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In Re Grand Jury Proceedings (U.S. v. Bank of Nova Scotia)

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SUBPOENA DUCES TECUM—PRODUCTION OF EVIDENCE LOCATED IN FOREIGN JURISDICTIONS — In an important decision, *In Re Grand Jury Proceedings (U.S. v. Bank of Nova Scotia)*,[1] the Court of Appeals for the Eleventh Circuit held that the Bahamian branch of a Canadian chartered bank was required to comply with a *subpoena duces tecum*[2] issued by a federal grand jury, despite the fact that disclosure might have subjected the bank to Bahamian criminal sanctions.[3] This decision is particularly significant in relation to the "growing interdependence of world trade and the increased mobility of persons and companies . . . [where] the need arises not infrequently, whether related to civil or criminal proceedings, for the production of evidence located in foreign jurisdictions."[4] As a result of this situation, tensions have developed which require a new and clearly defined approach.[5]

In the instant case, a federal grand jury, conducting a tax and narcotics investigation of a United States citizen, issued a *subpoena duces tecum* on the Bank of Nova Scotia, requesting the production of certain records[6] maintained at the Bank's branch located in the Bahamas.[7] Declining to comply with the subpoena, the Bank claimed that production of the documents without the customer's consent or a Bahamian court order would place the Bank in violation of Bahamian bank secrecy laws.[8]

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1. 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3056 (1983).

2. A *subpoena duces tecum* requires production of books, papers and other documentary evidence. BLACK'S LAW DICTIONARY 1279 (5th ed. 1979).

3. *See infra* note 8.

4. United States v. First National City Bank, 396 F.2d 897, 900 (2d Cir. 1968) (the possibility of civil liability was not sufficient justification for a German branch of Citibank to disobey a subpoena issued by an American court).

5. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 note 1 (Tent. Draft No. 3, 1982) states: "No aspect of the extension of the American legal system beyond the territorial frontiers 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.*

6. The records requested related to "the bank accounts of a customer of the Bank." 691 F.2d at 1386.

7. The Bank of Nova Scotia has branches in forty-five countries including the United States. *Id.*

8. *Id.* The Bank claimed production would subject it to the following laws:

> Banks and Trust Companies Regulations Act of 1965, 1965 Bah. Acts No. 64, *as amended by* the Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 Bah. Acts No. 3, and Section 19 of the Banks Act, III Bah. Rev. Laws, c. 96 (1965), *as amended by* the Banks Amendment Act 1980, 1980 Bah. Acts No. _____. Both Section 10 and Section 19 are identical. Section 10 of the

Following a hearing, the District Court for the Southern District of Florida entered an order compelling compliance with the subpoena.[9] The Bank formally declined to produce the documents,[10] and as a result, the district court held the Bank in civil contempt.[11]

The Court of Appeals for the Eleventh Circuit affirmed the district court decision, relying primarily on the balancing test adopted in *In Re Grand Jury Proceedings (United States v. Field)*.[12] The court of ap-

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Bank and Trust Companies Regulation Act as amended provides:
Preservation of secrecy.
10.-(1) No person who has acquired information in his capacity as—
(a) director, officer, employee or agent of any licensee or former licensee;
(b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act 1974, or as an employee agent of such counsel and attorney, consultant or auditor;
(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;
(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;
(e) the Inspector under the provisions of this Act, shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except—
(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or
(ii) for the purpose of the performance of his duties within the scope of his employment;
(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within the Bahamas, or under the provisions of any law of The Bahamas.
-(2) Nothing contained in this section shall—
(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or
(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.
-(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offense against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

Id.

9. 691 F.2d at 1387.

10. *Id.*

11. *Id.* Although the opinion did not indicate such, it is assumed that the contempt ruling was based on FED. R. CRIM. P. 17(g), which provides: "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 is issued. . . ." *Id.*

12. 532 F.2d 404 (5th Cir. 1976). For a discussion of this balancing approach, see

peals concluded that the Bahamian national interest manifested in the secrecy law was not "sufficient to outweigh the United States' interest in collecting revenues and insuring an unimpeded and efficacious grand jury process."[13] The Supreme Court denied the Bank's petition for a writ of certiorari on July 13, 1983.[14]

The case law in this area has evolved substantially over the last fifty years. Prior to the 1958 Supreme Court decision in *Societe Internationale v. Rogers*,[15] courts had relied heavily on what were regarded as "fundamental principles of international comity."[16] This rule was articulated in section 94 of the First Restatement of Conflict of Laws, which provided: "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed."[17] Expressed even more simply: a domestic court will not compel the violation of foreign law.

In *SEC v. Minas de Artemisa*,[18] compliance with a subpoena compelling the production of corporate books located in Mexico would have required violation of Mexican law.[19] The Court of Appeals for the

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RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 comment a (1965). See *infra* note 56 for the text of § 40.

13. 691 F.2d at 1391.

14. 103 S. Ct. 3056 (1983).

15. 357 U.S. 197 (1958) (although United States courts have the power to dismiss an action for a foreign party's failure to comply with a discovery order, that remedy was inappropriate when a good faith effort to comply with the production order could be shown).

16. Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960). "Comity" has been given varying definitions. Justice Story viewed comity as a reciprocal recognition by friendly nations of each other's laws. This recognition was based not only on convenience and utility, but also on the "moral necessity to do justice, in order that justice may be done to us in return." W. STORY, CONFLICT OF LAWS §§ 33, 35 at 34 (1st ed. 1834). Compare this more epigrammatic description: "Comity persuades; but it does not command." Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900). In its simplest terms, comity is based on the rule: do unto others as you would have done unto you. Note, *Ordering Production of Documents From Abroad in Violation of Foreign Law*, 31 U. CHI. L. REV. 791, 795 n.19 (1964).

17. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 94 (1934).

18. 150 F.2d 215 (9th Cir. 1945).

19. *Id.* at 218. The Mexican Law involved included several statutory provisions. One of these (Article 65, Ley General del Timbre-Stamp Act) provides that books of account must be available at the warehouse, shop or office of the taxpayer, unless in the possession of some judicial or fiscal authority. Another (Article 33, Codigo de Comercio) obligates merchants to carry accounts and to record their operations in at least three books. Codigo Fiscal de la Federacion, Article 228 XV, provides that failure to keep books or other documents required by law in the places specified constitutes an offense (Article 236 I) punishable by fine for each offense.

Id. at n.5.

Ninth Circuit, acting in accord with section 94, modified the subpoena and ordered the corporation either to seek permission from the Mexican Government to remove the books, or to allow the SEC to copy the books in Mexico.[20] Thus, the court exercised jurisdiction without compelling violation of the foreign law.

Such alternative means of acquiring desired information, however, often were not available to courts. In those situations the *per se* rule required by the comity doctrine, as articulated in section 94, failed to deal sufficiently with competing interests.[21] This *per se* rule required the full recognition of the foreign interest to avoid violation of foreign law, while ignoring the domestic interest in obtaining relevant evidence.[22] As the inflexibility of this rule eventually proved too burdensome,[23] courts gradually began to consider other criteria in determining whether to compel acts with the potential to violate foreign law.[24]

In *Societe Internationale v. Rogers*,[25] a Swiss holding company sued the United States Attorney General to recover property that allegedly had been wrongfully seized by the United States during World War II.[26] Because of the Swiss company's failure to comply with a pretrial production order,[27] the district court dismissed the complaint with prejudice.[28] Compliance with the document request would have placed

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Initially, there was a dispute whether compliance with the subpoena would indeed violate the Mexican legislation. The statutes do not expressly prohibit the furnishing of authenticated copies of subpoenaed materials, however, the court found that "*literal compliance* with the subpoena requiring production. . .of the corporate books would contravene Mexican law. . . ." *Id.* at 218 (emphasis added).

20. *Id.* at 218-19.

21. Note, *supra* note 16, at 796.

22. *Id.*

23. *See* Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877, 895 (1982). "The international comity approach . . . suffer[ed] from an overemphasis on comity in that it automatically defer[red] to foreign law without consideration of the underlying United States or foreign interests." *Id.*

24. *Id.*

25. 357 U.S. 197 (1958). *See supra* note 15.

26. 357 U.S. at 199. The property involved in the litigation had been seized for the United States by the alien property custodian pursuant to 50 U.S.C. app. § 6 (1982). The plaintiff sought to recover its property pursuant to 50 U.S.C. app. § 32. The Attorney General and the Treasurer of the United States were sued as successors to the alien property custodian. *See* Exec. Orders Nos. 9,788 and 11,281, *reprinted in* 50 U.S.C. app. § 6 at 186-87 (1982).

27. 357 U.S. at 201. The order required the production of banking records located in Swiss banks.' *Id.* at 200.

28. 111 F. Supp. 435, 445-46 (D.D.C. 1953). The Court followed FED. R. CIV. P. 37(b)(2), which provides in pertinent part:

the holding company in violation of the Swiss Penal Code and a Swiss banking secrecy statute.[29] The court of appeals affirmed.[30] The Supreme Court reversed, holding that non-compliance with the production order did not justify dismissal of the complaint "when it has been established that failure to comply has been due to inability, and *not to willfulness, bad faith or any fault of the petitioner.*"[31] Despite the fact that compliance would have resulted in a violation of foreign law, the Court never questioned the validity of the discovery order itself.[32] The Court merely found that dismissal of the case was too harsh a sanction.[33]

Thus, in theory, the old *per se* rule was abandoned.[34] Potential violation of foreign law no longer served as an absolute bar to compelling production of documents located in a foreign jurisdiction.[35] Additionally, the Supreme Court carved out an exception allowing for modification of sanctions ordinarily imposed for non-compliance with a production order when good faith efforts to comply were demonstrated.[36]

A number of questions, however, were left unresolved and, as might be expected, confusion developed among the circuit courts. In particular, the Second Circuit failed to apply the *Societe* rule, and instead relied on the older doctrine of international comity.[37]

> [i]f a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose him from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Id.

29. 357 U.S. at 200. The Swiss Federal Attorney indicated that disclosure of the requested records in "accordance with the production order would constitute a violation of Article 273 of the Swiss Penal Code, prohibiting economic espionage, and Article 47 of the Swiss Bank Law, relating to secrecy of banking records. . . ." *Id.*

30. 243 F.2d 254 (2d Cir. 1957).

31. 357 U.S. at 212 (emphasis added).

32. *Id.* at 204-06.

33. *Id.* at 213.

34. *Id.* at 211-12.

35. *Id.* at 204-06.

36. *Id.* at 212-13.

37. *See, e.g.*, Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).

In *Ings v. Ferguson*,[38] *subpoenas duces tecum* were issued requiring the production of documents located in certain Canadian banks[39] in Quebec. Compliance with the subpoenas presented a possible violation of Canadian law.[40] The Court of Appeals for the Second Circuit quashed the subpoenas,[41] reasoning that "[u]pon fundamental principles of *international comity*, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor. . . ."[42]

The court also noted that the litigants had no claims against the banks.[43] The banks had been subpoenaed merely as witnesses.[44] The court stated that "it seems highly undesirable that the courts of the United States should countenance service of a subpoena upon [a corporation] which is not a *party* to the litigation. . . ."[45] Thus, the court implied that a third-party witness in such a situation should be accorded greater deference than a party/litigant.[46]

Two years later, the Second Circuit again applied the comity analysis in *Application of the Chase Manhattan Bank*.[47] A *subpoena duces tecum* that had been served on a Panamanian branch of the Chase Manhattan Bank was modified to avoid violation of foreign law.[48] The court found an "obligation to respect laws of other sovereign states even though they may differ in economic and legal philosophy from our own."[49] As a result of the conflicting foreign law, the court also held that the duty of asking the foreign authorities to allow disclosure shifted to the party seeking production.[50]

In *United States v. First National City Bank*,[51] the Second Circuit once again dealt with a question involving production of documents located in a foreign state. A German branch of Citibank was presented with a subpoena demanding disclosure of certain records.[52]

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38. *Id.*

39. *Id.* at 150. Among the banks subpoenaed was the Bank of Nova Scotia. *Id.*

40. *Id.* at 151. The statute which might have been violated by compliance with the subpoena was the Business Concerns Records Act, QUE. REV. STAT. ch. 278 (1964).

41. 282 F.2d at 153.

42. *Id.* at 152 (emphasis added).

43. *Id.*

44. *Id.*

45. *Id.* (emphasis added).

46. *Id.* One commentator noted that "[t]he posture of the resisting party with respect to the litigation is a proper, indeed important, factor." Note, *supra* note 23, at 895 n.150.

47. 297 F.2d 611 (2d Cir. 1962).

48. *Id.* at 613.

49. *Id.*

50. *Id.*

51. 396 F.2d 897 (2d Cir. 1968).

52. *Id.* at 898. The subpoena required the production of documents involving any

Such disclosure would have subjected the bank to a possible civil action brought by the bank customer whose records were in dispute.[53] The court found that the possibility of civil liability (in contrast to a criminal penalty)[54] was not sufficient justification for disobeying the subpoena.[55] In requiring compliance, the court, rather than applying the comity analysis, relied primarily on the balancing test of the Second Restatement of Foreign Relations Law of the United States.[56] Of

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transaction related to certain bank customers. *Id.*

53. *Id.* at 899.

54. *Id.* at 901. For a discussion of this civil/criminal distinction, see *infra* note 107.

55. 396 F.2d at 902. The court, though, was careful to add that the criminal/civil distinction had not been the sole factor in reaching its determination. It cautioned against over-reliance on this criterion. "[I]t would seem unreal to let all hang on whether the label 'criminal' [was] attached to the sanction and to disregard all other factors." *Id.*

56. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). Section 40 reads:

> Limitations on Exercise of Enforcement Jurisdiction
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> 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 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.

Despite a consensus among the commentators that § 40 articulated clearer and more helpful criteria than those of the older comity analysis, this section received a significant amount of thoughtful criticism. "First, it is not the function of a court to make determinations as to the national interests of foreign nations. . . . Second, the nationality of the party subject to the order does not seem to be a relevant consideration. . . . Third, the power of a court to enforce its orders is as irrelevant a consideration here as in other cases where potentially unenforceable judgments are entered." Note, *supra* note 16, at 800 n.31.

The "judiciary has little expertise . . . to evaluate the economic and social policies of a foreign country. . . ." *In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979). In addition, "[i]t would be useful [if the Restatement would] distinguish between the cases where documents are requested from the party being investigated, and the case where the subpoena is served upon someone connected with the litigation merely by his possession of desired records." Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U.L. REV. 487, 531 (1969).

The most recent draft of the Restatement represents a substantial improvement over the 1965 text. The factors to be considered by the court are indicated with greater

the five factors specified for consideration in the Restatement balancing test, the court of appeals considered only two in detail: the vital national interests[57] involved and the hardship imposed on the subpoenaed party by inconsistent enforcement. Even though the court recognized the difficulty of determining the national interest of a foreign country as manifested in a particular law,[58] it found that the United States interest in enforcing the subpoena in furtherance of a criminal investigation outweighed the German interest in bank secrecy.[59] Turning to the "hardship" issue, the court was not convinced that bank business would suffer or that civil liability would be incurred if the bank were to comply with the subpoena.[60]

The Ninth Circuit also applied a balancing test in reaching its determination in *United States v. Vetco, Inc.*[61] The Internal Revenue Service had issued a summons to Vetco (a United States corporation) requesting the production of books and records of the company and its overseas subsidiaries (Vetco International) for the years 1971 to 1976.[62] Vetco resisted the summons. Affirming the court below, the circuit court required compliance with the summons[63] despite the fact that compliance might entail a violation of Swiss law.[64]

At the outset, the court noted that "*Societe Internationale* did not erect an absolute bar to summons enforcement and contempt sanc-

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specificity; for example, the possibility of alternative means of disclosure. This draft provides:

> In issuing an order directing production of documents or other information located abroad, a court in the United states must take into account [1] the importance to the investigation or litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] in which of the states involved the documents or information originated; [4] the extent to which compliance with the request would undermine important interests of the state where the information is located; [5] and the possibility of alternative means of securing information.

RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 420(1)(c) (Tent. Draft No. 3, 1982).

57. A vital national interest is described as "an interest such as national security or general welfare to which a state attaches overriding importance." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 comment b (1965).

58. 396 F.2d at 903.

59. *Id.* at 901-04.

60. *Id.* at 904-05.

61. 644 F.2d 1324, 1330-32 (9th Cir. 1981).

62. *Id.* at 1326-27.

63. *Id.* at 1333.

64. *Id.* at 1329. "Appellants contend[ed] that compliance with the summonses would require them to violate Article 273 of the Swiss Penal Code." *Id.* This statutory section was also involved in the *Societe* case. 357 U.S. 197 (1958). *See supra* note 29.

tions whenever compliance is prohibited by foreign law."[65] To determine "whether foreign illegality ought to preclude enforcement of an IRS summons,"[66] the Ninth Circuit balanced various competing interests.[67] The court found that the "strong American interest in collecting taxes from and prosecuting tax fraud by its own nationals operating through foreign subsidiaries" outweighed the Swiss "interest in preserving the secrecy of business records,"[68] especially when the IRS "is required by law to keep the information confidential."[69] Turning to the potential hardship to Vetco International, the court was "not persuaded that Article 273 [of the Swiss law] pose[d] a great danger to the appellants,"[70] noting that "[a]n affidavit from a representative of the Swiss Federal Attorney, state[d] that where production is pursuant to an order of a United States Court enforcing an IRS summons there may be a defense to a charge of violating" that article.[71]

Finally, the court considered two additional factors not specified in the 1965 Restatement: the "importance of the documents to the requesting party" and the "availability of alternate means of compliance."[72] The court found that the documents were indeed relevant to the tax investigation[73] and that the appellant's proposed alternate means of compliance[74] were not substantially equivalent to the summons.[75] This somewhat innovative approach taken by the Ninth Circuit provided strong support for its conclusion.[76]

In the recent decision *In Re Grand Jury 81-82*,[77] the United States District Court for the Western District of Michigan ordered the Deutsche Bank AG to comply with a grand jury subpoena requiring production of customer records despite the bank's potential exposure

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65. 644 F.2d at 1329.
66. *Id.* at 1330.
67. *Id.*
68. *Id.* at 1331.
69. *Id.*
70. *Id.*
71. *Id.* at 1332.
72. *Id.*
73. *Id.*
74. *Id.* "Appellants contend[ed] that there [were] six such alternatives: obtaining consents to the disclosure, issuance of letters rogatory, use of treaty procedures, masking the names of third parties, use of an independent expert on Swiss law, and having the IRS examine the records in Switzerland." *Id.*
75. *Id.*
76. It is contended that if the court had restricted itself to the traditional balancing test, its decision would not have been as persuasive. The court's consideration of these two additional factors indicated its particular attention to the equities of the dispute.
77. 550 F. Supp. 24 (W.D. Mich. 1982).

to civil liability.[78] The court rejected the German bank's suggestion that letters rogatory[79] could be issued as an alternative, less instrusive, means of obtaining disclosure.[80] Utilizing the balancing test of *United States v. First National City Bank*,[81] the district court concluded that full compliance with the subpoena was justified.[82]

In view of the general trend in these decisions, it is interesting to note the authorities and reasoning employed in *In Re Grand Jury Proceedings (U.S. v. Bank of Nova Scotia)*.[83] In this court of appeals decision, Judge Morgan first addressed the Bank's principal arguments. The Bank urged the court to follow the Third Circuit's decisions in *Schofield I*[84] and *Schofield II*,[85] "requir[ing] the government to show that the documents sought are relevant to an investigation properly within the grand jury's jurisdiction. . . ."[86] As one commentator noted, "[i]t makes little sense to interfere with another State's jurisdiction to obtain irrelevant documents."[87]

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78. *Id.* at 29. Since the Deutsche Bank AG maintained an active branch office in New York, the district court was able to exercise jurisdiction over the bank. *Id.* at 27.

79. *Id.* at 29. "A letter rogatory is a formal request, made by a court in which an action is pending, to a foreign court to perform some judicial act." Stern, *International Judicial Assistance*, 14 PRAC. LAW. (No. 8) at 15, 22 (1968).

80. 550 F. Supp. at 29.

81. 396 F.2d at 902. *See supra* note 56.

82. 550 F. Supp. at 29.

83. 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3056 (1983).

84. *In re* Grand Jury Proceedings, *In re* Jacqueline Schofield (*Schofield I*), 486 F.2d 85 (3rd Cir. 1973). "In *Schofield I* [the Third Circuit] soundly rejected any contention that the district court should 'rubber stamp' petitions for the enforcement of grand jury subpoenas. Instead [it] held that the trial court would first be required to satisfy itself of the propriety of the subpoena." *In re* Grand Jury Proceedings, Appeal of Jacqueline Schofield (*Schofield II*), 507 F.2d 963, 964 (3d Cir. 1975). The court found "it reasonable that the Government be required to make some preliminary showing by affidavit that each item [was] at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and [was] not sought primarily for another purpose." 486 F.2d at 93. "This broad rule [was] designed to prevent abuse of the grand jury process by requiring a minimum disclosure of the grand jury's purpose in every case." 507 F.2d at 965.

85. *Schofield II*, 507 F.2d at 963 (the court should be satisfied that information sought by subpoena is relevant before enforcing that subpoena).

86. 691 F.2d at 1387. The *Schofield* rule would seem especially appropriate in cases such as *Bank of Nova Scotia* where sensitive foreign relations are involved.

87. Onkelinx, *supra* note 56, at 533. In requiring production, the court in *In re* Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979), considered "whether the requested documents [were] crucial to the determination of a key issue in the litigation." *Id.* at 1154. The most recent tentative draft of the Restatement requires that a court directing production of documents located in a foreign jurisdiction "must take into account the importance to the investigation or litigation of the documents or other information requested." RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED

The district court in *Bank of Nova Scotia*, however, had "enforced the subpoena without determining whether the documents sought were relevant or necessary for the grand jury's investigation."[88] The court of appeals agreed, asserting that the "guidelines established by the Third Circuit in *Schofield* are not mandated by the Constitution . . . [w]e decline to impose any undue restrictions upon the grand jury investigative process pursuant to this court's supervisory power."[89]

Judge Morgan also addressed the Bank's due process argument "that compliance with the subpoena would require it to violate the Bahamian bank secrecy law and therefore enforcing the subpoena and imposing contempt sanctions for noncompliance violated due process under *Societe*. . . ."[90] The court explained that *Societe* did not establish an absolute bar to sanctions that are imposed for noncompliance with a summons or a subpoena whenever compliance is prohibited by foreign law.[91] Moreover, even if the *Societe* rule were applied, because the Bank had failed to make "a good faith effort to comply with the subpoena,"[92] the Bank had not brought "itself within the holding"[93] of that Supreme Court decision.

The Bank's final contention was that "comity between nations precludes enforcement of the subpoena."[94] While not directly refuting the comity argument, the court suggested that the determinative standard was the Foreign Relations Restatement balancing test[95] adopted in *In Re Grand Jury Proceedings (United States v. Field)*.[96] In *Field*, the balancing test was applied to uphold a subpoena issued on a bank

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STATES § 420 (1)(c) (Tent. Draft No. 3, 1982). According to the official comment, "it is reasonable to limit discovery of documents or information located abroad to those necessary to the action (i.e., containing information not otherwise obtainable) and directly relevant and material. . . ." *Id.* § 420 comment a.

88. 691 F.2d at 1387.

89. *Id.*

90. *Id.* at 1388.

91. *Id.*

92. *Id.* at 1389.

93. *Id.* It should be noted, however, that the Supreme Court in "*Societe* . . . [did not] specify what steps must be taken by a party resisting discovery to satisfy the requirements of 'good faith'. . . ." Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 618 (1979). The Court only stated that the party resisting production must have made efforts "to the maximum of [its] ability" to achieve compliance. 357 U.S. at 205. In *Bank of Nova Scotia*, Judge Morgan neither explained the standards for determining a good faith effort, nor indicated the factual basis for distinguishing the case from *Societe*. 691 F.2d at 1389.

94. 691 F.2d at 1389.

95. *Id.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). *See supra* note 56.

96. 532 F.2d at 404.

officer of a foreign bank while he was present in the United States.[97] Compliance was required[98] even though the officer would be subject to criminal prosecution in his country of residence for violation of its bank secrecy laws.[99]

The *Bank of Nova Scotia* court's reliance on *Field* is not persuasive. In *Field,* the subpoena was issued on an individual who was physically present in the United States at the time, while in *Bank of Nova Scotia* the subpoena was a request for documents located in a foreign jurisdiction. More importantly, in *Field* the foreign bank (as represented by the subpoenaed bank officer) was an actual target of the grand jury investigation. In contrast, the subpoenaed entity in *Bank of Nova Scotia* was merely an innocent bystander.[100] Perhaps Judge Morgan's reliance on *Field* was influenced by the fact that he was the author of the opinion in that case. Support provided by other cases would have been more helpful.[101]

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97. *Id.* at 407-09. In compelling compliance, the *Field* court relied principally on a balancing of the national interests involved, concluding that "in light of the traditional discretion given the grand jury and the significant interest this nation has in tax enforcement . . . we see no reason not to enforce the subpoena." *Id.* at 409. The court, however, failed to consider the other elements of § 40. *Id.* at 407-10. *See supra* note 56.

98. 532 F.2d at 405. One commentator has asserted that the contempt order issued on the witness in this case was "highly questionable; the conflict between the grand jury subpoena and bank secrecy law of the Cayman Islands might well have been avoided through an order to the witness to seek a waiver from the foreign government." Note, *supra* note 93, at 627.

99. 532 F.2d at 406. The banking law involved in *Field* was the Bank and Trust Companies Regulation Law 1966 (Law 8) (Cayman Islands). *See* 532 F.2d at 405 n.2.

100. 691 F.2d at 1386. This distinction was highlighted recently in *In Re* Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1983), where the court required compliance with a grand jury *subpoena duces tecum* issued on a Swiss commodities trading corporation despite the fact that disclosure would result in violation of the Swiss Penal Code. The Swiss corporation was allegedly involved in a tax evasion scheme which the grand jury was investigating. *Id.* at 665. Thus, in contradistinction to *Bank of Nova Scotia,* the subpoenaed entity in *Marc Rich* was an actual party to the proceedings under investigation.

101. The court might have looked to United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981). While the facts of *Vetco* are not identical (an IRS summons was involved rather than a *subpoena duces tecum*), the case does serve as an example of an earnest attempt to balance competing interests. *In re* Westinghouse Electric Corporation Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977), *aff'd on rehearing,* 570 F.2d 899 (10th Cir. 1977), is another case that the *Bank of Nova Scotia* court might have considered. In *Westinghouse,* a Delaware corporation that maintained offices in Canada, was found in civil contempt of court and fined $10,000 per day for failing to comply with a subpoena issued by the district court. The corporation (Rio Algom) had claimed that if it complied with the subpoena it would be in violation of the Canadian Uranium Information Security Regulations. *Id.* at 994. Noting the strong Canadian interest in controlling and supervising atomic energy and finding that the present discovery was in a sense

In applying the Restatement balancing test, the court restricted itself to a comparison of the vital national interests[102] involved. Despite the difficulty of ascertaining a foreign jurisdiction's vital national interest in a particular situation, the court determined that the "Bahamas' interest in the right of privacy"[103] was outweighed by the United States' interest in "insuring an unimpeded and efficacious grand jury process."[104]

The court was more persuasive in finding that viable alternative means of disclosure did not exist.[105] "[B]ecause of the cost in time and money and the uncertain likelihood of success," an application to the Supreme Court of the Bahamas was an inadequate solution.[106]

Concluding that the Bank of Nova Scotia must comply with the subpoena despite potential criminal sanctions,[107] the court declared

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cumulative, the court of appeals vacated the district court's contempt order. *Id.* at 998-99.

Among the cases noted in appellant's brief were United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981), United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968) and *In re* Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979). Brief of Appellant, *In re* Grand Jury Proceedings (United States v. Bank of Nova Scotia) 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3056 (1983).

102. 691 F.2d at 1389-91. *See supra* note 57.

103. 691 F.2d at 1391. To support its determination that the Bahamian interest was slight, the court noted that the banking secrecy statute was "hardly a blanket guarantee of privacy." *Id.* (quoting United States v. Payner, 447 U.S. 727, 731 n.4 (1980)). Arguably, such a rationale would encourage even more comprehensive foreign secrecy laws. Indeed, nondisclosure laws are often reactions "to what is considered an intrusion [by United States courts] upon the sovereignty of the nation involved." Note, *supra* note 16, at 797-98. *See also* Note, *supra* note 23, at 878-80.

Consider RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 reporters' note 2 (1965), indicating that there "have been cases in which the exercise of jurisdiction, to require the production in this country of records kept abroad, resulted in adverse official reactions abroad, including enactment of more than one statute elsewhere making it an offense to remove records in response to a foreign subpoena." *Id. See In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952).

A recent draft of the Restatement noted: "By the close of 1980, at least seven foreign states and two Canadian provinces had enacted so-called 'blocking statutes,' designed to give their subjects protection against inquiries by authorities in other states (understood to mean the United States)." RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 91-92 (Tent. Draft No. 2, 1980).

104. 691 F.2d at 1391.

105. *Id.* at 1390-91.

106. *Id.* at 1390.

107. *Id.* at 1386-87. The court should have given greater consideration to the "nature" of the penalty to be imposed by the foreign jurisdiction on the Bank upon its compliance with the subpoena. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 factor b (1965) addresses this very question when it recommends consideration of the "extent and nature of the hardship that inconsistent enforcement actions would impose upon the person." *Id.* Often the severity of the hardship

that it was "not willing to emasculate the grand jury process whenever a foreign nation attempts to block our criminal justice process."[108]

Considered in the aggregate, the court's analysis was weakened by its failure to utilize a more thorough application of the balancing test. By restricting itself to the balancing of the national interests involved[109] and relying on *Field* to the exclusion of other authority,[110] the court failed to support its conclusion convincingly.

Nevertheless, the holding in *Bank of Nova Scotia* extends the grand jury's power to subpoena documents located in a foreign jurisdiction further than any previous case. A third-party "witness," in contrast to a grand jury investigation "target," can now be compelled to produce records, even when that witness may be subject to foreign criminal penalities (in contrast to civil liability).

It is not clear whether the decision in *Bank of Nova Scotia* will have significant precedential value. In denying certiorari, the Supreme Court may have been anticipating a case involving a similar question but where the stakes would be more substantial.

The issue of compelling disclosure of documents in violation of foreign law will no doubt come up again, perhaps in the context of a grand jury investigation, anti-trust litigation, a tax prosecution or a private civil suit. Bearing in mind the unsettled nature of the law and the delicate foreign relations implications involved, a decision in this area by the Supreme Court will be welcomed.

Stephen Baum

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suffered will be determined by the nature of the sanction imposed (criminal and/or civil) in the foreign jurisdiction. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 comment c (1965) indicates that "[a] state will be less likely to refrain from exercising its jurisdiction when the consequence of obedience to its order will be a civil liability abroad." *Id.* Additionally, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 comment (d) (1967) states: "Only in a most extreme situation will a person be ordered to do an act in a state which is contrary to that state's criminal law. Such an order would not be conducive to the maintenance of harmonious relations between the states involved." *Id.* This criminal/civil distinction did not factor sufficiently into the court's decision in the instant case.

108. 691 F.2d at 1391. The court chose not to elaborate on its implied assertion that the Bahamas had attempted to "block our criminal justice process." *Id.*

109. *Id.*

110. *Id.* at 1389-91.