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I. INTRODUCTION

In the past several years, federal prosecutors have used subpoenas, in connection with criminal investigations, in an aggressive attempt to obtain bank records maintained in countries traditionally regarded as havens of bank secrecy.[1] The prosecutors' record of success in obtaining these records has been quite remarkable, and, as one recent decision reveals, the cost of the banks' resistance has been enormous.[2] In fact, recent history has shown that the banks' attempts to withhold production of subpoenaed documents by asserting the defense of a countervailing foreign law will inevitably fail under the following circumstances: (a) when a bank has a banking facility in the United States; (b) when a federal or state grand jury, or the Securities and Exchange Commission (SEC), has issued a subpoena for records held in one of the bank's foreign facilities, or the Internal Revenue Service has issued an administrative summons seeking such records; and (c) when the prosecuting agency can make a good faith showing that their investigation is likely to result in either an indictment, an SEC enforcement action or a tax recovery.[3] Although there are important aspects of this issue that have not been considered by the courts,[4] the

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1. *See generally* Olsen, *Discovery in Federal Criminal Investigations,* 16 N.Y.U. J. INT'L L. & POL. 999 (1984).

2. *See In re* Grand Jury Proceedings (United States v. Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985). A district court order of contempt and imposition of a $25,000 per day fine upon the Bank of Nova Scotia was held not to be an abuse of discretion where the bank repeatedly disregarded court orders to comply with a grand jury subpoena *duces tecum* for certain financial documents. *Id.*

3. *See, e.g., In re* Marc Rich & Co., 707 F.2d 663 (2d Cir.), *cert. denied,* 463 U.S. 1215 (1983); United States v. Toyota Motor Corp., 561 F. Supp. 354 (C.D. Cal. 1983); United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied,* 462 U.S. 1119 (1983); SEC v. Banco Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

4. For example, there would appear to be, at least in the popular mind, a distinction between Swiss bank secrecy and that of other countries. Experience has shown that particularly with respect to bank secrecy of traditional tax havens, such as that of some Caribbean nations, courts have trouble believing that secrecy laws are principled legisla-

weight and trend of authority clearly indicates that the foreign law will not be honored. This article offers bank counsel an alternative to litigation which attempts to satisfy, to some extent, the demands of competing sovereigns, and to avoid the onerous fines which courts in the United States have been willing to impose on banks caught in such a dilemma.

A. Decelerating the Process

Notwithstanding the apparent urgency of the problem in the minds of most bank counsel, the fact is that most United States prosecutors have thought little about the international enforcement of subpoenas against banks at the time of a subpoena's issuance. Rather, it is the following events that typically lead to the bank's dilemma. Prosecutors are involved in intricate (and sometimes frustrating) investigations directed at people they consider to be criminals. If during such an investigation, a prosecutor learns that the subject has made a deposit under an assumed name at "X" bank, the prosecutor will issue a subpoena, as a matter of course, directing "X" bank to produce "all records wheresoever located" relating to accounts maintained by the subject of the investigation.

Large banks often have internal systems and house clerks to respond to record subpoenas. A clerk preparing such a response may find that the individual under investigation has an account not only in the state where the subpoena was served but also in a foreign country. The clerk then may call the foreign branch and request that the account records be sent to the United States. If, however, the foreign country is one with a bank secrecy law,[5] then typically, a telex will be received a

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tive determinations and not calculated attempts to attract illegally obtained funds on which taxes have not been paid.

However, there appears to be a willingness of courts to recognize that Switzerland's policy of bank secrecy was a heroic response to the Nazis' attempt to seek financial information about Germans who fled their country in the 1930's. Whether the purpose of the enactment would persuade any judge to uphold the Swiss law, where he might not uphold a more recent law of a country perceived to be soliciting the money of outlaws, remains to be seen.

5. *See, e.g.*, Banks and Trust Companies Regulation (Amendment) Act, No. 3 (Bahamas 1980); Confidential Relationships (Preservation) Law, No. 16 (1976), *amended by* No. 26 (Cayman Is. 1979); The Bank of Jamaica Law, ch. 6, § 34 (Cayman Is. 1963); Schweizerisches Strafgesetzbuch [StGB] art. 273, Code pénal suisse [Cp] art. 273, Codice penale svizzero [Cp] art. 273 (Switz. 1976). For those countries whose common law imposes bank secrecy requirements and criminal penalties for violations thereof, see generally Garpeg Ltd. v. United States, 583 F. Supp. 789 (S.D.N.Y. 1984) (Hong Kong); CFTC v. United States Metals Depository Co., 468 F. Supp. 1149 (S.D.N.Y. 1979) (Luxembourg); United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973) (Liechtenstein); United

few days later from the bank's foreign branch manager stating that the foreign branch is not permitted to send the requested documents to the United States, even in response to a subpoena. At that point, the clerk advises bank counsel of the problem.

As often happens, the return date of the subpoena may have passed before bank counsel has had an opportunity to return the clerk's call. After finally hearing about the foreign branch's refusal to forward documents and about the subpoena's expired return date, bank counsel must first respond by going to (or sending someone to) the library to find a way out of the problem; however, the only book which should be referred to at this stage is the telephone book, in order to find the number of the prosecutor who issued the subpoena. Bank counsel should call and ask for a meeting in order to discuss the problem in connection with the subpoena in question. It is important that bank counsel conveys the message that the problem does not seem to be insurmountable and that the bank and the grand jury can work around it with a modicum of cooperation on both sides. It is vital that counsel for the bank conveys the impression that the problem is a mutual one, to be solved by the efforts of both the bank and the government. Prosecutors have often failed to consider the adverse impact on United States' interests that occurs when banks are compelled to violate the law of other sovereign nations, a factor which may, in certain circumstances, outweigh the value of bringing a tax evader to justice. At any rate, bank counsel should try to suggest that the appointment take place a few days hence because there are a few things that he should do before such a meeting.

The prosecutor may accept the invitation, or he may decline to meet because the bank is in default of the subpoena. If the response is negative, bank counsel should inform the prosecutor that he would like a conference with the judge who is overseeing the grand jury. The goal here is to get a few days respite in the hopes of working things out.

A few days breathing room is essential for a successful resolution of the bank's problem since the alternative is litigation with the government. Once the bank and the government start litigating, one or both will eventually bring the customer into the litigation. The customer, in turn, is likely to have special counsel who will attempt to reverse the things bank counsel is trying to accomplish. Therefore, litigation is to be avoided.

One way or another, bank counsel will probably obtain a few days adjournment and thereby postpone the return date of the subpoena. In addition, the prosecutor will probably agree to an interim meeting to

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States v. First Nat'l City Bank, 369 F.2d 897 (2d Cir. 1968) (West Germany).

discuss the "problem."

B. Selecting Foreign Counsel

The next thing that bank counsel should do is select local foreign counsel. This is one of the most important decisions in the entire proceeding because the foreign counsel will have one of the most difficult jobs of all the participants in this drama. First of all, foreign counsel must promptly supply bank counsel with a high-quality affidavit for presentation to the prosecutor and, if need be, to the United States court. The affidavit should emphatically state foreign counsel's expert opinion that the law of his jurisdiction prohibits production of banking records—even to prosecutorial agencies of the United States—and that penalties will be imposed for any violation of his country's bank secrecy law.

Foreign counsel often does not (or is unwilling to) draft a tightly knit opinion/affidavit of the sort that United States litigators are accustomed to presenting to courts. Indeed, the opinion/affidavits of foreign counsel are often vague, unannotated, and, quite frankly, of a sloppy nature. It should be noted, however, to foreign counsel's credit, that foreign law on banking secrecy is itself often vague and unannotated. Nonetheless, bank counsel should prevail upon foreign counsel to draft a straightforward affidavit which: (a) sets forth foreign counsel's experience (particularly in the area of banking law) by reason of which he is qualified to give admissible opinion evidence; (b) quotes the statute where one exists; (c) cites and describes cases where the banking privacy law had been applied; (d) describes the potential civil and criminal consequences for violation of the law and, if possible, lists instances in which such consequences have been meted out; and (e) states foreign counsel's unqualified opinion that the bank records cannot be produced in response to the United States subpoena. A wordy, confused and vague affidavit will color bank counsel's case and his client's credibility with both the prosecutor and the judge.

There was a time when such an affidavit was almost sufficient by itself to quash a subpoena calling for foreign bank records.[6] Unfortunately, under current law, this affidavit, or live testimony to the same effect, generally will not be sufficient for a bank to prevail in most courtrooms in the United States.[7] On the other hand, without such an affidavit, bank counsel will not even get the attention of the prosecutor or have the slightest chance of winning a motion to quash the sub-

6. *See, e.g., In re* Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962); First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

7. *See, e.g.*, 396 F.2d at 897.

poena. Moreover, the whole purpose behind bank counsel's efforts is to gain something with which he can negotiate. Thus, his foreign counsel's affidavit is vital.

The reason that local counsel has a difficult role in the proceeding is that bank counsel may also need local counsel to represent the bank in his own country's court, where he might have to argue the precise opposite of what his opinion/affidavit says. That is, if, as is happening more frequently these days, the customer commences an action against the bank in a foreign court to enjoin the bank from complying with the United States subpoena,[8] the bank's foreign counsel may have to argue that under the foreign law the bank should be permitted to comply with the subpoena. Because consent to the foreign injunction would be fatal to the bank's efforts to negotiate its way out of the predicament with the United States prosecutor, if the bank can in any way be persuaded to bear the nominal extra expense, foreign counsel other than the firm which prepared the opinion/affidavit should be retained to represent the bank in any foreign action commenced by the customer.

One other point with respect to local counsel should be remembered. Occasionally, clients think that if bank counsel chooses the right local counsel in a small foreign country things can be done to arrange matters satisfactorily, *e.g.*, laws can be adopted, laws can be applied or not applied, and/or pressure can be brought to bear in the right places. The belief is that the ruling class in small countries is so tightly knit that an influential lawyer need only talk to the right person and the law will be enforced any way that his client wants it to be. The concern here is not, and need not be, with those clients who think that someone can bribe a foreign official to get a desired result, but rather, with those clients who believe that a well-positioned local lawyer has the power and right to speak to a colleague to have a favor done for a client. In most countries, this cannot be done—at least in the context of the subject matter of this article. Certainly, it is advantageous for bank counsel to have a well-connected local lawyer who is highly regarded by his country's judiciary (and, as explained below, its foreign ministry); however, it is probably not wise for bank counsel to hire a local counsel solely on the basis of a recommendation that he is well-connected in his country.

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8. *See* United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); United States v. Chase Manhattan Bank, No. M-18-304 (S.D.N.Y. Apr. 12, 1984) (LEXIS, Genfed library, Dist file).

C. *Negotiating with the Prosecutor*

When the day arrives for bank counsel's meeting with the prosecutor, he should be in a great mood—gregarious, affable, humble. If he is not, he should have someone from his office who is gregarious, affable and humble attend the meeting because that is the tone which must be established. The bank is in a decidedly weak bargaining position. The prosecutor can, at any time, move to compel compliance with the foreign aspect of the subpoena, and the chances of success are very high.

Thus, with this in mind, the major impression that bank counsel wants to make in the meeting is that he is anxious to help the prosecutor solve the government's problem, which is finding a way to apprehend the criminal. His problem is finding a way to help without violating conflicting laws with respect to bank records. Often, to some extent at least, these two concerns do not clash.

When meeting with the prosecutor, bank counsel should bring all of the documents he has which are responsive to the subpoena, that is, those that are maintained in the United States and those in the foreign branch whose production is not prohibited by the foreign law. Production of these materials—particularly if done a day or two before the return date of the subpoena—is more convincing than any words that bank counsel is acting in good faith and sincerely wants to help solve the prosecutor's problem.

Bank counsel must take special care to see that those documents he does have are produced in their entirety. Part of the $25,000 per day fine levied against the Bank of Nova Scotia was for failure to perform a diligent and effective search of all its branches for those documents subpoenaed by the government.[9] In addition, bank records are often recorded on microfilm and their reproduction is of such poor quality that the records are illegible. Therefore, bank counsel should make sure that the records produced are readable. If this is not possible, bank counsel should bring the microfilm to the prosecutor's office and offer it in its original state, in keeping with his goal of convincing the prosecutor that the bank wants to assist with the investigation.

The prosecutor must be cautioned, however, that there are legal limits to the variety of help the bank can provide. Bank counsel should show the prosecutor the affidavit of foreign counsel and tell him that, unfortunately, the law affecting the bank's foreign branch appears to prohibit production of the foreign records. If the customer has already commenced litigation in the foreign country to enjoin the bank from producing the subpoenaed records, bank counsel should inform the

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9. *In re* Grand Jury Proceedings (United States v. Bank of Nova Scotia), 740 F.2d 817, 826, (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

prosecutor that his bank is opposing the injunction but has slim prospects of prevailing.

Having gone through these steps to convince the prosecutor of the bank's desire to assist in the investigation and to demonstrate the bank's exasperation with its uncooperative customer, bank counsel must proceed to find out what the prosecutor wants. This is often the most important task for bank counsel to accomplish. In a remarkably large number of cases, the information sufficient for the prosecutor to prove an element of the crime can be found in the documents which are maintained in the United States. The United States-based files often contain telexes, confirmations or even memoranda of bank officers that detail a movement of cash with sufficient particularity to convince a grand jury or, if need be, an ultimate fact-finder that a certain transaction occurred. Because of their inordinate workloads, however, most prosecutors will not have the time to immediately sort through the cartons of documents given to them, and, without more knowledge, bank counsel is not going to know which of the hundreds of documents just produced might prove a crucial transaction. Therefore, it is imperative that bank counsel knows the specific fact which the prosecutor wants to prove.

When requested, the prosecutor will sometimes give bank counsel the necessary knowledge: *e.g.* "We believe that in October, 1985 a deposit of $2,000,000 was made to the bank's account in a foreign country." This should instigate one obvious action and one not-so-obvious action on the part of the bank. First, the bank should scour their United States records and if a $2,000,000 transfer from one of the bank's United States accounts was made to the customer's foreign account, such can be pointed out to the prosecutor and probably end the whole problem. In addition, the prosecutor's words show what he thinks the foreign records would reveal. The foreign branch manager should be contacted and told what the prosecutor said. If the branch manager tells bank counsel that the account or party whose records have been subpoenaed never had a balance of more than, say, $50,000, *and* foreign bank secrecy laws do not prohibit the reporting of such information, then, bank counsel's problem may be solved. How to convince a prosecutor of the veracity of such information without producing the actual records is problematic and should be worked out with local foreign counsel. An affidavit from the local branch manager stating that the account never exceeded $50,000 comes close to violating foreign bank secrecy law, but, if bank counsel can get local counsel's blessing, it is a great way to end bank counsel's dilemma.

If none of this works, bank counsel should inform the prosecutor of those rights he has against the targeted individual. Most prosecutors

are aware that *United States v. Bank of Nova Scotia* permits prosecutorial agencies to cast aside foreign bank secrecy laws when they have jurisdiction over the United States banks.[10] Many prosecutors, however, do not know that there are appellate court decisions which permit the government to compel a target of a grand jury investigation to waive his foreign bank secrecy rights.[11] Many prosecutors probably do not know about such a process because it is such a counter-intuitive doctrine. A waiver is traditionally considered to be a voluntary relinquishment of one's rights; how a waiver can be compelled is really not clear, but it is the law. Bank counsel should suggest to the prosecutor that the target to the grand jury be contacted in order to execute a court-compelled waiver. Once executed, bank counsel should send a copy of the waiver to his foreign branch manager and his case might be over.

Lastly, in many instances the prosecutor can be directed toward a treaty provision, a "memorandum of understanding" or an "agreed upon procedure" between the United States and the foreign country which provides for the obtaining of documents—sometimes even bank documents—pursuant to the investigation of criminal or securities law violations.[12] Unfortunately, however, these treaties and "memoranda of understanding" are much more appealing on paper than in execution. With the notable exception of Switzerland, the treaty process is painfully slow when undertaken with most countries, and the pertinent treaty provisions are often riddled with loopholes (such as those which forbid disclosure of documents or testimony in connection with tax fraud investigations) or other impractical requirements. The same is true with letters rogatory used outside of the treaty context. Since

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10. 691 F.2d 1384, 1391 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

11. *See, e.g.*, 767 F.2d 1025 (2d Cir. 1985); *In re* United States Grand Jury Proceedings W. Dist. of La., 767 F.2d 1131 (5th Cir. 1985); United States v. Ghidoni, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); *see also In re* N.D.N.Y. Grand Jury Subpoena No. 86-0351-S, 811 F.2d 114 (2d Cir. 1987); *In re* Grand Jury Subpoena, 826 F.2d 1166 (2d Cir. 1987). *But see In re* Grand Jury Proceedings, 814 F.2d 791 (1st Cir. 1987) (rejecting the reasoning in *Ghidoni* regarding testimonial nature of such compelled waivers).

12. *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; Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, United States-Turkey, 32 U.S.T. 3111, T.I.A.S. No. 9891; Treaty on Extradition and Mutual Assistance in Criminal Matters, June 12, 1981, United States- Netherlands, T.I.A.S. No. 10734; Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, *reprinted in* 22 I.L.M. 1 (1983); *see also* 740 F.2d at 829-30, for a discussion of the "gentleman's agreement" between the United States and the Cayman Islands regarding procedures to be followed for obtaining documents in connection with investigations into tax fraud.

most prosecutors are in a hurry to end their investigations, they will not bother to comply with an obscure treaty requiring a letter rogatory when they feel they can obtain the same information by merely filling out a subpoena. Nonetheless, bank counsel might find a prosecutor who could be convinced that the government should obtain the documents through the treaty procedures so that an otherwise law-abiding U.S. bank is not forced to violate a foreign law.

If none of the foregoing approaches is appropriate, bank counsel should still meet with the prosecutor, for it is during such a negotiation session that bank counsel has the best chance of succeeding. The prosecutor can be threatened with litigation over every aspect of the subpoena—its breadth, the enforceability of the foreign document demand, and any other angle related thereto. Indeed, if negotiations with the prosecutor break down, these threats may have to be enforced. Such litigation would certainly inconvenience the prosecutor; however, if the case is a major one, litigation over the subpoena will not derail the investigation and the bank will ultimately be compelled to comply with the subpoena.

D. Negotiations with the Customer

It is the practice of some prosecutors to direct subpoenaed banks not to tell the customer about the subpoena. Bank counsel should avoid entering into such a commitment. The bank has no obligation to refrain from informing the subpoena's target of its issuance,[13] and, at this stage of the proceedings, one of bank counsel's chances to get the bank out of its predicament is to negotiate with the customer.

In fact, at the same time that bank counsel is dealing with the prosecutor, he should talk to the customer, show the customer and his counsel the decisions of *United States v. Bank of Nova Scotia,*[14] *Garpeg Ltd. v. United States,*[15] and *Two Grand Jury Contemnors v. United States,*[16] and explain that litigation in the foreign country would merely be a charade. After all, Aldo Gucci and Syracuse's Mayor Lee Alexander, both targets of prosecutors' investigations, pursued similar litigation and were indicted anyway.[17] Also, if litigation in the

13. United States v. Kilpatrick, 594 F. Supp. 1324 (D. Colo. 1984), *rev'd on other grounds,* 821 F.2d 1456 (10th Cir. 1987).

14. 691 F.2d 1384 (11th Cir. 1982), *cert. denied,* 462 U.S. 1119 (1983).

15. 583 F. Supp. 789 (S.D.N.Y. 1984).

16. 826 F.2d 1166 (2d Cir. 1987).

17. *See In re* N.D.N.Y. Grand Jury Subpoena No. 86-0351-S, 811 F.2d 114 (2d Cir. 1987) (Lee Alexander); United States v. Chase Manhattan Bank, No. M-18-304 (S.D.N.Y. Apr. 12, 1984) (LEXIS, Genfed library, Dist file) (Aldo Gucci); Garpeg Ltd. v. United States, 583 F. Supp. 789 (S.D.N.Y. 1984) (Aldo Gucci).

foreign country has already commenced, the customer should be made aware that, in the end, bank counsel's client is going to honor the United States court's order even if the foreign court issues a contradictory order, for the bank would prefer being ousted from the foreign tax haven than being crippled by fines in the United States. Bank counsel should do anything he can to convince the customer that litigation over the foreign bank records will ultimately be useless. The degree to which the customer will believe this is directly related to the defense strategy which he and his counsel have adopted in connection with the United States prosecutor's investigation. If their strategy is to fight the prosecutor to the hilt because the customer is innocent, they probably will not object to the production of the foreign bank documents because such records would either exonerate the target or have no bearing on his guilt or innocence. Quite frankly, this is rarely a defense strategy.

If their strategy is to look tough and eventually enter into the best plea agreement they can negotiate, bank counsel's words will have some bearing on the timing of their plea negotiations. Bank counsel's threat that he will eventually disclose the incriminating foreign bank document will speed up resolution of their (and therefore, bank counsel's) problem.

If, however, the defense strategy is to fight the case because the facts are such that it is impossible to negotiate a favorable plea arrangement, then there is little the bank can do. In fact, the only possible thing that bank counsel can do in such an instance is to make it too expensive for the target to carry on his policy of fighting everyone at every corner. The bank's customer not only will have the expense of litigating the subpoena issued in the United States and the injunction application in the foreign country; he will also have his other defense costs that are unrelated to the bank secrecy issue. If then, on top of all these costs bank counsel informs him that the bank is going to charge him for any contempt penalties that a court might impose, the customer and his attorney might reconsider whether they have chosen the wisest path to pursue.

The easiest way to charge the customer for bank counsel's legal fees occurs when the customer is also a borrower of the bank. If he has executed a standard loan agreement, there may be some provision in the agreement which can be interpreted as obligating him to pay the legal fees. Otherwise, bank counsel should inform him that the bank has a claim in common law indemnity against him and that it is going to offset his account in an amount equal to the damages the bank incurs from his conduct.

E. If Bank Counsel Has to Litigate

The best piece of advice for counsel for whom none of the above has worked is: litigate in the Seventh Circuit or in a jurisdiction which holds Seventh Circuit precedents in high regard.[18] Bank counsel should avoid litigation in the Second, Ninth or Eleventh Circuits where the "balancing test"[19] that courts apply to determine if production should be compelled, seems to balance in favor of the United States government, regardless of the facts.[20] For example, in *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia)*, the bank was held in contempt for not complying with a subpoena even though the United States government could have followed specified foreign procedure and obtained the documents themselves without putting the bank in jeopardy.[21]

Perhaps one approach to litigation that has not been emphasized enough is that of getting the foreign government involved at the district or trial court level rather than waiting until the case reaches the circuit or appellate court level. After all, it rings rather hollow for a bank attorney to argue to a court that an order compelling production

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18. *See, e.g.*, United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983) (court refused to compel production of bank records protected by Greek bank secrecy laws).

19. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). Under this balancing test, courts look to five factors advocated by § 40 to determine whether subpoenaed documents must be produced despite potential liability under the applicable foreign bank secrecy law.

Section 40 states:

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

20. *See, e.g.*, United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); United States v. Vetco, 644 F.2d 1324 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); Garpeg Ltd. v. United States, 583 F. Supp. 789 (S.D.N.Y. 1984).

21. 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

of foreign documents would undermine the power of a foreign sovereign to make its own laws and to have them recognized by foreign nations when the foreign sovereign itself is not complaining that the court is impermissibly infringing on its power. The argument sounds more convincing when it comes from counsel for the foreign government. He can argue that a federal district court has no right to nullify a duly enacted law of his government merely for the convenience of a United States criminal investigation.

There are two ways in which bank counsel can involve the foreign country in the bank's domestic litigation. He can contact the legal advisor at the foreign country's embassy or consulate in the United States and tell him that a judge is about to ride roughshod over one of his country's laws, or, perhaps more effectively, he can have his local foreign counsel convey the same information to the appropriate minister in the foreign country itself. At any rate, he should encourage the contact to hire able counsel to represent the foreign government who will then either intervene or file an *amicus* brief in support of quashing the foreign aspect of the subpoena.

II. CONCLUSION

The thesis of this article is that resolution of competing sovereign demands with respect to a subpoena of bank records is more a test of the bank counsel's negotiation and psychological skills than of his legal analysis or courtroom ability. Hopefully, this article, though admittedly subjective, will prove insightful to practitioners faced with such a dilemma and provide them with some method of resolving this type of seemingly "no-win" situation.