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Recent Developments in United States Insider Trading Prohibition and Swiss Secrecy Laws: Towards a Definitive Reconciliation?

by
Jean-Marc L. Rapp†

INTRODUCTION

A primary goal of the Securities Exchange Act of 1934¹ [hereinafter the Exchange Act] is the maintenance of public confidence in the U.S. securities markets by forbidding fraudulent and manipulative trading practices.² Pursuant to this goal, section 10(b)³ of the Exchange Act, and rule 10b-5⁴ promulgated thereunder, prohibit fraudulent practices in connection with the sale or purchase of any security. Insider trading, the act of purchasing or selling securities while in possession of material nonpublic information about

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1. 15 U.S.C. § 78 (1982) [hereinafter the Exchange Act].

2. See H.R. REP. NO. 1383, 73d Cong., 2d Sess. 1-5 (1934). See also Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). (Legislative history of the Exchange Act examined to determine whether a private cause of action for damages would lie under § 10(b) and rule 10b-5 in the absence of an allegation of scienter).

3. 15 U.S.C. § 78j(b) (1982).

4. 17 C.F.R. § 240.10b-5 (1986). Rule 10b-5 was promulgated by the Securities and Exchange Commission [hereinafter the SEC] in 1942 under the authority of § 10(b) of the Exchange Act. 15 U.S.C. § 78j(b) (1982). It is one of the most significant antifraud provisions enacted under the federal securities laws and reads as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Other significant antifraud provisions include § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1982), §§ 14(e) and 15(c)(1) of the Exchange Act, 15 U.S.C. § 78n(e) (1982), and § 206 of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-6 (1983).

an issuer or the trading market for an issuer's securities,⁵ is not expressly prohibited by section 10(b) nor rule 10b-5. Instead, the judicial and administrative construction of these federal securities laws has developed the prohibition against insider trading.⁶

The Securities and Exchange Commission [hereinafter the SEC] encounters serious difficulties in policing insider trading when transactions are executed in the U.S. markets through financial institutions located in foreign countries. The primary obstacles to SEC enforcement of insider trading laws are foreign secrecy and blocking statutes.⁷ These statutes often prevent the SEC from obtaining the information needed to investigate transactions suspected of transgressing the insider trading prohibition.⁸

Securities transactions entered into by Swiss banks are protected under Switzerland's comprehensive banking and business secrecy statutes.⁹ Given the sizeable amount of trade by Swiss banks in the U.S. securities markets,¹⁰ it is not surprising that Switzerland has become the principle target of SEC efforts to eliminate the use of foreign intermediaries by those engaged in insider trading. Although the conflict between the disclosure requirements of the Exchange Act and the protection mechanisms of Swiss secrecy laws has been the subject of substantial scholarly and judicial analyses in both Switzerland and the United States,¹¹ the issue bears reexamination because of two recent developments.

5. This common definition is stated in H.R. REP. NO. 355, 98th Cong., 2d Sess. 1, 21 n.33 (Memorandum of the Securities and Exchange Commission in Support of the Insider Trading Sanctions Act of 1982), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2274, 2293.

6. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1, 3 (1982); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 294 (1983) [hereinafter *Supreme Court*].

7. The SEC defines these statutes as follows:

Secrecy laws are confidentiality laws which protect private interests in bank records, such as the identity of a bank customer. They generally may be waived with the express or implied consent of the customer.

Blocking laws generally embody national interests in prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities. They cannot be waived by private parties because they protect national rather than private interests.

Waiver by Conduct Concept, Exchange Act Release No. 21186, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,648 at 86,980 (July 30, 1984) [hereinafter *Waiver by Conduct Approach*].

8. *Id.*; Fedders, Wade, Mann & Beizer, *Waiver by Conduct—A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. MARKET L. 1, 3 (1984); Navickas, *Swiss Banks and Insider Trading in the United States*, 2 INT'L TAX & BUS. LAW. 159, 160 (1984). For a description of the methods used by the SEC to detect suspect transactions, see Hawes, Lee & Robert, *Insider Trading Law Developments: an International Analysis*, 14 LAW & POL'Y INT'L BUS. 335, 382-87 (1982).

9. See *infra* notes 42-49 and accompanying text.

10. See Jost, *Insidergeschäfte*, Tages Anzeiger Magazin, Nov. 20, 1982, at 10; Siegel, *United States Insider Trading Prohibition in Conflict with Swiss Bank Secrecy*, 4 J. COMP. CORP. L. & SEC. REG. 353, 357 (1983). For example, in 1981, Swiss banks accounted for roughly 14.8 billion of the 75 billion dollars traded by foreigners in U.S. stock markets. N.Y. Times, Sept. 1, 1982, at 13, col. 6.

11. See generally M. AUBERT, J.P. KERNEN & H. SCHONLE, *LE SECRET BANCAIRE SUISSE* (2d ed. 1982), 441-44; Beguin, *Insider Trading in Switzerland after Santa Fe*, I. F. L.

First, the Swiss Federal Council published, on May 1, 1985, a draft of the Swiss Insider Trading Bill which would make insider trading a criminal offense.¹² The bill is still pending before the Swiss Parliament, the Federal Assembly, but is expected to pass soon. In general, the Swiss Insider Trading Bill satisfies the dual criminality condition required by the 1977 Swiss-U.S. Treaty on Mutual Assistance in Criminal Matters [hereinafter the MAT] for compulsory measures.¹³ It provides the SEC with a means of piercing banking or business secrecy.

Second, in July 1984, the SEC issued for public comment a new release titled the "Waiver by Conduct Concept" [hereinafter waiver by conduct approach].¹⁴ This new concept introduces the principle that the purchase or sale of securities in the United States constitutes implied consent to disclose

REV., Nov., 1983 at 10; de Capitani, *The Swiss Banks and the United States Securities Laws*, 35 WIRTSCHAFT UND RECHT 182 (1983); Friedli, *Statements on International Legal Assistance from the Viewpoint of One of the Large Swiss Banks*, 35 WIRTSCHAFT UND RECHT 245 (1983); Greene, *U.S.-Swiss Memorandum of Understanding of Insider Trading*, I. F. L. REV., Jan. 1983, at 26; Hawes, Lee & Robert, *supra* note 8, at 388-97; Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C.J. INT'L L. & COM. REG. 1 (1983); Keller, *L'accord avec les Etats-Unis concernant les opérations d'initiés*, in EINBLICK IN DIE SCHWEIZERISCHE AUSSENPOLITIK, FESTSCHRIFT ZUM 65. GEBURTSTAG VON STAATSEKRETAER RAYMOND PROBST 219 (1983); Navickas, *supra* note 8; Patry, *Convention XVI de l'association suisse des banquiers relative au traitement des demandes de renseignements de la Securities and Exchange Commission des Etats Unis sur les abus d'informations privilégiées*, 12 COLLECTION REVISION BANCAIRE (Problèmes de droit bancaire et fiscal de la revision) 143 (1984); Reichwein, *Kritische Bemerkungen zur Insider-Konvention*, 60 Neue Zuercher Zeitung [N.Z.Z.], March 12-13, 1983, at 37; Siegel, *supra* note 10; Stauder & Stauder, *Bankgeheimnis und amerikanisch-schweizerische Rechtshilfe*, 4 IPRAX 46; Note, *Insider Trading Laws and Swiss Banks: Recent Hope for Reconciliation*, 22 COLUM. J. TRANSNAT'L L. 303 (1984) [hereinafter *Recent Hope*]; Comment, *Recent Developments in Insider Trading Through Swiss Bank Accounts: An End to the "Double Standard"*, 5 NW. J. INT'L L. & BUS. 658 (1983) [hereinafter *An End*]; Note, *Conflict of Laws-Discovery-Swiss Banks Can Be Compelled to Disclose Identities of Clients Suspected of Insider Trading-Securities and Exchange Commission v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981), 13 SETON HALL L. REV. 91 (1982) [hereinafter *Note, Conflict of Laws*].

12. *Message du Conseil Fédéral concernant la modification du Code Pénal* (Opérations d'initiés) du Première Mai 1985, 1985 FEUILLE FEDERALE II [hereinafter FF] 70-94. This document includes the draft law submitted to the Swiss Parliament [hereinafter Swiss Bill], *id.* at 93-94, and a comment thereof [hereinafter Message], *id.* at 70-92. The draft law followed a first draft bill prohibiting insider trading issued in October 1983 by the Swiss Department of Justice and Police. DEPARTEMENT FEDERAL DE JUSTICE ET POLICE, AVANT-PROJET DE LEGISLATION RELATIVE AUX ABUS EN MATIERE D'INFORMATIONS PRIVILEGIEES (Opérations d'initiés) [hereinafter Swiss Draft Bill], Doc. No. V.776/LK/HS/PS/SM, Annexe 1, Berne (Oct. 1983) [available on request at Office Fédéral des Imprimés, CH-3003 Berne; reproduced and translated in 2 INT'L TAX & BUS. LAW. 159, 190 (1984)].

13. See Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302, art. 4(2) (a) and (3) (entered into force Jan. 23, 1977) [hereinafter MAT]. See also DEPARTEMENT FEDERAL DE JUSTICE ET POLICE, RAPPORT EXPLICATIF CONCERNANT L'AVANT-PROJET SUR UNE LEGISLATION RELATIVE AUX ABUS DE CONNAISSANCES PRIVILEGIEES (Opérations d'initiés), at 3-5, (Comment of the Proposed Swiss Legislation on Insider Trading), Doc. No. V.776/LK/HS/PS/SM, Annexe 2, Berne (Oct. 1983) [available on request at Office Fédéral des Imprimés, CH-3003 Berne] [hereinafter the Swiss Draft Bill Comment].

14. See *Waiver by Conduct Approach*, *supra* note 7.

any information and evidence relevant to an SEC investigation, *regardless* of any foreign secrecy law.

By focusing on these two new developments, this Article analyzes the basic choice available to the SEC in seeking evidence abroad for the purpose of policing insider trading.¹⁵ Essentially, the SEC can resort either to the provisions of international agreements or to domestic legal devices.

Part I of this Article summarizes the competing viewpoints of the United States and Switzerland that generated the legal conflict surrounding the prohibition against insider trading. Part II examines how this conflict was first addressed in the U.S. courts and then temporarily resolved by the signing of the 1982 Memorandum of Understanding [hereinafter the MOU]¹⁶ and its accompanying Agreement XVI [hereinafter the Bankers' Agreement].¹⁷ Part III analyzes the MAT, especially the dual criminality requirement as it relates to the Swiss Insider Trading Bill. Part IV examines the SEC waiver by conduct approach. Finally, Part V compares the MAT with the waiver by conduct approach from both a legal and policy perspective, and concludes that the waiver by conduct approach is a less functional alternative in the context of Swiss-U.S. relations.

I

THE LEGAL CONFLICT

A. *The U.S. Perspective*

While some U.S. commentators question the need to regulate insider trading,¹⁸ prevailing opinion holds that insider trading is undesirable and must be regulated by law.¹⁹ This view has been accepted as a matter of law

15. For the sake of clarity, it is best to emphasize that this Article deals only with SEC investigations and their possible civil, criminal and administrative consequences, to the exclusion of private party proceedings.

16. See Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, United States-Switzerland, 22 I.L.M. 1 (1983), [hereinafter MOU]; see also Honegger, *supra* note 11, at 32-33.

17. See Agreement XVI of the Swiss Bankers' Association with Regard to the Handling of Requests for Information from the Securities and Exchange Commission of the United States on the Subject of Misuse of Inside Information, Aug. 31, 1982, 22 I.L.M. 7 (1983), [hereinafter Bankers' Agreement]. See also Honegger, *supra* note 11, at 32-33.

18. See, e.g., H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966); Carlton & Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983); Manne, *In Defense of Insider Trading*, 44 HARV. BUS. REV. 113 (Nov.-Dec. 1966); Comment, *Insider Trading at Common Law*, 51 U. CHI. L. REV. 838 (1984).

19. See, e.g., Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322 (1979); Karjala, *Statutory Regulation of Insider Trading in Impersonal Markets*, 1982 DUKE L. J. 627; Loss, *Le concept de fiduciaire appliqué aux opérations des dirigeants sur les titres de leur société dans le droit des Etats-Unis*, 21 REVUE INTERNATIONALE DE DROIT COMPARE (R.I.D.C.) 743, 745-46 (1969); Mendelson, *The Economics of Insider Trading Reconsidered*, 117 U. PA. L. REV. 470 (1969); Mendelson, *Insider Trading Revisited*, 28 ETUDES SUISSES DE DROIT EUROPEEN 175 (1984); Schotland, *Unsafe at Any Price: A Reply to Manne*, 53 VA. L. REV. 1425 (1967).

by the U.S. courts²⁰ and by Congress. In 1984, Congress passed the Insider Trading Sanctions Act [hereinafter the ITSA] which provides for increased sanctions as a deterrence mechanism against insider trading.²¹

1. *The Scope of the Insider Trading Prohibition.*

Pursuant to the recommendation of the SEC,²² the ITSA did not incorporate a definition of insider trading. Since section 10(b) of the Exchange Act and rule 10b-5 promulgated thereunder also neither define nor expressly prohibit insider trading, the law of insider trading is almost entirely the product of judicial and administrative construction.²³ It is not surprising that the contours of this area of the law are somewhat ill-defined.²⁴

The trend in the case law is toward greater restriction of private damage actions against insider trading. In *Chiarella v. United States*²⁵ and *Dirks v. SEC*,²⁶ the Supreme Court rejected the "equal information" theory, under which a person engages in insider trading whenever he trades on the basis of material nonpublic information.²⁷ Instead, the Court adopted a "fiduciary duty" theory. Liability for insider trading is triggered by an insider's violation of a duty owed to a party related to the transaction.²⁸

Among U.S. scholars, the interpretation of these decisions has been varied.²⁹ According to some commentators, the opinions are sufficiently expansive to permit the courts to continue to prohibit most instances of insider

20. Langevoort, *supra* note 6, at 1 and n.2.

21. On the SEC's recommendation, Congress recently amended the Exchange Act to increase the sanctions against insider trading. See Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (1984) [hereinafter ITSA], section 2, § 21(d)(2) (civil penalty introduced) and section 3, § 32 (maximum criminal fine increased from \$10,000 to \$100,000), and H.R. REP. NO. 355, 98th Cong., 2d Sess. 1, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2274.

22. H.R. REP. NO. 355, 98th Cong., 2d Sess. 1, 32, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2274, 2304, citing letter from SEC Chairman John Shad to Subcommittee Chairman Timothy E. Wirth.

23. See *supra* note 6.

24. See Langevoort, *supra* note 6, at 3. See also Hawes, *Insider Trading Law in the U.S. Today—Courts and Congress in Complex Confusion*, 28 ETUDES SUISSES DE DROIT EUROPEEN 184, 184 (1984) [hereinafter Hawes I]. More generally, the Second Circuit observed in 1969 that "[s]ome engaged in the business of securities trading believe themselves to be characters from Victorian novels wandering aimlessly on treacherous moors." *H. Kook & Co. v. Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93, 98 (2d Cir. 1969).

25. 445 U.S. 222 (1980).

26. 463 U.S. 646 (1983).

27. *Id.*, at 657-59; *Chiarella*, 445 U.S. at 233. The "equal information theory", rejected by *Chiarella* and *Dirks*, had been suggested, if not adopted, by the landmark case *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). See Langevoort, *supra* note 6, at 9-10, and Farley, *A Current Look at the Law of Insider Trading*, 39 BUS. LAW 1771, 1773 (1984).

28. *Dirks*, 463 U.S. at 659; *Chiarella*, 445 U.S. at 235.

29. See, e.g., *Supreme Court*, *supra* note 6, at 294 ("Dirks ensures that insider trading cases will continue to be decided on the basis of anachronistic and misplaced notions of fiduciary duty"); Anderson, *Fraud, Fiduciaries, and Insider Trading*, 10 HOFSTRA L. REV. 341, 376 (1982)

trading.³⁰ Others maintain they merely show that the fraud and deception framework of section 10(b) and rule 10b-5 does not reflect today's impersonal marketplace where face-to-face dealings between buyers and sellers are infrequent.³¹

The uncertainty in the case law as to the proper scope of prohibited insider trading is of particular concern in light of the ITSA's provision for punitive damages.³² It is disturbing to note that Congress dramatically increased the sanctions against an evil which it has refused to define.

2. *The Role of the SEC.*

In addition to extensive disclosure requirements, one of the most striking characteristics of United States securities laws is the large administrative and enforcement role entrusted to the SEC. In addition to rulemaking and interpretive functions, the SEC has the right to initiate formal proceedings. In cases of fraud or other violations, the SEC may pursue civil injunctions, criminal prosecutions or administrative remedies,³³ as well as the civil penalties available through the ITSA.³⁴ The SEC is also granted broad investigatory powers. Under section 21(a) of the Exchange Act,³⁵ the SEC may initiate and conduct either the formal or informal investigations necessary "to determine whether any person has violated, is violating, or is about to violate any provision" of the federal securities laws. Furthermore, the SEC can invoke

(The Court in *Chiarella* "appears simply to be playing games with [common law misrepresentation] doctrine in order to limit liability without articulating the reasons why liability should be limited in just that way."). The SEC promulgated rule 14e-3, 17 C.F.R. § 240.14e-3(1984), after the *Chiarella* decision and at least in part in response to the Supreme Court's opinion in that case. See R. JENNINGS & H. MARSH, *SECURITIES REGULATION—CASES AND MATERIALS*, at 919-20 (5th ed. 1982).

30. Levine & Marshall, *Dirks in the Lower Courts*, 17 REV. SEC. REG. 897, 904 (1984); Langevoort, *supra* note 6, at 4, 53.

31. See, e.g., Karsch, *The Insider Trading Sanctions Act: Incorporating a Market Information Definition*, 6 J. COMP. BUS. & CAP. MARKET L. 283, 292-93 (1984); Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed, and Who Can Sue Whom under SEC Rule 10b-5?*, 54 S. CAL. L. REV. 1217, 1321 (1981).

32. See Karsch, *supra* note 31, at 291; Miller, *The Insider Trading Sanctions Act*, 17 REV. SEC. REG. 821, 821. See also Hawes I, *supra* note 24. But see Hawes, *Swiss Insider Trading Bill Brings Lively Debate*, Legal Times, July 16, 1984, 19, 23 [hereinafter Hawes II].

In *Chiarella*, the majority expressed its dissatisfaction with a federal statute and rule that provide no clear indication of what activity is prohibited (445 U.S. at 235 n. 20) and observed that it would be hesitant to adopt a parity-of-information rule absent some explicit evidence of congressional intent (445 U.S. at 233). Likewise, in *Dirks*, the Court considered it essential to provide a guiding principle for the market participants, who would be otherwise "forced to rely on the reasonableness of the SEC's litigation strategy," which "can be hazardous" (463 U.S. 664 and n. 24). Apparently, Congress has not heard these clear messages.

On the other hand, in 1981, the Second Circuit adopted the "misappropriation theory," which was not specifically considered in *Chiarella*, but held that the defendant had a reasonable opportunity to know that his conduct was prohibited. *United States v. Newman*, 664 F.2d 12, 16, 17 (2d Cir. 1981), cert. denied 464 U.S. 863 (1983).

33. SEC, *THE WORK OF THE SEC* (Oct. 1980), reprinted in JENNINGS & MARSH, *supra* note 29, at 30.

34. ITSA, *supra* note 21, section 2.

35. 15 U.S.C. § 78u(a) (1984).

the aid of the district courts in cases of contumacy.³⁶ According to the SEC, "[t]hose who consummate securities transactions entirely within the United States are subject to strict accountability."³⁷

B. The Swiss Perspective

1. Insider Trading Under Swiss Law.

Switzerland has neither a statutory scheme comparable to the Exchange Act³⁸ nor a regulatory body such as the SEC. While provisions dealing with the issue of securities may be found in various federal statutes,³⁹ the disclosure requirements for trading in securities are non-comprehensive and only regulate the relations between issuers and the public. Stock exchanges are solely regulated by cantonal laws.⁴⁰ Finally, there is no specific legislation, either federal or cantonal, defining or prohibiting insider trading.⁴¹

2. Swiss Banking Secrecy.

Swiss law places a premium on protecting privacy in financial and economic matters which are considered an integral part of liberty and personal independence.⁴² In particular, Swiss law views the banker-client relationship as more than an ordinary business relationship.⁴³ Three legal principles create the duty of the Swiss bank to respect the confidentiality of a customer's account: the civil right to personal privacy, the contractual relationship between the customer and bank, and specific statutory provisions governing banking secrecy.⁴⁴

36. Exchange Act section 21(c), 15 U.S.C. § 78u(c) (1984).

37. Waiver by Conduct Approach, *supra* note 7, at 86,980. For instance, the Right to Financial Privacy Act of 1978 generally requires notice to bank customers and an opportunity to challenge, before a government agency request for bank records may be honored. 12 U.S.C. §§ 3401-3422 (1984). But in 1980, Congress added section 21(h) to the Exchange Act in order to waive this requirement with regard to the SEC in certain cases, notably where records are necessary to trace beneficial ownership in any security. 15 U.S.C. § 78u(h) (1984).

38. For a summary of the Swiss securities regulation, see Dagon, *Securities Regulation in Switzerland*, 6 VAND. J. TRANSNAT'L L. 511 (1973); de Capitani, *supra* note 11, at 183-84; *International Securities Project*, 30 BUS. LAW. 585, 631-38 (1975).

39. See, e.g., SCHWEIZERISCHES OBLIGATIONSRECHT, CODE DES OBLIGATIONS, CODICE DELLE OBLIGAZIONI [hereinafter CO], arts. 631-32 (issuance of corporate stock), 1156 (issuance of bonds); Federal Law Relating to the Issue of Mortgage Bonds, July 1, 1966, SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS, RECUEIL SYSTEMATIQUE DU DROIT FEDERAL, RACCOLTA SISTEMATICA DEL DIRITTO FEDERALE [hereinafter RS] 951.31.

40. See EUROPEAN STOCK EXCHANGE 446 (1973); M. FELLMAN, RECHTLICHE ERFASUNG VON INSIDERTRANSAKTIONEN IN DER SCHWEIZ, 279-81 (Schweizer Schriften zum Handels- und Wirtschaftsrecht, vol. 51, 1981).

41. See Briner, *Insider Trading in Switzerland*, 10 INT'L BUS. LAW. 348 (1982).

42. AUBERT, KERNEN & SCHONLE, *supra* note 11, at 32 & n.6; Meyer, *Swiss Banking Secrecy and its Legal Implications in the United States*, 14 NEW ENG. L. REV. 18, 22 (1978).

43. Meyer, *supra* note 42, at 22.

44. See AUBERT, KERNEN & SCHONLE, *supra* note 11, at 31-37; Aubert, *The Limits of Swiss Banking Secrecy Under Domestic and International Law*, 2 INT'L TAX & BUS. LAW. 273, 273-74 (1984); Honnegger, *supra* note 11, at 2; Meyer, *supra* note 42, at 24.

Breaches of banking secrecy may result in civil liability under tort or contract law⁴⁵ and in criminal sanctions under the Banking Law of 1934.⁴⁶ In addition, two provisions of the Swiss Penal Code of 1937⁴⁷ may be applied to violations of banking secrecy. First, under article 162 of the Penal Code, it is a crime to reveal, or to take advantage of, a business secret when one is under a legal duty to protect it.⁴⁸ Second, article 273 of the Penal Code prohibits acts of economic espionage.⁴⁹

45. See AUBERT, KERNEN & SCHONLE, *supra* note 11, at 38-44; Honegger, *supra* note 11, at 3-4.

46. Federal Law Relating to Banks and Savings Banks, RS, *supra* note 39, 952.0 [hereinafter Banking Law of 1934]. Article 47 of the Banking Law of 1934 reads as follows:

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed 6 months or by a fine not exceeding 50,000 francs.

2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 francs.

3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.

4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved. (Author's translation)

The Banking Law of 1934 also provides for administrative sanctions. See Aubert, *supra* note 44, at 275 and n.14. The Banking Law does not define banking secrecy, which is determined by private law concepts. In brief, the mandate of secrecy covers "all activities in the banking domain, including the relationship between client and bank, information given by the client about his financial circumstances, the client's relationship with other banks, if any, and the bank's own transactions, if disclosure would harm a customer." Aubert, *supra* note 44, at 276. On the scope of banking secrecy, see AUBERT, KERNEN & SCHONLE, *supra* note 11, at 79-81.

47. SCHWEIZERISCHES STRAFGESETZBUCH, CODE PENAL SUISSE, CODICE PENALE SVIZZERO (entered into force Jan. 1, 1942) [hereinafter CP].

48. CP, *supra* note 47, art. 162:

Any person who reveals a manufacturing or business secret which he was bound to maintain by virtue of a legal or contractual obligation and any person who profits thereby shall, upon being charged, be punished with imprisonment or a fine. (Author's translation)

The Swiss Supreme Court has interpreted the term "business secret" to cover information concerning the preparation of a merger or a tender offer, i.e., facts of which a Swiss bank is often aware in the course of its activities. Judgment of Jan. 26, 1983, Tribunal Fédéral [hereinafter TF] 109 Arrêts du Tribunal Fédéral Suisse, Recueil Officiel [hereinafter ATF] Ib 47, 56-57 (1983) [hereinafter *Santa Fe I*]. A summary of this opinion in English translation appears at 22 I. L. M. 785 (1983). See also judgment of Jan. 26, 1983, TF, reprinted in 28 ETUDES SUISSES DE DROIT EUROPEEN 308, 310-11 (1984) [hereinafter *Antoniu/Courtois*] (this opinion was not published in ATF but is on file at *The International Tax and Business Lawyer*).

49. CP, *supra* note 47, art. 273:

Whoever explores a manufacturing or business secret in order to make it accessible to a foreign authority or a foreign organization or a foreign private business enterprise or their agents, whoever makes a manufacturing or business secret accessible to a foreign authority or a foreign organization or a foreign private business enterprise or their agents, shall be punished with imprisonment, in serious cases with penitentiary confinement. The deprivation of liberty can be combined with a fine. (Author's translation)

3. *National and International Limits to Swiss Banking Secrecy.*

Although protected by law, Swiss banking secrecy is far from absolute. First of all, due to the private law source of banking secrecy, the bank customer, as the master of the secret, can authorize the bank to furnish information to third parties or government authorities.⁵⁰ In Swiss criminal proceedings, banking secrecy can always be lifted.⁵¹ And in Swiss civil and tax matters, federal and cantonal laws also frequently compel disclosure.⁵²

When a foreign authority seeks to effect service of process or obtain evidence in Switzerland, it cannot lawfully do so without obtaining assistance from Swiss authorities, because Switzerland adheres to the principle that acts of foreign states may not be performed on its territory without authorization.⁵³ A Swiss banker may be punished for violating the Banking Law, whether the breach of secrecy occurs in Switzerland or abroad;⁵⁴ pleading that the Swiss banker was merely responding to a foreign authority is not a

Although this provision covers a much wider area than banking, it may be applied to bankers. See Aubert, *supra* note 44, at 275 and n.13; Meyer, *supra* note 42, at 24. For a discussion of Article 273, see Memorandum From the Swiss Embassy to the U.S. State Department Concerning the Official Position of the Swiss Authorities on the Application of Article 273 of the Swiss Penal Code (June 16, 1983; unpublished) [hereinafter Memorandum on art. 273 CP]; See Gerber, *Einige Probleme des Wirtschaftlichen Nachrichtendienstes*, 93 REVUE PENALE SUISSE [hereinafter RPS] 257 (1977).

50. See AUBERT, KERNEN & SCHONLE, *supra* note 11, at 38-39, 71; Honegger, *supra* note 11 at 5; Meyer, *supra* note 42, at 29.

51. Aubert, *supra* note 44 at 281-82; Honegger, *supra* note 11, at 6; Meyer, *supra* note 42, at 31.

52. Although there are federal civil procedure statutes, Swiss courts almost exclusively apply cantonal law in civil cases. Cantonal procedure regarding banking secrecy is divided into three groups. In the first group, there is no legal provision compelling bankers to divulge information. In the second group, the judge decides whether banking secrecy may be lifted. Finally, in the third group, banking secrecy is not viewed as professional secrecy, so that bankers are not entitled to refuse to testify. Aubert, *supra* note 44, at 281-82; Honegger, *supra* note 11, at 6; Meyer, *supra* note 42, at 31-32. In criminal prosecutions for tax fraud, all federal laws and most of the cantonal laws allow the judge to lift banking secrecy. Aubert, *supra* note 44, at 280; Honegger, *supra* note 11, at 7. On the other hand, in cases of tax evasion, no duty to give information or testimony is generally placed upon third parties, so that bankers do not need to rely on banking secrecy in refusing disclosure. Aubert, *supra* note 44, at 280; Honegger, *supra* note 11, at 7; Meyer, *supra* note 42, at 33-34. Tax evasion involves the mere failure of the taxpayer to declare certain incomes or assets in his or her tax return. However, the distinction between tax evasion and tax fraud is not always clear in the cantonal laws. Meyer, *supra* note 42, at 34 & n.101.

53. See CP, *supra* note 47, art. 271:

Whoever performs on Swiss territory, without being authorized, any acts for a foreign state which are reserved to a public authority or a public official, whoever performs such acts for a foreign political party or any other organization of a foreign country, whoever furthers any such acts, shall be punished with imprisonment, in serious cases with penitentiary confinement.

For comments on this provision, see Frei, *The Service of Process and the Taking of Evidence on Behalf of U.S. Proceedings—the Problem of Granting Assistance*, 35 WIRTSCHAFT UND RECHT 196, 200, 202 (1983) [hereinafter Frei I].

54. Under article 7(l) of the CP, *supra* note 47, a crime is deemed to have taken place in both the place where the offender acted and where the consequences occurred.

defense,⁵⁵ because only Swiss judicial authorities are vested with the power to override Swiss banking secrecy laws.⁵⁶

Whether embodied in Swiss statutes or international agreements, the Swiss judicial assistance rules tend to place foreign authorities in the same position as Swiss authorities.⁵⁷ For example, in criminal matters, both the MAT and the new Mutual Assistance Law provide that banking secrecy may be lifted *only* if the information requested relates to a crime punishable both in the foreign country and in Switzerland.⁵⁸ Thus foreign authorities are granted access to protected information to the same extent as Swiss authorities if this dual criminality condition is met. As regards civil matters,⁵⁹ there is neither a treaty with the United States nor a uniform federal law on international cooperation. Accordingly, foreign requests for information are handled under the relevant cantonal code of civil procedure, resulting in a disparity of applicable standards.⁶⁰ This disparity derives from the federal structure of Switzerland, which is similar to that of the United States.⁶¹

55. Aubert, *supra* note 44, at 284.

56. *Id.*

57. However, by virtue of a restriction generally accepted by other States, Switzerland always refuses assistance in matters concerning fiscal, political or military offenses. Aubert, *supra* note 44, at 285. In fiscal matters, this traditional position has been relaxed in the relationship with the United States and, more recently, by the new Mutual Assistance Law (*see infra* note 58). *See* Frei I, *supra* note 53, at 198.

58. MAT, *supra* note 13, art. 4(2)(a) and (3); Federal Law on International Assistance in Criminal Matters, March 20, 1981 (entered into force Jan. 1, 1983), RS, *supra* note 39, 351.1, art. 1 [hereinafter Mutual Assistance Law].

59. In order to avoid confusion, it is best to emphasize that the United States has a much broader concept of "civil" litigation than Switzerland has. For instance, the so-called civil law suits brought by U.S. regulatory agencies or authorities such as the Securities and Exchange Commission, Internal Revenue Service, and the Federal Trade Commission or the Antitrust Division of the Justice Department are not regarded as civil matters in Switzerland. Frei I, *supra* note 53, at 200. On the other hand, some of these proceedings may be deemed as criminal proceedings under Swiss law. *Id.* at 209-210.

60. For an example of this disparity, *see supra* note 52 and accompanying text.

61. For an overall discussion of the problem of granting assistance in the Swiss-American relationship, *see* Frei I, *supra* note 53.

On the MAT, *supra* note 13, *see* G. KELLER, DAS SCHWEIZERISCHE VORVERFAHREN ZUM RECHTSHILFEABKOMMEN IN STRAFSACHEN ZWISCHEN DEN VEREINIGTEN STAATEN VON AMERIKA UND DER SCHWEIZ (1981); H. SCHULTZ, DAS BANKGEHEIMNIS UND DER SCHWEIZERISCH-AMERIKANISCHE VERTRAG UEBER DIE RECHTSHILFE IN STRAFSACHEN (1976); Cortese, *La convention sur l'entraide judiciaire réciproque en matière pénale entre la Suisse et les Etats-Unis*, 56 REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 53 (1978); Frei, *Drei Jahre Rechtshilfevertrag mit den USA-Erste Erfahrungen in der Zusammenarbeit Zwischen zwei Laendern mit Verschiedenen Rechtssystemen*, 98 RPS, *supra* note 49, at 97 (1981) [hereinafter Frei II]; Markees, *Die Rechtshilfe in Strafsachen im Verkehr mit den USA nach dem Vertrag vom 25.5.1973 und dem Bundesgesetz vom 3.10.1975*, 95 RPS, *supra* note 49, at 113 (1978); Note, *Treaty Assistance — Criminal Procedure — Treaty with Switzerland Affects Banking Secrecy Law — Provisions Against Organized Crime Set New Precedent*, 15 HARV. INT'L L. J. 349 (1974); Note, *The Recent Swiss-American Treaty to Render Mutual Assistance in Criminal Law Enforcement (An Application of the Bank Secrecy Act): Panacea or Placebo?*, 7 N.Y.U. J. INT'L L. & POL. 103 (1974); Note, *Criminal Law — Treaty on Mutual*

II
CONFRONTATION IN U.S. COURTS AND THE SWISS-U.S.
PROVISIONAL AGREEMENTS

A. SEC v. Banca della Svizzera Italiana (BSI)⁶²

On March 10, 1981, Banca della Svizzera Italiana [hereinafter BSI], a Swiss bank with a subsidiary in New York, bought call options and common stock of St. Joe Minerals Corporation (St. Joe) for certain undisclosed principals.⁶³ The next day, a subsidiary of Joseph E. Seagram & Sons, Inc., announced a cash tender offer to purchase all of St. Joe's common stock.⁶⁴ Immediately following the announcement, BSI closed out the options and sold most of the common stock, netting an overnight profit of approximately two million dollars.⁶⁵

The SEC filed an injunctive action against BSI and its undisclosed principals in the United States District Court for the Southern District of New York, alleging insider trading by the defendants. The SEC obtained a temporary restraining order which "directed immediate discovery proceedings," froze the proceeds of the St. Joe stock sale, and required the bank to disclose the identity of its clients "insofar as permitted by law."⁶⁶ Relying on that qualification, the bank contended that it could not comply with the order without violating Swiss law.⁶⁷ The SEC filed a motion to compel production of the requested information and to impose contempt sanctions for non-compliance.⁶⁸ The requested sanctions included a fine of \$50,000 per day of non-compliance, a ban of trading in the U.S. securities markets, a total freeze on BSI assets in the United States, divestiture of properties within the United States owned by BSI, and an order for the arrest of any BSI officer, director, or controlling person found in the United States.⁶⁹

In a hearing on the motion, the Court announced its intent to sign an order compelling disclosure pursuant to Rules 33 and 37 of the Federal Rules of Civil Procedure following a week's grace period in which BSI would have the opportunity to obtain waivers of confidentiality from its clients.⁷⁰ The

Assistance in Criminal Matters Between the United States and Switzerland, 7 VAND. J. TRANS-NAT'L L. 469 (1974).

On the new Mutual Assistance Law, *supra* note 58, see de Capitani, *Internationale Rechtshilfe—Eine Standortsbestimmung—Strafsachen und Verwaltungssachen*, 100 REVUE DE DROIT SUISSE [hereinafter RDS], II, 365 (1981); Gauthier, *La nouvelle législation suisse sur l'entraide judiciaire en matière pénale*, 101 RPS, *supra* note 49, at 51 (1984); Schmid, Frei, Wyss & Schouwey, *L'entraide judiciaire en matière pénale*, 100 RDS, II, 247 (1981).

62. 92 F.R.D. 111 (S.D.N.Y. 1981).

63. *Id.* at 113.

64. *Id.* at 112.

65. *Id.* at 113.

66. *Id.*

67. Siegel, *supra* note 10, at 362.

68. See *Waiver by Conduct Approach*, *supra* note 7, at 86,980; Lowenfeld, *Bank Secrecy and Insider Trading: The Banca della Svizzera Italiana Case*, 15 REV. SEC. REG. 942, 942 (1982).

69. Siegel, *supra* note 10, at 362.

70. Lowenfeld, *supra* note 68, at 942; Siegel, *supra* note 10, at 362; 92 F.R.D. at 113.

threat of sanctions had a "catalytic effect" on the bank, which secured client waivers, furnished answers to some of the interrogatories and requested an extension to complete responses or provide reasons for noncompliance.⁷¹ Despite the bank's disclosures, on November 16, 1981, Judge Pollack issued a formal written opinion in order to lay down the principles to be applied in case "other notions of confidentiality" should be "developed on behalf of the disclosed Panamanian customers of the bank, applicable to Switzerland or elsewhere."⁷²

In short, the District Court confirmed its previous oral opinion on the basis of three different authorities: (1) the U.S. Supreme Court opinion in *Société Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers* [hereinafter *Rogers*];⁷³ (2) two recent Second Circuit decisions, *United States v. First National City Bank* [hereinafter *FNCB*]⁷⁴ and *Trade Development Bank v. Continental Insurance Co.* [hereinafter *Continental*];⁷⁵ and (3) section 40 of the *Restatement (Second) Foreign Relations Law of the United States*.⁷⁶ The *BSI* court interpreted *Rogers* to mean that a foreign law's prohibition of discovery is not decisive in U.S. proceedings. Instead, the noncomplying party's good or bad faith is a vital factor to consider.⁷⁷ Relying on *FNCB* and *Continental*, the court considered the factors set forth in section 40 of the Restatement and adopted a balancing test. The factors to be weighed were the national interests of both countries and the hardship in requiring compliance with U.S. discovery procedures. In determining the extent of hardship, Switzerland's prohibition against discovery was but one of

71. 92 F.R.D. at 113. In particular, BSI revealed the names of three Panamanian corporations and one Swiss corporation for whom the St. Joe options had been purchased, and the name of the customer who had ordered the transactions on the corporations' behalf, Giuseppe Tome. Siegel, *supra* note 10, at 362.

72. 92 F.R.D. at 114.

73. 357 U.S. 197 (1958).

74. 396 F.2d 897 (2d Cir. 1968).

75. 469 F.2d 35 (2d Cir. 1972).

76. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 40 (1965). Section 40 reads as follows:

§ 40. Limitations on Exercise of Enforcement Jurisdiction.

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:

- a) vital national interests of each of the states,
- b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- c) the extent to which the required conduct is to take place in the territory of the other state,
- d) the nationality of the person, and
- e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

77. 92 F.R.D. at 114.

many factors to consider.⁷⁸ According to the court, the facts in *BSI* were decisively in the SEC's favor.⁷⁹

The *BSI* decision played an important role in the opening of the 1982 U.S.-Swiss negotiations which led to a provisional mechanism for SEC information requests.⁸⁰ Beyond historical interest, however, the *BSI* case still deserves attention. Recent U.S. cases rely on the *BSI* opinion.⁸¹ And, even though the SEC presently seems to consider a motion to compel discovery under Rule 37 as an *ultima ratio*,⁸² it still regards *BSI* as a major victory and useful basis for its waiver by conduct proposal.⁸³ Yet the *BSI* decision remains vulnerable to criticism, particularly for its failure to identify and analyze the alternative means of discovery available through the MAT.⁸⁴

B. The Swiss-American Provisional Agreements

1. Background.

BSI was the first case in which a Swiss bank which had traded securities in the United States was threatened with severe contempt sanctions. Just prior to Judge Pollack's opinion in *BSI* on October 26, 1981, the SEC initiated a similar action before the same court, *SEC v. Certain Unknown Purchasers of the Common Stock and Call Options for the Common Stock of Santa Fe International, et al.* [hereinafter *Santa Fe*].⁸⁵ The *Santa Fe* case

78. *Id.* at 115.

79. *Id.* at 117.

80. See *infra* text accompanying notes 85-88.

81. See, e.g., *United States v. The Bank of Nova Scotia*, 691 F.2d 1384, 1389 (11th Cir. 1982); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 795-96 (S.D.N.Y. 1984); *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158, 1163 (C.D. Cal. 1983).

82. See *Waiver by Conduct Approach*, *supra* note 7, at 86,989 n. 44.

83. *Id.* at 86,981, 86,983, and 86,987.

84. This failure is the most striking point about the *BSI* case. The court merely asserted that these proposals "would only send the SEC on empty excursions." 92 F.R.D. at 113. Instead of relying exclusively upon pre-existing local sources, the *BSI* court should have discussed the implications of the more recent MAT. For want of real analysis of the various Swiss public and private interests at stake, the court relied heavily upon the fact that the Swiss government had not intervened in the proceeding. Yet Switzerland usually declines to submit *amicus curiae* briefs in foreign proceedings. Gattiker, *Foreign Policy Objective and the Extraterritorial Application of Law*, 35 WIRTSCHAFT UND RECHT 154, 160 (1983) While purporting to apply international law principles, the *BSI* court adopted a parochial attitude, which is understandable, given that the Restatement balancing test in effect requires a court "to choose between being unpatriotic or disingenuous." 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD*, 173 (2d ed. 1981). The *BSI* court did not address the repercussions of its decision on the international legal system. See Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 591-95 (1983), for a thorough criticism of the approach exemplified by *BSI*. See also Note, *Conflict of Laws*, *supra* note 11, 113-14 (1982). In particular, *BSI* did not indicate how Swiss banks could avoid the dilemma of conflicting U.S. and Swiss law they would face when carrying out their customers' orders on U.S. securities markets.

85. [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,323 (S.D.N.Y. Oct. 26, 1981). The SEC's complaint alleged that unknown buyers used Swiss banks to purchase stock and call options in *Santa Fe* while in possession of material nonpublic information relating to merger discussions between *Santa Fe* and Kuwait Petroleum Corporation.

involved five Swiss banks as nominal defendants, and the possibility of a decision similar to *BSI* caused great concern in the Swiss banking industry. The *Santa Fe* case prompted political maneuvering by both the United States and Switzerland.⁸⁶

Representatives of both the United States and Switzerland were interested in reaching a compromise solution to the insider trading law enforcement problem. American enforcement needs had to be reconciled with the Swiss concern of undue encroachment on Swiss sovereignty. Both sides shared a common economic interest in maintaining substantial Swiss participation in the U.S. securities markets.

The United States and Switzerland reached agreement on three points.⁸⁷ First, relying on a written opinion furnished by the Swiss Federal Office on Police Matters, the SEC agreed to apply for assistance pursuant to the MAT in pending cases, notably in *Santa Fe*. Second, because this administrative opinion had no binding effect upon the Swiss Supreme Court, both delegations agreed on a provisional measure (the Bankers' Agreement) which applied to insider trading cases not covered by the MAT. This agreement was to remain in force until the Insider Trading Bill became Swiss Law. Third, it was also agreed that an instrument should be signed setting forth these views on the meaning of the MAT. These three points are embodied in the Memorandum of Understanding (MOU).⁸⁸

2. *The MOU and the Bankers' Agreement.*

Signed on August 31, 1982, on behalf of the governments of the United States and Switzerland, the MOU is not a binding agreement subject to the ratification procedure applicable in each country.⁸⁹ Rather it is an expression of intent by the two governments concerning the interpretation or application of the MAT.⁹⁰ Since the MOU and the Bankers' Agreement⁹¹ have been described in detail by other commentators,⁹² this article will focus only on a few points.

The MOU notes the importance of the MAT and states that it "should be used to the extent feasible."⁹³ As regards the dual criminality condition of

86. See Part III(B), *infra*, for more on the *Santa Fe* case.

87. Greene, *supra* note 11, at 33.

88. See MOU *supra* note 16, at §§ II(1-2), III(1), II(4).

89. Beguin, *supra* note 11, at 11; Greene, *supra* note 11, at 26 and n.1; Honegger, *supra* note 11, at 36; Navickas, *supra* note 8, at 178.

90. MAT, *supra* note 13, art. 39(1). (Art. 39 is titled Consultations and Arbitration, and § 1 makes provision for both parties to exchange views "on the interpretation, application or operation" of the MAT); MOU, *supra* note 16, § I(1).

91. Greene, *supra* note 11, at 34-35; Honegger, *supra* note 11, at 24-31; Navickas, *supra* note 8, at 180-86; Patry, *supra* note 11.

92. See generally, Friedli, *supra* note 11, Greene, *supra* note 11, Hawes, Lee, & Robert, *supra* note 8, Honegger, *supra* note 11, Navickas, *supra* note 8, *Recent Hope*, *supra* note 11, Stauder & Stauder, *supra* note 11.

93. MOU, *supra* note 16, art. II(2).

the MAT⁹⁴, the MOU suggests that, until Switzerland enacts the Insider Trading Bill, insider trading could be a violation of articles 148 (fraud), 159 (unfaithful management) or 162 (violation of business secrets) of the Swiss Penal Code, and that compulsory measures will often be possible pursuant to the MAT.⁹⁵

The MOU also intends to clarify the meaning of article 1(3) of the MAT, which provides for assistance in "certain ancillary . . . proceedings in respect of measures which may be taken against the perpetrator of an offense falling within the purview of [the MAT]."⁹⁶ According to Edward F. Greene, General Counsel of the SEC, this provision most probably allows the SEC to use the information provided in any of the variety of proceedings it can bring with respect to an offense (injunctive actions, actions seeking disgorgement, administrative proceedings).⁹⁷

The Bankers' Agreement, which became effective on January 1, 1983, was signed by all members of the Swiss Bankers' Association which trade in the U.S. securities markets.⁹⁸ This private agreement was a temporary measure designed to address insider trading cases that might fall outside the MAT. It will last at least three years with an option to renew each year thereafter or until the Swiss Insider Trading Bill became law; until such time, it is still in effect.⁹⁹ The Agreement established a Commission of Inquiry¹⁰⁰ to handle investigations of certain suspicious transactions¹⁰¹ at the request of the United States.¹⁰² If the investigation revealed that the customer was an

94. For a discussion of the dual criminality condition of the MAT, see Part III(A)(1), *infra*.

95. MOU, *supra* note 16, art. III(3)(B). However, a recent Swiss Supreme Court opinion has not lived up to all of the predictions of the MOU drafters. See *infra* text accompanying notes 143-150.

96. MAT, *supra* note 13, art. 1(3).

97. Greene, *supra* note 11, at 33-34. A Swiss official has already stated that the SEC disgorgement proceedings are the equivalent of the judicial confiscation provided by article 58 of the Swiss Penal Code and should therefore be covered by the MAT. Frei I, *supra* note 53, at 209-10. The extent to which the civil penalty introduced by the ITSA (see *supra* note 21 and accompanying text) will be included by the parties remains to be seen. However, the trebling feature of such a penalty would constitute a criminal sanction under Swiss law, so that the MAT should also be applied in this case.

98. Navickas, *supra* note 8, at 183.

99. Bankers' Agreement, *supra* note 17, art. 11.

100. *Id.*, art. 2.

101. The type of transaction that triggers a request for information under art. 1 of the Bankers' Agreement is the "purchase or sale of securities or put or call options for securities of any company" "withing 25 trading days prior to a public announcement" of either a "business combination" — i.e. "a proposed merger, consolidation, sale of substantially all of an issuer's assets or business combination" — or an "acquisition" — i.e. "the proposed acquisition of at least 10% of the securities of an issuer by open market purchase, tender offer or otherwise." Bankers' Agreement, *supra* note 17, art. 1.

102. *Id.*, art. 1(a), provides that the U.S. Department of Justice send its request to the Swiss Federal Office for Police Matters; also, art. 3(1) provides that the Federal Office transmit it to the Commission.

“insider”¹⁰³ disclosure would be made to the SEC through the Swiss Federal Office of Police Matters.¹⁰⁴

3. Brief Assessment.

The Swiss-American provisional agreements created a considerable stir and met with a generally favorable reception. Members of the negotiation staffs of both the United States¹⁰⁵ and Switzerland,¹⁰⁶ and some American¹⁰⁷ and Swiss¹⁰⁸ commentators, regarded the agreements as important achievements. However, one could hear some discordant notes in the chorus of praise.

In the United States, a commentator observed that the Bankers' Agreement applied only to cases of insider trading involving business combinations and acquisitions of a particular character.¹⁰⁹ Moreover, the Agreement's definition of “insider” was subject to various criticisms.¹¹⁰ Finally, the sanctions against Swiss banks which would refuse to honor the Agreement were limited, and the Agreement bound only signatory banks.¹¹¹

While most of these American criticisms dealt with the content of the provisional compromise, some Swiss commentators questioned its efficiency. Since the Bankers' Agreement is a private agreement, it does not impose a legal limitation on banking secrecy. Hence, customer consent in order to waive the right of confidentiality is indispensable.¹¹² The signatory banks

103. As defined by the Bankers' Agreement, an insider includes anyone who is:

- a) a member of the board, an officer, an auditor or a mandated person of the Company or an assistant of any of them; or
- b) a member of a public authority or a public officer who in the execution of his public duty received information about an Acquisition or a Business Combination; or
- c) a person who on the basis of information about an Acquisition or a Business Combination received from a person described in [. . .] a) or b) above has been able to act for the latter or to benefit himself from inside information.

Bankers' Agreement, *supra* note 17, art. 5(2).

104. *Id.*, art. 5.

105. See Fedders, *supra* note 8, at 12; Greene, *supra* note 11, at 35.

106. See Frei I, *supra* note 53, at 208.

107. See, e.g., Bschorr, “Waiver by Conduct”: Another View, 6 J. COMP. BUS. & CAP. MARKET L. 307, 312 (1984); Singer, *The Internationalized Securities Market and International Law — a Reply to John M. Fedders*, 6 J. COMP. BUS. & CAP. MARKET L. 345, 352 (1984); *An End*, *supra* note 11, at 679.

108. See, e.g., de Capitani, *supra* note 11, at 193; Keller, *supra* note 11, at 243.

109. Navickas, *supra* note 8, at 184; *Recent Hope*, *supra* note 11, at 315.

110. Two commentators contend that this definition may not cover the wide range of potential insider traders that the SEC might wish to prosecute. Navickas, *supra* note 8, at 184; *Recent Hope*, *supra* note 11, at 315-17. Another one argues that by covering tippees who merely benefit from inside information, this definition disregards the teaching of the *Chiarella* and *Dirks* opinions. Wilson, “Insider Trading” und amerikanische Rechtsprechung, *Neue Zuercher Zeitung* [N.Z.Z.], Sept. 9, 1983, at 21.

111. Navickas, *supra* note 8, at 183.

112. See Honegger, *supra* note 11, at 29; Nobel, *Das Insider-geschaefit* (Pts. 1 and 2), 79 *REVUE SUISSE DE JURISPRUDENCE* 121, 137 (1983).

used three successive methods to procure these waivers: express waiver, waiver by silence and waiver by conduct.¹¹³ Each of these forms of waivers is, to various extents, questionable under Swiss law.¹¹⁴ Under the Agreement, the bank customer cannot appeal a decision of the Commission of Inquiry. Yet, one commentator argued these decisions could not escape the jurisdiction of Swiss courts.¹¹⁵ The mere possibility of litigation on this issue before Swiss courts could jeopardize the speed of the Bankers' Agreement procedure.

One cannot evaluate these criticisms in the light of experience because, for the first two years of the MOU and Bankers' Agreement, not a single request was filed.¹¹⁶ According to an official of the Swiss Bankers' Association, the SEC filed four requests for information under the Bankers' Agreement¹¹⁷ to date. In some cases, the SEC did receive the requested evidence via the Federal Office for Police Matters,¹¹⁸ which means that the private mechanism has been at least partially effective.¹¹⁹ As the details of the relevant proceedings are not a matter of public record, no precise conclusions can be drawn.¹²⁰ This might suggest that these provisional agreements effectively narrowed the options of insider traders who might use Swiss banks as their agents. However, because the legal framework of the provisional agreements is rather unstable, a safer solution is desirable.

113. See Honegger, *supra* note 11, at 29-31.

114. *Id.*, at 33-34; Nobel, *supra* note 112, at 139; Reichwein, *supra* note 11.

115. See Beguin, *supra* note 11, at 13. (If the Commission is deemed as an Arbitral Tribunal, an appeal is possible; if not, there is still the possibility of declaratory judgments and preliminary injunctions). The exclusion of judicial review provided by art. V(2) of the MOU concerns only U.S. proceedings.

116. See letter from the Swiss Bankers' Association to George A. Fitzsimmons, [former] SEC Secretary, at 6 (Nov. 20, 1984) (discussing the *Waiver by Conduct Approach*, *supra* note 7) (available for public inspection and copying at the SEC's Public Reference Room, File S7-27-84; also on file at *The International Tax & Business Lawyer*) [hereinafter SBA letter].

117. Telephone interview with Mr. Matthey, lawyer at the Swiss Bankers' Association (Feb. 13, 1987).

118. *Id.*

119. See *supra* notes 103-104 and accompanying text.

120. However, in one such proceeding, the bank customer objected to any intervention of the Federal Office for Police Matters on the ground that the Bankers' Agreement was not applicable. That office ignored the opposition and transmitted the U.S. request to the Commission of Inquiry. On June 18, 1986, the Swiss Supreme Court refused to examine the bank customer's appeal against the transmittal of the request. It was held that the court lacked jurisdiction as to the subject matter, because none of the interventions of the Federal Office under the MOU/Bankers' Agreement mechanism could constitute a decision subject to appeal. Judgment of June 18, 1986, TF, 112 ATF Ib 145. That opinion leaves the question open as to a judicial review of the Commission's decisions by ordinary courts in civil proceedings (see note 115 *supra* and accompanying text).

III
THE MAT APPROACH IN THE LIGHT OF THE SWISS INSIDER
TRADING BILL

A. Principles of the MAT

Unlike the MOU, the MAT¹²¹ is a binding international agreement. Accordingly, when all of the requirements of the MAT are satisfied, the United States and Switzerland each have an obligation to furnish assistance to the other.¹²² The MAT covers SEC investigations, irrespective of whether the matter has already been brought to the Department of Justice for criminal prosecution.¹²³ Four basic principles of the MAT merit discussion before examining the application of the MAT to insider trading cases.

1. Dual Criminality Condition.

Except for situations involving "organized crime",¹²⁴ the MAT permits the use of compulsory measures "only if the acts described in the request contain the elements, other than intent or negligence, of an offense . . . which would be punishable under the law in the requested State if committed within its jurisdiction . . ." ¹²⁵ In other words, the MAT does not require that the definition of an offense be identical in both systems, but only that the facts be

121. *Supra* note 13.

122. Message from the President transmitting the Treaty with the Swiss Confederation on Mutual Assistance in Criminal Matters (including Technical Analysis of the Treaty), S. Exec. Doc. No. 385-6, *reprinted in* Cong. Info. Service (1976), 94th Cong., 2d Sess., at V (letter of Submittal) [hereinafter U.S. MAT Message].

123. The Technical Analysis specifies that

[I]nvestigations by administrative authorities are covered by the Treaty so long as such investigations might result in criminal proceedings, [which] means, for example that an investigation by the United States Securities and Exchange Commission is an investigation to which assistance could be furnished (if the other requirements of the Treaty are met) as long as the investigation relates to conduct which might be dealt with by the criminal courts.

U.S. MAT Message, *supra* note 122, at 36 (Technical Analysis). The Swiss Supreme Court has concurred with that opinion. See Judgment of May 12, 1982, TF, *reproduced in* 28 ETUDES SUISSES DE DROIT EUROPEEN 298, 299 (1984); *Santa Fe I*, 109 ATF Ib at 51; Judgment of May 16, 1984, TF, *reproduced in* 28 ETUDES SUISSES DE DROIT EUROPEEN 316, 320 (1984) [hereinafter *Santa Fe II*]. It is true that, like the Technical Analysis, these three decisions deal with SEC investigations, and not with civil suits, for which the applicability of the MAT remains unclear. See notes 97-98 *supra* and accompanying text. The SEC was included in the U.S. negotiations staff, U.S. MAT Message, *supra* note 122 at 35, 69; recommended ratification of the MAT, *id.*, at p. vii; and helped to prepare the Technical Analysis of the MAT. U.S. MAT Message, *supra* note 122, at 66 (Technical Analysis).

124. Chapter II of the MAT, *supra* note 13, includes special provisions concerning organized crime, which provide for intensified assistance. In particular, if organized crime figures, as defined in article 6(2), are involved in the investigation, then, under article 7, the principle of dual criminality is waived to some extent.

125. MAT, *supra* note 13, art. 4(2)(a).

punishable in both countries.¹²⁶ Under article 4(4) of the MAT, the requested state will make its decision "only on the basis of its own law."¹²⁷ Thus, as the Swiss Supreme Court has consistently ruled, the Swiss authorities need not verify that the facts alleged in the request are punishable under U.S. law.¹²⁸ Nor need the Swiss authorities verify the alleged facts, assuming the statement of facts contains no obvious errors, deficiencies or contradictions.¹²⁹ Such rules are consistent with the traditional system of international assistance, since the authorities of the requested state are neither entitled nor able to serve as a substitute for foreign courts.

2. *Schedule or Importance Requirement.*

Satisfaction of the dual criminality requirement occurs when the alleged facts correspond to one of some thirty-five offenses described in the Schedule attached to the Treaty.¹³⁰ Pursuant to article 4(3) of the MAT, where this Schedule requirement is not met, "the Central Authority of the requested State shall determine whether the importance of the offense justifies the use of compulsory measures."¹³¹

3. *Protection of the Requested State's Essential Interests.*

Under article 3(1)(a) of the MAT, assistance may be refused to the extent that the requested State considers that assistance "is likely to prejudice its sovereignty, security or similar essential interests."¹³² When the MAT was signed, notes were exchanged to the effect that Swiss secrecy laws would not constitute an exception to the assistance which is required to be given under the treaty. However, facts normally protected by secrecy laws, where disclosure would harm "essential interests" of Switzerland, would fit under the article 3(1) exception.¹³³ The Swiss Execution Law specifies that this exception applies only if the disclosure is likely to cause the Swiss economy

126. *Santa Fe I*, 109 ATF 1b at 53.

127. *MAT*, *supra* note 13, art. 4(4).

128. *Santa Fe II*, *supra* note 123, at 321; Judgment of September 28, 1979, TF, 105 ATF Ib 419, 426 [hereinafter *Société G. et P.*]. At the very most, as art. 1(2) of the MAT shows, it is enough if the Swiss authorities have a reasonable suspicion that acts have been committed which constitute the elements of an offense under U.S. law. *Santa Fe II*, at 321; Judgment of May 4, 1983, TF, 109 ATF Ib 158, 163 (1983) [hereinafter *Sociétés X. et Y.*]; This "reasonable suspicion" standard of the MAT is less stringent than the "probable cause" standard applicable in the U.S. for the issuance of arrest and search warrants. U.S. MAT Message, *supra* note 122, at 37 (Technical Analysis).

129. *Sociétés X. et Y.*, 109 ATF Ib at 164; Judgment of August 26, 1981, TF, 107 ATF Ib at 254 [hereinafter *Société I.*]; *Société G. et P.*, 105 ATF Ib at 425-26.

130. *MAT*, *supra* note 13, art. 4(2)(a) and attached Schedule. The Schedule extends to financial crimes and obstruction of governmental proceedings as well as to crimes of violence.

131. *Id.*, art. 4(3).

132. *Id.*, art. 3(1)(a). Article 3(2) nevertheless obliges the requested State to review the matter and make every effort to furnish assistance in whole or in part.

133. Letter of May 25, 1973, 27 U.S.T. 2120, T.I.A.S. No. 8302, at 131-38, *reprinted in* 12 I.L.M. 969-71 (1973).

serious harm, disproportionate to the gravity of the offense,¹³⁴ such as where a bank discloses its relationship with a large part of its clientele.¹³⁵

4. Principle of Specialty.

Incorporating the Swiss concept of specialty, article 5(1) of the MAT states that all information or evidence furnished "shall not be used for investigative purposes nor be introduced into evidence in the requesting State in any proceeding relating to an offense other than the offense for which assistance has been granted."¹³⁶ In *Société G. et P.*, the Swiss Supreme Court stated in broad dicta that, where the U.S. authorities are seeking information protected by banking secrecy to establish multiple offenses, article 5(1) would forbid them to use that information with respect to those offenses for which compulsory measures are not available.¹³⁷ This dicta has been severely criticized,¹³⁸ and it should be noted that article 5(3)(a) of the MAT specifically permits the information and evidence to be used by the requesting State in any investigation or proceeding concerning the civil damages connected with the matter for which assistance is to be granted.¹³⁹

134. Federal Law Concerning the Execution of the MAT, RS, *supra* note 39, 351.93, art. 20(1) [hereinafter Swiss Execution Law].

135. H. SCHULZ, *supra* note 61, at 39.

136. MAT, *supra* note 13, art. 5(1).

137. *Société G. et P.*, 105 ATF Ib at 427.

138. Frei gave three convincing criticisms for this dicta. First, the court ignores that, because of the differences in the legal systems, the importance of the allegations in the request might often be viewed very differently by each country. For instance, acts not punishable under Swiss law might be regarded as serious offenses in the United States. Thus, it is inconsistent with the spirit of the MAT to invoke art. 5(1) as grounds for refusing assistance in those matters which are most important to the United States. Frei II, *supra* note 61, at 110. Second, relying on the Message of the Federal Council to the Federal Assembly concerning the MAT, Frei states that the principle of specialty only forbids the use of information obtained through the MAT in proceedings for which no assistance may be granted under the MAT, i.e., in proceedings excluded by arts. 1 or 2 of the MAT. *Id.*, at 111 and n. 53. It should not be forgotten that the basic obligation to furnish assistance, as defined by arts. 1 and 2 of the MAT, does not depend on the art. 4 conditions for compulsory measures. Art. 5(1) contains the term "assistance" which, under art. 40(5), cannot be deemed to mean only "assistance of a compulsory nature." Accordingly, argues Frei, provided the requesting State respects the specialty requirement, it is unimportant whether it uses materials obtained through compulsory measures for the prosecution of all of the offenses mentioned in the request. *Id.* Finally, Frei points out, the Swiss Supreme Court was inconsistent in *Société G. et P.* because it deemed it unnecessary that the requesting state meet the dual criminality condition with respect to all of the offenses. Logically, that question should not have been left undecided. *Id.*, at 111-12. In *Société G. et P.*, 105 ATF Ib at 428, the court held that the alleged facts would be punishable in Switzerland under Cp art. 159 (unfaithful management) but did not decide the question with respect to Cp art. 148 (fraud). To date, the Swiss Supreme Court has not had the opportunity to re-examine its 1979 opinion.

139. On the other hand, under art. 3(3) of the MOU, information obtained through the MOU/Bankers' Agreement provisory mechanism "will be used or introduced as evidence only in administrative or judicial proceedings brought by the SEC or Department of Justice relating to [insider trading], and may not be used or introduced as evidence in any other proceeding." MOU, *supra* note 16, art. 3(3).

B. Applicability of the MAT to Insider Trading Cases

As we have seen in examining the Swiss-American provisional agreements, the SEC agreed to apply for assistance pursuant to the MAT in pending insider trading cases, notably in *Santa Fe*.¹⁴⁰ As a result of ensuing litigation in Switzerland, the Swiss Supreme Court rendered two decisions¹⁴¹ that deserve attention for two reasons. First, they permit the examination of the applicability of the MAT to insider trading cases at the present time. Second, the Swiss Insider Bill, to be discussed later,¹⁴² can be better analyzed against the background of the Swiss Supreme Court opinions.

1. Santa Fe I.

On March 22, 1982, the United States sent a MAT request to the Swiss Federal Office for Police Matters, alleging that unknown principals, acting through Swiss banks, bought options and common stock of Santa Fe International Corporation [hereinafter Santa Fe] just prior to the purchase of Santa Fe by Kuwait Petroleum Corporation. The unknown principals netted over five million dollars profit. The SEC claimed these transactions constituted insider trading and requested the names of the principals.¹⁴³

On April 2, 1982, the Federal Office for Police Matters issued a decision concluding that the request met the MAT's requirements and, on June 30, 1982, it rejected an initial appeal of its decision. The Swiss Supreme Court overruled this latter decision in a landmark opinion on January 26, 1983.¹⁴⁴

The central question before the Swiss Supreme Court was whether the acts alleged in the request were punishable under Swiss law in the absence of a statute specifically prohibiting insider trading.¹⁴⁵ Because the market transactions did not involve personal contact between the buyers and sellers, the court concluded that insider trading could not constitute fraud within the meaning of article 148 of the Swiss Penal Code.¹⁴⁶ The court then considered

140. See text *supra* accompanying notes 87-88.

141. See *Santa Fe I*, 109 ATF Ib 47; *Santa Fe II*, *supra* note 123.

142. See Part III(C), *infra*.

143. *Santa Fe I*, 109 ATF Ib at 48-49.

144. *Id.*, at 49-50.

145. The court began by rejecting the appellant's procedural argument that an investigation by the SEC cannot be considered to fall within the MAT. *Id.*, at 50-51. In support of this ruling, the court relied on the U.S. MAT Message and on its unpublished opinion of May 12, 1982. See *supra* note 123. Insider trading will nearly always be a criminal offense in the U.S., particularly if it is within the scope of section 32 of the Exchange Act. *Santa Fe I*, 109 ATF Ib at 51-52.

146. The court stated that only the exploitation of a preexisting error might meet the requirements of article 148, since there is no individual contact between buyers and sellers on stock exchanges. *Santa Fe I*, 109 ATF Ib at 54. Even the fraudulent use of an error by the insider has to be rejected for four reasons. First, this presupposes some active behavior by which the insider would reinforce and confirm the victim's pre-existing error. Absent personal contact, the mere intent to purchase or to sell may not constitute such active behavior. *Id.*, at 54-55. Second, under Swiss law, there is no legal or contractual duty for the insider to warn the other party in stock market transactions. *Id.*, at 55. Third, according to case law, the cunning action required by the statute means a scheme of lies rather than a simple untruth. Without personal contact, such a scheme could not have been perpetrated. *Id.* Fourth, whether involving stock or options, the

another possible crime, disclosure of business secrets under article 162 of the Penal Code.¹⁴⁷ Here, the court ruled that information concerning the preparation of a merger or a tender offer *was* a business secret within the meaning of article 162. However, the holder of privileged information does not violate article 162 when she uses it for her own profit. Only disclosure, or use of another person's disclosure, violates article 162. The court acknowledged insider trading may seem more morally reprehensible than disinterested tipping. However, the purpose of article 162 is not to punish dishonest behavior, but to protect the holder of business secrets.¹⁴⁸

In the case at bar, the MAT request did not indicate whether the insiders suspected of improper trading acted on their own, which would not be illegal under Swiss law, or whether the insiders disclosed privileged information to third parties who used it for their own profit, which would violate article 162.¹⁴⁹ Because the request did not clearly set forth facts constituting a violation of Swiss criminal law, the court held that the dual criminality requirement was not satisfied. Accordingly, the court overturned the decision of the Federal Office for Police Matters.¹⁵⁰

insider transaction causes no injury to the other party. Had the insider not traded, the outsider would still have concluded his transaction with a third party, and would therefore have ended up in the same financial condition. *Id.* at 56.

147. For the text of that provision, see *supra* note 48.

148. *Santa Fe I*, 109 ATF Ib at 56-57.

149. The situation contemplated in *Santa Fe I*, i.e. the liability of tippees and tippers under article 162 of the Penal Code, materialized in the case of *Antoniou/Courtois*, *supra* note 48, decided the same day and by the same panel of judges as *Santa Fe I*. The facts of the case, involving systematic insider trading by investment bank employees, are identical to those of two reported U.S. opinions, *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), and *Moss v. Morgan Stanley & Co.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

In accordance with the holding in *Santa Fe I*, see *supra* notes 145-148 and accompanying text, the Swiss Supreme Court ruled that, inasmuch as Antoniu or Courtois (the insiders) were themselves dealing on the basis of confidential information that they each misappropriated, article 162 of the Penal Code was not violated. However, the court held, when they exchanged that information or conveyed it to third parties who acted thereupon (about one hundred people were involved in the scheme), both they and the third parties violated article 162. See *Antoniou/Courtois*, *supra* note 48 at 311-12.

The court then turned to the question of whether the offense was listed in the Schedule as required by article 4(2)(a) of the MAT. See Part III(A)(2), *supra*. Noting that article 162 was not mentioned, the court conceded that insider trading is not normally within the application of the MAT. *Antoniou/Courtois*, *supra* note 48, at 312-13. Nevertheless, this was not the inquiry since article 4(3) of the MAT allows the use of compulsory measures if the alleged offense is of special importance. See *supra* note 131 and accompanying text. In that respect, the court found that the violations of professional duty by the insiders coupled with the size and sophistication of the scheme justified compulsory measures. *Antoniou/Courtois*, *supra* note 48, at 314. To reach that conclusion, the court also held that the use of compulsory measures was in accordance with the general principle of proportionality and that the bank customers involved were not "persons who appeared not to be connected with the offense" within the meaning of art. 10(2) of the MAT. *Id.*, at 314-16. On the latter point, the court followed its earlier precedents and upheld the decision to grant international assistance.

150. *Santa Fe I*, 109 ATF Ib at 56-57.

2. Santa Fe II.¹⁵¹

In spite of the setback suffered in *Santa Fe I*, the SEC did not abandon its attempt to obtain the names of the unknown buyers of the Santa Fe stock. The Santa Fe case moved on to the political arena. Open negotiations took place in Washington between representatives of Switzerland, the banks involved, and the SEC.¹⁵² Several solutions were contemplated: anonymous restitution of the profits, backdated application of the Bankers' Agreement, utilization of a confidential "John Doe procedure", and designation of a "special master" outside of the United States in charge of deciding the case on the merits.¹⁵³ Finally, the U.S. Government resolved to send a new MAT request. This appeared to be the only way to protect the Swiss banks from the pressure that had led them to call for the help of the Swiss authorities at the beginning of the case.¹⁵⁴ The second¹⁵⁵ MAT request, submitted July 27, 1983, alleged that the unknown buyers were not insiders, but outsiders who had benefited from tips by trading upon them.¹⁵⁶ These new facts were revealed in statements made in Washington by the banks involved and through investigations conducted on U.S. soil.¹⁵⁷ The Federal Office for Police Matters granted the request, and, on May 16, 1984, the Swiss Supreme Court affirmed.¹⁵⁸

The court pointed out that any reliance by the appellants upon the Bankers' Agreement was misplaced. The Bankers' Agreement was a "simple gentleman's agreement" which could not supersede the MAT and could only be applied when this Treaty would not permit the granting of assistance. Thus, the only issue was to verify that the MAT requirements were fulfilled.¹⁵⁹

Although the disclosure of business secrets is not a crime listed in the MAT schedule, the court held, as it had in the *Antoniu/Courtois* case,¹⁶⁰ that the special importance of the alleged facts warranted the use of compulsory measures as provided for in article 4(3) of the MAT. The securities transactions had been carried out on a large scale by traders who had carefully devised their plan by using Swiss banks. Accordingly, the Swiss Supreme Court

151. *Supra* note 123.

152. *Id.*, at 317.

153. *Id.*

154. *Id.*, at 317-18.

155. In the ensuing litigation the Swiss Supreme Court advanced three reasons for rejecting a procedural argument that *Santa Fe I* barred the filing of a new request. First, as a rule, the res judicata principle is not entirely applicable with respect to administrative proceedings such as international assistance requests. Second, since *Santa Fe I* was a case of first impression in Switzerland, the U.S. authorities could not guess that a distinction was to be drawn between insider trading, on the one hand, and insider tipping and tippee trading on the other. Third, the second request undoubtedly included new facts. *Id.* at 319-20.

156. *Id.*, at 318.

157. *Id.*

158. *Id.*

159. *Id.*, at 318-19.

160. *Id.*, at 312-14. On the *Antoniu/Courtois* case, see *supra* note 149.

affirmed the decision granting assistance.¹⁶¹ The consequent release of the customers' identities and banking files, described by the *Wall Street Journal* as "a Swiss mistake,"¹⁶² was received favorably in Switzerland, where many commentators expressed the regret that the proceedings had taken so long.¹⁶³

3. Conclusion.

As illustrated in the *Santa Fe* opinions discussed above, rather than "stonewall" the SEC through reliance on Swiss notions of banking secrecy, the Swiss Supreme Court has attempted to bring an offense not dealt with specifically by Swiss law within the reach of the MAT. The Swiss Supreme Court, while rejecting the applicability of the fraud provision of the Penal Code to insider trading, acknowledged that the business secrecy provision of the Penal Code could cover at least some aspects of insider trading. Ironically, such an approach is somewhat consistent with current U.S. case law, where the rule 10b-5 liability of a corporate outsider who trades on confidential information is premised upon the defendant's theft of such information from his employer (misappropriation theory), and not upon a fraud on the shareholders from whom he purchased.¹⁶⁴

Nevertheless, the fact remains that, at the present time, insider trading regulation in Switzerland is unsatisfactory. Regardless of legal niceties, it is hardly acceptable to draw a sharp distinction between trading by insiders, on the one hand, and tipping by insiders leading to trading by tippees, on the other. This distinction jeopardizes both the coherence of the Swiss legal system and the possibilities of granting international assistance.

C. Applicability of the MAT in Light of the Swiss Insider Trading Bill

1. Introduction.

The Swiss Insider Trading Bill was issued on May 1, 1985 by the Swiss Federal Council,¹⁶⁵ after undergoing the "consultation process," a part of the Swiss democratic system whereby any change in the existing law must first be

161. *Santa Fe II*, *supra* note 123, at 318. Apparently as tenacious as the SEC, the unknown buyers involved in *Santa Fe II* attempted a last obstructive move. Relying on the escape clause provided by article 3(1)(a) of the MAT, they asked the political authorities designated by art. 4(a) of the Swiss Execution Law, *see supra* note 134, to rule that to override banking secrecy in that case would jeopardize Swiss national interests. This attempt failed. In the last instance, on February 20, 1985, the Swiss Federal Council denied the motion and the identities and banking files of the customers involved were sent to the U.S. Department of Justice. *See I. F. L. REV.*, Apr. 1985 at 43-44.

162. *I. F. L. REV.*, *supra* note 161, at 43-44 (quoting the *Wall St. J.*, European ed., Feb. 22, 1985).

163. *See, e.g.*, Lederrey, *L'affaire "Santa Fe": Une longue bataille de procédure juridique*, *Gazette de Lausanne [GDL]*, Feb. 24-25, 1985, at 11, col. 2.

164. *See, e.g.*, *Chiarella*, *supra* note 25 (where buyer of a stock does not owe a fiduciary duty to the seller, failure to disclose material inside information does not constitute fraud), and *United States v. Newman*, *supra* note 32 (misappropriation of inside information from employer is an exchange act violation).

165. *See supra* note 12.

circulated by the government to "interested" parties for comment.¹⁶⁶ The consultation process was triggered by the October 1983 release of the Department of Justice and Police Draft Bill.¹⁶⁷ As a result of this process, the civil provisions of the original Draft Bill¹⁶⁸ were dropped. According to the Federal Council, this does not abolish the fiduciary duties of corporate insiders as established by existing law.¹⁶⁹ On the other hand, the criminal provision was approved almost unanimously, except for a few points, notably the Draft Bill's exclusion of tippees.¹⁷⁰ The net result is a simple piece of legislation which would add a new article 161 to the Penal Code.¹⁷¹

In order to become law, the Bill must be approved by the Federal Assembly, the Swiss Parliament. Presently, it is still under consideration before the Federal Assembly. In the Conseil des Etats (the Swiss equivalent of the U.S. Senate), the Bill met with some opposition, especially from those who perceived it as a product of U.S. pressures.¹⁷² Some legislators also felt that the new provision would be very difficult to enforce. Finally, during the 1986 Fall session, the Conseil des Etats adopted article 161, but with an amendment designed to help its interpretation by the courts. The senators added subsection 2^{1st} to article 161. It reads as follows: "Deemed to be facts in the sense of subsections 1 and 2 are the impending issuance of new shareholding rights, any regrouping of enterprises or any analogous fact of similar importance." (author's translation)¹⁷³

That new subsection does not give an exhaustive list of material facts. However, it does confirm that the materiality concept of the pending Bill is

166. See 17 SEC. REG. & L. REP. 797-98 (1985).

167. See Swiss Draft Bill, *supra* note 12.

168. The civil provisions placed an obligation on the board of directors of a company to prevent and discover any misuse of confidential information; they also gave the company a cause of action to recover any profits gained through such misuse, including a right of shareholders to claim the profits in the corporation's stead if the board fails or refuses to act. See *id.* (proposed addition to arts. 726a, 726b, and 902a of the Co, *supra* note 39.)

169. See Message, *supra* note 12, at 79-81, that explains also the reasons and consequences of the withdrawal of the civil provisions.

170. See Swiss Draft Bill, *supra* note 12, (proposed addition of art. 161 to the Cp, *supra* note 47), and Swiss Draft Bill Comment, *supra* note 13, at 12-13, 19-20. The criminal part specifically made insider trading a crime, but consciously left out tippees from the provision, mainly on the ground that, as the Swiss Supreme Court had held, they were already covered by article 162(2) of the Penal Code.

171. The text of the Swiss Bill is set forth *infra* note 180 and accompanying text.

172. Such resistance was to be expected, especially in view of the issuance of the SEC Waiver by Conduct concept, to be discussed *infra*, Part IV.

173. Here is the French text of the amendment introduced by the Conseil des Etats: 2^{1st} Sont considérés comme faits au sens des chiffres 1 et 2 l'émission imminente de nouveaux droits de participation, un regroupement d'entreprises ou un fait analogue de même importance (to be published later together with the transcript of the debates in the 1986 *Bulletin sténographique des débats du Conseil des Etats*; a copy of the amendment is on file at *The Internationale Tax & Business Lawyer*).

In the final version of art. 161, subsection 2^{1st} is to become subsection 3, and subsections 3 and 4 of the Bill (see *supra* note 180 and accompanying text) will be accordingly renumbered. Telephone interview with Mr. Lutz Krauskopf, Vice-Director of the Federal Office for Justice Matters (Nov. 7, 1986).

very similar to the FSC approach, which is unlikely to create problems in the MAT application.¹⁷⁴

Together with that amendment, the Bill is scheduled to be examined on May 11, 1987 by a committee of the conseil National (the Swiss equivalent of the U.S. House of Representatives).¹⁷⁵ One can also expect some concern to be voiced than about the wording of the provisions in view of the *nullum crimen, nulla poena sine lege* principle¹⁷⁶ which requires precision in the definition of violations. However, as amended, the Bill is likely to be passed before the end of 1987 without substantial modification. In such a case, it will enter into force at the beginning of 1988.

As explained by the message, the new Bill serves a dual purpose. First of all, it fills the gap in the Swiss Penal Code which permitted insider trading, in accordance with wishes widely expressed in Switzerland.¹⁷⁷ Second, the Insider Trading Bill facilitates international assistance pursuant to the Mutual Assistance Law and the MAT.¹⁷⁸ In particular, the Bill replaces the Bankers' Agreement.¹⁷⁹ A question remains as to what extent the Bill brings insider trading within the reach of the dual criminality provision, thus allowing the SEC access to Swiss banking information in insider trading cases.

2. *The Swiss Insider Trading Bill.*

The new article 161 of the Penal Code proposed by the Bill reads as follows:

Exploitation of Knowledge of Confidential Facts

1. A person who, in his capacity as a member of the board, an officer, an auditor, or a mandated person of a company or of a corporation dominating this company or dominated by it, in his capacity as a member or a public authority or as a public officer or in his capacity as an assistant to such persons, knows a confidential fact whose disclosure can be anticipated to have a significant influence on the market price of the shares, other securities or equivalent negotiable instruments or interests of the company, or on the market price of options thereof, trades on, or ancillary to, any Swiss stock exchange, and obtains for himself or a third party a pecuniary advantage through the exploitation of this information, or discloses such a fact to any third party and obtains

174. See *infra* notes 193-195 and accompanying text.

175. Telephone interview with Mr. Lutz Krauskopf, Vice-Director of the Federal Office for Justice Matters (Feb. 20, 1987).

176. See *infra* note 201 and accompanying text.

177. Message, *supra* note 12, at 72, 75-76.

178. In that respect, a first question may be quickly resolved. Even after the enactment of the Bill, Swiss authorities will still have to verify if the facts alleged are of special importance, as required by article 4(3) of the MAT. Clearly, after *Antoniu/Courtois* and *Santa Fe II*, one cannot argue that the MAT drafters both foresaw the enactment of art. 161 of the Penal Code and intended to include it in the Schedule. Adding a new item in the Schedule or exchanging diplomatic notes on the matter seems, however, unnecessary because it is difficult to imagine a case where the importance requirement could not be met. A U.S. request for bank records in Switzerland in an insider trading case implies necessarily that some of the suspected persons have set up a sophisticated organization extending over two continents.

179. Message, *supra* note 12, at 72-73. See also notes 98-99 *supra* and accompanying text.

thereby for himself or a third party a pecuniary advantage, shall be punished by imprisonment or by a fine.

2. A person to whom such a fact is communicated directly or indirectly by any person described in subsection 1, and who obtains for himself or a third party a pecuniary advantage through the exploitation of this information, shall be punished by imprisonment for not over one year or by a fine.

3. When it is envisaged to bring together two corporations, subsections 1 and 2 apply to both corporations.

4. Subsections 1 to 3 apply by analogy when the exploitation of the knowledge of a confidential fact relates to shares, other securities or negotiable instruments or interests, or options thereof, of a cooperative corporation or of a foreign company.¹⁸⁰

At first glance, the language of the Bill is much broader than that in the Bankers' Agreement, as article 161 is not limited to cases involving business combinations and acquisitions.¹⁸¹ Contrary to the predictions of some American commentators, the Swiss legislation is not closely modeled upon the Bankers' Agreement.¹⁸² By focusing on the status of the person who is subject to the law, rather than on the mere possession of confidential (inside) information,¹⁸³ article 161 comports with U.S. law, at least in the rule 10b-5 context.¹⁸⁴

180. Swiss Bill, *supra* note 12 (translated by the author). The French text of the Bill provides as follows:

Art. 161

Exploitation de la connaissance de faits confidentiels

1. Celui qui, en qualité de membre du conseil d'administration, de la direction, de l'organe de révision, ou de mandataire d'une société anonyme ou d'une société dominante cette société anonyme ou dépendant d'elle, en qualité de membre d'une autorité ou de fonctionnaire, ou en qualité d'auxiliaire de ceux-ci, connaît un fait confidentiel, dont il est prévisible que la divulgation exercera une influence notable sur le cours d'actions, d'autres titres ou effets comptables correspondants de la société ou sur le cours d'options sur de tels titres, négociés en bourse ou avant bourse suisse, et obtient pour lui-même ou pour un tiers un avantage pécuniaire par l'exploitation de cette information, ou porte un tel fait à la connaissance de tiers et, par ce moyen, obtient pour lui-même ou pour un tiers un avantage pécuniaire, sera puni de l'emprisonnement ou de l'amende.

2. Celui à qui un tel fait est communiqué directement ou indirectement par l'une des personnes mentionnées au chiffre 1 et qui, par l'exploitation de cette information, obtient pour lui-même ou pour un tiers un avantage pécuniaire, sera puni de l'emprisonnement pour un an au plus ou de l'amende.

3. Lorsque le regroupement de deux sociétés anonymes est envisagé, les chiffres 1 et 2 s'appliquent aux deux sociétés.

4. Les chiffres 1 à 3 s'appliquent par analogie lorsque l'exploitation de la connaissance d'un fait confidentiel porte sur des parts sociales, autres titres, effets comptables ou options correspondantes d'une société coopérative ou d'une société étrangère.

181. See *Bankers' Agreement*, *supra* note 17, at 7-8. Art. 1 defines the meaning of "business combinations" and "acquisition" for the purposes of the *Agreement*; see *supra* note 101.

182. See e.g., *Recent Hope*, *supra* note 11, at 330; *Navickas*, *supra* note 8, at 188.

183. See *Message*, *supra* note 12, at 84.

184. In *Dirks*, *supra* note 26, the majority opinion [re]stated the basic principle under which "...only some persons, under some circumstances, will be barred from trading while in possession of material non-public information." 463 U.S. 646, 657 (1983).

3. *The Swiss Insider Trading Bill and the MAT Dual Criminality Condition.*

SEC access to Swiss banking information will depend upon how well the new Swiss Insider Trading Bill conforms to the dual criminality condition of the MAT. In order to determine what sort of investment behavior will violate the Bill, it is necessary to consider three main issues: i) conduct proscribed, ii) persons covered and iii) securities covered in the context of section 10(b)/rule 10b-5 case law.

a. *Conduct proscribed.*

A violation under the Swiss Bill is founded on knowing "a confidential fact whose disclosure can be anticipated to have significant influence on the market price" of the securities covered by article 161.¹⁸⁵ Setting aside the question of what constitutes a "fact",¹⁸⁶ one must first note that the Bill's formulation of materiality is not identical to the materiality test set forth in 1976 by the United States Supreme Court in *TSC Industries, Inc. v. Northway, Inc.* In *Northway*, a case involving a proxy contest under Rule 14a-9, a fact was deemed to be material "if there [was] a substantial likelihood that a reasonable shareholder would [have considered] it important in deciding how to vote."¹⁸⁷ The Bill's approach is reminiscent of the earlier test used in *SEC v. Texas Gulf Sulphur Co.* [hereinafter *TGS*].¹⁸⁸

In *TGS*, Judge Waterman stated:

an insider's duty to disclose information or his duty to abstain from dealing in his company's securities arises only in those situations which are essentially extraordinary in nature and which are reasonably certain to have a substantial effect on the market price of the security if [the extraordinary situation is] disclosed.¹⁸⁹

The American Law Institute has adopted Judge Waterman's statement in the Federal Securities Code [hereinafter *FSC*], which limits insider trading liability to cases involving a fact "of special significance," a fact that "in addition to being material [...] would be likely, on being made generally available, to affect the market price of a security to a significant extent."¹⁹⁰ The *FSC* drafters felt it "appropriate in the context of omissions . . . as distinct from

185. See *supra* note 180 and accompanying text.

186. Although it does not define what is meant by "fact", the Message gives examples of several fact situations that would be covered under it. Message, *supra* note 12, at 83. In the United States, see ALI, FEDERAL SECURITIES CODE (1980) [hereinafter cited as *FSC*], Comment to section 202(55), which states that the definition "codifies the case law" but "is used primarily in defining misrepresentation."

187. 426 U.S. 438, 449 (1976).

188. 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

189. *Id.*, at 848.

190. *FSC*, *supra* note 186, section 1603 and Comment (2)(h); section 202(56)(A) and Comment (1).

misstatements or half-truths to define the materiality concept somewhat more strictly.¹⁹¹

As to the meaning of article 161, the message in the Swiss Bill stresses the fact that, to be punishable, the author must have known and anticipated the consequences of the disclosure of the confidential fact.¹⁹² As examples of facts covered, the Message cites plans for any type of combination of companies, issuance of profit sharing rights or bonds, real estate transactions or other important projects, and imminent important losses realized by the corporation.¹⁹³ In this manner, the Swiss Bill test of materiality is very similar to the strict FSC approach.¹⁹⁴ While the question remains one of judicial construction, such an approach appears unlikely to create problems in the MAT application, since almost all of the U.S. insider trading cases involve extraordinary situations.¹⁹⁵

Yet article 161 prohibits a broad range of acts. Insiders listed in article 161(1) are forbidden to obtain a pecuniary advantage, for themselves or third parties, by either exploiting or disclosing their privileged knowledge. Pecuniary "advantage" covers losses avoided as well as profits gained.¹⁹⁶ Where the advantage does not materialize because the market price of the security does not react as expected to the public disclosure of the news, the author remains guilty of an attempt to commit the offense.¹⁹⁷ Thus, a MAT request by the United States is unlikely to fail because of a difference between the kinds of conduct prohibited by each regulation. One may even argue that the result of the Swiss Bill is identical to that announced in U.S. cases:¹⁹⁸ insiders either must disclose or be left with no viable alternative but to abstain from trading.¹⁹⁹

b. Persons covered.

Neither the Swiss Bill nor the current U.S. case law reflects a universally applicable theory of "market egalitarianism," in that they do not base the trading — or tipping — prohibition on the mere possession of material non-

191. See *id.*, Comment (1) to section 202(56) and Comment (1) to section 202(96). See also JENNINGS & MARSH, *supra* note 29, at 1025-26.

192. Message, *supra* note 12, at 83.

193. *Id.*

194. In fact, we could have used section 202(56)(A) of the FSC to translate article 161 in pertinent part.

195. It has been pointed out in the United States that "in fact, almost all of the cases holding insiders liable for . . . non-disclosure have involved situations 'essentially extraordinary in nature' . . ." JENNINGS & MARSH, *supra* note 29, at 1026. In addition, note should be taken that a very recent opinion adopted the test set forth by the FSC. See *Abatemarco v. Copytele, Inc.*, 608 F. Supp. 1024 (D.C.N.Y. 1985), 17 SEC. REG. & L. REP. 929 (1985).

196. Message, *supra* note 12, at 83.

197. *Id.* Of course, the Message does not consider the difficulties in detecting an attempted insider trading violation.

198. See *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961); *S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

199. See L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION*, at 828 (1983).

public (confidential) information. Instead, both focus on the status of the persons subject to the law. It is proper, however, to stress a major point of difference.

The Swiss Bill deals in terms of insider trading and attempts to draw a precise and exhaustive list of the possible defendants.²⁰⁰ Such an approach derives from the basic criminal law principle, embodied in article 1 of the Penal Code, that there must be no crime nor punishment unless expressly provided by statute.²⁰¹ Thus, in construing article 161, Swiss courts will have to rely first on the language of the provision and, second, on the interest(s) the Bill's drafters intended to protect. There is little room for creative interpretation of the law of insider trading, such as extending liability to persons not mentioned in article 161.

In the United States, on the other hand, the courts have discretion to fashion the law in this area, absent a statutory definition.²⁰² While *Chiarella* and *Dirks* have established a fiduciary duty basis for the obligation to disclose or abstain,²⁰³ there is still much room for lower courts to fashion doctrine to combat insider trading when confronted with compelling facts.²⁰⁴

By its terms, the Swiss Bill applies only to directors, officers, and their assistants. The concept of "assistant" most probably encompasses employees of the corporation, whether or not they have an executive title, as long as they acquire inside information in the course of employment.²⁰⁵ Neither issuers nor controlling shareholders are named in article 161.

As to issuers, the omission arises from the fact that Swiss law generally ignores the possibility of criminal prosecutions against corporate defendants. This particularity will not likely bar assistance because a MAT request will inevitably aim at persons other than the issuer itself. As to controlling shareholders, it is unclear whether they are omitted because they do not have a special fiduciary duty under Swiss corporate law, or because the "control" concept would be too imprecise to be embodied in a criminal statute. In any event, these persons will be subject to the Bill's sanctions when they act in any of the capacities mentioned in article 161, in particular as tippees under subsection 2. Thus the gap is more apparent than real.

200. The Message, *supra* note 12, at 84, clearly states that the offense can only be committed by a limited class of persons.

201. See *CP*, *supra* note 47, art. 1.

202. See *supra* note 6 and accompanying text.

203. See *supra* notes 25-28 and accompanying text.

204. Levine & Marshall, *supra* note 30, at 904.

205. The concept of "assistant" is the same as that which is used by article 321 of the Penal Code dealing, *inter alia*, with professional secrecy of physicians and attorneys. See Message, *supra* note 12 at 85. In that context, it covers all persons who work with physicians or attorneys, such as secretaries or receptionists.

Relying on the now famous footnote fourteen in *Dirks*, the SEC may prosecute constructive or temporary insiders such as underwriters, accountants, lawyers or consultants, who have entered into a special confidential relationship in the conduct of the enterprise and are given access to information solely for corporate purposes.²⁰⁶ Of those subject to the U.S. laws, the Swiss Bill specifically names only the auditor.²⁰⁷ However, article 161 names all "mandated" persons of a company, which covers all persons with whom the company has concluded a contract regulated by article 394 of the Code of Obligations.²⁰⁸ Thus, the Bill clearly covers lawyers, investment bankers, consultants, and accountants other than auditors, who receive confidential information in the course of their mandated activity.

The fact that the Swiss Bill requires that all the insiders know the "confidential" facts in their "capacity" raises the issue of whether the Bill covers "market" information. While the Bill appears not to cover such information, article 161(3) covers information coming from the bidder in a planned tender offer, a classic example of market information.²⁰⁹ Swiss judges confronted with this issue might consider that, as a whole, the Bill intends to protect the integrity of the securities markets.²¹⁰ For example, article 161 might cover the case where X, a company president, profits from having been told by a renowned analyst that the latter is about to publish a "buy" recommendation in regard to the stock of X's company.²¹¹

Yet, it is unlikely that the analyst in the above example would be liable under article 161 if she traded on the information. Outsiders such as "scalping" securities analysts, financial news writers or broadcasters are not named in article 161. In that respect, the Swiss Bill has some similarities to the FSC, which did not expressly place liability upon non-tippee outsiders, and left that area "to further judicial development."²¹² While such development may be taking place in U.S. courts,²¹³ article 1 of the Penal Code makes such judicial innovation impossible in Switzerland.

206. See 463 U.S. at 655, n.14.

207. See Cp, art. 161(1), *supra* note 180 and accompanying text.

208. Co, *supra* note 39, art. 394: The agency is the contract whereby the agent agrees to carry out in accordance with the agreement the business or service with which he is entrusted.

209. Message, *supra* note 12, at 85.

210. *Id.*, at 87-88.

211. For this example, see FSC, *supra* note 186, § 1603, Comment (2)(j). However, a Swiss court might be reluctant to so hold, because an analyst who himself trades prior to publication is probably not liable under article 161.

212. *Id.*, at § 1603, Comment (3)(d).

213. Compare *Chiarella*, *supra* note 25, with *Zweig v. Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979). While it is doubtful that *Zweig* survived *Chiarella*, one commentator has stated that a duty of disclosure owed to readers and investors would not be an "unreasonable" extension of existing United States case law. Wall St. J., May 18, 1984, at 2, col. 2 (Statement by Professor A. Bromberg). See also LOSS, FUNDAMENTALS OF SECURITIES REGULATION, at 869-70 (1983); See JENNINGS AND MARSH, *supra* note 29, at 920.

c. *Securities covered.*

Article 161 applies to all types of securities, both domestic or foreign, that are or might be traded in Switzerland. While the meaning of "shares" is obvious, the "other securities" named by article 161 include participation certificates, dividend-right certificates, bonds, and investment trust shares, among others. The bill covers all securities that are commonly traded in Switzerland, regardless of whether they constitute true "securities" (*papiers-valeurs*) within the meaning of the Code of Obligations.²¹⁴ It should also be noted that the Bill explicitly names options, which are an important vehicle of insider transactions.²¹⁵

More importantly, the phrase in article 161, "*effets comptables correspondants*," that we translated as "equivalent negotiable instruments or interests," is designed to allow for future developments of the Swiss stock markets.²¹⁶ As the Message states, this flexible concept is intended to cover trading on rights or interests only; this means on "certificateless" securities that are already traded in other countries.²¹⁷

4. *Conclusion.*

This comparison of U.S. law on insider trading with the Swiss Bill can only be a provisional assessment. In the wake of *Chiarella* and *Dirks*, U.S. courts and commentators continue to wrestle with the complex interplay of the common law and the securities statutes.²¹⁸ At the same time in Switzerland, the proposed article 161 raises questions that have yet to be resolved by the courts. Nevertheless, we can reasonably conclude that the Swiss Bill covers most, if not all, of the insider trading cases that can be prosecuted in U.S. criminal and SEC proceedings.

In bringing insider trading within the dual criminality requirement of the MAT, the Bill undoubtedly provides a better solution than did the Bankers' Agreement. First, the Bill is broader in scope than the Bankers' Agreement. Second, since the MAT institutes a legal limitation on banking secrecy, it does not require the banks to procure waivers of confidentiality from their customers. In this way, the MAT avoids creating conflict between the banks

214. Message, *supra* note 12, at 86. Under Swiss law, "security" (*papier-valeur*, *Wertpapier*) is statutorily defined by CO, *supra* note 39, art. 965, as a "document to which a right is attached in such a way as to render it impossible to enforce or transfer it independently of the document." For example, while a share of a corporation stock is a "security" in this technical meaning, a share of a cooperative corporation is not. Regardless of the legal definition, both types of shares are traded in Switzerland.

215. Likewise, in the U.S., the recent ITSA closed a potential loophole of the existing case law by explicitly covering insider trading in options. ITSA, *supra* note 21, section 5, § 20(d). See also Langevoort, *The Insider Trading Sanctions Act of 1984 and its Effect on Existing Law*, 37 VAND. L. REV. 1273, 1290 (1984); 17 SEC. REG. & L. REP. 1139 (1985) (*amicus curiae* brief filed by the SEC in *Bianco v. Texas Instruments, Inc.*, 627 F. Supp. 154 (N.D. Ill., 1985).

216. Message, *supra* note 12, at 86.

217. *Id.*

218. See also Langevoort, *supra* note 215 at 1298.

and their customers, being a source of uncertainty, or provoking dilatory litigation. Third, as a binding international agreement, the MAT removes some doubts expressed about the effectiveness of the MOU/Bankers' Agreement mechanism.²¹⁹ The progress of the Bill confirms Switzerland's willingness to grant assistance in insider trading cases as expressed in the Federal Council decision in *Santa Fe*.

Finally, the Bankers' Agreement allowed the bank customer to establish that he or she was not an "insider"²²⁰ and granted the SEC a limited right to appeal from the Swiss Commission's decisions.²²¹ In contrast, the MAT rules and the cases give the customer no opportunity to argue his case on the merits before Swiss authorities. That difference spares the U.S. authorities from having to plead twice on the merits.

V

THE WAIVER BY CONDUCT APPROACH

On May 31, 1984, a few days after the Swiss Supreme Court granted the SEC's second MAT request in the *Santa Fe* case,²²² the SEC issued a release requesting Congress to comment on the waiver by conduct approach as a means of overriding foreign bank secrecy laws. Although the SEC was careful not to endorse the waiver by conduct approach, the release has been widely perceived as a SEC proposal.²²³

A. *The SEC Proposal*

Under the waiver by conduct approach, the purchase or sale of securities in the United States would constitute an implied consent to: 1) disclosure of information and evidence relevant to any SEC investigation, regardless of any foreign secrecy law; 2) appointment of the U.S. broker-dealer as agent for the service of process or subpoenas; and 3) exercise of *in personam* jurisdiction by the U.S. courts and the SEC.²²⁴ To implement the waiver by conduct approach, the SEC contemplates a set of provisions dealing with four major issues of implied consent: disclosure, service of process, jurisdiction, and the sanctions to be applied against persons refusing to comply with an order compelling the production of evidence.²²⁵

219. See *supra* notes 114-115 and accompanying text.

220. Bankers' Agreement, *supra* note 17, art. 5.

221. *Id.*, art. 8.

222. See text accompanying note 158.

223. See e.g., Ingersoll, *SEC Proposal to Override Foreign Laws on Bank Secrecy Draws Wide Criticism*, Wall St. J., Feb. 11, 1985, at 13, col. 1; SBA letter, *supra* note 116. One reason for viewing the release as a proposal is that the SEC stated that the implementation of the waiver by conduct approach will result in more benefits than disadvantages. *Waiver by Conduct Approach*, *supra* note 7, at 86,988-91.

224. *Waiver by Conduct Approach*, *supra* note 7, at 86,977.

225. *Id.* at 86,986-88.

Concerning the first issue, implied consent to disclosure, the SEC maintains that the order tickets and confirmations that U.S. broker-dealers are required to make available during an SEC investigation "would constitute evidence of a particular consent."²²⁶ The approach would not require banks or brokerage firms to go through any paperwork or special procedure in order to obtain an express consent.²²⁷ The SEC admits, however, that a foreign bank would sometimes have to "seek guidance from foreign government authorities, including the courts, as to whether production [of the evidence] is permissible."²²⁸

As for service of process, the SEC claims that a purchase or sale of U.S. securities would constitute irrevocable implied consent to the appointment of the U.S. broker-dealer as an agent for service of process.²²⁹ While U.S. law would not require that broker-dealers and foreign banks forward the subpoenas or court papers to their clients, the duties of agency law make such a transmission likely.²³⁰

Finally, according to the SEC, provisions dealing with the issues of implied consent to jurisdiction and sanctions for non-disclosure would merely codify and clarify the existing authority of the courts.²³¹

B. The SEC Analysis

To illustrate the enforcement problems it has encountered, the SEC cites the *BSI* and *Santa Fe* cases.²³² Despite its eventual success in both cases, the SEC states that these positive results must be balanced against the methods used and the resources expended. In short, the lesson of *BSI* is that a Rule 37 motion is not always possible and may create tensions with foreign governments.²³³ The MAT procedure utilized in *Santa Fe* took 30 months and required an enormous expenditure of resources.²³⁴ The SEC considered the international approach of multilateral and bilateral agreements as a potential means of solving investigation and litigation problems, but concluded that they "present practical problems."²³⁵

According to the SEC, a waiver by conduct law would not "infringe upon the sovereignty of other nations or impose any substantive regulation of

226. *Id.* at 86,986.

227. *Id.* at 86,986 and n.36.

228. *Id.* at 86,987.

229. *Id.*

230. *Id.*

231. *Id.* at 86,988.

232. *Id.* at 86,980-82.

233. *Id.* at 86,981.

234. *Id.* at 86,982.

235. *Id.* The SEC argues that a multilateral conference would probably be unsuccessful due to the number of nations that have secrecy laws and to the diversity of their interests. They also argue that bilateral agreements are "time-consuming to negotiate and utilize," and "would result in a patchwork of differing and uneven provisions."

conduct upon persons or institutions located in another nation.”²³⁶ The SEC argues that such a law “would represent in large measure an appeal for nations with secrecy laws to apply principles of comity and construe those laws as inapplicable pursuant to the U.S. waiver by conduct approach.”²³⁷ The law would also serve as a basis for U.S. courts to issue orders compelling the production of evidence, as in the *BSI* case.²³⁸ Should compulsory measures be needed, the law would provide firm guidance to the American courts as to how the section 40 Restatement balancing test is to be applied.²³⁹ At the same time, the SEC states that the new approach “is intended to encourage voluntary production of evidence in order to avoid the need to rely upon compulsory measures.”²⁴⁰

The SEC relies heavily upon U.S. precedents to explain the legal rationale for the waiver by conduct approach. First, the SEC cites cases that apply the “conduct test” as grounds to assert *in personam* jurisdiction over persons who, though not physically present in the forum, have done some act by which they purposefully availed themselves of the benefit and protection of the forum’s laws.²⁴¹ The SEC argues that the purchase or sale of securities not only supports the exercise of *in personam* jurisdiction but also supports an implied waiver of the protection of secrecy laws in return for the benefits of participation in the U.S. securities markets.²⁴² Second, the SEC relies upon a line of early U.S. cases that, prior to the development of the “long-arm” statutes, approved approaches similar to the waiver by conduct approach in order to hold nonresidents accountable for their conduct (such as driving an automobile) within the state.²⁴³

The SEC admits that foreign law would govern the foreign nation’s recognition of the implied consent approach. The basis for such a recognition would be the fact that an investor, or his agent, ordered a purchase or sale of securities in the U.S. after receiving actual or constructive notice of the existence of a waiver by conduct statute.²⁴⁴ Under agency law principles, it would suffice that the U.S. broker-dealers effecting the transaction have statutory notice of such a statute.²⁴⁵ In addition, the SEC argues, the waiver by conduct approach appears compatible with provisions of foreign law which recognize that secrecy protection may be waived by an implied consent.²⁴⁶

236. *Id.* at 86,983. See also Hurd, *Insider Trading and Foreign Bank Secrecy*, 24 AM. BUS. L.J. 25 (1986).

237. *Waiver by Conduct Approach*, *supra* note 7, at 86,983.

238. *Id.*

239. *Id.* at n.7 and accompanying text.

240. *Id.* at 86,983.

241. *Id.* at 86,983-84 and cited cases.

242. *Id.* at 86,984.

243. *Id.* at 86,984-85 and cited cases.

244. *Id.* at 86,985.

245. *Id.*

246. *Id.* at 86,986.

Regarding Swiss law, the implied consent approach would be similar to that used by Swiss banks in implementing the Bankers' Agreement.

The SEC recognizes that the approach might lead to a diversion of trading from the U.S. market, or that some foreign nations might reject the approach. On the other hand, the SEC argues that enactment of a waiver by conduct law would act as a deterrent to violations, enhance voluntary cooperation and diplomatic efforts, as well as provide litigation certainty and cost effectiveness. The new concept would also serve as a model for other nations.²⁴⁷

C. Reactions and Critical Analysis

While the SEC succeeded in creating the international dialogue it wished, the reactions to its release concerning the waiver by conduct approach were overwhelmingly negative. Only six out of sixty-seven comment letters supported the proposal.²⁴⁸ Among the opponents, one can cite the governments of Austria, Brazil, Canada, France, Singapore, Switzerland and West Germany, the U.S. Treasury Department, many of the world's leading banks and securities firms, and organizations such as the New York Stock Exchange and the British, French, German, and Swiss Bankers' Associations.²⁴⁹

In its latest release on the problems related to the internationalization of the securities market, the SEC cited its waiver by conduct proposal only in passing. Moreover, the SEC solicited comments concerning the practicability of reaching "bilateral or multinational agreements on securities law enforcement, possibly through the aegis of a coordinating body of national regulatory entities."²⁵⁰ Whether or not this new request for public comments implies an abandonment of the waiver by conduct approach, the concept is worth analyzing because such analysis will shed light on the advantages of the international assistance alternative.

247. *Id.* at 86,987-91.

248. Ingersoll, *supra* note 223. In this minority, one finds the Commodity Futures Trading Commission, the North American Securities Administrators Association and a former U.S. Attorney for the Southern District of New York, John S. Martin, Jr., who expressed his opinion in the Wall St. J., Jan. 4, 1985, at 15.

249. See Ingersoll, *supra* note 223 and 17 SEC. REG. & L. REP. 291-93 (1985). These negative comments were somewhat foreseeable given the wide criticism that the waiver of conduct proposal drew even before its official release. See *A Question of Conduct*, Wall St. J., Nov. 19, 1984, at 32; Boyle & Thau, *The Newest Configuration of the Ugly American: a Response to Mr. Fedders*, 6 J. COMP. BUS. & CAP. MARKET L. 323 (1984); Bschorf, *supra* note 107; de Capitani, *Response to Fedders' "Waiver by Conduct"*, 6 J. COMP. BUS. & CAP. MARKET L. 331 (1984); Singer, *The International Securities Market and International Law—a Reply to John M. Fedders*, 6 J. COMP. BUS. & CAP. MARKET L. 345 (1984); Wymeersch, *Response to Fedders' "Waiver by Conduct"*, 6 J. COMP. BUS. & CAP. MARKET L. 339 (1984). *But see* Lepine, *A Response to Fedders' "Waiver by Conduct"*, 6 J. COMP. BUS. & CAP. MARKET L. 319 (1984).

250. Request for Comments on World Securities Markets, Exchange Act Release No. 34-21958 (April 18, 1985), reprinted in 17 SEC. REG. & L. REP. 783, 790 and n.69 (1985). The SEC refers to suggestions made by Commissioner Charles M. Marinaccio in a Jan. 9, 1985 speech, in which he strongly criticized Mr. Fedders' views. See 17 SEC. REG. & L. REP. 50, 51, 293 (1985).

The waiver by conduct proposal would create significant international comity and economic problems, without solving the practical problem of enforceability and the related issue of blocking laws. In addition, it would violate the spirit, if not the letter, of the existing international law enforcement agreements such as the MAT, as will be seen in the concluding section of this Article.²⁵¹ Thus, it comes as no surprise that the waiver by conduct approach has been rejected even by countries, organizations and commentators that share the SEC's views against insider trading. In Switzerland, the proposal has been perceived as an unfriendly gesture which weakens the credibility of the United States as a reliable partner in international agreements.²⁵²

The first argument relied upon by the SEC is that a single securities transaction within the United States constitutes sufficient "minimum contacts" for the United States to exercise *in personam* jurisdiction. Under current U.S. law, such jurisdiction certainly exists in the case of foreign banks, such as the Swiss Bank in the *BSI* case, that are deemed to be "doing business" in the United States.²⁵³ The situation becomes less clear, however, in the case of a foreign bank doing no more in the United States than arranging for U.S. broker-dealers to purchase or sell securities on U.S. markets, either upon the order of foreign customers²⁵⁴ or in an isolated transaction for a single customer.²⁵⁵

Insofar as the implied consent to jurisdiction proposed by the SEC would bring certainty to this area of law, it is welcome, provided that the party's "entry" into U.S. territory is voluntary and deliberate. But, crucially, the fact that the bank of the customer "may be hailed before a court of the United States in no way preempts the question of whether international law *permits* the application of U.S. law to their activities."²⁵⁶ In other words, the availability of *in personam* jurisdiction does not, by itself, decide the issue of jurisdiction to prescribe.

On the contrary, normal application of conflict of laws principles dictates that all aspects of a foreign right of secrecy must be governed by that foreign sovereign's law.²⁵⁷ Especially in the securities regulation area, U.S. law depends on the effects doctrine for its universal application so as to protect against incursions upon American domestic policy.²⁵⁸ Swiss courts rely

251. See, e.g., Singer, *supra* note 249. Neither the New York Stock Exchange, nor Canada or France, both of which have enacted statutes outlawing insider trading, can be suspected of encouraging or even tolerating this type of conduct.

252. See Ingersoll, *supra* note 223 (referring to the Swiss ambassador comment letter); SBA letter, *supra* note 116, at 6; de Capitani, *supra* note 249, at 334.

253. S.E.C. v. Banca Dells Svizzera Italiana, 92 F.R.D. 111, 112 (S.D.N.Y. 1981).

254. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975).

255. Singer, *supra* note 249, at 347.

256. *Id.* at 347 (emphasis added).

257. See Bschorr, *supra* note 249, at 309; de Capitani, *supra* note 249, at 332 n.7.

258. On the application of the "effects" test in the securities regulation field, see, e.g., LaRose, *Conflicts, Contacts and Cooperation: Extraterritorial Application of the United States Securities Laws*, 12 SEC. REG. L.J. 99, 115-17 (1984); Murano, *Extraterritorial Application of the*

upon the same effects doctrine when universally prescribing Swiss bank secrecy law. The reciprocity principle should lead U.S. authorities to recognize the legitimate interests of other nations in applying their secrecy laws.

While the SEC admits that foreign recognition of the effect of a waiver by conduct statute would be governed by foreign law, the proposal nevertheless disregards traditional principles of international comity.²⁵⁹ A concept of waiver defined by the United States is *per se* an attempt to ignore the mandate of another sovereign's laws. This attempt seems doomed to failure in several countries²⁶⁰ and Swiss courts probably would not recognize it,²⁶¹ although such recognition is theoretically possible.²⁶² The waiver by conduct approach completely invades the privacy of a foreign bank account, and, consequently, the investor's privacy,²⁶³ without any of the safeguards that were built into the Bankers' Agreement.²⁶⁴

As two American commentators stated, the waiver by conduct approach relies upon an "unwarranted assumption that policy goals reflected in the federal securities laws or espoused by the SEC are somehow morally superior to policy goals reflected by the secrecy and blocking laws of other nations."²⁶⁵ This disregard of international comity would often place foreign

Antifraud Provisions of the Securities Exchange Act of 1934, 2 INT'L TAX & BUS. L. 298, 315-20 (1984).

259. See Boyle & Thau, *supra* note 249, at 326-27; de Capitani, *supra* note 249, at 333.

260. See Ingersoll, *supra* note 223 (summarizing comments of banking groups from Brazil, Britain, Hong Kong and West Germany).

261. See de Capitani, *supra* note 249, at 332; SBA letter, *supra* note 116, at 3. As we observed in examining the Bankers' Agreement, each of the forms of waivers used by the signatory banks is, to various extents, questionable under Swiss law. See *supra* notes 112-114 and accompanying text. In addition, it is impossible that order tickets and confirmations could constitute evidence of a particular consent. They could only be viewed as documenting the contractual relationship between the Swiss bank and the U.S. broker-dealer. See SBA letter, *supra* note 116, at 4. The SEC asserts that U.S. broker-dealers act as "agents for foreign investors" for the limited purpose of accepting notice of the Waiver by Conduct law. *Waiver by Conduct Approach*, *supra* note 7, at 86,985. This assertion is untenable because the SEC does not take into account either the existence of the foreign bank/customer relationship or the issue of whose law is to be applied to this relationship. Swiss law distinguishes between the (internal) mandate of the principal to the "commission agent" (bank) to buy or sell, and the (external) purchase or sale by the "commission agent" on the stock exchange. The first element of the transaction is impliedly governed by Swiss law. See CO, *supra* note 40, arts. 425, 436; de Capitani, *supra* note 249, n.7 at 335-336.

262. See Beguin, *supra* note 115, at 13 (author implies this possibility when he discusses how either the bank or the customer might obtain a declaratory judgment). On the other hand, Swiss law does not provide a mechanism for obtaining the equivalent to a "no-action" statement. SBA letter, *supra* note 116, at 4.

263. Bschorr, *supra* note 249, at 312.

264. See, e.g., Bankers' Agreement, *supra* note 17, art. 3(5) ("undertaking by the SEC not to disclose the information to be provided [. . .] to any person except in connection with an SEC investigation [. . .]," and art. 5 (right of the investor to establish that he is not an insider).

265. Boyle & Thau, *supra* note 249, at 325-26. See also Singer, *supra* note 249, at 348. It is interesting to note that article 47 of the Swiss Banking Law was introduced to prevent Swiss bank collaboration with the Third Reich in its efforts to ferret out suspected accounts of Jews and other politically oppressed people. See Meyer, *supra* note 42, at 26. See also AUBERT, KERNEN & SCHONLE, *supra* note 11, at 61.

intermediaries in a "Catch 22" situation. By forwarding subpoenas, summons or complaints to their customers, the banks would risk criminal prosecution in countries, such as Switzerland, that forbid such conduct. By refusing to do so, the banks risk prosecution by the SEC.

The SEC argues that absent international recognition of its proposal,²⁶⁶ it would still have the option of litigation to compel production of evidence in a U.S. court, the court being "required to hold that a securities transaction in the U.S. constitutes a consent to the disclosure of information"²⁶⁷ A waiver by conduct statute would endow the *BSI* opinion with congressional approval. Thus, the proposal is subject to most of the criticisms aimed at *BSI*,²⁶⁸ and more. U.S. courts would seemingly have to compel disclosure regardless of the five factors listed by section 40 of the Restatement, and regardless of any adverse decisions previously handed down by foreign courts.²⁶⁹

Moreover, there is no assurance that the waiver by conduct approach could achieve its objectives. It works only where the foreign institution acts as an agent in effecting the trade for an investor principal. The proposal could not serve its purpose where the financial institution itself is the beneficial owner,²⁷⁰ or where the investor inserts a number of intermediaries between himself and the U.S. broker-dealer in order to ensure his privacy.²⁷¹ Because they could result in the punishment of innocent traders,²⁷² the sanctions contemplated by the SEC would be blunt weapons against smart insiders.²⁷³ In addition, implementation of the approach would probably drive substantial amounts of legitimate investment out of U.S. markets, thereby damaging the U.S. economy.²⁷⁴

266. It has been asserted that the automatic appointment of the U.S. broker-dealer as agent for service of process could also constitute a violation of international law, as the Canadian Embassy stated. See 17 SEC. REG. & L. REP. 291, 293 (1985).

267. *Waiver by Conduct Approach*, *supra* note 7, at 86,989.

268. See *supra* note 84 and accompanying text.

269. Since U.S. courts would be obliged by statute to hold that the foreign secrecy law has been effectively overridden, there would be no reason to take into account the good faith efforts of the recalcitrant party—whatever they may be—or the hardship considerations. According to the release, the SEC itself would actually have to balance the five factors in section 40 of the Restatement, see *supra* note 76, before a complaint or motion to compel is filed. See *Waiver by Conduct Approach*, *supra* note 7, n.44 at 86,989. The release, however, gives no guidance as to how the SEC will balance the conflicting interests. Thereby, the proposed system does not provide prospective defendants with the "litigation certainty" that the SEC is seeking. Finally, since the statute would seemingly apply to any court action that might arise out of the transaction, its net result would be to leave to private plaintiffs the interest balancing. Needless to say, such a consequence would do little to reduce the potential for confrontation with other nations.

270. See, e.g., Bschorr, *supra* note 249, at 310; de Capitani, *supra* note 249, n.13 at 336; 17 SEC. REG. & L. REP. 291, 292 (1985) (quoting the comment letter of the Securities Industry Association).

271. See, e.g., Boyle & Thau, *supra* note 249, at 324; SBA letter, *supra* note 116, at 4.

272. See Wymeersch, *supra* note 249, at 340.

273. See de Capitani, *supra* note 249, at 332.

274. See, e.g., Ingersoll, *supra* note 223 (discussing the comments of the American Corporate Counsel Association and Securities Industry Association); SBA letter, *supra* note 116, at 3.

Above all, a waiver by conduct law could cause deep resentment abroad. Foreign countries might retaliate by adopting blocking laws.²⁷⁵ Such a reaction would expose a major weakness of the SEC proposal since, as the SEC admits, the waiver by conduct approach does not address the problem of blocking statutes, which *cannot be waived* by private parties.²⁷⁶

Because of the weaknesses in the SEC proposal, a majority of commentators advocate international agreements instead of the unilateral waiver by conduct approach.²⁷⁷ One might argue that the mere release of the waiver by conduct proposal by the SEC violated the dispute resolution provisions of the MOU and the MAT.²⁷⁸

V CONCLUSIONS

The MAT approach to enforcing insider trading prohibitions differs from the waiver by conduct approach in two important ways. First, the MAT is premised upon a respect for the sovereignty of the state within which a witness, evidence or information is located.²⁷⁹ The assistance mechanism places part of the investigation in the hands of the state whose assistance is requested. Both the dual criminality condition²⁸⁰ and the right of the requested state to refuse assistance in exceptional circumstances²⁸¹ illustrate what has been aptly described as a "deferential framework".²⁸² By contrast, the waiver by conduct approach unilaterally bypasses both the Swiss secrecy laws and the right of Swiss authorities to override these laws under the rules embodied in an international instrument.

Second, the waiver by conduct approach suits only U.S. interests. The SEC attempted to minimize this aspect of the proposal by confirming its readiness to assist its foreign counterparts in their own law enforcement efforts.²⁸³ While nobody questions the SEC's willingness, its idea misses the point. The

275. *Waiver by Conduct Approach*, *supra* note 7, at 86,979 and 86,991.

276. *See, e.g.*, Boyle & Thau, *supra* note 249, at 324; Bschorr, *supra* note 249, at 310; Ingersoll, *supra* note 223; SBA letter, *supra* note 116, at 5-6.

277. *See* the comments summarized in 17 SEC. REG. & L. REP. 291-93 (1985); Bschorr, *supra* note 249, at 311; de Capitani, *supra* note 249, at 334; Singer, *supra* note 249, at 352.

278. In the MOU, the parties agreed "that any questions or disputes between them with respect to the interpretation or application of [the MOU], the exchange of opinions included [therein] pursuant to Article 39, paragraph 1, of the [MAT] or the operation of [the Bankers' Agreement] shall be settled by means of consultations." MOU, *supra* note 16, art. IV(2)(c). In addition, the MOU provides that, "[a]t the termination of [the Bankers' Agreement], the parties will consult regarding experience under [the Bankers' Agreement] and the [MAT], as well as the effect of such termination on the [MOU]." *Id.*, art. IV(2)(b). Likewise, the MAT sets forth the procedure for resolution of disputes which may arise as to the interpretation or application of the MAT, including a procedure for compulsory arbitration. *See* MAT, *supra* note 13, art. 39(2)-(6).

279. *See, e.g.*, Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 22 COLUM. J. TRANSNAT'L L. 233, 259 (1984).

280. *See supra* text accompanying notes 124-131.

281. *See supra* text accompanying notes 132-134.

282. Paikin, *supra* note 279, at 259.

283. *Waiver by Conduct Approach*, *supra* note 7, at 86,990.

real issue is whether the SEC or other U.S. authorities would tolerate another country's use of waiver by conduct to enforce laws *different* from those in the United States. The United States would be quite justified in vehemently opposing such a foreign waiver by conduct law.²⁸⁴ By comparison, the MAT contemplates bilateral enforcement and addresses both procedural and constitutional conflict of laws problems.²⁸⁵

However, the MAT and the waiver by conduct approach have a common drawback in that both fail to provide a speedy way to obtain information concerning suspected insider traders. With respect to the MAT, the duration of the *Santa Fe* case drew criticism both in the United States and in Switzerland.²⁸⁶ One might argue that *Santa Fe* was exceptional because it raised questions of first impression and because the SEC hesitated to use the MAT procedure.²⁸⁷ Moreover, the new Swiss Insider Trading Bill should significantly improve the MAT approach by covering most, if not all, insider trading cases as defined by U.S. law.²⁸⁸

The fact remains that the procedural rules designed to implement the MAT in Switzerland afford too many possibilities of appeals, thereby furthering mere dilatory tactics.²⁸⁹ However, this drawback applies equally to the waiver by conduct approach. In addition to using stalling tactics available in the U.S. courts, resolute insider traders will likely take the SEC at its word by seeking "guidance from foreign government authorities, including the courts, as to whether production [of evidence] is permissible."²⁹⁰ Worse, since the waiver by conduct approach would likely be rejected by Swiss courts, a blocking decision could totally prevent the SEC from obtaining the desired evidence.²⁹¹ While the more deferential approach of the MAT is imperfect, it would ultimately be more productive than the waiver by conduct approach.

284. See Singer, *supra* note 249, at 349-50. For instance, what would be the U.S. reaction to a foreign "waiver by conduct" law which would seek to strip U.S. citizens of their constitutional and other testimonial privileges in order to enforce a statute without counterpart in the United States?

285. Paikin, *supra* note 279, at 261.

286. See *supra* note 163 and accompanying text.

287. The SEC initiated the *Santa Fe* action on October 26, 1981. The first MAT request was sent on March 22, 1982. After the Swiss Supreme Court opinion of January 26, 1983, the second MAT request was sent on July 27, 1983. See *supra* notes 85, 143, 144, 156 and accompanying text.

288. See *supra* sections III(C)(2)-III(C)(3).

289. Under the current provisions of the Swiss Execution Law, *supra* note 134, the decisions of both the Federal Office for Police Matters and the cantonal authorities can be reviewed separately and successively by the Supreme Court. Moreover, a defendant may cause an article 3(1)(a) MAT decision to be examined by three different authorities. On this latter point, see the Swiss Execution Law, *supra* note 134, art. 4.

290. *Waiver by Conduct Approach*, *supra* note 7, at 86,987.

291. See Beguine, *supra* note 262, at 13 and accompanying text.

In the fall of 1985, the SEC took part in new bilateral talks between the United States and Switzerland for the purpose of evaluating judicial assistance.²⁹² The Director of the SEC Enforcement Division, Mr. Gary Lynch, is reported to have assured the Swiss negotiators that, for the time being, the waiver by conduct proposal has been put to rest.²⁹³ The Swiss delegation still stresses the use of existing bilateral mechanisms for obtaining evidence. An improvement of the MAT approach is contemplated by the Federal Council, which has accepted an expert report proposing several modifications of the Swiss Execution Law in order to accelerate the handling of U.S. requests.²⁹⁴ The mere fact that the parties are negotiating is positive. It means that a cooperative approach to resolving international conflicts is being followed. In addition, the Swiss delegation expressed no intention of modifying the MAT and, in spite of delays, the U.S. authorities have had a good degree of success in obtaining evidence pursuant to the MAT.²⁹⁵ Neither country appears to be interested in altering the compromise that resulted in the MAT.²⁹⁶

This, however, raises a difficult problem in cases where the MAT dual criminality condition cannot be met. Switzerland cannot bring its statutes closer to the U.S. counterparts (or vice versa) whenever a MAT request is rejected. In the case of insider trading, the need for consistency within the Swiss legal system called for a new statute. Absent such a statute, a solution similar to the MOU/Bankers' Agreement mechanism cannot supersede substantive and/or procedural rights conferred by Swiss law.²⁹⁷

292. See JUSTICE—entraide judiciaire avec les Etats-Unis: un climat de compréhension d'installe, Gazette de Lausanne [G.D.L.], Aug. 31-Sept. 1, 1985, at 11 [hereinafter *Entraide*]. These negotiations are a consequence of the well-known Marc Rich case, which involved criminal tax fraud charges investigated in the United States against Marc Rich A.G., a Swiss corporation, and Marc Rich International, its wholly-owned subsidiary. In *Marc Rich and Co. v. United States*, 707 F.2d. 663 (2d Cir. 1983), the court affirmed a district court opinion finding Marc Rich A.G. in civil contempt for having failed to produce documents located in Switzerland. In August 1983, Swiss authorities seized the documents that were remaining in Switzerland. Thereafter, Switzerland granted a U.S. MAT request on condition that the United States agree to discuss the question of judicial assistance as a whole.

293. *Id.*

294. *Id.* The decisions of the Federal Office for Police Matters would be operative notwithstanding an appeal to the Supreme Court, which would allow this court to review all possible appeals at the same time. In addition, the President of the special Advisory Commission would be allowed to dismiss frivolous motions to deny assistance.

295. As of August 1983, out of the nearly 250 requests for aid which had been made by the United States under the MAT, fewer than a half dozen had been refused. See *New York Times*, Aug. 18, 1983, at D 18, col. 4. For more detailed statistics concerning the first three years of the MAT's operation, see *Frei II*, *supra* note 61, at 98-100.

296. This compromise was so difficult to reach that the MAT was negotiated over a period of more than four years. See U.S. MAT Message, *supra* note 122, at 35 (Technical Analysis).

On the other hand, the application of the MAT to some SEC proceedings needs still to be clarified. See *supra* notes 96-97 and accompanying text.

297. This consequence should be familiar to the U.S. delegation, since U.S. courts are very reluctant to give effect to binding international instruments deemed inconsistent with the U.S. Constitution. See, e.g., *Cardenas v. Smith*, 733 F.2d 909, 917-20 (D.C. Cir. 1984). On the legal fragility of the MOU/Bankers' Agreement system, see *supra* text accompanying notes 89-116 and notes 219-221.

More recently, in a speech delivered on June 21, 1986 before the Swiss Bar Association, Mrs. Elizabeth Koop, head of Justice and Police Department, stated that a proposal for a new Memorandum of Understanding had been sent to the U.S. delegation.²⁹⁸ While the precise content of the proposal remains undisclosed, it should provide, e.g., for a consultation mechanism at the early stage of any proceeding.²⁹⁹ The ongoing negotiations between Switzerland and the United States have presumably made some progress, and they seem close to success. A meeting is scheduled to take place in Washington D.C. in the near future, and a press conference will follow it.³⁰⁰

Whatever the results of the current U.S.-Swiss talks, neither party is likely to leave the negotiating table a complete victor. While this feature is inherent in any agreement, one point is extremely important. Be it modest or comprehensive, any new U.S.-Swiss arrangement will have to be respected down to the smallest detail. If difficulties lead the SEC to revive the waiver by conduct approach, one must wonder whether other nations, as potential candidates to similar bilateral or multilateral agreements, will have any incentive to negotiate with the SEC. For better or worse, the fruits of these negotiations are likely to affect more than a relationship between two friendly countries.

298. See Kopp, *Aktuelle Probleme der Internationalen Rechtshilfe in Strafsachen*, ENTRAIDE PENALE (Publication — Fédération Suisse des Avocats, vol. 1, 1986), at 7, 13.

299. *Id.* In her speech, Mrs. Koop also mentioned the preparation of diplomatic notes designed to clarify the application of the MAT to SEC proceedings in insider trading cases, as provided by the MOU, *supra* note 16, art. II(4). Kopp, *supra* note 298, at 14-15.

300. See *supra* note 175.