

1998

The Role of the Independent Committee of Eminent Persons

Michael Bradfield

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Bradfield, Michael. "The Role of the Independent Committee of Eminent Persons." *American University International Law Review* 14, no. 1 (1998): 231-236.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

THE ROLE OF THE INDEPENDENT COMMITTEE OF EMINENT PERSONS

MICHAEL BRADFIELD*

INTRODUCTION	231
I. ORIGINS OF ICEP	231
II. ESTABLISHMENT OF ICEP	233
III. THE FIRST PHASE	234
IV. THE SECOND PHASE	235
CONCLUSION	236

INTRODUCTION

The Independent Committee of Eminent Persons (“ICEP” or the “Committee”) has had a notable first year.¹ ICEP and the international accounting firms that are working for it have the specific task of finding dormant accounts of victims of Nazi persecution in Swiss banks.

I. ORIGINS OF ICEP

Many people were killed during World War II, and after the war, this sad fact was well known in Switzerland as well as elsewhere. There was a great controversy in Switzerland from before the end of the war until about 1970. The Swiss argued among themselves about what to do with the “heirless assets” that existed in Switzerland—“heirless assets” of people who had assets in Switzerland and disap-

* Counsel, Independent Committee of Eminent Persons. Mr. Bradfield is also a partner at Jones, Day, Reavis & Pogue, Washington, D.C. and former General Counsel of the Board of Governors of the Federal Reserve System.

1. In September 1998, International Council of Eminent Persons (“ICEP”) released a Status Report describing in detail its investigation, and the status of it. The Status Report may be read on ICEP’s webpage. See INTERNATIONAL COMMITTEE OF EMINENT PERSONS, STATUS REPORT (visited Oct. 31, 1998) <http://www.icep-iaep.org/press_releases/980916sr.htm>.

irless assets" of people who had assets in Switzerland and disappeared. The heated debate focused on exactly what to do with these assets.

The Swiss had the particular problem of bank secrecy. Essentially the argument on the one side was that Switzerland had a moral responsibility to publish the names of the holders of these accounts so that their heirs could come forward to claim the accounts; on the other side, the argument was that publication would compromise bank secrecy, which was so important to Switzerland and to the Swiss banking system. The argument went back and forth.

By 1962, those persons arguing against publication of the names of the holders of dormant accounts won. Instead, Switzerland passed legislation that effectively nationalized these accounts. All intermediaries, including financial intermediaries, in Switzerland were commanded by law to turn over these accounts to the Swiss Government. The Swiss Government was to advertise for claimants without publishing the names of the account holders and then distribute the assets to recognized claimants. The passage of the legislation and its implementation was a major event at that time. It was well publicized around the world.

However, the Swiss did a terrible job of administering the law. They really did not have their heart in it. It is now well recognized, both outside Switzerland and in Switzerland, that a miserable job was done. In the end, some 10,000 claims were made, and only 1,000 claims were recognized. All funds relating to claims that were not recognized were donated to charity. No serious attempt was made to compel the financial intermediaries, including the banks, to turn over all accounts. No one checked how banks complied with the law.

Consequently, there remained this terrible question that justice had not been done, that all of these assets had not been turned over to the Swiss Government, and that they remained in the banks. This issue continued to plague the Swiss. At various times, they made surveys of Swiss banks and came up with various amounts of money that remained in dormant accounts.

Finally, in 1996, the Swiss Bankers Association ("SBA") made a new survey and came up with the amount of 32 million Swiss francs as the total amount of heirless accounts remaining in Swiss banks. The Jewish groups, particularly the World Jewish Restitution Or-

ganization ("WJRO") and the World Jewish Congress, did not have confidence in this accounting. They did not think it was independent. They did not think it was fair, and they protested vigorously that something more had to be done. One story relates how Edgar Bronfman, then the President of the World Jewish Congress, came to the SBA for a meeting, was made to stand up throughout the meeting, and was not treated properly. Whatever the merits of the story, the problem was a serious one, and it was recognized in Switzerland as a serious one. In the United States, Senator Alfonse D'Amato held a hearing on the topic during the spring of 1996. The problem caught the attention of the SBA, and they decided to enter into an agreement with the WJRO to establish an independent investigation.

II. ESTABLISHMENT OF ICEP

A Memorandum of Understanding ("MOU") was signed on May 2, 1996 by representatives of the SBA, the WJRO, and allied organizations. This MOU established ICEP.² In August, the members agreed that they would select Paul A. Volcker, former Chairman of the Board of Governors of the Federal Reserve System, to be the neutral chairman. The Committee consists of three members and two alternates appointed by the SBA, and three members and two alternates appointed by the WJRO. Chairman Volcker focuses the members on maintaining a strong common program.

The Committee became operational on August 16, 1996 and began to formulate a mandate. The MOU between the WJRO and the SBA provided for an independent, thorough investigation of Swiss banks to determine the existence of dormant accounts. It provided that an international audit firm would be selected in order to carry out such investigation. Furthermore, the agreement provided, for the first time, that the audit firm would have free and unfettered access to all the documentation in Swiss banks in order to make this investigation.

The first task of the Committee was to select an international audit firm to conduct the investigation. Early in the selection process, the Committee realized that using more than one audit firm would be a

2. The Memorandum of Understanding can be read on ICEP's homepage. See Memorandum of Understanding between The World Jewish Restitution Organization and The World Jewish Congress and The Swiss Bankers Association, May 2, 1996 (visited October 31, 1998) <<http://www.icep-iaep.org/mou.htm>>.

good idea because it would encourage a competition in excellence and would also solve conflicts of interest problems that arose because the international audit firms had Swiss affiliates and audited Swiss banks. The Committee did not want any audit firm that was auditing a Swiss bank to do the investigation of that bank. Rather, the Committee would have an audit firm that was not regularly employed by a particular bank to do the investigation at such bank.

III. THE FIRST PHASE

In November 1996, the mandate was drafted,³ and the audit firms were selected. Arthur Andersen, Price Waterhouse, and KPMG were the three firms chosen at that time to conduct the investigation. The Committee adopted an elaborate investigation plan. Preparatory work was commissioned to develop the historical background, to determine where the documentary evidence would be located, to account for the capital flows into Switzerland, and to prepare a history of the banks themselves. This work was performed, for the most part, in the spring of 1997. At that point, ten pilot audits were commissioned in order to determine how the plan of investigation would work in actual practice.

Some of this effort was delayed by the question of indemnification. Audit firms are very sensitive to the issue of being sued by their clients, by people who are relying on the information that they produce, and, in this instance, by class action plaintiffs. In October 1996, two class action lawsuits against Swiss banks had been filed in New York on behalf of Holocaust victims. The audit firms were greatly concerned about their potential liability. Consequently, a significant amount of time was spent discussing the subject of how to deal with the issue of indemnification.

The Bergier Commission, which does some work similar to the work that the Committee does in the narrow field of dormant accounts, is protected by the sovereignty of the Swiss Government.

3. The First and Second Phase Mandates are available on ICEP's homepage. See INTERNATIONAL COMMITTEE OF EMINENT PERSONS, AUDIT FIRM MANDATE AND INSTRUCTIONS—THE FIRST PHASE (Nov. 19, 1996), *available in* <http://www.icep-iaep.org/first_phase_mandate.htm>; INTERNATIONAL COMMITTEE OF EMINENT PERSONS, AUDIT FIRM MANDATE—THE SECOND PHASE (JAN. 30, 1998), *available in* <http://www.icep-iaep.org/second_phase_mandate.htm>.

ICEP does not have that benefit. It is a uniquely private effort between two private groups to deal with, in a sense, a very large public policy problem that happens to involve particular financial institutions of a particular country.

Eventually, the problem of indemnification was resolved in a very complex agreement that involves insurance and other elements. The Committee has been able to put this issue behind it and is now involved in the second phase, which is on-site investigations of the major Swiss banks that existed in the 1933-45 period or entities that acquired banks in existence at that time.

IV. THE SECOND PHASE

In this second phase, another audit firm, Coopers & Lybrand, was selected to conduct investigations at the private and cantonal banks. A major effort is being made at the three largest Swiss banks, Credit Suisse, the former Union Bank of Switzerland (now UBS AG), and the former Swiss Bank Corporation (now part of UBS AG). Arthur Andersen, KPMG, and Price Waterhouse, respectively, are performing the investigations at these banks. These three banks represented approximately half of the banking system in the 1933-45 period. Approximately fifty-five banks represented almost 85% of the Swiss banking system at that period. Consequently, the effort is being concentrated in those banks. In April 1997, there were approximately 250 auditors in the field going through the records of Swiss banks.

The amazing thing about this effort is that when the investigation began, the Swiss banks said there was not much documentation to review because Swiss law permits bank and all commercial records that are more than ten years old to be destroyed.⁴ Consequently, by law, the banks noted that they did not have to keep business records that are more than ten years old.

The auditors performing the ICEP investigations have found kilometers of relevant records. That is both the good news and the bad news. The good news is that there is a tremendous amount of documentary material, and a very substantial part of this documentary material relates to the 1933-45 period. This discovery of large quantities of relevant documentation is also, in a sense, a curse because

4. Schweizerisches Obligationenrecht [Swiss Code of Obligations] Art. 962.

how do you find in this huge horde of material the part of it which is relevant to the investigation? That is the job of these audit firms—to try to make sense of this process.

The records indicate that there is a sufficient basis for making a database of all the accounts that were open or opened in the 1933-45 period. Those databases can be compared against databases of victims of Nazi persecution.

The audit firms are using many databases of victims' names. They made a database of victims' names based on the approximately 10,000 claims that have been submitted to Swiss banks. There is also a database of the names of intermediaries—lawyers, accountants, and notaries. With the help of the Bergier Commission, ICEP expects to expand the database with a complete list of all the intermediaries that were active during the period. In addition, there is also a database of 8,000 names of individuals in Germany and countries that were occupied by Germany when Switzerland blocked the assets of all these countries. The most important databases are those from the U.S. Holocaust Museum in Washington, D.C., and Yad Vashem, the Holocaust Memorial, in Israel. These databases contain over 3 million names of Holocaust victims. Finally, there is a database of the claims submitted to ATAG Ernst & Young, a Swiss accounting firm that was employed by the SBA to receive claims to those accounts that have been published by the SBA. The SBA and the Swiss banks have published some 5,570 dormant accounts that they have found on their books. Over 12,500 claims have been filed for those 5,570 accounts.

CONCLUSION

ICEP would not have been able to achieve as much as it has during its first year without the support of the Swiss Federal Banking Commission and the cooperation from the banks that have been subject to the investigations. The technique of building databases of accounts and comparing that database to databases of the names of victims of Nazi persecution and other persons who made claims on behalf of those victims will produce the most accurate record that is possible at this period of time, more than fifty years after the events in question.