

RECENT DEVELOPMENTS

BANKING SECRECY TODAY

WERNER DE CAPITANI*

For a Swiss bank lawyer, there is hardly a more frustrating topic to write about than bank secrecy. It seems impossible to dispel misconceptions about banking secrecy and its constant and unavoidable companion, the totally inaccessible anonymous numbered account. Even sophisticated people tend to believe the dramatic depictions of crime novelists. Official United States sources inevitably resort to the epithet "blocking statute" when they deal with Swiss bank secrecy provisions.

*In an April 30, 1987 speech before the Asociacion Bancaria de Panama, the author describes the historical background of the secrecy law, and he shows that financial privacy is a common feature in many European countries. Particular attention is given to the controversial situation existing between the United States and Switzerland. This controversy has lost much of its previous tension due to the Treaty on Mutual Assistance in Criminal Matters. The author does not expand in detail on the legal limitations of bank secrecy in the various fields of law; for this he refers to Bernhard F. Meyer's article, *Swiss Banking Secrecy And Its Legal Implications in the United States*, 18 NEW ENG. L. REV. 18 (1978), which is still fairly accurate.*

To address the Asociacion Bancaria de Panama at your Sixth International Banking Convention is an honor, a privilege, and, of course, a responsibility.

My task will not be easy, because I understand you are a geographically mixed audience. The approach to the topic of banking secrecy depends very much on where the event takes place. If the audience is German, I can rely on the fact that the audience is familiar with the basic facts of bank secrecy and, more importantly, that its attitude

* General Counsel for Credit Suisse; Judge at the Commercial Court of the Canton of Zurich (banking division); admitted to the Zurich Bar, 1961; Dr. jur., 1959, University of Zurich Law School.

towards bank secrecy is more or less friendly and sympathetic.¹ The situation is of course totally different if the audience is, for example, North American.² My primary task is to dispel fundamental misunderstandings, and my aim is to de-dramatize the topic and to demonstrate that bank secrecy is not a bulwark the size of the Swiss Alps behind which all the dirty money in this world is hidden, and that it is not even a blocking statute enacted to thwart the difficult job of foreign magistrates.

Your Organizing Committee suggested that I should speak about the current international state of bank secrecy. I am flattered and at the same time distressed to see the extent to which you overestimate my capabilities. Rather, I will focus on the situation in Switzerland and then try to establish whether some generally applicable conclusions may be drawn from the Swiss example.

The individual right to privacy is a basic concept of democracies. It has perhaps greater significance in the countries of the European continent than elsewhere, because Europeans have been involved in a century-long struggle against the aggressions of authoritarian regimes.

Financial privacy — which embraces bank secrecy — is an inseparable part of this concept of privacy. This is supported by old sources. Edouard Chambost is the author of a rather pleasurable and not altogether serious book about bank secrets.³ If we can believe him, the most ancient hint of the bank secret can be found in the Code of Hammurabi, a law book written, or rather carved, in stone 4000 years ago in Babylon. Unfortunately, I am not fluent with that language and was not able to check whether Chambost's interpretation makes sense. But the first controllable and unmistakable secrecy provision is laid down in the rules of the Banco Ambrosiano Milano of 1593. They say that the banker who violates his secrecy duty shall lose his license. In 1619, a similar clause was adopted by the Hamburger Bank,⁴ and subsequently, the secrecy obligation was more and more frequently applied until, in the nineteenth century, it became a routine clause in the Articles of Association of German banks. It is an undeniable fact that in Europe the secrecy duty has been an essential component of the banker/client relationship for centuries.

In Switzerland, the first private, savings banks were established in the eighteenth century. They had only local significance. Geneva,

¹ See E. CHAMBOST, *BANK ACCOUNTS: A WORLD GUIDE TO CONFIDENTIALITY* 115 (P. Walton & M. Thompson eds. 1983).

² See *id.* at 98.

³ *Id.*

⁴ See *id.* at 115.

though, was already an important banking center by 1780. The real upswing started only fifty years later when the financial needs of industrialization and the construction of the railroads had to be met. Credit Suisse, for example, as the oldest of the "Big Three" banks in Switzerland, was established in 1856. Towards the end of the nineteenth century, banking laws were enacted in several cantons.⁵ Federal legislation was tackled only when several banks faced enormous liquidity problems and nearly failed as a result of massive savings withdrawals at the outbreak of World War I. Legislation, however, was delayed until after the depression of 1929, and the Swiss Banking Law was not enacted until 1934.⁶ Not surprisingly, it contains a secrecy provision,⁷ because we share the conviction that discretion is an essential element of banking in any country where the personal liberty of the individual is recognized.

The present version of the secrecy provision dates from 1971.⁸ In 1971, the Swiss Banking Law was overhauled. The secrecy provision was modernized, but only formally. In substance, it did not undergo any change. One may ask, why was the secrecy duty coupled with criminal sanctions? There are two explanations.

The well-known explanation is that the penalty provision was intended to deter the Nazis from spying out accounts in Swiss banks.⁹ The world economic crisis had led to a significant capital flight from Germany to Switzerland. As a reply, Germany introduced foreign ex-

⁵ Cantons are the individual states of the Swiss Confederation.

⁶ Federal Law Relating to Banks and Savings Banks of November 8, 1934, amended by Federal Law of March 11, 1971, *Systematische Sammlung des Bundesrechts* [SR] 952.0, *Recueil systematique du droit fédéral* [RS] 952.0 (Switz.) [hereinafter *Banking Law of 1934*].

⁷ Banking Law of 1934, art. 47, which reads as follows:

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, authorized agent, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity; and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding SFr 50,000.
2. If the act has been committed by negligence, the penalty shall be a fine not exceeding SFr 30,000.
3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.
4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.

⁸ See *supra* note 6.

⁹ See Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, 14 *New Eng. L. Rev.* 26 (1978).

change controls on August 1, 1931. Immediately afterwards, several German agents were caught trying to obtain information from Swiss bank employees. The situation was aggravated considerably after Hitler had gained power in 1933, and a German law was enacted which served the purpose of confiscating Jewish property.¹⁰ German citizens were forced to sign waivers authorizing German officials to collect information from Swiss banks. The Swiss National Bank intervened swiftly and prohibited the giving of information. But this did not impress the foreign agents, because there was no provision declaring these activities punishable. Therefore, the bank secrecy criminal provision was rushed through at the very last moment.

A less heroic, but equally likely version reads as follows: One of the Swiss statutes which experienced a particularly wearisome and long ripening period was the Penal Code.¹¹ Its first drafts dated from the 19th century, but it was only ratified in 1937 and enacted as of January 1, 1942.¹² The Penal Code contains, of course, provisions about business secrets and the secrecy duty of lawyers, doctors and clergymen. When the Swiss government transmitted the Banking Act bill to the Parliament, it indicated that the penal provisions of the Banking Act were drafted along the same lines as the Penal Code bill, whose enactment was still far away. So it was possibly merely a question of time saving that Switzerland has its secrecy provision in the Banking Act. Let me add that the Swiss are still convinced that financial confidentiality is something we want and need. A legislative initiative of the Socialist Party aimed at substantially weakening the bank secrecy provisions was rejected in 1984 by the Swiss voters by a three to one margin.

This observation gives me the opportunity to make some general remarks. It has become customary for certain countries to be singled out and blamed for protecting their bank secrecy duties with criminal penalties, and you may take it for granted that Panama, Switzerland and Luxembourg are mentioned as the primary examples. This choice is absolutely arbitrary. If we neglect those newly created financial centers — which are usually situated on an island not too far from a real financial center and which try to boost their attraction by providing draconic penalties for secrecy violations — then there remain at least the following countries which hardly ever are scolded even though their Banking Laws also provide criminal sanctions for the breach of the

¹⁰ See *id.*

¹¹ 1937 SCHWEIZERISCHES STRAFGESETZBUCH [STGB], CODE PÉNAL SUISSE, [CP], amended by RS 311.0.

¹² See F. DESSEMONTET & T. ANSAY, INTRODUCTION TO SWISS LAW 214 (1981).

secrecy duty: Austria, Denmark, Finland, Mexico, Norway, Portugal, Sweden, and Turkey.¹³ Likewise, it is important to note that several countries whose banking laws do not contain a particular secrecy clause regard the bank secrecy as a business secret like the secret of an attorney whose violation is punishable in the terms of the "normal" Penal Code. Among these countries are France, Greece, Luxembourg, The Netherlands, and Spain.¹⁴

The number of reputable countries where the violation of bank secrecy entails criminal sanctions is quite impressive. One country, though, is patently missing: Italy, where the first mention of bank secrecy and the consequences for breach of it were made. I do not pretend that it is a cogent result of this, but I want you to know that the Banco Ambrosiano, the bank which I mentioned earlier as the first bank operating under a secrecy duty, is presently being wound up.

At this point, let me drop one or two words about the civil sanctions. Frequently, lists are also drawn itemizing the countries where you can sue your bank for damages if it breached its secrecy duty towards you. In my opinion, these lists are of little value. In the first place, I cannot imagine that, where confidentiality is an element of the banker/customer relationship, a breach of such confidentiality does not constitute a contract and therefore automatically entitles you to a damage claim. But then, I am hard put to give you examples of what the damages would be. In my career, I have never come across a case where a violation of the bank secrecy resulted in a recoverable damage.

Likewise, I am hard put to give you a definition or rather a description of the term "bank secret." The Banking Law itself simply speaks of "bank secret" without specifying what actually is meant. The general opinion is that bank secrecy covers all aspects of the banker/client relationship unless they are publicly known. Obviously, this is a very vague description, and the border zones are correspondingly large.

Let us now turn to the scope of Swiss bank secrecy. In this respect, we are confronted with two phenomena: one is the still widespread belief that the banker's discretion is absolute, and the other one is the exultant cry which we expect to read at least once every year in the United States newspapers, "Swiss banking secrecy cracked." Where lies the truth?

It is difficult to judge today what the drafters of the secrecy clause had in mind in 1934, and I would not totally exclude that, under the

¹³ See generally E. CHAMBOST, *supra* note 1 (giving a general review of the bank secrecy laws of the above mentioned nations).

¹⁴ *Id.* The information supporting this list was gathered in 1984 and may no longer be accurate.

then prevailing conditions, they wanted to give it a very broad field of application. But I cannot imagine that they intended to build up an obstacle which would have resisted even a Swiss criminal investigation. Anyway, all this is guesswork, because there are absolutely no sources available.

When I joined Credit Suisse in 1962, it was clear that the secrecy duty could be overridden by many information duties. I do not intend to bore you with technicalities, and I restrict myself to saying that all persons or authorities who represent the customer by operation of law are entitled to full information. This includes the heirs and/or the executor of the will or the administrator of the estate, the guardian, and also the Bankruptcy Office, which in my country is a public institution. Moreover, the secrecy clause of the Banking Law expressly states that the Swiss procedural regulations concerning the duty to testify take precedence over the secrecy duty, and this means, generally speaking, that a banker is bound to testify or to produce documents both in civil litigation and in criminal cases.¹⁵ I said "generally speaking," for the situation is rather intricate due to the fact that in our Confederation we have dozens of different codes of procedure, and each one looks different. It is fair to say, however, that in all major cantons, bankers are now under the duty to testify. If we step back twenty-five years, this applied only to Swiss litigation and Swiss criminal investigations. In the area of international legal assistance, no one bound by a professional discretionary duty could be forced to testify. The reason was that this international cooperation was volunteered and lacked a formal statutory basis.

This sounds terrible, but it was not. In fact, in the early sixties, the Swiss banks were still nice little entities with predominantly domestic businesses and little enthusiasm to go international. When Credit Suisse celebrated its one hundredth anniversary in 1956, it boasted a balance sheet total of SFr 3 billion in comparison with SFr 103 billion today, it had 2,600 employees compared with 14,000 now, and it consisted of 26 branches as opposed to about 200 branches and affiliates in Switzerland plus 69 abroad today. The outlook which concluded the commemorative book published on that occasion cast a suspicious glance at the economic boom of the years after World War II, cautioning that this could not go on forever and hailing the banks' determina-

¹⁵ See Comment, *The Effect of Swiss Bank Secrecy on the Enforcement of Insider Trading Regulations and the Memorandum of Understanding Between the United States and Switzerland*, 7 B.C. INT'L & COMP. L. REV. 541, 551 (1984); Comment, *The Conflict Between United States Securities Laws on Insider Trading and Swiss Bank Secrecy Laws*, 7 NW. U.J. INT'L L. & BUS. 318, 330 (1985).

tion to give domestic business precedence over risky international exposure. As before, this pessimistic forecast was swept away by the turn of events. In the "Roaring Sixties," the banking business soared to unexpected dimensions, certainly not as a result of domestic growth, but rather as a result of a totally new scenario. This scenario arose when the continents moved closer together and when international trade and, simultaneously, international crime climbed to unanticipated heights.

This new situation soon led to clashes about Swiss bank secrecy, almost exclusively with the United States. The situation in Europe was under control. In 1966, Switzerland joined the European Convention on Mutual Assistance in Criminal Matters,¹⁶ which provided a basis for assistance to all Western European countries.

As for the United States, I wish to avoid the impression that they played a role as arch-villains. To a certain extent, it was predictable that problems arose. The United States played a predominant role in our export trade, the Swiss banks had built up a strong presence in the United States, and we were faced with a legal system which in our European eyes was tinged with a good bit of chauvinism, if this word may be used in this connection.

It is true that our first friction with the United States goes back to earlier times. Immediately after World War II, the Americans endeavored to trace and to seize German assets allegedly hidden in Swiss banks. In this controversy, however, bank secrecy was not the central issue. The main problem was that the Swiss Government said it was unable to recognize the legal basis of the claims. Eventually, the situation was dealt with on a political level by the conclusion of various international agreements.

One last offshoot of the post-war period was the Interhandel case, in the United States called *Societe Internationale v. Rogers*.¹⁷ Interhandel sued the United States to recover property which had been considered Nazi-controlled and seized by the Alien Property Custodian. In the course of the discovery proceedings, the United States requested records of a Swiss bank in an effort to prove that the bank had conspired with Interhandel in order to disguise German ownership of the assets. The bank refused, and the situation became even more complicated when the Swiss Government enjoined production of the records. The United States Supreme Court held that the fear of criminal prosecution excused the bank's noncompliance with the discovery request.¹⁸

¹⁶ European Convention on Mutual Assistance in Criminal Matters, *concluded* April 20, 1959, 472 U.N.T.S. 185.

¹⁷ 357 U.S. 197 (1958).

¹⁸ *Id.* at 211-12.

Many years later the case was settled. The assets in question were sold and the sales price divided among the parties.

Then followed the period of the valiant crusade of District Attorney Robert M. Morgenthau against foreign "secret" bank accounts. His efforts were spectacular, but probably doomed to failure from the very beginning, for already in 1968 Switzerland and the United States had earnestly begun to negotiate a legal assistance treaty. These negotiations lasted five years. After signature of the treaty by both countries in 1973, it became effective on January 23, 1977.¹⁹ During its lifetime, the treaty has been used by the United States close to 500 times. The treaty contains a highly unusual chapter about legal assistance in cases of organized crime which was introduced at the vigorous insistence of the Americans.²⁰ Interestingly, this chapter has rarely been used. What unfortunately has become most important is legal assistance in connection with drug trafficking.

The United States enjoyed its preferential treatment for only six years, because in 1981, the Swiss Law on International Mutual Assistance in Criminal Matters (IMAC)²¹ was enacted. This law gives all countries essentially equal opportunity to obtain legal assistance from Switzerland, including the production of bank records. Obviously, the foreign request must meet certain standards. In the first place, the relevant facts of the case must show that the offense prosecuted in the requesting country contains all the elements of an offense punishable in Switzerland.²² In other words, if assistance is sought for an act which is not punishable in my country, the standard of dual criminality is not met, and a banker cannot be forced to testify. In addition, the IMAC provides certain exceptions where no legal assistance is granted. These include cases which may have a predominantly political character and military justice proceedings.²³

These cases, however, may also include, in the terminology of the IMAC, offenses which appear to be aimed at minimizing taxes or which violate regulations concerning currency, trade, or economic policy.²⁴ Does this mean that legal assistance is excluded in tax cases? Not

¹⁹ Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter U.S.-Swiss Treaty].

²⁰ *Id.*, chapter II, 27 U.S.T. at 2031-34.

²¹ Bundesgesetz über internationale Rechtshilfe in Strafsachen [Swiss Federal Law on International Assistance in Criminal Matters], 1981 SR 351.1, 1981 RS 351.1, art. 67 [hereinafter IMAC].

²² *Id.*

²³ *Id.*

²⁴ *Id.*

at all. We make the following distinction: tax evasion (which means the simple failure to declare or to pay taxes) is not a criminal offense in Switzerland, but only a misdemeanor. If the Swiss tax authorities accuse a taxpayer of tax evasion, they have no means for requesting the production of bank records. So if we refuse to grant international legal assistance in these instances, this only means that foreign tax authorities are put on the same level as their Swiss counterparts. The situation, however, is different in cases of tax fraud. Fraudulent conduct means the use of such devices as counterfeited or forged documents of all sorts including inflated invoices, manipulated balance sheets or even advices reflecting a date which is not the date of execution. Such behavior is considered criminal, and accordingly legal assistance can be obtained.

Incidentally, this is also true as far as the famous numbered accounts are concerned. A numbered account is an absolutely normal account. There is only one technical difference: its holder is only known to a restricted number of personnel. It is a safety measure which reduces the risk of inadvertent or intentional divulgence, but the identity of the customer is as carefully checked as in any normal case. This does not, of course, exclude the risk that a numbered account is opened for a black sheep, and then the Lord have mercy upon the bank involved — the media certainly will not.

It would seem that the legitimate expectations of prosecutors all over the world have been met to a large extent. Information including disclosure of bank records can be obtained from Switzerland in almost all cases which are considered as crimes. However, peace has by no means come yet. The latest round with the Americans was about insider trading, which is not punishable yet in Switzerland. I would exaggerate if I said that I enjoyed the attacks of the SEC against Swiss banks in the *St. Joe Minerals*²⁵ and *Santa Fe*²⁶ cases. On the other hand, they had the gratifying effect of reanimating the Swiss insider bill which had fallen into oblivion since it first was rather lamely discussed more than ten years ago. The Swiss legislation machine is extremely slow, and the insider bill, which allegedly was given preferential treatment, is still under discussion. In order to bridge the gap, the Swiss government, the SEC and the Swiss Bankers Association joined

²⁵ SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

²⁶ SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of, Santa Fe Int'l Corp., [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,424 (S.D.N.Y. July 25, 1983), *settlement announced* [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,484 (S.D.N.Y. Feb. 26, 1986), *aff'd*, 817 F.2d 1018 (2d Cir. 1987).

their efforts and established an Agreement which is known as Convention XVI.²⁷ It allows the SEC to obtain bank records reflecting stock exchange transactions, if the SEC establishes that, within twenty-five days prior to the announcement of the merger, tender offer or similar matter, material price or volume movements have occurred in a particular stock.²⁸

A special Swiss Commission will investigate the matter and release the information to the SEC if the customer involved and/or his bank are not able to convince the Commission that he was not an insider or benefitting from inside information. This Agreement has been in force since January 1, 1983, and apparently the Commission has handled several cases. The SEC has declared its satisfaction with this procedure and its results. In Switzerland, in turn, the Convention has faced criticism. It is neither a law nor a treaty, and many scholars believe that the bank secrecy should not be lifted by what seems to be a private agreement. Anyway, we expect the insider provision to be enacted in the Penal Code within the next ten months.²⁹ Then the Convention

²⁷ Agreement XVI of the Swiss Bankers' Association with regard to the Handling of Requests for Information from the Securities and Exchange Commission of the United States on the Subject of Misuse of Inside Information, January 1, 1983, 22 I.L.M. 7 (1983) [hereinafter Convention XVI].

²⁸ *Id.* at 7-8.

²⁹ StGB, art. 161, CP, art. 161 (The law is expected to be enacted in mid-1988. The expiration for the time to hold an opposition referendum is April 11, 1988.).

The following is a translation of art. 161:

EXPLOITATION OF THE KNOWLEDGE OF CONFIDENTIAL FACTS

1. Whoever as a member of a board of directors, of a management, of an auditing body or as an agent of a stock corporation or of a corporation controlling such stock corporation or depending from it, as a member of a public authority or as a public officer, or as the auxiliary of the above named persons, obtains a pecuniary advantage for himself or a third person by exploiting the knowledge of a confidential fact which, when becoming known, will in a foreseeable way have a considerable influence on the market price of shares, other securities or corresponding ledger securities of the corporation or of options traded in Switzerland on a Stock Exchange or on a pre-Stock Exchange market, or who reveals such fact to a third person, shall be punished with imprisonment or with a fine.

2. Whoever becomes informed directly or indirectly on such a fact by one of the persons referred to in section 1 and who obtains a pecuniary advantage for himself or a third person by exploiting this information, shall be punished with imprisonment of up to one year or with a fine.

3. Are to be considered as facts in the meaning of section 2 and 3 a forthcoming issue of new equity participations, a consolidation of companies or a similar fact of comparable bearing.

4. If the consolidation of two stock corporations is planned, then sections 1 to 3 apply to both corporations.

will automatically expire, and, not only the SEC, but securities regulators of all countries will have the opportunity to obtain information about suspected insider transactions.

The most recent legislative activity in Switzerland concerns money laundering. A preliminary bill has been released for comments. I cannot predict yet how long it will take until this bill becomes the law.

There is another point which leads to frustration. It has to do with the impatience of prosecutors. I take the liberty to quote a passage from a speech which the Swiss Ambassador to the United States made two months ago before the Washington Foreign Law Society:

It will probably not come as a big surprise that especially in this country with its penchant for instant gratification prosecutors often regard judicial assistance as not much more than a time consuming nuisance and are therefore tempted to try so-called unilateral measures — in clear language they try to confiscate assets of a bank in this country in order to pressure that bank to deliver the requested evidence from Switzerland. Needless to say that this is a surefire way to unproductive confrontation. It is unavoidable that obtaining evidence abroad is a bit more complicated, yes, maybe more cumbersome and time consuming than the taking of evidence domestically. It is a price worth paying to avoid confrontation. Nevertheless it is obvious that the delays inherent in foreign assistance procedures have to be reasonable. Otherwise this instrument ceases to be a valid and efficient way for legitimate law enforcement. The Swiss authorities have recognized that fact and envisage to undertake several in part quite far reaching steps to *streamline the procedure*. It is clear, however, that concerns for due process, a concept I do not have to explain to Americans, put a certain limit to this endeavor.³⁰

I wish to add here a story which came quite recently to my attention and which I find rather amusing. It has to do with the investigation of the United States House Select Committee in the Iran/Contra affair. A formal United States request for information was received

5. Sections 1 to 4 apply by analogy if the exploitation of the knowledge of a confidential fact relates to shares, other securities, ledger securities or corresponding options of a co-operative association or of a foreign company.

³⁰ Address by Klaus Jacobi, Ambassador of Switzerland to the United States of America, at the Annual Dinner of the Washington Foreign Law Society (Feb. 20, 1987) (*emphasis in original*).

long ago, and I believe the information will be released very soon. However, the House Committee carries its own investigation, and it requested to receive information on its own. The request was politely turned down, because the Treaty says that all United States requests have to emanate from the United States Attorney General and his designates, which is also the office which receives the information from Switzerland.³¹ Apparently, this reaction was taken badly by members of the staff of the House Committee, and the Swiss were accused of unfairly hiding behind the Treaty and invited to change their laws. We certainly should not overestimate this incident; on the other hand, it demonstrates how difficult it can become to operate in an area where the prosecution of the law is soaked with questions of prestige and, as I believe, also of publicity.

Incidentally, both the IMAC and the Swiss law implementing the Legal Assistance Treaty with the United States provide that a legal assistance request can be preceded by a request for a temporary blocking order, which can rather summarily be motivated and is not subject to the requirements concerning form and content which are applicable to the actual request for assistance.³² Under these conditions, I cannot find any justification for the unilateral domestic steps which the Ambassador mentioned.

Ladies and gentlemen, you are probably surprised at my zeal to demonstrate the many ways that exist for "cracking" the bank secrecy, and you may wonder whether, after all, it is true that the secrecy is like a Swiss cheese: full of holes. Well, I like the comparison, because a high-quality Swiss cheese must have plenty of holes, and without holes, nobody would relish it. Let me make one thing plain: the Swiss bank secret was always intended to protect privacy from illegitimate assaults, and it was never intended to protect illegal behavior from legitimate investigation. If you understand bank secrecy in this basic conceptual sense, it has not undergone any change. It is exactly in this spirit that the Swiss banks established an ethical code with rules of good conduct in bank management ten years ago.

Banks undertake careful examination of the identity of their customers, including the beneficial owners of domiciliary companies. Anonymous accounts do not exist in Switzerland. Bank counter transactions normally do not require identification of the counterparty. You can exchange currency or buy gold coins without revealing who you

³¹ U.S.-Swiss Treaty *supra* note 17, at 2050.

³² Bundesgesetz zum Staatsvertrag mit den Vereinigten Staaten von Amerika über gegenseitige Rechtshilfe in Strafsachen [Swiss Federal Law on the United States-Swiss Treaty on Mutual Assistance in Criminal Matters], 1975 SR 351.93, 1975 RS 351.93.

are. In order to diminish potential misuse of such cash transactions, banks will not accept amounts of SFr 500,000 or more without checking the identity of the bearer. This sum will be lowered to SFr 100,000 in October of this year. The banks also will not actively assist attempts at tax evasion or capital transfers from countries with exchange controls. The tax evasion undertaking means basically that only records shall be given to the customer which are made in the ordinary course of business and which reflect, without omissions or alterations, all transactions that were carried out. The provision aims at preventing ad hoc statements from being produced which could aptly be used to deceive the tax authorities. The agreement is by no means a paper tiger. Non-compliance carries fines of up to SFr 10 million (corresponding today to U.S. \$7 million).

This code of conduct shows how we in Switzerland understand bank secrecy. We believe that the concept of discretion as such is right and must be maintained. But the form in which it takes shape needs continuous review and, if necessary, adjustment to a changing environment. Take insider trading. Not so terribly long ago, insider trading was, perhaps grudgingly, regarded as a possibility for a company's top management to gain a super-bonus. Public opinion has changed; such behavior is not simply unfair, but inconsistent with our sense of justice. Prompt action has to be taken in order to ensure that insider trading cannot benefit any longer from the protection of bank secrecy. Such flexibility is not the result of modern insights. It goes in line with the maxim which the Greek philosopher Heraclitus coined 2500 years ago: *Panta rhei* — everything is always in motion. I think it would be disastrous for bank secrecy if it would be treated as a static and unchanging principle. New challenges have already surfaced. The United Kingdom Companies Act gives any company the right to request information about its genuine shareholders.³³ Virtually all shares of United Kingdom companies which are deposited with Swiss banks are registered in the names of nominees. How do we react if a company requests identification of the real shareholder? The situation is even more delicate since criminal behavior plays no role at all. We are presently examining what could and what should be done in order to comply with the company's legitimate information request without sacrificing the client's likewise legitimate privacy. Perhaps this problem should not be overestimated, and perhaps bank secrecy will become more and more insignificant. Today, strict bank secrecy is not enough to make a country an important financial center. Today, the big clients are the

³³ Companies Act 1985, ch. 8, § 212 (UK).
Published by Penn Law: Legal Scholarship Repository, 2014.

institutional investors. They are not particularly interested in discretion, but are in quest of efficient service and performance, and in addition, they will attach great importance to such factors as political, economic and monetary stability, free flow of money, avoidance of red tape, and the high rating of the financial institutions with whom they deal.

Nonetheless, bank secrecy as a shield from unjustified invasion of privacy will not altogether lose its importance, and in that respect will continue to add to the attractiveness of any reputable financial center.

Panama, April 30, 1987