1. General Considerations on Judicial Assistance Between Switzerland and the United States

1.1. Introduction

The importance of Switzerland’s financial institutions to the international securities markets makes appropriate a discussion of the Swiss approach to international judicial assistance. This paper will review the general workings of the Swiss system as well as the ten years’ experience of application of the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters (Treaty), without limiting the discussion to securities matters. In this respect it will be helpful to briefly discuss a few principles to which Swiss authorities are bound and to describe the relationship between the Federal Office in Police Matters (OFP) and the executing magistrate (a judicial authority).

1.2. Basic Principles

The principle of “dual criminality” is of utmost importance to judicial assistance. Where the requested assistance can be granted only through the use of coercive measures, this principle requires that the conduct giving rise to foreign proceedings must also be punishable domestically. Although the existence of dual criminality will be determined under Swiss law, there is no requirement that legal norms be identical. This means that if an act is denominated as, for example, “insider trading” in the United States, assistance may be granted in
Switzerland even if Swiss law does not define such an offense, so long as some specific Swiss statute makes the conduct unlawful. However, if the conduct is punishable only in the requesting state, assistance may not be granted by the requested state.

Swiss law also embodies the rule of “speciality” which is derived from extradition practice. Article 5 of the Treaty provides a detailed explication of this norm and enumerates a list of exceptions to the general rule. Under this provision the requested state retains full authority to grant or deny the right to use documents obtained through the Treaty for another independent proceeding. The Swiss national law on international judicial assistance also requires that this rule shall apply to all foreign requests for judicial assistance.

Several articles of the Swiss Criminal Code reflect the “protective principle” as regards Swiss interests. In order to protect higher state interests, these provisions declare unlawful (1) acts committed in Switzerland by foreign authorities without prior executive consent (for example, investigations by foreign police or magistrates) and, (2) disclosure abroad of business or industrial secrets by individuals.

The Swiss Civil Code contains a provision calling for protection of interests related to private life. To achieve this goal, it prohibits disclosure of facts or documents related to the “private sphere” of the individual or his economic, personal, or professional secrets. Banking secrecy can be seen as an extension of this right.

In examining the merits of a case, whether criminal or not, a Swiss judge has to balance private and public interests. This need arises whenever the necessity of protecting an individual’s or corporation’s private sphere conflicts with the desirability of disclosure in the interest of the community. This conflict becomes particularly relevant in criminal investigations. The Treaty embodies this principle by setting forth very strict conditions under which disclosure of information with respect to an unrelated third party is allowed. Such disclosure is always subject to the ultimate condition that it be absolutely necessary to carry out the foreign investigation.

It must be emphasized that these principles are fundamental to Swiss law. Although they may be questioned under some provisions of
1.3. Some Particulars of the Swiss System

Since January 1983, international mutual assistance in criminal matters in Switzerland has been governed by a new law, the Swiss Federal Law on International Assistance in Criminal Matters (IMAC)\textsuperscript{11} which applies to all cases unless an international treaty or convention provides differently. The procedure governing the handling of a request submitted by the United States, however, is generally regulated by the national law of October 1975 implementing the Treaty.\textsuperscript{12}

The great difference in treatment of a United States request for assistance and a request originating with another state\textsuperscript{13} lies in the role played by the OFP. In United States matters the OFP has final control of the procedure and decides on the merits whether or not to transmit the documents. The local judge or court official is simply in charge of the formal execution of the OFP's decisions, i.e., hearing witnesses, authenticating documents, and issuing warrants for search and seizure. In all other foreign requests, the OFP is limited to a much more formal role. It must screen requests submitted through diplomatic channels, but the ultimate decision on the merits is reached by the local judge, subject to a right of appeal to both the cantonal and federal levels.

In both situations, these authorities are bound by their own rules of procedure. As to matters related to the Treaty or any other form of assistance, the OFP, as a part of the executive branch, will decide based upon federal administrative law. Conversely, the local judge\textsuperscript{14} will apply the rules of criminal procedure peculiar to the particular canton in which he is sitting. This distinction has an important consequence because all decisions related to coercive measures can be taken only by the local judge, acting pursuant to the cantonal statute on criminal procedure. The final review of all cases related to judicial assistance is made by the Federal Supreme Court which, pursuant to the law implementing the Treaty and the IMAC, will review the case under rules of administrative procedure.

This dual procedure may result in complications for both the au-

\textsuperscript{11} IMAC, supra note 7.
\textsuperscript{13} Such a request might be made under a bilateral or multilateral agreement or even under the reciprocity provision contained in article 8 of the IMAC, supra note 7.
\textsuperscript{14} In Geneva, this will be the examining magistrate.
authorities and the private parties involved in the request, because Swiss federal administrative law (with a few exceptions such as provisions of criminal administrative law) does not provide the Swiss administrative authorities with the power to exert any coercive measures. In a landmark decision,\(^5\) the Swiss Supreme Court recognized this situation and affirmed the principle that cantonal authorities must decide under their rules of criminal procedure. In so doing, the Court confirmed the dual administrative and criminal nature of Swiss procedure in granting assistance in international criminal matters. It is, therefore, not surprising that the OFP, as a member of the executive branch,\(^6\) has no power over the local judge, a member of the judicial branch. This suggests that, in some cases, the delay in handling a request is not the responsibility of the OFP, because the authority of execution is the cantonal judge. The OFP may only exert pressure on the judge and is precluded from taking any judicial, administrative, or other measures itself.

The authority handling the foreign request, be it the OFP, or the local judge, has a legal duty to expedite the request and protect the rights and interests of Swiss or other non-United States citizens or corporations. This is particularly true when the examination of a non-United States witness takes place under United States rules of procedure.\(^7\) In such instances Swiss law requires the local judge to ascertain that the questions are admissible and do not imperil the rights of the witness.\(^8\) These factors, combined with the absence of motivation on the part of local judges who must handle cases they will not fully adjudicate, provide serious obstacles to the prompt disposition of requests. The OFP, however, as an executive authority, has been more receptive to United States requests.

I.4. Results of Application of the Treaty

Although the number of requests for assistance issued by the Swiss authorities is not negligible, United States requests are both more numerous and more complex. The numerical disparity is not surprising considering the incidence of white collar crimes and drug-related offenses, the profits of which tend more often to be deposited in Switzer-
land by persons acting in the United States than the reverse. As to complexity, the typical United States request aims at the disclosure of business secrets (generally bank documents), the hearing of witnesses, the production of hotel and telephone bills, and similarly detailed matters. Due to the liberal United States rules governing discovery, a much greater number of acts will have to take place in Switzerland than would in the United States if the same request for assistance emanated from Swiss authorities. Furthermore, an authentication process is always necessary when documents are produced by a bank or a corporation even though the procedure specified in Article 18 of the Treaty is seldom followed.\textsuperscript{19} The reverse, again, is not true. The local Swiss judge will, of course, be able to delegate part of the investigation to the police but will have to proceed personally with hearings, searches, and seizures.

In order to respond to the needs of United States authorities, local Swiss judges have acceded to requests for methods of discovery, such as verbatim depositions, voice recording, or videotape recording, for which Swiss procedural rules make no provision. Although the Treaty provides for verbatim transcriptions,\textsuperscript{20} it is silent as to other technical means. No Swiss canton has a criminal procedure that specifically envisions taking evidence by these technical methods. Nevertheless, in a few cases local judges (e.g., in Zurich and Geneva) have agreed, with the consent of witnesses, to take discovery in these unusual ways.

This flexibility reflects the strong good will of Swiss authorities, particularly the OFP, in rapidly expediting the examination of requests. Delays usually occur at the execution stage or at the appeal level, specifically when the case is forwarded to the Swiss Supreme Court. The delay in handling such appeals, however, has decreased dramatically in recent years.

The issue of what procedural safeguards should control the use (and prevent the abuse) of local remedies remains a sensitive point. Under the law implementing the Treaty,\textsuperscript{21} the person concerned can first file an objection with the OFP and then appeal to the Swiss Supreme Court. It is not clearly established whether the cantonal court of appeal can examine the merits of the disputed request or can only review the legality of the procedure employed by the local judge in ordering a search or seizure. In a recent decision,\textsuperscript{22} the Supreme Court held that the cantonal court could examine the merits of the case insofar as

\textsuperscript{19} Treaty, supra note 1, art. 18, 27 U.S.T. at 2041-42.
\textsuperscript{20} Id. art. 12.6, 27 U.S.T. at 2038.
\textsuperscript{21} Swiss Law on the Treaty, supra note 12.
\textsuperscript{22} Judgment of May 2, 1984, Bundesgericht, 110 BGE Ib 88.
the OFP had not done so previously, observing that under the Treaty the OFP usually issues its decision at the start of proceedings. This opinion is not without ambiguity and could lead to the OFP and the canton asserting overlapping jurisdiction.

The law implementing the Treaty, therefore, provides opportunities to delay delivery of the requested documents to the United States authorities. Requests for the freezing of assets, however, are immediately executed, notwithstanding any appeal or opposition, in order to prevent irreparable harm caused by disappearance of the funds. In such situations the Treaty allows a very swift decision which may be taken by the OFP (in exceptional circumstances) or the local judge. Thus, the urgency of a matter can be respected, even if the merits of a case are examined much later, and the United States authorities cannot be informed immediately of the outcome of their requests. The law implementing the Treaty also provides for an application to a consultative commission when Swiss national interests are at stake. This cumbersome procedure has not been used frequently.

As a practical matter, then, an opposing party can delay the delivery of requested documents to United States authorities by several months. It is easy, therefore, to understand the concern of United States authorities with such delays. This situation is ironic because some of the remedies provided in the Treaty to protect individual rights were inserted to conform to United States rules of procedure, particularly with respect to the constitutional right to remain silent. Moreover, the Treaty is geared toward granting assistance in important criminal cases, and it is therefore understandable that strong safeguards exist. In addition, the Treaty provisions providing for disclosure of business or professional secrets had to recognize a person’s right under Swiss law to assert that a particular disclosure was unnecessary or even unlawful.

The position of the Swiss Supreme Court has been favorable to granting judicial assistance to foreign states, particularly the United States. Based on the good faith presumption of customary public international law, its jurisprudence shows a total reluctance to review the

23 Where extreme urgency attends a Treaty request, article 8 of the Swiss Law on the Treaty, supra note 12, permits the OFP to take precautionary measures swiftly.
24 Id. art. 6.
25 Under the Treaty a state may refuse to execute a request that it considers "likely to prejudice its sovereignty, security, or similar essential interests . . . ." Treaty, supra note 1, art. 3.1(a), 27 U.S.T. at 2028.
26 Articles 6–8 of the Treaty, supra note 1, 27 U.S.T. at 2031-34, contain special provisions aimed at organized crime.

https://scholarship.law.upenn.edu/jil/vol9/iss3/9
facts asserted by the foreign state (as in extradition cases). The Court also takes into account allegations by the party opposing the request that documents obtained in Switzerland may be used in proceedings other than those for which assistance was granted. This position stems from the argument that bad faith on the part of a foreign contracting state cannot be presumed and that obligations imposed by the Treaty will therefore be respected (pacta sunt servanda). Furthermore, there is no principle of res judicata in matters related to international assistance. The Supreme Court has stated that, even if a request could not be granted, nothing would prevent the foreign state from later proceeding with a new, more complete request. This was particularly true in the *Santa Fe* case, in which the first request was denied, whereas a year later a new request was granted. In fact, there seem to be very few cases in which assistance was finally refused, after the OFP accepted the matter.

The Swiss authorities’ presumption in favor of granting assistance can also be illustrated with reference to fraud in fiscal matters unrelated to organized crime. The Treaty does not apply in these cases, and the IMAC can be used only under the condition (among others) that reciprocity be granted. Cases have occurred in which assistance was granted to a United States tax fraud investigation because the conduct was rendered criminal by a specific provision of Swiss law although it did not fall within the list of offenses specified by the Treaty. An example of such conduct would be the creation of a corporation in Europe with fraudulent bills issued to allow unauthorized payments by a United States corporation.

Unfortunately, with the exception of cases in which the Swiss judge travels to the United States and is efficiently assisted there by the Federal Bureau of Investigation, the handling of Swiss requests has not been as expeditious as might reasonably be expected. In fact, the lack of motivation suggested above exists for the local United States judge or authority as well. There is the additional reluctance, in some cases, to grant information that will be used in a foreign proceeding that does not provide the same procedural guarantees as the one taking place in the United States in regard to the same matter. These problems are no less in requests for assistance in civil matters which have been executed after very long delays. The mutuality of such problems suggests that

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29 Judgment of May 16, 1984, Bundesgericht.
30 A schedule of offenses for which the Treaty provides compulsory measures appears at 27 U.S.T. 2064-67.
they are simply inherent in the mutual assistance process, in which two judges or authorities act, but only the requesting state is truly concerned with the final outcome of the proceeding.

1.5. Questions Specific to SEC Investigations

In the *Santa Fe* case, the Swiss Supreme Court had to determine whether a request originating from the Securities and Exchange Commission (SEC) fell within the scope of the Treaty.\(^{31}\) The answer was not obvious, because under the Swiss system, law enforcement agencies, with the exception of some specialized federal administrative bodies,\(^{32}\) generally lack independent judicial powers. The Court finally determined that even if the demand of the SEC did not have as a principal goal the institution of criminal proceedings, that aspect still existed and was related to the request.\(^{33}\) Furthermore, it stated that the formal presentation of the request by the United States Department of Justice arguably satisfied the conditions of the Treaty.\(^{34}\)

The Swiss Supreme Court further ruled that the facts described as “insider trading” would fall under the provisions of Article 162 of the Penal Code, provided that the insider had tipped a third party.\(^{35}\) In this case, the Court found that the tipper and tippee could have been prosecuted in Switzerland for disclosure of commercial secrets if the tippee took advantage of the tip. This decision was not unanimously accepted by legal commentators, some of whom considered that the conduct was not yet punishable under Swiss law. In fact, the problem is a serious one, and it therefore appeared necessary to enact a new provision of the Penal Code to quiet any doubt. Again, it took a strong cooperative will to embark on this path.

If the United States definition of unlawful conduct were to change in the future, however, assistance might not be granted because the dual criminality test would not then be met. Because it is not contended that every single transaction on the United States securities market entitles the SEC to full disclosure under the Treaty or the Memorandum of Understanding,\(^{36}\) a request may be denied in the future if, for instance, the definition contained in Article 162 of the Penal Code or

\(^{31}\) 22 I.L.M. at 785.
\(^{32}\) For example, the Customs Administration has the power to impose fines but not deprivation of liberty.
\(^{33}\) 22 I.L.M. at 785.
\(^{34}\) Id.
\(^{35}\) Id. at 796-98.
\(^{36}\) Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, United States-Switzerland, 22 I.L.M. 1 (1983) [hereinafter MOU].
even in the new Swiss regulations on insider trading envisions conduct different from that described in the request. This raises the difficult question of the extent to which United States authorities can expect Swiss authorities to follow their legislative and regulatory changes as well as new enforcement policies.

There are additional reasons why requests related to insider trading are not handled as quickly as the SEC would desire. Insider trading is not (at least for the time being) perceived in Switzerland as a "crime" in the same sense as more traditional forms of proscribed behavior. This perception is prominent not only in legal circles but also among the general population. Therefore, because the Treaty is geared to providing assistance in criminal matters, some judges see no reason to give these cases priority over others, noting that the correct handling of requests relating to insider trading is very time consuming.

Sometimes, such as in SEC v. Banca Della Svizzera Italiana (St. Joe Case), the request is presented by the United States authorities several years after the occurrence of the facts. It is then difficult for the Swiss judge to understand why a particular need for haste still exists when the recollection of witnesses is already impaired. Finally, although requests made on behalf of the SEC or any other United States authority are well structured and complete, their scope is often seen as too broad by the Swiss. For example, when investigating an insider trading case, the SEC will ask for information on every single trade made on the United States market through a Swiss bank during the days preceding announcement of a tender offer, regardless of the number of shares or options involved. Cases are known where the fortuitous acquisition of 500 shares (each share’s value being fifty dollars) had to be investigated upon request of the SEC because the order was placed through a Swiss bank, arguably indicating that it could have originated from the same tip as other acquisitions made at the same time. It appears that a more extensive balancing test should take place in order to avoid investigation of small, insignificant cases involving no wrongdoing. In such instances, assistance is ultimately denied because the bank demonstrates to the judge that the decision to buy was made by the bank without its client’s knowledge and as a result of normal observation of the market rather than receipt of inside information. In these cases, the SEC tends not to be easily convinced that assistance was rightfully denied. However, even when considering only those requests made on behalf of the SEC, the record shows that the information

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needed was eventually furnished, even if the expected time schedule was not always met.

1.6. Suggestions for Cooperation

The preceding discussion leads to some broad suggestions for improving the process of judicial assistance between the United States and Switzerland.

In the future, United States authorities should accept, on its face, the fact finding process which the OFP conducts through the examining magistrate, that is, without demanding that the Swiss authorities support the accuracy of their findings. For instance, in an insider trading investigation, the statement of the OFP stressing that the operation has no nexus with the tender offer should be accepted as sufficient. In the past, the SEC has frequently requested additional documents which must be edited before transmittal to protect the individual involved. Too often United States authorities require more from the OFP (and indirectly from an individual who turns out to be innocent) than from the Commission instituted by the MOU; yet when the Commission denies a request, United States authorities accept its refusal. The good faith clause should work both ways, and there should be a simple procedure instituted under which the OFP could simply declare (and the United States authorities accept) that the investigation made in Switzerland leads to a belief that the suspect operation is not unlawful.

Treaty procedures should always be used in preference to unilateral sanctions such as freezing of assets or imposition of daily fines for contempt of a disclosure order. At the very least it should be agreed that if judicial assistance is requested (and in particular when it is successful), the SEC should refrain from also using a court proceeding in the United States to put additional pressure on the Swiss bank or corporation. If this suggestion were followed, Swiss banks would tend to be even more cooperative than they are now. Moreover, such a policy would respect the spirit of the Treaty, which provides for extensive assistance, but only under strict, mutually agreed upon rules. Otherwise, persistence in the application of unilateral pressure may well achieve a goal opposite to that desired and further delay the receipt of needed information.

Thinking more generally, if the goal is to prevent manipulation or unlawful profits when a takeover occurs, it may be more efficient in the future to enact strict laws regulating market transactions rather than to

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38 For a description of the Commission's role, see MOU, supra note 36, art. III(3), 22 I.L.M. at 4-5.

https://scholarship.law.upenn.edu/jil/vol9/iss3/9
penalize the conduct of some insiders. Under the current United States legal environment, the temptation present in a highly profit-oriented society makes illegal insider trading almost inevitable. In Switzerland, a takeover cannot easily occur because the target corporation’s board must approve the sale of registered shares. This requirement represents a more restrictive approach to market regulation but leaves less opportunity for fraud.

Despite the problems examined above, the general conclusion should be a positive one. The United States-Switzerland Treaty was the first of its kind between countries of common law and civil law origins, with corresponding differences in procedural systems and modes of legal thought. The results on both sides are very encouraging, and the regular increase in the number of requests shows that the cooperation is real and certainly has a future.

2. DISCUSSION OF THE HYPOTHETICALS FROM THE SWISS POINT OF VIEW

2.1. Market Transaction Hypothetical

2.1.1. Actual Possibilities of Judicial Assistance by Switzerland

Judicial assistance in criminal matters is possible only if the facts alleged by the SEC also constitute a criminal offense in Switzerland. Because insider trading is not itself illegal in Switzerland, assistance may not be granted. However, if the insider is not trading for his own account, but rather tips others, assistance may be provided. This is because the Swiss Criminal Code prohibits officers or other employees of a company (insiders) from divulging business secrets of that company to a third party, and prohibits the third party from taking advantage of the secrets. Consequently, the tipper’s giving of a tip and the tippee’s taking advantage of it have been considered by the Swiss Supreme Court to be criminal infractions in Switzerland.

Where insiders trade for their own account, assistance may be provided through an original system, based upon a private agreement of the Swiss Bankers’ Association (Convention XVI) and the MOU.

For a discussion of this “dual criminality” principle, see supra notes 4-5 and accompanying text.

Cp, art. 162.


MOU, supra note 36.

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entered into between the Swiss and United States governments. This system seems to function to the satisfaction of the United States authorities although it applies only to banks, and not to brokers or other financial institutions who did not sign Convention XVI. The Swiss, however, consider it to be a very exceptional and provisional system which will be repealed as soon as the new statute on insider trading is enacted. The legal basis of this system is not absolutely certain, and it is not viewed as a proper way to limit banking secrecy. Particularly objectionable is the absence in Convention XVI of any provision giving the bank’s client the right to object to release of information concerning his identity or affairs.

International assistance in civil or administrative matters is not available in such a case. The present legal system will not be discussed further here as it will soon be outdated by new legislation.

2.1.2. Judicial Assistance Under the Proposed Statute

In 1985, the Swiss government introduced a new bill on insider trading, which must be passed by both chambers of the Swiss Parliament to become effective. One chamber has approved the bill, and the second is about to consider it. It is very probable that it will become law in late 1988, or at the latest, in 1989. Its very short text would add one new article (art. 161) to the Swiss Criminal Code.

The text of the bill, as adopted by the first chamber of the Swiss Parliament (which added paragraph 2bis), presently reads:

Article 161 of the Swiss Criminal Code.
Misuse of confidential information.

1. Anybody who, in his function as member of the board of directors, officer, auditor (or representative) of a corporation (or of a corporation controlling it or controlled by it), as member of a public authority, or as a public officer, or as assistant to them, knows a confidential fact, the disclosure of which can be anticipated to materially influence the price of shares, other securities or assimilated “papers” of the corporation or the price of options related to such securities, traded at the Stock exchange or “avant bourse” and secures a profit

43 See infra section 2.1.2.
44 1985 Feuille Fédérale II 70.
46 “Avant bourse” refers to the trading of stocks by authorized brokers but outside of the usual market hours.
for himself or a third party by misusing this information, or discloses such fact to third parties and, by doing so, secures a profit for himself or a third party, shall be sentenced to imprisonment or to a fine.

2. The third party (tippee) to whom such fact is disclosed directly or indirectly by one of the persons referred to in section 1 and who, by misusing such information, secures to himself or a third party a profit, shall be sentenced to up to one year imprisonment or to a fine.

2bis. The facts referred to in sections 1 and 2 shall include the imminent offering of new shares, a merger or similar information of equal significance.

3. Sections 1 and 2 apply to both corporations whose merger is being considered.

4. Sections 1 to 3 apply by analogy when the misused confidential information relates to stocks, other securities or assimilated "papers" or options of a cooperative company or a foreign company.

After enactment of this bill, Switzerland will be able to grant judicial assistance in practically all insider trading cases. It may be that, in some particular case, the definition of the Swiss law will not cover the facts for which the SEC would like to receive information. This would probably occur only rarely because of the bill’s broad definition of insider trading.

In the case of the hypothetical, international assistance undoubtedly would be given under the new statute. Resolution of this example would be easy, because the SEC’s request is precise and concerns a particular and important trading operation. The case would be more difficult if the request concerned a great number of isolated and possibly small transactions during a certain period, with no clear relation to an insider operation. In such a case, international assistance should not be given without some examination of the merits by the Swiss judge.

2.1.3. Assistance in Learning the Name of the Beneficial Owner

If international judicial assistance is available, the name of the legal owner of the account for which the Swiss bank has made the transaction certainly will be provided to the SEC.


See supra Section 1.5.
A problem arises if the nominal owner of the account is a person acting as a trustee or a nominee. A more difficult problem exists if such owner is a "shell corporation," incorporated in Switzerland or in some foreign country such as Liechtenstein, Panama, the Bahamas, or the Cayman Islands. In both cases, it is to be noted that, in all or most foreign countries, including the United States, the bank will not always know the beneficial owner’s identity. Indeed, even if the bank knows such owner’s identity, it may decide not to divulge this information as it was not obliged to know it. Consequently, in most countries, judicial assistance will not be very useful, if the beneficial owner has been cautious enough to avoid any direct contact with the bank, giving all instructions through a nominee or an officer of the "shell corporation."

Switzerland is apparently the only country in the world in which banks are obliged, in principle, to know who is the beneficial owner of accounts, especially those of "shell corporations," opened with them. This obligation is provided by the famous "Duty of Care Agreement" entered into in 1977 between the Swiss National Bank and practically all Swiss banks. This Agreement expires on September 30, 1987, but will be replaced by a very similar Agreement between the Swiss Bankers' Association and all Swiss banks. Consequently, as banks will normally know the beneficial owner of the account, the name of such beneficial owner will be provided to the SEC through judicial assistance. Remarkably enough, it does not seem that other countries, including the United States, are taking or requesting similar measures.

Under the Agreement, however, Swiss banks need not identify the beneficial owner of the account, if the account is opened by an attorney or a "recognized chartered accountant" acting under professional secrecy and attesting that he knows the beneficial owner, who is "fit and proper." One plausible solution in this situation would be for the Swiss Judicial Authority to request the attorney or "recognized chartered accountant" to reveal the name of the beneficial owner. An obstacle, especially for attorneys, lies with the "attorney-client privilege." The professional secrecy of attorneys does not, however, allow them to make commercial or financial transactions for the account of a client and then refuse to divulge the client's name even in response to a criminal inquiry.50

49 Agreement Between the Banks Domiciled in Switzerland and the Swiss Bankers' Association, on the one hand, and the Swiss National Bank, on the other hand, on the Observance of Care in Accepting Funds and on the Practising of Banking Secrecy, enacted into force July 1, 1977, 16 I.L.M. 767 (1977).

50 Although contested until recently, this point is now well settled Swiss Law following the as yet unpublished judgment of Dec. 29, 1986 of the Bundesgericht in a case involving judicial assistance requested by the United States.

https://scholarship.law.upenn.edu/jil/vol9/iss3/9
In any case, the scope of this “attorney clause” will be narrowed in the new Agreement which becomes effective in October 1987. In the future, attorneys and “recognized chartered accountants” will not routinely prevent the bank from knowing the real identity of the beneficial owners of accounts, but will do so only if such action is justified by their professional activity.

2.2. Disclosure Hypothetical

2.2.1. Particular Characteristics of the Hypothetical

Resolution of this case appears easy, from the Swiss point of view, because of three characteristics. Firstly, what is alleged by the SEC is that the profit shown in the last balance sheet of the Swiss subsidiary was artificially high, because false invoices were made and included in the accounting. This amounts to making a “forged document,” which is a criminal offense under Swiss law. The case would be much more difficult if the reason for showing an artificially high profit were different. For example, the utilization of “undisclosed reserves” made during prior years is, at least in principle, permissible and certainly not criminal under Swiss law. The making of insufficient provisions for probable future losses is illegal, but not necessarily criminal, in Switzerland.

Secondly, information about such forged documents and the resulting inflated profit clearly will not jeopardize legitimate business secrets of either the Swiss subsidiary or third parties. Here again, the problem would be very different had the allegations concerned insufficient provisions for future losses or other accounting irregularities not involving forged documents.

Finally, the SEC apparently has full jurisdictional power over the United States corporation, which is the sole shareholder of the Swiss subsidiary. Consequently, we assume that the SEC may order the United States corporation to compel a number of actions by its Swiss subsidiary, which will allow the information to be supplied. Should the SEC find it lacks the power to so order the parent corporation, it would do better to obtain expanded powers under United States law rather than to insist upon obtaining international assistance.

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61 Cp, art. 251.
62 Such conduct is apparently quite legal in the United States, as illustrated by the recent example of loans made by United States banks to South American borrowers.
63 See infra Section 2.2.2.
2.2.2. Provision of Information by the Subsidiary Without International Assistance

From the Swiss perspective, the easiest solution would be for the SEC to order the United States corporation to change the directors or auditors of the Swiss subsidiary. Thereafter, upon request of the SEC, the United States corporation could, as shareholder, request these new directors and/or auditors to make an inquiry and present its results to the general meeting of the shareholders. Such information could be transmitted to the SEC, as it would not jeopardize legitimate business interests of the subsidiary itself or of third parties. However, conducting such an inquiry could be difficult if some participants refused to cooperate.

2.2.3. International Assistance

If the SEC presented a request for international assistance to the Swiss Government, the request could be granted if considered to be part of a (possibly future) criminal proceeding in the United States. However, the Swiss authorities could decide that the whole case should be considered as a Swiss crime and tried in Switzerland.

2.2.4. Direct Complaint in Switzerland

The SEC could enjoin the United States corporation, as shareholder, to file a criminal complaint in Switzerland against the (possibly unnamed) persons who have allegedly made the false balance sheet and the false invoices. The United States corporation, or at least certainly the Swiss subsidiary itself, would have access to the criminal files and could transmit them to the SEC.


3.1. Institutional Background

In most developed countries the national aspects of financial markets are decreasing and the international ones are increasing. As a consequence, regulation must take these new international aspects into account. Therefore, a few proposals have been made for organizing international cooperation between the different national regulatory authorities of financial markets. This could be done in accordance with three different models, which are not exclusive of each other:

1. Such international cooperation could include all countries having a national financial market, and possibly even others, for the sake
of international enforcement. This could be, for instance, the aim of an organization like the International Organization of Securities Commissions and Similar Organizations (IOSCO), with a large (possibly too large) number of members.

(2) Such international cooperation possibly could be limited to the nations with the most important financial markets, for example between ten and fifteen countries. This was apparently the aim of the Wilton Lask Conference organized in London in December 1986.

(3) In certain cases, such international cooperation could also occur on a bilateral basis, such as under the Memorandum of Understanding entered into between the United States and the United Kingdom in September 1986.

3.2. Comparison With Cooperation Among Banking Regulators

A similar effort has been made, especially in the last decade, in the field of banking regulation. Some worldwide cooperation has begun; four world conferences of banking supervisors have already been organized. The most developed organization is the so-called “Cooke Committee,” in which twelve countries have cooperated for more than twelve years.

Some efforts at bilateral cooperation have also taken place. A striking recent example is the agreement of January 1987 between the United States and the United Kingdom on the capital ratios of banks.

3.3. Scope of Cooperation

 Probably the most important question raised by international cooperation of financial market regulators is determination of its proper

85 This corresponds to model (1) in Section 3.1.
87 This corresponds to model (2) in Section 3.1.
Most previous efforts have been directed toward cooperation in the two traditional fields of SEC regulation. The first such field is mandating disclosure of relevant information both as to new issues and on a continuing basis. The second concerns the prevention and sanction of fraud including insider trading and manipulation. In today's conditions this approach appears too narrow to effectively protect either investors or the system of international financial markets.

A second model aims at the regulation of financial intermediaries such as investment banks and broker-dealers. This concept recognizes that private (as opposed to institutional) investors normally deal through financial intermediaries in which they have confidence. Such investors do not want protection beyond that represented by the financial strength and reliability of their broker or banker. The regulation of financial intermediaries aims at insuring that they develop and apply proper rules of conduct and disclosure, that they maintain proper capital ratios, and that investors have a proper means to resolve their complaints. Regulation in the United Kingdom follows this approach with the recent passage of the Financial Services Act.⁶⁹

A third, more comprehensive model would be to organize international cooperation for the regulation of all financial markets including banking, securities issues, secondary markets, and possibly other financial services. Such an approach certainly is intended to protect investors. But it is also, and perhaps mainly, intended to protect the smooth functioning of the international financial markets; this is important for investors as well as for international economic stability.

The vice-president of the Swiss National Bank has recently proposed this last approach. Although more ambitious, it could be more realistic and more efficient than the first two methods. In particular, international cooperation among financial regulators should avoid the conflicts which often arise between different authorities within a given national regulatory system (banking authorities, securities authorities, commodities authorities, insurance authorities).

### 3.4. Proposals for Bilateral Swiss-United States Cooperation

International cooperation of financial regulators should, in principle, be organized on a multinational basis. The sponsors of this Conference have, however, requested that some ideas be explored regarding possible bilateral cooperation. The following proposals relate to the bilateral approach with particular emphasis on relations between Swit-

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⁶⁹ Financial Services Act, 1986, ch. 60.

https://scholarship.law.upenn.edu/jil/vol9/iss3/9
zerland and the United States.

Both countries could agree to establish a bilateral "Contact and Consultative Working Group on the Regulation of Financial Markets." Such a Working Group would have no legal power and its existence would imply no obligation on the part of the two governments. The authorities of both states could submit to the Working Group cases related to the regulation of financial markets and affecting Swiss-United States relations. The Working Group would seek the best way to resolve such cases in a spirit of mutual cooperation and understanding of the legal systems and traditions of the two countries. This implies that both countries must accept that the aim of cooperation is to achieve some compromise and not merely to create another means of enforcing national regulation internationally.

In accordance with the third model described in Section 3.3, the Working Group should not limit its activities to the problems traditionally addressed by the SEC (namely disclosure and market frauds). Its activities should encompass the regulation of financial intermediaries including banks. In short, it should be competent to examine any case relating to the regulation of financial markets.

The proposal of such a Working Group may be seen as too ambitious and ineffective. It may be that it will not cope with some SEC needs and requests as quickly as the SEC would wish. However, the Working Group should be organized so as to be able to examine with reasonable dispatch the cases put to it. In the long run such a Working Group could be very useful for the bilateral relations between Switzerland and the United States in financial matters. It could even serve as a model for the bilateral or preferably multilateral cooperation of other countries in this field.