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Compelled Waiver of Bank Secrecy in the Cayman Islands: Solution to International Tax Evasion or Threat to Sovereignty of Nations?

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Abstract

Part I of this Note describes the conflict of laws between foreign bank secrecy policies and United States tax laws, and how the use of unilateral investigatory methods have intensified that conflict. Part II surveys the development of compelled waiver case law in the United States and the Cayman Islands since the introduction of the device in 1981, and discusses how use of the waiver has raised questions of international comity and conflict of laws. Part III evaluates the failure of United States courts to address completely the international legal problems posed by unilateral investigatory methods, and cites the analysis of cross-border subpoenas as a vivid example of this failure. Part IV proposes that the United States and the Cayman Islands acknowledge that the conflict between their national policies cannot be resolved in the courts of either state and suggests that they negotiate a treaty. The Note concludes that only through international cooperation will the public policies of each jurisdiction be given fair, unbiased treatment.

COMPELLED WAIVER OF BANK SECRECY IN THE CAYMAN ISLANDS: SOLUTION TO INTERNATIONAL TAX EVASION OR THREAT TO SOVEREIGNTY OF NATIONS?

INTRODUCTION

For decades, United States taxpayers have used tax havens¹ for both legal and illegal purposes.² In the last five

1. A tax haven is a jurisdiction that imposes little or no tax on most income. *Crime and Secrecy: The Use of Offshore Banks and Companies, Report Made by the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 99th Cong., 1st Sess. 29 (1985)* [hereinafter cited as *Subcomm. Report*]; R. GORDON, *TAX HAVENS AND THEIR USE BY UNITED STATES TAXPAYERS—AN OVERVIEW* 26 (1981) (report to United States Department of the Treasury) [hereinafter cited as *GORDON REPORT*], reprinted in M. LANGER, *PRACTICAL INTERNATIONAL TAX PLANNING A-1* (3d ed. 1985). Additionally, most havens have strict banking secrecy policies. See *infra* note 6 (definition of banking secrecy and common law origins of tax havens' banking secrecy). These bank secrecy laws are specifically designed to encourage the "tax haven trade . . . the unfortunate result of which has been to render vital information virtually impossible for foreign government investigators to obtain." *Subcomm. Report, supra*, at 30. Finally, bankers, lawyers, and accountants constitute a large portion of a tax haven's professional class, which exists to facilitate multinational transactions for investors desiring to lessen or eliminate their tax burdens. See *id.* Many of these professionals market their financial expertise as part of a tourist attraction package. See, e.g., *INTERNATIONAL SERVICES GROUP LTD., TAX HAVEN JOURNAL* (tourist attraction package published in the Cayman Islands) (available at the *Fordham International Law Journal*).

This Note refers to tax havens as "secrecy havens" or "secrecy jurisdictions," because "virtually every tax haven is a 'secrecy haven.'" STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 98TH CONG., 1ST SESS., *CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES* 7 (Comm. Print 1983) [hereinafter cited as *SENATE STUDY*].

2. *Subcomm. Report, supra* note 1, at 1, 2. The *Report* notes that in 1983, the Joint Economic Committee estimated that:

the U.S. underground economy hides [U.S.]\$222 billion from the IRS—7.5% of the gross national product. . . . Without question, the underground economy is linked to the use of offshore facilities. . . . [T]he so called "tax gap" (taxes owed as opposed to those actually received) has grown from [U.S.]\$30.9 billion in 1973 to [U.S.]\$90.5 billion in 1981.

Id. at 1-2. The use of tax havens by United States citizens may be largely attributed to firmly-entrenched banking secrecy policies that have existed since the 1930's. See Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, 14 *NEW ENG. L. REV.* 18, 25 (1978) (discussing the Swiss banking secrecy law, enacted in 1934, and amended in 1971, which has served as a model for modern banking secrecy). The illegal use of tax havens to "launder" money, i.e. divert money to tax haven jurisdictions, in connection with such crimes as narcotics trafficking and tax evasion has been a source of international tension in recent years. See, e.g., *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984) (grand jury narcotics investigation involving Bahamian and Cayman Islands banks), *cert. denied*, 105 S. Ct. 778 (1985) (*Bank of Nova Scotia II*); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.) (United States

years, the Cayman Islands, British West Indies (Cayman Islands or the Caymans) have become the quintessential jurisdiction in which to maintain an offshore bank account.³ The area offers stability,⁴ financial expertise,⁵ and, most importantly,

national investigated for suspected tax evasion), *cert. denied*, 105 S. Ct. 328 (1984); *Marc Rich & Co. v. United States*, 707 F.2d 663 (2d Cir.) (United States subsidiary of Swiss parent corporation ordered to produce documents despite claim to protection under Swiss secrecy law), *cert. denied*, 463 U.S. 1215 (1983); *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982) (grand jury tax and narcotics investigation involving Bahamian bank secrecy law), *cert. denied*, 462 U.S. 1119 (1983) (*Bank of Nova Scotia I*); see also Ricks, *Tax Evaders Find Foreign Banks Aren't Havens of Secrecy Anymore*, Wall St. J., Aug. 14, 1985, at 25, col. 4. "The attack on offshore accounts begins with the IRS's conviction that there are few legitimate reasons for an American taxpayer to have one. . . . [P]eople usually do it to duck their taxes." *Id.*

In 1982, the Permanent Subcommittee on Investigations of the United States Senate began an intensive study of offshore tax havens. The Subcommittee determined that the effect of criminal exploitation of offshore havens: "has been to systematically obstruct U.S. law enforcement investigations, erode the public's confidence in our criminal justice system, and thwart the collection of massive amounts of tax revenues." *Subcomm. Report, supra* note 1, at 1.

3. See Comment, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example*, 20 TEX. INT'L L.J. 133, 136 (1985) (describing the Caymans as such because of their overwhelming economic growth). "A vivid example of the rapid growth of tax haven banks and trust companies is offered by the Cayman Islands." *Subcomm. Report, supra* note 1, at 30. In part, the growth of the Cayman Islands as a tax haven is due to economic development. In 1981, the capital city of Georgetown boasted more banks per capita than any other city in the world. *Id.* at 76; Miller, *Why Bankers Love the Cayman Islands*, BUS. & SOC'Y REV., Summer 1981, at 19. By 1983, the Cayman Islands, with a population of 17,000, hosted 425 banks, as compared with only 30 in 1981. Further, the number of offshore companies has risen from 15,000 in 1981 to 36,000 in 1985. *Subcomm. Report, supra* note 1, at 30-31. Moreover, the Cayman Islands appear to have capitalized on development in order to establish a center for financial expertise. An aggressive tourism strategy directed at financial and real estate investors has increased the islands' popularity. See, e.g., TAX HAVEN JOURNAL, *supra* note 1 (discussing how to benefit from tax havens and more specifically marketing the Cayman Islands). The International Services Group also shows a video "All You Need to Know About Tax Havens," three times daily at a major United States hotel chain on Grand Cayman (information available by writing to International Services Group, Ltd.).

4. The Cayman Islands are British-owned and have no political parties. *Subcomm. Report, supra* note 1, at 31, 76; Taft, *Non-Treaty Tax Havens*, N.Y.L.J., July 18, 1984, at 1, col. 1. "The opportunity for money laundering and the creation of offshore banks, trusts and companies for the purposes of fraud, exist in part because offshore havens are part of the less regulated Euromarket." SENATE STUDY, *supra* note 1, at 6. The Euromarket is a market in which Eurodollars are invested. A Eurodollar is a deposit of United States dollars at a bank located outside the United States. R. BLUM, OFFSHORE HAVEN BANKS, TRUSTS, AND COMPANIES 29 (1984). The Euromarket attracts borrowers and lenders because of the ways in which it differs from domestic banking operations. There are no reserve requirements, deposits have a fixed maturity with guaranteed rate of interest, and there are no taxes on deposits. *Subcomm. Report, supra* note 1, at 146. Because the Euromarket is a neces-

banking secrecy.⁶ Cayman law, like that of many secrecy and tax havens,⁷ prohibits disclosure of information relating to a customer's bank account unless the customer has waived this protection.⁸ Bank employees may incur criminal liability for

sary feature of international commerce, "the same conditions which facilitate international commerce also create criminal opportunities." SENATE STUDY, *supra* note 1, at 6.

5. See *supra* note 3. International Services Group Ltd. is a legal, tax, and financial planning organization that publishes books and sponsors seminars for United States taxpayers seeking to reduce, defer, or eliminate personal or corporate income tax. See generally TAX HAVEN JOURNAL, *supra* note 3. These seminars are presented by internationally known tax planning experts and economists. See *id.* The announcements note particularly that the cost of attending the seminars may be tax deductible as travel expenses. *Id.* The Caymans are easily accessible by commercial and private airlines from the United States. *Subcomm. Report, supra* note 1, at 31.

6. Banking secrecy refers to a bank's legal obligation not to disclose information obtained from its customers through their banking relationship. See Meyer, *supra* note 2, at 27. In most secrecy jurisdictions, this obligation of financial confidentiality derives from British common law. In *Tournier v. National Provincial and Union Bank of Eng.*, [1924] 1 K.B. 461 (C.A. 1923), the Court of Appeal held that an implied contract existed between the banker and his client, and the banker had the obligation of treating his client's affairs confidentially. See *id.* at 471-73, 480, 486. The banker would be civilly liable for breach of this implied contract. *Id.* at 475. The right to financial privacy granted by *Tournier* is not absolute. It does not apply when 1) disclosure is compelled by law, 2) there is a public duty to disclose, 3) the bank's interests require disclosure, and 4) the customer expressly or impliedly consents to disclosure. *Id.* at 473. The common law has been codified and, in some cases, strengthened, by statute. See *infra* note 7. In the United States, the right to financial privacy created by bank secrecy statutes is limited. See *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980).

7. See, e.g., Banks and Trust Companies Regulation Act 1965, Bah. Acts, No. 64, § 10, amended by Banks and Trust Companies Regulation (Amendment) Act, 1980, Bah. Acts, No. 3 (Bahamas: disclosure prohibited without customer consent except with judicial and executive approval); Swiss Banking Law, Art. 47(b); Evidence Act § 59 (Bermuda: banker may not be compelled to produce or testify to bank records unless by judicial order). See generally SENATE STUDY, *supra* note 1, at 177-245 (compilation of bank secrecy laws and analyses by the Library of Congress of the United States). For a list of secrecy laws and one approach to their application in practice, see Newcomb & Kohler, *Coping with Secrecy and Blocking Laws*, in 1 TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS 630, 636-38 (A.B.A. NAT'L INST. March 8-9, 1984).

8. The Confidential Relationships (Preservation) (Amendment) Law § 3(2)(b)(i) (Law 26 of 1979), reprinted in CAYMAN ISLANDS GAZETTE No. 21 (1979) [hereinafter cited as CRPA Law] (amending Confidential Relationships (Preservation) Law (Law 16 of 1976), reprinted in CAYMAN ISLANDS GAZETTE No. 20 (1976) [hereinafter cited as CRP Law]) (available at the *Fordham International Law Journal*). The customer may waive the protection afforded him under the statute by consenting to disclosure: "This Law has no application to the seeking, divulging, or obtaining, of confidential information . . . by or to . . . any professional person acting . . . with the consent, express or implied, of the relevant principal . . ." *Id.*

producing such confidential information without the customer's consent.⁹ This assurance of confidentiality has permitted depositors to use the services of a Cayman bank to divert illegal as well as legal money without fear of detection.¹⁰

In response to the recent increase in the use of offshore banking to facilitate violations of United States tax and criminal laws,¹¹ United States law enforcers have employed unilateral investigatory methods, also known as domestic process,¹²

9. See CRP Law, *supra* note 8, § 4. This section reads in part:

§ 4 (1) [W]hoever—

(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; . . .

(b) . . . is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 2 years or both.

Id.

10. See *Subcomm. Report, supra* note 1, at 31. The Cayman Islands "provide an outstanding opportunity for individuals seeking to launder or otherwise hide illegal profits." *Id.* (statement of Cass Weiland, Chief Counsel of Permanent Subcommittee on Investigations of United States Senate, at Subcommittee Hearings on Narcotics Trafficking).

11. See Ricks, *Tax Evaders Find Foreign Banks Aren't Havens of Secrecy Anymore*, Wall St. J., Aug. 14, 1985, at 25, col. 4. This Note does not discuss the use of offshore tax havens to facilitate narcotics trafficking, although an individual may evade his United States tax obligations in order to conceal the illegal profits from such criminal activities. See GORDON REPORT, *supra* note 1, at 19. For an overview of United States' investigative and judicial efforts to curtail narcotics trafficking in the Cayman Islands, see Comment, *supra* note 3, at 140-61.

12. The United States investigators can use either domestic process or diplomatic means to obtain information from a foreign state. See Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 22 COLUM. J. TRANSNAT'L L. 233, 243-63 (1984). The most frequently used domestic process device is the subpoena *duces tecum*. A subpoena *duces tecum* is the means by which a court may require production of documents, papers, or tangible items. *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541, 550-52 (1908); see FED. R. CIV. P. 45(b); FED. R. CRIM. P. 17(c). However, a United States Attorney or other investigator must initiate the request for documents or information. See Bschorr, "Waiver-By-Conduct: Another View", 6 J. COMP. BUS. & CAP. MKT. L. 307, 313 (1984) (letter from D. Lowell Jensen, Associate United States Attorney General, Criminal Division, Justice Department, to United States Attorneys, November 17, 1983, reprinted as appendix).

United States investigators have asserted that domestic process is faster and less costly than using diplomatic measures such as letters rogatory or attempting to use a foreign judicial system or foreign counsel. See *Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 215-16, 218 (statement of D. Lowell Jensen, Assistant United States Attorney General, Criminal Division, Justice Department) [hereinafter cited as *Crime and Secrecy Hearings*]. However, the lengthy liti-

to obtain information protected by a foreign jurisdiction's secrecy law. Not surprisingly, use of these unilateral investigatory devices has created friction between the United States and foreign tax havens, such as the Cayman Islands,¹³ which view the use of these methods, particularly the cross-border subpoena, as an affront to their sovereignty.¹⁴ This tension has

gation involved in each procedure may belie that conclusion. See Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999, 1006-07, 1012-14 (discussion of Cayman Islands' *Lemire* litigation and *Bank of Nova Scotia I*). In *Lemire* (also known as the *Interconex* case), the United States cooperated with local Cayman counsel, and the requested documents were obtained through a post-indictment conference within one year. See *id.* at 1006-07. In *Bank of Nova Scotia I*, the United States used a grand jury subpoena, and the litigation lasted equally as long as that in *Lemire*. See *id.* at 1012-14. For a discussion of *Lemire*, which involved bribery money diverted through tax haven banks, see *Crime and Secrecy Hearings, supra*, at 216-18, 231-32.

Enforcement of domestic process in violation of foreign bank secrecy laws "gives the holder of the information a Hobson's choice: either the holder can respond to the subpoena and risk legal action in the foreign state or he can suffer the consequences of disobedience in the United States." Paikin, *supra*, at 247-48; see *infra* note 49 and accompanying text. For a description of the tension caused when a subpoena is served in a foreign country or takes effect there, see *infra* note 13. This Note refers to subpoenas and other domestic process devices as "unilateral investigatory methods."

13. See Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 579 (1983). "The sharpest confrontations and the ones with the greatest potential for disrupting amicable political and economic relations . . . occur when the United States . . . require[s] or prohibit[s] acts or omissions abroad that are contrary to the laws or policies of the foreign [state]." *Id.* The subpoena is one of the most controversial investigatory methods, especially when it is enforced against a United States bank whose branch in a secrecy haven possesses confidential information (becoming in that case a "cross-border" subpoena). Comment, *supra* note 3, at 156; see *Bank of Nova Scotia II*, 740 F.2d at 826-29; *Bank of Nova Scotia I*, 691 F.2d at 1389-91; Brief on Behalf of the Government of Canada as *amicus curiae*, *Bank of Nova Scotia v. United States*, Appeal No. 83-5708 (11th Cir. Nov. 18, 1983), at 19. "No case other than *Bank of Nova Scotia I* has ever ordered a branch or agency of a foreign bank to produce records located in the territory of a third state." *Id.*; see also Comment, *supra* note 3, at 156-61 (discussing *Bank of Nova Scotia I* and *II*). "The broad assertion of jurisdiction by various States—particularly . . . the subpoena *duces tecum* of the American courts—has made the limitations of international law on a State's jurisdiction more and more marginal." Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U.L. REV. 487, 501 (1964). For a detailed description of the uses of cross-border subpoenas, see Note, *Extraterritorial Jurisdiction of U.S. Courts Regarding the Use of Subpoenas Duces Tecum to Obtain Discovery in Transnational Litigation: The Search for a Limiting Principle*, 16 N.Y.U. J. INT'L L. & POL. 1135 (1984).

14. Sovereignty is synonymous with independence. See 1 L. OPPENHEIM, INTERNATIONAL LAW § 64, at 118-19 (H. Lauterpacht 8th ed. 1955). "Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty . . . implies, therefore, independence all around, within and without the borders of the country." *Id.* at 118-19. Accordingly, by virtue of their sovereignty,

increased as law enforcers have begun to use a new device, the compelled waiver,¹⁵ to further their investigations.¹⁶ This de-

states have the right "to be their own ultimate authority in determining their behavior." W. LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 16 (1979).

Sovereignty protects a state from the exercise of jurisdiction by another state's courts. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952). "Where . . . there can be no interference with the sovereignty of another nation, [a court] . . . may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *Id.*; see J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* §§ 18-20, at 21-23 (M. Bigelow 8th ed. 1883).

For a discussion of the origins and development of the concept of sovereignty, see I L. OPPENHEIM, *supra*, §§ 67-70, at 120-23.

15. "Compelled waiver" is the popular term for a consent directive which, when signed, waives an individual's right to secrecy of his bank records. See, e.g., *United States v. Davis*, 767 F.2d 1025, 1033-36 (2d Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814, 816 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 799 (S.D.N.Y. 1984); *Newcomb & Kohler*, *supra* note 7, at 656. It is "compelled" because the defendant, usually in a criminal case, but see *infra* notes 56-57 and accompanying text, must choose between signing the directive and releasing his bank records as possible evidence of the crime, or being found in civil contempt in the United States for failure to comply with a court order. See *infra* notes 52, 59, 65-120 and accompanying text (description of compelled waiver and discussion of cases).

The opinion of the United States Department of Justice is that this device solves the problem of foreign states objecting to United States production orders. Such an analysis, however, only considers the domestic implications of using the compelled waiver. See Ricks, *Tax Evaders Find Foreign Banks Aren't Havens of Secrecy Anymore*, Wall St. J., Aug. 14, 1985, at 25, col. 4. "The Ghidoni precedent [insofar as *Ghidoni* established the compelled waiver as a tax evasion "tactic"] will be 'really helpful,' " noted a Justice Department tax attorney. *Id.* at col. 6; Pasztor, *U.S. Employs New Method to Overcome Bank Secrecy Laws in Cayman Islands*, Wall St. J., Dec. 10, 1984, at 58, col. 1. "Defense attorneys are certain to continue challenging the legality of the tactic." *Id.* at col. 2; see *infra* notes 65-131 and accompanying text (discussion of compelled waiver cases).

An example of a compelled waiver follows:

I, [name], of the State of [name of state] in the United States of America, do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, specifically including [banks] and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice, and to give evidence relevant thereto, in the case of [name of case], now pending in the United States [name of court], and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order . . . in the aforesaid case, dated _____. This direction is intended to apply to the [applicable secrecy statute], and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

vice circumvents the policy of confidentiality¹⁷ by coercing the customer to waive secrecy protections extended by the foreign jurisdiction,¹⁸ and thereby permitting a foreign bank to release financial information concerning the customer's account without fear of liability.¹⁹ The refusal of Cayman courts to recog-

Ghidoni, 732 F.2d at 815-16 n.1.

A court has the power to issue compelled waivers, because it can issue orders to aid in its enforcement of subpoenas. See All Writ's Act, 28 U.S.C. § 1651(a) (1982). This power "extends, under appropriate circumstances, to persons who . . . are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977). Compelled waivers have, however, been used without corresponding subpoenas. See Telephone interview with John Harris, Esq., International Affairs Division, United States Department of Justice (Feb. 4, 1986) (author's notes available at the *Fordham International Law Journal*).

Compelled waivers have been used in connection with United States grand jury investigations. See, e.g., *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*), *rev'g In re Grand Jury Investigation, Doe*, 599 F. Supp. 746 (S.D. Tex. 1984); *United States v. Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984). The importance of the grand jury power is undisputed. See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (the public "has a right to every man's evidence"); see also *Bank of Nova Scotia I*, 691 F.2d at 1387 (the Eleventh Circuit "decline[d] to impose any undue restrictions upon the grand jury investigative process").

United States courts have used the term "compelled consent" and "compelled waiver" to describe the investigatory device. See *Davis*, 767 F.2d at 1033 ("compelled consent"); *Garpeg*, 583 F. Supp. at 799 ("compelled waiver"). This Note uses the terms interchangeably.

16. See, e.g., *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*), *rev'g In re Grand Jury Investigation, Doe*, 599 F. Supp. 746 (S.D. Tex. 1984) (subject matter of grand jury investigation unidentified in opinion); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985) (fraud, racketeering, conspiracy); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.) (tax evasion), *cert. denied*, 105 S. Ct. 328 (1984).

17. This Note refers to the policy underlying tax havens' bank secrecy laws as "confidentiality" or "financial privacy." These labels are used to describe the financial privacy interests of the United States. Although the United States does have financial privacy laws, see *infra* note 231 and accompanying text, the United States concern with financial privacy should be distinguished from the interests protected in Title II of the Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970), 1970 U.S. CODE CONG. & AD. NEWS 1301 (codified as amended at 31 U.S.C. §§ 5311-5322 (1982)), amended by Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2135. The United States Bank Secrecy Act is designed to thwart international crime, implicitly *circumventing* foreign bank secrecy. See *infra* note 30 (discussion of United States Bank Secrecy Act of 1970 and recent amendments).

18. See, e.g., *Davis*, 767 F.2d at 1033-35; *Ghidoni*, 732 F.2d at 816 & n.2.

19. See, e.g., CRP Law, *supra* note 8, § 4 (fine and imprisonment penalties faced by bankers who disclose in violation of Cayman law).

nize this compelled waiver,²⁰ as well as the United States' continued use of the device in violation of Cayman policy,²¹ have raised an international conflict of laws issue not yet addressed by either jurisdiction.²²

Part I of this Note describes the conflict of laws between foreign bank secrecy policies and United States tax laws, and how the use of unilateral investigatory methods have intensified that conflict.²³ Part II surveys the development of compelled waiver case law in the United States and the Cayman Islands since the introduction of the device in 1981,²⁴ and discusses how use of the waiver has raised questions of international comity and conflict of laws.²⁵ Part III evaluates the failure of United States courts to address completely the international legal problems posed by unilateral investigatory methods, and cites the analysis of cross-border subpoenas as a vivid example of this failure.²⁶ Part IV proposes that the United States and the Cayman Islands acknowledge that the conflict between their national policies cannot be resolved in the courts of either state and suggests that they negotiate a treaty.²⁷ The Note concludes that only through international cooperation will the public policies of each jurisdiction be given fair, unbiased treatment.

20. See *infra* notes 92-101 and accompanying text (discussion of Cayman Islands' Judgment in *In re An Application by ABC, Ltd. Under the Confidential Relationships (Preservation) (Amendment) Law, 1979*).

21. See *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*), *rev'g In re Grand Jury Investigation, Doe*, 599 F. Supp. 746 (S.D. Tex. 1984); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984).

22. See *infra* notes 28-33 and accompanying text. Conflict of laws is the term used to describe the branch of law that addresses the questions of "when and why the courts of one jurisdiction . . . consider the prior determination of another state or of a foreign nation in a case pending before it." E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 1.1, at 1 (1982) (emphasis in original). The rules of conflict of laws apply in the context of international law. See *id.*; *infra* note 28.

23. See *infra* notes 28-64 and accompanying text.

24. See *infra* notes 65-131 and accompanying text.

25. See *infra* notes 65, 69, 80-83, 99-101, 121-31 and accompanying text.

26. See *infra* notes 132-211 and accompanying text.

27. See *infra* notes 212-38 and accompanying text.

I. TAX HAVENS AND UNILATERAL ATTEMPTS TO
PIERCE THEIR LAWS: AN INTERNATIONAL
CONFLICT OF LAWS

Unilateral attempts by United States investigators to pierce the bank secrecy laws of foreign jurisdictions present conflict of laws problems.²⁸ These conflicts are especially problematic when United States courts apply domestic law extraterritorially to obtain information about possible United States tax law violations.²⁹ The primary reason for this conflict in the area of taxation is that many bank secrecy jurisdictions do not recognize tax evasion³⁰ as a crime.³¹ Therefore, the United

28. Domestic conflict of laws rules apply internationally. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (1971) [hereinafter cited as SECOND RESTATEMENT, CONFLICTS]. That a "true conflict" exists between the United States and the Cayman Islands provides additional authority for a conflict of laws analysis. A 'true conflict' exists when "each country has a strong interest in having its own law or lack of law applied to the transaction, and application of each law would produce a contrary result." Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1033 n.192 (1976); see E. SCOLES & P. HAY, *supra* note 22, § 2.6, at 17-18 (discussion of false and true conflicts).

29. See *supra* note 11; see, e.g., *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984); *Marc Rich & Co. v. United States*, 707 F.2d 663 (2d Cir.), *cert. denied*, 103 S. Ct. 3555 (1983); *Bank of Nova Scotia I*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983).

30. In the United States, tax evasion is a felony punishable by fines up to U.S.\$100,000 and by up to five years imprisonment. See I.R.C. § 7201 (1986). See generally KARZON, *International Tax Evasion: Spawned in the United States and Nurtured by Secrecy Havens*, 16 VAND. J. TRANSNAT'L L. 757, 759-60 (1983).

A United States taxpayer may also be liable for failure to report transportation of certain amounts of United States currency across international boundaries or for failure to report the existence of an offshore account. See Title II of the Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970), 1970 U.S. CODE CONG. & AD. NEWS 1301 (codified as amended at 31 U.S.C. §§ 5311-5322 (1982)), amended by Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2135; Ricks, *Tax Evaders Find Foreign Banks Aren't Havens of Secrecy Anymore*, Wall St. J., Aug. 14, 1985, at 25, col. 4. "There is no legal way to keep the existence of a substantial (more than [U.S.]\$5,000) offshore account from the IRS. Since 1976, U.S. taxpayers have been required to report their foreign accounts on schedule B of the 1040 tax form and to file more detailed information [with the Treasury Department]." *Id.* at col. 4-5. Title II of the Bank Secrecy Act, the Currency and Foreign Transactions Reporting Act, requires reporting where the reports "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311 (1982), as supplemented by 31 C.F.R. § 103 (1985) (regulations promulgated under this section of the United States Code requiring financial institutions to file Current Transaction Reports (CTRs) with the Treasury Department within fifteen days after the customer withdraws or transfers more than U.S.\$10,000), amended by Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2135. 31 U.S.C. § 5316 (1982),

States interest in deriving revenues through taxation of its citizens runs counter to the foreign bank secrecy jurisdiction's interest in protecting the confidentiality of its bank customers.³² Because each country has a strong interest in having its own law or policy applied to the transaction, and application of each law or policy would produce a contrary result, a true conflict exists.³³

amended by Comprehensive Crime Control Act of 1984, ch. 9, § 901(c)(2), Pub. L. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2135, requires anyone who transports, physically or through the mails, more than U.S.\$10,000 in cash into or out of the United States to file a report with the United States Customs Service. Taxpayers with foreign bank accounts must file a report with the Treasury Department. Failure to comply with these requirements results in criminal and civil penalties. See 31 U.S.C. § 5316(b)(1) (1982).

For a discussion of the Bank Secrecy Act as it relates to the Department of Justice's strategy to combat narcotics trafficking, see *Subcomm. Report, supra* note 1, at 20; Abramovsky, *Money-Laundering and Narcotics Prosecution*, 54 *FORDHAM L. REV.* 471, 475-77 (1986) (attempting to strike a balance between governmental investigations and individual constitutional rights); Comment, *supra* note 3, at 140-49. See also Collora & Tillotson, *Defense Perspective of Prosecuting Criminal Cases Under Secrecy Act*, *Nat'l L.J.*, Feb. 17, 1986, at 30, col. 1 (discussing reporting requirements and recent caselaw).

31. See *Subcomm. Report, supra* note 1, at 29, 30; SENATE STUDY, *supra* note 1, at 7. The United States taxes its citizens, residents, and domestic corporations on all income earned within the United States or outside its borders. See I.R.C. §§ 1, 11, 61 (1986); *Cook v. Tait*, 265 U.S. 47, 54-56 (1924) (United States citizen domiciled in Mexico received income from property located in Mexico); see also *Bull v. United States*, 295 U.S. 247, 259 (1935) (stressing the importance of tax collection to the United States Government).

Compare *Bull v. United States*, 295 U.S. 247, 259 (1935) ("Taxes are the lifeblood of government, and their prompt and certain availability an imperious need.") and *United States v. Vetco Inc.*, 691 F.2d 1281, 1290-91 (9th Cir.) (United States tax interest in prosecuting tax fraud outweighed Swiss interest in protecting secrecy of bank records), *cert. denied*, 454 U.S. 1098 (1981) and *United States v. Field*, 532 F.2d 404, 408 (5th Cir. 1976) ("The collection of revenue is crucial to the financial integrity of the republic."), *cert. denied*, 429 U.S. 940 (1976) with *Affidavit of Thomas Carroll Jefferson*, official member of Cayman Island Executive Council and Legislative Assembly, Judgment of Oct. 28, 1985, *Attorney General v. Bank of Nova Scotia, Grand Court, Cayman Islands* (Cause No. 442) (available at the *Fordham International Law Journal*). "The Cayman Islands [will] only assist in respect to offences common to both jurisdictions. The Cayman[s] . . . have no tax laws, and . . . have generally declined to assist foreign powers to seek or obtain evidence for use in purely revenue matters." *Id.* at 5.

32. Compare *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984) with Judgment of July 24, 1984, *In re An Application by ABC, Ltd. Under the Confidential Relationships (Preservation) (Amendment) Law, 1979, Grand Court, Cayman Islands* (Cause No. 269).

33. See *supra* note 28 (definition of 'true conflict'). The United States has several reasons for seeking the application of its own law in this situation. One of these reasons is that the customer is a United States citizen. See *United States v. Davis*, 767 F.2d 1025, 1033 (2d Cir. 1985) (defendant required to disclose information regard-

Contrasting policies on evidence-gathering have exacerbated this conflict.³⁴ Because foreign secrecy jurisdictions have very limited discovery procedures,³⁵ they view unilateral investigatory methods as infringements on their sovereignty.³⁶ Therefore, they require United States prosecutors to obtain an order through their local courts.³⁷ United States investigators,

ing foreign bank accounts under United States law). Additionally, by conducting business in the United States, the customer has subjected himself to United States tax laws and their concomitant obligations. See *Bull v. United States*, 295 U.S. 247, 259 (1935). "A tax is an exaction by the sovereign, and necessarily the sovereign has an enforceable [sic] claim against everyone within the taxable class for the amount lawfully due from him." *Id.* Moreover, the evasion practiced by the customer has been shown to undermine the United States economy as the practice becomes widespread. See *Subcomm. Report, supra* note 1, at 1; SENATE STUDY, *supra* note 1, at 3.

34. See Carter, *Existing Rules and Procedures*, 13 INT'L LAW. 5, 5-6 (1979); Rosenthal & Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery*, 16 N.Y.U. J. INT'L L. & POL. 1075, 1075-78 (1984); Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877, 885-86 (1982). Compare RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437 (Tent. Draft No. 7 1986) [hereinafter cited as REVISED RESTATEMENT, FOREIGN RELATIONS LAW] (allows United States courts to request disclosure of information "relevant to an . . . investigation") with FED. R. CIV. P. 26(b)(1) (permits request of documents or information "reasonably calculated to lead to the discovery of admissible evidence").

35. See 2 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 15.10, at 227-28 (2d ed. 1981); Atwood, *Blocking Statutes and Foreign Sovereign Compulsion: Recent Developments and the Revised Restatement*, in 1985 FORDHAM CORP. L. INST. 327, 338 (B. Hawk ed. 1986). Discovery in civil law countries such as the United Kingdom and its dependent territories is conducted by the judiciary. *Id.* For example, pre-trial depositions are not permitted, except to preserve the testimony of persons likely to be unavailable for trial. REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 reporters' note 1 (Tent. Draft No. 7 1986).

36. See Maier, *supra* note 13, at 594. "Whenever one sovereign attempts to coerce or require activities inside the borders of another that conflict with the foreign sovereign's local law policies it interferes with that nation's interest in controlling and guiding its own affairs." *Id.* (citing 1 C. HYDE, INTERNATIONAL LAW § 200, at 641 (rev. 2d ed. 1947)); see REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 reporters' note 1 (Tent. Draft No. 7 1986) (discussing the conflicts between extraterritorial discovery requests and foreign nondisclosure laws). Permission of the foreign state is required to apply any extraterritorial discovery or investigatory technique to persons or documents located in a foreign state. *Id.*

37. See CRPA Law, *supra* note 8.

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 . . .

(2) to . . . a Judge of the Grand Court sitting alone and *in camera*.

Id. § 3(A)(1), (2). The requirement of obtaining a court "direction" applies to Cayman officials as well as to United States investigators. *Id.* In a criminal case, a Cay-

in contrast, view these foreign procedures as attempts to frustrate United States investigations.³⁸ The United States, therefore, takes the position that those who avail themselves of United States jurisdiction are subject to its broad discovery laws.³⁹

Although traditional conflict of laws rules require states to enforce each others' laws,⁴⁰ two taxation-related exceptions to these rules may explain Cayman's intransigence. One exception provides that one state need not recognize another state's revenue-raising laws.⁴¹ The second exception provides that

man court will not order production of confidential records unless proceedings have been instituted against the accused. *See* United States v. Carver, No. 5 (Cayman Islands Civil Appeals 1982) (unpublished opinion), reprinted in 2 TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS 1584, 1586 (A.B.A. NAT'L INST., March 8-9, 1984) (available at the *Fordham International Law Journal*), *aff'd sub nom.* United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984).

38. *See Crime and Secrecy Hearings*, *supra* note 12, at 231-32 (statement of D. Lowell Jensen, Assistant United States Attorney General, Criminal Division, Justice Department, discussing Cayman Islands investigation).

39. *See* REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 reporters' note 1 (Tent. Draft No. 7 1986).

40. *See* SECOND RESTATEMENT, CONFLICTS, *supra* note 28, § 117; *see also id.* § 103 comment b. This requirement derives from the full faith and credit clause of article IV of the United States Constitution. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1; *see* E. SCOLES & P. HAY, *supra* note 22, at 77 (foreign judgments entitled to recognition under full faith and credit clause); *see also* Rules Enabling Act, 28 U.S.C. § 1738 (1982) (statutory recognition of full faith and credit to "[a]cts, records and judicial proceedings").

41. *See* Holman v. Johnson, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775). "[N]o country ever takes notice of the revenue laws of another." *Id.* The rationale for the rule in the United Kingdom was that enforcement of foreign revenue laws would impede trade relations. *See* Boucher v. Lawson, Cas. t. Hard. 85, 89, 95 Eng. Rep. 53, 56 (K.B. 1734); A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 48, at 170 (1962); Greenberg, *Extrastate Enforcement of Tax Claims and Administrative Tax Determinations Under the Full Faith and Credit Clause*, 43 BROOKLYN L. REV. 630, 632 (1977). In a more recent case, Judge Learned Hand explained the rationale for the doctrine in the United States as follows:

Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the "settled public policy" of its own. . . . To pass upon the provisions for the public order of another state is . . . beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, C.J., concurring), *aff'd on*

one state is not required to enforce the laws of another state if the laws of the second state would undermine the public policy of the first.⁴² The Cayman Islands adhere to these exceptions,

other grounds, 281 U.S. 18 (1930). The "revenue-raising" exception is found in the First Restatement of Conflict of Laws but is noticeably absent from the Second Restatement. Compare RESTATEMENT OF CONFLICT OF LAWS § 610 comment c (1934) (§ 610 forbids actions "on a right created by the law of a foreign state as a method of furthering its own governmental interests" including tax laws) with SECOND RESTATEMENT, CONFLICTS, *supra* note 28, § 90 ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."). The exception for the enforcement of foreign tax claims is "closely related to public policy concerns" of the forum, E. SCOLES & P. HAY, *supra* note 22, § 24.19, at 943; see A. DICEY & J. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 93 (10th ed. 1980), and to state sovereignty. See E. SCOLES & P. HAY, *supra* note 22, §§ 24.23, 24.44, 948, 978; A. DICEY & J. MORRIS, *supra*, at 90.

The United States Supreme Court and several state courts have explicitly rejected the rule's application in the United States. See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935). "[N]o state can . . . have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments . . . it must give full faith and credit." *Id.*; see, e.g., *Oklahoma ex rel. Okla. Tax Comm'n v. Neely*, 225 Ark. 230, 282 S.W.2d 150 (1955); *Oklahoma ex rel. Okla. Tax Comm'n v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946). In *Rodgers*, the court stated that "[t]he taxpayer who enjoys the protection of government should bear his share of the expense of maintaining the government, and should not be permitted to escape his obligation by crossing state lines." 238 Mo. App. at 1128, 193 S.W.2d at 927. In *Neely*, the court noted: "In our opinion th[is] oft-reported dogma . . . is rapidly approaching a deserved extinction in those instances in which the dispute is *not international* but merely interstate." *Id.* at 232, 282 S.W.2d at 151 (emphasis added). The court further noted that "[t]he original rule, in its application to cases of international aspect, may well find some justification in one sovereign's reluctance to inquire into another's system of law or to risk the giving of affront by the denial of a sovereign demand." *Id.* at 233, 282 S.W.2d at 151-52. But, the court warned, "the rule encourages willful, dishonest tax evasion." *Id.* at 233, 282 S.W.2d at 152; cf. *City of Detroit v. Proctor*, 44 Del. 193, 61 A.2d 412 (1948). In commenting upon *Rodgers*, the court stated that "the opinion of the Missouri court seems to ignore the fact that Michigan's sovereignty is as foreign to Delaware as Russia's." 44 Del. at 202, 61 A.2d at 416.

Some commentators have also denounced the rule. See, e.g., E. SCOLES & P. HAY, *supra* note 22, § 24.23, at 949; A. DICEY & J. MORRIS, *supra*, at 93. Revenue laws are now usually disregarded on grounds of public policy, if they are to be disregarded at all. See *id.* (citing *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929)). The conflict of laws exception for enforcement of penal laws may also cover tax laws to the extent that tax laws are criminal. See E. SCOLES & P. HAY, *supra* note 22, at 75-76.

For a history of the "revenue-raising" exception, see Greenberg, *supra*, at 631-37; Note, *Extra-Territorial Collection of States Inheritance Taxes*, 29 COLUM. L. REV. 782 (1929); cf. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 215-25 (1932) (rejecting the exception in the United States).

42. See SECOND RESTATEMENT, CONFLICTS, *supra* note 28, § 90. The public policy exception permits a court to disregard foreign law that is contrary to local public policy. *Id.* This exception is very narrow, in that courts "are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of

and have asserted that its refusal to honor the compelled waiver in tax cases is justified by rules of international comity.⁴³

expediency of fairness." *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918). They should not refuse to enforce a foreign law unless application of that law "would violate some fundamental principle of justice, some prevalent concept of good morals, some deep-rooted tradition of the common weal." *Id.* For a court to invoke the public policy defense, there cannot be merely a difference between the two laws. See SECOND RESTATEMENT, CONFLICTS, *supra* note 28, § 90 comment b. Further, a court may not discriminate against a foreign cause of action which would be entertained if it had arisen locally. See *Hughes v. Fetter*, 341 U.S. 609, 612 (1951). For a discussion of this exception, see A. DICEY & J. MORRIS, *supra* note 41, at 83-89; E. SCOLES & P. HAY, *supra* note 22, §§ 3.15-16, 24.20-21, at 72-75, 943-46; Paulsen & Sovorn, *Public Policy in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956); Simson, *The Public Policy Doctrine in Choice of Law: A Reconsideration of Older Themes*, 1974 WASH. U.L.Q. 391.

One of the rationales for this public policy defense is that states should not judge the acts of each other. See *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 479, 14 N.E.2d 798, 800 (1938) (per curiam) (New York public policy did not preclude enforcement of contract in Germany even though Jewish plaintiff's discharge was required by German law). Some courts have noted the similarity of the public policy defense to the act of state doctrine. See *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 53, 242 N.E.2d 704, 709, 295 N.Y.S.2d 433, 441 (1968) (suggesting that court's holding in *Holzer* was compelled by act of state doctrine); see also Rosenthal, *supra* note 34, at 497-503 (proposing application of act of state doctrine to jurisdictional conflicts currently intensified by use of balancing tests). This commentator suggests that the act of state doctrine will protect the public policies of foreign states from usurpation by United States courts. *Id.* at 500, 502-03.

The conflict between bank secrecy laws and United States investigative requests unquestionably represents a conflict of national policies. See 2 J. ATWOOD & K. BREWSTER, *supra* note 35, § 15.01, at 227-28; Editorial, *Beyond Marc Rich*, Wall St. J., Oct. 22, 1984, at 30, col. 1. "[T]hat the Swiss simply don't regard tax cases the way the Justice Department does . . . looks like a conflict between two cultures." *Id.*; see Note, *supra* note 34, at 880. "The circumstances attendant to promulgation suggest that nondisclosure laws are part of a larger conflict between the policies underlying the United States law sought to be enforced and the policies sought to be promoted by the foreign nondisclosure law." *Id.* However, all public policies are not equally valid by virtue of state sovereignty. See SECOND RESTATEMENT, CONFLICTS, *supra* note 28, at § 90.

A state's public policy may be determined by looking to its constitution, statutes, judicial decisions, legislative history, executive and legislative pronouncements, and case-specific reports. See *Johnson v. United States*, 163 F. 30, 32 (1908) (Holmes, Circuit Justice); *Straus & Co. v. Canadian Pac. Ry.*, 254 N.Y. 407, 413-14, 173 N.E. 564, 566-67 (1930) (the legislature has power to decide state's policy, which courts then enforce); see also Note, *The Public Policy Concept in the Conflict of Laws*, 33 COLUM. L. REV. 508, 515 (1933).

43. See Affidavit of Thomas Carroll Jefferson, official member of Cayman Island Executive Council and Legislative Assembly, Judgment of Oct. 28, 1985, *Attorney General v. Bank of Nova Scotia*, Grand Court, Cayman Islands (Cause No. 442), at 5 (available at the *Fordham International Law Journal*).

Unilateral investigatory methods promote the United States law enforcement policies behind speedy trials,⁴⁴ and investigations based on all available information.⁴⁵ The device most frequently used by United States courts and investigators to obtain extraterritorial information is the "cross-border" subpoena.⁴⁶ A subpoena may be served on the person or on the bank, to require the production of documents or information or to require a person abroad to testify in the United States.⁴⁷ When issued across international boundaries, a subpoena has been a controversial investigatory technique,⁴⁸ because it forces a bank to choose between criminal penalties under its bank secrecy law, should it comply with the subpoena, or contempt fines under United States law, should the bank choose not to comply.⁴⁹ For this reason, United States'

44. See U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." *Id.*; see also Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982).

45. See *United States v. Nixon*, 418 U.S. 683, 709 (1974) (per curiam).

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts [I]t is imperative . . . that compulsory process be available for the production of evidence

Id. (Burger, C.J.); see also FED. R. CIV. P. 26(b).

46. See *supra* note 12 (discussion of cross-border subpoenas); Paikin, *supra* note 12, at 244. United States investigators use subpoenas more frequently than they use depositions, another form of domestic process used extraterritorially. *Id.*

47. Paikin, *supra* note 12, at 244-45.

48. REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 reporters' note 1 (Tent. Draft No. 7 1986). "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States." *Id.* Extraterritorial application of United States law in general has disturbed this country's relationships with its allies and trading partners. Maier, *supra* note 13, at 579. Additionally, "[i]n many areas of the law, United States statutes are the most rigorous and far reaching of any found in the world." Note, *supra* note 28, at 1025 n.141.

49. See FED. R. CIV. P. 45(f); FED. R. CRIM. P. 17(g). "Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued . . ." *Id.*; see also 28 U.S.C. § 1784 (1982) (contempt for disobedience of subpoena served in foreign country). See generally 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 702 (2d ed. 1982). Civil contempt occurs when a party's intransigence consists "in refusing to do what had been ordered," for example, by failing to comply with a subpoena. See *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 449 (1911). This must be distinguished from criminal contempt, which consists "in doing what had been prohibited by the injunction." *Id.*; see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.9, at 93-94,

standards for subpoenas served in a foreign country are strict.⁵⁰ Despite stringent standards, foreign states usually object to extraterritorial subpoenas, particularly if the bank is not a party to the United States proceeding.⁵¹

In contrast to the cross-border subpoena, the compelled waiver⁵² ostensibly offers a means of obtaining extraterritorial information without subjecting non-party banks to this choice between penalties under either United States law, for contempt, or under its own law, for violating nondisclosure laws.⁵³ A compelled waiver is an order, analogous to an injunction,⁵⁴ compelling a United States citizen to waive the right to secrecy granted by the jurisdiction in which he has an offshore bank account.⁵⁵ The device was first used in a civil case,⁵⁶ but is now

96-98 (1973) (nature of contempt power). The court's power to hold an individual in contempt is a power to impose sanctions for disobedience of a personal order. *Id.* at 93.

50. 28 U.S.C. § 1783 (1982). Under the federal standards for subpoenas served in a foreign country, the subpoena must be 1) issued by a court, 2) only to nationals or United States residents, and 3) only "if the court finds that particular testimony or the production of the document or other thing by him is necessary to do justice." *Id.* Some subpoenas have been served on a United States branch of the bank from which the records are sought. See *infra* note 85 (subpoenas served on both foreign and domestic bank branches).

51. See *Bank of Nova Scotia II*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 778 (1985); *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *Bank of Nova Scotia I*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); *United States v. Vetco Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35 (2d Cir. 1972); *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968); *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080 (S.D.N.Y. 1984); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984).

52. See *supra* note 15 (definition of compelled waiver).

53. Compare FED. R. CIV. P. 45(f) and FED. R. CRIM. P. 17(c) with CRP Law, *supra* note 8 (penalties for failure to abide by obligation of confidentiality).

54. See D. DOBBS, *supra* note 49, § 2.10, at 105-13. An injunction is an order directing a defendant to act or refrain from acting in a certain way. *Id.* at 105. Similarly, a compelled waiver forces a defendant to sign a consent directive. See *infra* note 55. An injunction is enforceable by the contempt power. D. DOBBS, *supra* note 49, at 105. A compelled waiver may also be enforced in this way. See *infra* note 59 and accompanying text.

55. See, e.g., *United States v. Davis*, 767 F.2d 1025, 1033-36 (2d Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814, 816 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 799 (S.D.N.Y. 1984).

56. See *Traboulsi v. Shearson Loeb Rhoades, Inc.*, 80 Civ. 7088 (WK) (order) (S.D.N.Y. Oct. 1, 1981); *Financière Indosuez v. Karaman*, 81 Civ. 1866 (WK) (order) (S.D.N.Y. Oct. 1, 1981). Karaman, an account executive with Shearson Loeb Rhoades, defaulted on a loan from a Swiss bank, Financière Indosuez. Karaman claimed that the money was not loaned to him but to Traboulsi, guarantor of the

customarily used in criminal cases involving foreign bank records protected by secrecy statutes.⁵⁷ In a compelled waiver situation, a United States court compels a criminal defendant to sign a consent form and then sends the signed form to the defendant's foreign bank as the consent needed to release con-

loan, for use as contribution for a brokerage joint venture. Transcript of Hearing before Judge Knapp, Oct. 1, 1981, at 3-6. A waiver of Swiss bank secrecy was sought to determine who had the beneficial interest in the loan. See Transcript of Hearing before Magistrate Bernikow, Sept. 25, 1981, at 11. Magistrate Bernikow ruled that Swiss bank secrecy applied, so as to bar the release of the records. See Transcript of Hearing before Judge Knapp, at 16-17. Judge Knapp, however, ordered the consent signed. *Financière Indosuez v. Karaman*, 81 Civ. 1866 (S.D.N.Y. Oct. 1, 1981) (order); see also *SEC v. Musella*, 83 Civ. 342 (S.D.N.Y. Sept. 15, 1983) (order) (Securities and Exchange Commission (SEC) compelled Musella and other defendants accused of insider securities trading to waive their right to Swiss banking secrecy).

57. United States courts faced with a claim involving the compelled waiver have split over whether compelling consent constitutes testimonial self-incrimination under the fifth amendment of the United States Constitution. Some courts have held that a defendant is not entitled to claim the fifth amendment privilege, whereas others hold that the defendant may only produce the potentially incriminating documents if he is guaranteed either "transactional" (broad) or "use" (narrow) immunity from further lawsuits. Compare *In re Grand Jury Investigation 82-1691*, slip op. (N.D. Ill. Dec. 15, 1983) (subject of grand jury investigation compelled to waive Bahamian bank secrecy rights) and *United States v. Dial*, 83 Cr. 271, slip op. (N.D. Ill. July 28, 1983) (defendant's motion in opposition to compel execution of consent denied, because defendant objected partially on relevance grounds, an evidentiary, not constitutional, issue), *aff'd* 757 F.2d 163 (7th Cir.), *cert. denied*, 106 S. Ct. 116 (1985) with *In re Grand Jury Investigation, Doe*, 599 F. Supp. 746 (S.D. Tex. 1984) (because compelled consent might enable government to obtain records to supplement its information, this would be testimonial self-incrimination in violation of fifth amendment), *rev'd sub nom.* *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*) and *United States v. Porter*, 711 F.2d 1397 (7th Cir. 1983) (compelled waiver was testimonial act for which defendant is entitled to fifth amendment protection greater than "use immunity") and *United States v. Ward*, 81-1-Cr-J-B, slip op., at 7 (M.D. Fla. Apr. 6, 1983) (compelled waiver was a "false oath" that violated Florida law and denied due process under the United States Constitution); *cf.* *Garpeg, Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984) (although Internal Revenue summons, as modified, was enforced against Hong Kong corporation, court denied motion for order compelling corporation to waive its Hong Kong secrecy rights); *Stern v. Commissioner*, 74 T.C. 1075 (1980) (taxpayer compelled to consent to Bahamian and Cayman banks to disclose to the Commissioner of Internal Revenue documents described in subpoenas, for which taxpayer sought reimbursement for cost of compliance).

For a discussion of the fifth amendment privilege and the two different types of immunity, see C. McCORMICK, *McCORMICK ON EVIDENCE* § 143, at 354-60 (3d ed. 1984). See also *Abramovsky*, *supra* note 30, at 495-502 (defendants' fifth amendment rights and repercussions caused by application of Bank Secrecy Act); *infra* note 67 (discussion of fifth amendment argument in compelled waiver cases).

fidential information concerning the defendant's account.⁵⁸ Although this action forces a defendant to choose between either signing the directive and releasing his potentially incriminating records, or being found in civil contempt in the United States for failure to comply with a court order,⁵⁹ United States courts faced with a compelled waiver claim did not address the conflict of laws problem.⁶⁰ In so doing, the courts involved have failed to consider the effect that United States-ordered consent would have on the foreign banks' view of their obligation of confidentiality.⁶¹

58. See, e.g., *United States v. Ghidoni*, 732 F.2d 814, 816 (11th Cir.), cert. denied, 105 S. Ct. 328 (1984).

59. See *id.* Though defendants have argued that the choice lies between contempt and self-incrimination in violation of the fifth amendment, the majority of United States courts that have confronted this issue have found that the consent directive does not amount to a testimonial act. See *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*); *United States v. Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), cert. denied, 105 S. Ct. 328 (1984); *United States v. Browne*, 624 F. Supp. 245 (N.D.N.Y. 1985); *In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum*, 611 F. Supp. 16 (S.D. Fla. 1985); *In re Grand Jury Investigation 82-1691*, slip op. (N.D. Ill. Dec. 15, 1983); *United States v. Dial*, 83 Cr. 271, slip op. (N.D. Ill. July 28, 1983), *aff'd*, 757 F.2d 163 (7th Cir.), cert. denied, 106 S. Ct. 116 (1985).

60. See *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*), *rev'g In re Grand Jury Investigation, Doe*, 599 F. Supp. 746 (S.D. Tex. 1984); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), cert. denied, 105 S. Ct. 328 (1984); *In re Grand Jury Investigation 82-1691* (N.D. Ill. Dec. 15, 1983); *United States v. Dial*, No. 83 Cr. 271, slip op. (N.D. Ill. July 28, 1983), *aff'd*, 757 F.2d 163 (7th Cir.), cert. denied, 106 S. Ct. 116 (1985); see also *SEC v. Musella*, 83 Civ. 342 (order) (S.D.N.Y. Sept. 15, 1983); *Traboulsi v. Shearson Loeb Rhoades, Inc.*, 80 Civ. 7088 (WK) (order) (S.D.N.Y. Oct. 1, 1981).

61. See, e.g., *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*), *rev'g In re Grand Jury Investigation, Doe*, 599 F. Supp. 746 (S.D. Tex. 1984); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), cert. denied, 105 S. Ct. 328 (1984); *In re Grand Jury Investigation 82-1691* (N.D. Ill. Dec. 15, 1983); *United States v. Dial*, No. 83 Cr. 271, slip op. (N.D. Ill. July 28, 1983), *aff'd*, 757 F.2d 163 (7th Cir.), cert. denied, 106 S. Ct. 116 (1985); see also *SEC v. Musella*, 83 Civ. 342 (order) (S.D.N.Y. Sept. 15, 1983); *Traboulsi v. Shearson Loeb Rhoades, Inc.*, 80 Civ. 7088 (WK) (order) (S.D.N.Y. Oct. 1, 1981); *Pasztor, U.S. Employs New Method to Overcome Bank Secrecy Laws in Cayman Islands*, *Wall St. J.*, Dec. 10, 1984, at 58, col. 1, asserting that "the tactic gets the foreign bank out of the difficult position" of facing prosecution for complying with an investigatory request. *Id.* at col. 2. *But see, e.g., United States v. Davis*, 767 F.2d 1025, 1033-35 (2d Cir. 1985) (discussion of need to balance interests); *United States v. Quigg*, Cr. No. 80-41-1, at 3 (D. Vt.) (opinion and order), *aff'd*, 679 F.2d 874 (2d Cir. 1981) (unpublished opinion) (considering comity). Paikin notes that

A review of compelled waiver cases emphasizes the conflict that exists between United States and Cayman policies.⁶² The Cayman refusal to recognize the waiver has increased tension between the two sovereigns.⁶³ This tension forces the United States to resort to unilateral methods and postpones the opportunity for cooperative efforts against international tax evasion.⁶⁴

U.S. courts may rationalize their decisions in transnational cases by observing that the party concerned is not being required to disclose more than would be the case either if both the party and the information concerned were entirely within the United States or if the foreign state itself had explicit power to penetrate the wall of secrecy for its own investigative purposes. Such observations miss the point, however, that the burden for the information holder is not the production of evidence *per se* but the consequences that flow from the disclosure of evidence in violation of a foreign state's laws.

Paikin, *supra* note 12, at 268; see also Newcomb, *Policing Trans-Border Fraud—A View from the Bridge*, 11 *BROOKLYN J. INT'L L.* 559, 574 (1985).

62. See *infra* notes 70-131 and accompanying text.

63. See *supra* note 31 (discussion of affidavit submitted in the Cayman Islands proceeding, Attorney General v. Bank of Nova Scotia, after *In re Grand Jury Investigation, Doe*, was reversed by the United States Court of Appeals for the Fifth Circuit).

64. See Note, *supra* note 28, at 1005 n.2. "Ideally, the solution to the regulation of the multinational [enterprise] is through bi- or multi-governmental agreements setting forth general guidelines. . . . However, such treaties seem far off. In the meantime, the United States is forced to act unilaterally." *Id.* (citations omitted). A similar analysis has been made with respect to "blocking" statutes in civil litigation. See Atwood, *supra* note 35, at 329, 332-33. "As national economies and legal systems are compelled towards greater interdependency, . . . [one sees a] waning of judicial assistance and a proliferation of blocking statutes . . . [which] is likely to accelerate as U.S. courts become increasingly impatient with sometimes cumbersome procedures under the Hague Evidence Convention, refusing to defer to those procedures [before] ordering American-style discovery under the Federal Rules of Civil Procedure." *Id.* (citations omitted).

United States efforts to negotiate mutual assistance treaties with tax havens have not yet been successful. SENATE STUDY, *supra* note 1, at 13; Weiland, *The Use of Off-shore Institutions to Facilitate Criminal Activity in the United States*, 16 *N.Y.U. J. INT'L L. & POL.* 1115, 1130 (1984). The tax haven's intransigent position may be giving way to a more cooperative policy. See Ingersoll & Pasztor, *U.S. Seeks Treaties Against Money Crimes*, *Wall St. J.*, Oct. 31, 1985, at 37, col. 1 (discussing proposed mutual assistance treaties that may be broader in scope than present compromises that cover organized crime and narcotics trafficking). However, it is uncertain whether the proposed treaty would cover tax evasion or the compelled waiver. See *infra* notes 223-25 and accompanying text (discussing need to depart from previous treaty models in a compelled waiver situation).

II. THE DEVELOPMENT OF COMPELLED WAIVER CASE LAW

According to United States investigators and one commentator, use of the compelled waiver circumvents the choice of law problem posed by the use of a cross-border subpoena.⁶⁵ Because the waiver is executed by a United States national who controls the documents, it does not threaten the non-party bank's liability under bank secrecy laws.⁶⁶ However, rather than solving this substantive conflict of laws problem, United States and Cayman courts have perpetuated the conflict by applying their respective domestic law analyses in compelled waiver cases: United States courts have addressed only the issue of whether compelling consent violates a defendant's fifth amendment rights under the United States Constitution.⁶⁷

65. See Paikin, *supra* note 12, at 249; Pasztor, *U.S. Employs New Method to Overcome Bank Secrecy Laws in Cayman Islands*, Wall St. J., Dec. 10, 1984, at 58, col. 1 (asserting that waiver helps foreign banks avoid prosecution for releasing confidential information).

66. See *supra* note 53 and accompanying text; Paikin, *supra* note 12, at 249 n.71, 269.

67. U.S. CONST. amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." *Id.* The United States Supreme Court has held that the fifth amendment privilege applies only to compelled testimonial self-incrimination. See *Fisher v. United States*, 425 U.S. 391, 410-11 (1976). The Court found that, while this privilege attaches to the act of producing certain documents, the act of producing documents in response to a subpoena does not itself involve testimonial self-incrimination. *Id.* The Court in *Fisher* held that compliance with a summons directing the taxpayer to produce accountant's documents did not involve testimonial communication. *Id.* at 402, 410-11. The Court reasoned that the defendant's possession or control was a "foregone conclusion." *Id.* at 411. The Court in *United States v. Doe*, 465 U.S. 605 (1984), applied *Fisher* to the contents of a sole proprietor's business records and found that although these documents were not privileged, the act of production could not be compelled under the fifth amendment.

Fisher has been followed in most compelled waiver cases. See, e.g., *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*); *United States v. Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984); *In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum*, 611 F. Supp. 16 (S.D. Fla. 1985); *United States v. Quigg*, Cr. No. 80-41-1 (D. Vt.) (opinion and order), *aff'd*, 679 F.2d 874 (2d Cir. 1981) (unpublished opinion).

Some defendants have argued that the fourth amendment of the United States Constitution is implicated by the compelled waiver. See *United States v. Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985); *In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum*, 611 F. Supp. 16 (S.D. Fla. 1985). The pertinent part of the fourth amendment reads: "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; see also *United States v. Dionisio*, 410 U.S. 1, 13 (1972) (subpoena com-

The Cayman Islands, on the other hand, have refused to recognize the consent to waive bank secrecy because it was given under compulsion.⁶⁸ This intransigence cannot be explained or excused simply by the Cayman desire to thwart United States intrusion. The conflict of national policies reflects fundamental differences about taxation as a policy and tax evasion as a crime.⁶⁹

A. *Use of the Compelled Waiver: United States v. Ghidoni and Its Progeny*

Use of the compelled waiver was first reported⁷⁰ in a 1981 case, *United States v. Quigg*.⁷¹ In *Quigg*, a federal district court issued a subpoena in connection with a criminal tax evasion investigation ordering a Canadian bank doing business in New York to produce records located in the Bahamas.⁷² Like the Cayman secrecy statute, the Bahamian secrecy law only prohibited disclosure without the customer's consent.⁷³ The court used this loophole to order *Quigg's* consent to disclosure of the records.⁷⁴

The court was reluctant to compel a disclosure that would violate Bahamian law.⁷⁵ Nevertheless, the court reasoned that compelling the customer's consent would not violate the principle of sovereignty.⁷⁶ Rather, the court characterized the act as merely "remov[ing] an obstacle" to the document production.⁷⁷ One commentator has asserted that the court's holding "represented an attempt to adjust the effect of another state's

PELLING person to give voice exemplar for purposes of identification was not seizure within the meaning of the fourth amendment); *Abramovsky*, *supra* note 30, at 479-95 (defendants' fourth amendment rights and repercussions of application of Bank Secrecy Act).

68. *See infra* notes 92-101 and accompanying text.

69. *See supra* notes 30-33, 41-43 and accompanying text (discussing conflict of laws underlying tax evasion).

70. The *Traboulsi* and *Karaman* decisions, *see supra* note 56, were not reported.

71. Cr. 80-41-1 (D. Vt.) (opinion and order), *aff'd*, 679 F.2d 874 (2d Cir. 1981) (unpublished opinion).

72. *Id.* at 1-2.

73. *Id.* at 2-3.

74. *Id.* at 2-3, 9.

75. *Id.* at 3.

76. *See id.* (court discusses "comity and international law").

77. *Id.* at 5.

policies,"⁷⁸ and warned that a failure to consider the effect of the waiver on the bank's obligation of confidentiality might disrupt international relations.⁷⁹

Since *Quigg*, neither United States nor foreign courts have addressed this conflict of laws problem.⁸⁰ In *United States v. Ghidoni*,⁸¹ for example, both the majority and the dissenting opinions discussed the question of self-incrimination, satisfied that the compelled waiver presented only that legal issue.⁸² The court failed to acknowledge that the compulsion of a waiver was an attempt to undermine foreign bank secrecy, and that this waiver sought records in connection with an act not recognized as criminal in most secrecy jurisdictions.⁸³

Ghidoni involved a Florida businessman who diverted part of his income to accounts in the Bank of Nova Scotia's Cayman Islands branch and never reported the existence of the accounts on his tax returns.⁸⁴ When the Internal Revenue Ser-

78. Paikin, *supra* note 12, at 249. Conversely, bank secrecy laws may be attempts to adjust the effect of United States policies, particularly the United States' interest in tax collection. See REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 reporters' note 4 (Tent. Draft No. 7 1986). Certain nondisclosure laws attempt to take advantage of the fact that a United States court will excuse compliance because of "foreign government compulsion." *Id.*; see *infra* note 147 (definition of foreign government, or sovereign, compulsion).

79. See Paikin, *supra* note 12, at 249, 269. The author asserts that "[t]he approach taken in *Quigg* may be attractive to courts because it avoids the consequences of conflicts of laws . . ." *Id.* However, "[t]he foreign state could react to the challenge by providing that no consent given in response to a court order could operate to release a bank from its obligations of confidentiality. Thus, this approach may simply postpone confrontations with the third party and further aggravate tensions between the states." *Id.* at 269.

80. See *supra* note 60 and accompanying text.

81. 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984).

82. See *Ghidoni*, 732 F.2d at 816-19 (Anderson, J.), 819-21 (Clark, J., dissenting). At least the *Quigg* court acknowledged the conflict. See *supra* text accompanying notes 75-76. The district court opinion in *Ghidoni* cited *Quigg* with approval, *Ghidoni*, TCR 83-07016, at 10-11 (N.D. Fla. Dec. 30, 1983), yet ignored its brief discussion of conflict of laws. See *supra* notes 76-77 and accompanying text (*Quigg's* holding that the compelled waiver would alleviate any conflict of laws problems). The dissenting opinion in *Ghidoni* asserted that the compelled consent was incriminating testimony "in that it furnishes a link in the chain leading to procurement of the documents that the government intends to use to secure Ghidoni's conviction." 732 F.2d at 821 (citations omitted).

83. See *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984).

84. *Ghidoni*, 732 F.2d at 816; *cf.* *United States v. Ghidoni*, TCR 83-07016, at 1 (N.D. Fla. Dec. 30, 1983) (order) (Ghidoni charged with "willfully and knowingly ma[king] and subscrib[ing] false . . . income tax returns").

vice obtained records of this secret account, the United States Government issued a subpoena to the Bank of Nova Scotia's branch in Miami, Florida, commanding production of bank records relating to Ghidoni's account.⁸⁵

Upon receiving the subpoena, the bank suggested that the problem of compelling production in direct violation of Cayman's secrecy law could be avoided if the defendant executed a waiver consenting to disclosure.⁸⁶ Accordingly, the United States Government obtained a district court order compelling Ghidoni to sign the consent directive.⁸⁷ When he refused, claiming that the act violated the self-incrimination clause of the fifth amendment of the United States Constitution,⁸⁸ the district court held him in civil contempt.⁸⁹ The United States Court of Appeals for the Eleventh Circuit affirmed.⁹⁰ Since *Ghidoni*, other United States courts have adopted the compelled waiver technique and have followed *Ghidoni's* fifth amendment analysis.⁹¹

85. *Ghidoni*, 732 F.2d at 816. Although in *Ghidoni* the court served the subpoena on the United States branch of the bank, in some cases the United States court has served a subpoena directly on the offshore bank. See, e.g., *United States v. Davis*, 767 F.2d 1025, 1032 (2d Cir. 1985) (Cayman Islands branch of Bank of Nova Scotia).

According to United States courts, bank records must be produced if subpoenaed. Such records are not protected by any constitutional privilege, because they are maintained by a third party and are not private or testimonial in nature. *United States v. Miller*, 425 U.S. 435 (1976); *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974). *But cf. infra* note 231 (United States financial privacy legislation). This legislation was enacted in reaction to the limited guarantee of privacy under *Miller*. H.R. REP. No. 1383, 95th Cong., 1st Sess. 34, reprinted in 1978 U.S. CODE CONC. & AD. NEWS 9273, 9306.

86. *Ghidoni*, 732 F.2d at 816. Prior to this suggestion, both *Ghidoni* and the Bank of Nova Scotia moved to quash the subpoenas. *Ghidoni*, TCR 83-07016, at 2 (order). The United States District Court for the Northern District of Florida denied *Ghidoni's* motion. *Id.* at 2, 12.

87. *Ghidoni*, 732 F.2d at 816.

88. *See id.*

89. *Id.* On December 30, 1983, the district court ordered *Ghidoni* to appear at the office of the United States Attorney to execute the consent directive. *Ghidoni*, TCR 83-07016, at 12 (order). *Ghidoni* did not sign the consent directive until November 6, 1984. See *Direction of Lawrence L. Ghidoni* (attached as appendix to district court opinion) (available at the *Fordham International Law Journal*).

90. *Ghidoni*, 732 F.2d at 816, 819.

91. *See United States v. Doe*, 775 F.2d 300 (5th Cir. 1985), *rev'g* *In re Grand Jury Investigation, Doe*, 599 F. Supp. 746 (S.D. Tex. 1984); *United States v. Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985) (court rejected arguments that subpoena was abuse of grand jury process and that compelling consent constituted unlawful seizure under fourth amendment); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *United States v. Browne*, 624 F. Supp. 245 (N.D.N.Y. 1985) (reasoning that consent form

B. *Cayman Opposition to Compelled Waiver: In re An Application by ABC, Ltd. Under the Confidential Relations (Preservation) (Amendment) Act, 1979*

The Caymans' reaction to United States use of the compelled waiver emphasizes the international ramifications of coercive domestic procedures. Within four months of the Eleventh Circuit decision in *Ghidoni*, the Grand Court of the Cayman Islands issued an advisory opinion condemning a similar result under a hypothetical set of facts.⁹² In *In re An Application by ABC, Ltd. under the Confidential Relationships (Preservation) (Amendment) Law, 1979*⁹³ (*ABC Judgment*), a Cayman bank possessing confidential information feared extensive use of the compelled waiver in United States judicial proceedings. The bank wished to "clarify its position" on the use of compelled waivers.⁹⁴ The court held that when a foreign court orders a defendant to sign a consent directive, and when that court could impose penal sanctions for failure to sign, Cayman law will not recognize the "consent."⁹⁵

The Grand Court reasoned that "consent given under compulsion is merely submission to force."⁹⁶ However, this analysis interpreted "consent" only under Cayman law,⁹⁷ and,

was broadly worded and did not concede defendant's control over the records); In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum, 611 F. Supp. 16 (S.D. Fla. 1985) (compelled waiver calling for records of investment corporation was only means of establishing authenticity of records in tax and narcotics investigation). *But see* United States v. Zaval, No. CR-84-019-2, at 2 (E.D. Wash. Sept. 17, 1984) (order granting plaintiff's amended motion regarding Panamanian bank records) (in declining to use the waiver, the court reasoned that by signing a consent directive, defendants tacitly conceded the records' existence and their possession or control over them).

Ghidoni also attracted more notoriety from the United States press than had other compelled waiver cases. *See, e.g.,* Ricks, *Tax Evaders Find Foreign Banks Aren't Havens of Secrecy Anymore*, Wall St. J., Aug. 14, 1985, at 25, col. 4; Pasztor, *U.S. Employs New Method to Overcome Bank Secrecy Laws in Cayman Islands*, Wall St. J., Dec. 10, 1984, at 58, col. 1. The press also warned against the use of secrecy jurisdictions as tax havens. Taft, *Non-Treaty Tax Havens*, N.Y.L.J., July 18, 1984, at 1, col. 1.

92. Newcomb, *supra* note 53, at 15-16 (discussing advisory opinion).

93. Judgment of July 24, 1984, Grand Court, Cayman Islands, July 24, 1984 (Cause No. 269) [hereinafter cited as *ABC Judgment*].

94. *Id.* at 2.

95. *Id.* at 1, 4.

96. *Id.* at 4.

97. *Id.* at 2. The court admitted that it "is only concerned with the position in [its] jurisdiction of such a consent directive compelled by a foreign court." *Id.* at 3.

Both United States and British common law indicate that the Cayman Grand

like the United States courts' fifth amendment analysis, it stressed only what that court viewed as the threshold issue under domestic law.⁹⁸ Furthermore, the Grand Court disregarded the United States interest in enforcing its tax laws.⁹⁹ This disregard for United States interests may be attributed to the conflict of laws rule that one nation will not assist the other in enforcement of its revenue laws.¹⁰⁰ It may also be justified by the exception to the comity doctrine that one nation need not enforce another nation's laws if doing so would undermine its own domestic interests.¹⁰¹ It cannot, however, be justified

Court's definition of consent is neither the only, nor even the predominant, interpretation of consent. Under British common law, the term has no uniform definition. *See, e.g.*, *Whittaker v. Campbell*, [1983] 3 All. E.R. 582, 585 (Q.B. 1983) (consent of automobile owner to another's use of his automobile not vitiated by fraudulent misrepresentation); *Barton v. Armstrong*, 1976 A.C. 104, 121 (P.C. 1973) ("absence of choice [regarding contract entered into by fraud] . . . does not negate consent in law. . .") (Lord Wilberforce and Lord Simon, dissenting); *Cumming v. Ince*, 11 Q.B. 112, 116 Eng. Rep. 418 (K.B. 1847) (plaintiff's incompetency precluded her acting from free will and hence contract was voidable for duress). The issue in these cases was not whether the consent was produced under compulsion but whether that compulsion is lawful under the circumstances. *See Cumming v. Ince*, 11 Q.B. 112, 121, 116 Eng. Rep. 418, 421 (K.B. 1847); *see also Biffin v. Bignell*, 7 H. & N. 877, 879-80, 158 Eng. Rep. 725, 726 (Ex. 1862); *Smith v. Monteith*, 13 M. & W. 427, 437, 153 Eng. Rep. 178, 182 (Ex. 1844).

Under the United States common law of contracts, a party's consent to a contract is vitiated if the party consented to the agreement while under duress. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 9-2, at 262 (2d ed. 1977); *RESTATEMENT (SECOND) OF CONTRACTS* § 492 (1979). Duress is defined as "any wrongful act or threat which overcomes the free will of a party." J. CALAMARI & J. PERILLO, *supra*, § 9-2, at 262. An act or threat is wrongful if it is "an abuse of the powers of the party making the threat; that is, any threat the purpose of which was not to achieve the end for which the right, power, or privilege was given." *Id.* § 9-3, at 265 (quoting *Dalzell, Duress by Economic Pressure II*, 20 N.C.L. REV. 341, 364 (1942)).

The threat of civil imprisonment, such as civil contempt, cannot usually justify a finding of duress: "[c]oercive it may be, but it is not wrongful." *Id.* § 9-4, at 265; *see, e.g.*, *Harrell v. Allen*, 439 F.2d 1005 (5th Cir. 1971); *Citibank, N.A. v. London*, 526 F. Supp. 793, 804 (S.D. Tex. 1981); *Jack Winter, Inc. v. Koratron Co., Inc.*, 329 F. Supp. 211, 213 (N.D. Cal. 1971).

Similarly, under United States tort law, duress, in the form of a direct, immediate threat, may invalidate the consent it produces. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 18, at 121 (5th ed. 1984). However, if the threat is merely one of future arrest, courts do not vitiate the consent. *Id.*

98. *ABC Judgment*, *supra* note 93, at 2, 3. The Grand Court stressed its concern with "the position in this [Cayman Islands] jurisdiction." *Id.*

99. *See generally ABC Judgment*, *supra* note 93.

100. *See supra* note 41 and accompanying text.

101. *See supra* note 42 and accompanying text.

by a semantic debate over the meaning of the word "consent."

C. *United States Case Law After the ABC Judgment*

*United States v. Davis*¹⁰² is the most important case since the *ABC Judgment* to use the compelled waiver in an extraterritorial investigation.¹⁰³ *Davis* does not respond to the *ABC Judgment*, nor does it acknowledge the Cayman Islands' unfavorable reaction to United States use of the device.¹⁰⁴ Nevertheless, the case represents the first attempt by a United States federal court to "internationalize" that use, by applying a balancing of interests approach¹⁰⁵ to analyze the propriety of the compelled

102. 767 F.2d 1025 (2d Cir. 1985).

103. See *infra* notes 105-06 and accompanying text.

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

105. *Davis*, 767 F.2d at 1033-35 (balancing competing interests under the Second Restatement of Foreign Relations Law). The term "balancing of interests" may have originated with the "governmental interest" analysis proposed by Professor Brainerd Currie. See generally Currie, *Married Woman's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); R. CRAMPTON, D. CURRIE, & H. KAY, *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* 216-19 (3d ed. 1981). Today, however,

[T]he term 'interest balancing' suggests a decision-making process in which the court identifies the interests of the countries having contact with the situation to be adjudicated, weighs each country's interest in having its law applied against that of the others, and makes the choice of law decision according to the turn of the scales.

Maier, *supra* note 13, at 588-89; see E. SCOLAS & P. HAY, *supra* note 22, at 17. "[W]hen asked to apply the law of another forum, a court should first inquire into the policies expressed in the respective laws and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of these policies." *Id.*; see REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 (Tent. Draft No. 7 1986).

[T]he court or agency should take into account not merely a general policy of the foreign state to resist "intrusion upon its sovereign interests," or to prefer its own system of litigation, but the extent to which compliance with an order to produce the requested information would affect important substantive policies or interests of the foreign state.

Id. § 437 comment c; see also *id.* § 403 reporters' note 6 (determination of competing state interests).

The Restatements of Foreign Relations Law and Conflict of Laws embody a variety of "balancing" approaches. See, e.g., REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 (Tent. Draft No. 7 1986) (foreign nondisclosure laws and sovereign compulsion balancing test); *id.* § 403 ("reasonableness" balancing approach); SECOND RESTATEMENT, CONFLICTS, *supra* note 28, § 6 (choice of law principles); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) [hereinafter cited as SECOND RESTATEMENT, FOREIGN RELATIONS LAW] (limits on exercise of enforcement jurisdiction balancing test).

Interest balancing, as currently employed by United States courts, has not "ef-

waiver.¹⁰⁶

Davis involved a series of crimes that culminated in the "laundering"¹⁰⁷ of several million United States dollars through offshore accounts in the Cayman Islands.¹⁰⁸ *Davis* was a Senior Vice President of Frigitemp, a subcontractor for commercial and naval shipbuilding projects.¹⁰⁹ During the 1970's, Frigitemp paid kickbacks¹¹⁰ to executives of General Dynamics Corporation in return for the award of subcontracts worth U.S. \$44 million.¹¹¹ *Davis* received money for the kickbacks by submitting to Frigitemp a series of fictitious contracts in the name of sham Cayman Islands corporations.¹¹² He then laundered this kickback fund through an elaborate network of offshore bank accounts, including one with the Bank of Nova Scotia

factively coordinat[ed] the relevant substantive policies of nation-states." Maier, *supra* note 13, at 590. The blame for this lies in the balancing procedure of the Restatement (Second) of the Foreign Relations Law of the United States (Second Restatement), which has been accused of favoring United States interests. See *infra* notes 175-82 and accompanying text. But see Currie, *supra*, at 261. "The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law." *Id.*

Professor Maier advocates diplomatic resolution of conflicting claims of authority to forbid or require conduct within a nation's borders, rather than judicial decisions in which a forum court balances its own interest against the competing interests of other states. Maier, *supra* note 13, at 581. "In the diplomatic forum, the label 'balancing of interests' merely characterizes the ordinary international law formation process of demand, response and eventual accommodation in the light of reciprocal national needs and tolerances. The rules of international law describe community expectations that result from this process." Maier, *supra* note 13, at 584 (footnotes omitted).

106. *Davis*, 767 F.2d at 1033-35; see *infra* notes 117-20, 125-26 and accompanying text (discussing *Davis*' use of the Second Restatement balancing test).

107. Money laundering is "the process by which one conceals the existence, illegal source, or illegal application of income and then disguises the source of that income to make it appear legitimate." *Money Laundering Legislation: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 1 (1985) (statement of Jay B. Stephens, Associate Deputy United States Attorney General).

108. *Davis*, 767 F.2d at 1027.

109. *Id.*

110. *Davis*, 767 F.2d at 1027. "Kickback" is defined as the "[p]ayment back of a portion of the purchase price to buyer or public official by seller to induce purchase or to influence improperly future purchases or leases." BLACK'S LAW DICTIONARY 781 (5th ed. 1979). These payments are not tax deductible as ordinary and necessary business expenses. See I.R.C. § 162(c) (1986). A federal statute makes kickbacks a criminal offense in connection with public construction projects financed wholly or partially by the United States Government. See 18 U.S.C. § 874 (1982).

111. *Davis*, 767 F.2d at 1027.

112. *Id.*

(BNS) in the Cayman Islands.¹¹³ In carrying out the Frigitemp conspiracy, Davis secretly diverted to his personal BNS account nearly U.S. \$2.5 million.¹¹⁴

The United States Court of Appeals for the Second Circuit affirmed the district court order requiring Davis to execute a waiver of his bank secrecy rights.¹¹⁵ In so doing, the court departed from the analysis used in prior waiver cases.¹¹⁶ In *Davis*, the court attempted to weigh the interests represented in each jurisdiction's laws.¹¹⁷ The court used a balancing test set forth in section 40 of the Restatement (Second) of Foreign Relations Law of the United States¹¹⁸ (Second Restatement), a test that evaluates the propriety of a cross-border subpoena that conflicts with foreign law.¹¹⁹ The court concluded that the

113. *Id.*

114. *Id.*

115. *Id.* at 1041.

116. See *supra* notes 56, 57, 70, 80, 91 and accompanying text (discussing waiver cases before *Davis*).

117. See *Davis*, 767 F.2d at 1033-35. The *Davis* court recognized that Davis' objection may not be so easily dismissed. Over the last thirty years, courts have imposed certain limitations on the power of a federal court to order a bank to produce records located in a state which proscribes their disclosure. These limitations have been engendered both by a concern for the hardship imposed on the subject of the order and a respect for the national interests of the state where the records are located.

Id. at 1033 (emphasis added).

118. See *Davis*, 767 F.2d at 1033-35. The balancing test derives from SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 40:

§ 40. *Limitations on Exercise of Enforcement Jurisdiction*

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- a) vital national interests of each of the states,
- b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- 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.

Id. No principle of international law, however, requires states to consider these factors. The rule "seems to be more of a 'wish' of what international law should be, or a suggestion of self-restraint." Onkelinx, *supra* note 13, at 501.

119. See *infra* note 175-77 (subpoena cases in which the United States court used the Second Restatement's section 40 balancing test).

United States interest in the effective enforcement of its criminal laws outweighed Cayman's interest in preserving the privacy of its banking customers.¹²⁰

Insofar as the court considered Cayman's interests, *Davis* is an improvement over its predecessors.¹²¹ The *Davis* holding, however, does not resolve the international conflict of laws issue in recent compelled waiver cases. In contrast to *Ghidoni* and its progeny, *Davis* involved crimes that both sovereigns shared an interest in deterring.¹²² The decision does not address the substantive differences between one nation's attempt to enforce its tax laws and another's refusal to recognize those laws.¹²³ Additionally, it does not address the problem of "consent" raised by the *ABC Judgment*.¹²⁴ Finally, *Davis* relied on the Second Restatement balancing test,¹²⁵ a test which has failed to give competing national interests, such as criminal law enforcement and bank secrecy, more than a superficial review.¹²⁶ *Davis*, then, does not represent a significant advance

120. See *Davis*, 767 F.2d at 1033-36. In reaching this conclusion, the *Davis* court examined several factors, including the content of the subpoenaed reach, because *Davis* was required to disclose the documents under United States law, *id.* at 1035, and the Cayman policy against using secrecy laws "to encourage or foster criminal activities." *Id.* In addition, the court emphasized that the Cayman Attorney General had assisted the United States court in obtaining disclosure authorization from the Cayman court. *Id.* The Second Circuit considered this fact significant because of its prior opinion in *United States v. First Nat'l City Bank*, 396 F.2d 897, 904 (2d Cir. 1968) ("when foreign governments . . . consider . . . their vital national interests threatened, they have not hesitated to make known their objections"). *Id.*

121. See Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW 487, 492-93 (1985) (asserting the importance of deferring to foreign governments under the act of state doctrine). When the *Davis* court upheld the propriety of the district court order, it noted that "such an order is an extraordinary remedy which may be used only in very limited circumstances—and only after other means of obtaining the records have been explored." 767 F.2d at 1039.

122. See *Davis*, 767 F.2d at 1027-28. One factor distinguishing *Davis* from other waiver cases is that *Davis* was far more complex. *Davis* raised several legal issues, and the complaint listed seventeen counts that included conspiracy, fraud, and racketeering. *Id.* These acts are illegal in both the United States and the Cayman Islands. Thus, in contrast to a case involving tax evasion, which the Cayman Islands does not recognize as a criminal act, *Davis* involved behavior that both nations have an interest in deterring. See *supra* notes 30, 41 and accompanying text (discussion of revenue-raising exception and United States law). This common interest may explain why the court applied an "international" analysis.

123. See *Davis*, 767 F.2d at 1025-33; *supra* note 41 and accompanying text.

124. See *Davis*, 767 F.2d at 1033-35 (discussing compelled consent).

125. See *supra* note 118 and accompanying text.

126. See *Davis*, 767 F.2d at 1033-35; see also Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1331-33 (1983); Note, *supra* note

over *Ghidoni*.

Although the Second Circuit did not discuss the *ABC Judgment*, the *Davis* holding suggests that the Cayman court would recognize the compelled waiver if the United States investigation involved an act that also violated Cayman law. Therefore, *Davis* may imply that the Cayman Islands will only object when a United States court uses a compelled waiver in a tax evasion case.¹²⁷

Recently, a United States court faced with a compelled waiver claim retreated from the advances made in *Davis* and applied United States process extraterritorially.¹²⁸ This position on the part of United States courts may only encourage the Caymans to continue its own purely domestic legal analysis.¹²⁹ In order to eliminate domestic treatment of an international issue, both nations must adopt a broader view. Nevertheless, as long as bank secrecy laws continue to thwart United States investigations to benefit the "tax haven trade," criminals will be able to avoid prosecution in the United States.¹³⁰ The analysis of the cross-border subpoena, another domestic investigatory device, illustrates that "internationalizing" the conflict may not change the result in United States courts.¹³¹

III. EVALUATING THE PROPRIETY OF EXTRATERRITORIAL INVESTIGATIVE METHODS: THE CROSS-BORDER SUBPOENA

The conflicts that have arisen in a compelled waiver situa-

34, at 892-94, 899-902; cf. *Bank of Nova Scotia I*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); *United States v. Vetco Inc.*, 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *United States v. Field*, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

127. The vehement objection by the Cayman Islands after *Ghidoni*, a tax investigation, coupled with the lack of response after *Davis*, in which the United States investigated crimes that are arguably of "universal interest," see SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 34 reporters' note 2, suggests that the conflict is limited to tax evasion investigations.

128. See *United States v. Doe*, 775 F.2d 300 (5th Cir. 1985) (unpublished opinion available at the *Fordham International Law Journal*), *rev'g In re Grand Jury Investigation, Doe*, 599 F. Supp. 746 (S.D. Tex. 1984).

129. See *Crime and Secrecy Hearings*, *supra* note 12, at 217-18; Maier, *supra* note 13, at 592.

130. See Olsen, *supra* note 12, at 1011; see also Maier, *supra* note 13, at 592.

131. See *infra* notes 164-211 and accompanying text (discussion of balancing interests under the Second and Revised Restatements of Foreign Relations Law).

tion also arise when a court uses a cross-border subpoena, because in a cross-border subpoena case, the foreign state perceives the extraterritorial assertion of United States jurisdiction as a threat to its domestic policies.¹³² *Davis*' application of the Second Restatement balancing test, one of the cross-border subpoena analyses, to a compelled waiver case has raised the possibility that other cross-border subpoena tests could also be applied to a compelled waiver situation.¹³³ The methods used in United States federal courts to evaluate the propriety of a cross-border subpoena, like the *Davis* analysis, have failed to resolve the policy conflicts, despite the courts' attempts to consider the other state's interests.¹³⁴

United States courts have used three methods to evaluate a cross-border subpoena challenged by its recipient. The first examines whether the target of the subpoena has exercised good faith efforts to comply with the subpoena.¹³⁵ Another approach follows the 1960's interpretation of international comity, by completely deferring to foreign law.¹³⁶ A third method has employed the "balancing tests" of the United States Restatements of Foreign Relations Law, sections 40 and 437.¹³⁷

While all three methods have advantages, they do not address the policies underlying bank secrecy law and United States criminal law.¹³⁸ Therefore, these methods are ineffective in analyzing the propriety of either cross-border subpoenas or compelled waivers.

132. See 2 J. ATWOOD & K. BREWSTER, *supra* note 35, at § 15.06, at 221, § 15.10, at 227-28.

133. See *Davis*, 767 F.2d at 1033-36 (application of Second Restatement balancing test to compelled waiver).

134. See, e.g., Rosenthal, *supra* note 121, at 488-92 (discussing Second Restatement's failure to state international law); Note, *supra* note 126, at 1327-39 (discussing confusion generated by comity and balancing tests over the standard to be applied when discovery and foreign law conflict and whether the issue of sanctions for non-compliance with production orders should be treated separately from that substantive conflict); Note, *supra* note 34, at 880, 887-902 (discussing the inadequacy of good faith and comity, and the failure of the Second Restatement to address the conflicts between United States and foreign law); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1323-25 (1985) (discussing failure of balancing tests to assure predictability and preserve comity among nations).

135. See *infra* notes 139-57 and accompanying text.

136. See *infra* notes 158-63 and accompanying text.

137. See *infra* notes 164-204 and accompanying text.

138. See *infra* notes 205-11 and accompanying text.

A. Supreme Court Precedent and Good Faith

The good faith test is not a practical approach to determining the propriety of a compelled waiver. Introduced by the United States Supreme Court in 1958, this test considers whether the recipient of a subpoena exercised good faith efforts to comply with that subpoena.¹³⁹ As originally formulated, good faith efforts became relevant in the determination of sanctions for noncompliance.¹⁴⁰ The good faith test is ineffective because it ultimately offers little guidance to courts on the issue of whether the domestic device should be enforced against a foreign bank.¹⁴¹

In 1958, the United States Supreme Court, in *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*,¹⁴² articulated the good faith standard for resolving conflicts between the enforcement of a cross-border subpoena and foreign nondisclosure laws.¹⁴³ The Court analyzed the conflict

139. See *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 205, 208-09 (1958).

140. See *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958). "Rule 37 [of the Federal Rules of Civil Procedure, which imposes sanctions for noncompliance with discovery orders] should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* (footnote omitted); see FED. R. CIV. P. 37(b)(2)(C). "If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make . . . [a]n order . . . dismissing the action." *Id.*; see also Olsen, *supra* note 12, at 1022-24.

141. Good faith is only relevant to the determination of sanctions for noncompliance, which is a procedural issue. See *Société Internationale*, 357 U.S. at 208 (discussing the district court's power to impose sanctions under Rule 37(b)); Olsen, *supra* note 12, at 1024; *infra* note 145.

142. 357 U.S. 197 (1958). In *Société Internationale*, a Swiss holding company sued to recover assets seized by the United States during World War II under the Trading with the Enemy Act of 1917, 40 Stat. 419, as amended, 50 U.S.C. § 5(b) (app.). 357 U.S. at 198-89. The company, known as I.G. Chemie or "Interhandel," protested seizure on the ground that it was a national of a neutral state and therefore not an enemy. 357 U.S. at 199. The United States claimed that the assets were held for German interests, and the Attorney General of the United States sought an order to produce bank records allegedly relevant to Interhandel's "enemy taint." *Id.* The company asserted that disclosure of the records would violate the Swiss Penal Code and Bank Secrecy Law. See *id.* at 200. Despite substantial cooperation with the Swiss government, Interhandel could not fully comply with the order. *Id.* at 201-03.

143. *Id.* at 204. In order to have made the requisite "good faith" efforts at compliance, the party resisting production must have made "efforts to the maximum of [its] ability" to comply with the United States order. 357 U.S. at 205. Additionally,

between the subpoena and the foreign law on two levels. First, the Court examined whether the order was proper under the circumstances.¹⁴⁴ Second, the Court considered the appropriateness of sanctions for noncompliance with the subpoena.¹⁴⁵ The Court was concerned that the defendant had deliberately placed the documents in Switzerland to avoid discovery.¹⁴⁶ In this respect, the Court considered the possibility that the subpoenaed party may actually have tried to obtain the documents but was thwarted by the foreign law or refused by the foreign government.¹⁴⁷

the party must not have "deliberately courted legal impediments" to the document production. *Id.* at 208-09. Because the plaintiff in *Société Internationale* had acted in good faith, he was entitled to a hearing on the merits of his claim. See 357 U.S. at 211-12. For a definition of "courting legal impediments," see *infra* note 138.

144. *Société Internationale*, 357 U.S. at 204-08. In discussing the propriety of the discovery order, the Court considered only three factors: 1) the importance of the United States policy behind the Trading with the Enemy Act of 1917, 40 Stat. 415, as amended, 50 U.S.C. §§ 5(b), 9(a) (app.), 2) the importance of the requested documents to the party seeking them in this case, the United States, and 3) the nationality of the parties. 357 U.S. at 204-05. The Court determined that United States' interests should prevail, because of the United States' policy of uncovering enemy interests through strict enforcement of the Trading with the Enemy Act. Moreover, the Court asserted that the defendant, a Swiss national, could plead with the Swiss Government to relax its standards to allow compliance with the United States order. See 357 U.S. at 205-08. The Court did not consider the Swiss interest underlying its secrecy law. See Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061, 1067 (1984). See generally Aubert, *The Limits of Swiss Banking Secrecy Under Domestic and International Law*, 2 INT'L TAX & BUS. LAW. 273 (1984); Meyer, *supra* note 2 (detailed discussion of Swiss banking secrecy).

145. *Société Internationale*, 357 U.S. at 206, 208. Although the Court determined that good faith efforts do not provide an excuse for non-compliance, the Court held that those efforts do prevent the imposition of the harshest sanctions for non-compliance with a discovery order. *Société Internationale*, 357 U.S. at 212-13; see Note, *supra* note 34, at 891.

146. *Société Internationale*, 357 U.S. at 208-09. This is called "courting legal impediments." A party deliberately "courts legal impediments" to document production if it sends documents abroad to make them unavailable in anticipation of litigation. *Id.*; see, e.g., *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111, 117, 119 (S.D.N.Y. 1981) (bank deliberately used Swiss nondisclosure law to evade United States securities law prohibition against insider trading, thus forfeiting good faith defense); see also *Bank of Nova Scotia II*, 740 F.2d at 825 (rather than trying to comply with order, bank asserted need for letters rogatory and a showing that documents requested were "necessary" and "material" to the investigation); *Bank of Nova Scotia I*, 691 F.2d at 1389 (because the Bahamian government had not prevented the bank from complying with the subpoena, court held bank had acted in bad faith); see also Newcomb & Kohler, *supra* note 7, at 645.

147. See *Société Internationale*, 357 U.S. at 211-12. "In our view, petitioner stands in the position of an American plaintiff subject to criminal sanctions in Switzerland

Although the good faith test considers whether the subpoenaed party is genuinely subject to two conflicting laws,¹⁴⁸ the approach used by the Court in *Société Internationale* has two significant drawbacks. First, despite the two-tiered approach, the Court only applied the good faith test with respect to the second issue, the appropriateness of sanctions for noncompliance.¹⁴⁹ Furthermore, in determining that the subpoena was proper, the Court applied United States law and considered only the interests underlying that law.¹⁵⁰ The Court did not consider the policy underlying the foreign law until after determining the sanctions for nonproduction.¹⁵¹

Société Internationale is the only Supreme Court case to address the standard for evaluating the conflict between nondisclosure laws and United States investigatory efforts.¹⁵² However, lower federal courts have had difficulty applying the standard,¹⁵³ because the Court never defined good faith.¹⁵⁴

because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws." *Id.* at 211. The contemporary phrase that describes this possibility is the foreign government, or sovereign, compulsion defense. This defense permits a noncomplying party to assert that a United States court cannot force him to commit an act in a foreign state if that act would violate the foreign state's laws. *See* *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979) (the defense is "not principally concerned with the validity or legality of the foreign government's order, but rather with whether it compelled the American business to violate American antitrust law"); REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 comment e, reporters' note 5 (Tent. Draft No. 7 1986); *Atwood*, *supra* note 35, at 2-3, 10-11.

148. *See* *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 156 (D.C. Cir. 1961); *Onkelinx*, *supra* note 13, at 518; Note, *supra* note 13, at 1146.

149. *See* *Société Internationale*, 357 U.S. at 208-13 (discussing whether the district court properly exercised its power under Rule 37(b) by imposing the sanction of dismissal).

150. *Id.* at 204-06; *see infra* notes 143. In *Société Internationale*, the petitioner opposed the district court's issuance of the production order, because he did not have control of the documents under Federal Rule 34. 357 U.S. at 204. However, the Court declined "to hold broadly that petitioner's failure to produce the . . . records because of fear of punishment under the laws of its sovereign" would excuse production. *Id.* at 205. That would preclude "a court from finding that petitioner had 'control' over them, and thereby from ordering their production [Such a result] would undermine congressional policies . . . and invite efforts to place ownership of American assets" in jurisdictions where secrecy is assured. *Id.*

151. *Société Internationale*, 357 U.S. at 211-12.

152. *See* Note, *supra* note 126, at 1326 (discussing *Société Internationale* and advocating a good faith standard); Note, *supra* note 34, at 889-92; REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 reporters' note 6 (Tent. Draft No. 7 1986).

153. *See* Note, *supra* note 126, at 1327; Note, *supra* note 34, at 898-99. The

Furthermore, because the test is only relevant to the determination of sanctions, it does not reach the merits of the case.¹⁵⁵ Most courts have retained the test with respect to the appropriateness of sanctions,¹⁵⁶ but some have supplemented their evaluation with a balancing of interest analysis.¹⁵⁷

Court's holding in *Société Internationale* was vague. See *Société Internationale*, 357 U.S. at 205-06. "We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control." *Id.* Further, the Court noted: "[W]e hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order." *Id.* at 206. As a result of this vagueness, lower courts have emphasized different aspects of the *Société Internationale* decision. Some courts have emphasized its good faith test and attempts to secure permission to disclose documents protected by bank secrecy laws. See *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147 (D.C. Cir. 1961) (demonstration of good faith efforts to obtain waiver of prohibition was prerequisite to court's consideration of foreign government compulsion). Other cases have focused on the sanction of dismissal, and have been unwilling to use the sanction if the noncomplying party effectively demonstrated foreign government compulsion. See *United States v. Vetco Inc.*, 691 F.2d 1281, 1287-88 (9th Cir.) (only extensive efforts at compliance preclude the court from ordering dismissal), *cert. denied*, 454 U.S. 1098 (1981); see also REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 reporters' note 6 (Tent. Draft No. 7 1986) (discussing that some United States cases have applied the Court's suggestion that unfavorable inferences may be drawn even if the party were not at fault in its failure to produce, while other cases have emphasized its case-by-case approach and the discretion given to the district court).

154. See Note, *supra* note 126, at 1327. See generally *Société Internationale*, 357 U.S. 197 (1958).

155. Compare Note, *supra* note 126, at 1345-46 ("in most cases, good faith is the decisive criterion upon which the decision to impose sanctions for noncompliance is based") with *Olsen*, *supra* note 12, at 1024. "In the context of government litigation, . . . the government seeks evidence on a small scale which may involve tremendous commercial activity. . . . *Id.* "'Good faith' . . . [therefore] provides little guidance for the decision on the merits of the case." *Id.*

156. See, e.g., *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 295-96 (S.D. Cal. 1981); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138, 1146-48 (N.D. Ill. 1979); *United Nuclear Corp. v. General Atomic Co.* 629 P.2d 231, 268-69 (N.M. 1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981).

157. See, e.g., *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 345-47 (7th Cir. 1983). This case involved an Internal Revenue Service (IRS) summons issued to the First National Bank of Chicago (First Chicago) requiring it to produce statements of two depositors who maintained accounts at its Athens branch. 699 F.2d at 342. The Greek bank secrecy law imposed severe criminal penalties for disclosure of such information. Furthermore, unlike the Cayman secrecy law, customer consent could not be used to circumvent the law's application. *Id.* at 342-45. Because of these provisions, the Seventh Circuit held that the bank should not be penalized for refusing to comply with a summons if Greek law prohibited compliance. *Id.* at 345-46. In analyzing the problem under both the Second Restatement and Revised Restatement, the court found that the Government's interest in tax collection equalled the Greek interest in bank secrecy, and that in this case, United States' inter-

B. Comity: The Early 1960's

In the early 1960's, many federal courts ignored the *Société Internationale* good faith test and applied instead the principle of international comity¹⁵⁸ to conflicts between cross-border subpoenas and foreign nondisclosure laws. The United States

ests were outweighed by the risk of imprisonment discovery would impose on the bank's employees. *Id.* at 346. The court only required that First Chicago make a reasonable good faith effort to determine whether it could comply with the summons without violating Greek law. *Id.*; see also *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997-99 (10th Cir. 1977) (court used balancing approach to evaluate sanctions imposed, but used good faith to assess production order).

158. See 1 L. OPPENHEIM, *supra* note 14, § 19c, at 33-35. This treatise asserts four meanings of the principle of comity. First, comity has been defined as "the rules of politeness, convenience, and goodwill observed by States in their natural intercourse without being legally bound by them." *Id.* at 34 n.1. This is most likely the meaning attributed to the term in the United Kingdom. See, e.g., *Foster v. Driscoll*, [1929] 1 K.B. 470, 510 (1928) (recognition of contract made in another State for criminal purposes "would be contrary to our obligation of international comity" and against public policy). Comity has thus been equated with the public policy exception, *id.* at 496-99, and with the revenue-raising exception, *id.* at 516-20.

A second meaning equates comity with private international law. See 4 R. PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW § 1 (3d ed. 1889). "Private international law" in the United Kingdom is equivalent to "conflict of laws" in the United States. See E. SCOLES & P. HAY, *supra* note 22, at 1-2. See generally A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW (1974). A third meaning equates comity with "international law." See 1 L. OPPENHEIM, *supra* note 14, § 19c, at 34 n.1. Presumably the editor intended a distinction between *public* international law and *private* international law. Private international law is concerned with the relations between individuals, while public international law involves the relations between nations and the people comprising those nations. BLACK'S LAW DICTIONARY 1076, 1106-07 (5th ed. 1979). "English and American courts often refer to 'international comity' in situations to which there ought to be more properly applied the term 'international law.' It is probable that many a present rule of International Comity will in future become one of International Law." L. OPPENHEIM, *supra* note 14, at 34-35 (footnotes omitted).

Finally, comity has been misused "for the company of nations mutually practicing international comity (in some instances erroneous association with *L. comes*, 'companion,' is to be suspected)." *Id.* at 34 n.1 (quoting Murray's New English Dictionary).

The Oppenheim treatise takes the position that comity was originally not equivalent to international law, but rather, "[a] factor of a special kind which . . . influences the growth of International Law." *Id.* at 33. It was seen almost as a separate discipline. "In their intercourse with one another states observed not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill. Such rules of international conduct are not rules of law, but of Comity." *Id.* at 34.

Comity denotes a stage in the development of conflict of laws theory. See E. SCOLES & P. HAY, *supra* note 22, at 12-13. Comity originally "sought to reconcile the territoriality (sovereignty) of states with the need for consideration of foreign law in appropriate cases." *Id.* at 13. This compromise position was difficult to apply in

Court of Appeals for the Second Circuit held in three cases that production should not be ordered if it would absolutely violate foreign law.¹⁵⁹ These cases automatically deferred to foreign law without weighing the underlying United States or foreign interests.¹⁶⁰ Because this approach encouraged use of foreign laws to evade tax and other legal obligations in the

practice, because "law was said to be at once territorial yet entitled to some effect beyond the limits of the territorial sovereign from where it emanated." *Id.*

Comity also embraces the notion of recognition of judgments or reciprocity. *See* *Hilton v. Guyot*, 159 U.S. 113, 226-28 (1895); E. SCOLLES & P. HAY, *supra* note 22, at 961-74. *Hilton* defines comity as "the recognition which one nation allows within its territory to the . . . 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." *Id.* at 163-64; *see also* *Sompportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972). "Comity should be withheld only when its acceptance would be contrary to prejudicial to the interest of the nation called upon to give it effect." *Id.* (footnote omitted).

Comity was applied differently by United States courts in the 1960's than it is applied by United States courts in the 1980's. *See infra* note 162 and accompanying text. For a discussion of the doctrine's origins, *see generally* Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966). *See also* Note, *supra* note 34, at 894-95; Note, *supra* note 42, at 510 n.3.

159. *See, e.g., In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (court found it had "an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own"); *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960). "Upon fundamental principles of international comity, our courts . . . should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures." *Id.* *But see* *First Nat'l City Bank of N.Y. v. Internal Revenue Serv.*, 271 F.2d 616, 620 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960). "If the Bank cannot, as it were, serve two masters and comply with the lawful requirements [of both countries], perhaps it should surrender to one sovereign or the other the privileges received therefrom." *Id.*

160. *See Chase Manhattan Bank*, 297 F.2d at 613 (subpoena modified pending good faith efforts to comply with request by seeking government cooperation); *Ings*, 282 F.2d at 153 (order modified by restricting document production to specific records indicated in subpoena that could be obtained through New York bank branches); *cf. First Nat'l City Bank*, 271 F.2d at 619 (although court held that bank could not defeat summons in this case, it noted that if production "would require action by personnel in Panama in violation of [Panamanian law], . . . production . . . should not be ordered").

A student commentator in the early 1960's realized the limitations of this deference to foreign law:

[A]ny discussion which proceeds from "comity" fails to grapple with the competing policies which arise when a court is asked to order the production of protected documents. On the one hand, the forum state has a strong interest in basing its judgment on all relevant information. On the other, it has an interest in not forcing the violation of foreign law. "Comity" recognizes only the latter interest

United States,¹⁶¹ federal courts in the United States have limited the application of comity.¹⁶² Accordingly, comity as interpreted and applied in the 1960's would not be a practical approach to analysis of a compelled waiver situation.¹⁶³

C. *Balancing Interests Under the Restatements of Foreign Relations Law*

The balancing tests of the Restatements of Foreign Relations Law are premised upon both states' rules requiring inconsistent conduct.¹⁶⁴ In advocating a balancing of interests¹⁶⁵

Note, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. CHI. L. REV. 791, 796 (1964).

161. See Note, *supra* note 34, at 895.

162. See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). Comity has been interpreted since the 1960's to mean "the degree of deference that a domestic forum must pay to the act of a foreign government." *Id.* (emphasis added). Courts have recognized that comity is an elusive concept, its application varying from case to case, but that it fosters cooperation and encourages reciprocity among nations. *Id.* Unlike the courts of the early 1960's, courts now hold that comity is limited as a governing principle of international law: The obligation of comity no longer binds states if a foreign act prejudices the forum state's interests. *Id.* The earliest authorities actually supported this meaning of comity. *Id.* at 937 & n.104; see *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (comity "is the voluntary act of the nation by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests"); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 30, at 32-33 (1834) (Arno Press ed. 1972) (foreign laws should be given effect in domestic forums only "so far as they do not prejudice the power or right of other governments, or of their citizens"); cf. Remarks of Prof. Louis Henkin, at the International Law Weekend, Association of the Bar of the City of New York, *The Revised Restatement of the Foreign Relations Law of the U.S.: Issues, Comments and Questions*, (Nov. 1-2, 1985) (author's notes available at the *Fordham International Law Journal*). "Because comity is misunderstood, we avoid it. But in my view the term embraces the principle that a state is obligated to do certain things out of international deference to another state." *Id.* See generally Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again"*, 25 VA. J. INT'L L. 7 (1984). But cf. *id.* at 15-16. "To say that the comity doctrine is 'vague' when applied in domestic courts is only to say that any general principle of decision is vague until it is reflected in specific applications." *Id.*

163. Automatic deference to bank secrecy laws would not give enough deference to United States' interest in tax collection and would encourage using tax haven jurisdictions to evade United States laws. See *supra* note 161. See generally *Crime and Secrecy Hearings*, *supra* note 12, at 244 (statement of Glenn L. Archer, Assistant Attorney General, Tax Division, Justice Department, asserting that strict banking secrecy frustrates United States investigations).

164. See REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 403(3) (Tent. Draft No. 7 1986) ("[w]hen more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states . . . conflict . . ."); SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 40 ("[w]here two states have jurisdiction to prescribe and enforce

approach to this conflict, however, the tests give too much discretion to the judiciary.¹⁶⁶ Furthermore, the interests weighed under the test are irreconcilable.¹⁶⁷ Accordingly, both tests weigh the interests more heavily in favor of the United States.¹⁶⁸

1. The Second Restatement

The provisions of the Second Restatement applied by United States courts to the nondisclosure problem¹⁶⁹ often provide for concurrent jurisdiction of United States and foreign courts, even if conflicting laws are involved.¹⁷⁰ Section 40 details five factors that a state should consider in moderating its enforcement action:¹⁷¹ 1) each state's "vital national interests", 2) the extent and nature of the hardship that inconsistent enforcement actions might impose upon the person, 3) the extent to which the required conduct will take place within the territory of the other state, 4) the person's nationality, and 5) the extent to which enforcement by action of either state can be expected to achieve compliance with the rule prescribed by each of the states.¹⁷²

The benefit of the Second Restatement test is that it considers both states' interests, rather than automatically deferring to foreign law.¹⁷³ In addition, it improves upon the *Société*

rules of law and the rules they may prescribe require inconsistent conduct upon the party of a person . . .").

165. See *supra* note 105 (discussion of interest-balancing).

166. See *infra* note 177 (courts' inclusion of various factors on an *ad hoc* basis).

167. See Maier, *supra* note 13, at 592. Judicial analyses should not attempt "to weigh . . . the apples of taxation against the oranges of bank secrecy to determine which is somehow more important to the governments whose laws assert these interests." *Id.*

168. See *infra* note 198 (letter from Judge Wilkey to Prof. Louis Henkin regarding the section 403 balancing test).

169. The applicable sections are sections 39 and 40. See *supra* note 118; *infra* text accompanying note 172 (factors of section 40); *infra* note 170 (factors of section 39(1)).

170. SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 39(1) (when one nation has jurisdiction to prescribe a rule of law, other nations are not precluded from also having jurisdiction to prescribe or enforce a contrary rule).

171. See *supra* note 118; *infra* text accompanying note 172 (factors of section 40).

172. SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 40.

173. See SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 40 (requiring consideration of "vital national interests of each of the states") (emphasis added).

Internationale good faith test by assessing each of the factors at both the order and sanction stages.¹⁷⁴

Despite this improvement, United States courts have applied section 40 inconsistently, focusing primarily on the first two factors, i.e., vital national interests and the hardship that inconsistent enforcement actions would impose.¹⁷⁵ In so doing, these courts have only superficially reviewed each of the underlying policies.¹⁷⁶ Moreover, courts have supplemented their section 40 analysis with other factors, which, though relevant, undermine its effectiveness.¹⁷⁷ United States interests

174. Compare *id.* with *Société Internationale*, 357 U.S. at 208-13. *Société Internationale*'s good faith test was previously limited to the issue of sanctions. See *supra* notes 148, 154 and accompanying text (discussing limitation of *Société Internationale* test to determination of sanctions for nonproduction); Note, *supra* note 134, at 1331. Courts should consider these factors at both stages, because each stage represents a separate exercise of enforcement jurisdiction, i.e., the "capacity of a state under international law to enforce" one of its rules. SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 6; see *United States v. Vetco Inc.*, 691 F.2d 1281, 1288-89 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *United States v. Field*, 532 F.2d 404, 407 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 401(2) (Tent. Draft No. 2, 1981); SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 6 comment a.

175. Although "vital national interests" and "hardship" are considered the two most important factors, see *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981); *United States v. First Nat'l City Bank*, 396 F.2d 897, 904-05 (2d Cir. 1968), the drafters of the Second Restatement presumably intended an equal assessment of all factors and that section 40 was not to be considered an exclusive list. For the views of the reporters of the Revised Restatement, see generally Remarks of Prof. Louis Henkin, at the International Law Weekend, Association of the Bar of the City of New York, *The Revised Restatement of the Foreign Relations Law of the U.S.: Issues, Comments and Questions*, (Nov. 1-2, 1985) (author's notes available at the *Forham International Law Journal*).

176. See, e.g., *Field*, 532 F.2d at 407. *Field* involved the director of a Cayman Islands bank who, while at the Miami Airport, was subpoenaed to testify before a grand jury investigating the use of foreign banks to evade United States income tax laws. *Id.* at 405. In holding that he was required to testify despite the fact that it would violate Cayman's secrecy law, the court focused only on the necessity of providing grand juries and other investigative agencies with information relevant to the enforcement of tax laws. *Id.* at 407-09. The court did not examine the policies underlying the Cayman law. It only considered the first factor listed in section 40 and did not discuss any of the other factors in the balancing test. *Id.* at 407.

177. See, e.g., *United States v. Vetco Inc.*, 691 F.2d 1281, 1288-89 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *United States v. First Nat'l City Bank*, 396 F.2d 897 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); Note, *supra* note 34, at 901-02. Other factors that courts have considered include: the necessity of the documents, the availability of alternative means of compliance, and the existence of foreign protests. See *Vetco*, 691 F.2d at 1289-90; *First Nat'l City Bank*, 396 F.2d at 904.

have consistently prevailed in such a situation.¹⁷⁸ Consequently, commentators have criticized this ostensibly flexible approach for its rigidity.¹⁷⁹

The primary reason for section 40's ineffectiveness is that it gives too much discretion to the judiciary of the United States.¹⁸⁰ The responsibility of United States courts for evaluating competing state interests raises international legal problems.¹⁸¹ United States judges are rarely equipped to balance such foreign interests.¹⁸² Moreover, despite section 40's

178. See, e.g., *Bank of Nova Scotia II*, 740 F.2d 817 (11th Cir. 1984) (grand jury proceeding; strong United States interest in criminal tax law enforcement), *cert. denied*, 105 S. Ct. 778 (1985); *Bank of Nova Scotia I*, 691 F.2d 1384 (11th Cir. 1982) (grand jury proceeding involving United States tax and narcotics laws), *cert. denied*, 462 U.S. 1119 (1983); *United States v. Vetco Inc.*, 691 F.2d 1281 (9th Cir.) (interest in tax collection and prosecuting tax fraud), *cert. denied*, 454 U.S. 1098 (1981); *United States v. Field*, 532 F.2d 404 (5th Cir.) (using grand jury power to enforce tax laws), *cert. denied*, 429 U.S. 940 (1976); *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968) (antitrust laws); *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981) (securities laws); see also Note, *supra* note 134, at 1324-25. "In practice, balancing analysis often operates as a means of 'assert[ing] . . . the primacy of United States interests in the guise of applying an international, jurisdictional rule of reason;' the nod to foreign interests is rarely more than perfunctory. . . . [B]alancing tests almost invariably yield the same result: jurisdiction lies." *Id.* But see *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983) (IRS summons could not override Greek bank secrecy law).

179. See Note, *supra* note 34, at 900 & n.204; Note, *supra* note 126, at 1320. One of these commentaries suggests that the bias in favor of United States interests stems from the way the Second Restatement is written. See Note, *supra* note 34, at 900 n.204. There appears to be greater concern for the hardship imposed on a person faced with inconsistent enforcement actions than with the impact of exercises of jurisdiction on the foreign state's underlying policies. SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 40 comment b. Additionally, section 40 defines "vital national interests" as a factor favoring the exercise of jurisdiction, even if the exercise of jurisdiction by one state would interfere with the exercise of jurisdiction by another state. *Id.* A vital national interest is "an interest such as national security or general welfare to which a state attaches overriding importance." *Id.* Another commentator has asserted that "even if we assume the United States' interests are legitimate, it does not necessarily follow that the United States is justified in acting unilaterally to achieve them." Note, *supra* note 134, at 1320.

180. See Rosenthal & Yale-Loehr, *supra* note 34, at 1084; *supra* note 177 (courts' inclusion of factors on an *ad hoc* basis).

181. See generally Rosenthal, *supra* note 121.

182. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). Judge Wilkey noted that

when courts are forced to choose between a domestic law . . . designed to protect domestic interests, and a foreign law . . . calculated to thwart the implementation of the domestic law . . . [, they must address] two primary problems: (1) there are substantial limitations on the Court's ability to conduct a neutral balancing of the competing interests, and (2) the adoption of

assertion that international law requires states to consider these factors before exercising jurisdiction,¹⁸³ section 40 does not state "international law."¹⁸⁴ Section 40 represents United States law on foreign relations, not international law.¹⁸⁵ One authority has asserted that section 40's balancing test actually violates international law.¹⁸⁶

2. The Tentative Drafts of the Revised Restatement

Some of the additional factors courts have added to section 40 in recent years have been incorporated into the drafts of the Restatement of Foreign Relations Law of the United States (Revised) (Revised Restatement).¹⁸⁷ While not yet formally adopted by the American Law Institute,¹⁸⁸ the Revised Restatement noticeably improves upon its predecessor.¹⁸⁹ The new sections are more explanatory, providing more detailed comments and notes.¹⁹⁰ Additionally, because the Re-

interest balancing is unlikely to achieve its goal of promoting international comity.

Id. at 948; *see Note, supra* note 134, at 1324. "Unless one has some principled means to assign 'weight' to a foreign sovereign's interest in enforcing its own particular laws and pursuing its own particular policies, . . . how can a judge determine whether cases involving different countries are similar and therefore demand similar results?" *Id.* The author cites bank secrecy laws as a particular example of this problem. *Id.* Giving insufficient weight to a foreign country's interests may intensify foreign relations conflicts. Rosenthal, *supra* note 121, at 497.

183. SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 40.

184. Rosenthal, *supra* note 121, at 488, 491. "The Restatement (Second) repudiates the supremacy of the territoriality principle and thus fails to state international law." *Id.* at 491.

185. *See id.* at 488.

186. *See id.* at 492. The fact that the enactment of foreign nondisclosure laws has "more than quadrupled [since 1965] is strong evidence that the Restatement (Second), in permitting the United States to exercise so expansive an extraterritorial jurisdiction even where it conflicts with the policies of the [foreign] state, . . . cannot possibly express international law today." *Id.*

187. *See* REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437(1)(c) (Tent. Draft No. 7 1986) (two such factors are the importance of the documents or information to the litigation or investigation and the possibility of securing the information by alternate means).

188. The American Law Institute is responsible for drafting and approving the Restatements of United States law. *See* Oliver, Foreword, 25 VA. J. INT'L L. 1, 1 (symposium on Restatement of Foreign Relations Law of the United States (Revised)); Rosenthal & Yale-Loehr, *supra* note 34, at 1082-83.

189. *See* Rosenthal & Yale-Loehr, *supra* note 34, at 1085 (discussing section 40 of Second Restatement as predecessor to sections 403 and 437 of Revised Restatement).

190. *See* REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, §§ 403,

statement is continually being debated and revised, it incorporates several circuit court decisions that mandate consideration of competing governmental interests.¹⁹¹ Finally, the Revised Restatement devotes an entire section, section 437, to the conflict between nondisclosure laws and United States discovery.¹⁹²

Under the test set out in the section on nondisclosure laws, courts should consider¹⁹³ 1) the importance of the documents or information requested to the investigation, 2) the degree of specificity of the request, 3) whether the information originated in the United States, 4) the extent to which compliance with the request would undermine important interests of the state in which the information is located, and 5) the possibility of alternative means of securing the information.¹⁹⁴ In this revision, the drafters specifically noted that conflicting laws may undermine the national interests of one or both of the states.¹⁹⁵ By incorporating this into the analysis, the Revised Restatement suggests that courts consider the modern

437 (Tent. Draft No. 7 1986); Rosenthal & Yale-Loehr, *supra* note 34, at 1085-87 (discussing Tentative Draft No. 3, 1982). Ideally, the Revised Restatement should decrease judicial discretion and the "temptation to tilt too casually toward finding appropriate U.S. jurisdiction." *Id.* at 1086.

191. *See, e.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 613-15 (9th Cir. 1976).

192. REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 (Tent. Draft No. 7 1986). This section, entitled "Requests for Disclosure," includes several of the factors courts added to the Second Restatement when it provided the only applicable balancing test. "The 1965 Restatement does not have a specific section dealing with the problem of discovery conflicts." Rosenthal & Yale-Loehr, *supra* note 34, at 1084 (these are conditions of self-restraint for United States courts and proper standards for compelling discovery). Section 40 applies to any jurisdictional conflict between the United States and another sovereign, and judges should exercise restraint in applying United States law. *Id.*; *see supra* note 169 (sections 39 and 40 applied to nondisclosure conflicts in absence of explicit section for such conflicts).

193. The American Law Institute changed the wording from "must" to "should" in the years from Tentative Draft No. 3 (1982) to Tentative Draft No. 6 (1985). *Compare* REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 420 (Tent. Draft No. 3, 1982) *with* REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437 (Tent. Draft No. 6 1985). Tentative Draft No. 7 retains the word change. This leaves the "test's" non-discretionary appeal open to question, and suggests a retreat to the discretion of section 40. *See infra* text accompanying note 199.

194. REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, § 437(1)(c) (Tent. Draft No. 7 1986).

195. *See id.* ("the extent to which compliance with the request would undermine important interests of the state in which the information is located").

notion of comity.¹⁹⁶ Ideally, this framework should promote stability and predictability in international law.¹⁹⁷

In reality, however, section 437 advocates another unilateral balancing test.¹⁹⁸ Section 437 does not *require* United States courts to consider these criteria, but only suggests that they "should".¹⁹⁹ Furthermore, as with any other legal "test," there is no guarantee that courts will apply each of the factors consistently.²⁰⁰ Section 437 therefore "institutionalizes a bias in the balancing against foreign [nondisclosure] laws."²⁰¹ In addition, the Revised Restatement is in draft form, and its future direction is unclear.²⁰² At this time, the state of the law is

196. See SECOND RESTATEMENT, CONFLICTS, *supra* note 28, § 90 (comity is not required when interests of forum are undermined); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937-38 (D.C. Cir. 1984).

197. See Rosenthal & Yale-Loehr, *supra* note 30, at 1091. These commentators assert that the factors of the Revised Restatement represent a "substantial step toward accommodation" of the foreign international legal community's view of international law. *Id.* The goals of international law as perceived by the Supreme Court of the United States are "stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to defined the domain which each nation will claim as its own." *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953); see Note, *supra* note 126 (advocating predictability and comity as "common goals of extraterritorial jurisdiction").

198. See Letter from Judge Wilkey to Prof. Louis Henkin (August 24, 1984) (commenting on the Revised Restatement's § 403 "reasonableness approach" to extraterritorial jurisdiction) (available at the *Fordham International Law Journal*).

[The] old balancing test, balancing "the respective interests of the regulating states," and "in light of the factors listed" . . . invites a court into a swampy morass, where it doesn't belong, and gives it precious little guidance in how to find its way out. . . . As we used to say in Kentucky where I grew up, "This dog won't hunt."

Id.; see REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 30, § 403 (Tent. Draft No. 7 1986).

199. REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 30, § 437; see *supra* note 185 (textual change from Tentative Draft No. 3 to Tentative Draft No. 6).

200. See Rosenthal & Yale-Loehr, *supra* note 30, at 1091. "If consistently applied, these standards would reduce international conflicts without doing an injustice to the important interests of U.S. law enforcers and private litigants." *Id.* (emphasis added) (referring to Tentative Draft No. 3 of the Revised Restatement).

201. *Id.* at 1099.

202. See Rosenthal, *supra* note 121, at 492 n.24; Rosenthal & Yale-Loehr, *supra* note 34, at 1083 ("[t]he Revised Restatement is very much a work in progress open to further modification"). Thus far, six tentative drafts and a tentative final draft have been created by the American Law Institute. The tentative seventh draft was published *after* the tentative final draft. Therefore, the law in this area is hardly settled. Only when the American Law Institute approves all "tentative" drafts will a "proposed official draft" be submitted for approval. See Rosenthal & Yale-Loehr, *supra* note 34, at 1083.

too unpredictable for a court to rely on section 437.²⁰³ Even more importantly, the current draft neither discusses the compelled waiver nor relates the device to the problems posed by foreign nondisclosure laws.²⁰⁴

D. *Summary*

Attempts by United States courts to assuage the international tension caused by cross-border subpoenas have failed. When a court considers a party's good faith attempts to comply with a subpoena, it ignores the legal and policy interests of the foreign jurisdiction.²⁰⁵ The principle of comity, as used in the 1960's, is also inadequate because it does not effectively address the monumental tax evasion problems of the 1980's.²⁰⁶ Additionally, the deference to foreign law embraced by comity ends if one state attempts to undermine the other's policies.²⁰⁷ Balancing interests under the Restatements of United States Foreign Relations Law is likewise ineffective. Unlike an international forum, United States courts cannot arbitrate among competing state interests.²⁰⁸ If a United States court balances the interests in question, the court's interest in effective enforcement of United States criminal laws will prevail.

Current combinations of these analytical methods, such as the balancing test with the good faith test, have perpetuated

203. *Cf.* *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983) (noting that Restatement is in revision process); *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158, 1162-63 (D.C. Cal. 1983) (discussing standard of "relevance, necessity and materiality" required under Revised Restatement for documents sought abroad).

204. *See generally* REVISED RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 34, §§ 401-437 (Tent. Draft No. 7 1986) (covering jurisdiction and judgments).

205. *See supra* notes 148-57 and accompanying text (drawbacks of the good faith test).

206. *See supra* notes 161-63 and accompanying text (inadequacy of 1960's interpretation of comity).

207. *See supra* note 162; *infra* note 218 and accompanying text (discussion of public policy exception to enforcement of other state's laws).

208. *See* Maier, *supra* note 13, at 588, 592. Decisions that "purport . . . to apply [international rules] . . . use international law as a political cover, not as an authoritative source, and by so doing encourage and sanction similar attitudes abroad." *Id.* at 594-95; *see* Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 *COLUM. L. REV.* 189, 200 (1942). "Nothing . . . is more inconsistent with harmonious international cooperation than insistence upon national viewpoints under the pretense of their being international." *Id.*

the policy conflicts and continue to infringe upon other nations' sovereignty.²⁰⁹ These methods will fail if used to evaluate a compelled waiver.²¹⁰ Both United States and foreign courts must recognize that individual adjudication of irreconcilable interests, such as bank secrecy and tax collection, will intensify international conflicts.²¹¹ The compelled waiver, therefore, requires a different framework in which to analyze its use. This task is best accomplished in a diplomatic forum.

IV. *THE CAYMAN ISLANDS AND EXTRATERRITORIAL TAX INVESTIGATIONS: TOWARDS AN EXCHANGE OF INFORMATION TREATY*

If the Cayman Islands continues to renounce the compelled waiver in tax evasion cases, the United States will have three alternatives. First, the United States can continue compel consent in violation of Cayman law. This action, however, is an affront to Cayman's sovereignty because it ignores Cayman's policy towards taxation and tax evasion.²¹² Second, if the Cayman Government continues to thwart United States investigative efforts, the United States could continue to act unilaterally, either by imposing sanctions against the Cayman Islands,²¹³ or by making United States investment in the Cayman

209. See, e.g., Supplemental Brief on Behalf of the Government of Canada as *amicus curiae* Following Remand Proceedings Before the District Court, *Bank of Nova Scotia v. United States*, Nos. 83-5708/84-5198, at 6 (11th Cir. Apr. 10, 1984); Brief of the Commonwealth of the Bahamas as *amicus curiae* in Support of Petition for a Writ of Certiorari, *Bank of Nova Scotia v. United States*, No. 82-1531, at 8-9 (11th Cir. Apr. 14, 1983) (available at the *Fordham International Law Journal*).

210. See *ABC Judgment*, *supra* note 93. Unilateral methods exacerbate conflicting national policies. See Editorial, *Beyond Marc Rich*, *Wall St. J.*, Oct. 22, 1984, at 30, col. 1 (discussing the *Marc Rich* case as representing a "cultural clash" between the United States and Switzerland and predicting additional such "clashes" in the future).

211. See *supra* note 130 and accompanying text; J. ATWOOD & K. BREWSTER, *supra* note 35, § 15.06, at 221; Rosenthal, *supra* note 121, at 490 (United States' unilateral conduct "challeng[es] and undercut[s] the authority of a state within its own territory"). United States' investigations have already intensified international conflict. See *supra* note 209 (*amicus curiae* briefs opposing grand jury subpoenas in *Bank of Nova Scotia II*).

212. See *supra* note 31 (discussing the tension that arises when one state attempts to regulate another state's internal affairs).

213. See GORDON REPORT, *supra* note 1, at A-225-26. In his 1981 report to the United States Department of the Treasury, Richard Gordon recommended new legislation that would impose sanctions on certain designated tax havens for failure to disclose tax data requested by the United States. These sanctions could include:

Islands a crime in the United States. Such drastic measures do not promote international cooperation, but United States government officials have indicated that they will use these measures if provoked by foreign intransigence.²¹⁴

The third and best alternative would be to negotiate a treaty. The most complex conflicts arising from the extraterritorial application of United States laws in recent years have been resolved out of court.²¹⁵ In order to negotiate effectively, both the United States and the Cayman Islands must recognize and abide by the modern notion of comity as interpreted in these decisions.

Comity is "the degree of deference" that a domestic forum must pay to the decisions of foreign tribunals not otherwise binding on the forum.²¹⁶ Adherence to this principle fosters international cooperation and encourages reciprocity, thereby advancing the interests of both forums.²¹⁷ However,

1) the tax imposed on amounts paid from the United States to foreign individuals or corporations in designated tax havens would increase from 30% to 50%; 2) the proceeds of loans from designated tax havens to United States citizens would be presumed taxable as ordinary income (at normal rates without deductions) unless this presumption were overcome by evidence to the contrary; 3) elimination of the foreign tax credit for foreign corporations; 4) disallowing United States deductions for losses and expenses incurred in transactions through entities in tax havens; 5) cancellation of direct flights from the United States to designated tax havens and possible prohibition of all flights to these havens; and 6) prohibiting United States banks from conducting business in a designated tax haven. *Id.* The purpose of these sanctions "would be to discourage U.S. business activity in the tax haven." *Id.* at 225.

214. See Ingersoll & Pasztor, *U.S. Seeks Treaties Against Money Crimes*, Wall St. J., Oct. 31, 1985, at 37, col. 1.

If certain countries continue to spurn bilateral agreements, the SEC and Justice Department may try to revive an unpopular proposal called "waiver-by-conduct" under which the U.S. would declare that any investor who trades securities in American markets automatically waives his right to banking secrecy. "It would be a mistake to say that we would never pursue a unilateral approach," warns the SEC's [enforcement director].

Id.; see Wall St. J., Oct. 10, 1985, at 1, col. 5 (discussing United States Senate Permanent Subcommittee on Investigation's recommendation of sanctions).

215. See, e.g., Newcomb, *supra* note 61, at 572 & n.88 (citing Wash. Post, Nov. 30, 1984, at A6, col. 3, discussing political and diplomatic measures used to resolve the *Laker* bankruptcy litigation); *U.S. Seeks Help from Hong Kong in Gucci Tax Investigation*, Amer. Banker, Sept. 19, 1984, at 20, col. 1 (discussing formal request made to Hong Kong judicial authorities in connection with tax investigation of Gucci Shops, Inc.—the *Garpeg* and *Chase Manhattan* litigation).

216. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (discussing whether comity should be applied to *Laker* bankruptcy's anti-suit injunction in courts of United Kingdom).

217. *Id.*

as broad a concept as this may seem, comity is limited to foreign acts that are consistent with the forum's policies.²¹⁸

Strict adherence to this interpretation of comity requires negotiation of a treaty, because the acts of one sovereign have offended the policies of the other.²¹⁹ On the one hand, the compelled waiver, like other unilateral, extraterritorial methods of obtaining information, undermines Cayman's interest in financial privacy.²²⁰ On the other hand, the Cayman confidentiality policy undermines United States policy towards taxation.²²¹ Unilateral action in the courts or through the governments of each sovereign, without consideration of the other's interests, is a blatant violation of comity.²²²

Because "mutual assistance treaties" exempt tax offenses

218. *Id.* "No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." *Id.*; see *supra* note 154 (interpretation of comity since the 1960's).

219. See *infra* text accompanying notes 212-13. Current mutual assistance treaties allow the "requested state," e.g. Switzerland or the Cayman Islands, to invoke a public policy defense to circumvent the "requesting state's," e.g. the United States', request. See, e.g., Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter cited as Swiss Mutual Assistance Treaty]. Article 3(1)(a) provides for discretionary assistance if compliance with the request would be likely to prejudice the requested state's sovereignty. See *id.* art. 3(1)(a). This "public order" clause, however, cannot be invoked unless the requested state had already determined whether, and under what circumstances, it will grant assistance. See *id.* art. 3(2).

The treaty with Switzerland has been in force since 1977. Treaties with other nations, such as Turkey, have only recently been ratified, and potential treaties have been proposed with countries that are not major tax haven jurisdictions. See GORDON REPORT, *supra* note 1, at A-221. For that reason, this section of the Note cites the Swiss Mutual Assistance Treaty frequently. See also *Crime and Secrecy Hearings*, *supra* note 12, 216-17 (success of the Swiss treaty in obtaining cooperation).

220. See *supra* notes 31-32 and accompanying text.

221. See *supra* notes 31-32 and accompanying text.

222. See Rosenthal, *supra* note 121, at 496. Unilateral action on the part of the United States not only violates comity but also reflects a sort of "international blindness," in that the United States fails to consider what its own reaction would be if it were faced with an assertion of extraterritorial jurisdiction by another sovereign. *Id.* For example, suppose that a foreign investigator compelled a visiting United States official to surrender documents classified by order of the Executive, or protected under one of the United States' own privacy acts. See *infra* note 231 (discussion of United States financial privacy legislation). The United States would, undoubtedly, be outraged, especially if the foreign court had not made a preliminary determination that the confidential information could be obtained through United States courts. See Brief of the Commonwealth of the Bahamas as *amicus curiae* in Support of Petition for a Writ of Certiorari, *Bank of Nova Scotia v. United States*, No. 82-1531 at 8-9 (11th Cir. Apr. 14, 1983); Rosenthal & Yale-Loehr, *supra* note 30, at 1100 (advocating a "jurisdictional golden rule").

from their provisions, there is no model treaty addressing tax evasion.²²³ Furthermore, "tax treaties" are concerned with eliminating double taxation by two or more countries.²²⁴ Tax evasion, however, does not pose this risk. A treaty that fully acknowledged this problem would have to address the substantive conflict of laws.

223. See, e.g., Swiss Mutual Assistance Treaty, *supra* note 219, art. 6(1), 27 U.S.T. at 2031 (the chief objective of which was cooperation "in the fight against organized crime"); Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, United States-Turkey, T.I.A.S. No. 9891. These mutual assistance treaties do not address tax evasion, because tax evasion as understood in the United States is not recognized as a criminal act in secrecy jurisdictions with which the United States has entered into a treaty relationship. See *supra* note 31 and accompanying text. In Switzerland, for instance, tax evasion is considered a minor violation. Meyer, *supra* note 2, at 33. "[T]ax evasion is not a crime within the Swiss Penal Code, and this situation is not likely to change, especially when one considers that a proposal to make serious cases of tax evasion a crime was dramatically defeated in 1965." Note, *The "Secret" Swiss Account: End of an Era*, 38 BROOKLYN L. REV. 384, 390 (1971).

224. See M. LANGER, PRACTICAL INTERNATIONAL TAX PLANNING 6-16 (3d ed. 1985); Karzon, *supra* note 30, at 782. "Tax treaties," however, relieve a treaty partner from the obligation "to supply information which is not obtainable under the laws" of either state; in other words, the requirement of "mutuality" exists here as it does in mutual assistance treaties. If the information would not be available in the secrecy jurisdiction, for example, the United States could not obtain such information. Moreover, a treaty partner is not required "to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy." Convention for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, reprinted in 1 TAX TREATIES (CCH) ¶ 158 at 265 (June 1981). Such a treaty would also be inappropriate to resolution of substantive conflicts over tax evasion, because the clauses limit the exchange of information between states. Karzon, *supra* note 30, at 783.

Such tax treaties override local bank secrecy laws only in cases of "tax fraud." Meyer defines tax fraud as the crime that is committed when a taxpayer "uses fraudulent practices or falsifies documentary evidence in order to mislead tax authorities." Meyer, *supra* note 2, at 34. Further, in regard to Switzerland, he notes:

International conflicts arise because many countries have more rigid standards with regard to tax offenses and do not have such limited possibilities in tax proceedings as the Swiss tax authorities. Not being able, under similar circumstances, to enforce the requested information on its own behalf, the Swiss government has to refuse judicial assistance to foreign countries.

Id. at 34-35.

The Swiss definition of tax fraud corresponds somewhat to the United States classification of tax evasion as a felony. See *supra* note 30 (defining tax evasion). The distinction between tax evasion and tax fraud is, arguably, a semantic one. See *id.* However, the Swiss have cooperated in United States fraud investigations, see Meyer, *supra* note 2, at 34-35, while declining assistance in tax evasion investigations. See *Crime and Secrecy Hearings*, *supra* note 12, at 217 n.* (general intransigence regarding tax evasion investigations). This inconsistency should be removed. See Karzon, *supra* note 30, at 791 (discussing the narrow definition given to tax fraud by the Swiss).

A treaty between the United States and the Cayman Islands should differ in at least two ways from prior mutual assistance or tax treaties. First, the treaty must specifically address the compelled waiver and the international conflict of laws problem that arises when a judiciary unfamiliar with the international legal issues uses the device.²²⁵

Second, because United States investigators require access to information, and this access is barred by secrecy laws, the treaty should exempt United States criminal tax evasion investigations from the Cayman secrecy law.²²⁶ The treaty could either contain a provision overriding secrecy laws²²⁷ or it could

225. See *Crime and Secrecy Hearings*, *supra* note 12, at 217 n.* (existing mutual assistance treaties are inappropriate for tax law violations). The reason for failure in treaty negotiations is that tax evasion is not one of the universally recognized crimes. See SECOND RESTATEMENT, FOREIGN RELATIONS LAW, *supra* note 105, § 34 reporters' note 2 (crimes of "universal interest" are: slave trade, piracy, narcotics trafficking, prostitution). The very nature of a "mutual assistance" treaty demands that both nations recognize the act as criminal and share an interest in deterring that act. The framers of these rules may not have anticipated the monumental problems created by international tax evasion. See *infra* note 227 (overcoming this problem).

226. See Karzon, *supra* note 30, at 783; GORDON REPORT, *supra* note 1, at A-180, A-182. This type of treaty is called a "limited tax treaty." It specifically overrides banking secrecy. See GORDON REPORT, *supra* note 1, at A-224. One author characterizes this alternative tax treaty as "an interesting concept that has not yet reached fruition." Karzon, *supra* note 30, at 783. This separate agreement limited solely to the exchange of tax information, "could be executed by the United States and a country with which the United States could not reach a fundamental understanding on all of the substantive issues" addressed in a standard bilateral tax treaty. *Id.* at 783-84. It therefore has potential in the area of international tax evasion.

227. See GORDON REPORT, *supra* note 1, at A-180, A-224. "The exchange of information article in U.S. tax treaties with tax havens could be strengthened to override local bank and commercial secrecy." *Id.* at 180. Furthermore, "[a] contracting country should be obliged to use its best efforts within the framework of its internal system to supply information pursuant to a treaty request . . . even if the requesting country does not have or cannot use similar procedures." *Id.* at 225. This would eliminate the requirement of mutuality of criminal interests. *Id.*

A proposed exchange of information article follows:

Article 4

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange information to administer and enforce the domestic laws of the Contracting States concerning taxes covered by this Agreement, including information to effect the determination, assessment, and collection of tax, the recovery and enforcement of tax claims, or the investigation or prosecution of tax crimes or crimes involving the contravention of tax administration.

2. The competent authorities of the Contracting States shall automatically transmit information to each other for the purposes referred to in paragraph

1. The competent authorities shall determine the items of information to be

require the Cayman Islands to amend its secrecy statute.²²⁸ Such an exception to bank secrecy would align Cayman's policy with that of other sovereigns, including Switzerland and Great Britain,²²⁹ which have realized the need for effective

exchanged pursuant to this paragraph and the procedures to be used to exchange such items of information. . . .

4. The competent authority of the requested State shall provide information upon request by the competent authority of the applicant State for the purposes referred to in paragraph 1. . . .

(a) the requested State shall have the authority to . . .

(iii) compel any person having knowledge or in possession, custody or control of information which may be relevant or material . . . to . . . produce books, papers, records, or other tangible property;

. . .

(b) Laws or practices of the requested State pertaining to disclosure of information

(c) by banks . . . acting in an agency or fiduciary capacity, . . .

shall not prevent or otherwise affect the authority of the requested State described in subparagraph (a). The competent authorities of the Contracting States shall have authority to obtain and provide information notwithstanding such disclosure laws and practices.

. . .

5. If information is requested by a Contracting State pursuant to paragraph 4, the requested State shall obtain the information requested in the same manner, and provide it in the same form, as if the tax of the applicant State were the tax of the requested State and were being imposed by the requested State.

Caribbean Basin Model Exchange-of-Information Agreement, *reprinted in* 1 *TAX TREATIES* (CCH) ¶ 175, at 300 (Aug. 1984).

228. Such an exception is authorized by both British common law, which governs in the Cayman Islands, *see supra* note 6, and the Cayman secrecy law. *See CRPA Law, supra* note 8, § 5 ("Nothing in this Law shall by implication be deemed to derogate from the rule in *Tournier v. National Provincial and Union Bank of England*, . . . which rule is declared to have application to the Islands.").

229. *See* Memorandum of Understanding, Aug. 31, 1982, United States-Switzerland, 22 *I.L.M.* 1 (1983) (procedure to be followed in insider trading cases if Swiss Mutual Assistance Treaty precluded assistance). Local Swiss procedures now permit the United States to obtain information about transactions that may violate the United States securities law prohibition against insider trading. *Id.* Additionally, following the effective date of the Swiss Mutual Assistance Treaty, *supra* note 219, Switzerland implemented the Law on International Mutual Assistance in Criminal Matters (IMAC), Mar. 20, 1981 (Switzerland), *reprinted in* 20 *I.L.M.* 1339 (1982), which supersedes Swiss banking secrecy in cases of tax fraud. *See* Karzon, *supra* note 30, at 791. *See generally* Putka, *Those Famed Swiss Bank Accounts Aren't Quite as Impenetrable as They Used to Be*, *Wall St. J.*, June 20, 1986, at 21, col. 4.

In the United Kingdom, those investigating tax evasion cases may obtain evidence from financial institutions. *See* *Clinch v. Inland Revenue Comm'rs*, [1974] 1 *Q.B.* 76, 88 (rejecting a "right of silence" with respect to tax evasion and holding that income tax statute justified broad document request on part of Revenue Commissioner); *Williams v. Summerfield*, [1972] 2 *Q.B.* 512 (prosecutor may inspect bank records notwithstanding possible incrimination of defendant). *But see* *Mackinnon v.*

means of piercing financial privacy statutes in cases of criminal tax investigation.²³⁰ This exception would also underscore the similarities between Cayman and United States policies on financial privacy.²³¹

The United States and the Cayman Islands have previously reached understandings on narcotics trafficking,²³² which

Donaldson, Lufkin and Jenrette, Judgment of Nov. 5, 1985, Chancery Division, London (court declined to exercise jurisdiction over Bahamian bank account in alleged fraud case and quashed subpoena); *Regina v. Grossman*, [1981] 73 Crim. App. 302 (although court had power to compel documents from Isle of Man branch of London bank in criminal tax evasion case, to do so, the court held, would violate principle of comity).

230. See *Subcomm. Report*, *supra* note 1, at 52; Olsen, *supra* note 12, at 1009.

231. The United States and the Cayman Islands have similar financial privacy interests. See The Third Party Record Keeper's Act, 19 U.S.C. § 1509 (1982) (allowing disclosure of financial records to the Internal Revenue Service, but only under limited circumstances and with sufficient procedural protection). The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-13 (1983), similarly restricts federal administrators' access to bank records.

Like the Cayman Islands, federal investigators in the United States must comply with certain procedures before they are granted access. See 12 U.S.C. § 3405 (1983). Despite these protections, nothing prevents a United States law enforcement official from acquiring records in connection with an appropriate criminal investigation. For instance, the Right to Financial Privacy Act exempts grand jury investigations from its provisions. See 12 U.S.C. § 3413(i) (1983).

The statement of D. Lowell Jensen, then-Assistant Attorney General, Criminal Division, Justice Department, summarizes the need for an effective compromise of disclosure and privacy. See *Crime and Secrecy Hearings*, *supra* note 12, at 216:

It is a mistake . . . to condemn bank secrecy . . . because it is being abused in some . . . jurisdictions. Persons and companies transacting business with and through banks are entitled to a reasonable degree of privacy in connection with such business transactions. The United States itself, through the Right to Financial Privacy Act, recognizes this right. The critical question is . . . whether the country has built into its laws *effective and efficient* means of piercing bank secrecy where there is reasonable suspicion that a bank account has been used in connection with a crime or has been the depository of the proceeds of a crime.

Id. (emphasis in original).

232. See *Subcomm. Report*, *supra* note 1, at 31. "[T]he recent tradition of conflict with the Caymans may be changing. In August, 1984, the United States and the Caymans reached an agreement with respect to the disclosure of records relating to drug transactions. This is seen by both U.S. and Cayman government authorities as a very important development." *Id.* The agreement referred to is the Exchange of Letters Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning the Cayman Islands and Matters Connected With, Arising From, Related To, or Resulting From Any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs (1961), July 26, 1984 [hereinafter cited as Agreement] (available at the *Fordham International Law Journal*). This Agreement, scheduled to expire fifteen months after its

is recognized as a crime in both jurisdictions, and recent developments suggest that treaties are being negotiated between the two sovereigns in areas other than narcotics trafficking.²³³ This willingness to negotiate is promising, but before a treaty is proposed, both nations must make a firm commitment to resolve the substantive conflict surrounding tax evasion.²³⁴

CONCLUSION

The undesirable international ramifications of using the compelled waiver can no longer be ignored. The United States emphasis on self-incrimination²³⁵ and the Cayman concern with the semantics of "consent"²³⁶ both lack the perspective that this new international law problem so desperately needs. The compelled waiver, like the cross-border subpoena, attempts to circumvent Cayman bank secrecy because it has thwarted United States tax investigations.²³⁷ As analysis of the cross-border subpoena has demonstrated, the courts of both

enactment, called for a review to begin in mid-1985, at which time the two nations were to begin negotiating a comprehensive criminal assistance treaty. See Agreement, *supra*, § 10.1; Garsson, *Cayman Officials to Visit US For Talks on Money Laundering*, *Amer. Banker*, May 29, 1985, at 2, col. 1; see also Ingersoll & Pasztor, *U.S. Seeks Treaties Against Money Crimes*, *Wall St. J.*, Oct. 31, 1985, at 37, col. 1. "Since the Cayman Islands signed an interim agreement about a year ago to provide bank records in major U.S. drug investigations, . . . [the Justice Department] has received 'more records on major cases in the past year' from Cayman Island banks . . . 'than from all of the other Caribbean countries combined ever before.'" *Id.*

233. See Address of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division, Department of Justice, Before the Annual Meeting of the Pennsylvania District Attorneys Office, in Pittsburgh, Pennsylvania, *Intergovernmental Cooperation in Criminal Prosecutions Under the Reagan Administration*, (Feb. 6, 1986), at 17 (available at the *Fordham International Law Journal*). "[W]e are presently negotiating with the Caymans for a permanent treaty to enable us to have access to this information in a broader range of criminal cases." *Id.*; Ingersoll & Pasztor, *U.S. Seeks Treaties Against Money Crimes*, *Wall St. J.*, Oct. 31, 1985, at 37, col. 1. "Negotiations with the Bahamas in the past few months have produced a proposed mutual assistance treaty that could serve as a model for other Caribbean . . . countries The proposal . . . calls for cooperation 'that is much broader than just narcotics cases' . . ." *Id.* at col. 2-3.

234. See Halstead, *Tax havens—their survival in the 1980s*, *N.Z.L.J.*, Jan. 1983, at 14. "[E]normous conflicts of interest of the political, social and economic variety . . . must be surmounted before any concerted international governmental activity . . . can be [implemented]." *Id.*

235. See *supra* notes 80-91, 102-31 and accompanying text (discussion of United States compelled waiver cases).

236. See *supra* notes 92-101 and accompanying text (discussion of *ABC Judgment*).

237. See *supra* notes 32, 38 and accompanying text (discussion of conflict between United States' tax investigations and bank secrecy laws).

the United States and the Cayman Islands are ill-equipped to balance such irreconcilable substantive interests.²³⁸ Negotiating a treaty will help to assess their interests, foster cooperation between the two nations, and resolve the conflict of laws resulting from the unilateral use of extraterritorial investigative devices like the compelled waiver.

Ellen C. Auwarter

[As this Note was going to press, the United States and the Cayman Islands signed a treaty giving United States law enforcement officials access to Cayman bank records in cases of alleged tax evasion.* As suggested by the author, this treaty goes further than existing mutual assistance treaties with the Caymans or with other tax haven jurisdictions, in securing records in a broader range of criminal cases. Additionally, it appears, at least superficially, to serve the interests of both sovereigns: the United States will obtain necessary bank records only to the extent that the conflict of laws is not exacerbated.** The compelled waiver, however, is not mentioned. The Department of Justice has merely indicated that it will withhold issuing cross-border subpoenas “[a]s a goodwill gesture.”***]

238. See *supra* note 198 (letter from Wilkey to Henkin); April & Fried, *Compelling Discovery and Disclosure in Transnational Criminal Litigation—A Canadian View*, 16 N.Y.U. J. INT'L L. & POL. 961, 968 (1984).

[I]t is inconsistent with international law to expect a U.S. court to judge the interests of foreign governments We expect that a U.S. court, whether under the Restatement or otherwise, would always find that the U.S. interest in enforcement of its criminal law must take priority over the interests of a small state in ensuring, for its own public policy reasons, the confidentiality of a banking transaction.

Id.; cf. Karzon, *supra* note 30, at 827 (“[i]t is unrealistic to expect and egocentric to believe that the United States could, or should, *compel* all other countries to alter their internal tax, corporate, banking, and commercial laws, at the expense of their nationalistic self-interests, in order to facilitate United States tax collections”) (emphasis added).

* Pasztor & Nazario, *U.S. Will Gain Access to Bank Records On Cayman Islands Under New Treaty*, Wall St. J., July 3, 1986, at 5, col. 1.

** *Id.* at cols. 4-5. “[O]n the surface, at least, the treaty allows [the Caymans] to adhere to [their principle of not providing information in tax cases]. Bank records or other information turned over by the Cayman Islands, for example, can’t be used to file criminal tax charges against any individual or company in the U.S.” *Id.* at col. 5.

*** *Id.* The treaty is due to be ratified by early 1987.