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International Cooperation In Insider Trading Cases

INTERNATIONAL COOPERATION IN INSIDER TRADING CASES

In recent years, international participation in securities trading has increased dramatically.[1] The volume of both foreign investment in United States securities and United States investment in foreign securities has risen during the past decade.[2] Although internationalization of the securities markets yields substantial benefits,[3] policing domestic securities transactions becomes more difficult when foreign entities take part in securities trading.[4] For example, foreign banks that are subject to banking secrecy laws[5] and that participate in securities transactions on behalf

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[1] *See* Hawes, Lee & Robert, *Insider Trading Law Developments: An International Analysis*, 14 LAW & POL'Y IN INT'L BUS. 335, 397 (1982) (securities markets becoming internationalized); Lee, Robert, Hirsch & Pollack, *Secrecy Laws and Other Obstacles to International Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 63, 70 (1982) (international cooperation necessary for effective supervision of securities markets); Thomas, *Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy*, 7 J. CORP. L. 189, 190 (1982) (capital markets have become increasingly international) [hereinafter cited as *Extraterritorial Application*]; Williams & Spencer, *Regulation of International Securities Markets: Towards a Greater Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 55, 55 (1982) (idea of world-wide securities market gaining increasing prominence); Thomas, *Securities Regulators Grapple with Extraterritoriality*, Legal Times, Jan. 17, 1983, at 20, col. 1 (volume of transnational securities transactions has increased dramatically) [hereinafter cited as *Securities Regulators*].

[2] *See Securities Regulators, supra* note 1, at 20, col. 1. Between approximately the end of 1971 and 1981, American investment in foreign securities rose from $19.6 billion to $62.1 billion. *Id.* Between 1971 and 1981, foreign investment in United States securities rose from $25.6 billion to $74 billion. *Id.*

[3] *See* Williams & Spencer, *supra* note 1, at 56 (properly functioning international securities market would increase global welfare); *Securities Regulators, supra* note 1, at 20, col. 1 (international securities transactions will promote free flow of capital and efficient allocation of world resources). A properly functioning world securities market would permit a more efficient allocation of scarce world resources. Williams & Spencer, *supra* note 1, at 56. A world-wide securities market would allow corporations to broaden their ownership and sell their securities in a wider market. *Id.* An international securities market would provide investors with a greater investment choice. *Id.* Investors would be able to select not only between industries and companies, but also between different economies and currencies. *Id.*

[4] *See* Hawes, Lee & Robert, *supra* note 1, at 378-79, 380, 388-91 (foreign bank secrecy laws hinder enforcement of insider trading laws); Pozen, *International Securities Markets: Comparative Disclosure Requirements*, 3 J. COMP. CORP. L. & SEC. REG. 392, 392 (1981) (extent to which securities regulators should require disclosure from foreign issuers); *Extraterritorial Application, supra* note 1, at 190 (problems of extraterritorial application of United States securities laws); Williams & Spencer, *supra* note 1, at 57 (same); Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 553-63 (1976) (extraterritorial application of United States' antifraud laws). *See generally Securities Regulators, supra* note 1 (problems of regulating foreigners' participation in United States securities transactions).

[5] *See U.S. Aides Seek to Ease Bank-Secrecy Laws in Other Nations After Signing Swiss Pact*, Wall St. J., Sept. 2, 1982, at 6, col. 2 (banks of Switzerland, Cayman Islands, Panama,

of bank customers often are prohibited, under the laws of the banks' home countries, from disclosing any information about the banks' customers.[6] Since the banks must keep customers' names confidential, bank secrecy laws impede regulatory authorities' attempts to learn the identities of persons using foreign banks to execute insider trading transactions.[7] Foreign bank secrecy laws thus interfere with enforcement of laws prohibiting insider trading in securities.[8]

In the United States, the Securities Exchange Act of 1934[9] ('34 Act)

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and Bahamas subject to bank secrecy laws) [hereinafter cited as *Ease Bank-Secrecy*]; *infra* notes 18-24 and accompanying text (discussion of Swiss bank secrecy laws); *infra* note 105 (United Kingdom and Belgium have bank secrecy laws).

[6] *See* Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 37 (2d Cir. 1972) (Swiss banks may provide stock brokerage services); Hawes, Lee & Robert, *supra* note 1, at 378-79, 380, 388-91 (foreign bank secrecy laws hinder enforcement of insider trading prohibitions); Kronstein, *SEC Practice: A Haven Lost?*, 10 SEC. REG. L.J. 91, 91 (1982) (Americans allegedly have used Swiss bank accounts to manipulate trading in securities on United States markets); Lee, Robert, Hirsch & Pollack, *supra* note 1, at 67-78 (foreign bank secrecy laws hinder enforcement of insider trading prohibitions); Müller, *Banking and Economic Confidentiality Under Swiss Law*, in SECRET FOREIGN BANK ACCOUNTS 7, 10 (R. Needham ed. 1971) (Swiss banks may not disclose customer information to private parties or governmental authorities); *see also In re* Grand Jury Proceedings, 532 F.2d 404, 405 (5th Cir. 1976) (managing director of Cayman bank refused to testify concerning bank customers who allegedly violated United States securities and tax laws on grounds that testifying would violate Cayman bank secrecy laws), *cert. denied*, 429 U.S. 940 (1977); United States v. Frank, 520 F.2d 1287, 1289, 1290 (2d Cir. 1975) (stock manipulators utilized Swiss banking facilities to carry out illegal trading scheme), *cert. denied*, 423 U.S. 1087 (1976); SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145, 92,148 (S.D.N.Y. 1981) (Swiss bank refused to disclose names of customers on grounds that disclosure would violate Swiss bank secrecy laws); Legal Times, Jan. 31, 1983, at 4, col. 1 (highest court of Switzerland ruled that Swiss authorities may not release to SEC certain Swiss bank information that SEC sought in investigation of insider trading case). American banks must disclose information about bank customers' accounts when United States government authorities request the information pursuant to the Right to Financial Privacy Act. *See* Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697-3710 (codified at 12 U.S.C. §§ 3401-3422 (Supp. V 1981)).

[7] *See* H.R. REP. NO. 975, 91st Cong., 2d Sess. 12, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4394, 4397 (secret foreign bank accounts have allowed Americans and others to avoid securities laws and regulations) [hereinafter cited as House Report]; Hawes, Lee & Robert, *supra* note 1, at 378-80, 388-91 (bank secrecy laws have hindered efforts of British, French and American authorities to learn identities of persons trading on inside information); Meyer, *Swiss Bank Secrecy and Its Legal Implications in the United States*, 14 NEW. ENG. L. REV. 18, 50 (1978) (by channeling stock market operations through Swiss banks, insiders may realize illegal profits without risk of detection); *infra* notes 9-16 and accompanying text (United States laws against insider trading); *infra* note 122 (French, British, and German laws against insider trading).

[8] *See* Lee, Robert, Hirsch & Pollack, *supra* note 1, at 67 (bank secrecy laws are great deterrent to effective supervision of securities markets); Note, *Swiss Banks Can Be Compelled to Disclose Identities of Clients Suspected of Insider Trading*, 13 SETON HALL L. REV. 91, 91 (1982) (Swiss bank secrecy laws have frustrated attempts to police international transactions on securities markets) [hereinafter cited as *Compelled to Disclose*].

[9] Securities Exchange Act of 1934 ('34 Act), ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. § 78 (1976 & Supp. V 1981)).

and regulations promulgated under the '34 Act[10] prohibit insider trading in securities.[11] Corporate insiders who possess material inside information either must disclose the information to the investing public or must abstain from trading in or recommending the security concerned while the inside information remains undisclosed.[12] The Securities and Exchange Commission[13] (SEC) has the authority to investigate violations of the '34 Act.[14] To carry out investigations, the SEC may subpoena witnesses and require production of documents.[15] Furthermore, the SEC may invoke judicial assistance to enforce compliance with the SEC's demands for information.[16]

The SEC's demands for information have come into conflict with Switzerland's bank secrecy laws.[17] Swiss bank secrecy laws protect from disclosure all personal and business information that banks obtain in con-

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[10] 17 C.F.R. § 240 (1982).

[11] *See* 15 U.S.C. §§ 78j(b), 78p(b) (1976); 17 C.F.R. § 240.10b-5 (1982). The '34 Act prohibits use of the means or instrumentalities of interstate commerce to employ manipulative or deceptive devices in connection with the purchase or sale of securities. 15 U.S.C. § 78j(b); *see* 17 C.F.R. § 240.10b-5 (list of unlawful manipulative devices). The Exchange Act defines interstate commerce as trade, commerce, transportation, or communication among the several states or between any foreign country and any state. 15 U.S.C. § 78c(a)(17). In addition, to prevent unfair use of corporate information, a corporation may recover profits that the corporation's directors and officers and certain beneficial owners of the corporation's securities realized from the purchase and sale, or sale and purchase, of the corporation's securities within a six-month period. *Id.* § 78p(b).

[12] *See In re* Cady Roberts & Co., 40 S.E.C. 907, 911, 912 (1961); *see also* Vohs v. Dickson, 495 F.2d 607, 622 (5th Cir. 1974) (material fact is fact that would influence reasonable investor's decision regarding securities transaction); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 887 (2d Cir. 1972) (whether inside information is material depends upon whether reasonable man would attach importance to information in determining whether to engage in securities transaction); 15 U.S.C. § 78p(a)-(b) (1976) (to prevent unfair use of company information, company may recover profits that certain insiders realized from purchase and sale, or sale and purchase, of company's securities within six month period). Under the Exchange Act, a corporation's officers, directors, and controlling shareholders traditionally have had a duty either to disclose material inside information or to refrain from trading in the corporation's securities until the inside information has been disclosed. *See Cady Roberts & Co.*, 40 S.E.C. at 911 (duty to disclose traditionally placed on corporation's officers, directors, and controlling shareholders); Note, *Corporate Outsider May Be Liable for Failure to Disclose or Abstain Under Rule 10b-5 Based on Employer-Employee Fiduciary Relationship*, 13 SETON HALL L. REV. 178, 182-88 (1982) (evolution of disclose or abstain rule); *cf.* Chiarella v. United States, 445 U.S. 222, 226-30, 235 (1980) (duty to disclose nonpublic market information under Exchange Act § 10(b) does not arise from mere possession of information).

[13] *See* 15 U.S.C. § 78d (1976 & Supp. V 1981) (creation of SEC).

[14] *Id.* § 78u(a) (1976).

[15] *Id.* § 78u(b).

[16] *Id.* § 78u(c).

[17] *See, e.g.*, SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145 (S.D.N.Y. 1981) (Swiss bank refused to disclose names of bank customers on grounds that disclosure would violate Swiss bank secrecy laws); *Compelled To Disclose, supra* note 8, at 91 (Swiss bank secrecy laws preclude SEC from ascertaining identities of persons who fraudulently trade on United States securities markets through

nection with the business transactions and consultations of the banks' customers.[18] Swiss law allows Swiss bankers to disclose information about bank customers only when Swiss legislation,[19] international agreements,[20]

Swiss banks); *Ease Bank-Secrecy, supra* note 5, at 6, col. 3 (persons have used Swiss banks as conduits for insider transactions).

[18] *See* Mueller, *Swiss Banking Secret*, 18 INTL & COMP. L.Q. 360, 362 (1969) (Swiss bank secrecy pertains to all personal and business items of which bank obtains knowledge in connection with bank's business with client); Müller, *supra* note 6, at 10 (same).

[19] *See* Meyer, *supra* note 7, at 31 (banker's obligation to secrecy overridden to extent that Swiss statutes impose duty to disclose banking information); Müller, *supra* note 6, at 11, 15 (Swiss federal and cantonal statutes govern banker's duty to disclose banking information). Swiss bank secrecy laws allow a banker to testify to otherwise secret information only when a Swiss federal or cantonal statue permits the banker to testify and when a Swiss court or administrative authority having jurisdiction over the banker compels the testimony. *Id.* at 11; *see* Meyer, *supra* note 7, at 31-32 (exceptions to bank secrecy under Swiss federal and cantonal codes). The Swiss Confederation and each of the Swiss cantons have distinct codes governing the extent to which a banker may testify to confidential banking matters. *See* Meyer, *supra* note 7, at 31 (summary of Swiss federal and cantonal laws governing extent to which bankers must testify to confidential banking matters); Müller, *supra* note 6, at 11 (Swiss confederation and each Swiss canton have distinct codes concerning extent to which banker must testify to confidential banking information). In criminal investigations and prosecutions, the codes generally require disclosure of banking information. *See* Meyer, *supra* note 7, at 31 (Swiss federal and cantonal codes require bankers to disclose banking information when information necessary for criminal investigation or prosecution); Müller, *supra* note 6, at 11-12 (same). In civil proceedings, however, only the Swiss federal code and several cantonal codes provide for bankers to testify to banking matters. Meyer, *supra* note 7, at 31-32.

[20] *See* Müller, *supra* note 6, at 15 (Swiss banker may disclose banking information when international agreement provides for information's disclosure); *see also* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, ___ U.N.T.S. ___ (procedure for gathering evidence from abroad in civil cases) [hereinafter cited as Convention on Taking Evidence]. Based on international agreements, Switzerland may assist other countries in the investigation of crimes. Müller, *supra* note 6, at 15; *see* Memorandum on Insider Trading, Aug. 31, 1982, United States-Switzerland, pt. 1, ¶ 2, *reprinted in* 14 SEC. REG. & L. REP. (BNA) No. 39, at 1737 (Oct. 8, 1982) (under certain circumstances Swiss banks may disclose customer information to United States authorities when United States authorities require bank information to investigate insider trading cases) [hereinafter cited as Memorandum on Insider Trading]; Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, art. 1, 27 U.S.T. 2019, 2025, T.I.A.S. No. 8302 (entered into force Jan. 23, 1977) (law enforcement cooperation between United States and Switzerland) [hereinafter cited as Treaty on Mutual Assistance]. A foreign tribunal that requires assistance with a criminal investigation must submit a letter rogatory to the Swiss Federal Government's Departments of Justice and Police. Müller, *supra* note 6, at 16; *see* 28 U.S.C. § 1781 (1976) (transmittal of letter rogatory); Treaty on Mutual Assistance, *supra*, art. 28 (procedure for requesting Swiss assistance in criminal matters); *see also* Convention on Taking Evidence, *supra*, arts. 2-4 (procedure for requesting evidence in civil matters). The Swiss Departments of Justice and Police transmit the request for assistance to the appropriate cantonal court or investigation office. Müller, *supra* note 6, at 16; *see* Treaty on Mutual Assistance, *supra*, art. 31(2) (transmittal of request for assistance to appropriate cantonal authority). Swiss cantonal law generally determines which banking information, if any, a foreigner may receive. Mueller, *supra* note 18, at 374; Müller, *supra* note 6, at 16; *see* Convention on Taking Evidence, *supra*, art. 11 (person requested to give evidence may refuse to give evidence insofar as person has privilege

or principles of international reciprocity and comity[21] require divulging the banking information.[22] In addition, Swiss banks may disclose customer information if bank customers waive the banks' obligation of confidentiality.[23] Bankers who violate the Swiss banking secrecy obligations are subject to criminal sanctions.[24]

Foreign banks, particularly Swiss banks, have invoked foreign bank secrecy laws as grounds for noncompliance with United States courts' discovery orders.[25] *Societe Internationale Pour Participations Industrielles*

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or duty to refuse to give evidence under laws of state in which request executed). Foreign courts usually may obtain Swiss banking information to the same extent that Swiss courts may receive the information. Müller, *supra* note 6, at 16.

[21] *See* Müller, *supra* note 6, at 15 (principles of reciprocity and international comity may provide for lifting Swiss bank secrecy); *see also* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (comity is recognition that nation allows within its territory to legislative, executive, or judicial acts of another nation).

[22] *See* Müller, *supra* note 6, at 15. *See generally* Meyer, *supra* note 7, at 28-35 (exceptions to Swiss bank secrecy).

[23] *See Meyer*, *supra* note 7, at 29 (customer of Swiss bank may authorize bank to furnish information about customer's bank account to third parties); Mueller, *supra* note 18, at 363 (since bank client is master of client's banking information, client may authorize bank to disclose client's banking information to third parties); *see also* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 203 (1958) (Swiss bank may secure waiver of confidentiality from bank customer); SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145 (S.D.N.Y. 1981) (same).

[24] Meyer, *supra* note 7, at 25-26; Mueller, *supra* note 18, at 362 n.4. Switzerland traditionally has recognized bank secrecy as a civil duty. Meyer, *supra* note 7, at 27. In 1934, Switzerland enacted article 47 of the Banking Law, which made violations of bank secrecy criminal offenses. Mueller, *supra* note 18, at 361-62. Bankers who intentionally violate secrecy laws are subject to a fine of up to 20,000 francs, or imprisonment for up to six months, or both. *Id.* at 362. Bankers who negligently violate secrecy laws are subject to a fine of up to 10,000 francs. *Id.* Switzerland made violations of bank secrecy criminal offenses in response to Nazi Germany's pressure on Swiss banks to disclose the identities of foreign depositors. Meyer, *supra* note 7, at 25-26; *see* Mueller, *supra* note 18, at 361 (Switzerland made breach of banking secrecy criminal offense to protect Jews and other victims of Nazi Germany's policies from Nazi Germany's investigations of assets deposited in foreign banks).

[25] *See, e.g.*, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 200, 204 (1958) (plaintiff claimed that Swiss bank secrecy laws precluded plaintiff from complying with document production order); *In re* Grand Jury Proceedings, 532 F.2d 404, 405 (5th Cir. 1976) (managing director of Cayman Islands bank refused to comply with grand jury subpoena on grounds that compliance would violate Cayman bank secrecy law), *cert. denied*, 429 U.S. 940 (1977); United States v. First Nat'l City Bank, 396 F.2d 897, 898 (2d Cir. 1968) (United States bank refused to comply with subpoena requiring production of documents located in bank's German branch because production would subject bank to civil liability in Germany); Application of Chase Manhattan Bank, 297 F.2d 611, 612 (2d Cir. 1962) (United States bank requested modification of grand jury subpoena to excuse bank from producing records in possession of bank's Panamanian branch on grounds that production would subject bank to criminal penalties under Panamanian law); SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145, 92,148 (S.D.N.Y. 1981) (Swiss bank refused to disclose names of customers on grounds that disclosure would violate Swiss bank secrecy laws).

et Commerciales, S.A. v. Rogers[26] is the seminal case on the use of foreign nondisclosure law as a defense to noncompliance with a discovery order.[27] In *Societe Internationale*, the Supreme Court considered whether a district court erred in dismissing a Swiss holding company's complaint since the company had failed to comply with a pretrial production order because of possible criminal liability under Swiss secrecy laws.[28] The plaintiff holding company had brought suit to recover a German firm's assets that the United States government had seized pursuant to the Trading with the Enemy Act[29] (Enemy Act). The holding company based the lawsuit on a provision of the Enemy Act that authorized any person not an enemy or an ally of an enemy to recover seized assets to the extent of the person's interest in the assets.[30] The holding company claimed that because the holding company was a national of a neutral power and the owner of the German firm's seized assets, the holding company could recover the assets.[31] The United States government challenged the plaintiff's claims to ownership of the German firm's assets.[32] The district court ordered the plaintiff to produce certain bank records tending to show ownership of the seized assets.[33]

The *Societe Internationale* plaintiff moved for relief from production of the bank records on the ground that production would violate Swiss

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[26] 357 U.S. 197 (1958); *see* Meyer, *supra* note 7, at 41-42 (history of *Societe Internationale* litigation).

[27] *See* SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145 (S.D.N.Y. 1981) (decision of whether to compel foreign party to disclose information when disclosure might subject foreign party to criminal liability in party's home country must begin with analysis of Supreme Court's opinion in *Societe Internationale*); *Compelled To Disclose, supra* note 8, at 95 (*Societe Internationale* is leading case on conflict between discovery order and foreign nondisclosure law).

[28] 357 U.S. at 198.

[29] *Id.* at 199; *see* Trading with the Enemy Act (Enemy Act), ch. 106, § 9(a), 40 Stat. 411, 419 (1917), amended, ch. 285, § 9(a), 42 Stat. 1511, 1511 (1923) (current version at 50 U.S.C. app. § 9(a) (1976)) (person having interest in enemy's seized assets may bring suit to recover assets). During World War II, pursuant to the Enemy Act, the United States Alien Property Custodian assumed control of assets that the Custodian found to be owned by or held for the benefit of I.G. Farbenindustrie, a German firm and national enemy. 357 U.S. at 198-99; *see* Enemy Act, ch. 106, § 5(b), 40 Stat. 415, 417 (1917) (current version at 50 U.S.C. app. § 5(b)(1) (1976 & Supp. V 1981)) (Alien Property Custodian may seize enemy's assets). The I.G. Farbenindustrie assets had a value of more than $100,000,000. 357 U.S. at 199. The assets consisted of cash in American banks and stock in a Delaware corporation. *Id.* The *Societe Internationale* plaintiff brought suit to recover the I.G. Farbenindustire assets. *Id.*

[30] 357 U.S. at 199; *see* Enemy Act, ch. 285, § 9(a), 42 Stat. 1511, 1511 (1923) (person not enemy or ally of enemy may bring suit to recover enemy's seized assets to extent of person's interest in seized assets).

[31] 357 U.S. at 199.

[32] *Id.* at 199. In addition to challenging the plaintiff holding company's ownership of the I.G. Farbenindustrie assets, the government alleged that the plaintiff was connected intimately with the German firm and hence was affected with enemy taint. *Id.*

[33] *See id.* at 200 (district court ordered production of Swiss bank records).

penal law.[34] The government moved to dismiss the plaintiff's complaint because the plaintiff had failed to comply with the district court's production order.[35] After giving the plaintiff time to comply with the production order, the district court granted the defendant's motion to dismiss the complaint.[36] The court of appeals affirmed the district court's decision.[37]

On appeal to the Supreme Court, the holding company argued that the district court erroneously ordered production of the banking documents.[38] The *Societe Internationale* Court recognized that in enacting the Enemy Act, Congress expressed concern over enemies using innocent fronts to recover seized assets.[39] The Enemy Act thus requires a plaintiff to prove his interest in seized assets as a condition to recovery of the assets.[40] The Court found that allowing the plaintiff to invoke Swiss secrecy

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[34] *Id.* at 200. The *Societe Internationale* district court had referred the bank record production controversy to a special master, who made findings of Swiss law relating to the plaintiff holding company's situation. *See id.* at 201. The master noted that Swiss authorities had "confiscated" the Swiss bank documents that the plaintiff should have produced. *See id.* Confiscation of the bank records amounted to an interdiction on the bank's transmission of the records to third parties. *See id.* The master found that the Swiss government had acted in accordance with Swiss law by confiscating the bank documents. *See id.* The master also found that the plaintiff has satisfied the obligation of making a good faith effort to comply with the district court's production order. *See id.* The district court accepted the master's findings, but the court nevertheless granted the defendant's motion to dismiss the plaintiff's complaint. *Id.*; *see infra* note 36 and accompanying text (district court dismissed plaintiff's complaint).

[35] *See* 357 U.S. at 200 (*Societe Internationale* defendant moved to dismiss plaintiff's complaint).

[36] *See id.* at 201-03 (*Societe Internationale* district court dismissed plaintiff's complaint); *see also* FED. R. CIV. P. 37(b)(2)(C) (court may dismiss party's complaint if party fails to comply with the court's discovery order). The plaintiff in *Societe Internationale* had proposed a plan for examining the Swiss bank records whose discovery the district court had ordered. *Id.* at 203; *see supra* text accompanying note 33 (district court had ordered production of Swiss bank records). The plaintiff had proposed that the parties to the litigation, the district court, and the Swiss authorities appoint a neutral expert to examine bank files. 357 U.S. at 203. After inspecting the files, the expert, without violating Swiss secrecy laws, would submit to the parties a report identifying documents that the expert found relevant to the litigation. *Id.* The plaintiff then would seek to obtain waivers of confidentiality or secure the relevant documents by using letters rogatory or Swiss arbitration proceedings. *Id.*; *see supra* note 20 (use of letters regatory). The Swiss authorities had approved the plaintiff's plan. 357 U.S. at 203. The district court, however, refused to accept the plaintiff's scheme for producing the bank records. *See id.* (district court did not accept plaintiff's discovery plan); *see also* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell, 243 F.2d 254, 255-56 (D.C. Cir. 1957) (affirming district court's decision to reject plaintiff's discovery plan and quoting from district court's opinion giving reasons for rejection of plan), *rev'd sub nom.* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

[37] Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell, 243 F.2d 254, 256 (D.C. Cir. 1957), *rev'd sub nom.* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

[38] 357 U.S. at 204.

[39] *Id.* at 205.

[40] *See* Enemy Act, ch. 285, § 9(a), 42 Stat. 1511, 1511 (1923) (current version at 50 U.S.C.

laws to avoid producing documents indicating ownership of seized assets would frustrate congressional intent.[41] The Court therefore held that congressional concerns underlying the Enemy Act justified the district court's issuance of a production order.[42] The holding company argued further that the district court improperly dismissed the complaint since the company had made a good faith effort to comply with the discovery order.[43] The Court noted that, although the plaintiff had made a full attempt to comply with the discovery order, the plaintiff was unable to comply because of Swiss legal constraints.[44] The Court consequently held that the district court erred in dismissing the plaintiff's complaint when the plaintiff had established that failure to comply with the production order was due to inability to comply rather than to the wilfullness, bad faith, or fault of the plaintiff.[45]

In cases subsequent to *Societe Internationale*, United States courts similarly have ordered discovery despite possible conflicts with foreign secrecy laws.[46]

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app. § 9(a) (1976)) (to recover seized assets pursuant to Enemy Act, plaintiff must establish plaintiff's interest or rights in seized property).

[41] 357 U.S. at 205.

[42] *Id.* at 206.

[43] *Id.* at 208.

[44] *Id.* at 212. The *Societe Internationale* Court found that because the Swiss authorities had not removed the bank records from the plaintiff holding company's possession, the company continued to control the records despite the Swiss authorities' confiscation of the documents. *Id.* at 204; *see supra* note 34 (Swiss authorities' confiscation of Swiss bank's records). The Court nevertheless noted that fear of criminal prosecution abroad constituted a strong excuse for the holding company's failure to produce the bank records. 357 U.S. at 211. The Court further recognized that the plaintiff's failure to comply with the district court's discovery order was due to circumstances outside the plaintiff's control. *Id.*

[45] 357 U.S. at 212. The *Societe Internationale* Court suggested that if the plaintiff holding company had deliberately courted legal impediments to production of the Swiss bank records, the district court's dismissal of the plaintiff's complaint might have been warranted. *Id.* at 208-09.

[46] *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 997 (10th Cir. 1977) (court ordered compliance with subpoena despite conflict with Canadian law, but court declined to impose sanctions for noncompliance); Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 341-42 (10th Cir. 1976) (court ordered production of documents even though production allegedly would violate Swiss secrecy laws), *cert. denied*, 429 U.S. 1096 (1977); *In re* Grand Jury Proceedings, 532 F.2d 404, 407 (5th Cir. 1976) (court ordered witness to comply with subpoena and testify before grand jury even though testifying could subject witness to criminal prosecution in Cayman Islands), *cert. denied*, 429 U.S. 940 (1977); United States v. First Nat'l City Bank, 396 F.2d 887, 901 (2d Cir. 1968) (court held bank in contempt for failure to comply with subpoena even though compliance could subject bank to civil liability under German law); SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,144 (S.D.N.Y. 1981) (court ordered production of Swiss bank records even though production could violate Swiss bank secrecy laws); Vesco v. SEC, [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,160, at 91-157-3 (D.N.J. 1971) (court ordered compliance with subpoena even though compliance allegedly would violate Swiss secrecy laws). *But see, e.g.*, Application of Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962) (court excused witness from producing documents on grounds that production would violate Panamanian law); Ings v. Ferguson, 282 F.2d 149, 153 (2d Cir. 1960) (court

In *Arthur Andersen & Co. v. Finesilver*,[47] the Tenth Circuit recognized the *Societe Internationale* Court's distinction between ordering production of documents subject to foreign secrecy laws and imposing sanctions for non-production of the documents.[48] In *Arthur Andersen*, the State of Ohio brought suit against Arthur Andersen & Company (Andersen), asserting that Andersen had violated securities laws by issuing financial statements that fraudulently misrepresented a corporation's financial condition.[49] The State of Ohio claimed that the State had purchased the corporation's securities in reliance on Andersen's financial statements.[50] In connection with the litigation, the State of Ohio requested Andersen to produce various documents located in Andersen's Switzerland office.[51] Andersen refused to produce the documents, claiming that production would violate Swiss secrecy laws.[52] The district court granted Ohio's motion for discovery of the documents.[53] The Tenth Circuit recognized that *Societe Internationale* does not require a court to refuse to order discovery when discovery would violate foreign laws.[55] The *Arthur Andersen* court instead noted that under *Societe Internationale*, a court

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modified production order to excuse witness from producing Canadian bank records because production would violate Canadian law). Although United States courts have ordered discovery notwithstanding conflicting foreign nondisclosure laws, the courts have declined to impose sanctions for noncompliance with the discovery orders unless the noncomplying party had acted in bad faith. *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d at 998 (contempt sanctions unjustified because witness did not act in bad faith by failing to comply with subpoena); State of Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374, 1376 (10th Cir. 1978) (sanctions justified because defendant had acted in bad faith by contriving defense of secrecy laws as excuse for noncompliance with discovery order), *cert. denied*, 439 U.S. 833 (1978); SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145, 92,146, 92,148 (court threatened sanctions because court found that bank had acted in bad faith by deliberately making use of Swiss nondisclosure law to evade American securities laws); *see also infra* note 92 (discussion of good faith standard).

[47] 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

[48] *Id.* at 341, 342; *see supra* text accompanying notes 38-45 (*Societe Internationale* Court's decision).

[49] 546 F.2d at 340. The *Arthur Andersen* district court had jurisdiction based on § 22(a) of the Securities Act of 1933 and on § 27 of the '34 Act. *Id.* at 340-31; *see* 15 U.S.C. § 77v(a) (1976) (district court has jurisdiction over suits brought to enforce Securities Act of 1933); *id.* § 78aa (district court has jurisdiction over suits brought to enforce '34 Act).

[50] 546 F.2d at 340.

[51] *Id.*

[52] *Id.*

[53] *See id.*

[54] *Id.* at 342.

[55] *Id.* at 341, 342. The *Arthur Andersen* court did not accept Arthur Andersen and Company's (Andersen) contention that international comity prevents a United States court from ordering action that violates foreign law. *Id.* at 342. The *Arthur Andersen* court noted that if the court's order could result in a breach of relations between nations, Andersen should have brought the matter to the State Department's attention. *Id.* The court suggested that the State Department could then decide whether to petition the court to refrain from issuing the order. *See id.*; *cf.* United States v. First Nat'l City Bank, 396 F.2d 897, 904 (2d Cir. 1968) (in deciding to enforce subpoena when compliance with subpoena alleged-

should consider foreign legal constraints when deciding whether to impose sanctions for noncompliance with a discovery order.[56]

In a recent insider trading action, a Swiss bank, the Banca della Svizzera Italiana (the bank), unsuccessfully asserted that Swiss bank secrecy laws should excuse the bank from disclosing the identities of bank customers suspected of insider trading.[57] In *SEC v. Banca della Svizzera Italiana*,[58] the United States District Court for the Southern District of New York threatened to impose sanctions against the bank if the bank failed to disclose the customers' identities.[59] The bank had purchased stock and ten day call options in St. Joe Minerals Corporation (St. Joe), a New York corporation.[60] On the day after the purchase, a subsidiary of Joseph E. Seagram & Sons, Inc. announced a cash tender offer for all of the St.

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ly would result in civil liability under German law, court considered that neither United States nor German government had objected to enforcement of subpoena).

In deciding to order production of documents when production might violate foreign law, the *Arthur Andersen* court relied on the Supreme Court's opinion in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*. *See* 546 F.2d at 341-42; *see also* Societe Internationale Pour Participations Industrielles et Commercials, S.A. v. Rogers, 357 U.S. 197 (1958); *supra* notes 26-45 and accompanying text (discussion of *Societe Internationale*). The *Societe Internationale* Court held that the policies behind the legislation on which the lawsuit was based justified the issuance of a document production order. 357 U.S. at 206. The *Arthur Andersen* court, on the other hand, did not consider whether policies underlying the securities laws, which Andersen allegedly had violated, supported the district court's issuance of a production order. *See* 546 F.2d at 341-42. The *Arthur Andersen* decision therefore suggests that courts may order production of documents, even when production may violate foreign law, without considering whether declining to order production would frustrate legislative intent.

[56] 546 F.2d at 341, 342. Andersen ultimately failed to comply with the *Arthur Andersen* court's document production order. State of Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1371 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978); *see supra* text accompanying notes 51, 53-54 (court ordered Andersen to produce certain documents). The district court imposed sanctions against Andersen for noncompliance with the discovery order. *See* 570 F.2d at 1372. On appeal, the Tenth Circuit noted that Andersen had claimed that Swiss secrecy laws prevented production of the documents when Andersen had not even known the contents of the documents whose production the court required. *Id.* at 1373-74. The appellate court further found that Andersen had not known how Swiss secrecy laws applied to production of the documents at the time that Andersen had claimed secrecy laws as an excuse for nonproduction. *Id.* The Tenth Circuit concluded that Andersen's claims that Swiss secrecy laws prevented production were mere diversionary tactics. *Id.* at 374. The Tenth Circuit thus found that Andersen's bad faith justified the district court's imposition of sanctions. *Id.* at 1374, 1376.

[57] *See* SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,144, 92,145 (S.D.N.Y. 1981) (Swiss bank must answer interrogatories requesting information on bank customers even though bank's disclosure of customer information violates Swiss bank secrecy laws); *infra* notes 58-76 and accompanying text (discussion of *Banca della Svizzera*); *supra* notes 18-24 and accompanying text (discussion of Swiss bank secrecy laws).

[58] [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346 (S.D.N.Y. 1981).

[59] *Id.* at 92,145.

[60] *Id.* at 92,144. Banca della Svizzera Italiana (the bank) purchased common stock of the St. Joe Minerals Corp. (St. Joe) through the New York Stock Exchange. *Id.* The bank purchased St. Joe options through the Philadelphia Stock Exchange. *Id.*

Joe common stock.[61] The bank subsequently instructed its brokers to sell the St. Joe common stock and close out the St. Joe options.[62] The transactions yielded profits of approximately two million dollars, which the bank deposited in its account with an American bank.[63]

The SEC, noticing substantial activity on the options market, investigated the trading in St. Joe options.[64] The SEC subsequently brought suit against the bank and other unnamed parties for an injunction and violations of the insider trading provisions of the '34 Act.[65] The SEC contended that the bank performed the transactions in St. Joe securities on behalf of corporate insiders who traded on the basis of material, non-public information about the upcoming tender offer.[66] For eight months, the SEC employed various discovery techniques in an attempt to learn the identities of the persons for whom the bank had purchased and sold the St. Joe securities.[67] The SEC's discovery requests proved unavailing, however, since the bank, asserting its obligations under Swiss bank secrecy laws, refused to disclose the identities of the bank customers.[68]

In November 1981, the *Banca della Svizzera* court ordered the bank to disclose the identites of the bank customers involved in the St. Joe securities transactions.[69] The district court threatened to impose severe contempt sanctions if the bank failed to comply with the order.[70] The court

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[61] *Id.*

[62] *Id.*

[63] *Id.* at 92,144-45. The bank deposited proceeds of the sale of the St. Joe securities in the bank's account with the Irving Trust, an American bank. *See id.* at 92,145.

[64] *Id.*

[65] *Id.* at 92,144. The SEC brought suit against the bank and other unnamed parties pursuant to § 21(d) of the '34 Act. *Id.; see* 15 U.S.C. § 78u(d) (1976) (SEC may bring action to enjoin violations of '34 Act). The SEC alleged that the bank and unnamed others violated §§ 10(b) and 14(e) of the '34 Act and rules 10b-5 and 14e-3 of the regulations promulgated under the '34 Act. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,144; *see* 15 U.S.C. § 78j(b) (1976) (use of manipulative or deceptive device in connection with purchase or sale of security); *id.* § 78n(e) (fraudulent, manipulative, or deceptive acts in connection with tender offer); 17 C.F.R. § 240.10b-5 (1982) (employment of manipulative and deceptive devices); *id.* § 240.14e-3 (transactions in securities on basis of material, non-public information in context of tender offer). Sections 21(e) and 27 of the '34 Act conferred jurisdiction on the district court to hear the SEC's suit. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,144; *see* 15 U.S.C. § 78u(e) (district court has jurisdiction to issue injunctions and orders to enforce compliance with '34 Act); *id.* § 78aa (district court's jurisdiction). The district court had personal jurisdiction over the defendant because the bank carried on business in New York City. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,144; *see* 15 U.S.C. § 78aa (suit to enforce '34 Act may be brought in district where defendant is found).

[66] [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145; *see supra* note 59 (provisions of '34 Act that SEC contended bank violated).

[67] [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145.

[68] *Id.*; *see supra* notes 18-24 and accompanying text (discussing Swiss bank secrecy laws).

[69] [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145.

[70] *Id.* Contempt sanctions that the *Banca della Svizzera* court contemplated imposing on the bank included a daily fine and an order that the bank cease further direct and indirect trading on the United States securities markets, except trading to liquidate the bank's

issued an opinion detailing the basis for ordering the bank to disclose information about bank customers.[71] The *Banca della Svizzera* court, employing the balancing test set forth in section 40 of the *Restatement (Second) of Foreign Relations Law of the United States*[72] *(Restatement (Second))*, recognized that the United States has a vital interest in maintaining the integrity of the United States' financial markets.[73] The court noted that the use of secret foreign bank accounts thwarts enforcement of the United States securities laws.[74] The court found that the bank had acted in bad faith by deliberately undertaking the St. Joe transactions with the expectation of using Swiss nondisclosure laws to evade liability under the United States laws against insider trading.[75] Since the bank had acted in bad faith,

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portfolio. Kronstein, *supra* note 6, at 92. At the time the court threatened sanctions, no United States court ever had excluded a foreign bank from trading on the United States securities markets. *See id.*

Subsequent to the court's announcement of the decision to impose sanctions, the bank obtained waivers of confidentiality from the bank customers suspected of insider trading. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145. Since the bank's customers had waived the bank's obligation of bank secrecy, the bank was free to disclose the customers' indentities to the SEC without being in violation of Swiss bank secrecy laws. *See id.* at 92,149 (bank customers' waivers of confidentiality permitted bank to disclose customers' banking information); *supra* note 23 and accompanying text (Swiss bank customer may waive bank's obligation of confidentiality). The bank also had answered some of the SEC's interrogatories. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145. Since the bank had taken steps to comply with the district court's order, the court did not impose the threatened sanctions. *See id.* at 92,145, 92,149.

[71] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,145 (*Banca della Svizzera* court analyzed legal questions that court's issuance of discovery order presented).

[72] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) [hereinafter cited as RESTATEMENT (SECOND)]; *see infra* notes 83-88 and accompanying text (discussion of section 40 of *Restatement (Second)*).

[73] [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,148.

[74] *Id.*

[75] Id. at 92,149. The *Banca della Svizzera* court's finding of bad faith represents an expansion of the good faith analysis that the Supreme Court enunciated in *Societe Internationale*. *Compare id.* at 98,148 (bank acted in bad faith by deliberately using foreign nondisclosure law to evade American securities laws) *with* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 203, 211 (1958) (by attempting to gain release of Swiss bank records without violating Swiss law, plaintiff made good faith attempt to comply with production order). The *Societe Internationale* Court analyzed good faith in terms of a party's efforts to comply with a production order, whereas the *Banca della Svizzera* court found that a party had acted in bad faith because the party made use of foreign secrecy laws to engage in an unlawful transaction. *See id.* at 212-13 (plaintiff's failure to comply with production order due to plaintiff's inability to comply rather than to plaintiff's willfulness, bad faith, or fault); [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,148 (bank acted in bad faith by making deliberate use of Swiss nondisclosure law to evade American laws against insider trading). If a person deliberately makes use of foreign secrecy laws to shield activity that violates the United States laws, the person should bear responsibility when foreign secrecy laws prohibit the person from disclosing the information in an American legal proceeding. To permit a person to refuse to disclose the information that foreign secrecy laws protect would encourage the use of

the *Banca della Svizzera* court rejected the bank's argument that the existence of criminal sanctions under Swiss law should excuse the bank from producing information about the bank's customers.[76]

Although the bank would be subject to liability under Swiss law for disclosing the names of bank customers, the *Banca della Svizzera* court did not violate international law by ordering the bank to take action that would violate the laws of another country.[77] Section 39 of the *Restatement (Second)* provides that a country may exercise its jurisdiction[78] to prescribe[79]

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secret foreign bank accounts to conceal unlawful transactions. *See* HOUSE REPORT, *supra* note 7, at 12, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4394, 4397 (by using secret foreign bank accounts, Americans have concealed unlawul securities transactions). Consequently, if the *Banca della Svizzea* court was correct in finding that the Swiss bank defendant knowingly utilized Swiss secrecy laws to conceal an unlawful transaction, the court's conclusion that the bank was at fault in failing to produce information about the transaction would be sound. *See id.* (bank made deliberate use of Swiss nondisclosure law to evade American securities laws). No evidence before the court, however, suggested that the bank knew that the customers were corporate insiders. *See id.* at 92,148, 92,149 (bank acted in bad faith); Kronstein, *supra* note 6, at 93 (no evidence suggested bank's knowledge of customers' possession of inside information); *Compelled To Diclose, supra* note 8, at 113 (no evidence to support *Banca della Svizzera* court's conclusion that bank deliberately courted legal impediments to discovery of bank information); *see also* Meyer, *supra* note 7, at 46, 52 (Swiss banks generally have neither means nor ability to ascertain whether customers use bank services to evade United States laws). The *Banca della Svizzera* court therefore should have given further consideration to the role that the bank played in the St. Joe securities transaction before the court concluded that the bank acted in bad faith by engaging in the transaction. *See Kronsein, supra* note 6, at 93 (bank merely executed customers' orders by purchasing and selling St. Joe securities).

[76] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,149. The *Banca della Svizzera* court, in contrast to the *Arthur Andersen* court, did not perceive a need to distinguish between the analysis that a court should employ for deciding to issue an order compelling discovery and the analysis that a court should use for determining whether to impose sanctions for noncompliance with a discovery order. *See id.* at 92,148 n.3; *see also* Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976) (presence of foreign legal constraints relevant to issue of whether court should impose sanctions for nondiscovery but not relevant to question of whether court should issue discovery order), *cert. denied,* 429 U.S. 1096 (1977). The *Banca della Svizzera* court explained that the distinction in analysis would make little difference in the outcome of the *Banca della Svizzera* case. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,148 n.3.

[77] *See infra* notes 78-87 and accompanying text (international legal considerations applied to nations' conflicting laws).

[78] *See* RESTATEMENT (SECOND), *supra* note 72, at § 6 (term "jurisdiction", as used in *Restatement (Second),* means capacity of nation under international law to prescribe or enforce rule of law); *infra* note 79 (jurisdiction to prescribe law); *infra* note 80 (jurisdiction to enforce law).

[79] *See* RESTATEMENT (SECOND), *supra* note 72, at §§ 17, 18, 30. Section 17 of the *Restatement (Second)* confers upon a nation jurisdiction to prescribe laws concerning conduct that occurs within the state's territory. RESTATEMENT (SECOND), *supra* note 72, at § 17(a); *see* SEC v. Kasser, 548 F.2d 109, 115, 116 (3d Cir.) (court has subject matter jurisdiction over securities fraud case when fraudulent acts perpetrated in United States), *cert. denied,* 431 U.S. 938 (1977); IIT v. Vencap Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975) (same); *see also* Fidenas A.G. v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 10 (2d Cir. 1979) (court lacked subject matter jurisdiction because fraudulent conduct occurred

or enforce[80] a law even though the exercise of jurisdiction would require a person to engage in conduct subjecting the person to liability under the laws of another country that also has jurisdiction over the person's conduct.[81] Section 40 of the *Restatement (Second)* lists five factors that countries should weigh to minimize conflicts that may arise from the application of section 39.[82] The factors that countries should consider to moderate

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primarily abroad). *See generally* Note, *Extraterritorial Application of the Federal Securities Laws: The Need for Reassessment,* 14 J. INT'L L. & ECON. 529 (1980) (jurisdictional problems that courts encounter when applying federal securities laws to international transactions) [hereinafter cited as *Need for Reassessment*]. Section 18 of the *Restatement (Second)* confers upon a nation jurisdiction to prescribe laws that attach consequences to conduct that occurs outside the nation's territory and that causes an effect within the nation's territory. RESTATEMENT (SECOND), *supra* note 72, at § 18; *see* Des Brisay v. Goldfield Corp., 546 F.2d 133, 135, 136 (9th Cir. 1977) (United States court has subject matter jurisdiction over '34 Act violation that occurs outside United States when corporation's securities registered and listed on United States exchange and when violation adversely affects United States buyers, sellers, and holders of corporation's securities); Schoenbaum v. Firstbrook, 405 F.2d 200, 208-09 (court has subject matter jurisdiction over violations of '34 Act that occur outside United States when violations produce detrimental effects within United States), *modified on other grounds,* 405 F.2d 215 (2d Cir. 1968), *cert. denied,* 395 U.S. 906 (1969); United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) (nation may impose liabilities for conduct that occurs outside nation's borders and that produces reprehensible effects within nation's borders). *See generally Need for Reassessment, supra,* at 529-56 (jurisdictional problems that courts encounter when applying federal securities laws to international transactions). Section 30 of the *Restatement (Second)* authorizes a country to prescribe laws that attach consequences to conduct of the country's nationals wherever the conduct occurs. RESTATEMENT (SECOND), *supra* note 72, at § 30(a); *see Need for Reassessment, supra,* at 531 n.2 (United States courts unwilling to find jurisdiction when nationality principle enunciated in *Restatement (Second)* § 30 provides sole basis for assertion of jurisdiction).

[80] *See* RESTATEMENT (SECOND), *supra* note 72, at § 7 (relationship between jurisdiction to prescribe and jurisdiction to enforce laws); *id.* § 20 (jurisidiction to enforce laws within nation's territory). A nation does not have jurisdiction to enforce a law unless the nation had jurisdiction to prescribe the law that the nation seeks to enforce. *Id.* § 7(2); *see supra* note 79 (jurisdiction to prescribe law). Since enforcement jurisdiction is limited to a nation's own territory, a nation that has jurisdiction to prescribe a law may not have jurisdiction to enforce the law in all instances. *See* RESTATEMENT (SECOND), *supra* note 72, at § 7(1) (nation having jurisdiction to prescribe law does not have jurisdiction to enforce law in all instances); *id.* § 20 (nation has jurisdiction to enforce within nation's territory law that nation validly prescribed); *see also* FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1316 & n.89 (D.C. Cir. 1980) (nation's enforcement jurisdiction limited to nation's territorial boundaries).

[81] RESTATEMENT (SECOND), *supra* note 72, at § 39. In the United States, a court's exercise of jurisdiction must comport with the due process clause of the fifth amendment. Leasco Data Processing Equip. Co. v. Maxwell, 468 F.2d 1326, 1339, 1340 (2d Cir. 1972); *see* U.S. CONST. amend V (person shall not be deprived of life, liberty, or property without due process of law). When a defendant has acted within a state or sufficiently caused consequences within a state, the state's tribunals may exercise jurisdiction over the defendant's person. 468 F.2d at 1340.

[82] *See* RESTATEMENT (SECOND), *supra* note 72, at §§ 39, 40. Several courts have relied on the balancing test set forth in § 40 of the *Restatement (Second)* or on similar balancing tests when deciding whether to apply United States laws to international matters. *See, e.g.,* United States v. Vetco, 644 F.2d 1324, 1330-33 (9th Cir.) (court employed balancing

the exercise of their enforcement jurisdiction include the vital national interests of each of the countries,[83] the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,[84] and the extent to which the required conduct will take place in the other country.[85] In addition, countries should consider the nationality of the person who must comply with nations' conflicting laws[86] and the extent to which each country's enforcement action can achieve compliance with the law that each country prescribes.[87]

Under *Societe Internationale*[88] and principles of foreign relations law,[89] United States courts having personal jurisdiction over a foreign bank may order production of bank information that relates to possible insider trading violations despite the existence of foreign laws that prohibit disclosure of the information.[90] The *Societe Internationale* Court noted, however, that fear of criminal prosecution abroad constitutes a strong defense to noncompliance with a production order.[91] The *Societe Inter-*

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test enunciated in § 40 of *Restatement (Second)* to weigh competing national interests), *cert. denied*, 454 U.S. 1098 (1981); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 613-15 (9th Cir. 1976) (court developed balancing test to determine whether United States court should exercise extraterritorial jurisdiction in antitrust case); SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,148-49 (S.D.N.Y. 1981) (court used balancing test set fourth in § 40 of *Restatement (Second)* to determine whether court should order disclosure of information when disclosure would violate foreign law); *cf. In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1154-56 (N.D. Ill. 1979) (court criticized balancing test enunciated in *Restatement (Second)* § 40 and developed alternative balancing test to determine whether court should order production of documents protected by foreign nondisclosure law); Pansius, *Resolving Conflicts with Foreign Nondisclosure Laws: An Analysis of the Vetco Case*, 12 DENVER J. INT'L L. & POL'Y 13, 21-23, 33 (1982) (criticizing balancing test set forth in *Restatement (Second)* § 40 and suggesting that courts adopt alternative test for deciding whether to order production of information that foreign secrecy laws protect).

[83] RESTATEMENT (SECOND), *supra* note 72, at § 40(a); *see id.* comment b and illustrations 3 & 4 (vital national interests explained).

[84] *Id.* § 40(b); *see id.* comment c (hardship that inconsistent enforcement would impose upon person); *id.* reporters' note 1 (United States' courts resolution of hardship questions); *cf. id.* § 30 comment c (effect of sanctions imposed under foreign law).

[85] *Id.* § 40(c).

[86] *Id.* § 40(d); *see id.* comments c & d and reporters' note 3 (effect of nationality of person).

[87] *Id.* § 40(e); *see id.* comment e (effectiveness of countries' enforcement of laws).

[88] Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

[89] *See supra* notes 77-87 and accompanying text (principles of foreign relations law that apply to countries' conflicting laws).

[90] *See, e.g.*, United States v. Vetco, 644 F.2d 1324, 1326 (9th Cir.) (court affirmed enforcement of contempt sanctions for noncompliance with summons even though compliance might constitute violation of foreign law), *cert. denied*, 454 U.S. 1098 (1981); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 997 (10th Cir. 1977) (court ordered compliance with subpoena despite conflict with Canadian law, but court declined to impose sanctions for noncompliance); Arthur Anderson & Co. v. Finesilver, 546 F.2d 338, 341, 342 (10th Cir. 1976) (court ordered production of documents even though production allegedly would violate Swiss law), *cert. denied*, 429 U.S. 1096 (1977); SEC v. Banca della Svizzera

nationale Court indicated that a court should not impose sanctions on a party who makes a good faith effort to obey a production order[92] but who hesitates to produce the information because foreign law prohibits disclosure of the information.[93] Thus, the *Societe Internationale* decision suggests that a foreign bank which attempts to obtain required information without violating the laws of the bank's home country may avoid sanctions even though the bank's attempts to obtain the information in accordance with foreign law are unsuccessful.[94] Applying sanctions against a party would be unfair when circumstances beyond the party's control hinder compliance with a production order.[95] Allowing the required information to escape production, however, encourages persons violating the insider trading laws to utilize foreign banks subject to secrecy laws as unwitting accomplices to unlawful schemes.[96] Foreign bank secrecy laws thus can shield information on illegal securities transactions from the SEC's scrutiny.[97]

Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,144 (S.D.N.Y. 1981) (court ordered production of Swiss bank records even though production would violate Swiss secrecy laws).

[91] Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 211 (1958).

[92] *See id.* at 201, 203, 211 (by attempting to gain release of Swiss bank records without violating Swiss law, *Societe Internationale* plaintiff made good faith effort to achieve compliance with production order); *Compelled to Disclose, supra* note 8, at 112-13 (for good faith to exist, party must maximize his efforts to disclose information that court ordered); *cf. In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 1001-02 (10th Cir. 1977) (Doyle, J., dissenting) (party acted in bad faith by colluding with foreign government to achieve promulgation of nondisclosure regulation); SEC v. Banca della Svizzera Italiana, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346, at 92,148 (S.D.N.Y. 1981) (Swiss bank acted in bad faith by making deliberate use of Swiss nondisclosure law to evade United States laws against insider trading).

[93] *See* 357 U.S. at 212-13 (*Societe Internationale* Court declined to enforce sanctions against plaintiff because although plaintiff made good faith effort to obey discovery order, Swiss secrecy laws prohibited compliance with order). *But see* United States v. First Nat'l City Bank, 396 F.2d 897, 901-02 (2d Cir. 1968) (court imposed sanctions for disobedience of subpoena, noting that possibility of civil sanctions under German law not adequate justification for disobedience).

[94] *See* 357 U.S. at 212-13 (district court erred in dismissing *Societe Internationale* plaintiff's complaint when plaintiff had established that failure to comply with production order was due to inability to comply rather than to willfulness, bad faith, or fault of plaintiff).

[95] *See id.* at 211 (*Societe Internationale* plaintiff's failure to comply with production order was due to circumstances beyond plaintiff's control).

[96] *See* Kronstein, *supra* note 6, at 93 (Swiss bank might execute securities transactions without knowing that bank customers are corporate insiders trading with knowledge of material inside information); Meyer, *supra* note 7, at 46, 52 (Swiss banks have neither means nor ability to ascertain whether investors use bank's facilities to evade United States laws).

[97] *See* House Report, *supra* note 7, at 12, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4394, 4397 (secret foreign bank accounts have allowed Americans to avoid securities laws and regulations); Hawes, Lee & Robert, *supra* note 1, at 388-91 (bank secrecy laws have hindered enforcement of United States insider trading laws); *Compelled To Disclose, supra* note 8, at 91 (same).

Although the SEC has a vital interest in gaining access to foreign bank records that relate to suspected insider transactions, the United States courts should be sensitive to other nations' interests when deciding to order production or impose sanctions for nonproduction of foreign bank information.[98] Broad assertion of extraterritorial jurisdiction may offend other nations and thereby impede the SEC's ability to investigate occurences of international securities frauds.[99] Several countries already have enacted retaliatory legislation in response to the extraterritorial application of United States laws.[100] Achieving international cooperation in the investigation and prosecution of securities fraud cases would permit the SEC to investigate transnational securities fraud without offending other nations.

International cooperation in securities regulation currently takes place on an ad hoc basis.[101] Although little systematic cooperation exists between nations' regulatory authorities, the authorities have assisted each other in investigations of securities laws violations.[102] The French securities regulation agency, the Commission des Operations de Bourse (COB), has notified the Swiss Bankers' Association and individual Swiss banks of suspected insider transactions that originated in Swiss banks.[103] The banks concerned often have made their own investigations and, without revealing confidential bank information, have informed COB of whether the suspected insider transactions might have violated French law.[104] The

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[98] *Extraterritorial Application, supra* note 1, at 190; *see* RESTATEMENT (SECOND), *supra* note 72, at § 40 reporters' note 2 (United States courts' broad exercise of jurisdiction has offended foreign governments).

[99] *Extraterritorial Application, supra* note 1, at 190.

[100] *See* Hawes, Lee & Robert, *supra* note 1, at 381 & n.267, 391 (recent British legislation may prevent British compliance with foreign authorities' requests for certain information); *Compelled To Disclose, supra* note 8, at 108 n.171 (nations that have enacted retaliatory legislation in response to extraterritorial application of United States laws). Recent French legislation may prevent French securities regulators from cooperating with the SEC or other nations' regulatory authorities. Lee, Robert, Hirsch & Pollack, *supra* note 1, at 69. The recent legislation prohibits French persons from disseminating economic, commercial, or financial information to foreign authorities under certain circumstances. *See id.* at 69-70. The French legislature adopted the new law as a result of a United States Federal Trade Commission (FTC) investigation of several non-American companies. *Id.* at 70. The FTC had applied administrative sanctions in the amount of $200,000 against a French company. *Id.* at 70, 82 n.18.

[101] *See* Williams & Spencer, *supra* note 1, at 59.

[102] *See id.* (nations have cooperated in investigations of securities laws violations).

[103] *See* Hawes, Lee & Robert, *supra* note 1, at 380 (French securities regulation agency has informed Swiss banks of suspected insider trading violations originating from banks); Lee, Robert, Hirsch & Pollack, *supra* note 1, at 67 (same). Between 1971 and 1980, the French securities regulation agency, the Commission des Operations de Bourse (COB), investigated approximately 250 insider trading cases involving major buyers. Lee, Robert, Hirsch & Pollack, *supra* note 1, at 67. In about 40 of the 250 investigations, the transactions had originated in a foreign country, usually Switzerland. *Id.*

[104] *See* Hawes, Lee & Robert, *supra* note 1, at 380; Lee, Robert, Hirsch & Pollack, *supra* note 1, at 67. The COB found that Swiss banks made efforts to assist COB in insider trading

British and Belgian authorities similarly have cooperated with COB.[105] COB also has assisted the SEC with investigations of insider transactions.[106]

In the Investment Overseas Services (IOS) fraud cases,[107] another example of ad hoc international cooperation, the SEC brought suit against IOS and others who had engaged in fraud and other securities violations.[108] The court that was overseeing the liquidation of IOS appointed a receiver to liquidate the company, which had funds in Canadian, Luxembourg, and Netherlands Antilles banks.[109] The SEC alerted the countries concerned to the fraud that IOS had perpetrated.[110] In some instances, the foreign securities regulation authorities and banks prevented IOS from removing funds from IOS bank accounts.[111] A committee composed of representatives from the countries involved in the IOS affair agreed to liquidate IOS funds according to the laws of the respective countries holding the company's funds.[112] The SEC, the United States receiver, and the foreign fund liquidators thus worked together to liquidate IOS.[113] The cooperative arrangement operated effectively and minimized jurisdictional and bank secrecy obstacles.[114]

Although ad hoc cooperation proved successful in the IOS case,[115] ad hoc cooperation is not the best long-term solution to international securities regulation problems.[116] Countries with bank secrecy laws may be unable or unwilling to assit foreign authorities that seek disclosure of bank information.[117] In addition, countries may resent foreign authorities'

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investigations because the banks were anxious to protect their reputations and wished to avoid serving customers who violated French law. *Id.*

[105] *See* Hawes, Lee & Robert, *supra* note 1, at 380; Lee, Robert, Hirsch & Pollack, *supra* note 1, at 68. Although British and Belgian authorities have cooperated with COB, British and Belgian bank secrecy laws have prevented the respective countries' authorities from disclosing names of bank customers. *Id.*

[106] *See* Hawes, Lee & Robert, *supra* note 1, at 381; Lee, Robert, Hirsch & Pollack, *supra* note 1, at 69; *see supra* note 100 (French retaliatory legislation may prevent COB from providing further cooperation to other nations' regulatory authorities).

[107] Various lawsuits were filed in connection with the Investment Overseas Services (IOS) fraud. *See, e.g., In re* Colorado Corp., 531 F.2d 463 (10th Cir. 1976); International Controls Corp. v. Vesco, 490 F.2d 1334 (2d Cir.), *cert. denied,* 417 U.S. 932 (1974); ITT v. Cornfeld, 462 F. Supp. 209 (S.D.N.Y. 1978).

[108] *See* Lee, Robert, Hirsch & Pollack, *supra* note 1, at 78-79 (discussion of IOS fraud cases).

[109] *See In re* Colorado Corp., 531 F.2d 463, 466 & n.1 (10th Cir. 1976) (liquidation of IOS); Cornfeld v. Investors Overseas Servs., Ltd., 471 F. Supp. 1255, 1259 n.4 (S.D.N.Y. 1979) (same); Lee, Robert, Hirsch & Pollack, *supra* note 1, at 78-79 (discussion of IOS fraud cases).

[110] *See* Lee, Robert, Hirsch & Pollack, *supra* note 1, at 78-79 (discussion of IOS fraud cases).

[111] *See id.* at 79-80.

[112] *See id.* at 79.

[113] *See id.*

[114] *See id.*

[115] *See supra* notes 107-14 and accompanying text (cooperation in IOS fraud cases).

[116] Williams & Spencer, *supra* note 1, at 59.

[117] *See* Lee, Robert, Hirsch & Pollack, *supra* note 1, at 67-68 (bank secrecy laws hinder effective international cooperation); Müller, *supra* note 6, at 10-15 (Swiss bank secrecy); *supra* notes 18-24 and accompanying text (same); *supra* note 105 (Britain and Belgium have bank secrecy laws).

attempts to assert extraterritorially the foreign nations' securities laws.[118]

An ideal solution to multinational insider trading problems would be to establish a system of international cooperation.[119] Cooperation would deter international securities fraud because nations' securities regulators would work together to investigate and prosecute defrauders.[120] Cooperation also could lead to more efficient operation of the international financial markets.[121] Achieving cooperation, however, would require compromise because different countries have different practices, interests, and goals concerning securities regulation.[122] Nevertheless, as securities trading increasingly assumes international aspects, cooperation becomes necessary to ensure effective supervision of the securities market.[123]

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[118] *See supra* note 100 (retaliatory legislation).

[119] Hawes, Lee & Robert, *supra* note 1, at 393 (cooperation among nations' securities regulation authorities would reduce use of secret foreign bank accounts to effect insider trading schemes); Lee, Robert, Hirsch & Pollack, *supra* note 1, at 70 (nations should establish system of cooperation to resolve problems that international securities trading presents); Williams & Spencer, *supra* note 1, at 60 (nations' securities regulation authorities should develop system of cooperation to resolve problems concerning international securities regulation).

[120] *See* Hawes, Lee & Robert, *supra* note 1, at 397 (cooperation would reduce use of foreign banks to effect insider trading schemes); Williams & Spencer, *supra* note 1, at 60 (international cooperation can present powerful front against fraud).

[121] Williams & Spencer, *supra* note 1, at 60.

[122] *See* Lee, Robert, Hirsch & Pollack, *supra* note 1, at 73-74 (achieving cooperation may be difficult because different countries have different goals regarding securities regulation); Williams & Spencer, *supra* note 1, at 56 (establishing system of international cooperation may be difficult because of countries' differing customs, interests, and law enforcement policies). Countries' differing securities laws may pose a barrier to cooperation. *Id.* Securities laws and enforcement techniques vary from country to country. *See id.* (extent of securities regulation varies widely among countries). France, for example, enacted legislation prohibiting insider trading in 1970. Hawes, Lee & Robert, *supra* note 1, at 342; Lee, Robert, Hirsch & Pollack, *supra* note 1, at 67; *see supra* notes 103-106 and accompanying text (French cooperation in investigations of insider transactions). The French COB functions much like the United States' SEC. Hawes, Lee & Robert, *supra* note 1, at 341 n.42.

The United Kingdom has outlawed insider trading since 1980. *Id.* at 338-39. The British police have authority to investigate cases of suspected insider trading. *Id.* at 340. Although the Federal Republic of Germany has no statutory proscriptions against insider trading, German banks and corporations have enacted rules prohibiting insider transactions in securities. MULTINATIONAL APPROACHES—CORPORATE INSIDERS 59-60 (L. Loss ed. 1976). *See generally* Schwark, *Regulation of German Capital Markets—Present Situation, Problems, and Outlook*, 1 J. COMP. CORP. L. & SEC. REG. 299, 308-09 (1978) (Federal Republic of Germany's insider trading regulations). In Germany, a commission composed of corporate managers investigates suspected insider transactions. MULTINATIONAL APPROACHES—CORPORATE INSIDERS, *supra*, at 60, 62.

Switzerland's laws do not prohibit insider trading in securities, but the Swiss nevertheless consider insider trading dishonorable. Memorandum on Insider Trading, *supra* note 20, at pt. 1, ¶ 2. Swiss officials hope that by 1984 Switzerland will have enacted a law prohibiting the misuse of inside information. *Swiss and U.S. Reach Accord on Investigation of Insider Trading*, 14 SEC. REG. & L. REP. (BNA) No. 35, at 1538, 1538 (Sept. 3, 1982) [hereinafter cited as *Swiss and U.S. Reach Accord*.].

[123] Hawes, Lee & Robert, *supra* note 1, at 397 (since securities trading is becoming increasingly international in scope, nations should make efforts to achieve international

The United States and Switzerland recently have established a system of cooperation in the investigation of insider trading cases.[124] In August 1982, the two countries signed a Memorandum on Insider Trading (Memorandum).[125] The Memorandum is a precedent-setting accord that permits participating Swiss banks to furnish United States securities enforcement officials with information on transactions conducted through Swiss bank accounts when the transactions may involve insider trading.[126] The American and Swiss authorities adopted the Memorandum because the

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cooperation in securities regulation); Lee, Robert, Hirsch & Pollack, *supra* note 1, at 70 (nations should develop system of international cooperation for securities regulation); Williams & Spencer, *supra* note 1, at 61-62 (formal system of international cooperation can provide solution to problems that international securities trading presents).

[124] *See infra* notes 125-135 and accompanying text (United States-Switzerland agreement to cooperate in insider trading investigations).

[125] Memorandum on Insider Trading, *supra* note 20; *see Swiss and U.S. Reach Accord, supra* note 122, at 1538 (officials of United States and Switzerland signed Memorandum on Insider Trading).

[126] Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 1; *see Swiss and U.S. Reach Accord, supra* note 122, at 1538. A 1977 treaty between the United States and Switzerland provides for the two countries to cooperate in connection with investigations and prosecutions of criminal offenses. *See* Treaty on Mutual Assistance, *supra* note 20, at art. 1(1)(a). The treaty requires mutual cooperation, however, only when the offense under investigation is a crime under the laws of both the United States and Switzerland. *Id.* arts. 1(1)(a), 1(2), (4)(2)(a). Since insider trading is not a crime under Swiss law, the 1977 treaty generally does not require Swiss cooperation in investigating insider transactions involving Swiss participants. *See* Memorandum on Insider Trading, *supra* note 20, at pt. II, ¶ 3(b), pt. III, ¶ 1; *cf. id.* pt. II, ¶ 3(b) (1977 treaty may provide for cooperation in certain insider trading cases). Consequently, the United States and Switzerland developed the Memorandum on Insider Trading to allow assistance in insider trading investigations. *Id.* at pt. III, ¶ 1. The provisions of the Memorandum on Insider Trading will terminate if Switzerland enacts legislation prohibiting the misuse of inside information. *See id., see also Swiss and U.S. Reach Accord, supra* note 122, at 1538 (Switzerland considering enacting law prohibiting misuse of inside information).

Although the 1977 treaty does not apply to all insider trading cases, persons who violate United States laws against insider trading also could be in violation of Swiss laws that prohibit fraud, unfaithful management, or violation of business secrets. *See* Memorandum on Insider Trading, *supra* note 20, at pt. II, ¶ 3(b). If the insider transaction is a crime under Swiss law, the SEC may obtain confidential Swiss bank information concerning the transaction pursuant to the 1977 treaty. *See id.* The SEC used the 1977 treaty procedures to attempt to obtain Swiss bank information to investigate suspected insider transactions that took place during the 1981 merger of Santa Fe Industries and Kuwait Petroleum Corporation. *Swiss Court Rejects SEC Request in Santa Fe Insider Trading Case,* 15 SEC. REG. & L. REP. (BNA) No. 9, at 271 (Feb. 4, 1983) [hereinafter cited as *Swiss Court Rejects SEC Request*]; Legal Times, Jan. 31, 1983, at 4, col. 1. The United States Justice Department transmitted the SEC's request for information to the Swiss government in March 1982. *Swiss Court Rejects SEC Request, supra,* at 271. The Swiss Federal Office for Police Matters (Police Office) had decided to release the bank records to the United States authorities. *Id.* The persons suspected of insider trading, however, challenged the Police Office's determination in the Swiss courts. *Id.* The Supreme Court of Switzerland ruled 3-2 that the Swiss authorities could not release the bank information to the SEC. *Id.* The swing judge supposedly based his ruling on a technicality rather than on whether the alleged offenses constituted criminal

countries recognized that ascertaining the identities of persons suspected of insider trading is important to the enforcement of American securities laws.[127] Officials of the countries concurred that the use of Swiss banks to effect insider transactions that violate American law is detrimental to the interests of both the United States and Switzerland.[128]

The Swiss Bankers' Association will implement the terms of the Memorandum by submitting a Private Agreement[129] to Swiss banks that might engage in trading on the United States securities markets.[130] Banks that sign the Private Agreement must disclose bank information pertaining to insider transactions that the SEC or the Justice Department may request.[131] The Private Agreement provides for Swiss banks to disclose bank information only when the alleged insider transaction occurred within twenty-five trading days prior to a public announcement of a proposed business combination or acquisition.[132] In addition, the Private Agreement

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activity under Swiss law. *Id.* The United States therefore might be able to submit a revised application for the same information. *Id.*

Since the Memorandum on Insider Trading provides for Swiss cooperation in insider trading investigations regardless of whether the suspect transaction constitutes a criminal act under Swiss law, the SEC will be able to achieve Swiss cooperation in more investigations than would be possible under the 1977 treaty alone. *See* Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 1. Under the Memorandum on Insider Trading, however, the SEC's requests for Swiss bank information must meet stringent procedural requirements. *See id.* (criteria for release of Swiss bank information); *infra* notes 132-133 and accompanying text (same).

[127] *See* Memorandum on Insider Trading, *supra* note 20, at pt. I, ¶ 3.

[128] *Id.* at ¶ 4.

[129] Agreement XVI of the Swiss Bankers' Association (July 14, 1982), *reprinted in* 14 SEC. REG. & L. REP. (BNA) No. 39, at 1740 (Oct. 8, 1982) [hereinafter cited as Private Agreement].

[130] *See* Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 2, pt. V, ¶ 3 (Swiss Bankers' Association will submit Private Agreement to Swiss banks that might trade on United States securities markets). American and Swiss officials expect that all Swiss banks that trade in American capital markets will sign the Private Agreement. *Swiss and U.S. Reach Accord, supra* note 122, at 1538. The Private Agreement establishes the terms of the relationship between signatory banks and their customers who place orders with the banks for execution on the United States securities markets. Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 2; Private Agreement, *supra* note 129, at art. 12. Signatory banks must inform their customers of the contents of the Private Agreement. *Id.*

[131] Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 1; Private Agreement, *supra* note 129, at art. 4.

[132] Private Agreement, *supra* note 129, at art. 1. When the SEC or Justice Department requires information to investigate a suspected insider transaction involving a Swiss bank, the Justice Department must submit a written application to the Swiss Police Office. *Id.* The Police Office in turn transmits the application to a Commission of the Swiss Bankers' Association (Commission). *See id.* at art. 2(1) (Board of Directors of Swiss Bankers' Association shall appoint Commission composed of three members and three deputies); *id.* at art. 3(1) (Commission shall handle requests for information that Police Office transmits to Commission). The Commission has responsibility for analyzing United States authorities' applications for assistance and contacting Swiss banks that must disclose information that the United States authorities have requested. *Id.* at arts. 3, 4.

provides for Swiss banks to cooperate in insider trading investigations only when the suspect transaction meets certain criteria for trading volume and price changes preceding public announcement of a business combination or tender offer that may indicate the existence of insider trading.[133] To preserve banking confidentiality to the fullest extent possible, the Memorandum and the Private Agreement provide that the SEC must strive to keep secret the information that the SEC receives pursuant to the Private Agreement.[134] The SEC and the Justice Department may use the Swiss bank information only in administrative or judicial proceedings that the SEC or Justice Department brings to enforce laws prohibiting insider trading.[135]

The specific requirements that trigger disclosure of Swiss bank information under the Private Agreement as well as the limited ways in which United States authorities may use the information appear to make the

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[133] *See id.* at art. 3(4) (trading volume and price criteria). If the insider transaction under investigation meets the trading volume and price criteria set forth in the Private Agreement, then the Commission presumes that the SEC or Justice Department has made a reasonable request for assistance. *Id.; see supra* note 132 (Commission of Swiss Bankers' Association analyzes United States' requests for assistance in insider trading investigations). If the transaction fails to meet the criteria, the Commission reviews the application for assistance and determines whether the United States authorities have reasonable grounds for requesting Swiss banking information. Private Agreement, *supra* note 129, at art. 3(4). When the Commission has determined to undertake the request for assistance, the Commission orders the Swiss bank involved in the suspect transaction to prepare a report of the transaction. *Id.* at art. 4(1). Upon receiving the Commission's order, the bank must notify the customer whose activity instigated the investigation. *Id.* at art. 4(2). The bank must invite the customer to provide the bank with information showing that the customer did not violate the United States insider trading laws or that the United States' request for information does not satisfy the requirements set forth in the Private Agreement. *Id.* The bank must file with the Commission the bank's report and all information that the bank received from the customer. *Id.* at art. 4(3)-(4). In addition, at the Commission's request, the bank must freeze the customer's account to the extent of profits realized or losses avoided from the alleged insider transaction. *See id.* at art. 9(1).

After receiving the bank's information, the Commission furnishes the Police Office with a report containing the information that the American authorities requested. *Id.* at art. 5. The SEC receives the Commission's report after the Police Office has determined that the report contains no information that could harm Swiss interests or innocent third parties. *Id.* at art. 5. If the Police Office determines that sending the bank's report will harm Swiss interests or innocent third parties, the Police Office must try to adapt the report so that the SEC receives the requested information without damaging the interests of Switzerland or third parties. Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 3. In certain circumstances, the Police Office will not transmit the Commission's report to the SEC. *See* Private Agreement, *supra* note 129, at art. 5. The Police Office will not send the report to the SEC if the bank's customer or report establish that the customer was not an insider or that the customer did not place the purchase or sale order that the SEC is investigating. *Id.* at art. 5(1)-(2); *see id.* at art. 5(2) (definition of insider).

[134] *See* Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 3; Private Agreement, *supra* note 129, at art. 3(5).

[135] Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 3; Private Agreement, *supra* note 129, at art. 3(5).

Memorandum and the Private Agreement a successful compromise between the United States' need to learn the identities of inside traders and Switzerland's desire to keep banking matters confidential.[136] The Memorandum and the Private Agreement should reduce the use of Swiss bank accounts as conduits for insider transactions.[137] The Memorandum and the Private Agreement, however, have significant limitations. For example, only the SEC and the Justice Department may have access to the information that Swiss banks disclose pursuant to the Private Agreement.[138] Consequently, private parties who might have been injured by the insider transaction under investigation may not utilize the Swiss bank information that the United States authorities have received by using Private Agreement procedures.[139] In addition, the Private Agreement applies only to insider transactions that involve business combinations or acquisitions.[140] Thus, the Private Agreement will not provide for disclosure of Swiss bank information when an insider with knowledge of internal corporate developments other than a possible business combination or tender offer engages in insider transactions.[141]

Despite inherent limitations, the Memorandum and the Private Agreement represent important developments for international securities regulation.[142] Bilateral agreements such as the Memorandum on Insider Trading that the United States and Switzerland have adopted could provide a basis for further international cooperation in insider trading cases.[143]

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[136] *See Swiss and U.S. Reach Accord, supra* note 122, at 1538 (in developing Private Agreement, United States' and Switzerland's representatives attempted to balance interests of respective countries).

[137] Hawes, Lee & Robert, *supra* note 1, at 393.

[138] Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 3 (information that SEC obtains through use of Private Agreement shall be used only in administrative or judicial proceedings that SEC of Justice Department brings to enforce laws prohibiting insider trading); Private Agreement, *supra* note 129, at art. 3(5) (when SEC requests Swiss banking information pursuant to Private Agreement, SEC must assure Swiss authorities that SEC will not disclose banking information except in connection with SEC investigation or law enforcement action).

[139] *See* Memorandum on Insider Trading, *supra* note 20, at pt. III, ¶ 3 (information that Swiss authorities disclose pursuant to Private Agreement may not be used in proceedings other than SEC or Justice Department actions to enforce laws against insider trading).

[140] *See* Private Agreement, *supra* note 129, at art. 1 (Swiss bank may disclose banking information relating to alleged insider transaction when transaction took place within twenty-five trading days prior to business combination or acquisition).

[141] *Ease Bank-Secrecy, supra* note 5, at 6, col. 2. When the Private Agreement does not provide for disclosure of Swiss banking information, the Treaty on Mutual Assistance may provide an alternative means for obtaining the information. *See* Treaty on Mutual Assistance, *supra* note 20; *supra* note 126 (Treaty on Mutual Assistance may apply to some insider trading violations).

[142] *See* Hawes, Lee & Robert, *supra* note 1, at 393 (United States-Swiss agreement is key development in securities regulation); *Swiss and U.S. Reach Accord, supra* note 122, at 1538 (same).

[143] *See* Hawes, Lee & Robert, *supra* note 1, at 393 (United States-Swiss agreement can provide pattern for similar agreements with other countries); *Ease Bank-Secrecy, supra* note

Since international securities transactions affect a variety of nations, however, the most effective method of achieving international cooperation in securities regulation would be to develop a multilateral treaty.[144] A multilateral treaty would ensure long-range cooperation between countries.[145] A multilateral treaty also could establish a uniform procedure for cooperation in securities matters.[146]

Commentators have suggested several procedures for international cooperation in securities regulation.[147] As one alternative, countries could adopt a system of cooperation among securities regulation agencies along with third party verification.[148] Nations would agree to require financial intermediaries to disclose the identites of beneficial owners of accounts to designated independent accountants.[149] Third party verification would reduce the use of secret foreign bank accounts to effect insider transactions.[150] Cooperation with third party verification would preserve traders' anonymity except when a securities regulation agency requires information on illegal securities trading.[151]

Another cooperative procedure would be for nations to receive and provide assistance through a multinational securities regulation committee.[152] Securities regulators from participating countries would serve on the committee.[153] The committee would concern itself with supervising only companies that voluntarily participate in the international securities market.[154] The committee would serve as a clearinghouse for information, encourage exchange of ideas and experiences, and assist in harmonization of nations' diverse disclosure and accounting standards.[155]

Another procedure for international cooperation involves establishing

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5, at 6, col. 2 (Justice Department contemplates negotiations with Cayman Islands, Panama, Bahamas, and Bermuda to reach agreement similar to Swiss agreement).

[144] Lee, Robert, Hirsch & Pollock, *supra* note 1, at 70, 73.

[145] *See* Williams & Spencer, *supra* note 1, at 60 (treaty would ensure long-range cooperation).

[146] *See id.* at 60-61 (nations should work toward negotiating multilateral treaty on international securities trading to establish formal procedure for cooperation).

[147] *See supra* text accompanying notes 145-146 (multilateral treaty could provide for international cooperation in insider trading investigations); *infra* text accompanying notes 149-161 (methods of achieving cooperation).

[148] Hawes, Lee & Robert, *supra* note 1, at 393.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 393-94.

[152] Lee, Robert, Hirsch & Pollack, *supra* note 1, at 73; Williams & Spencer, *supra* note 1, at 60.

[153] Williams & Spencer, *supra* note 1, at 61.

[154] *Id.* at 60. Under the regime of an international securities coordination committee, authority to regulate companies that trade solely in domestic markets would remain with domestic securities agencies. *Id.* Companies that trade in both domestic and foreign markets would be subject to rules of both the domestic regulators and the international committee. *See id.* at 61.

[155] *Id.* at 60.

international standards for securities trading.[156] International securities standards could provide that countries adopting the standards will refuse to accept securities trades from countries that do not reveal information about the beneficial owners of securities.[157] As a further alternative for establishing international cooperation, nations could create an international securities agency.[158] The agency would have the authority to establish standards for both international and domestic trading of securities.[159] Nations, however, would be reluctant to surrender regulatory control to an international body.[160] Consequently, nations probably would not take initiatives to create an international securities agency which would have the authority to regulate purely domestic trading.[161]

International participation in securities trading will continue to present challenges to domestic securities regulators. Nations should respond to internationalization of the securities market by establishing a system of regulatory cooperation.[162] To achieve uniform and long-range cooperation, countries should develop a multilateral treaty that emboides a procedure for regulating international securities trades.[163] Effective regulatory cooperation would reduce the use of the international securities market as a conduit for unlawful securities transactions.[164]

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[156] Lee, Robert, Hirsch & Pollack, *supra* note 1, at 70, 73.

[157] *Id.* Since nations have varying standards of securities regulation, companies and investors may engage in regulatory forum shopping. Williams & Spencer, *supra* note 1, at 59. Investors sometimes have chosen to engage in securities trading through Swiss banks because the banks may not reveal information about bank customers. *See supra* note 8 and accompanying text (Swiss bank secrecy laws have hindered efforts to learn identities of persons engaging in unlawful securities transactions); *supra* notes 18-24 and accompanying text (Swiss bank secrecy laws). To adopt standards providing that countries will refuse to accept securities trades from countries that do not reveal information about the beneficial owners of securities would reduce incentives to utilize banks subject to secrecy laws to perpetrate unlawful securities transactions. *See* Lee, Robert, Hirsch & Pollack, *supra* note 1, at 70, 73.

[158] Williams & Spencer, *supra* note 1, at 61.

[159] *See id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 60. The SEC has made efforts to accomodate foreign participation in American securities markest. *See, e.g., Extraterritorial Application, supra* note 1, at 195-96 (SEC's efforts to accomodate foreign traders and issuers); Williams & Spencer, *supra* note 1, at 58-59 (SEC approval of New York Stock Exchange rule regarding foreign traders). In addition, the European Economic Community has prepared a draft directive on insider trading. Lee, Robert, Hirsch and Pollack, *supra* note 1, at 71-73. If adopted, each member of the European Economic Community would have to alter its laws to make insider trading an offense. *Id.*

[163] *See supra* text accompanying notes 144-161 (describing possible methods of international cooperation in securities regulation).

[164] *See* Williams & Spencer, *supra* note 1, at 60 (international cooperation in securities regulation can present powerful front against fraud).