U.S. 99, 102 (1988) [hereinafter *Braswell*] and *Bellis v. United States*, 417 U.S. 85, 89-90 (1974) [hereinafter *Bellis*]).

⁹⁷ See, e.g., cases cited *supra* notes 6 and 7.

⁹⁸ For a discussion of the “case by case” approach, see *Sidestepping Foreign Bank Secrecy, supra* note 46, at 77-85.

⁹⁹ *United States v. (Under Seal)*, 794 F.2d 920, 925 (4th Cir.), *stay granted sub nom. Araneta v. United States*, 478 U.S. 1301, *stay vacated and cert. denied*, 479 U.S. 924 (1986).

¹⁰⁰ *Sealed Case, supra* note 6, at 497. *But see id.* at 498 (Bank owned by country X should not be forced to violate secrecy laws of country Y or face contempt sanctions).

banks subject to foreign secrecy laws.¹⁰¹ Essentially, the government directs a witness to sign a statement declaring that "if" a bank account exists in a secrecy jurisdiction bank and the bank "thinks" the witness has control, the bank should provide the government with all records of that account.¹⁰² The Supreme Court recently found such compulsion consistent with the Fifth Amendment in *Doe v. United States (Doe)*.¹⁰³ In that case, a district court held "John Doe" in contempt for refusing to sign a consent form in an investigation of his alleged tax law violations and suspected fraudulent manipulation of oil cargoes.¹⁰⁴ The petitioner claimed that his execution of the consent form would have independent testimonial significance and the Fifth Amendment prohibited the government from compelling his signature.¹⁰⁵ The Court held the consent directive itself was not "testimonial" because its execution held no testimonial significance; therefore, the Fifth Amendment was not implicated.¹⁰⁶ Justice Blackmun noted that a question of comity could exist in such cases, but found that it was not implicated in *Doe*.¹⁰⁷

Other cases have entirely stripped Fifth Amendment protection. Corporate custodians have no Fifth Amendment protection because they hold records in a representative capacity.¹⁰⁸ This is true even if the cus-

¹⁰¹ D. MCGOWEN, D. O'DAY, & K. NORTH, CRIMINAL AND CIVIL TAX FRAUD § 11.06 (Supp. 1991).

¹⁰² For examples of the form of such statements, see, e.g., *United States v. Ghidoni*, 732 F.2d 814, 815-816 n.1 (11th Cir.), cert. denied, 469 U.S. 932 (1984); *Doe*, supra note 74, at 204 n.2; *In re Grand Jury Proceedings, Yanagihara Grand Jury*, 709 F. Supp. 192, 194 n.4 (C.D. Cal. 1989) [hereinafter *Yanagihara*].

¹⁰³ *Doe*, supra note 74.

¹⁰⁴ The district court originally found such compulsion to be in violation of the Fifth Amendment's self-incrimination clause in *In re Grand Jury Investigation, United States v. Doe*, 599 F. Supp. 746 (S.D. Tex. 1984) which was reversed on the initial appeal. On remand, the district court ordered Doe to sign the consent form and held him in contempt when he refused. This appeal followed.

¹⁰⁵ *Doe*, supra note 74, at 207.

¹⁰⁶ *Id.* at 215-217.

¹⁰⁷ *Id.* at 218 n.16. Whether this holding would have any actual effect in the Cayman Islands remained unclear. The Grand Court of the Cayman Islands held expressly that consent directives compelled under threat of contempt sanctions do not constitute consent under the Cayman Bank Secrecy Law. *Id.*, citing *In re ABC Ltd.*, 1984 C.I.L.R. 130 (1984), although that decision had not been appealed. Whether a defendant has standing to raise the comity issue in a consent directive context has also been questioned. *Yanagihara*, supra note 102, at 195.

The dissent in *Doe* by Justice Stevens was not particularly persuasive. He based his opinion on the belief that "forced execution of a document that purports to convey the signer's authority. . .invade[s] the dignity of the human mind," and the fact that the majority failed to recognize that the directive itself creates "new facts. . .[probative of control] that may be used against petitioner." *Id.* at 219 n.1 and 221 n.2 (Stevens, J., dissenting) (emphasis in original). Exactly where protection of dignity is enunciated constitutionally was not explained.

¹⁰⁸ *Bellis*, supra note 96, at 88.

todian is a named co-defendant¹⁰⁹ but not if the corporation is operated as a sole proprietorship.¹¹⁰ These cases are of particular importance for individuals operating private offshore banks¹¹¹ who would generally lose their Fifth Amendment protection because of their bank's corporate form.

IV. THE LIMITS OF INTERNATIONAL COOPERATION

Because of the conflict between domestic and foreign policies and procedures, nations attempt to cooperate when possible to meet the needs of each. Their efforts include treaties, informal agreements, and multilateral cooperation to improve upon the traditional non-treaty mechanisms for obtaining evidence abroad.

A. Non-Treaty Mechanisms for Obtaining Evidence Abroad

Letters rogatory are the oldest bilateral procedure for obtaining information in a foreign jurisdiction. "Letters rogatory are the medium . . . whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country . . ." ¹¹² Based on international comity,¹¹³ nations ordinarily grant such requests absent unusual circumstances.¹¹⁴ Letters rogatory can be used for both private and government actions.

Although letters rogatory can produce information, several drawbacks limit their value. First, few specific procedures exist with respect to letters rogatory.¹¹⁵ While some nations require a formal request

¹⁰⁹ *Braswell*, *supra* note 96, at 120 (Kennedy, J., dissenting).

¹¹⁰ *Id.* at 104, *citing* *United States v. Doe*, 465 U.S. 605 (1984).

¹¹¹ *See supra* notes 32-34 and accompanying text.

¹¹² *The Signe*, 37 F. Supp. 819, 820 (E.D. La. 1941). *See also* *In re Westinghouse Electric Corp. and Duquesne Light Co.*, 16 O.R.2d 273, 290 (1977) [hereinafter *Duquesne Light*] ("The enforcement of letters rogatory is always a matter within the discretionary power of the Court.").

¹¹³ "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 543 n.27 (1987) [hereinafter *Société Nationale*].

'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895), *reaffirmed in Société Nationale*, *supra*, at 542-43. *See Duquesne Light*, *supra* note 112, at 290-91.

¹¹⁴ *See The Signe*, *supra* note 112, at 820.

¹¹⁵ There is a treaty concerning letters rogatory, *European Convention on Mutual Assistance in*

through diplomatic channels, others do not. Even when the letter can be directly sent from the domestic court to the foreign court, the procedure still takes time. To discover the correct procedures requires litigants to expend not only extensive time but also money, a second drawback to the procedure.¹¹⁶ Third, the letter itself must be simple enough to be understood but sufficiently complete to convince a foreign judge to act.¹¹⁷ This requires careful drafting to avoid confusion with U.S. legal terms and peculiar names for offenses. Fourth, the foreign procedure may prevent the domestic party from obtaining sufficient information. Because the letters rogatory process is limited by the laws and procedures of the jurisdiction, foreign judges might not assist U.S. courts; this is especially so with fiscal offenses (*i.e.* currency, securities, or tax offenses).¹¹⁸

Finally, other nations have a general antipathy for U.S. litigation procedures and practice. Many countries find it unreasonable to compel individuals to expend extensive time, effort, and money to produce records for an adverse party on a fishing expedition.¹¹⁹ Similarly, foreign jurisdictions often do not recognize United States grand jury and administrative procedures as valid bases for letters rogatory because they do not meet their "judicial proceeding" requirement for answering a letter rogatory.¹²⁰ Parties have no certainty that the procedure will be successful in procuring information,¹²¹ particularly when attempting to over-

Criminal Matters, *opened for signature* Apr. 20, 1959, 472 U.N.T.S. 185, but "[t]he Convention does not really create any new procedures for obtaining evidence. It provides a procedure for executing letters rogatory, but does *not* expand on this mechanism for securing evidence." Knapp, *Mutual Legal Assistance Treaties as a Way To Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L. 405, 406 n.4 (1988) (emphasis added).

¹¹⁶ *Nova Scotia I*, *supra* note 10, at 1390. Even when a letter can be directly sent from the domestic court to the foreign court, the procedure still takes time. The letter must be submitted by counsel to the domestic court, approved, and then sent via diplomatic channels to the foreign court. The foreign court must collect the information and return it by the same process. RESTATEMENT THIRD, *supra* note 14, at § 473 reporters' note 1. When the government is the requestor, the letter must also follow the appropriate bureaucratic path before reaching the domestic court, adding further delay. Address by James Springer, Washington, D.C. Bar Association, International Law Section's Narco-Terrorism and International Law Forum (Oct. 20, 1989), Federal News Service (available on NEXIS).

¹¹⁷ Knapp, *supra* note 115, at 409.

¹¹⁸ *Id.* at 409-10. See *Vetco*, *supra* note 10, at 1333 ("The Swiss Federal Attorney has stated that tax investigations are fiscal matters, and that it would be unable to respond favorably to a letter rogatory."). Cf. *Duquesne Light*, *supra* note 112, at 286-287 ("The Court is entitled to go behind letters rogatory, to examine precisely what it is the foreign Court is seeking to do, and to give effect to them only if they satisfy the requirements of the law of this jurisdiction.").

¹¹⁹ RESTATEMENT THIRD, *supra* note 14, at § 442 reporters' note 1.

¹²⁰ Knapp, *supra* note 115, at 410. The United States usually accepts requests from administrative authorities and foreign nations often provide assistance to private parties engaged in administrative proceedings. RESTATEMENT THIRD, *supra* note 14, at § 473 comment c.

¹²¹ *Nova Scotia I*, *supra* note 10, at 1390.

come bank secrecy laws.¹²² For these reasons, letters rogatory are often used as a last resort when evidence cannot otherwise be compelled, especially in the case of bank records protected by foreign law.

Employed only in civil matters,¹²³ the Hague Evidence Convention has, for some nations, supplanted the use of letters rogatory.¹²⁴ Civil law nations interpret the Hague Convention as not applying to criminal, government fiscal, or administrative matters, “as well as other cases in which the government is the plaintiff.”¹²⁵ The Convention itself also effectively excludes injunctions and restraining orders.¹²⁶ This leaves letters rogatory or procedures established under treaties as the only available alternative.

B. Bilateral Agreements

1. Mutual Legal Assistance Treaties

Faced with the problems of transboundary litigation and crime, among others, the United States started negotiating bilateral treaties designed to effectuate a better system of obtaining evidence and piercing bank secrecy. The mutual legal assistance treaty (MLAT) between the United States and Switzerland (Swiss Treaty)¹²⁷ was the first of these treaties. It created an obligation between the nations “to afford each other . . . mutual assistance” in investigations and the return of property

¹²² *Id.*

¹²³ For example, Switzerland and the Canadian provinces regularly execute letters rogatory. RESTATEMENT THIRD, *supra* note 14, at § 473 reporters’ note 1. *But see infra* notes 133, 276 and accompanying text.

¹²⁴ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (*implemented in* 28 U.S.C. §§ 1781-82 (1991), Fed. R. Civ. P. 28(b)) [hereinafter Hague Evidence Convention]. The formal channels of the Hague Evidence Convention have been termed an “extremely slow and expensive” process. *To Amend the Federal Securities Laws in Order to Facilitate Cooperation Between the United States and Foreign Countries in Securities Law Enforcement, 1988: Hearing on S. 2544 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 2d Sess. 776 (1988)* (statement of David Ruder, Chairman, SEC). Although the Hague Evidence Convention can be used in government civil actions with common law countries, its use is not required. *See Société Nationale, supra* note 113, at 542-543. For a discussion of *Société Nationale*, the Hague Evidence Convention, and its use in France, Italy, Germany, and the United Kingdom, see Prescott & Alley, *Effective Evidence-Taking Under the Hague Convention*, 22 INT’L LAW. 939 (1988).

¹²⁵ Prescott & Alley, *supra* note 124, at 947.

¹²⁶ *Id.* at 948.

¹²⁷ Treaty on Mutual Assistance in Criminal Matters, United States-Switzerland, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302 (*entered into force* Jan. 23, 1977) [hereinafter Swiss MLAT]. For a general discussion of U.S. MLATs, see Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT’L LAW. 189 (1985).

obtained through crimes.¹²⁸ Although every bilateral MLAT negotiated by the United States has been tailored to the specific needs of the contracting parties, they tend to have some common elements.¹²⁹ The treaties generally exclude political, military, and in some cases, tax offenses.¹³⁰ Employing a "dual criminality" prerequisite,¹³¹ these treaties require that the offense either be a crime in both nations or a crime listed in the treaty. Nations limit the use of information to the purpose in the assistance request in order to prevent circumvention of the dual criminality requirement.¹³² The treaties also establish general guidelines for the evidence request process.¹³³

Since the Swiss Treaty, the United States has negotiated MLATs with a number of other nations.¹³⁴ A treaty with the Netherlands, including the bank haven Dutch-Antilles, became the second major secrecy jurisdiction MLAT in 1983.¹³⁵ The Senate approved six other treaties in October 1989, with the reservation that mutual assistance would not be given to foreign officials involved in the drug trade.¹³⁶ These included treaties with the Bahamas (Bahamian MLAT)¹³⁷ and Cayman Islands (Cayman MLAT),¹³⁸ both secrecy havens, as well as Canada, a blocking

¹²⁸ *Id.* at art. 1, ¶ 1(a), (b).

¹²⁹ The Swiss MLAT is far more detailed than most other MLATs, but the elements of other MLATs are essentially variations on the same themes.

¹³⁰ Swiss MLAT, *supra* note 127, at art. 2, ¶¶ 1(c)(1)-(3), (5); *infra* notes 143-44 and accompanying text.

¹³¹ *Id.* at art. 4 and Schedule. But in this regard, commentators hope the new Belgian MLAT, Treaty on Legal Mutual Assistance in Criminal Matters, Jan. 28, 1988, United States-Belgium, S. TREATY DOC. No. 16, 100th Cong., 2d Sess. (1988) [hereinafter Belgian MLAT], will become the international model "since it applies to 'any offense under the laws of the [assistance] Requesting State' unless otherwise provided by the treaty." See Mutual Legal Assistance Treaty Concerning the Cayman Islands, S. EXEC. REP. No. 101-8, 101st Cong., 1st Sess. 209 (1989) [hereinafter Cayman Treaty Report] (Statement of Bruce Zagaris, Editor-in-Chief, Int'l Enforcement L. Rep.).

¹³² *Id.* at art. 5.

¹³³ *Id.* at arts. 28-35.

¹³⁴ Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, United States-Turkey, 32 U.S.T. 3111, T.I.A.S. No. 9891; Treaty on Mutual Assistance in Criminal Matters, Nov. 9, 1982, United States-Italy, 24 I.L.M. 1536 (entered into force Nov. 13, 1985).

¹³⁵ Treaty on Mutual Assistance in Criminal Matters with the Kingdom of the Netherlands, June 12, 1981, United States-Netherlands, T.I.A.S. No. 10,734, 21 I.L.M. 48 (1982) (entered into force Sept. 15, 1983).

¹³⁶ Several senators, notably Senator Jesse Helms, objected to the treaties because some governments had drug trafficking ties and could not be trusted to share information. See Cayman Treaty Report, *supra* note 131, at 258-75. The reservations are a result of those objections. *Senate Votes 6 Pacts To Track Drug Money*, N.Y. Times, Oct. 25, 1989, at A14, col. 3.

¹³⁷ Treaty on Mutual Assistance in Criminal Matters, Aug. 18, 1987, United States-Bahamas, S. TREATY DOC. 17, 100th Cong., 2d Sess. (1988) [hereinafter Bahamian MLAT].

¹³⁸ Treaty Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, United States-United Kingdom, 26 I.L.M. 537 (1987) [hereinafter Cayman MLAT].

law jurisdiction.¹³⁹ The United States signed a treaty with Colombia, but Colombia apparently will not ratify the treaty due to strong domestic opposition.¹⁴⁰ A Jamaican treaty also awaits approval by both sides¹⁴¹ while negotiations for a Panamanian MLAT continue.¹⁴²

The Bahamian and Cayman MLATs both have important restrictions on information relating to tax matters. Under the Bahamian treaty, the contracting state must only provide assistance in tax matters where the "offence" involves narcotics, theft, violence, or dual crimes.¹⁴³ The Cayman MLAT similarly excludes tax and currency offenses not relating to another criminal matter.¹⁴⁴ While the Caribbean MLATs were only recently approved, both the United States and its early treaty partners consider MLATs a success. Swiss Justice Minister Elisabeth Kopp stated that the Swiss seem satisfied with the arrangement, even though U.S. requests outpace Swiss requests three to one.¹⁴⁵ Commentators

¹³⁹ Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, United States-Canada, 24 I.L.M. 1092 (1985). The other three treaties are the Belgian MLAT, *supra* note 131; Mutual Legal Assistance Cooperation Treaty, Dec. 9, 1987, United States-Mexico, S. TREATY DOC. No. 13, 100th Cong., 2d Sess. (1988); and Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 19, 1986, United States-Thailand, S. TREATY DOC. No. 18, 100th Cong., 2d Sess. (1988).

¹⁴⁰ Mutual Legal Assistance Treaty, Aug. 20, 1980, United States-Colombia, T.I.A.S. No. 10,734 (*not yet entered into force*); Knapp, *supra* note 115, at 413 n.30.

¹⁴¹ Treaty on Mutual Assistance in Criminal Matters, United States-Jamaica (*not yet entered into force*), cited by Daily Report for Executives (BNA), June 1, 1990, at G-3 (comments of James Springer) (available on NEXIS).

¹⁴² Knapp, *supra* note 115, at 414.

¹⁴³ Bahamian MLAT, *supra* note 137, at art. 2, §§ 1, 2. British, and consequently Bahamian, Common law treats tax avoidance, as opposed to tax evasion, as it is in the United States. See Karzon, *International Tax Evasion: Spawned in the United States and Nurtured by Secrecy Havens*, 16 VAND. J. TRANSNAT'L L. 757, 759 n.2 (1983).

¹⁴⁴ Cayman MLAT, *supra* note 138, at arts. 3, ¶ 1(a), 19, ¶ 3(d), (e). Insider trading issues will be interesting to watch under the Cayman MLAT. The treaty's definition of "Criminal offense," art. 19, ¶ 3, includes "insider trading" which is defined as "the offer, purchase, or sale of securities by any person while in possession of material non-public information directly or indirectly relating to the securities offered, purchased, or sold, *in breach of a legally binding duty of trust or confidence.*" *Id.* at art. 19, ¶ 3(g) (emphasis added). This is a more limited definition than has been advanced by the SEC and some United States courts. Rule 14e-3, 17 C.F.R. 240.14e-3 (1990); *United States v. Chestman*, 704 F. Supp. 451 (S.D.N.Y. 1989), *rev'd*, 903 F.2d 75 (2d Cir. 1990), *reh'g en banc granted*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,439 (1990).

Previous bilateral treaties limited to narcotics matters also allowed the Federal government to obtain financial information for tax felony prosecution if the fiscal offenses were related to narcotics crimes. See, e.g., *United States v. Pinto*, 838 F.2d 426, 430 (10th Cir. 1988).

¹⁴⁵ *The Swiss Case on Insiders, Taxes and Evidence*, Wall St. J., Oct. 28, 1987, at 33. "The Swiss Treaty is the model that we look to for the most productive treaty we have. The Netherlands is a close second." *Money Laundering Control Act of 1986 and the Regulations Implementing the Bank Secrecy Act: Hearings Before the Subcomm. on Financial Institutions, Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 1st Sess. 27 (1987) (statement of William Weld, Assistant Attorney General, Criminal Division) [hereinafter *Money Laundering Hearings*].

have suggested that the United States "could be expected to make the majority of the requests under treaties with bank secrecy jurisdictions,"¹⁴⁶ such as the Bahamas and Cayman Islands.

The United States improves "treaty performance" after ratification through less formal means. United States pressure, both indirect through international organizations¹⁴⁷ and direct, has proved instrumental in changing foreign laws without new agreements. Direct pressure is brought upon nations to enact new legislation, bringing new offenses within dual criminality requirements.¹⁴⁸ But considering the breadth of the new Caribbean MLATs and their corresponding strict limits relating to tax crimes, this form of creeping treaty will probably not contribute to future Caribbean MLATs for tax purposes.¹⁴⁹

MLATs provide a number of advantages to government investigators gathering secret foreign bank information. After they enter into force, processing a request for evidence merely requires contacting the treaty-specified representative in the other jurisdiction. MLATs also constitute a formal treaty, within the Senate's constitutional "advise and consent" requirement,¹⁵⁰ which U.S. lawmakers and administrators can supplement with new domestic laws and regulations to further refine information procurement techniques.

From the U.S. government's perspective, MLATs do not represent complete solutions. They do not contain all of the offenses the United States would prefer; this problem stems more from general international relations than the specific MLATs. Nations that do not regard certain activities as criminal understandably are unwilling to enter into agreements to assist in the prosecution of people in other nations;¹⁵¹ the same

¹⁴⁶ Knapp, *supra* note 115, at 416.

¹⁴⁷ See *infra* notes 189-200 and accompanying text.

¹⁴⁸ Roth, *Swiss Urged to Curb Money Laundering*, Wall St. J., Dec. 2, 1988, at A12, col. 1. Some Swiss attribute their new insider trading law to U.S. pressure. Melloan, *Switzerland's 'Glasnost' Has Roots in the USA*, Wall St. J., June 28, 1988, at 33, col. 3. Some United States officials attribute the Swiss money laundering law to pressure by the United States and others. See *infra* notes 189-95. The new law enables U.S. law enforcement agencies to obtain evidence under the more formal procedures of the Swiss MLAT.

¹⁴⁹ See *supra* notes 137-44 and accompanying text.

¹⁵⁰ "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. CONST. art. II, § 2.

¹⁵¹ See *supra* notes 143-44 and accompanying text. Cayman Financial Secretary Thomas Jefferson noted while commenting on his nation's aversion to any tax agreements, "[o]ne reason [for agreements not covering tax offenses] is that we really have no direct taxation. With no taxation, signing a treaty with another country is just a way of policing for them." Peagam, *Future Growth That Doesn't Scare the World*, EUROMONEY, May 1989, Supp. at 67. The other reason is respect for confidentiality. *Id.* See *Offshore Financial Centers*, *supra* note 44, at 527-28 n.46.

reservations exist with respect to U.S. litigation techniques.¹⁵² Some offenses also technically fall outside the dual criminality requirements of MLATs. The new Swiss insider trading law exemplifies this difficulty. Because the Swiss definition of insider trading remains more limited than the SEC's, some SEC inquiries could still fall outside the Swiss Treaty's dual criminality requirements.¹⁵³ This problem, however, seems to be limited to more technical crimes and cases.¹⁵⁴

The United States also limits the effectiveness of MLATs through its own doing. The last six treaties languished in the Senate eighteen to twenty-four months awaiting Senate advice and consent.¹⁵⁵ Such inaction not only limits the timely use of MLATs, but also makes the United States appear less serious about the treaties that it convinced other nations to negotiate.

2. *Specialized Treaties*

a. Tax

The United States presently has forty tax treaties in force and several others in various stages of negotiation.¹⁵⁶ These treaties provide for the direct exchange of information between competent authorities.¹⁵⁷ Like securities, antitrust, and narcotics agreements, as well as MLATs, these treaties are limited by domestic law and often generate abundant domestic case law.¹⁵⁸

On February 24, 1983, the Reagan administration announced the Caribbean Basin Initiative.¹⁵⁹ The Caribbean Basin Economic Recovery

¹⁵² See *supra* note 9 and accompanying text.

¹⁵³ See Melloan, *supra* note 148. See also *supra* note 144.

¹⁵⁴ Most traditional laws against violent and non-violent crimes have counterparts in other systems. See *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) ("murdering thousands of Jews and non-Jews" under Israeli law is an extraditable offense under the U.S.-Israeli extradition treaty's "murder" definition).

¹⁵⁵ REPORT OF PROCEEDINGS OF SEMINAR, "INTERNATIONAL DRUG MONEY LAUNDERING: ISSUES AND OPTIONS FOR CONGRESS," JUNE 21, 1990, PREPARED FOR THE HOUSE COMM. ON FOREIGN AFFAIRS BY THE CONG. RESEARCH SERVICE LIB. OF CONG. 22 (Comm. Print 1990) (statement of Andre K. Surena, Assistant Legal Adviser, Law Enforcement and Intelligence, U.S. Dept. of State) [hereinafter ISSUES AND OPTIONS FOR CONGRESS].

¹⁵⁶ D. MCGOWEN, D. O'DAY, & K. NORTH, *supra* note 101, at § 11.03. Two regional tax treaties also exist among the five Scandinavian nations and the members of the European Community. See Crinion, *Information Gathering on Tax Evasion in Tax Haven Countries*, 20 INT'L LAW. 1209, 1243 (1986).

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., *id.* at 323-24 (Swiss Federal Supreme Court decisions under the United States-Switzerland Tax Treaty).

¹⁵⁹ "The initiative was originally proposed in an address to the Organization of American States. The major elements of the plan were a free trade area, economic and military aid, investment tax

Act (CBERA),¹⁶⁰ designed to implement the initiative, contained a section promoting the negotiation of tax treaties with Caribbean tax havens. Under CBERA, U.S. corporations can deduct the costs of attending conventions in Caribbean nations if those nations have negotiated tax treaties with the United States.¹⁶¹ These tax treaties must allow the United States to procure information needed for criminal or civil tax proceedings regardless of local bank secrecy laws.¹⁶² The effect of CBERA has not been overwhelming. Of the nations originally designated as beneficiary countries,¹⁶³ only six have negotiated tax agreements with the United States.¹⁶⁴

b. Narcotics

Narcotics agreements, like tax and securities agreements, are executive agreements and thus not subject to the Senate's advise and consent procedure.¹⁶⁵ According to their stated purpose, these agreements only apply to crimes involving narcotics trafficking and are intended to be interim in nature, expiring once broader assistance treaties come into force.¹⁶⁶ The United States has negotiated several treaties with various United Kingdom commonwealth states in the Caribbean,¹⁶⁷ although those treaties have been superseded by the broader Cayman MLAT.¹⁶⁸

credits, and programs designed to encourage private investment and production in the Caribbean." *Offshore Financial Centers*, *supra* note 44, at 521 n.7.

¹⁶⁰ Caribbean Basin Economic Recovery Act, Title II, Pub. L. No. 98-67, 97 Stat. 384 (codified in various sections of Titles 19, 26, and 31 of the U.S. Code) (1983) [hereinafter CBERA].

¹⁶¹ The IRS disallows expenses for conventions outside North America. A nation qualifies as North American if it has been designated a "beneficiary country" under CBERA and has negotiated an information exchange agreement with the United States. D. MCGOWEN, D. O'DAY & K. NORTH, *supra* note 101, at § 11.05. The Tax Reform Act of 1984 also contains provisions that encourage corporations to establish Foreign Sales Corporations (FSC) in Caribbean countries. "An FSC can exempt a part of its export income from United States income tax if the FSC meets certain foreign management and economic process requirements." FSC host and CBERA requirements are essentially the same. *Offshore Financial Centers*, *supra* note 44, at 537 n.103.

¹⁶² I.R.C. § 274(h)(6)(C)(1990).

¹⁶³ The President designated Antigua and Barbuda, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Jamaica, Montserrat, Netherlands Antilles, Panama, St. Christopher-Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and the British Virgin Islands as beneficiary nations. D. MCGOWEN, D. O'DAY, & K. NORTH, *supra* note 101, at § 11.05.

¹⁶⁴ Barbados, Dominica, Dominican Republic, Grenada, Jamaica, and St. Lucia. *Id.*; *Tax Report Briefs*, Wall St. J., Dec. 27, 1989, at A1, col. 5. The United States also has agreements with Bermuda, Netherlands-Antilles, and Aruba.

¹⁶⁵ See *supra* note 150.

¹⁶⁶ Knapp, *supra* note 115, at 412-13.

¹⁶⁷ *Id.* at 413 (these include Anguilla, British Virgin Islands, Montserrat, and Turks & Caicos Islands).

¹⁶⁸ Cayman MLAT, *supra* note 138, at Protocol.

One State Department official described this sort of treaty as irrational but recognized that "historical, financial, political, [and] economic reasons" contribute to the hesitancy of foreign nations to enter into international agreements.¹⁶⁹

c. Securities

The Securities and Exchange Commission (SEC) actively pursues violations of U.S. securities laws outside the United States. Most of these efforts center around major industrialized nations and their securities markets.¹⁷⁰ The SEC has negotiated a number of Memoranda of Understanding (MOUs) with nations possessing major markets.¹⁷¹ The Commission also requires that every inter-exchange linkage agreement subject to SEC approval contain a clause providing for the sharing of information, and cooperation in surveillance and investigations.¹⁷² With the exception of Switzerland, however, these various agreements do not affect practices in secrecy havens.

d. Antitrust

The United States has negotiated three bilateral antitrust agreements. The first with West Germany¹⁷³ merely represented a codification of mechanisms of cooperation used to enforce similar antitrust

¹⁶⁹ ISSUES AND OPTIONS FOR CONGRESS, *supra* note 155, at 21-22 (statement of Andre K. Surena) ("If a foreign government is [willing to permit] piercing [of] bank secrecy in cases of narcotics trafficking, why should it not allow [the same] in the case of murder for hire . . . or fraud?") *Id.*

¹⁷⁰ *Cf.* Bloomenthal, *The SEC and Internationalization of Capital Markets: Herein of Regulation S and Rule 144A—Part II*, 19 DEN. J. INT'L L. & POL'Y 343, 348 n.32 (1991) (noting the markets included and excluded in the new Regulation S).

¹⁷¹ These include agreements with the United Kingdom's Department of Trade and Industry, Japan's Ministry of Finance, Brazil's Comissão de Valores Mobiliários (Brazil's SEC), and the securities commissions of France, Mexico, Switzerland, the Netherlands, British Columbia, Ontario, and Quebec. *SEC, Mexico Sign MOU Regarding Enforcement*, 22 Sec. Reg. & L. Rep. (BNA) No. 42, at 1518 (Oct. 26, 1990). See Goelzer & Sullivan, *Obtaining Evidence for the International Enforcement of the United States Securities Laws*, 16 BROOKLYN J. INT'L L. 145, 170-71 (1990). The SEC is negotiating an agreement with Germany and is undertaking preliminary negotiations with Sweden, Norway, Denmark, and Finland who have entered into a securities agreement among themselves. 10 INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 1.10 (H. Bloomenthal ed. Supp. 1990); *International Securities Enforcement: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 72 (1989) (statement of David Ruder). One publication has described the growth of these agreements as, "sprout[ing] like mushrooms." *Tighter Belts*, *The Economist*, Oct. 5, 1991, at 91.

¹⁷² See Peters, *Overview of International Securities Regulation*, 6 INT'L TAX & BUS. LAW. 229, 237-38 n.39 (1988).

¹⁷³ Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291, *reprinted in* 15 I.L.M. 1282 (1976); A. LOWE, *supra* note 15, at 228.

laws.¹⁷⁴ The other two, with Australia¹⁷⁵ and Canada,¹⁷⁶ were negotiated after the uranium cartel affair of the late 1970s. Both provide a framework for communication and cooperation.¹⁷⁷ While such agreements are important, they are limited to these three nations and exclude major industrial trading partners such as Japan, France, and the United Kingdom¹⁷⁸ as well as all non-industrial countries.

C. Multilateral Efforts

1. *The United Nations and the U.N. Drug Convention*

The Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Narcotics Convention or Convention), adopted on December 19, 1988 by the U.N. Narcotics Trafficking Conference, represents an important cooperative effort towards international consensus on the issues of narcotics trafficking and bank secrecy.¹⁷⁹ The Narcotics Convention accommodates and encourages other bilateral and multilateral agreements to facilitate mutual legal assistance¹⁸⁰ and other enforcement mechanisms.¹⁸¹

In terms of piercing bank secrecy, the Convention offers a number of procedural advantages for law enforcement agencies over traditional letters rogatory and the patchwork bilateral assistance treaties. It requires that mutual legal assistance be afforded for documents and records including bank, financial, corporate, or business records in narcotics matters.¹⁸² The Convention has sufficient breadth to embrace most business

¹⁷⁴ Note, *The United States-Australian Antitrust Cooperation Agreement: A Step in the Right Direction*, 24 VA. J. INT'L L. 127, 164 (1983) [hereinafter *Right Direction*].

¹⁷⁵ Agreement Relating to Cooperation on Antitrust Matters, United States-Australia, June 29, 1982, T.I.A.S. No. 10,365, reprinted in 21 I.L.M. 702 (1982); A. LOWE, *supra* note 15, at 233.

¹⁷⁶ Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, United States-Canada, Mar. 9, 1984, reprinted in 23 I.L.M. 275 (1984).

¹⁷⁷ See *Right Direction*, *supra* note 174; Leich, *International Economic Law: Cooperation in Antitrust Matters, U.S.-Canada*, 78 AM. J. INT'L L. 659 (1984).

¹⁷⁸ One commentator has proposed a U.S.-U.K. antitrust treaty. See Barbolak, *Laker Airways: Recognizing the Need for a United States-United Kingdom Antitrust Treaty*, 4 DICK. J. INT'L L. 39 (1986).

¹⁷⁹ Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature Dec. 20, 1988, 28 I.L.M. 493 (1989) [hereinafter *Narcotics Convention*]. The United States Senate ratified the treaty on Nov. 22, 1989 and President Bush signed it on Feb. 13, 1990. U.S. DEP'T ST. DISPATCH, Sept. 3, 1990, at 59. Twenty nations must ratify the treaty for it to come into effect. *Narcotics Convention*, *supra*, at art. 29.

¹⁸⁰ *Narcotics Convention*, *supra* note 179, at art. 7, ¶¶ 6, 20.

¹⁸¹ See *id.* at art. 5, ¶ 4(g) (confiscation); *id.* at art. 6, ¶ 11 (extradition); *id.* at art. 10, ¶ 3 (international assistance for transit states); *id.* at art. 14, ¶ 4 (eliminating narcotics demand); and *id.* at art. 17, ¶ 9 (illicit traffic by sea).

¹⁸² *Id.* at art. 7, ¶ 2(f).

records. The Convention promotes mutual assistance by eliminating the right of signatories to refuse mutual assistance based on bank secrecy or blocking laws.¹⁸³ For signatories that are not parties to other bilateral or multilateral MLATs, the Convention furnishes procedures to effectuate this assistance.¹⁸⁴

Article 9 of the Narcotics Convention assists government agencies by establishing a system for inter-agency channels of communication and working groups.¹⁸⁵ The Convention dictates that states shall “[e]stablish and maintain channels of communication between [the nations’] competent agencies and services to facilitate the secure and rapid exchange of information . . .” regarding drug trafficking and money laundering.¹⁸⁶ Article 9 also provides for assistance in conducting inquiries,¹⁸⁷ a historic problem for U.S. grand jury investigations.¹⁸⁸

2. *International Organizations*

In 1983, a Congressional staff report noted that leading international organizations “do not address [the] issues” of crime and secrecy.¹⁸⁹ Since that time, the United States and other foreign governments have worked within international organizations to promote inter-governmental communication and to provide the groundwork for both bilateral and multilateral agreements. Their efforts flow through a number of organizations which generally focus on specific international problems.

a. The Cooke Committee

The Bank for International Settlements (BIS) was founded in 1930 to promote cooperation among central banks and facilitate financial operations.¹⁹⁰ In an effort to address new international bank supervision issues, the BIS created a new standing committee in 1974: the Committee on Bank Regulations and Supervisory Practices (Cooke Committee).¹⁹¹ The Cooke Committee, made up of the central bank and

¹⁸³ *Id.* at art. 7, ¶ 5.

¹⁸⁴ *Id.* at art. 7, ¶ 7. The procedures themselves are found at art. 7, ¶¶ 8-19.

¹⁸⁵ *Id.* at art. 9. See *infra* notes 198-99 and accompanying text.

¹⁸⁶ *Id.* at art. 9, ¶ 1(a).

¹⁸⁷ *Id.* at art. 9, ¶ 1(b).

¹⁸⁸ See *supra* note 120.

¹⁸⁹ STAFF REPORT, *supra* note 4, at 103.

¹⁹⁰ Hackney & Shafer, *The Regulation of International Banking: An Assessment of International Institutions*, 11 N.C.J. INT’L L. & COM. REG. 475, 486.

¹⁹¹ The Committee is known as the “Basle Committee” after the Swiss city where the committee meets and where the BIS is headquartered, or as the “Cooke Committee” after its chairman, Peter Cooke of the Bank of England.

supervisory agency officials of twelve nations,¹⁹² meets thrice yearly and attempts to "strengthen . . . collaboration among national authorities in their prudential supervision of international banking" and lessen the dangers posed by uneven regulatory practices.¹⁹³

In 1986, the Cooke Committee started to consider the problem of money laundering through the international payment system. Initially, committee members solicited cooperation amongst themselves and educated each other on their different money laundering rules and regulations.¹⁹⁴ Thereafter, the Committee worked toward developing a consensus on a code of conduct for bank monitoring and avoiding criminal use of the payment system.¹⁹⁵ In the past, the informal relationship between the Federal Reserve and the other central banks has allowed the U.S. government to obtain information when necessary without strict formal arrangements and to pressure other governments into passing laws against fiscal crimes.¹⁹⁶ The Cooke Committee was designed to forge international bank policy based on similar cooperation among all of the major banking nations. The implication of that design is that major banking players establish standards and then press others into their system.

b. INTERPOL

In October 1986, the INTERPOL General Assembly, acting on a U.S. resolution, formed a working group to improve cooperation between law enforcement agencies and financial institutions. The group focused on sharing financial information in drug trafficking investigations, devel-

¹⁹² Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States.

¹⁹³ *Money Laundering Control Act of 1986, Regulations Implementing the Bank Secrecy Act, and Insider Fraud on Financial Institutions: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 1st Sess. 249 n.1 (1987) (statement of Manuel Johnson, Vice-Chairman, Board of Governors of the Federal Reserve System) [hereinafter *Insider Fraud Hearings*]. The Cooke Committee established general guidelines in 1975 in the Basle "Concordat" which provided non-mandatory recommendations for central banks. These included:

1. Surveillance and supervision of foreign banks should be the joint responsibility of parent and host authorities.
2. No foreign bank should be able to evade/avoid supervision.
- ...
5. Ideally, international co-operation should be promoted by information exchanges between host and parent authorities.

Reprinted in R. JOHNS, *supra* note 8, at 6.

¹⁹⁴ R. JOHNS, *supra* note 8, at 211.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 212. Vice-Chairman Johnson attributed the Swiss passage of a money laundering statute to the BIS. *Id.* at 211.

oping guidelines, and establishing memoranda of understanding.¹⁹⁷ At the first meeting of the working group in March 1987, the United States submitted a five point proposal for consideration. The United States recommended that:

1. Countries adopt codes of conduct similar to the Cooke Committee's efforts;
2. Bank regulators, bank associations, and law enforcement agencies adopt a "filter" or "point of contact" for law enforcement;
3. Banks, bank regulators, and bank associations use INTERPOL's facilities to provide an information system for vetting prospective bank personnel;
4. Countries adopt regulations requiring banks to report violations of all laws to law enforcement authorities and that the information be shared with banks, bank regulators, and bank associations;
5. Countries criminalize the laundering of money obtained from criminal activities.¹⁹⁸

Three of the recommendations relate directly to improving communications between law enforcement organizations and banking professionals. Informal relationships generally facilitate the use of existing exceptions to bank secrecy practices rather than create new legal access to private information; but such informal relationships are considered important by industry and government figures. The stain of illegal activities on a particular bank's reputation isolates it from reputable business.¹⁹⁹ Similarly, the stain of illegal activities on a banking nation's reputation isolates all of its banks from the international community.²⁰⁰

The fourth INTERPOL recommendation would elevate bankers to a quasi-law enforcement position. It would require either that bankers make judgments as to what constitutes illegal activity, or it would require the creation of guidelines for bankers to determine the legality of an activity. In either case, it is unlikely that the goal could be achieved without overriding some sort of secrecy privilege.

V. JUDICIAL COMPULSION

A. Pre-Restatement Comity

Prior to the publication of the Restatement (Second), Foreign Rela-

¹⁹⁷ *Money Laundering Hearings*, *supra* note 145, at 11-12 (statement of Francis Keating, Assistant Secretary for Enforcement and Operations, Department of Treasury); *Insider Fraud Hearings*, *supra* note 193, at 325 (statement of Robert Serino, Deputy Chief Counsel (Operations), Office of Comptroller of the Currency).

¹⁹⁸ *Insider Fraud Hearings*, *supra* note 193, at 326-27 (statement of Robert Serino).

¹⁹⁹ Fuhrman, *The Bulgarian Connection*, *FORBES*, Apr. 17, 1989, at 40; R. JOHNS, *supra* note 8, at 192.

²⁰⁰ *Insider Fraud Hearings*, *supra* note 193, at 214 (statement of Manuel Johnson).

tions Law of the United States (Restatement Second) in 1965,²⁰¹ two Second Circuit cases, *First National City Bank v. Internal Revenue Service (Citibank I)*²⁰² in 1959, followed by *Ings v. Ferguson (Ings)*²⁰³ ten months later, considered the problems associated with foreign bank secrecy laws. In *Citibank I*, the IRS served a summons on the bank at its U.S. headquarters for documents held at its Panama City branch for a Panamanian corporation with offices in New York City. The bank moved to vacate or modify the summons claiming that compliance with the summons would violate secrecy provisions of the Panamanian constitution.²⁰⁴ The panel rejected this argument stating that the particular provisions of the Panamanian constitution implicitly accepted this type of investigation.²⁰⁵

In *Ings*, a corporate bankruptcy trustee sought records from several Canadian banks and served subpoenas on their New York branches for records of transactions occurring at branches outside of the United States.²⁰⁶ The banks sought to quash the subpoenas. The appeals court balanced several factors in the interest of comity, including the non-defendant status of the banks and the foreign nature of the transactions and records.²⁰⁷ In light of those factors, the panel decided to defer to Canadian courts²⁰⁸ and delayed its decision until the Canadian courts had ruled.²⁰⁹ If the Canadians determined that the disclosure would be inconsistent with their law, the Second Circuit stated that it would grant a motion to quash the subpoenas.²¹⁰

Later courts criticized these opinions. They considered the failure to distinguish between prescriptive jurisdiction in order issuance versus

²⁰¹ RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter RESTATEMENT SECOND].

²⁰² *First Nat'l City Bank of New York v. Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960) [hereinafter *Citibank I*].

²⁰³ *Ings*, supra note 1.

²⁰⁴ *Citibank I*, supra note 202, at 618.

²⁰⁵ *Id.* at 619-20.

²⁰⁶ *Ings*, supra note 1, at 150-151.

²⁰⁷ *Id.* at 152.

²⁰⁸ See supra note 1 and accompanying text.

²⁰⁹ *Ings*, supra note 1, at 151-52.

²¹⁰ *Id.* at 152. A third case prior to the RESTATEMENT SECOND followed the deference analysis in *Ings*. *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962) [hereinafter *Chase*], involved facts similar to *Citibank I*. In *Chase*, the bank presented its Panamanian counsel to testify that the production of records without an order from a Panamanian official would constitute a misdemeanor under Panama law. The court modified the subpoena to allow the U.S. government to pursue the matter with Panamanian officials and required Chase to comply with "its duty of actively cooperating with the Government . . ." 297 F.2d at 613. Rejecting the government's contention that Chase must show a good faith effort to comply with the subpoena, the panel found that Chase's continuing duty of active cooperation constituted a good faith effort.

enforcement jurisdiction in order enforcement and sanctions to be improper.²¹¹ As such, these holdings were not directly followed by courts after the publication of the Restatement Second.

B. Comity and the Restatements

Because treaties, informal agreements, and international organizations provide only patchwork links through the broad range of financial relationships, U.S. courts developed their own tests to solve conflicts stemming from secrecy laws. To assist the courts, the American Law Institute (ALI) published the Restatement Second. The Restatement Second proposed a model balancing test to remedy jurisdictional conflicts. Section 40 stated that where two courts have prescriptive jurisdiction and each could apply rules requiring inconsistent conduct, international law requires each tribunal to consider, in moderating its enforcement jurisdiction, such factors as:

- (a) the 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 [before the courts];
- (c) the extent to which the required conduct is to take place in the territory of the other state;
- (d) the nationality of the person; and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.²¹²

Many of the circuits adopted the section 40 test²¹³ while others did not.²¹⁴ Of the panels that used the formula, actual application was so diverse that today's precedents do not represent a uniform test. While the differing applications of the standard could be attributed to the factual differences in the cases, one commentator questioned whether the cases were result-driven.²¹⁵

²¹¹ See *Vetco*, *supra* note 10, at 1330-1331; see also cases and sources cited *supra* note 10.

²¹² RESTATEMENT SECOND, *supra* note 201, at § 40 (emphasis added).

²¹³ See *infra* notes 239-80 and accompanying text.

²¹⁴ See *infra* notes 281-84 and accompanying text. See also *Uranium Antitrust*, *supra* note 19, at 1148, which stated:

Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. . . . It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions.

This lack of expertise was noted in *Société Nationale*, *supra* note 113, at 552 (Blackmun, J., dissenting) ("Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood."); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 951 (D.C. Cir. 1984) [hereinafter *Laker Airways*].

²¹⁵ O'Donnell, *The Secrets of Foreign Bankers and the Federal Investigation: Tottering Balances*, 20 CASE W. RES. J. INT'L L. 509, 538-39 (1988).

In 1988, ALI published the Restatement (Third) of the Foreign Policy Law of the United States (Restatement Third).²¹⁶ In part because the Restatement Second was not precisely tailored to conflicts between discovery procedures and foreign laws barring document production,²¹⁷ the Restatement Third created a more detailed analytical structure for courts to use. According to the Restatement Third, U.S. courts have "jurisdiction to prescribe law with respect to (a) conduct that, wholly or in substantial part, takes place within its territory [and] (b) the status of persons, or interests in things, present within its territory."²¹⁸ Civil discovery, grand jury subpoenas, and agency demands represent legitimate exercises of such jurisdiction.²¹⁹ In the interest of comity, however, courts should limit the exercise of that jurisdiction by the standard of reasonableness.²²⁰ Restatement Third section 403(2) states that courts should determine reasonableness by considering:

- (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.²²¹

²¹⁶ RESTATEMENT THIRD, *supra* note 14.

²¹⁷ *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 512 (N.D. Ill. 1984) [hereinafter *Graco*].

²¹⁸ RESTATEMENT THIRD, *supra* note 14, at § 402(1)(a)-(b). See *Citibank I*, *supra* note 202; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²¹⁹ RESTATEMENT THIRD, *supra* note 14, at § 442 comments a, b:

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.

RESTATEMENT THIRD, *supra* note 14, at § 442(1)(a).

²²⁰ *Id.* at § 403(1).

²²¹ *Id.* at § 403(2)(a)-(h). The list of considerations is not exhaustive. *Id.* at § 403 comment b.

If a U.S. court determines that jurisdiction exists, that court should consider, in deciding whether to order production of information and in framing a production order, factors in Restatement Third section 442(1)(c) including:

- 1) the importance to the investigation or litigation of the documents or other information requested;
- 2) the degree of specificity of the request;
- 3) whether the information originated in the United States;
- 4) the availability of alternative means of securing the information; and
- 5) the extent to which noncompliance with 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.²²²

If a court determines that issuing an order is appropriate and a foreign law or court order prohibits disclosure of the information, a U.S. judge may enforce that order and, under section 442(2): a) require a person to make a good faith attempt to secure permission from a foreign authority to obtain requested information; b) impose sanctions of contempt, dismissal, or default for failure to make a good faith effort or deliberately concealing or removing information; or c) make adverse findings of fact for failure to obtain the requested information, *regardless* of any good faith attempt to procure it.²²³

The Restatement Third essentially divides judicial analysis in bank secrecy and blocking law situations into three separate and structured steps. First, a court should determine whether it should exercise jurisdiction based on the section 403(2) “reasonableness test.” If the court decides it has jurisdiction, it should then consider other factors in the section 442(1)(c) “order test” in deciding whether to issue an order and how to phrase an order if its issuance were appropriate. Finally, if a party fails to comply with an order, a judge should analyze the section 442(2) “enforcement test” to ascertain what, if any, penalty should be assessed against the non-complying party.

The Restatement Third three-step analysis represents restatements, extensions, or additions to the Restatement Second balancing test. The reasonableness test requires a court to evaluate three former Restatement Second factors before issuing a production order. Factors (c), (d), and (e) in the Restatement Second balancing test — the extent to which the conduct would occur outside the U.S., the nationality of the persons, and

Where it is reasonable for both states to exercise jurisdiction, “a state should defer to the other state if that state’s interest is clearly greater.” *Id.* at § 403(3).

²²² *Id.* at § 442(1)(c).

²²³ *Id.* at § 442(2)(a)-(c) (emphasis added).

the expected compliance — must be considered during the initial comity analysis under the reasonableness test.²²⁴ However, the Restatement Third replaces the “expected compliance” factor with the lesser standard of “likelihood of conflict.”²²⁵ The vital national interests of the states, formerly considered by courts as the Restatement Second balancing test factor (a), must now be considered in the reasonableness test, section 403(2)(g), and at the order issuance stage under part five of the order test.

The hardship test of Restatement Second section 40(b) has only been partially integrated into the Restatement Third tests. The hardship imposed upon the party producing the records can be considered by the court under the reasonableness test, but only as the “justified expectations” of the party, which is a lower standard than actual hardship.²²⁶ Hardship must again be judged in the “enforcement test” but can clearly be ignored at a court’s discretion.²²⁷

C. Comity and the Judiciary

Although the Restatement Second test has been influential, it does not represent the exclusive source of U.S. law. United States courts confronting the problems associated with bank secrecy and blocking laws developed several lines of cases. Initially, the Supreme Court and Second Circuit²²⁸ created two standards. After the adoption of the Restatement Second, the circuits created various tests both based on and rejecting the suggested standard. Finally, the Supreme Court implicitly recognized the validity of the Restatement Third, although the circuits have yet to adopt that standard or any other uniform standard.

1. *Société Internationale and Civil Discovery*

The Supreme Court first addressed the problems associated with conflicting national laws in *Société Internationale pour Participations Industrielles et Commerciales v. Rogers (Société Internationale)*.²²⁹ A Swiss company sued the U.S. government to recover assets seized during World War II under the Trading with the Enemy Act. The U.S. govern-

²²⁴ See *id.* at § 403(a), (b), (h).

²²⁵ See *infra* notes 268-69 and accompanying text; *Administratia Asigurarilor*, *supra* note 20, at 1281 (Romanian secrecy law “vigorously enforced, thus satisfying section 40(e)”).

²²⁶ This was consistent with federal appeals court decisions. See O’Donnell, *supra* note 215, at 539-40. See also *infra* note 310 and accompanying text.

²²⁷ RESTATEMENT THIRD, *supra* note 14, at § 442(2)(c).

²²⁸ See *infra* notes 239-47 and accompanying text.

²²⁹ *Société Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958) [hereinafter *Société Internationale*].

ment claimed that the company's connection with a German firm made it an enemy under the act and sought discovery from an alleged co-conspirator, a third party Swiss banking firm, in order to show control of the plaintiff by the German concern. After the United States moved to compel discovery, the Swiss government, of its own volition, "confiscated" the records.²³⁰ I.G. Chemie, the plaintiff Swiss company, refused to comply with the discovery orders because doing so would constitute a violation of Swiss economic espionage and bank secrecy laws and the confiscation order. A district court master found that the plaintiff did not control the records but had made a good faith effort to comply with the discovery request. In spite of that finding, the district court dismissed the case for plaintiff's failure to comply with its discovery order.

The Supreme Court reinstated the suit. Justice Harlan's opinion first accepted that foreign laws do not constitute a complete bar to a discovery order in cases under the Trading with the Enemy Act; U.S. courts have the power, according to the holding, to require foreign national plaintiffs in such cases "to make all such efforts to the maximum of their ability" to comply with a court order.²³¹ Three factors influenced the court's reasoning. First, Congress had expressed its "deep concern" in effectuating the policy of "reach[ing] enemy interests which masqueraded under. . .innocent fronts."²³² Second, failure to reach these records would "undermine [this] congressional polic[y]" because the records "might have vital influence upon this litigation. . . ."²³³ Finally, the plaintiff Sturzenegger was "in the most advantageous position to plead with its own sovereign for relaxation of penal laws. . . ."²³⁴

The Court then found that in light of I.G. Chemie's good faith efforts to procure the documents and a lack of collusion between the Swiss government and the plaintiff, dismissal was inappropriate as a sanction for noncompliance.²³⁵ In conclusion, the opinion stated: "[I]t is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws

²³⁰ "This 'confiscation' left possession of the records in Sturzenegger [the Swiss banking firm holding the records] and amounted to an interdiction on Sturzenegger's transmission of the records to third persons." *Id.* at 200-201.

²³¹ *Id.* at 205.

²³² *Id.* (citations omitted).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 208-212. In dicta, the Court stated that if the company had conspired prior to the war to use Swiss bank secrecy provisions to avoid the penalties of the Trading with the Enemy Act, such "deliberate impediments" would weigh in favor of dismissal. In this case, however, the Special Master had found no such evidence. *Id.* at 208-209.

preventing compliance are those of a foreign sovereign."²³⁶ The decision limited its holding to this "given case."²³⁷ Accordingly, only courts confronting foreign civil discovery conflicts follow the Court's specific analysis.²³⁸

2. *Restatement Second in the Second Circuit: Citibank II*

In 1968, the Second Circuit rejected the *Citibank I* line of cases and adopted the Restatement Second as the analytical framework for foreign bank secrecy cases.²³⁹ In *United States v. First National City Bank (Citibank II)*,²⁴⁰ the court rejected Citibank's application to reverse the district court's contempt order against the bank and its vice-president who refused to order bank employees to comply with an antitrust grand jury subpoena. Although Citibank complied with the portions of the subpoena requesting documents held in New York City, the bank refused to produce the documents kept in Frankfurt, West Germany. Citibank claimed that disclosure would subject it to civil penalties and possibly

²³⁶ *Id.* at 211.

²³⁷ "We do not say that this ruling would apply to every [similar case] The . . . use [of discovery orders] depends upon the circumstances of a given case" *Id.* at 205-206. See *Uranium Antitrust*, *supra* note 19, at 1147.

This "case-by-case" analysis was not, however, inherent in the comity principle. See *Société Nationale*, *supra* note 113, at 554-55 n.9 (Blackmun, J., dissenting) (citations omitted).

²³⁸ The first of these in a court of appeals was in *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) [hereinafter *Finesilver*] and *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1977) [hereinafter *Arthur Andersen*]. In these cases, Ohio sought the production of documents held in Switzerland by Arthur Andersen & Co. (Andersen), an accounting firm, in litigation involving a loan by Ohio to King Resources Company Ohio claimed it relied on reports by the accounting firm.

Finesilver rejected Andersen's objection to the district court's discovery order. The Tenth Circuit noted *Société Internationale's* distinction between challenges to discovery orders and sanctions for violating such orders. According to the decision, *Société Internationale* required future courts to only consider foreign law conflicts in sanction proceedings and not order proceedings. After certiorari was denied and the District Court found Andersen in contempt, the Tenth Circuit reviewed the case again in *Arthur Andersen*. The panel upheld the District Court's sanctions based on the accountant's lack of good faith in complying with the original order. *Arthur Andersen*, *supra*, at 1373.

Uranium Antitrust, *supra* note 19, arose from the Uranium cartel controversy of the late 1970s. The district court ordered a variety of parties to comply with its outstanding discovery requests. *Id.* at 1156. The parties refused to comply based on five sets of laws: blocking laws in Canada, Australia, and South Africa enacted in response to the Uranium cartel litigation; the Ontario Business Records Protection Act, *supra* note 50; and Swiss Penal Code § 273, *supra* note 51. The District Court accepted the broad analytical framework of *Société Internationale*, flatly rejecting the use of a balancing test, in finding U.S. interests superior and granting plaintiff's motions to compel. See *supra* note 214.

²³⁹ *International Society for Krishna Consciousness v. Lee*, 105 F.R.D. 435, 438 n.4 (S.D.N.Y. 1984) [hereinafter *Krishna*].

²⁴⁰ *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968) [hereinafter *Citibank II*].

criminal sanctions.²⁴¹ The district court found them in contempt for refusing to comply with the subpoena. District Court Judge Pollack rejected the bank's argument finding that criminal sanctions were unlikely, that Citibank had not acted in good faith, and that even in the event of a civil suit in West Germany by a customer, the bank should have a valid defense.²⁴²

The court of appeals affirmed. It specifically adopted the Restatement Second's position that states are not precluded from exercising jurisdiction solely because of possible foreign state liability.²⁴³ Noting this, the panel accepted Citibank's assertion that absence of criminal sanctions does not mandate subpoena compliance as the government claimed; nevertheless, the court rejected the bank's claim because it found that these particular civil sanctions were legally insufficient to warrant non-compliance.²⁴⁴

Second, the court rejected the claim that a clash in national interests excused compliance with the subpoena, facially accepting the five-step Restatement Second balancing test.²⁴⁵ The court, however, limited its analysis to the first two factors: vital national interests and hardship to the bank.²⁴⁶ Finding the German law unimportant to that country's overall national policy and the likelihood of civil penalties remote, the court of appeals upheld the contempt order.²⁴⁷

²⁴¹ Citibank's expert, Dr. Martin Domke, testified that the bank's disclosure would breach the "self evident" contractual obligation" between the bank and its customer, constituting a civil liability. Moreover, the customer could obtain an *ex parte* restraining order from a German court. If Citibank violated the order, it would be subject to criminal contempt sanctions. *Id.* at 898-899.

²⁴² The government's expert testified that Citibank could claim compulsion as a defense in the civil suit and that specific exculpatory language in the contract would allow the bank's actions. *Id.* at 899-900 n.6.

²⁴³ *Id.* at 901 (citing RESTATEMENT SECOND, *supra* note 201, at § 39(1)).

²⁴⁴ *Id.* at 902. The court cited the revocation of a bank's foreign business license as a case where civil penalties might be sufficient to warrant non-compliance. *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 902-905. See also *Davis, supra* note 39; *Krishna, supra* note 239; *Garpeg, Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984) [hereinafter *Garpeg*]; *BSI, supra* note 79. But see *Compagnie Française D'Assurance pour le Commerce Extérieur v. Phillips Petroleum*, 105 F.R.D. 16 (S.D.N.Y. 1984) [hereinafter *Compagnie Française*].

²⁴⁷ *Citibank II, supra* note 240, at 902-905.

A later decision in the Second Circuit reaffirmed in dicta the RESTATEMENT SECOND test. In *Trade Development Bank v. Continental Insurance Co.*, 469 F.2d 35 (2d Cir. 1972) [hereinafter *Trade Development Bank*], the court of appeals accepted that the district court was entitled to balance the factors in the RESTATEMENT SECOND but expressed that all of the section 40 factors should be considered in light of the "relative unimportance" of the information sought. *Id.* at 41.

A recent Second Circuit holding also considered the test. In *Davis, supra* note 39, the defendant claimed a consent directive was improperly compelled on the basis of international comity. The panel did not analyze the hardship factor because the bank, which would actually suffer the harm, had not raised the objection. *Davis* followed *Citibank II* by only further considering the remaining

3. *Restatement Second in the Fifth and Eleventh Circuits: Field and Nova Scotia II*

The Fifth Circuit panel in *In re Grand Jury Proceedings, United States v. Field (Field)*²⁴⁸ adopted a version of the balancing test, eight years after *Citibank II*, with an even more restricted emphasis than *Citibank II*. A Canadian citizen named Field, managing director of a Cayman Island bank, was served in the lobby of Miami International Airport with a subpoena to testify, before a grand jury investigating tax law violations, about his activities on behalf of the bank and his clients. He refused based on, among other claims, the interests of international comity.

The court of appeals distinguished *Citibank II* in three important ways. The panel first elevated the "vital national interest" factor to supreme importance in the Restatement Second test.²⁴⁹ Second, the court expanded the scope of review under the "vital national interest" balancing test to include speculation as to a foreign government's views on the limits of its own powers. Specifically, *Field* accepted grand jury tax investigations as "vital" to prosecutions in our system of jurisprudence and found that the Cayman law, if granted complete deference, would "significantly restrict" that process.²⁵⁰ The court claimed an international consensus existed on the issue of tax investigations, noting the fact that the United Kingdom allowed broad discretion in tax investigations and that even secrecy haven Switzerland would allow some U.S. inquiry into Swiss bank records in tax matters.²⁵¹ Against this anecdotal evidence and without considering the United States' international minority position on grand jury investigations,²⁵² the court balanced the fact

factor of the Second Circuit's two part test. *Davis, supra* note 39, at 1034-1035. The Second Circuit found the consent directive was compelled properly in the interests of comity, "[a]fter carefully analyzing the competing national interests. . . ." *Id.* at 1035.

²⁴⁸ *Field, supra* note 6.

²⁴⁹ *Id.* at 407. Of the other four balancing factors not considered in the decision, the hardship test plainly would have favored Field. The court did not address this possibility.

²⁵⁰ *Id.* at 407-08.

²⁵¹ The decision cites Note, *Judicial Assistance - Criminal Procedure - Treaty with Switzerland Affects Banking Secrecy Law - Provisions Against Organized Crime Set New Precedent - Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matter, Done at Bern, May 25, 1973*, 15 HARV. INT'L L.J. 349, 359 (1974) for the proposition that the Swiss will in some cases provide assistance to U.S. inquiries. The Note discussed the Swiss MLAT, *supra* note 127, and commented that in organized crime investigations with ancillary tax investigations, assistance would be allowed. The Note stated specifically and contrary to *Field* that, "[u]nder Swiss law . . . tax evasion [is] not considered [a] criminal act Therefore, Swiss courts [give] no assistance to foreign authorities in such cases." *Id.*

²⁵² The court of appeals elevated the United States' interest in grand jury investigations above a foreign sovereign's interests in preserving a right to financial privacy, contrary to prior appeals court analysis. In a previous grand jury subpoena case, the Second Circuit stated, "[t]he Government . . . has a real interest in civil and criminal cases in obtaining evidence wherever located. However, we

that in a Cayman government investigation, the local officials could order the revelation of otherwise protected information.²⁵³ The court concluded that these factors weighed against the national interests of the Cayman government and in favor of the vital interests of the United States.²⁵⁴ Implicitly, the court assumed that in light of the conflicting national policies regarding bank secrecy, one government's right to pierce bank secrecy allowed another foreign court to do the same, regardless of possibly differing national policies for allowing records inspection.²⁵⁵

In a third distinction from *Citibank II*, the court rejected the validity of the Cayman economic interest in preserving bank secrecy. Field claimed that the U.S. interest was reduced because it only involved "economic regulation." The court rejected this claim, balancing Cayman interests in creating a secrecy haven against U.S. interests in pursuing tax violations and found that U.S. interests were dominant.²⁵⁶

While the Eleventh Circuit initially followed the truncated analysis of Field in *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia (Nova Scotia I)*,²⁵⁷ the circuit revived the full balancing test in *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia (Nova Scotia II)*.²⁵⁸ Against a complex factual background, the Bank of Nova Scotia essentially responded to a grand jury subpoena in a piecemeal manner. The government served the subpoena on the bank's Miami branch for documents in the Bahamas and Cayman Islands in a narcotics investigation. Due to the bank's delayed production, the district court fined the bank \$1,825,000. The panel examined the Bank of Nova Scotia's claim that the U.S. court's exercise of its enforcement powers should have been moderated in the interests of comity, considering the conflicting obligations imposed on the bank.²⁵⁹ In its Restatement Second anal-

also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own." *Chase, supra* note 210, at 613.

²⁵³ Field, *supra* note 6, at 408.

²⁵⁴ *Id.* at 410.

²⁵⁵ "[W]ould not the federal courts be sorely offended if a foreign nation were to compel disclosure of grand jury proceedings in violation of a rule of court, not even a statute of the nation, because that rule itself permitted disclosure to appropriate authorities in the United States?" O'Donnell, *supra* note 215, at 539, citing FED. R. CRIM. P. 6(e).

²⁵⁶ Field, *supra* note 6, at 408-409. The court also injected the political views of the Congress into its balancing analysis. See *supra* note 9 and accompanying text.

²⁵⁷ *Nova Scotia I, supra* note 10. Judge Lewis Morgan, who wrote *Nova Scotia I*, also wrote Field. The decision implicitly reaffirmed the explicit refusal to consider the possible hardship on third party subpoena targets in *Citibank II, supra* note 240, at 904-05.

²⁵⁸ *Nova Scotia II, supra* note 10. Field remains, however, valid law in the Fifth Circuit.

²⁵⁹ *Id.* at 826-27.

ysis, the court reinvigorated the four balancing test factors rejected in *Field*.²⁶⁰

4. *Restatement Second in the Ninth, Seventh, and Eighth Circuits:
Vetco, First Chicago, and Aerospatiale/Rubin*

The Ninth Circuit in *United States v. Vetco (Vetco)*²⁶¹ first applied the balancing test to bank secrecy cases,²⁶² and while it did not truncate the test as the Fifth Circuit had, *Vetco* extended some of the questionable conclusions of *Field*. The IRS believed that Vetco, Inc. used two foreign corporations to funnel goods to its Swiss subsidiary in order to avoid reporting requirements. The agency summonsed Vetco, Inc. and its accountants to determine whether the company had attempted to circumvent reporting requirements. When both parties refused to comply with the summonses and the subsequent district court order, the court imposed contempt sanctions. The accountants and Vetco appealed the order and sanctions.

The Ninth Circuit affirmed using a more detailed balancing framework than the Fifth and Second Circuits in *Field* and *Citibank II*, respectively. Based on a Swiss government representative's statement, the court found, in balancing the competing vital national interests of the United States and Switzerland, that the balance tipped in favor of the United States.²⁶³ In analyzing the competing hardships under section 40(b), the court minimized the danger the Swiss criminal law represented to Vetco because duress "may be a defense" to a criminal proceeding under Swiss law and no cases existed in Switzerland where an IRS sum-

²⁶⁰ *Nova Scotia II* emphasized the vital national interest of U.S. narcotics investigations and the diminished privacy interests of the United States in foreign bank accounts against the Cayman government's stated policy of not supporting money laundering. *Id.* at 827-28. (In discussing the reduced privacy interests of Americans offshore, the panel cited *Payner*, *supra* note 94: "[T]here is nothing in the [Cayman Bank Secrecy Statute] to suggest that it is the public policy of the Cayman Islands to permit a person to launder the proceeds of crime in the Cayman Islands, secure from detection and punishment." *Id.* at 828, quoting *In re Confidential Relationships (Preservation) Law*, *United States v. Carver* (Jamaica Ct. App. 1982) (Joint Brief of the United Kingdom and the Cayman Islands, Appendix L). Rejecting the three renewed Restatement factors as persuasive, the court dismissed the bank's comity claim. *Id.* at 829.

Nova Scotia II's analysis only discussed the Cayman statute instead of the Bahamian laws because the bank and amicus briefs of the Canadian Bankers Association and the government of the Cayman Islands based most of their arguments on those laws. *Nova Scotia II*, *supra* note 10, at 826 n.14.

²⁶¹ *Vetco*, *supra* note 10.

²⁶² The Ninth Circuit adopted the section 40 balancing test originally as part of its effects doctrine analysis in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-15 (9th Cir. 1976) [hereinafter *Tiberlane*].

²⁶³ *Vetco*, *supra* note 10, at 1331.

mons resulted in prosecution.²⁶⁴ The court of appeals summarily found the remaining Restatement factors unpersuasive.²⁶⁵

The significance of *Vetco*, aside from its recognition of all five Restatement Second factors, stems from the court's consideration of the importance of the documents and possible alternate means of compliance in addition to the Restatement test. The court found the value of the documents to the IRS to be persuasive.²⁶⁶ As to possible alternate means, the court rejected the allegedly equivalent means suggested by the defendants.²⁶⁷

The Seventh Circuit also adopted the Restatement Second balancing test in *United States v. First National Bank of Chicago (First Chicago)*.²⁶⁸ The IRS served First Chicago seeking disclosure of records held in the bank's branch in Athens, Greece. Greek law prohibited any disclosure of bank records.²⁶⁹ On First Chicago's appeal of the district court compliance order, the court of appeals reversed and remanded for further consideration.

The court in *First Chicago* analyzed the conflict in light of all five balancing test factors, placing special emphasis on the hardship to be

²⁶⁴ *Id.* at 1331-32 (emphasis added). The court stated that because the corporation was supposed to keep sufficient records on hand to allow the IRS to make this particular compliance determination, the hardship was diminished; this simply begged the question, however, as to whether disclosure would still cause actual hardship upon the corporation. *Id.* at 1332.

²⁶⁵ *Id.*

²⁶⁶ The court cited *Westinghouse*, *supra* note 19, where the documents were not essential to the litigation, and the dicta reference in *Trade Development Bank*, *supra* note 247, to the importance of the documents. *Vetco*, *supra* note 10, at 1333. This 'document importance' position was rejected by the Eleventh Circuit in *Nova Scotia I*, *supra* note 10, at 1389-91.

²⁶⁷ The defendants suggested consents, letters rogatory, treaties, masking third party names, the use of a Swiss law expert, and IRS examination in Switzerland. *Vetco*, *supra* note 10, at 1332.

²⁶⁸ *First Chicago*, *supra* note 7.

²⁶⁹ The Greek law stated:

Article 1: Deposits in Greek banks are regarded as secret.

Article 2:

1. Governors, members of the board, [members of] other collective bodies, or employees of a bank who, in the course of their duties acquire knowledge of deposits, convey any information in any manner, are punished with a minimum of 6 months' imprisonment.

The consent or approval of the depositor who has the right of secrecy *does not* change the punishable nature of the act.

2. Upon conviction for the [above] offense . . . , the court *cannot* order suspension of the penalty nor can it change a conviction to a fine.

3. The persons mentioned in Section 1, called upon as witnesses at civil or criminal trial, cannot be questioned on the secret deposits, even though the depositor consents.

Article 3: As an exception, information is allowed on secret bank deposits only by virtue of a specially justified decision of a domestic court, to the extent that the information is regarded as absolutely necessary for searching and punishing offenses which are regarded as felonies committed in Greece.

GREEK BANK SECRECY ACT, *reprinted in First Chicago*, *supra* note 7, at 344 n.2 (emphasis added) [hereinafter GREEK LAW].

placed on the actor under section 40(b).²⁷⁰ This factor, according to the court of appeals, weighed heavily in favor of the bank because of the great hardship that would be imposed on bank employees. In light of the other balancing test factors, which also weighed in favor of the bank, the Seventh Circuit found the interests of comity favored Greece and First Chicago. The court remanded for the district court to determine if the bank should be ordered to make a good faith effort to obtain the records.²⁷¹

The Eighth Circuit summarily adopted the Restatement Second balancing test in *In re Société Nationale Industrielle Aérospatiale (Aérospatiale)*²⁷² with little comment. A later case reaffirmed the test in dicta and made some additional observations. In *United States v. Rubin*,²⁷³ the court rejected the defendant's appeal concerning a quashed subpoena. Rubin had served a subpoena at trial on a Cayman Island bank officer who was testifying for the government. The defendant hoped to force the officer to produce documents about accounts controlled by two Cayman citizens not party to the litigation.²⁷⁴ The decision turned on the court's assessment of the actual probative value of this information but in dicta applied the Restatement Second balancing test. The court found that the Cayman nationality and third party status of the account holders strengthened the Cayman interest in preserving secrecy; moreover, cases cited by Rubin favoring compulsion involved secret grand jury proceedings, not a public criminal defense.²⁷⁵

5. Hybrid Cases: *Westinghouse Electric* and *In re Sealed Case*

There are two circuit court cases which combine different forms of analysis to reach a conclusion. First, the Tenth Circuit decided *In re Westinghouse Elec. Corp. Uranium Contracts Litig. (Westinghouse)*,²⁷⁶ a case arising from the uranium cartel controversy. Westinghouse sought

²⁷⁰ "In determining whether to refrain from exercising jurisdiction, a state must give special weight to the nature of the penalty that may be imposed by the other state." *Id.* at 345-46 (citations omitted).

²⁷¹ *First Chicago* specifically addressed the differing conclusion reached in *Nova Scotia I*. The court distinguished the earlier case on four grounds: 1) The Bank of Nova Scotia had not made a good faith effort to comply; 2) *Nova Scotia I* involved a grand jury investigation of tax and narcotics law violations; 3) the Greek law treated disclosures with consent as a crime; and 4) Bahamian courts appeared to not be as strictly limited. *First Chicago*, *supra* note 7, at 346-347.

²⁷² *In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120, 126-27 (8th Cir. 1986) [hereinafter *Aérospatiale*], *vacated on other grounds*, *Société Nationale*, *supra* note 113.

²⁷³ *United States v. Rubin*, 836 F.2d 1096 (8th Cir. 1988) [hereinafter *Rubin*].

²⁷⁴ *Id.* at 1102.

²⁷⁵ *Id.* (citing *Field*, *supra* note 6, *Nova Scotia II*, *supra* note 10, *Davis*, *supra* note 39, and *Vetco*, *supra* note 10).

²⁷⁶ *Westinghouse*, *supra* note 19.

to compel discovery by Rio Algom, a Canadian company doing business in Utah, and its president.²⁷⁷ Previously, Westinghouse caused letters rogatory to be issued to the Supreme Court of Ontario, which declined to enforce them based on a conflict with the stated national policy of the Canadian government.²⁷⁸ After finding Rio Algom in contempt for failing to comply with the district court discovery order, the Canadian concern appealed.

Integrating the *Société Internationale* and balancing test analyses, the Tenth Circuit overturned the contempt order and sanctions. The panel held that “*Société [Internationale]* calls for a ‘balancing approach’ on a case-by-case basis” and that “[g]uidance as to [those] factors . . . is [to be] found” in the Restatement Second.²⁷⁹ After determining that Rio Algom made a good faith effort to comply with the discovery order as required under *Société Internationale*,²⁸⁰ the court weighed the facts under the balancing test. Concentrating heavily on the “national interest” factor, the panel noted the clear Canadian interest in “controlling and supervising [its] atomic energy [industry]” and that the nondisclosure regulations furthered that goal.²⁸¹ By comparison, the U.S. interest of ensuring adequate discovery by litigants in U.S. courts was diminished by the partially cumulative nature of the discovery and the fact that the order did not encompass government law enforcement goals nor a grand jury investigation.²⁸² Given the disparity of these interests and in light of the other balancing test factors, the court vacated the district court’s holding.

In the second hybrid case, *In re Sealed Case*,²⁸³ the U.S. Attorney had served a bank in the United States, owned by country X, with a grand jury subpoena for documents at the bank’s branch in country Y. The bank refused to produce the documents based on the bank secrecy laws of Y and the district court found it in contempt when it failed to produce the documents after a good faith effort.²⁸⁴ The bank claimed

²⁷⁷ *Id.* at 994.

²⁷⁸ *Id.* at 995 (citing *Duquesne Light*, *supra* note 112). The Ontario court held that compliance would contradict the policy behind the Atomic Energy Control Act and violate the Uranium Information Security Regulations (UISR) (reprinted in *Duquesne Light*, *supra* note 112, at 293), promulgated thereunder. The UISR had a maximum fine of \$10,000, or five years imprisonment, or both. *Westinghouse*, *supra* note 19, at 996.

²⁷⁹ *Id.* at 997.

²⁸⁰ Five months later in *Arthur Andersen*, the Tenth Circuit found this factor to be the initial test before reaching the balancing analysis; the later court distinguished *Andersen* from *Rio Algom* based on the former’s lack of good faith. *Arthur Andersen*, *supra* note 238, at 1373.

²⁸¹ *Westinghouse*, *supra* note 19, at 998.

²⁸² *Id.* at 999.

²⁸³ *Sealed Case*, *supra* note 6.

²⁸⁴ *Id.* at 495-98.

that the court erred in entering a contempt order because of the conflicting demands of the United States and country Y. The D.C. Circuit agreed. Although the holding did not explicitly accept the Restatement analysis, it considered a number of decisions that used the balancing test.²⁸⁵ The panel concentrated on the fact that a contempt order required conflicting conduct. In light of this conflict, the bank's status as a third party in the investigation, its ownership by country X, and the clear jurisdiction of country Y over the conduct of the bank weighed against enforcement.²⁸⁶

6. *Restatement Third*

Some cases analyzed or noted tentative drafts of the Restatement Third prior to its actual publication.²⁸⁷ The most serious discussion came from the Supreme Court in *Société Nationale Industrielle Aerospatiale v. United States District Court (Société Nationale)*,²⁸⁸ the appeal of the *Aerospatiale* decision. While the holding centered on whether the use of the Hague Evidence Convention was mandatory, the rationale of the majority and the opinion of the dissenters are instructive. The Court recommended in a footnote that the factors in the Restatement Third order test should "guide a comity analysis"²⁸⁹ by the district court, but nonetheless maintained the "case-by-case" comity analysis.²⁹⁰ "The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke."²⁹¹ The majority also stated that courts should place special emphasis on protecting foreign litigants from excessive discovery burdens.²⁹² The four person dissent agreed that such a comity analysis was appropriate for cases where treaties had not been negotiated,²⁹³ but believed that the Hague Evidence Convention's general application should be presumed.

²⁸⁵ These included the pre-RESTATEMENT SECOND cases, *supra* notes 202-10 and accompanying text; *Westinghouse*, *supra* note 19; and *Vetco*, *supra* note 10.

²⁸⁶ *Sealed Case* also distinguished *Nova Scotia I*, *supra* note 10, and *Nova Scotia II*, *supra* note 10, by noting that the former case involved a U.S. subsidiary which might not be subject to the bank secrecy laws and that both cases involved a lack of good faith. *Sealed Case*, *supra* note 6, at 498.

²⁸⁷ See *Davis*, *supra* note 39, at 1027 n.4; *First Chicago*, *supra* note 7, at 346; *Garpeg*, *supra* note 246, at 796; *Graco*, *supra* note 217, at 516.

²⁸⁸ *Société Nationale*, *supra* note 113.

²⁸⁹ *Id.* at 544 n.28.

²⁹⁰ *Id.* at 548 (Blackmun, J., dissenting).

²⁹¹ *Id.* at 546.

²⁹² *Id.*

²⁹³ *Id.* at 556 (Blackmun, J., dissenting).

A pair of cases tangentially considered the implications of the Restatement Third after its publication. The court in *In re Grand Jury Proceedings, Yanagihara Grand Jury*²⁹⁴ noted, “[t]he revisions [encompassed in section 403] are immaterial to the issue before the court, and thus do not alter the comity analysis.” The Seventh Circuit, in *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat (Administration of State Insurance)*,²⁹⁵ became the first court of appeals to consider the published Restatement Third tests. The panel stated that the Restatement Third section 442 test and the Restatement Second section 40 test were similar, and that “[a]lthough there are certain differences in emphasis, the factors to be considered remain largely synonymous and do not alter our determination. . . .”²⁹⁶

VI. IMPLICATIONS FOR THE UNITED STATES

The U.S. executive branch actively pursued various multilateral and bilateral agreements throughout the 1980s, while the judicial branch limited the rights of accused individuals and third party subpoena targets during the same period. These executive and judicial trends limit the total number of future situations that will result in international disputes, but they also magnify the severity of any future conflict.

A. The Executive Branch

To better obtain foreign documents, testimony, and records, the United States negotiated a number of treaties to avoid the impractical use of letters rogatory in obtaining records. These compacts are not, however, a panacea. First, agreements do not extend to every important jurisdiction. Only ten MLATs have entered into force. The Narcotics Treaty may gain wide acceptance in the future, but only a handful of nations have signed it. Securities and antitrust understandings exist with only a handful of major industrial nations and tax treaties, although numerous, still do not cover every haven.

Second, even if treaties had wider acceptance, some nations would inevitably maintain bank secrecy or blocking laws for particular economic or policy reasons. Under today’s international agreements, some nations simply refuse to assist the United States in certain areas of law enforcement,²⁹⁷ and even if those nations changed their policies, other

²⁹⁴ *Yanagihara*, *supra* note 102.

²⁹⁵ *Administratia Asigurarilor*, *supra* note 20.

²⁹⁶ *Id.* at 1282 (citing *Yanagihara*, *supra* note 102, at 196 n.6).

²⁹⁷ See *supra* notes 143-44 and accompanying text.

countries would take their place.²⁹⁸

Finally, assuming the best case scenario for the United States in which every nation entered some sort of cooperative treaty, conflicts would still arise because of different views as to what constitutes criminal and inappropriate civil behavior. For example, the U.S. policy on insider trading does not require violation of a professional duty for liability, whereas Swiss, European Community, and Cayman policies demand a violation of a duty.²⁹⁹ Furthermore, the expansive effects doctrine basis of jurisdiction employed by the United States dwarfs the more reserved European Court of Justice or German versions, among those few industrialized nations that accept this new jurisdictional base.³⁰⁰ The differing views on this doctrine will affect the future application of, for example, any extraterritorial antitrust action.

The President should continue to aggressively pursue such treaties and agreements, which represent the best method of fostering comity.³⁰¹ In other areas, however, the actions of the executive are promoting U.S. force over international cooperation. In the evolution of U.S. case law, the President has been more than a willing participant. Most cases that aggressively extend the enforcement of subpoenas came about at the initiative of the Justice Department.³⁰² In future cases, the Justice Department should at least maintain a deferential view towards agreements negotiated by the President and independent agencies such as the SEC, and not attempt to circumvent them when treaty partners fail to cede to Justice Department requests that fall outside treaty provisions.

B. The Legislative Branch

Congress also bears some fault in the present conflict. As law writer and treaty reviewer, the legislative branch can create or destroy support

²⁹⁸ See *supra* note 8.

²⁹⁹ See *supra* note 144. Melloan, *supra* note 148. The European Community's Insider Trading Directive requires EC nations to enact laws prohibiting trading based on information acquired "in the exercise of a person's profession or dut[y]." *Council Directive Coordinating Regulation on Insider Trading* art. 1, § 1, 132 O.J. EUR. COMM. (No. C 277) 13 (1989), 1 Common Mkt. Rep. (CCH) Section 95,028. See Warren, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 217-19 (1990). Even among the Europeans, some nations greet the prospect of enforcing insider trading laws with "nods and winks." *Id.* at 231.

³⁰⁰ The Justice Department "applies the 'direct, substantial, and reasonably foreseeable' standard" when deciding whether to pursue an alleged international antitrust violation. *DOJ Int'l AT Guidelines*, *supra* note 11, at S-21. See *Timberlane*, *supra* note 262; *Manington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *In re Bayer/Firestone*, Kammergericht, Nov. 26, 1980, W v W/E OLG 2441 (*Synthetischer Kautschuk I*, 1980).

³⁰¹ Ellinger, *Extraterritorial Aspects of Bank Secrecy*, J. BUS. L. 439, 446 (1985).

³⁰² See *Citibank II*, *supra* note 240; *Field*, *supra* note 6; *Vetco*, *supra* note 10; *Nova Scotia I*, *supra* note 10; and *Nova Scotia II*, *supra* note 10.

for actions by the Justice Department. One proposed policy is clearly unwise: Congress should not pressure the President to force other nations to change their secrecy laws through the use of sanctions.³⁰³ This policy is at best arrogant and at worst anti-democratic. The United States should not assume that it has established the perfect free market order. Other democratically elected governments have chosen to respect the privacy of individuals' financial affairs.³⁰⁴ As one business publication remarked:

Just because almost all other countries have given up what for centuries had been a globally upheld financial freedom, the Swiss are not believed to have the slightest inclination to follow suit . . . [W]hy should the Swiss banking system give up the very discretion for which it is world-renowned and respected?³⁰⁵

The U.S. government hopes to solve many of its law enforcement problems by attacking an old financial tradition preserved by foreign sovereigns. The United States should concentrate on solving its own problems instead of harassing other nations that do not share the U.S. passion for prosecuting crimes on which nations disagree.³⁰⁶

Aside from these philosophical considerations, the proposed congressional policy would be ineffective. The dollar is the universal currency. Any sanctions imposed by the United States could be easily circumvented by foreign banks.³⁰⁷ The United States probably lacks the political will to impose sanctions on those other nations and, even if the government tried to impose such sanctions, the protectionist policy would savage the U.S. financial services industry.³⁰⁸

The Senate can reduce international friction by quickly acting on treaties submitted by the President. The Senate's delay in approving the last six MLATs was irresponsible. For Congress to propose sanctions

³⁰³ This has been recommended by a Congressional Committee, which proposed that sanctions include denial of access to the U.S. dollar clearing system and revocation of U.S. branch charters. *BANKS AND FOREIGN POLICY*, *supra* note 12, at 32.

³⁰⁴ See *supra* notes 7-8, 20 and accompanying text.

³⁰⁵ *Assault on Privacy: U.S. Officials Ought to Stop Maligning Swiss Banks*, *BARRON'S*, Jan. 20, 1989, at 1.

³⁰⁶ This particular passion is most offensive in tax prosecutions. Although one official described it as a question of "being serious" about collecting taxes, *supra* note 10, a more appropriate question is whether the United States is more concerned about solving its own law enforcement problems on its own soil than pushing its problems onto other sovereign nations in an area where no international consensus exists and, in respect to criminal prosecutions, the United States is in the clear minority. *R. JOHNS*, *supra* note 8, at 43-44. See also *supra* notes 12 and 151.

³⁰⁷ See *supra* note 303. These could be circumvented by clearing dollars through banks in others nations and a handful of major international banks remaining chartered in those nations.

³⁰⁸ The results of such sanctions would be similar in effect, though not in scope, to the forced domestic divestment of non-investment grade debt securities by U.S. banks, which helped bankrupt Drexel Burham and depress Wall Street.

while agreements with other nations languish in the Senate clearly does not serve the interests of justice or comity.

C. The Judicial Branch

The primary cause of the international conflict is the courts. There appears to be little chance that the Constitution will reduce the friction. The Supreme Court made consent forms a clearly legal method of procuring individuals' records held in bank secrecy jurisdictions. Whether these compelled consents will be accepted in nations holding the records remains unclear,³⁰⁹ but litigants can no longer prevent such production on constitutional grounds.³¹⁰ The more important questions for future courts will concern third party subpoenas. Several important problems exist with U.S. judicial doctrine on this subject.

In third party cases, where consents do not apply, courts have rejected secrecy laws because they prejudice U.S. interests without considering the valid interests of economies dependant on private banking and nations that protect their interests with blocking laws.³¹¹ This judicial policy will only exacerbate the friction between nations. Many banking nations tie their economic livelihood to bank secrecy, but U.S. tribunals continue to ignore this interest.³¹² Other courts have rejected blocking laws because their stated intent is only to block U.S. investigations and frustrate U.S. interests.³¹³ Yet the courts fail to explain why important U.S. judicial procedure interests must necessarily override the interests of other nations in upholding their laws and protecting their citizens and corporations.³¹⁴

United States courts commonly respond to this dilemma by repeating an oft quoted statement from *Citibank I*: "If [the corporation] cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and [the foreign nation], perhaps it should surrender to one sovereign or the other the privileges received

³⁰⁹ See *supra* note 107.

³¹⁰ See *supra* notes 90-93 and accompanying text.

³¹¹ See *supra* note 255 and accompanying text. "There is . . . a tendency on the part of courts, perhaps unrecognized, to view a dispute from a local perspective." *Société Nationale*, *supra* note 113, at 553 n.4 (Blackmun, J., dissenting).

³¹² See *supra* note 259. See also *Garpeg*, *supra* note 246, at 794-796.

³¹³ See *Aerospatiale*, *supra* note 272, at 127; *Compagnie Française*, *supra* note 246, at 30.

³¹⁴ See *supra* note 254. The attitude of the courts and their draconian responses are especially offensive when one considers that the underlying values supporting these laws is, for the United States, administrative preference, and for the havens, fundamental economic organization. Given the sanctions U.S. courts are willing to impose, a casual observer could mistake U.S. laws as having some undefined moral foundation.

therefrom.”³¹⁵ The Tenth Circuit properly rejected this rationale in *Westinghouse Electric*:

The argument that because [the subsidiary, Rio Algom, is doing business in Utah and enjoying the privileges afforded by the United States], Rio Algom is somehow ungrateful when it fails to obey the discovery orders of the local courts and that it is only proper that it be compelled to comply therewith is superficially appealing. However, this is but one side of the argument. The fact still remains that . . . the business records which Westinghouse seeks to examine are physically located in Canada [which] has a legitimate interest in the disclosure of these documents³¹⁶

The problem, as implicitly recognized by the Tenth Circuit, is that third parties and unwilling individuals are caught between competing national interests. The solution lies in deference to comity, not a resort to compulsion.

The Supreme Court should adopt the Restatement Third’s reasonableness and order tests³¹⁷ to replace the *Société Internationale* “case by case” analysis for cases where foreign bank secrecy and blocking laws bar production of documents.³¹⁸ As evidenced by the various circuit court decisions on the matter, no consensus exists among the circuits as to what test should be applied or how to apply each of the different tests.³¹⁹ Adopting the Restatement Third analysis will not necessarily eliminate international conflict but it will provide uniform guidance to courts confronted by the comity dilemma.

Although the Restatement Third will provide an acceptable initial framework, several modifications are required and important guidance in the application should be added. First, in addition to the broad range factors encompassed by the order test, courts must also recognize the hardship imposed upon individuals, a concept enunciated in Restatement Second section 40(b).³²⁰ Hardship imposed upon the ordered party

³¹⁵ *Citibank I*, *supra* note 202, at 620 (cited in *Nova Scotia II*, *supra* note 10, at 828; *United States v. Chase Manhattan Bank*, 584 F. Supp. 1080, 1087 (S.D.N.Y. 1984); *Garpeg*, *supra* note 246, at 797; *BSI*, *supra* note 79, at 115).

³¹⁶ *Westinghouse*, *supra* note 19, at 999.

³¹⁷ See *supra* notes 221-22 and accompanying text. This would extend the test recommended by the court in *Société Nationale* to cases without treaties. See *supra* note 287.

³¹⁸ The RESTATEMENT THIRD’s enforcement test, *supra* note 223 and accompanying text, is merely a restatement of part of the holding in *Société Internationale*. See *supra* note 237 and accompanying text. The financial and practical hardships associated with extraterritorial discovery should also be considered by courts. See *Société Nationale*, *supra* note 113, at 546. Hardship, as discussed herein, generally refers to foreign penalties for violating foreign laws.

³¹⁹ The Supreme Court used a “case-by-case” analysis in *Société Nationale* but the guidance provided by the Court in footnote 28, *supra* note 287 and accompanying text, should limit the unfettered discretion of trial courts. *Prescott & Alley*, *supra* note 124, at 942. *But see id.* at 942 n.13.

³²⁰ The hardship imposed upon litigants was of prime concern in the recommended analysis in *Société Nationale*. See *supra* note 290 and accompanying text.

should be maintained as an additional and specific consideration in the order test. Relegating this concept to the reasonableness or enforcement tests is inappropriate: first, it necessarily assumes that subpoenaed parties could conceivably hold "justified expectations" about foreign laws which are accepted by some U.S. courts and rejected by others; and second, the enforcement test considerations are merely suggested, not mandatory. With the exception of select circuits judging a small group of bank secrecy and blocking laws, the idea of justified expectations based on precedent remains nonsensical.

In analyzing the potential hardship, balancing the varying degrees of penalties should be considered by courts. Making document production a game to determine which nation can squeeze an individual or corporation hardest with sanctions, penalties, or imprisonment does not advance the overall interests of justice. Courts have in the past doubted the efficacy of foreign penalties,³²¹ but in the future, U.S. tribunals should not discount the effect of other penalties unless the actual difference is clear.³²² Similarly, the willingness of U.S. courts to impose heavy penalties³²³ on individuals and corporations should indicate that nations are willing to exact extensive penalties in pursuit of their national interests. While U.S. policies might indeed outweigh foreign interests, the degree of the foreign penalty, be it capital, criminal, or civil, must be recognized and balanced in good faith against the domestic interests involved.³²⁴

Finally, courts should not downplay the potential hardship imposed by a foreign statute simply because the law has never been used before³²⁵ or because the discovery target is not required to return to the secrecy haven.³²⁶ First, even if the intent of a secrecy or blocking law were that it never actually be used, foreign criminal laws should not be given a "one bite" rule. A U.S. ruling that brought about the first "bite" would be no more just simply because the U.S. court believed the foreign law would not be used. Second, the fact that the hardship will be imposed on a non-national of the secrecy haven does not reduce the hardship imposed on that individual. Significant personal, property, and business

³²¹ See *infra* note 323.

³²² See, e.g., *Citibank II*, *supra* note 240, at 902 (civil penalties in other cases could be sufficiently severe to equal criminal penalties). The Panamanian law's penalty in *Chase*, *supra* note 210, at 613, effectively made it a misdemeanor.

³²³ *Supra* note 26.

³²⁴ See *supra* note 3 and accompanying text; RESTATEMENT SECOND, *supra* note 201, at § 40(b).

³²⁵ See *Vetco*, *supra* note 10, at 1332 ("No case has been cited in which a person has been prosecuted for complying with a court order enforcing an IRS summons."); *Compagnie Française*, *supra* note 246, at 30-31; *Graco*, *supra* note 217, at 514.

³²⁶ *Sealed Case*, *supra* note 6.

connections to a secrecy haven³²⁷ should be taken into account in any hardship analysis.

Aside from the revived hardship analysis, the Supreme Court should adopt “better faith” revival of the national interest balancing factor in the Restatement Third order test. While more general international agreement might exist as to traditional criminal laws, little agreement exists as to economic laws and economic crimes. Bank secrecy laws are generally maintained because of their positive fiscal effects while blocking laws arise from conflicts in economic and procedural priorities. These foreign laws should not be summarily rejected as invalid national interests simply because their purpose is in opposition to U.S. interests. Laws that protect individuals from the threat of extraterritorial application of U.S. economic laws involve no less valid interests than the United States has in advancing its own economic interests.³²⁸ Similarly, promoting economic growth by better preserving the right to financial privacy also merits more consideration than previously given when compared to U.S. interests. One need only look to U.S. frustration with foreign blocking laws that obstruct U.S. antitrust investigations to discover how the United States would react to the frustration of its own economic interests. Courts must honestly and in “better faith” respect those interests when balancing competing national interests.

In addition, courts should not accept the ability of a foreign sovereign or court to pierce bank secrecy as lessening that nation’s interest in that secrecy.³²⁹ As evidenced by the existence of blocking laws and the conflicts in the cases discussed above, nations prioritize their economic and social policies differently. The fact that a foreign law allows the foreign government to pierce bank secrecy does not mean that its rationale for doing so necessarily coincides with U.S. policies. One commentator questioned whether U.S. courts would react so cavalierly if a foreign na-

³²⁷ *Id.* at 495.

³²⁸ This position does not represent a retreat to the often shallow defense of “cultural relativism.” Conflicts in this area still exist among nations that have accepted capitalism and respect individual rights. The difficulty here is not in the choice of economic or social systems but the creation of rules for those systems; it is a difficulty that has arisen to the partial fault of the United States, which wants to significantly and unilaterally change the previously accepted rules with which it agreed until recently. See *supra* notes 55-70 and accompanying text.

³²⁹ See *Field*, *supra* note 6, at 408; *Garpeg*, *supra* note 246, at 796; *BSI*, *supra* note 79, at 118. Cf. *First Chicago*, *supra* note 7. In *First Chicago*, the Greek law provided a very limited exception for furnishing certain information. That exception, however, did not allow account holder waiver and only allowed Greek courts to make exceptions where production was “absolutely necessary for searching and punishing” crimes regarded as felonies in Greece. GREEK LAW, *supra* note 269, at art. 3; *Administratia Asigurarilor*, *supra* note 20, at 1282-83 (“There are no exceptions to Romania’s secrecy law.”).

tion sought to circumvent U.S. grand jury secrecy.³³⁰ Similarly, would U.S. courts accept the claim of a foreign nation that the attorney-client privilege could be violated simply because the foreign nation desired such information and U.S. rules allow the breach in certain situations? Probably not. The appropriate solution dictates that domestic courts not rely on the ability of foreign governments and courts to pierce secrecy or allow production of documents in order to justify the U.S. court's decision to force a violation of the foreign law.

Finally, courts should consider executive action between governments as expressing national interests. Where treaties exist between nations and a dispute arises because of practices specifically excluded or differentiated in the agreement's obligations, courts should defer to those concrete displays of national interests.³³¹ Such deference would promote the traditional concept of international comity and would reduce friction between nations that have stated their official level of consensus on a particular issue. Courts should not, however, take foreign government indifference to particular subpoena targets as an indication of a lessened foreign government interest in the matter.³³² Every litigant should not be required to obtain the express and affirmative support of the government of a secrecy or blocking jurisdiction simply to provide additional support to a policy clearly expressed by the text of banking and blocking laws.

These analytical considerations do not guarantee impartial application of any balancing test chosen by a court, nor that international disputes will not arise because U.S. courts order foreign document production. But the continued progress made with bilateral and multilateral agreements, along with good faith judicial consideration of a uniform standard adopted by the Supreme Court, will help reduce international friction.

VII. CONCLUSION

Bank secrecy evolved over the past century to meet the needs of

³³⁰ See *supra* note 255.

³³¹ See *Société Nationale*, *supra* note 113, at 552 (Blackmun, J., dissenting) ("Unlike the courts, 'diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association,'" quoting *Laker Airways*, *supra* note 214, at 955). Cf. *Société Nationale*, *supra* (majority opinion) (although the use of the Hague Evidence Convention is not required, it represents one alternative for discovery; the Convention's use can be considered and courts should weigh the various interests in deference to this agreement negotiated by the U.S. government).

³³² See *Citibank II*, *supra* note 240, at 903; *Garpeg*, *supra* note 246, at 796; and *BSI*, *supra* note 79, at 117-18.

individuals avoiding government criminal and fiscal practices. The United States, like many other nations, has prioritized its enforcement goals and seen a corresponding growth in both financial privacy jurisdictions catering to U.S. citizens as well as blocking statutes in industrialized nations. Diplomatic efforts will reduce the conflict but the disparate and often prejudicial tests of the circuit courts will promote friction where agreement does not exist. The Supreme Court must adopt a uniform test to be applied in a more even-handed manner than in the past. The President must pursue international cooperation instead of attempting to coerce other nations into changing their financial privacy laws. Only then will the U.S. judiciary meet Judge Moore's call to respect the principals of international comity and friendly relations among states.