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Bradley O. Field

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COMMENTS

Improving International Evidence-Gathering Methods: Piercing Bank Secrecy Laws from Switzerland to the Caribbean and Beyond

I. INTRODUCTION

Developments of modern technology have transformed a once divided world into a single economic community. Individuals and corporations no longer confine their activity to a single country. Likewise, criminal enterprises have gone international, availing themselves to the benefits existing in countries around the world.¹ Legitimate and illegitimate actors alike often employ foreign banking systems to conceal assets they would rather keep private.² The United States has recognized the use of foreign banks by criminals and is constantly improving methods to detect such activity.³

One of the most effective ways United States prosecutors impair

1. "The current trend is to use the secrecy laws of tax haven countries to facilitate tax evasion. For example during the period 1977 through August 1983, the [Internal Revenue Service ("IRS")] identified 772 criminal cases which had financial transactions involving some 90 foreign countries. . . . The frequency of [IRS] cases involving foreign countries is increasing." CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES, S. REP. NO. 130, 99th Cong., 1st Sess. 1, at 2 (1985) (quoting a letter dated April 19, 1984, from the Commissioner of the Internal Revenue Service to Senators William Roth and Sam Nunn) [hereinafter REPORT ON OFFSHORE BANKS].

2. Parties using foreign banking systems include United States-based companies or individuals using banks other than those located in the United States, as well as foreign-based companies and individuals using United States banks in their business operations. This Comment will focus on illegitimate business activities that use foreign offshore banks.

3. JUDICIAL PROCEDURES IN LITIGATION WITH INTERNATIONAL ASPECTS, S. REP. NO. 1580, 88th Cong., 2d Sess. 13 (1964). "The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation." *Id.* at 2. In 1982, the Permanent Subcommittee on Investigations initiated a study of criminal exploitation of foreign tax haven countries. That subcommittee's report to the Senate Committee on Governmental Affairs stated that drug traffickers and those involved in commodities fraud favored these havens because these countries exhibited an uncompromising attitude toward secrecy. REPORT ON OFFSHORE BANKS, *supra* note 1, at 1.

criminal activity is by tracing the illegal proceeds.⁴ However, this is a difficult process in an international context. The prosecutor or investigating agency must discover which country the criminal has deposited the illegal proceeds. Investigators frequently require assistance from foreign governments to uncover this information. The United States government has made a serious effort to establish these channels of cooperation. Professor Gerhard Mueller aptly described the state of affairs existing in the early 1960s:

Absent treaty or statute, American courts, in general, have been reluctant to cooperate with foreign criminal tribunals. The reason may be found in traditional isolationism, ignorance of foreign criminal law and procedure — which is often suspected of being inquisitorial — or simple unfamiliarity with a court's own express or implied powers to grant judicial assistance.⁵

The desire to cripple organized crime and other unlawful activity in the United States requires that law enforcement's reach extend as far as the criminal may go. However, in this zealous pursuit, practical and procedural limitations exist. The United States is concerned with protecting the accused's legal and constitutional rights, granted by both the United States and the country from which assistance is sought. In the pursuit of evidence located abroad, the United States balances these constitutional interests with the need for decisive convictions.

This Comment examines the methods by which the United States obtains criminal evidence from foreign banking institutions, through the use of treaties of mutual assistance.⁶ Cooperation with the government of a foreign country assures that the United States does not infringe on the rights which that country accords those under its jurisdiction.⁷ This Comment examines bank laws in Switzerland, and examines the United States-Switzerland Treaty on Mutual Assistance in

4. Ethan A. Nadelmann, *Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions*, 18 U. MIAMI INTER-AM. L. REV. 33, 34 (1986).

5. Gerhard O. W. Mueller, *International Judicial Assistance in Criminal Matters*, 7 VILL. L. REV. 193, 198 (1961-62).

6. The term "mutual assistance" as used in this Comment refers to reciprocal obligations and duties imposed by a treaty on the signatories.

7. Legislative bodies frequently design a country's secrecy laws for banking institutions. Thus, clients of a bank, regardless of citizenship or residency, gain the protection of the law. Elliot A. Stultz, Note, *Swiss Bank Secrecy and the United States Efforts to Obtain Information from Swiss Banks*, 21 VAND. J. TRANSNAT'L L. 63, 67-68 (1988).

Criminal Matters⁸ (“Swiss Treaty”) as a model treaty to be used in the formation of future treaties. In an effort to learn from and improve on this model treaty, this Comment analyzes its strengths and limitations. Next, this Comment compares the Swiss Treaty with recently ratified treaties between the United States and her Caribbean neighbors, and evaluates their merits. Finally, this Comment offers proposals for the improvement of mutual assistance treaties and negotiation methods.

II. SOURCES OF THE PROBLEM

A. *Money Laundering*

One goal of every criminal enterprise is to “get away clean.” Evading the authorities and preventing the uncovering of clues that will lead to one’s detection and apprehension are critical areas the wrong-doer can control. Many criminals, aware of the methods by which authorities track them down, use money laundering and bank secrecy laws to further elude authorities. A problem faced by perpetrators of crimes of pecuniary gain is that the ill-gotten money or valuable commodities may be traced to the unlawful source. Ideally, a criminal would like to spend the money or reinvest it without raising suspicion as to its origin, hence the term “money laundering.”⁹ A criminal will pass money through various channels in an effort to obscure the “paper trail” and thus cause the money withdrawn from this process to appear to be derived from a legitimate activity.¹⁰

For example, tax evasion is a crime of pecuniary gain because taxes not paid are the proceeds from the crime. Because the money

8. Treaty on the Mutual Assistance in Criminal Matters, May 25, 1973, Switz.-U.S., 27 U.S.T. 2019 [hereinafter Treaty].

9. Preventing reinvestment of criminal proceeds often impedes the commission of subsequent crime. This is a primary reason United States law enforcement authorities target the proceeds of prior crimes. Other rationales underlying the seizure of proceeds include the following: (1) it deters and punishes offenders; (2) it prevents the escalation of more sophisticated types of crime since higher level criminals often only violate laws relating to the proceeds, preferring to distance themselves from baser activities; and (3) it can often be used to fund law enforcement activity. Nadelmann, *supra* note 4, at 34.

10. A money laundering scheme can be as simple as depositing the ill-gotten funds in an account protected by secrecy laws, and then withdrawing them from the same account. A transfer through two accounts, which doubles the difficulty in tracing the money, is also common. To prevent these withdrawals from appearing tainted, frequently launderers will open a second account in the name of a “dummy” consulting business, and claim the money in the account constitutes fees for untraceable, non-tangible services. For a collection of illegal concealment schemes, see Bernhard F. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, 14 NEW ENG. L. REV. 18, 43-51 (1978-79).

clandestinely deposited in a foreign account is not necessarily "dirty" money at the time of deposit, but only becomes dirty if it is not reported as applicable law requires, tax evasion is different from money laundering. The United States Congress enacted the Banking Secrecy laws¹¹ in order to combat the evasion of United States tax laws. In 1981, an Internal Revenue Service report discussing United States taxpayers' use of tax havens found "that between 1968 and 1978, international deposits made . . . in banks located in all important tax haven areas increased from \$5.3 billion to \$88.7 billion."¹² In 1987, the Tax Division of the United States Department of Justice reported that tax evasion by United States taxpayers, primarily through use of offshore financial centers, nurtured an underground economy of as much as \$600 billion.¹³

B. Banking Secrecy in Switzerland

Every laundering or tax evasion scheme requires an institution, often a bank, to mask the identity of the interest holder or the origin of the funds.¹⁴ Usually masking is only possible if the institution is obligated to maintain account secrecy. The secrecy protection Switzerland provides derives from three distinct legal concepts.¹⁵

First, the Swiss concept of the right to privacy includes not only privacy in one's health and family life, but also extends to one's financial existence.¹⁶ As a civil law jurisdiction, Switzerland also extends financial privacy to business entities. Common law jurisdictions such as the United States confine the right to privacy to the individual.¹⁷

11. 12 U.S.C. §§ 1951-59 (1989). Banking secrecy in the United States is an oxymoron because the laws do not involve secrecy at all, but require disclosure of transactions within the guidelines of the laws. Danforth Newcomb, *United States Litigation and Foreign Bank Secrecy: The Origins of Conflict*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 47, 50-51 (1988).

12. REPORT ON OFFSHORE BANKS, *supra* note 1, at 2. In 1983, tax evaders and other criminals had an estimated \$222 billion hidden from the IRS in offshore banks. *Id.* at 1. Another Congressional report stated that in 1984 the Treasury Department estimated that tax havens cost the United States billions of tax dollars each year. ADMISSIBILITY OF FOREIGN BUSINESS RECORDS, H.R. REP. NO. 907, 98th Cong., 2d Sess. 2 (1984).

13. *International Tax Evasion/Tax Treaty Issues, Hearings Before a Subcomm. of the House of Representatives Comm. on Government Operations*, 100th Cong., 1st Sess. 273, at 274 (1987) (statement of Michael C. Durney, Acting Assistant Attorney General, Tax Division, United States Department of Justice).

14. See generally Gregory P. Crinion, *Information Gathering on Tax Evasion in Tax Haven Countries*, 20 INT'L LAW. 1209, 1210 (1986).

15. Meyer, *supra* note 10, at 24.

16. Stultz, *supra* note 7, at 67.

17. *Id.* at 67 n.23.

Second, Swiss banks promote the goals of bank secrecy as an implied contractual condition. Pointing to its rigid chartering requirements, licensing procedures and severe tax and interest charges, Switzerland considers itself a financial center rather than a money haven.¹⁸ Swiss bankers take great pride in providing banking services; so much so, it can be called the Swiss national product. They believe a successful banker-client relationship is founded on confidentiality since the banker is entrusted with the financial privacy the civil law grants to the individual or business.¹⁹ In fact, Swiss law allows “a bank customer to sue his bank [in tort for injuries] . . . for its failure to maintain bank secrecy.”²⁰

Finally, the Swiss government has historically held that secrecy was valuable and during the early years of World War II, it made violation of bank secrecy law a criminal offense.²¹ Nazi German agents’ attempts to acquire the assets of German Jews were a direct attack on Switzerland’s reputation as a financial center.²² To preserve its international integrity, Switzerland thwarted Germany’s intrusion by passing Article 47 of the Banking Law, which subjects anyone who divulges secrets obtained by virtue of one’s capacity with a financial institution to a prison term or monetary fine.²³

Many people overestimate the extent to which these secrecy laws provide anonymity to foreign bank customers. Numbered accounts keep customer names from lower level bank employees such as clerks and tellers, although the bank does record the name of the opening party.²⁴ Bank officials provide the same level of secrecy to named accounts as they do to numbered accounts or to the documents that reveal the customer behind the numbered account.²⁵

Switzerland remains a popular tax haven and laundering center despite recent cooperation from both Swiss banks and the Swiss government in United States’ investigations and prosecutions of Swiss

18. REPORT ON OFFSHORE BANKS, *supra* note 1, at 125.

19. Stultz, *supra* note 7, at 67-68.

20. *Id.* at 68-69; *see also id.* at 68 n.27.

21. *Id.* at 71. Meyer, *supra* note 10, at 26.

22. Stultz, *supra* note 7, at 71.

23. Meyer, *supra* note 10, at 26 (citing 47 BankG, *reprinted in* UNION BANK OF SWITZERLAND, FEDERAL LAW RELATING TO BANKS AND SAVINGS BANKS 21 (1972) (unofficial translation of the Banking Law, published by UBS, Zurich, 1972)).

24. Meyer, *supra* note 10, at 28.

25. *Id.* In fact, to maintain their image as a respected financial center and to distance themselves from other tax havens, Swiss banks are no longer issuing or advertising numbered accounts. *Id.*

bank customers.²⁶ Preference for Swiss banks over other tax havens may be attributed to "Switzerland's political and economic stability, its historical commitment to financial privacy, and the soundness of the Swiss franc."²⁷ Nonetheless, other countries around the world have emerged as tax havens, offering comparable banking secrecy and services.²⁸

C. Tax Havens Around the World

Many countries which have adopted rules of secrecy similar to those of Switzerland have come to be known as tax havens. A tax haven country is a country in which banks withhold information regarding their customers' accounts. This information includes the origin or owner of the funds, the amounts of money deposited in, withdrawn from, or transferred through an account, and how often such account transactions occur.²⁹ However the existence of secrecy laws does not necessarily mean that the country is a tax haven. A country earns the label "tax haven" after the Internal Revenue Service compares the value of its exports against the amount of foreign assets in its banks.³⁰ If the ratio of foreign bank assets to exports is high, the country may be considered a tax haven. For example, in 1982, Bermuda and Panama each held foreign assets more than 100 times greater in value than the products they exported.³¹ The Cayman Islands' index is immeasurable because it has almost no exports.³²

Because of new Swiss laws and investigative cooperation with other countries, the Cayman Islands now surpasses Switzerland as the world's preeminent tax haven.³³ Still, to those unfamiliar with laundering strategies, Switzerland conjures images of banks and anonymous accounts while countries such as Anguilla, the Cayman Islands

26. See William R. Salisbury, Note, *International Agreements: The United States-Switzerland Investigation of Insider Trading Through Swiss Banks*, 23 HARV. INT'L L.J. 437, 438 (1983).

27. *Id.* at 442-43.

28. *Id.* at 442. These countries include Panama, Liechtenstein, the Bahamas, Luxembourg, Germany, Curacao, Hong Kong, and Bermuda. *Id.* at 442 n.41.

29. Crinion, *supra* note 14, at 1210.

30. RICHARD A. GORDON, ESTIMATES OF LEVELS OF TAX HAVEN USE: A STUDY TO QUANTIFY THE USE OF TAX HAVENS, TAX HAVEN STUDY GROUP 1 (1981).

31. Crinion, *supra* note 14, tbl. I.

32. *Id.*

33. Edwin A. Finn & Tatiana Pouschine, *Luxembourg: Color it Green*, FORBES, Apr. 10, 1987, at 42.

and Montserrat invoke images of vacation paradise. Unfortunately, many suspected criminals are using these and other tax havens to cleanse illicit money.³⁴ In fact, even the Swiss use Caribbean banks to regain the advantage of secrecy their own government has taken from them.³⁵

To effectively reduce money laundering, the methods employed by Switzerland must be applied to these other tax havens. The Swiss Treaty, discussed *infra*, should serve as a template for future negotiations with other tax haven nations whose banks provide secrecy for their customers.³⁶

III. METHODS OF OBTAINING EVIDENCE FROM ABROAD

In the past, cooperating countries have used several methods in order exchange information to curb the use of bank secrecy for dishonest purposes. Passive judicial assistance, active judicial assistance, and the mutual assistance treaties have all responded to the problem created by money laundering and bank secrecy laws.

A. *Passive Judicial Assistance*

Passive judicial assistance is the process by which a nation obtains evidence located in a foreign country without the assistance of that country's government.³⁷ Typically, a nation will acquire foreign evidence by the same methods that are available within its own borders.³⁸ Occasionally, domestic methods will conflict with foreign law and may be prohibited.³⁹ Frequently employed methods of evidence gathering include domestic-based inquiry, independent investigation, consent, and subpoena.

Domestic-based inquiry supplies information about foreign activity before the activity occurs.⁴⁰ The United States, for example, has

34. See *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817 (1984) (prosecution found evidence related to individuals under investigation in banks in the Bahamas and the Cayman Islands); *United States v. Davis*, 767 F.2d 1025 (1985) (prosecution found records related to individual under investigation in Switzerland and the Cayman Islands).

35. Finn & Pouschine, *supra* note 33, at 43.

36. Paul W. Johnson, Note, *Judicial Assistance — Criminal Procedure — Treaty with Switzerland Affects Banking Secrecy Law*, 15 HARV. INT'L L.J. 349, 350 (1974); James H. Bloem, Note, *Criminal Law — Treaty on Mutual Assistance in Criminal Matters Between the United States and Switzerland*, 7 VAND. J. TRANSNAT'L L. 469, 479 (1974).

37. Mueller, *supra* note 5, at 199.

38. See *id.* at 199-200.

39. See *id.* at 211.

40. See generally Nadelmann, *supra* note 4, at 42-43.

enacted laws that require banks to report certain transactions concerning monetary instruments⁴¹ and impose criminal sanctions for failing to comply with the reporting requirements.⁴²

Investigators may also obtain foreign evidence by entering a foreign country and conducting investigations as they would at home. However, many countries refuse to grant foreigners the authority to compel testimony and demand evidence from its citizens. In fact, Swiss law makes investigations by or for a foreign nation illegal without prior governmental approval.⁴³ Granting such authority is unlikely in many cases because a country that allows another nation to conduct an investigation within its borders usually monitors and restricts the investigation procedures.

The consenting guardian is another source of information located abroad. Rarely will a suspected offender knowingly relinquish incriminating evidence. Consensual access can be acquired, however, from others who rightfully have access to the evidence and who fear no punishment for any wrongdoing. For example, a bank officer may be privy to evidence and may be able to supply investigators with information but only in situations where the law does not require or imply confidentiality.⁴⁴ Therefore, in bank secrecy jurisdictions, the United States government must obtain information from other sources. Frequently, United States officials will rely on informants to provide crucial information;⁴⁵ sometimes these informants are bank employees who have witnessed suspicious activity and feel a desire to divulge the information.⁴⁶ Law enforcement agencies are often willing to assist the foreign investigation as well.⁴⁷ At a minimum, these informants face tort liability for their disclosures in secrecy jurisdictions. Often, however, no mechanism for suppressing the evidence

41. 12 U.S.C. §§ 1952-53 (1988) requires uninsured banks to keep financial records and evidence of its operation and 31 U.S.C. §§ 5313-16 (1991) requires banking institutions and individuals to report transactions in monetary instruments over a certain amount (currently \$10,000).

42. 12 U.S.C. §§ 1954-57 (1988) establish penalties for failure to comply with the bank record keeping requirements. 31 U.S.C. §§ 5321-22 (1988) establish penalties for failure to report transactions in excess of \$10,000 in currency.

43. Lionel Frei & Stefan Trechsel, *Origins and Applications of the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters*, 31 HARV. INTERNAT'L L.J. 77, 78 (1990).

44. Stultz, *supra* note 7, at 73.

45. See Nadelmann, *supra* note 4, at 44.

46. *Id.*

47. *Id.* at 43.

exists.⁴⁸

Finally, a nation seeking foreign evidence or testimony may resort to a subpoena. The subpoena is a valuable tool to the investigator because it reaches as far as the jurisdiction of the issuing court reaches. If a United States court determines a person to be sufficiently present or doing business in its jurisdiction,⁴⁹ the court may compel that person to produce documents and evidence within his control.⁵⁰

In 1948, the United States Congress enlarged the federal courts' authority to include within their subpoena power the ability to require United States citizens or residents in foreign countries to produce documents and other evidence located abroad. The courts may also require persons within the United States to produce evidence within their control but abroad.⁵¹ Congress also gave the federal courts authority to hold in contempt those who failed to comply with the subpoena.⁵²

Since enactment of the foreign subpoena power, district courts have compelled production of evidence without which the government could not have prosecuted many cases. In 1983, in *In re Grand Jury Subpoena Directed to Marc Rich & Co.*,⁵³ the Court of Appeals for the Second Circuit affirmed the district court's finding that a Swiss corporation doing business in the United States must comply with a subpoena for documents located in its foreign offices.⁵⁴ The court also found that the imposition of a per diem civil contempt fine of \$50,000 pending compliance with the subpoena was within the court's discretion and reasonable.⁵⁵ The following year, in *In re Grand Jury Proceedings Bank of Nova Scotia*,⁵⁶ the Court of Appeals for the Eleventh Circuit affirmed a Florida district court's ruling that required the bank's United States branch office to produce documents from its Caribbean Island branch offices.⁵⁷ By the time the bank completely

48. See, e.g., text accompanying note 20.

49. See generally *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

50. BLACK'S LAW DICTIONARY 1426 (6th ed. 1990). See, e.g., FED. R. CIV. P. 45(b).

51. 28 U.S.C. § 1783 (1988). In 1987, the Court of Appeals for the District of Columbia Circuit affirmed the lower court decision by finding that a witness in the Iran-Contra Affair failed to produce business documents of eight foreign companies for which the witness acted as a custodian. *In re Sealed Case*, No. 87-5256, 832 F.2d 1268 (D.C. Cir. 1987).

52. 28 U.S.C. § 1784 (1988).

53. 707 F.2d 663 (2d Cir. 1983).

54. *Id.*

55. *Id.* at 670.

56. 740 F.2d 817 (11th Cir. 1984).

57. *Id.*

complied with the subpoena, its \$25,000 per day fine totaled \$1,825,000.⁵⁸

While the federal courts received the evidence they requested, the courts forced defendant corporation Marc Rich to forfeit its secrecy privilege available under Swiss law.⁵⁹ Furthermore, by complying with the federal court order, the Bank of Nova Scotia actually violated Cayman Island law.⁶⁰ Forcing transgression of a foreign country's law in order to comply with United States law is comparable to invading the country and conducting an investigation using foreign judicial mechanisms to circumvent that nation's law. In *In re Grand Jury Proceedings Bank of Nova Scotia*, the United States government served its subpoena on March 4, 1983.⁶¹ The bank began its United States appeal process in April 1983, after the Cayman branch office denied its request for documents.⁶² In May 1983, the bank asked the Grand Court of the Cayman Islands for permission to release the requested documents but it refused with impunity.⁶³ On November 11, 1983, the Cayman court denied a renewed request to circumvent the secrecy law.⁶⁴ Six days later, however, the Governor of the Islands exempted the bank from the law for the purpose of complying with the subpoena.⁶⁵ The documents requested from the Bahamas branch office were exempt from Bahamian law on November 11, 1983, as well, but delays attributable to the bank postponed their admission into evidence until February 14, 1984.⁶⁶ To decide whether the subpoena wrongly infringed on a foreign secrecy law, the district court employed a balancing test. The court concluded that the United States' interest in investigating individuals involved in drug trafficking outweighed the Cayman Islands' interest in preserving secrecy, a characteristic crucial to the country's financial expansion.⁶⁷

The court emphasized that there were exceptions to the secrecy

58. *Id.* at 824.

59. *In re Mark Rich & Co.*, 707 F.2d at 665.

60. *In re Bank of Nova Scotia*, 740 F.2d at 826-27.

61. *Id.* at 820.

62. *Id.*

63. *Id.*

64. *Id.* at 821. The Attorney General of the Bahamas, however, did authorize disclosure of records sought from a Bahamian branch. The United States appeal process halted the per diem fine which the lower court had ordered due to the bank's refusal to hand over the Cayman documents. The bulk of the fine, therefore, came from the bank's refusal to provide the Bahamian documents. *Id.* at 821 n.5.

65. *In re Bank of Nova Scotia*, 740 F.2d at 821.

66. *Id.* at 821-23.

67. *Id.* at 827.

policy and that the accounts belonged to United States citizens who expect less privacy because their government demands the disclosure of such transactions.⁶⁸ The court concluded: “[t]he Bank has voluntarily elected to do business in numerous foreign countries and has accepted the incidental risk of occasional inconsistent governmental actions. It cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations.”⁶⁹ Problems of inconsistency, such as those imposed on Nova Scotia Bank by the governments of the United States and the Cayman Islands, suggest mutual agreement would put both countries, and individuals in foreign countries, on notice as to what activity is susceptible to invasion by another country.

B. Active Judicial Assistance

The most obvious way a country may gain access to information in a foreign country is to have that country’s officers investigate the matter.⁷⁰ Active judicial assistance, however, may be restricted by the foreign country’s laws and unwillingness to perform the requested activities. The two primary forms of request are the letter rogatory and the mutual agreement.

In the early nineteenth century, United States courts recognized and used the letter rogatory as a device for obtaining information located outside its jurisdiction.⁷¹ However, a request that a foreign sovereignty perform a specified task depends on the foreign sovereign’s sense of obligation to cooperate. “[A requesting nation] may ask for whatever evidence or testimony it wants, however, there is no assurance that [the requested nation] will oblige.”⁷² Refusals to comply with requests are often based on a conflict in law between the nations,⁷³ but a sovereign nation needs no grounds for refusing assistance.

In 1964, the United States Congress authorized the Department of State to serve as the liaison between tribunals of the United States

68. *Id.* at 827-28.

69. *Id.* at 828.

70. Gerhard Mueller considers this international coordination as a request “by the judicial authorities of one nation, for the taking of active measures in the requested nation, in aid of proceedings pending in the requesting nation, . . . beyond the mere taking of depositions or the subpoenaing of documents or tangible evidence.” Mueller, *supra* note 5, at 209.

71. Newcomb, *supra* note 11, at 60 n.83.

72. Lee Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 22 COLUM. J. TRANSNAT’L L. 233, 254 (1984).

73. *Id.* at 255.

and foreign tribunals for the exchange of letters rogatory.⁷⁴ The law does not limit letters rogatory from the State Department; courts of the United States and foreign countries remain free to exchange requests⁷⁵ as they have done in the past.⁷⁶

The effectiveness of letters rogatory depends on comity between nations. Matters the requesting state finds important, however, are often less pressing to the requested nation. In *United States v. Bastanipour*,⁷⁷ the district court issued its judgment after postponing the trial several months while anticipating a response to a letter rogatory.⁷⁸ The court decided to proceed to judgment and allow a new trial if the requested evidence materialized and justified a new trial.⁷⁹

Letters rogatory may be refused if the requested nation feels the release of the information would be contrary to its own interests.⁸⁰ In *Re Westinghouse Electric Corp. and Duquesne Light Co.*,⁸¹ the Supreme Court of Canada refused to disclose information to the United States it felt harmed the interests of the Canadian government.⁸² Such foreign interests typically include the sanctity of its legal process. Many countries refuse to assist the United States in proceedings that they consider offensive or nonexistent in their respective countries.⁸³ For example, some foreign nations oppose providing investigative information to grand juries because they feel such proceedings are overly intrusive.⁸⁴

The primary way to insure that a foreign law or a foreign country's discretion will not affect a request for information is to establish procedures to facilitate cooperation, often through a bilateral or multilateral treaty.⁸⁵ If a nation considers a treaty supreme over its own

74. 28 U.S.C. § 1781(a) (1988).

75. *Id.* § 1781(b).

76. Professor Paikin refers to the court's inherent ability to send and respond to letters rogatory, citing *United States v. Reagan*, 453 F.2d 165 (6th Cir. 1971). Paikin, *supra* note 72, at 254.

77. 697 F.2d 170 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983).

78. *Id.* at 178.

79. *Id.*

80. Paikin, *supra* note 72, at 255.

81. 16 O.R.2d 273 (1977) (Can.).

82. *Westinghouse*, 16 O.R. at 288-89. The Court found that the request was one of discovery, not necessary for use at trial, and therefore not to be used in the "interest of justice." *Id.* at 18.

83. Newcomb, *supra* note 11, at 60-61.

84. *Id.* at 60-62.

85. Other forms of agreement include case-specific agreements, which are treaties applicable only to a certain investigation, letters of cooperation, and letters of understanding, which are typically arrangements between nations, but are less formal than a treaty. See, e.g., New-

laws, a treaty will serve as an effective exemption to its secrecy laws. The treaty is a vast improvement over prior information-gathering methods because “[t]he Treaty presents a systematic program for judicial assistance between the contracting parties.”⁸⁶ One such treaty is the United States-Swiss Treaty on Mutual Assistance in Criminal Matters.⁸⁷

IV. UNITED STATES-SWISS TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

A. History

Prior to 1926, the United States government depended largely upon letters rogatory to acquire testimony from witnesses located outside the United States.⁸⁸ Subpoenas came into use in the 1920s to compel testimony requested by a letter rogatory when a United States citizen refused to voluntarily comply with the request.⁸⁹ In 1938, the Department of Justice wanted to expand the extraterritorial reach of the United States judicial system.⁹⁰ The Department of Justice recruited the assistance of the Harvard Law School’s Research in International Law Project to draft what became known as the Harvard Project,⁹¹ a draft of a treaty relating to international judicial assistance. In the decade that followed, United States authorities actively pursued international cooperation in judicial matters by joining the North Atlantic Treaty Organization.⁹² Legislation which followed

comb, *supra* note 11, at 69-70; see generally Salisbury, *supra* note 26. In the United States, for example, a letter of cooperation is less effective than a treaty because it does not acquire “law” status, since it is not ratified by the Senate. See Stultz, *supra* note 7, at 107. Letters may attain law status if attached to a treaty, prior to the treaty’s ratification. See, e.g., Treaty, *supra* note 8, at 2019.

86. Johnson, *supra* note 36, at 351.

87. Treaty, *supra* note 8.

88. Congress passed various acts between 1855 and 1873 that addressed the scope of a letter rogatory and the extent of a court’s authority to use one. Congress increasingly restricted the content of the request and the subject matter the letter rogatory could address during this time. See Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT’L LAW. 189, 192 n.17 (1985).

89. A court’s authority to issue subpoenas was also limited since the subpoena only had power over United States citizens and service occurred via consular offices abroad. See *id.*

90. *Id.* at 193.

91. *Id.*

92. *Id.* Congress later enacted legislation to facilitate its role as a signatory to the agreement. The legislation provided for the transmission and receipt of letters rogatory and physical evidence. Later amendments to these laws, however, failed to provide the United States with the ability to effectively participate in the international exchange of evidence. *Id.* at 193-96.

imposed limitations on international participation⁹³ and these limitations left the United States Department of Justice seeking more effective agreements.

The United States Department of Justice began its search for binding arrangements in 1961, when it proposed initial discussions with Italy concerning a bilateral treaty.⁹⁴ However, no such agreement materialized. The focus then shifted to piercing the veil of Swiss banking secrecy laws when criminal prosecution in the United States exposed the illegality fostered by such secrecy.⁹⁵ In November 1968, federal law enforcement agencies sought cooperation from Switzerland on criminal matters.⁹⁶ Five years of negotiation resulted in the Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters ("Treaty").⁹⁷ After ratification by the United States Senate, President Gerald R. Ford signed the Treaty on July 10, 1976.⁹⁸ Switzerland ratified the Treaty on July 7, 1976, and the Treaty entered into force on January 23, 1977.⁹⁹ The Treaty also included seven interpretatory letters exchanged between the two governments.¹⁰⁰

B. Strengths and Limitations of Selected Provisions in the Treaty

This Comment avoids examination of the Treaty, article by article. Instead, this Comment focuses on aspects of the Treaty that are directly relevant to facilitating or hindering the exchange of evidence. Although the analysis which follows places emphasis on the effects the Treaty has on United States prosecutors, most arguments apply equally to Swiss authorities. Understanding the Treaty's benefits and burdens will assist the determination of which features future treaties

93. *Id.*

94. *Id.* at 196.

95. *Id.* at 196-97.

96. JOHN SPARKMAN, TREATY WITH THE SWISS CONFEDERATION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, S. REP. NO. 29, 94th Cong., 2d Sess. 1 (1976) [hereinafter SPARKMAN REPORT].

97. Treaty, *supra* note 8, at 2019. Negotiations lasted five years because of the parties' dispute over the treaty's applicability to tax violations. See Ellis & Pisani, *supra* note 88, at 197.

98. Treaty, *supra* note 8, at 2019. The Senate advised ratification on June 21, 1976.

99. *Id.*

100. *Id.* See TREATY WITH THE SWISS CONFEDERATION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, MESSAGE FROM THE PRESIDENT, S. EXEC. DOC. F, 94th Cong., 2d Sess. 23 (1976) [hereinafter PRESIDENTIAL MESSAGE]. The United States initiated all but one of the seven letters. The letters explained how the United States interpreted the Treaty and requested a notice of acceptance of that interpretation. *Id.* at 35-36.

should incorporate and which features need improvement in order to ensure cooperation.

1. Application of the Treaty

Article 1 of the Treaty outlines the matters that require both countries' cooperation. Assistance is available for investigations and court proceedings concerning offenses punishable in the requesting "State."¹⁰¹ The negotiators insisted that the Treaty mandate assistance in both the investigative and trial phases of criminal prosecution.¹⁰² Further, assistance extends to federal and state grand jury proceedings, governmental agency investigations¹⁰³ and certain administrative actions.¹⁰⁴ Depending on the extent to which either country grants assistance, foreign investigators may obtain information just as if they entered the country and began their own investigation under a passive judicial assistance scheme.¹⁰⁵

The Treaty defines an offense as any act that the requesting State has a *reasonable suspicion* to believe occurred which constitutes the elements of a crime.¹⁰⁶ This provision is beneficial because it allows the United States to request Switzerland to use judicial procedures, such as warrants, based on a less demanding level of suspicion than the United States' requirement of probable cause.¹⁰⁷ The Treaty, in effect, reduces the requisite level of suspicion for a warrant for international evidence gathering.

Article 2 treats tax crimes, among other offenses, separately. The

101. Treaty, *supra* note 8, art. 1, para. 1(a). The term "State" refers to either the United States, Switzerland, any particular states in the United States, or any canton in Switzerland. The term "state" will be used when referring to one of the United States in general, and the term "country" will be used when referring to either Switzerland or the United States. The term "assistance" includes, but is not limited to, locating witnesses, taking persons' testimony or statements, producing or preserving necessary documents, records, or articles of evidence, serving documents, and authenticating documents. *Id.* para. 4(a)-(e).

102. PRESIDENTIAL MESSAGE, *supra* note 100, at 35-36.

103. *Id.* at 36. The Department of Justice informed the Senate Committee on Foreign Relations that the Treaty was a significant step because it bound a civil law country and a common law country and contained sections that permitted automatic admissibility of evidence in United States courts. SPARKMAN REPORT, *supra* note 96, at 4 (statement of John Keeney, Deputy Assistant Attorney General, before the Foreign Relations Committee).

104. See PRESIDENTIAL MESSAGE, *supra* note 100, at 37.

105. See *supra* notes 37-69 and accompanying text. This process saves money. Swiss authorities can conduct an investigation for their United States counterpart, thus saving travel and lodging costs. The Treaty only requires that the parties pay reasonable costs for efforts expended while fulfilling a treaty-based assistance request. Treaty, *supra* note 8, art. 34.

106. Treaty, *supra* note 8, art. 1, para. 2.

107. PRESIDENTIAL MESSAGE, *supra* note 100, at 36-37.

Swiss adamantly opposed the inclusion of tax law violations in the Treaty's coverage. The Swiss delegation refused to include such violations because Swiss law does not recognize such actions as criminal.¹⁰⁸ Certain tax violations and government regulatory infractions, therefore, are not governed by the Treaty.¹⁰⁹

The twenty-six cantons of Switzerland¹¹⁰ are free to apply federal and cantonal law as they wish in the collection of taxes.¹¹¹ Tax collection authorities have chosen not to invade citizens' financial privacy, choosing instead to rely on taxpayers' voluntary reporting.¹¹² If a taxpayer fails to file a return, Swiss law gives the authorities no other means of acquiring this information.¹¹³ This policy applies only to tax evasion; the Swiss government looks differently upon tax fraud. Tax fraud occurs when a taxpayer "commits overt acts, uses fraudulent practices or falsifies documentary evidence in order to mislead tax authorities."¹¹⁴ Because the cantons define crimes independent of a national scheme, a criminal act in one canton may not be considered a criminal act in another.¹¹⁵ Because Switzerland's national government considers tax violations minor offenses and refuses to invade people's privacy in financial matters, the Swiss negotiating team excluded tax violations from the Treaty, except in certain cases involv-

108. SPARKMAN REPORT, *supra* note 96, at 2. "Tax evasion is not considered a crime in Switzerland and is, therefore, not included under the coverage of [the] agreement." *Id.*

109. Article 2, paragraph 1 states in pertinent part:

1. This Treaty shall not apply to: . . .

c. investigations or proceedings: . . .

(5) concerning violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations other than the offenses listed in items 26 and 30 of the Schedule to this Treaty (Schedule) and the related offenses in items 34 and 35 of the Schedule.

Treaty, *supra* note 8, art. 2, para. 1.

Offenses excluded from this exception include gambling and trade in narcotics, injurious substances and weapons, as well as attempts or conspiracy to commit such crimes. See *id.* at 2064-67 for discussion of the Schedule of Offenses.

110. "Switzerland is divided into twenty-six legally autonomous cantons, including six half-cantons." Stultz, *supra* note 7, at 72 n.49 (citing VOYAME, INTRODUCTION TO SWISS LAW 4 (F. Dessemonet & T. Ansay eds. 1983)).

111. Meyer, *supra* note 10, at 32.

112. *Id.* at 33.

113. See *id.* This holds especially true in regard to obtaining information from banking institutions; banks, as third parties, have no duty to disclose such information, even upon request from the government. *Id.* It should be noted that in some instances and under specific circumstances, Swiss law requires third persons to provide information to the tax authorities. See *id.* at 33 n. 94.

114. *Id.* at 34.

115. See *id.*

ing the investigation of organized crime.¹¹⁶ Finally, the Treaty does not provide assistance for collateral crimes that may be committed during the commission of a crime not covered by the Treaty.¹¹⁷ For example, the Treaty allows cooperation regarding the offense of forgery,¹¹⁸ but denies cooperation if the only purpose for committing forgery was to evade taxes.¹¹⁹ The express limitations of Article 2 prevent overly restrictive or unintended results.

The United States Court of Appeals for the Second Circuit has interpreted Article 2 to allow assistance for violations of customs laws not associated with the payment of duties.¹²⁰ In *United States v. Johnpoll*,¹²¹ the defendant was charged not only for transporting stolen securities, but also for failing to report the transportation of negotiable instruments,¹²² a customs violation. The court concluded that "as long as the evidence was used to prosecute violations covered by the Treaty, the government was not precluded from also prosecuting other related non-treaty offenses."¹²³ Therefore, the court found it permissible to use the requested evidence for a non-included (but not prohibited) offense.

Article 3 contains one of the greatest limitations with respect to information exchange. Paragraph 1 gives to the requested State the right to refuse to cooperate if: (1) such cooperation "is likely to prejudice its sovereignty, security or similar interest" or (2) the purpose of the request for information is to prosecute a person for an offense for which one has already been tried in a court of the requested State.¹²⁴ The United States negotiating team's technical analysis of the Treaty emphasized that this considerable loophole applies only to limited government interests.¹²⁵ "[B]oth Governments also recognize that the execution by Switzerland of a request which would require the disclosure of information normally protected by banking secrecy is not comprehended by the concept 'likely to prejudice its sovereignty,

116. Treaty, *supra* note 8, art. 2, para. 2, art. 6, para. 2(a).

117. *Id.* art. 2, para. 4.

118. The Treaty generally provides assistance for forgery. See *id.* at 2065.

119. PRESIDENTIAL MESSAGE, *supra* note 100, at 39.

120. Paragraph 1 states that the "Treaty shall not apply to: . . . c. investigations or procedures: (5) concerning violations with respect to . . . customs duties." Treaty, *supra* note 8, art. 2, para. 1.

121. 739 F.2d 702 (2d Cir. 1984).

122. *Id.* at 704.

123. *Id.* at 714.

124. Treaty, *supra* note 8, art. 3, para. 1.

125. See PRESIDENTIAL MESSAGE, *supra* note 100, at 39.

security or similar essential interest.'"¹²⁶ Despite the United States' assertion, an exchanged letter accompanying the Treaty states that banking secrets could, in exceptional circumstances, be an "essential interest" justifying the denial of assistance.¹²⁷ The Swiss policy for determining whether to divulge a secret requires the balancing of the individual's privacy interest against the requesting State's interest in justice and need for the evidence.¹²⁸ These criteria are not formulaic, and allow the State to refuse assistance merely by claiming the individual's interest outweighs the necessity for the evidence.¹²⁹

Article 4 prescribes the degree of action to be taken when a request is neither excluded by Article 2, nor refused under Article 3. The parties are on notice that their criminal procedures may not be available through the Treaty unless the requested State has a comparable procedure.¹³⁰

United States courts interpret the measures available under Article 4 to prohibit pronouncing foreign indictments upon suspects. In *In re Request from the Swiss Federal Department of Justice and Police*,¹³¹ United States prosecutors subpoenaed a witness, Bruno Giordano, to testify for a Swiss criminal investigation.¹³² Swiss authorities then asked the prosecutor, as a representative of the Swiss Government, to pronounce the Swiss indictment upon the witness when he appeared.¹³³ The district court found that the indictment would be similar to a United States arraignment, which Article 2 of the Treaty did not address.¹³⁴ The court added that the Treaty did not extend the jurisdiction of Swiss procedures to the United States,¹³⁵ nor could it allow the United States to compel an appearance without an arrest warrant.¹³⁶ The following month, a New Jersey district court rejected

126. *Id.* at 48.

127. *Id.* at 28-29 (interpretive letters between Albert Weitnauer, Ambassador of Switzerland, and Shelby Cullom Davis, Ambassador of the United States).

128. *Id.* at 48. Article 10 of the Treaty addresses the right to refuse to testify concerning matters protected by banking secrecy laws. See *infra* notes 157-61 and accompanying text.

129. The Treaty provides for remedial procedures to allow cooperation before the requested State refuses assistance. If possible, the requested State will provide assistance under conditions it feels are necessary to avoid any prejudicial impact. See Treaty, *supra* note 8, art. 3, para. 2.

130. Treaty, *supra* note 8, art. 4, para. 1.

131. 731 F. Supp. 490 (S.D. Fla. 1990).

132. *Id.* at 491.

133. *Id.*

134. *Id.* at 492.

135. *Id.*

136. 731 F. Supp. at 492.

the claim that the pronouncement of a Swiss indictment was a "proceeding" which allowed the use of the compulsory measures of Article 4.¹³⁷

While Article 4 may not include the application of a requesting State's criminal procedures, courts have interpreted it to include the freezing of assets. In *Barr v. United States Dep't of Justice*,¹³⁸ the court determined that:

[a] freeze of the assets of a criminal defendant is not specifically mentioned in the list. However, . . . Switzerland's legislation implementing the Treaty does authorize that measure. Thus, both the American government (as shown by its request in this case) and the Swiss government . . . believe that such a freeze is one of the mutual assistance measures embraced by the Treaty.¹³⁹

Further, Article 4 imposes the rule of dual criminality upon the offense in order to employ compulsory measures. To utilize compulsory measures, the acts or omissions described in the assistance request must first satisfy the elements of a criminal offense.¹⁴⁰ Second, the offense must not only be punishable under the requested State's law, but also listed in the Treaty's Schedule of Offenses.¹⁴¹

The Treaty provides that for unlisted offenses, a requesting State may use compulsory measures only at the requested State's discretion.¹⁴² This provision insures that the Schedule of Offenses is not exclusive, allowing the possibility that the requested State may offer broader assistance.

Paragraph 4 of Article 4 requires that the requested State deter-

137. *In re Request from L. Kasper-Ansermet*, 132 F.R.D. 622, 633-36 (D.N.J. 1990). The suspects to be indicted were Salvatore Giordano, Sr. and Salvatore Giordano, Jr., owners of the company involved in the same fraudulent scheme. The court emphasized that the primary purpose of the Treaty was in the area of cooperative evidence exchange, not participation in judicial proceedings. *Id.* at 635 (evaluating the intent of Article 29 of the Treaty).

138. 819 F.2d 25 (2d Cir. 1987).

139. *Id.* at 28.

140. Treaty, *supra* note 8, art. 4, para. 2.

141. *Id.* See PRESIDENTIAL MESSAGE, *supra* note 100, at 40. Offenses deemed worthy of compelled cooperation include: homicide, infliction of grievous bodily harm, threat of murder, kidnapping, child abandonment, rape, trafficking in women and children, robbery, burglary, embezzlement, extortion, certain types of fraud, bribery, forgery, perjury, bookmaking, arson, piracy, trafficking in or possession of drugs, poisons or weapons, and attempts to commit, conspiracy to commit, or participation in any of these acts. Treaty, *supra* note 8, at 2064-67.

Note, however, paragraph 2 allows for assistance in matters concerning gambling even though in some states such acts are not criminal. This is an exception to the dual criminality requirement. *Id.* art. 4, para. 2(b), 2066.

142. Treaty, *supra* note 8, art. 4, para. 3.

mine if the offense described in the request constitutes a crime under its own law.¹⁴³ The fact that the elements of a crime may be different in one State from another does not limit the Treaty. The requested State may ignore variations in offense definitions if the elements of a corresponding offense, as its law defines, are present.¹⁴⁴ Article 4 also encourages the requested State to invoke voluntary procedures to induce the production of the requested evidence, but not to punish failure to comply.¹⁴⁵ Assistance is advocated, but actual cooperation depends on the requested State's disposition. The inclusion of this voluntary assistance provision, although discretionary, further facilitates law enforcement.

Article 5 limits the Treaty's applicability and is the result of a clash between the United States and Switzerland over the extent to which each country can use exchanged information. The negotiators settled on the Swiss scheme, which limits the use of evidence to purposes related to the offense for which the requested State granted assistance.¹⁴⁶ However, this restriction is ineffective when evidence obtained for prosecution in a United States court becomes part of the public record and is thereby available for future use.¹⁴⁷ In addition, Article 5 employs a timesaving provision allowing previously obtained evidence to be used against the same suspects for a subsequent case when the Treaty would have required the requested State to provide assistance or the requested State would have chosen to provide it.¹⁴⁸

United States case law has also expanded the use of requested information. In *Melridge, Inc. v. Heublein*,¹⁴⁹ the court held that Article 5, paragraph 1, allows a bankruptcy trustee, who the Swiss con-

143. Treaty, *supra* note 8, art. 4, para. 4.

144. *Id.* For example, the federal government's definition of fraud includes only fraudulent acts that involve subject matter within the jurisdiction of the federal government. PRESIDENTIAL MESSAGE, *supra* note 100, at 66. In Switzerland, fraud is always a crime. Under Article 4, the Treaty allows assistance regardless of whether Swiss law has a comparable jurisdiction-establishing element. *Id.*

145. PRESIDENTIAL MESSAGE, *supra* note 100, at 41.

146. Treaty, *supra* note 8, art. 5, para. 1.

147. PRESIDENTIAL MESSAGE, *supra* note 100, at 24-26 (interpretive letters between Albert Weitnauer, Ambassador of Switzerland, and Shelby Cullom Davis, Ambassador of the United States).

148. Treaty, *supra* note 8, art. 5, para. 2(a)-(c). A State may not, however, grant evidence to be used in cases against accomplices upon a renewed request. For example, if the initial evidence had been banking information of the principle offender, Switzerland would not provide the same information for the prosecution of an accomplice. Even under the tenets of paragraph 2, Switzerland may not give its approval to the use of that evidence in the second trial.

149. 125 B.R. 825 (Bankr. D. Or. 1991).

sider to be a government authority, to use the Treaty to obtain a debtor's banking information when the trustee suspects that the debtor is violating a court order.¹⁵⁰ Thus, the Treaty may provide evidence for a civil contempt charge even though the initial court involvement was not criminal in nature. Furthermore, this evidence is also available in any related bankruptcy proceedings, even those commenced before the court order or other circumstances giving rise to an assistance request.

2. Organized Crime Provisions

Articles 6 through 8 specify certain conditions in which a requested State will grant assistance even though the Treaty would not have otherwise included these exceptional offenses.¹⁵¹ These articles establish that cooperation is warranted when the requested information satisfies conditions related to the fight against organized crime. Articles 6 through 8 are beneficial because they provide for cooperation when dual criminality is non-existent,¹⁵² and allow assistance for tax violations when certain conditions exist.¹⁵³ The extent to which this paragraph increases the Treaty's use is not of primary concern. The inclusion of provisions such as the organized crime-tax evasion exception are extremely convenient and beneficial to overall extraterritorial enforcement of United States law, especially when there is insufficient evidence to prosecute in the United States.¹⁵⁴ However, this added usefulness is limited since the requested State has the discretion to refuse assistance.¹⁵⁵

3. Obligations of the Requested State

Article 9 stipulates that a request shall be performed under the laws of the requested State, as though the criminal committed the offense in that jurisdiction.¹⁵⁶ Although this provision limits the tools

150. *Id.* at 827-28.

151. PRESIDENTIAL MESSAGE, *supra* note 100, at 43.

152. Treaty, *supra* note 8, art. 7, para. 1.

153. *Id.* art. 7, para. 2.

154. A major requirement of Article 7 is that "the requesting State reasonably conclude that the securing of the information or evidence is not possible without the cooperation of the authorities in the requested State, or that it would place unreasonable burdens on the requesting State or a state or canton thereof." *Id.* art. 7, para. 3.

155. *Id.* art. 8, para. 2.

156. *Id.* art. 9, para. 1. The mere fact that the requesting State executes requests in accordance with the requested State's law does not mean that the only redress for a party injured by the execution of the request is also under the laws of the requested State. *Cardenas v.*

available to the requesting State, it insures that the requested State remains within the bounds of its own laws.

Article 10 states that a person compelled to testify or produce evidence for a proceeding in a requesting State must do so only in accord with the customs of the requested State.¹⁵⁷ That person may refuse to comply if he can do so lawfully in either State.¹⁵⁸ This provision allows a foreign witness to employ testimonial and production excuses in proceedings not typically recognized as valid. The United States agreed to this limitation because banking secrets did not fall into this category.¹⁵⁹

Article 10 also requires that Switzerland release regularly protected banking information of parties not accused of committing a crime if: (1) the information relates to a serious offense, (2) the information is important to obtain or prove facts that are substantially significant, and (3) the information is otherwise unavailable.¹⁶⁰ This provision was an important victory for the United States delegation because it provides important collateral evidence upon the satisfaction of easily fulfilled conditions.¹⁶¹

4. Obligations of the Requesting State

The Swiss delegation's concern over maintaining the privacy of bank records for persons unassociated with the commission of the crime led to the inclusion of Article 15. It states that such information shall be kept from public disclosure if the requested State so desires and it is constitutionally possible.¹⁶² The United States' constitutional right to a public trial guaranteed by the Sixth Amendment¹⁶³ creates an anomaly. The United States Supreme Court has

Smith, 733 F.2d 909, 919 (D.C. Cir. 1984). For further discussion of the right to judicial review see *infra* notes 200-06 and accompanying text.

157. Treaty, *supra* note 8, art. 10, para. 1.

158. *Id.*

159. An interpretive letter between Ambassadors of the United States and Switzerland insures that Swiss banking secrecy is not an area in which a person can claim a testimonial or production privilege. See PRESIDENTIAL MESSAGE, *supra* note 100, at 48.

160. Treaty, *supra* note 8, art. 10, para. 2.

161. As stated in the United States' technical analysis of the Treaty:

Paragraph 2 strikes a balance between the interest of the United States in obtaining broad assistance in connection with important criminal cases and the Swiss interest in not departing from banking secrecy except where the reasons for doing so are compelling from the point of view of international cooperation in the fight against crime.

PRESIDENTIAL MESSAGE, *supra* note 100, at 48. *But see* Treaty, *supra* note 8, art. 10, para. 3.

162. Treaty, *supra* note 8, art. 15.

163. U.S. CONST. amend. VI.

found an absolute right of public access to testimonial evidence, but a court may protect documentary evidence through a protective order upon Switzerland's request to keep the evidence private.¹⁶⁴ Article 13 prohibits the use of witness testimony in a subsequent proceeding against him if the court did not initially warn the witness of his right not to testify.¹⁶⁵ United States prosecutors, however, can combine the Sixth Amendment and the Treaty provision to make information at the initial trial available at the subsequent trial.

5. Documents, Records, and Articles of Evidence

Article 16 instructs the requested State to provide court judgments, documents, records, and articles of evidence in court files to the requesting State as if it were performing the same function in its own State.¹⁶⁶ Court decisions are typically public records,¹⁶⁷ but the tender of file evidence, which is not always accessible, benefits both the United States and Switzerland in their efforts to convict using all relevant information. However, the use of file evidence is limited in a closed case, or when the central authority of the requested State permits its disclosure.¹⁶⁸

For the most part, Articles 17 and 18 mitigate the uncertainty surrounding admissibility. Article 17 requires that proffered documents be unedited, and prefers the originals.¹⁶⁹ Article 18 allows the authentication of business documents without requiring the record custodian to testify.¹⁷⁰ This is advantageous to both countries because it eliminates the need for costly in-court authentication.

164. PRESIDENTIAL MESSAGE, *supra* note 100, at 52. For further explanation of the defendant's right to public trial and the conflict between the United States Constitution and the Treaty see *id.* at 30-32 (discussing the contents of the interpretative letters between the ambassadors of each country).

165. Treaty, *supra* note 8, art. 13. See also PRESIDENTIAL MESSAGE, *supra* note 100, at 51.

166. Treaty, *supra* note 8, art. 16, para. 1(a), (b).

167. PRESIDENTIAL MESSAGE, *supra* note 100, at 52.

168. Treaty, *supra* note 8, art. 16, para. 2.

169. *Id.* art. 17.

170. PRESIDENTIAL MESSAGE, *supra* note 100, at 53. The Treaty closely resembles 28 U.S.C. § 1732 (1991) (Federal Rule of Evidence 803(6)). The Treaty requires that the requested authority determine, under oath:

[I]f [the document] is genuine and if it was made as a memorandum or record of an act, transaction, occurrence, or event, if it was made in the regular course of business and if it was the regular course of such business to make such document at the time of the act, transaction, occurrence, or event recorded therein or within a reasonable time thereafter.

Treaty, *supra* note 8, art. 18, para. 1.

Article 19 establishes the authenticity of official documents by requiring that the applicable authority attest and seal them.¹⁷¹ This provision is extremely beneficial to jurisdictions that have relaxed admissibility rules because it recognizes the requesting State's law as superior to the formalities of the Treaty. Thus, a document may be admissible under local rules although it did not meet the requirements of Article 19.¹⁷²

Article 20 allows a requesting State to take advantage of the procedural devices available in the requested State. If necessary for the admissibility of evidentiary material, the requested State may use compulsory measures to force a person's appearance before representatives of the requesting State and to compel the production of evidence or testimony.¹⁷³ This provision does not demand such measures, but permits United States officials to employ them outside their jurisdiction.¹⁷⁴

6. Service for Requesting State and Related Provisions

Like Article 10,¹⁷⁵ Article 25 grants a witness from the requested State the right to refuse to testify or produce evidence if he has the lawful right to do so in either the requesting or requested State.¹⁷⁶ The requesting State concedes the right to refuse under either States' laws in return for the assistance the other State provides.¹⁷⁷ This provision may detrimentally impact the United States' prosecutorial efforts since it gives the witness the laws of two nations behind which to hide. The Treaty further limits the availability of evidence by allowing a witness in the United States to refuse to produce evidence or give testimony regarding a non-involved party's banking information unless the conditions of Article 10 are met.¹⁷⁸ This provision precludes yet additional evidence from United States proceedings; it is,

171. Treaty, *supra* note 8, art. 19, para. 1.

172. PRESIDENTIAL MESSAGE, *supra* note 100, at 55.

173. Treaty, *supra* note 8, art. 20, para. 1.

174. See PRESIDENTIAL MESSAGE, *supra* note 100, at 56; *supra* notes 37-69 and accompanying text (passive judicial assistance discussion).

175. See *supra* notes 157-61 and accompanying text.

176. Treaty, *supra* note 8, art. 25, para. 1.

177. PRESIDENTIAL MESSAGE, *supra* note 100, at 59.

178. Treaty, *supra* note 8, art. 25, para. 2. These conditions include: (1) the request itself must "concern . . . the investigation or prosecution of a serious offense;" (2) the disclosure is important "for obtaining or proving facts" that are greatly needed; (3) the United States has made "reasonable but unsuccessful efforts to obtain the evidence or information in other ways." *Id.* art. 10, para. 2(a)-(c).

however, consistent with Article 10. Furthermore, the United States may not appropriate evidence that the Swiss government may suppress. Article 25 also requires that the requested State inform the requesting State whether the witness has validly asserted his right to refuse in the requesting State.¹⁷⁹ The only redeeming feature of this provision is that the requesting State has the last word. After considering the requested State's opinion on the claimed privilege, the requesting State may make its own determination on whether the conditions of Article 10 are met.¹⁸⁰

7. General Procedures

Articles 28 through 35 establish the procedures each country must follow when requesting assistance. Article 28 provides that the central authority of the requesting State approve and forward requests generated by the courts and other authorities under its control.¹⁸¹ Although this provision provides for consistent application, the added procedural step of endorsement may prevent a state or canton from having the requested State consider its request.¹⁸²

Article 31 requires the requested State to inform the requesting State when it believes that the request does not comply with the Treaty.¹⁸³ The authority or court required to execute the request must exercise all powers available to it when executing the request.¹⁸⁴ As a result, United States investigators wield the power of Swiss authority, while Swiss investigators may employ United States authority.¹⁸⁵

In 1990, a federal district court attempted to define the term "all powers available." In *In re Request from L. Kasper-Ansermet*,¹⁸⁶ the

179. *Id.* art. 25, para. 3.

180. *Id.*

181. *Id.* art. 28, para. 2.

182. Negotiators qualified this requirement, claiming the approval process merely insures that the request has proper form and content. PRESIDENTIAL MESSAGE, *supra* note 100, at 60. The central authority, however, also may prioritize which requests get sent. *Id.*

183. Treaty, *supra* note 8, art. 31, para. 1. Unfortunately, the provision does not mandate preserving the evidence requested, while awaiting a corrected request. PRESIDENTIAL MESSAGE, *supra* note 100, at 61.

184. Treaty, *supra* note 8, art. 31, para. 2. This power includes the issuance of procedural documents compelling the production of evidence and giving of testimony. *See id.* art. 31, para. 3.

185. The Treaty expressly provides Switzerland with the use of grand juries in the United States. *Id.* art. 31, para. 2. The Treaty also allows the requested State, with the requesting State's consent, to commission private parties to execute a request. *Id.* art. 31, para. 4.

186. 132 F.R.D. 622 (D.N.J. 1990).

defendants argued that the use of a civil subpoena to compel testimony for a criminal proceeding was impermissible under the Treaty, and that the prosecutor needed an analogous criminal summons.¹⁸⁷ The court held that although a prosecutor may request a grand jury subpoena, Article 31 allows courts to use *their* authority to compel testimony, and a civil subpoena is the court's procedural method for doing so.¹⁸⁸

8. Notice and Review of Determinations

Notice requirements of the requested State are set out in Article 36. When executing a request, the requested State is required to notify: (a) any person from whom the requesting State seeks testimony or evidence, (b) any criminal suspect or defendant of the investigation living in that State (but only if the requesting State's laws require notice for admissibility and the requesting State asks for such notice), and (c) any defendant in a criminal proceeding in the requesting State if the requested State's law requires it.¹⁸⁹ The underlying purpose of this provision is to provide a suspect or defendant in a United States criminal proceeding the opportunity to be present at the Swiss admissibility hearing, in order to satisfy United States' constitutional requirements.¹⁹⁰ Although in the United States, the defendant may assert his constitutional right to be present,¹⁹¹ the admissibility of evidence does not turn on his presence.¹⁹² Therefore, the failure to satisfy (b) is never fatal.

When authenticating a business document under Article 18, Article 36(c) does not necessarily require either State to notify the defendant or suspect that it is gathering such information.¹⁹³ Apparently, the defendant or suspect must discover this on his own. However, the only way a suspect could anticipate the authentication hearing is if the requesting State already asked him for the information and he refused, or the custodian of the documents warned him

187. *Id.* at 626.

188. *Id.* at 627.

189. Treaty, *supra* note 8, art. 36.

190. See PRESIDENTIAL MESSAGE, *supra* note 100, at 63. This policy of limited redress also applies to suspected violations of Article 5. If a party believes that the prosecution used validly obtained evidence for an additional purpose, such as a different investigation or proceeding, that person would not have the right to the typical forms of judicial relief. *Id.* at 43.

191. See *id.* at 55.

192. See *id.*

193. See Treaty, *supra* note 8, art. 36.

that the information was requested.¹⁹⁴ In *United States v. Davis*,¹⁹⁵ the defendant argued that the United States court erroneously admitted certain evidence because the government failed to inform him of the Swiss authentication hearing and thus violated his Sixth Amendment right to confrontation.¹⁹⁶ The court found that the United States was neither explicitly nor implicitly required to notify the defendant.¹⁹⁷ The court concluded that under the Treaty only Switzerland may be required to notify him of the Swiss authentication proceeding.¹⁹⁸ The court determined that the gap in the notice requirement was specifically erected by the negotiators to "simplify and expedite the procedures for obtaining information."¹⁹⁹

Article 37 establishes important limitations on the right of a party seeking redress under the Treaty. Paragraph 1, with limited exceptions, prohibits a party from suppressing or excluding evidence, or obtaining judicial relief in the United States by asserting restrictions expressed in the Treaty.²⁰⁰ This provision makes the Treaty appealable pursuant to its own terms. "Enforcement of the provisions of the Treaty is a matter for the Contracting Parties and does not give rise to any right on the part of defendants, subjects, witnesses or other persons to obtain judicial relief except as specifically provided therein."²⁰¹ This condition speeds prosecution and limits the ability to appeal judgments, except in instances when a court may have infringed upon a substantial procedural right.

This limited right of appeal has been litigated frequently, but un-

194. In *Barr v. United States Dep't of Justice*, 819 F.2d 25 (2d Cir. 1987), one of the defendant's Swiss banks notified him of the query made on behalf of the United States shortly after the request, and the defendant retained counsel to contest the freezing of his account. Unfortunately, his appeal was rejected by the Swiss courts. *Id.* at 26.

195. 767 F.2d 1025 (2d. Cir. 1985).

196. *Id.* at 1027.

197. *Id.* at 1030.

198. *Id.* at 1031. See also Treaty, *supra* note 8, art. 36.

199. *United States v. Davis*, 767 F.2d at 1031.

200. Treaty, *supra* note 8, art. 37. para. 1. Paragraph 1 allows an injured party, however, to raise rights granted under other areas of the Treaty. These areas include:

(a) Searches and Seizure (Article 9:2); (b) privileges in connection with requested testimony (Article 10:1); (c) restrictions on use of testimony (Article 13); (d) rights to question the genuineness of documents furnished pursuant to the Treaty (Article 18:7); (e) limitations on compelling testimony in the requesting State (Article 25:1); (f) limitations in the Treaty on the transfer of persons (Article 26); and (g) provisions in the Treaty on safe conduct of witnesses (Article 27)

Treaty, *supra* note 8, arts. 9, 10, 13, 18, 25, 26, 27. See also PRESIDENTIAL MESSAGE, *supra* note 100, at 63-64.

201. PRESIDENTIAL MESSAGE, *supra* note 100, at 63.

successfully. As the Court of Appeals for the District of Columbia Circuit held in *Cardenas v. Smith*,²⁰² Article 37 may "indeed short-circuit any claims Cardenas makes that stem from the Treaty. It does not follow that the Treaty, as a superior law of the land, precludes any actions premised on the Constitution or other statute."²⁰³ The court reasoned that Cardenas may not have had a valid claim, but the district court had overstepped the limits of the Treaty when it claimed the Treaty prevented her from raising defenses unrelated to the Treaty. Since *Cardenas v. Smith*, United States courts have repeatedly held that an alleged injured party may not demand judicial review of either parties' error in application or execution of a Treaty provision.²⁰⁴ As stated below, the injured party must seek redress from the other signatory.

Paragraph 2 of Article 37 establishes that the decisions of Swiss authorities concerning requests for evidence shall be governed by Swiss law.²⁰⁵ Paragraph 3 provides a remedy to the person who believes a State failed to comply with the Treaty. That person may demonstrate to the central authority of one State the suspected breach by the other State, and the notified State may take steps to resolve the difficulty.²⁰⁶ This appeal process is an injured party's only remedy to infringements that paragraph 1 does not except. Such a route is beneficial to prosecution and investigative authorities because the appeals process is handled by an entirely different body that has no authority to halt their investigation. Yet for the very same reason, this means of appeal is disadvantageous to the injured party.

202. 733 F.2d 909 (D.C. Cir. 1984).

203. *Id.* at 918.

204. See *United States v. Johnpoll*, 739 F.2d 702, 714 (2d Cir. 1984), *cert. denied*, 469 U.S. 1025 (1985) (stating that Article 37 expressly bars the suppression or exclusion of the type of evidence furnished in the case); *United States v. Davis*, 767 F.2d 1025, 1029 (2d Cir. 1985) (stating defendant had no standing to raise the purported Treaty violation before the court); *Barr v. United States Dep't of Justice*, 645 F. Supp. 235, 237 (E.D.N.Y. 1986), *aff'd*, 819 F.2d 25 (2d Cir. 1987) (stating Article 37 affords no right to private persons to obtain judicial relief except as to matters not relevant to that proceeding); *Melridge, Inc. v. Heublein*, 125 B.R. 825, 828 (Bankr. D. Or. 1991) (stating that defendant lacked standing to assert violations of the Treaty).

205. Treaty, *supra* note 8, art. 37, para. 1. In *Cardenas v. Smith*, 733 F.2d 909 (D.C. Cir. 1984), the court noted that it was aware that Cardenas had filed suit in Switzerland to prevent the forfeiture of her bank account contents to the Swiss government. *Id.* at 912. In *Barr*, Barr filed an objection and an appeal to the Swiss authorities concerning the freezing of his funds. *Barr*, 819 F.2d at 26.

206. Treaty, *supra* note 8, art. 37, para. 3.

9. Final Provisions

Article 38 declares that the Treaty does not detract from procedures available under other treaties or laws of the contracting States.²⁰⁷ The States are still at liberty to use their own laws to conduct investigations and criminal proceedings.²⁰⁸ However, the Treaty supercedes inconsistent local law.²⁰⁹ These provisions mean that the Treaty procedures are wholly in addition to pre-existing evidence gathering methods. In *In re Sealed Case No. 87-5256*,²¹⁰ the court rejected the witness's argument that the Treaty provides the exclusive method for obtaining records maintained in or generated in Switzerland and, therefore, obtaining documents by subpoena was invalid.²¹¹ The court discounted that claim by explaining that according to such reasoning, investigators using traditional domestic methods could never obtain copies of Swiss documents which are located in a defendant's home in the United States.²¹²

Article 39 establishes guidelines for consultation and arbitration. The central authorities may correspond with each other as necessary concerning interpretation and use of the Treaty.²¹³ Parties are to refer disputes that are unresolved by mutual agreement of the parties, to arbitration²¹⁴ presided by a three person board.²¹⁵ This provision, although not unique,²¹⁶ provides for a system of dispute resolution independent of either State's law and is dedicated to the Treaty's terms. Furthermore, decisions of the arbitration board are binding on the parties.²¹⁷ As a result, comity is likely because, instead of terminating relations when a disagreement arises, the parties understand that by agreeing to this provision both have agreed to work out the dispute and continue mutual assistance.

207. *Id.* art. 38, para. 1.

208. *Id.* art. 38, para. 2.

209. *Id.* art. 38, para. 3. Furthermore, this Treaty does not encompass the type of information contemplated under the Treaty on the Avoidance of Double Taxation with Respect to Taxes on Income. *Id.* art. 38, para. 4.

210. 832 F.2d 1268 (D.C. Cir. 1987).

211. *Id.* at 1283.

212. *Id.*

213. Treaty, *supra* note 8, art. 39, para. 1.

214. *Id.* art. 39, para. 2.

215. *Id.* art. 39, para. 2. By granting authority to the president of the International Court of Justice to select the members of the arbitration board, the Treaty resolves potential board selection conflicts. See *id.* art. 39, paras. 3, 4.

216. "Such provisions are common in technical agreements or treaties . . ." PRESIDENTIAL MESSAGE, *supra* note 100, at 65.

217. Treaty, *supra* note 8, art. 39, para. 7.

Article 40 defines the terms used throughout the Treaty. The only term worthy of mention is "articles of evidence," which is defined as all evidence whether admissible or not.²¹⁸

Although the above discussion is not a complete analysis of each article of the Treaty, the coverage given does address issues of primary concern in evidence gathering. This Treaty, although twenty years old, serves as a template for future mutual assistance treaties because no treaty since has so meticulously considered so many aspects of international cooperation in criminal matters.

V. MUTUAL ASSISTANCE TREATIES IN THE CARIBBEAN

A. Background

The Swiss Treaty was not the only treaty the United States was compelled to negotiate. In effect, the presence of the Swiss Treaty forced criminals to different bank secrecy countries, and thus, created a need for other mutual assistance treaties.

The development of Caribbean nations into financial centers was facilitated, in part, by the financial secrecy offered to their bank customers. This led the United States to negotiate a series of agreements seeking judicial assistance in criminal matters.²¹⁹ These efforts began in the early 1980s and are not yet complete. The State Department obtained an agreement from the United Kingdom and the government of the Cayman Islands to assist the United States in its fight against drug trafficking.²²⁰ Interestingly, although the Cayman Islands government has agreed to assist the United States, the United States has no reciprocal obligation.²²¹ In consideration for its unilateral assistance, however, the Cayman Islands' government received a promise from the United States that the agreement would be the exclusive mechanism by which the United States could obtain evidence located in the Cayman Islands.²²²

218. *Id.* art. 40, para. 3. For the entire list, see *id.* para. 1-10.

219. Mutual Legal Assistance Treaty Concerning the Cayman Islands, S. REP. NO. 8, 101st Cong., 1st Sess. 1 (1989) [hereinafter Report on Cayman Islands].

220. Agreement Concerning Obtaining Evidence from the Cayman Islands with regard to Narcotics Activities, July 26, 1984, U.K.-U.S., 24 I.L.M. 1110 [hereinafter Cayman Islands Agreement].

221. See *id.* § 1.

222. *Id.* § 6; Report on Cayman Islands, *supra* note 219, at 3. This Agreement's applicability was extended to include Turks and Caicos Islands on September 18, 1986, Anguilla on March 1, 1987, the British Virgin Islands on April 14, 1987, and Montserrat on May 14, 1987. Agreement Extending the Agreement of July 26, 1984, concerning the Cayman Islands and

The Cayman Island Agreement was to serve as a prelude to a more formal treaty. Initially, however, the Cayman government used the Agreement to prevent further progress. Section 7 of the Agreement binds the United States, the United Kingdom and the Cayman Islands to negotiate a law enforcement treaty.²²³ However, section 10 allows the Agreement to be extended beyond its stated expiration date.²²⁴ Although the nations did negotiate the Treaty Concerning the Cayman Islands and Mutual Assistance in Criminal Matters²²⁵ ("Cayman Islands Treaty"), the Cayman Islands government took nearly five years to ratify it,²²⁶ most likely because it favored the terms in the Agreement over those of the Treaty.

B. Analysis of the Cayman Islands Agreement and Treaty

Although the Treaty has entered into force, examining the Agreement as well as the Treaty reveals issues all negotiators and drafters of mutual assistance treaties should strongly consider.

1. The Cayman Islands Agreement

Improving on its Swiss counterpart, the Cayman Islands Agreement broadly defined covered offenses. Section 2 required assistance on "all offences or ancillary civil or administrative proceedings taken by the United States Government or its agencies connected with, arising from, related to, or resulting from any narcotics activity" covered

Narcotics Activities, Feb. 27, 1990, U.K.-U.S., Hein's No. KAV 2912 [hereinafter Extension Agreement].

223. Cayman Islands Agreement, *supra* note 220, § 7.

224. *Id.* § 10.

225. Treaty Concerning the Cayman Islands and Mutual Assistance in Criminal Matters, July 3, 1986, U.K.-U.S., 26 I.L.M. 536 (1987) [hereinafter Cayman Islands Treaty]. Anguilla, the British Virgin Islands, and Turks and Caicos Islands agreed to extend the Treaty's applicability to their territories on November 9, 1990. Agreement Extending the Applicability of the Treaty of July 3, 1986, concerning the Cayman Islands relating to mutual assistance in criminal matters, to Anguilla, the British Virgin Islands, and Turks and Caicos Islands, Nov. 9, 1990, U.K.-U.S., Hein's No. KAV 2762. On April 26, 1991, Montserrat agreed to extend the Treaty's applicability to its territory. Agreement Extending the Applicability of the Treaty of July 3, 1986, concerning the Cayman Islands relating to mutual assistance in criminal matters, to Montserrat, Apr. 26, 1991, U.K.-U.S., Hein's No. KAV 2880.

226. The United States Senate advised and consented to ratification of the Cayman Islands Treaty on January 3, 1989. Report on Cayman Islands, *supra* note 219, at 51. As of February 27, 1990, the Cayman Islands had not ratified its treaty. Extension Agreement, *supra* note 222. A State Department letter to the President, dated September 26, 1991, refers to the Cayman Islands Treaty as "in force." Treaty on Mutual Legal Assistance in Criminal Matters, July 7, 1989, Jam.-U.S., S. TREATY DOC. NO. 16, 102d Cong., 1st Sess. III (1989) [hereinafter Jamaica Treaty].

by the Single Convention on Narcotic Drugs of 1961.²²⁷ Not only did this language include offenses related to drug offenses, but a requirement of dual criminality was nonexistent. Therefore, practically any crime for which a United States prosecutor requested evidence fell under the Agreement.

Compliance with a Cayman Islands order to produce evidence was ensured by section 3.2.b. Refusal to produce documentary information rendered the requested party liable to substantial fine and imprisonment.²²⁸ Furthermore, officials could seize the requested evidence²²⁹ and make it available to the prosecution.

Section 6 significantly hindered evidence collection. It prohibited the use of federal subpoenas by the United States to obtain evidence otherwise covered under the Agreement and located in the Cayman Islands, without the consent of the United Kingdom or the Cayman Islands.²³⁰ This provision basically killed the subpoena power of the federal courts relied on in cases such as *In re Bank of Nova Scotia*. It is no wonder the Cayman Islands government continued to extend this Agreement and stall ratification of the more expansive treaty.

2. The Cayman Islands Treaty

As stated above, the Cayman Islands government eventually ratified the Cayman Islands Treaty and ceased using the Cayman Island Agreement. The Cayman Islands Treaty is a prime example of good intentions never realized. The United States' use of the subpoena power caused the Cayman Islands to tighten its banking secrecy laws and to discourage unauthorized disclosures.²³¹ Negotiations failed to relax the Cayman Islands government's stance or facilitate judicial interaction. Many of the provisions in the Cayman Islands Treaty are more restrictive than those of the Swiss Treaty.²³²

Article 3 of the Cayman Islands Treaty permits authorities to deny assistance if they certify that the request is contrary to the public interest of the State.²³³ The requested State exercises its own discre-

227. Cayman Islands Agreement, *supra* note 220, § 2. The Single Convention of Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1409.

228. *Id.* § 3.2.b.

229. *Id.*

230. *Id.* § 6.

231. Report on Cayman Islands, *supra* note 219, at 3.

232. *Id.* at 1.

233. Cayman Islands Treaty, *supra* note 225, art. 3, para. 1.

tion, and no criteria are provided to aid the determination of what is contrary to public interest. A redeeming provision asserts that a State may provide assistance subject to conditions which permit it while avoiding the feared harm.²³⁴

Article 7 of the Cayman Islands Treaty prohibits the subsequent use of information supplied by a State. Although the Swiss Treaty negotiators assumed free use of information made public,²³⁵ the Cayman Islands Treaty expressly limits subsequent use of evidence to a confined group of situations.²³⁶

The United States took another step backward when it agreed to Article 14 of the Cayman Islands Treaty. Instead of establishing a requisite level of suspicion for taking foreign action,²³⁷ as is done in the Swiss Treaty, the United States submits to the Cayman Islands' reasonable suspicion requirement.²³⁸

Article 17 is another provision that has hindered United States' efforts to obtain evidence. The United States agreed that the Cayman Islands Treaty would be the first method for obtaining foreign evidence.²³⁹ This provision, however, stops short of the earlier Agreement by allowing alternative means of evidence gathering after a party has first attempted to acquire the information under the Treaty.²⁴⁰ Nonetheless, requiring prosecutors to initially comply with the formalities of the Cayman Islands Treaty is an impediment to swift and effective law enforcement.

The provisions of the Cayman Islands Treaty are not entirely weaker than those of the Swiss Treaty. Under Article 16, either State may notify the other State of the presence of criminal offense proceeds located in its territory.²⁴¹ This, coupled with the express forms of assistance available listed under Article 1, effectively codifies the authority to freeze the assets of a criminal enterprise.²⁴² These provisions prevent defendants from contesting freezing actions similar to

234. *Id.* art. 3, para. 4.

235. *See supra* text accompanying notes 162-65.

236. *See* Cayman Islands Treaty, *supra* note 225, art. 7, para. 4. Furthermore, information furnished must be kept confidential. *Id.* art. 7, para. 2.

237. *See supra* text accompanying notes 106-07.

238. *See* Treaty with the United Kingdom Concerning the Cayman Islands Relating to Mutual Assistance in Criminal Matters, Message from the President, S. TREATY DOC. NO. 8, 100th Cong., 1st Sess. VIII (1987).

239. Cayman Islands Treaty, *supra* note 225, art. 17.

240. *Id.*

241. *Id.* art. 16, para. 1.

242. *Id.* art. 1, para. 2(g).

*Barr v. United States Dep't of Justice.*²⁴³

3. Other Tax Haven Country Treaties

The United States has recently concluded two other treaties with Caribbean nations. The United States and the Bahamas signed the Treaty with the Bahamas on Mutual Assistance in Criminal Matters²⁴⁴ ("Bahamas Treaty") on August 18, 1987, and on July 7, 1989, the United States and Jamaica signed the Treaty with Jamaica on Mutual Legal Assistance in Criminal Matters²⁴⁵ ("Jamaica Treaty"). United States Presidents Ronald Reagan and George Bush, respectively, told the Senate, upon request for ratification, that the treaties would serve as valuable tools in the battle against drug cartels and white collar crime.²⁴⁶

The Bahamas Treaty imposes the requirement of dual criminality when it defines offenses worthy of assistance, but relaxes the requirement for certain felonies.²⁴⁷ Also, the Bahamas Treaty expressly provides for the freezing of assets related to narcotic offenses.²⁴⁸ The standard discretionary loophole for requests contrary to a State's public interest is modified by allowing conditional assistance.²⁴⁹ Much like the Cayman Islands Treaty, information admitted into evidence in a public proceeding is available for subsequent use only if certain conditions exist.²⁵⁰ The final two provisions represent the only significant advances that the Bahamas Treaty makes over the Swiss Treaty. Either State may inform the other if it becomes aware of criminal proceeds present in its jurisdiction.²⁵¹ Also, United States negotiators did not repeat the problem of the Cayman Islands in that the Bahamas Treaty is not the exclusive means of obtaining assistance.²⁵²

The Jamaica Treaty's major improvement over prior agreements is its abandonment of dual criminality. "Assistance shall be rendered . . . under the laws of the Requesting State and regardless of whether

243. See *supra* text accompanying notes 138-39.

244. Treaty on Mutual Assistance in Criminal Matters, Aug. 18, 1987, U.S.-Bah., S. TREATY DOC. NO. 17, 100th Cong., 1st Sess. 1 [hereinafter Bahamas Treaty].

245. Jamaica Treaty, *supra* note 226.

246. See Bahamas Treaty, *supra* note 244, at III; Jamaica Treaty, *supra* note 226, at III.

247. Bahamas Treaty, *supra* note 244, art. 2.

248. *Id.* art. 20. The Bahamas Treaty further provides assistance in hearings which could result in the forfeiture of drug proceeds and instrumentalities. *Id.* art. 2, para. 3(c).

249. See *id.* art. 3.

250. See *id.* art. 8.

251. *Id.* art. 14.

252. *Id.* art. 18.

. . . prohibited under the laws of the Requested State”²⁵³ However, like the Cayman Islands and Bahamas Treaties, the discretionary denial provision includes a conditional assistance option.²⁵⁴ The State Department negotiators finally received unlimited and unrestricted use of treaty evidence made public.²⁵⁵ Finally, like the Bahamas Treaty, the Jamaica Treaty provides for assistance in locating and seizing the proceeds of crime,²⁵⁶ and its provisions are not the exclusive means for obtaining foreign evidence.²⁵⁷

VI. RECOMMENDATIONS

Cooperation between the United States and its treaty partners can be improved if the countries fully embrace the treaty terms. Any resultant improvements also may benefit future mutual assistance agreements with other nations. Many of the changes that benefit the United States are little more than concessions attained in negotiations. These improvements, such as unlimited use of testimony in subsequent proceedings, removing the requirement of dual criminality, allowing the subsequent use of evidence made public or expanding the list of included offenses, are provisions that successful negotiators may procure. This Comment has familiarized the reader with the strengths and weaknesses of the various treaty provisions. Obtaining every substantive edge possible must be a primary negotiation objective. Therefore, negotiators must focus on mechanisms that will ensure they reach this objective.

A. Mechanisms in Negotiating

To enhance the probability of reaching a favorable agreement, a country may approach negotiations in a variety of ways. One method that may prove successful requires that a party direct its efforts toward the achievement of a very specific goal. For instance, the United States entered into negotiations with Switzerland with the express de-

253. Jamaica Treaty, *supra* note 226, art. 1, para. 3.

254. *Id.* art. 2.

255. *Id.* art. 8, para. 4. Inclusion of such a provision goes one step further than the understanding between the United States and Switzerland concerning public records. The Swiss Treaty allowed subsequent use if the now public information was usable in the requested State. Treaty, *supra* note 8, art. 5. The Jamaica Treaty allows use regardless of the requested State's policy on use of public information. Jamaica Treaty, *supra* note 226, art. 8, para. 4. See PRESIDENTIAL MESSAGE, *supra* note 100, at 24-26.

256. Jamaica Treaty, *supra* note 226, art. 20.

257. *Id.* art. 19.

sire of prosecuting organized crime figures.²⁵⁸ Although Switzerland refused to include general tax offenses in the Treaty, the United States' persistence to secure an agreement to hamper organized crime resulted in the adoption of Articles 6 through 8, which require assistance in such matters.²⁵⁹

Another way a country can insure that it obtains the terms it desires in an international agreement is to enhance its negotiating leverage by using its economic power. The United States holds a commanding position in the international economic community, and flexing its economic muscle often forces negotiating partners to concede to otherwise unwelcome demands. Negotiators must remember, however, that no party is required to continue negotiations and high-pressure tactics may not only end the discussions, but may weaken or terminate existing cooperation. Measures the United States can employ include refusing economic or humanitarian aid, turning world public opinion against uncooperative nations,²⁶⁰ or sanctioning uncooperative nations.²⁶¹

Furthermore, the United States government can indirectly influence cooperation by employing domestic measures that dissuade foreign intercourse. Money launderers often obtain "clean" money by obtaining loans from foreign banks, and securing the loans with the "dirty" money. By creating a rebuttable presumption that all loans from identified tax or bank security havens are backed by a taxpayer's own funds, the Internal Revenue Service could treat the loan as taxable income.²⁶² Discouraging investment in foreign nations that de-

258. The Cayman Islands Treaty focused on narcotic trafficking. *See generally* Cayman Islands Treaty, *supra* note 225.

259. *See Meyer, supra* note 10, at 64 (briefly discussing the differing interests between the United States and Switzerland regarding the scope of their Treaty).

260. Bernhard Meyer suggests that should a country inflexibly protect secrecy, even in extreme cases of criminal conduct, other countries may condemn that country's policy, resulting in harm to that country's international reputation. *Id.* at 80.

261. Because United States companies comprise much of a bank's business and Swiss banks desire that business, the United States government can threaten to prohibit Swiss banks from doing business in the United States in retaliation for Switzerland's failure to cooperate. Finn & Pouschine, *supra* note 33, at 43.

The Senate Subcommittee on Governmental Affairs has suggested sanctioning tax haven countries that choose not to negotiate mutual assistance treaties with the United States. REPORT ON OFFSHORE BANKS, *supra* note 1, at 139. The tools available as leverage include: (1) requiring that taxpayers report loans from those countries as income for income tax purposes, (2) denying as tax deductions losses and expenses arising out of transactions in or with those countries, (3) requiring that United States' banks report all transactions with that country, and (4) limiting or restricting direct airline flights to and from those countries. *Id.*

262. Meyer, *supra* note 10, at 79.

pend on United States' business may persuade uncooperative nations to accede to cooperation agreements.

Finally, the United States can entice cooperation by suggesting that these countries instigate their own forfeiture laws, similar to those in the United States. The United States-Swiss Treaty recognizes that a cooperating party should be entitled to benefit from the fruits of its labor. That is, once a State supplied information sufficient to convict, proceeds from the offender's crime may become the property of the assisting nation.²⁶³ Furthermore, seizure is advantageous because it is in the best interest of all parties to prevent the commission of future crimes.²⁶⁴

B. Procedural Improvements

In addition to focusing on the attainment of specific crime fighting objectives, negotiators of future United States criminal assistance agreements should seek detailed procedural improvements over existing treaties. Additional treaty provisions will improve cooperation, extend applicability and strengthen enforcement. Prosecutorial efforts would benefit from the streamlining of investigative action requirements. Limiting the conditions necessary to obtain a warrant or compel testimony to the least restrictive country's laws would benefit the nation that ordinarily must comply with a higher standard within its own boundaries. However, the nation with the lower standard would not receive any benefit from such a provision. A provision more beneficial to each is one that establishes thresholds of suspicion independent of the law of either country. Such a provision may be unworkable, however, since no jurisdiction would have policy or precedent upon which to base its decisions to grant or deny compulsory measures.

To address the absence of a tribunal to determine independent policies and procedures, the contracting nations could mandate the formation of a multinational board, similar to the dispute-settling board provided in Article 39 of the United States-Swiss Treaty.²⁶⁵ Board membership could consist of representatives from all signatory nations and perhaps competently informed persons not associated

263. Paikin, *supra* note 72, at 266-67. Of course, authorities would return proceeds that are the property of a victim of a crime. *Id.* The Caribbean Island treaties provide for such forfeiture assistance. See Bahamas Treaty, *supra* note 244, art. 14; Jamaica Treaty, *supra* note 226, art. 20; Cayman Islands Treaty, *supra* note 225, art. 16.

264. See *supra* note 9.

265. See *supra* notes 213-17 and accompanying text.

with the signatory nations. For example, the tribunal could decide when compulsory measures must be provided. However, because of the degree of individual involvement, such a provision would only be effective in a limited number of circumstances.

A multinational tribunal could address whether a party's decision not to cooperate on discretionary grounds is valid. As the Swiss Treaty now reads, either State can refuse to assist in the production of evidence if it feels such cooperation would prejudice its sovereignty or security interests.²⁶⁶ In fact, the Senate Committee on Foreign Relations remarked that one of the Swiss Treaty's two flaws is that the Swiss have the discretion whether to allow the use of information they provide.²⁶⁷ Here, an independent board could render a decision after balancing the necessity for the requested information against the reason for refusal to determine whether a nation's position is justified under its own law. The tribunal's decision is one in which the requesting State can place more faith.

This multinational tribunal could also have an appellate review function which would determine violations alleged by persons injured by the treaty. The appellate review provision could require that if it determines the existence of a violation the State acquiring the ill-gotten information must either suppress that evidence or compensate the injured party. In addition, the tribunal board, independent of the central authorities of any party, could review requests for assistance and make a preliminary determination of whether assistance must be granted. Some sovereigns, however, may find this role unacceptable since it would not require its courts to comply with an international tribunal's command to issue compulsory process. Obviously, a United States court will not issue a search warrant because a committee, not directly entrusted with the preservation of constitutional rights, requests it. Furthermore, with or without a tribunal, a sovereign nation may choose to deny assistance under a treaty.

The furthest courts appear willing to extend immunity from local court policy is the provision in the Swiss Treaty limiting appeals to the requested State.²⁶⁸ Prohibiting an appeal of a Swiss decision to cooperate automatically renders any evidence released to United States authorities admissible if it meets local evidentiary requirements. However, courts have placed one substantial barrier between

266. See *supra* notes 124-29 and accompanying text.

267. Report on Cayman Islands, *supra* note 219, at 1.

268. See *supra* notes 200-04 and accompanying text.

a completed request and admissibility. In *Cardenas v. Smith*, the court determined that the Swiss Treaty did not prevent review of constitutional violations.²⁶⁹ Thus, the courts must review possible Fourth and Fifth Amendment transgressions committed by Swiss authorities in the process of seizing assets to determine if Switzerland has infringed a defendant's rights.

Perhaps the most effective means of insuring that a requesting nation has the best opportunity to obtain requested evidence is to allow the requesting State to solicit the compulsory order from the foreign court directly rather than through a central authority. A provision which allows United States authorities to request a Swiss court to compel Swiss authorities to execute an order that the United States court believes is justifiable provides the United States with its best chance to secure the evidence it needs but cannot reach under its domestic laws. In effect, such a provision is comparable to a compulsory letter rogatory because assistance is obligatory under a treaty.

VII. CONCLUSION

Common sense and a desire to bring criminals to justice has demanded that the internationalization of crime be combatted with the concomitant internationalization of crime fighting. The United States has responded by attempting to obtain evidence necessary to prosecute offenders by any method possible. In an effort to pacify nations which disapproved of foreign investigation and compulsion within its borders, the United States relied on its own evidence gathering techniques. However, consensual cooperation by offenders and statutorily imposed reporting requirements often proved ineffective in providing vital evidence necessary for many convictions. Although subpoenas extended the long arm of United States law, they confined prosecutors to the jurisdiction of the Court issuing the subpoena. Bank secrecy laws in foreign countries presented a barrier few United States courts could breach.

United States authorities realized that the only way to circumvent these obstacles was to take advantage of a foreign authorities' ability to obtain information that it could not. The letter rogatory proved invaluable for bridging the international evidence gap. However, the United States sought more reliable and regular cooperation and developed mutual agreements. The Treaty Between the United

269. 733 F.2d 909 (D.C. Cir. 1984).

States and the Confederation of Switzerland on Mutual Assistance in Criminal Matters has demonstrated that consistent cooperation is attainable. Although the Swiss Treaty has successfully supplied both nations with invaluable criminal evidence, its limitations clouded its ability to supply investigators and prosecutors with information indispensable in the ferreting out and conviction of criminals.

Because criminal enterprise is always at least one step ahead of enforcement and since criminal schemes constantly evolve, a treaty that accounts for all situations on one day may be useless the next. Therefore, nations must supplement and improve old treaties and draft new treaties to keep pace with both international and domestic criminal enterprise. Nations such as the United States, wishing to include controversial or disputed provisions in international agreements, must emphasize specific goals and exert social, political or economic leverage when negotiating. These countries must also focus on substantive matters in the negotiating process. Agreeing on provisions that expand either nations' investigatory reach while insuring admissibility and limiting exclusion and appeal appear to be the most successful methods for insuring that evidence necessary for prosecution can be obtained and successfully used against the accused.

Bradley O. Field