Other International Issues

A CRITICAL ANALYSIS OF THE EFFECTS OF *COLELLO V. SEC* ON INTERNATIONAL SECURITIES LAW ENFORCEMENT AGREEMENTS

I. INTRODUCTION

In September 1995, a California federal district court ruled in *Colello v. SEC*[1] that the use by the Securities and Exchange Commission (SEC) of a mutual legal assistance treaty with Switzerland to freeze the Swiss bank accounts of individuals suspected of securities fraud under the jurisdiction of the SEC violated the Fourth and Fifth Amendments of the U.S. Constitution. This ruling not only draws into question the constitutionality of the particular action taken by the SEC in this case, but also the constitutionality in general of the use of treaties and less formal agreements by the SEC to obtain information and asset freezes.

This Note will first provide a brief background on the main international assistance mechanisms used by the SEC as well as some of the drawbacks to each mechanism. The *Colello* case will then be presented and briefly analyzed. Finally, several recent agreements used by the SEC in international investigation and enforcement will be examined, in light both of the issues raised in *Colello* and other issues.

II. INTERNATIONAL INVESTIGATION AND ENFORCEMENT METHODS

A. Traditional Methods: The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

Though not directly relevant to the issues considered in Colello, the Hague Convention on the Taking of Evidence Abroad in Civil or

1. 908 F. Supp. 738; Fed. Sec. L. Rep. (CCH) ¶ 99,424 (C.D. Cal. 1995).

Commercial Matters[2] merits a brief mention, as it was the first concrete agreement through which member states could request assistance from each other to obtain evidence "for use in judicial proceedings, commenced or contemplated."[3] Under the Hague Convention, Letters of Request may be sent to the designated authority in a member state, and, to the extent that the request is compatible with that state's domestic law, the request is to be executed expediently.[4] Though an important step towards fostering international cooperation in obtaining evidence for use in domestic proceedings, its value to the SEC has been limited by the fact that it applies only to civil judicial proceedings, and is thus inapplicable to the SEC's administrative actions and requests.[5] A further restriction is found in Article 23 of the Hague Convention, which allows signatories to declare that they will not execute letters rogatory[6] for "discovery" as it is known in common law countries.[7] However, Article 27 provides that information-gathering methods not listed in the convention are permissible as well.[8] Thus, courts need not turn to the Hague Convention in order to obtain information; rather, they can employ other means, such as their subpoena powers over United States-based branches of foreign entities.[9]

B. Mutual Legal Assistance Treaties

Mutual Legal Assistance Treaties (MLATs) are bilateral treaties

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2. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241[hereinafter Hague Convention].

3. *Id.* art. 1, para. 2, 23 U.S.T. at 2557, 847 U.N.T.S. at 241.

4. *See id.* art. 12, para. (a), 23 U.S.T. at 2562, 847 U.N.T.S. at 243.

5. *See id.*; Caroline Greene, Note, *International Securities Law Enforcement: Recent Advances in Assistance*, 27 VAND. J. TRANSNAT'L L. 635, 639-40; Richard M. Phillips et al., *The Internationalization of Securities Fraud Enforcement in the 1990's*, *in* 2 TWENTY-THIRD ANNUAL INSTITUTE ON SECURITIES REGULATION 383, 384 (PLI Corp. Law & Practice Course Handbook Series No. 755, 1991).

6. A letter rogatory is a formal request for evidence by a court in one jurisdiction to a court in the jurisdiction in which the evidence is located. *See* Greene, *supra* note 5, at 639. This method is cumbersome, and leads to inconsistent results, as the court receiving the letter rogatory is under no obligation to execute the request and may deny it without stating reasons. *See* Robert G. Morvillo, *International Criminal Law Issues*, N.Y.L.J., Feb. 1, 1994, at 3, 6.

7. Hague Convention, *supra* note 2, art. 23, 23 U.S.T. at 2568, 847 U.N.T.S. at 245.

8. *Id.* art. 27, 23 U.S.T. at 2569, 847 U.N.T.S. at 246.

9. *See, e.g.*, Societé Nationale Industrielle Aerospatiale v. United States Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 544 (1987) (ruling that comity does not require resort to the Hague Convention before using other discovery methods, particularly when the corporation ordered to comply with discovery order was within the court's jurisdiction).

that are designed to aid in cross-border mutual enforcement and assistance in the investigation and prosecution of criminal violations.[10] They are negotiated through diplomatic channels[11] and, like any other treaty, must be ratified by the U.S. Senate.[12] Under an MLAT, requests for assistance pass directly between the "designated authorities" of the countries involved.[13] Unlike the procedures used under the Hague Convention, these "designated parties" are separate from the judiciary,[14] which alleviates the problem under the Hague Convention of states refusing to provide information to non-judicial authorities.

MLATs provide for several different kinds of assistance. Generally, a party to the treaty may request asset freezes,[15] forfeiture actions, repatriation of assets located abroad, and enforcement of forfeiture judgments issued by a court of the requesting country.[16] However, there are several restrictions on the effectiveness of MLATs, the most important of which is the widespread use of a dual criminality requirement.[17] Under the dual criminality requirement, the offense being investigated must be a criminal violation in both

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10. *See* Philip Erwin, Comment, *The International Securities Enforcement Cooperation Act of 1990: Increasing International Cooperation in Extraterritorial Discovery?*, 15 B.C. INT'L & COMP. L. REV. 471, 482 (1992).

11. *See* Greene, *supra* note 5, at 640.

12. *See* James A. Kehoe, Comment, *Exporting Insider Trading Laws: The Enforcement of U.S. Insider Trading Laws Internationally*, 9 EMORY INT'L L. REV. 345, 362 (1995).

13. *See* Robert L. Pisani & Robert Fogelnest, *The United States Treaties on Mutual Assistance in Criminal Matters*, *in* INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 233, 236 (Ved P. Nanda & M. Cherif Bassouni eds., 1987).

14. The "designated parties" are frequently prosecutorial agencies. *See, e.g.*, Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019, 2050 (entered into force Jan. 23, 1977) [hereinafter Swiss Treaty]. The "designated authority" for the United States is the Attorney General or his/her appointee, and the "designated authority" for Switzerland is the Division of Police of the Federal Department of Justice and Police. *Id.*, para. 1, 27 U.S.T. at 2050.

15. *But see* Colello v. SEC, 908 F. Supp. 738, 749-52 (C.D. Calif. 1995) (holding that since Swiss MLAT does not specifically provide for asset freezes, the use of such freezes is of questionable validity absent other formal agreements). For further discussion of asset freezes, see *infra* Part III.

16. *See* Michael Mann et al., *The Establishment of International Mechanisms for Enforcing Provisional Orders and Final Judgments Arising from Securities Law Violations*, 55 LAW & CONTEMP. PROBS. 303, 323 (1992) [hereinafter *Establishment of International Enforcement Mechanisms*].

17. *See, e.g.*, Swiss Treaty, *supra* note 14, art. 4, 27 U.S.T. at 2028-29. In the last few years, MLATs have been signed that significantly expand the scope of assistance permitted, including the removal of the dual criminality requirement. As these are still awaiting ratification, I will discuss them in the section on current developments, *infra* Part V.

the requesting state and the executing state.[18] Thus, where an action is illegal in the United States, but not in the requested country, as was recently still the case with insider trading in Switzerland,[19] no assistance as to the investigation of that action may be obtained under an MLAT.

The effectiveness of MLATs is also limited by the fact that requests for assistance must go through the "designated parties." Since all requests must be approved and transmitted by the Department of Justice, the SEC is effectively deprived of the ultimate power to decide whether to request information.[20] Furthermore, Article 3 of the Swiss Treaty allows the executing country to deny assistance if such assistance would "prejudice [its] sovereignty, security, or other similar interests."[21] In addition, under Article 5 of the Swiss Treaty, information obtained by means of the treaty may only be used, with limited exceptions, in proceedings relating to the offense for which assistance has been granted.[22]

C. Memoranda of Understanding

Where an MLAT is either nonexistent or its use is impractical, the SEC may turn to another alternative: the Memorandum of Understanding[23] (hereinafter MOU). In the context of international securities law enforcement, MOUs are non-binding statements of intent between regulators in different countries that are designed to facilitate the exchange of information and mutual cooperation in the investigation of securities violations.[24] MOUs provide many advan-

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18. *See, e.g., id.*; Kehoe, *supra* note 12, at 364; Michael D. Mann & Lise A. Lustgarten, *Internationalization of Insider Trading Enforcement—A Guide to Regulation and Cooperation*, *in* WHITE COLLAR CRIME 511, 530 (ABA National Institute on White Collar Crime, 1990) [hereinafter Mann & Lustgarten].

19. *See* discussion of Memoranda of Understanding [hereinafter MOUs], *infra* Part IIC.

20. *See* Kehoe, *supra* note 12, at 363.

21. Swiss Treaty, *supra* note 14, art. 3, 27 U.S.T. at 2028. It appears, however, that assistance is generally granted as long as the person about whom information is sought is connected with the offense. *See* Mann & Lustgarten, *supra* note 18, at 530-31.

22. *See* Swiss Treaty, *supra* note 14, art. 5(1), 27 U.S.T. at 2029. This means that the evidence can only be used in the investigation and prosecution of a person who was being investigated for the specific offense for which assistance was granted. The main exception is that the information may also be used in the investigation or prosecution of a person who was a suspect in an investigation for which assistance has been granted and who is suspected of another offense for which assistance is required to be (but has not yet been) granted under the Treaty. *Id.* art. 5(2), 27 U.S.T. at 2030.

23. *See, e.g.*, Ronald E. Bornstein & N. Elaine Dugger, *International Regulation of Insider Trading*, 2 COLUM. BUS. L. REV. 375, 414 (1987).

24. *See* Mann & Lustgarten, *supra* note 18, at 534. For a general description of MOUs, see

tages over MLATs. Unlike MLATs, MOUs are negotiated, and their terms are carried out, directly between securities regulators in various countries, rather than through "designated parties." This feature leads to greater speed and reliability of requests and assistance, as there is no need to pass through "designated parties." MOUs provide a more expeditious means for establishing mutual assistance mechanisms, as they do not require Senate ratification.[25] Furthermore, MOUs do not have the dual criminality requirement of the MLATs.[26] Finally, since MOUs are subject-specific, they are better able to address specific concerns in international securities regulation; in contrast, the Hague Convention and MLATs are general agreements applicable in many other contexts, and are thus often overbroad and not sufficiently detailed in the context of securities regulation.

The SEC's first MOU was with Switzerland in 1982.[27] This MOU provided for assistance to the SEC in insider trading investigations, but only when assistance under the Swiss MLAT was infeasible.[28] Under the treaty, requests for information are processed through the Swiss Central Authority, and information divulged may only be used in SEC or Department of Justice proceedings "relating to trading by persons in possession of material non-public information."[29] Before releasing information on suspected insider traders, Swiss banks inform those customers of the request and provide them with a chance to refute the charges.[30]

Kehoe, *supra* note 12, at 359-62.

25. *See* Greene, *supra* note 5, at 649.

26. *See* Michael D. Mann & Joseph G. Mari, Developments in International Securities Law Enforcement and Regulation 34 (Oct. 24, 1990) (SEC Securities Regulation Seminar Document, unpublished manuscript, on file with the *Duke Journal of Comparative & International Law*), at 74-86.

27. Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, U.S.-Switz., 22 I.L.M. 1 [hereinafter First Swiss MOU].

28. *See id.*, art. III, para. 3, at 3. The obvious case of infeasibility is one in which the activity being investigated or prosecuted is a crime in one country, but not the other. Since insider trading was not illegal per se in Switzerland at the time, the MLAT could not be used, so the MOU was developed to fill the gap. Tippee trading, on the other hand, was illegal in Switzerland, and assistance in its prosecution could therefore be requested under the Swiss Treaty. Switzerland: Supreme Court Opinion in the Second Santa Fe Case Concerning Judicial Assistance, 24 I.L.M. 745, 746-47 (1985).

29. First Swiss MOU, *supra* note 27, art. III, para. 3, 22 I.L.M. at 4.

30. The MOU incorporated Convention XVI, a private agreement between Swiss bankers. Convention XVI authorized the release of information about bank customers if certain criteria indicating insider trading on the U.S. markets were met, and if customers had been given notice and a chance to explain their trading activity. If the customer failed to provide an adequate

Over the course of the 1980s, similar MOUs were concluded between the SEC and its regulatory counterparts in Japan[31] and the United Kingdom,[32] both of which were relatively limited in scope.[33] In the late 1980s, as greater flexibility was being encouraged in international securities law enforcement agreements,[34] the SEC began to enter into a "new type"[35] of MOU, beginning with its counterparts in Canada[36] and Brazil.[37] This new type of MOU greatly broadens the scope of assistance that can be sought. For example, the Canadian MOU calls for the "fullest mutual assistance possible" where one agency needs information that is in the jurisdiction of another,[38] and covers virtually all SEC investigations of securities violations, including compulsory subpoena powers and the authority of one party to launch a "full scale investigation" at the behest of the other party.[39] Since the passage of the Insider Trading & Securities Enforcement Act (ITSFEA) and the International Securities Cooperation Act (ISECA),[40] the number of MOUs has grown rapidly,[41] with most fol-

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explanation, the convention authorized the bank to freeze the customer's account. *See* Greene, *supra* note 5, at 651.

31. Memorandum of the U.S. Securities and Exchange Commission and the Securities Bureau of the Japanese Ministry of Finance on the Sharing of Information, May 23, 1986, 43 SEC Docket 184, *reprinted in* 25 I.L.M. 1429.

32. Memorandum of Understanding on Exchange of Information in Matters Relating to Securities and Futures, Sept. 23, 1986, U.S.-U.K., 25 I.L.M. 1431.

33. *See* Pamela Jimenez, Comment, *International Securities Enforcement Cooperation Act and Memoranda of Understanding*, 31 HARV. INT'L L.J. 295, 306-08 (1990) (noting that the U.K. MOU provides only for "best efforts" to provide records and that the Japanese MOU calls for cooperation on a "case-by-case basis").

34. It was during this period that the legislation that was to become ITSFEA and ISECA, *see* discussion, *infra* Part II D, was being introduced and debated in Congress.

35. Greene, *supra* note 5, at 654.

36. Memorandum of Understanding on Administration and Enforcement of Securities Laws, Jan. 7, 1988, U.S.-Can., 27 I.L.M. 410 [hereinafter Canadian MOU].

37. Memorandum of Understanding Between the Securities Exchange Commission and the Brazil Commissao De Valores Mobiliarios, July 1, 1988, U.S.-Braz., 43 SEC Docket 196 [hereinafter Brazilian MOU].

38. Joint Press Release, *U.S. and Canadian Provincial Securities Regulators Sign Memorandum of Understanding to Enhance Cooperation in Enforcement*, 11 OSC Bull., No. 1, Jan. 8, 1988, *cited in* Jimenez, *supra* note 33, at 308 n.84.

39. Canadian MOU, *supra* note 36, art. 1, 27 I.L.M. at 410-13. For a more complete summary of the features of the Canadian MOU, see Greene, *supra* note 5, at 654-55.

40. *See* discussion *infra* Part II.D.

41. *See The Securities and Exchange Commission Reauthorization Act of 1996: Hearings on H.R. 2972 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong., 203-35 (1996) (testimony of Arthur Levitt, Chairman, SEC) (In the last several years, MOUs have been entered into with 27 countries; in 1995 alone, the SEC made 230 requests for enforcement assistance from foreign governments under MOUs or other less formal arrangements); *see also* Michael D. Mann & Lise A. Lustgarten, *Internationaliza-*

lowing the same pattern as the Canadian and Brazilian MOUs. For example, the MOU with Norway provides for "the fullest mutual assistance . . . to facilitate the enforcement of [securities] laws or regulations; . . . and the conduct of investigations, litigation, or prosecution . . . without regard to whether the type of conduct described . . . would constitute a violation of the laws . . . of the requested authority."[42] The recent MOU with Hong Kong defines an almost identical scope of assistance.[43] Unlike the earlier MOUs, these recent MOUs explicitly provide for cooperation in enforcement actions as well as in investigatory proceedings.

D. ITSFEA and ISECA

In light of the general "best efforts" limitations to MOUs in the early 1980s,[44] and the limitations inherent in MLATs,[45] it was natural that the SEC would push for domestic enabling legislation to strengthen international assistance agreements. This was accomplished by the passage of two acts: the Insider Trading and Securities Fraud Enforcement Act of 1988[46] (ITSFEA) and the International Securities Cooperation Act of 1990[47] (ISECA).

Primarily, ITSFEA gives the SEC the power to investigate secu-

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tion of Insider Trading Enforcement: A Guide to Regulation and Cooperation, 798 PLI/CORP. 7, *in* Corporate Law and Practice Course Handbook Series, January 14-15, 1993 (MOUs have been entered into with Brazil (1988), Italy (1989), the Netherlands (1989), France (1989), Hungary (1990), Mexico (1990), Norway (1991), Argentina (1991), Spain (1992), the European Community (1991), Sweden (1991), Costa Rica (1991), Indonesia (1992)). More recently, the SEC has announced that MOUs have been entered into with China, SEC 94-35, 1994 WL 150804 (Apr. 28, 1994); Hong Kong, SEC 95-215, 1995 WL 582726 (Oct. 5, 1995); Russia, SEC 95-252, 1995 WL 717669 (Dec. 7, 1995); Egypt, SEC 96-23, 1996 WL 58439 (Feb. 11, 1996); and Israel, SEC 96-26, 1994 WL 57014 (Feb. 13, 1996).

42. Memorandum of Understanding Between the United States Securities and Exchange Commission and the Norway Banking, Insurance, and Securities Commission Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, September 24, 1991, art. 3(1), SEC Int'l Series, Release No. 321, *available in* 1991 SEC Lexis 1995 [hereinafter Norwegian MOU].

43. Memorandum of Understanding Between the United States Securities and Exchange Commission and the Hong Kong Securities and Futures Commission Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, October 5, 1995, art. 3.1, 1995 SEC Lexis 2810 [hereinafter Hong Kong MOU].

44. *See, e.g.*, Jimenez, *supra* note 33, at 307.

45. *See supra* text accompanying notes 9-21.

46. Insider Trading & Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified as amended in scattered sections of 15 U.S.C. (1988 & Supp. V 1993)) [hereinafter ITSFEA].

47. International Securities Cooperation Act of 1990, Pub. L. No. 101-550, 104 Stat. 2714 (codified as amended in scattered sections of 15 U.S.C. (1988 & Supp. V 1993)) [hereinafter ISECA].

rities law violations on behalf of foreign securities authorities even if no "dual criminality" is present; in other words, the action being investigated need only be a violation of law in the country requesting investigative assistance, and need not be a violation of U.S. law.[48]

This impetus was carried forward by the passage in 1990 of the ISECA, which gives the SEC greater leverage in negotiating "forceful and binding international enforcement cooperation agreements, a strategy that the SEC has been pursuing since the mid-1980s."[49] The ISECA contains four particularly important provisions. First, it grants an exemption to the Freedom of Information Act.[50] When a foreign securities regulator has provided the SEC with confidential information, the SEC may withhold disclosure of such information where the foreign regulator has made a good faith showing that disclosure would be illegal under the foreign country's laws, even where disclosure would normally be mandated under the FOIA.[51] Congress' goal in passing this provision was to encourage foreign regulators to enter into binding agreements with the SEC without fear that information that was confidential in the foreign country would be revealed in the United States.[52]

The second major provision of the ISECA addresses FOIA restrictions on the disclosure of confidential information.[53] The ISECA gives the SEC general rulemaking authority to provide records to domestic and foreign persons, as long as those persons provide "adequate assurances of confidentiality,"[54] and the records are furnished only for the purposes given in the request.[55] The result is likely to be greater willingness on the part of foreign authorities to negotiate agreements with more specific provisions on access to information.[56]

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48. ITSFEA, 15 U.S.C. § 78u(a)(2).

49. Kehoe, *supra* note 12, at 370. For a more thorough description of the ISECA's provisions, see Erwin, *supra* note 10, at 488-99.

50. Freedom of Information Act, 5 U.S.C. § 552 (1988) [hereinafter FOIA].

51. *See* ISECA, 15 U.S.C. § 78x(d).

52. *See* Erwin, *supra* note 10, at 491-92.

53. *See id.* at 492. Under the Securities Enforcement Act as amended in 1975, the SEC was prevented from disclosing information deemed confidential under the FOIA.

54. ISECA, 15 U.S.C. § 78x(c).

55. *See* H.R. REP. NO. 101-240, at 20-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3888, 3914. The specific limitations on the use of information provided is generally set out in the MOU. By virtue of this power, the SEC is able to release to foreign securities regulators information that might otherwise be protected from disclosure under FOIA.

56. For example, the Canadian MOU provides for the use of all reasonable efforts to obtain the necessary authorization to fulfill requests under the MOU. Canadian MOU, *supra*

The third major provision of the ISECA is the SEC's authority to discipline U.S.-registered securities professionals based on findings of a foreign court.[57] By virtue of this authority, the SEC will now be able to offer agreements encompassing such enforcement actions in the United States in return for similar enforcement actions in foreign countries,[58] thus broadening the range of instruments available for the international enforcement of securities laws.

The fourth major provision of the ISECA for the first time explicitly allows the SEC to request reimbursement from foreign securities authorities for expenses incurred in carrying out requests for those foreign authorities.[59] In implementing this provision, Congress sought to expand the SEC's enforcement capabilities by increasing the economic feasibility of investigations at the request of foreign securities authorities.[60]

III. *COLELLO* AND OTHER CONSTITUTIONAL ISSUES

A. The *Colello* Case

In June 1994 the SEC sued Michael Colello for his role in a pyramid scheme.[61] Before filing the enforcement action against Colello and other defendants, the SEC sent a request under the Swiss Treaty, via the Department of Justice, to freeze Colello's Swiss bank accounts in order to prevent further dissipation of the funds contained in those accounts once the enforcement action was announced.[62] Though the Swiss Treaty makes no explicit mention of asset freezes, the Swiss enabling legislation for the treaty specifically permits asset freezes, and the American request for an asset freeze indicates that both parties believe that asset freezes are a permissible measure under the Treaty.[63] Colello received no notice from the SEC

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note 36, at 414. The SEC's increased authority under ISECA now gives considerably more muscle to this provision, as the SEC now has substantial power to determine on its own what information may be released to the Canadian authorities.

57. *See* Erwin, *supra* note 10, at 495.

58. *See, e.g.*, Kehoe, *supra* note 12, at 373.

59. *See* ISECA, 15 U.S.C. § 78d. The Canadian MOU provides for cost-sharing between the requesting and the requested authority. Canadian MOU, *supra* note 36, at 420. ISECA now gives the SEC legal authority to fully use this provision in the Canadian MOU.

60. *See* Erwin, *supra* note 10, at 495-96.

61. Colello v. SEC, 908 F. Supp. 738, 740 (C.D. Cal. 1995). A pyramid scheme is a sales device "in which a buyer of goods is promised a payment for each additional buyer procured by him." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990).

62. *Colello*, 908 F. Supp. at 741-42.

63. Barr v. U.S. Dep't of Justice, 819 F.2d 25, 28 (2nd Cir. 1987). The SEC used the Swiss

that his Swiss accounts were being frozen, either prior to or following the freeze. However, the Swiss, in accordance with Swiss enabling legislation associated with the treaty, notified Colello and provided him with the chance to file a written objection.[64] At the same time the Swiss assets were frozen, a temporary restraining order was issued in the United States, freezing all the defendants' assets, including Colello's.[65] This domestic temporary restraining order and asset freeze dissolved, however, when the court declined to grant the SEC's motion for a preliminary injunction.[66] Colello then asked the court to require the SEC to ask the Swiss to dissolve the freeze on the Swiss accounts. The court denied the motion, agreeing with the SEC that the court had not ordered the freeze, and the freeze had not been part of the enforcement action.[67] Colello then petitioned the Swiss Central Authority to have the freeze lifted, which the Swiss Central Authority denied, though it requested an explanation from the SEC as to why the freeze should remain in effect.[68] The Department of Justice responded that the domestic ruling was only preliminary, that Colello remained a defendant in the case, and that additional information was being gathered linking Colello to the fraudulent scheme.[69] The Swiss Federal Supreme Court held that the asset freeze was proper, explaining that the Swiss courts could not rule on alleged deficiencies in the American proceedings, and that its scope of review was limited to whether the preconditions for assistance under the treaty had been met.[70] Finally, the American court found that there was "no genuine issue of material fact as to Colello's improper receipt of investors' funds and that, as a matter of law, disgorgement [was] appropriate, indeed, necessary."[71]

Colello filed suit against the SEC, claiming that the asset freeze under the Swiss Treaty had violated his Fourth Amendment right against unreasonable search and seizure, as well as his Fifth Amend-

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Treaty to freeze Barr's Swiss assets after Barr had been indicted on charges of conspiracy, fraud, and grand larceny. The court held that, absent a showing by Barr that the interpretation of the Swiss Treaty to include asset freezes was wrong, deference would be given to that interpretation. *Id.*

64. *See Colello*, 908 F. Supp. at 746.
65. *See id.*
66. *See id.*
67. *See id.*
68. *See id.* at 743.
69. *See id.*
70. *See id.* at 743-44.
71. *See id.* at 744.

ment procedural due process right to notice and a hearing.[72] The court granted summary judgment for Colello on both counts.[73]

The court held that the Fourth Amendment requirement of probable cause had been violated because the "reasonable suspicion" standard required for a request under the treaty was less than the requisite standard of probable cause.[74] In fact, the Technical Analysis of the Treaty specifically explained that "reasonable suspicion" was to be a less stringent standard than "probable cause" so that suspected offenses could be verified.[75]

As to the due process claim, the court applied the test announced in *Fuentes v. Shevin*.[76] Under this test, before a seizure may be executed without a predeprivation hearing, three criteria must be satisfied: (1) the seizure must be directly necessary to secure an important governmental or general public interest; (2) there has to be a special need for prompt action; and (3) the State must keep strict control over its monopoly of legitimate force, i.e., "the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."[77] The court found that the first two requirements were satisfied by the important public interest in preventing securities fraud and the need for prompt action to avoid the dissipation of Colello's ill-begotten assets. The court held, however, that the third requirement was not met, as there was no statute in force that addressed the issue, no mention of asset freezes in the Treaty, and no other source of "tight standards" to control the SEC's discretion.[78] Furthermore, the court noted that Colello had not been provided with either pre- or post-deprivation notice and opportunity for a hearing by the SEC. Thus, the court held that Colello's due process rights had been violated and that the Swiss Treaty's "reasonable suspicion" standard violated the Fourth Amendment's requirement of due process.[79]

72. *See id.* at 741.
73. *See id.* at 755.
74. *See id.* at 753.
75. *See id.* at 744 n.4.
76. 407 U.S. 67 (1972).
77. *Id.* at 91.
78. *Colello*, 908 F. Supp. at 750-51.
79. *See id.* at 755.

B. Analysis of *Colello*

1. *Policy Considerations.* By holding the Swiss Treaty to be unconstitutional, both on its face and as applied, the court places in grave danger virtually all of the mechanisms used by the SEC to obtain assistance from foreign authorities in investigating and enforcing securities law actions, as neither the Hague Convention, nor the various MLATs and MOUs, contain "probable cause" or "notice and hearing" requirements. These mechanisms have been used to achieve a large number of results that are instinctively considered to be just. Not only has international information-gathering been greatly facilitated, but the existence of such mechanisms may reduce the probability of international disputes over just what information may or may not be released and what may be done with it. In addition, these mechanisms have been used successfully to restore funds to defrauded investors that might otherwise never have seen their money again and to track down and prosecute individuals who previously thought they could flout U.S. securities laws and then, if the tables turned, hide their ill-gotten gains outside of the country.[80] This author has been unable to locate any case in which the SEC abused its power under these mechanisms, either by freezing the assets of innocent parties, maintaining freezes longer than necessary, misusing information obtained in accordance with one of these mechanisms, or otherwise. Indeed, the outcome in *Colello* suggests that the SEC may have been justified in maintaing the freeze on Colello's account, as it was later held that there was no question of material fact as to whether Colello had misappropriated funds and defrauded his customers, and he was ordered to disgorge all of his fraudulent proceeds.

This is not to suggest that the SEC should be granted free reign to do as it pleases under the guise of action in accordance with a treaty or memorandum of understanding, in disregard of constitutional considerations. Though beyond the scope of this Note, adequate remedies for any genuine wrongdoing or violation of constitutional rights by the SEC can likely be found in domestic administrative law without going to the extreme of declaring a treaty

80. *See, e.g.*, SEC v. Antar, Litigation Rel. No. 12548 [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,341 (D. N.J. 1990); Trustee/Receier Recovers Canadian Assets of Eddie Antar, SEC NEWS DIGEST 93-99, May 25, 1993. *See also Establishment of International Enforcement Mechanisms, supra* note 16, at 311-12.

unconstitutional.[81] Furthermore, part of the *Colello* court's holding is based on the lack of notice and hearing, which, though certainly a question of due process, is a right which has a particular meaning in the context of agency action.[82] It seems, therefore, that an analysis of the SEC's actions should begin with the jurisprudence of administrative law; yet the court bypasses this step and moves directly into a sweeping constitutional analysis.

Given the great importance of the SEC maintaining its ability to use international enforcement mechanisms, and the highly negative impact that the newfound unconstitutionality of virtually all such agreements would have on this capability, courts in cases such as *Colello* would be well-advised to apply the Constitution no more broadly than necessary and to limit themselves to a more restrained holding. It would be preferable to rebuke the SEC for not providing notice and hearing, or for not obtaining a warrant, which would lead to the institution of additional procedures by the SEC to ensure compliance with these requirements, than to erase years of cooperation and development with one broad stroke of the judicial pen by declaring an important and frequently-used treaty unconstitutional. Rather than strike down an entire treaty, the appropriate remedy, if any, should be found in a more restrictive application of constitutional protections.

It is with this need for a more restrictive reading in mind that the holding in *Colello* will now be analyzed.

2. *The Extent of Constitutional Protection.* The *Colello* court emphasized the view that constitutional protection extends beyond the boundaries of the United States when enforcement efforts by U.S. actors are involved.[83] However, the court failed to specify why the actions taken by the Swiss authorities constitute enforcement efforts by U.S. actors. As a threshold matter, then, it must be determined whether the asset freeze was such an enforcement effort.

The test used to determine whether a particular action abroad is that of a U.S. actor was set out in *Stonehill v. United States*.[84] In *Stonehill*, the admissibility of certain evidence in a tax proceeding

81. For example, the problem could be resolved by simply finding that the SEC failed to provide sufficient notice and opportunity for a hearing under the Administrative Procedures Act, rather than declaring the use of the treaty itself to be unconstitutional.

82. *See infra* Part III.B.3.

83. 908 F. Supp. at 754, *citing to* Reid v. Covert, 354 U.S. 1, 5-6 (1957).

84. 405 F.2d 738 (9th Cir. 1968).

was challenged, as the evidence had been gathered as the result of government raids in the Philippines, which would have been unconstitutional if performed in the United States. In affirming the district court's order denying the motion to suppress, the Ninth Circuit set forth the following test of whether action by a U.S. actor was present: If the nature of the federal agent's involvement in the challenged conduct was that of a joint venture, then the involvement would be sufficient to raise constitutional concerns.[85] The *Stonehill* court then considered the admissibility of information obtained by methods which would run counter to the Fourth Amendment if performed in the United States. The court held that this was a very fact-specific inquiry,[86] and compared cases in which a joint venture was held to have existed with those in which no joint venture was found. Essentially, the court concluded that, while merely giving information to the foreign authorities which results in the release of information to U.S. authorities does not constitute a joint venture,[87] such a joint venture does exist when the U.S. agent in question was physically present and participated personally in the unlawful search, and may exist when the U.S. agent directed that the action be taken.[88]

Though *Colello* neglects to engage in the determination of whether an action by a U.S. actor is present, the court itself uses language which would tend to distinguish this case from the cases in which a joint venture was found to exist. The court goes to great length to point out that the SEC and the Department of Justice in no way "controll[ed]" the Swiss response,[89] and seems to suggest that there is some doubt as to whether the Swiss Central Authority could even be considered to be an agent of the SEC or the Department of Justice.[90] Nevertheless, despite the court's improvident choice of words, it appears that a joint venture existed between the SEC and the Department of Justice and the Swiss Authorities, thus subjecting the validity of the asset freeze to constitutional scrutiny. First, the SEC, though not physically present in Switzerland, directed that the asset freeze take place; second, the existence of a joint venture is further indicated by the fact that the Swiss had no stake in the matter;

85. *See id.* at 743.

86. *See id.* at 744.

87. *See id.* at 746.

88. *See id.* at 745.

89. 908 F. Supp. at 752.

90. *See id.* (stating that "even if there were some way that the Swiss Central Authority might be said to be the 'agent' of the United States when responding to treaty requests, nothing in the Treaty or diplomatic notes requires Switzerland to answer to the United States").

and third, the freeze took place solely at the request of the SEC for the benefit of the SEC. Furthermore, the spirit of international cooperation in securities law enforcement, evidenced by the cooperation between the Swiss and the SEC and the expectation of reciprocity should the need arise, indicates a joint venture. It should be noted that though the U.S. actors were not physically present in Switzerland, the asset freeze would not have taken place but for their treaty request. This indicates that, under Stonehill, the Swiss action was a joint venture by the Swiss with the SEC and Department of Justice, and that therefore the Swiss action was subject to scrutiny under the Fourth Amendment. However, as stated above, policy considerations dictate that the procedure, if constitutionally infirm, should be invalidated under administrative law jurisprudence rather than by striking down the entire Treaty.

3. *Notice and Hearing.* The *Colello* court held that the failure by the SEC and the Department of Justice to provide notice and opportunity for a hearing to the plaintiffs was a violation of the Fifth Amendment's guarantee of due process.[91] This was held even though the Swiss Central Authority gave notice of the freeze and Swiss Federal Law provides that "[a]ny person affected by a legal assistance proceeding and [having] an interest worthy of protection" may file a written objection within ten days after the Central Authority has announced the order.[92] Whether or not notice and opportunity for a hearing must be given by the U.S. party to the treaty request, or whether such notice and hearing can be provided for by the foreign party, has apparently never been litigated. The test for whether agency notice and hearing provisions are sufficient is set forth in *Mathews v. Eldridge.*[93] There, Justice Powell announced a three-prong balancing test that considers the private interest that will be affected by the official action, weighted by the risk of erroneous deprivation through procedures used and the probable value of additional procedural safeguards, balanced against the Government's interest in the current procedures.[94]

In *Colello*, the private interest is the temporary deprivation of

91. Had notice and hearing been given, the *Fuentes* test would presumably not have come into play, as pre-deprivation notice and hearing would have made *Fuentes* moot in this case, and adequate post-deprivation notice might have served as the requisite check on the SEC's discretion.

92. 908 F. Supp. at 746.

93. 424 U.S. 319, 335 (1976).

94. *Id.*

funds held in a foreign bank account. The *Colello* court agreed that under *Fuentes* there is a need for immediate action[95] and that the lack of due process occurred only in not providing the plaintiffs with post-deprivation notice and hearing by the SEC. It is difficult to see how post-deprivation notice and hearing by the SEC, as compared to the Swiss authorities, would have provided substantially different safeguards. Furthermore, the SEC had requested that the freeze be maintained, even after having its request for a temporary restraining order denied in federal court, and thus, its position was unlikely to change in an agency hearing. Finally, the plaintiffs did learn of the asset freeze from the Swiss authorities and had the opportunity to file a protest to the freeze with the Swiss.

The low probable value of additional safeguards, combined with the temporary nature of the asset freeze and the fact that this freeze did not likely subject the plaintiff to any undue hardship, provides for a low factor on the plaintiff's side of the *Mathews* balancing test. Furthermore, after *Goss v. Lopez*,[96] written notice and opportunity to respond to charges in writing is generally deemed sufficient to guarantee due process. Thus, the opportunity provided by Swiss law appears to fulfill the hearing requirement. On the other hand, the relative ease with which the SEC could have provided Colello with post-deprivation notice and a hearing also provides for a low factor on the government interest side.

On balance, it appears that the procedures provided by Swiss law provided sufficient due process to the plaintiffs. The risk remains, however, that under similar MLATs the foreign country may not provide sufficient due process. This concern should be addressed in future SEC actions involving the use of international enforcement agreements.

4. *Seizure.* *Colello*'s analysis of the seizure[97] begins by enunciating the principle that, if it is not to violate the Fourth Amendment, any search or seizure must be reasonable.[98] It further reasons that any warrant must be based on probable cause,[99] and that, when proceeding without a warrant, a search or seizure must be "reasonable," which has been equated with "probable cause."[100] Since the Swiss Treaty provided for assistance based on a "reasonable suspicion,"[101] which the Technical Analysis to the Treaty expressly identifies as being a less stringent standard than probable

95. *See* 908 F. Supp. at 750.

96. 419 U.S. 565, 582 (1975).

cause,[102] the court held that the constitutional standard had not been met, and that the seizure was therefore a violation of the Fourth Amendment.[103]

Though convincing as a matter of pure constitutional law, the court's opinion fails to consider the SEC's status as a federal agency. This federal administrative status allows the SEC to rely upon certain exceptions to the warrant requirement in the context of a federal search. Notably, the Supreme Court held, in *New York v. Burger*,[104] that where the business being searched is a "closely regulated business," no warrant is necessary.[105] The Court has furthermore stated that "[e]xcept in certain well-defined circumstances, a search *or seizure* . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause."[106] These special circumstances include situations in which the warrant and probable cause requirement is impractical.[107] When such special needs are present, the Court is willing to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirement in the particular context.[108]

It appears, therefore, that seizures may be included in the exceptions to the warrant and probable cause requirement. Presumably, therefore, a lower standard may be applied as well to *seizures* related to closely-regulated businesses. If junkyards are a closely-regulated business, so then must be the securities industry, whose every facet is regulated by the federal securities laws. Since the asset freeze was a seizure related to the securities industry, the "closely regulated business" rule could arguably apply.

One problem with such an analysis, however, is that the seizure itself is not taking place in a business that is closely regulated by the SEC. Rather, it is taking place in the rather private and discrete

97. Both the SEC and the Department of Justice conceded that the asset freeze was a seizure. *See* 908 F. Supp. at 752-53.

98. *See id.* at 753.

99. *See id.*

100. *See id.*

101. Swiss Treaty, *supra* note 14, art. 1(2).

102. *See* 908 F. Supp. at 753.

103. *See id.* at 755.

104. 482 U.S. 691 (1987).

105. *Id.* at 702.

106. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (emphasis added).

107. *See id.*

108. *See id.*

world of Swiss banking. Given the fairly strict limitations to the "closely regulated business" rule and the inquiry into congressional intent set out in *Marshall v. Barlow's*,[109] use of this exception to the warrant and probable requirement will likely prove untenable, not only because the location of the seizure does not fall squarely within the rubric of a "closely regulated business," but also because the lack of enabling legislation related to the treaty indicates no congressional intent to permit this type of seizure.

A more promising analysis would balance the SEC's interest in being able to rapidly freeze assets located abroad as well as meeting the probable cause and warrant requirements at an early stage of the investigation against the plaintiffs' interest in having access to their assets. The SEC has a significant interest in the rapid freeze of foreign-located assets of persons suspected of securities law violations. Through quick action it can prevent the dissipation of those assets once their owner is alerted to the proceedings against him. Furthermore, the SEC may not have sufficient evidence to fully establish probable cause until its investigation is well under way. By that point, the assets may no longer be easily identifiable or traceable, as the suspected offender will likely have realized that he is under investigation and may have taken steps to further dissipate those assets. Coupled with the potential difficulties and delays in issuing an internationally valid warrant, the balance seems to tip strongly in favor of the SEC. This rings particularly true in light of the fact that Colello was probably not subjected to undue hardship by the asset freeze, as he likely possessed considerable assets outside of Switzerland.[110]

Whatever the ultimate outcome in *Colello* on appeal, the message is clear: Courts are willing to examine the constitutionality of procedures used by the SEC to obtain information and freeze assets abroad, and care should be taken to ensure that future actions comply with constitutional requirements in order to avoid results of the kind seen in *Colello*.

C. Other Constitutional Issues

Assuming the existence of a joint venture under *Stonehill*, several other constitutional questions are raised by the use of MOUs and MLATs. These include:

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109. 436 U.S. 307, 311 (1978).

110. This is indicated by the fact that Colello had assets in the United States that were sufficiently large to justify the SEC's attempt to freeze them in addition to freezing his assets in Switzerland. *Colello*, 908 F. Supp. at 740.

> 2) Does a person questioned [abroad under an MOU or MLAT] have the right to raise under the United States Constitution various rights and privileges such as the Fifth Amendment right against self-incrimination, the Sixth Amendment right to counsel or the Fourth Amendment right against unreasonable searches and seizures?
>
> . . .
>
> 4) What role does the Fifth Amendment right against self-incrimination play in the procedures outlined in the MOU?
>
> . . .
>
> b) What if the [foreign] authority is responsible for the taking of testimony. Are the United States constitutional protections of procedural and substantive due process available to the deponent? If not, should the deponent be allowed to raise the absence of these protections in seeking to exclude his testimony in subsequent proceedings brought in the United States?[111]

In a similar vein, Senator Jesse Helms (R-N.C.), in debating the ratification of several MLATs in 1988, voiced concerns that, among other things,

> 4) MLATs do not provide for cross-examination of witnesses in the authentication of documents, as required by the 6th Amendment of the U.S. Constitution.
>
> 5) The MLATs do not provide for safe conduct to potential witnesses. As a result, the governments rely upon depositions rather than the appearance of witnesses at trial, which is guaranteed by the bill of rights
>
> . . . .
>
> 7) The U.S. Government is not required to demonstrate probable cause to obtain documents under the treaties from a government thereby violating the 4th Amendment of the Constitution . . . .[112]

Because of the debate over these and other issues, the ratification of the MLATs was significantly delayed.[113] Yet, these questions demonstrate clearly some of the problems that need to be resolved and indicate the sort of constitutional challenges that are likely to be made regarding the SEC's use of MLATs and MOUs.

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111. Theodore Sonde & Teresa A. Scott, *Constitutional and Procedural Questions Raised by the Canadian Memorandum of Understanding and Other Facets of the SEC's International Enforcement Efforts*, C475 ALI-ABA 261, 277-79 (1989).

112. Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT'L L. & POL'Y 339, 356 (1990).

113. *Id.* at 357.

IV. RECENT AGREEMENTS

In addition to the "new breed" of MOUs discussed above, numerous MLATs have been entered into by the United States over the last few years that indicate a broadening of international cooperation in investigating and prosecuting violations of law, including SEC investigations of violations of Unites States securities laws. These new MLATs, currently awaiting Senate ratification, address some of the problems associated with MLATs and MOUs, reflect the increased possibilities under ITSFEA and ISECA,[114] and include many of the voluntary provisions previously found in MOUs, now in the binding form of a treaty. The highly similar recent MLATs with Korea,[115] Hungary,[116] and Austria[117] are representative of the general form that recent MLATs have taken. Their principle features and remaining problems are described below.

A. Constitutional Concerns

1. *Searches and Seizures.* Article 1 of all three treaties contains a non-exclusive list of the types of assistance to be provided under the treaty, including the execution of requests for searches and seizures, as well as assistance in forfeiture proceedings, expressly including asset freezes in the Austrian and Hungarian MLATs.[118] This eliminates the problem posed in *Colello* where the lack of a specific provision in the Swiss Treaty authorizing asset freezes allowed Colello to attack the action on technical grounds. However, Article 15 of the three treaties requires the requested state to execute search-and-seizure requests only if the request includes information justifying such a request under the laws of the *requested* state.[119] Under *Reid*,[120] if it can be shown that the SEC is acting in concert with a foreign regulator, as was found in *Colello*, this standard based

114. *See* text accompanying notes 43-59, *supra.*

115. Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters, Nov. 23, 1993, U.S.-Kor., S. TREATY DOC. NO. 104-1 (1995) [hereinafter Korean MLAT].

116. Treaty with Hungary on Mutual Legal Assistance in Criminal Matters, Dec. 1, 1994, U.S.-Hung., S. TREATY DOC. NO. 104-20 (1995) [hereinafter Hungarian MLAT].

117. Treaty With Austria on Mutual Legal Assistance in Criminal Matters, Feb. 23, 1995, U.S.-Aus., S. TREATY DOC. NO. 104-21 (1995) [hereinafter Austrian MLAT].

118. *See* Korean MLAT, *supra* note 115, art. 1, at 2; Hungarian MLAT, *supra* note 116, art. 1, at 2; Austrian MLAT, *supra* note 117, art. 1, at 2.

119. *See* Korean MLAT, *supra* note 115, art. 15, at 14; Hungarian MLAT, *supra* note 116, art. 15, at 16; Austrian MLAT, *supra* note 117, art. 15, at 18.

120. 354 U.S. 1 (1985); see further discussion of *Colello*, *supra* Part III.

on the laws of the requested state may be insufficient, as the requested state's laws do not necessarily provide the same constitutional safeguards present in the United States.

2. *Probable Cause.* The three treaties do not adequately address the concerns enunciated in *Colello* about using a standard of proof other than probable cause. The Austrian treaty employs the same "reasonable suspicion" standard[121] that was challenged in *Colello*,[122] while the Hungarian and Korean treaties make no mention of the standard of proof required to be met in making a request. Though Article 15 of all three treaties provides that a request for a search and seizure must be accompanied by information justifying the action under the laws of the requested state,[123] this standard may not meet constitutional muster.

3. *Due Process.* None of the three treaties has a notice or hearing requirement in connection with asset freezes. In this regard, these new MLATs are no less problematic than the Swiss MLAT in *Colello*.[124]

4. *Right to Counsel.* Under Article 8 of the treaties, the requested state must allow the presence of persons specified in the request during the execution of the request, and must allow those persons to cross-examine persons giving testimony in connection with the request.[125] These specified persons may include the accused, counsel for the accused, or other interested persons.[126] Though the requesting state must ask for the presence of these persons, the SEC could use this provision to avoid Sixth Amendment challenges by providing in its requests that the accused must be entitled to have counsel present at the time testimony or evidence is taken.

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121. It is interesting to note that in the border-search context, reasonable suspicion is the established standard for initiating a non-routine search. United States v. Montoya de Hernandez, 473 U.S. 531 (1985) ("'reasonable suspicion' standard effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause"). By suggesting that probable cause is the required standard in any search and seizure case, *Colello* appears to be in direct conflict with clear Supreme Court precedent. 908 F. Supp. at 753.

122. *See* Austrian MLAT, *supra* note 117, art. 1, at 3.

123. *See id.* art. 15, at 18; Hungarian MLAT, *supra* note 116, art. 15, at 16; Korean MLAT, *supra* note 115, art. 15, at 14-15.

124. *See* discussion in text accompanying notes 75-78 and 88-93, *supra.*

125. *See* Korean MLAT, *supra* note 115, art. 8, at 9-10; Hungarian MLAT, *supra* note 116, art. 8, at 10; Austrian MLAT, *supra* note 117, art. 8, at 11-12.

126. *See, e.g.*, Letter of Submittal, Austrian MLAT, *supra* note 117, at iii.

B. Other Concerns

1. *Dual Criminality.* Under Article 1 of the Austrian and Hungarian treaties, no dual criminality is required.[127] Under the Korean treaty, the requested state has the discretion to deny assistance if the conduct being investigated would not be an offense under the law of the requested state. However, this basis for denial may not be used if the conduct falls under one of twenty-three categories of serious crimes annexed to the treaty,[128] which specifically include fraudulent securities practices and insider trading.[129] Thus, the SEC will be able to issue binding requests for information and enforcement assistance where it could previously only request voluntary action under an MOU.

2. *Scope of Assistance.* Requests under the Korean and Hungarian treaties are not limited to criminal matters; they may be for any form of assistance not prohibited by the laws of the requested state.[130] Under the Austrian treaty, the scope of the treaty includes, in addition to criminal offenses, forfeiture proceedings.[131] As a result of these provisions and the enabling legislation of ITSFEA,[132] the SEC, through the Department of Justice, will be able to request a broad range of information for civil actions, even in the absence of concurrent criminal proceedings.

3. *Confidentiality.* Article 5 of all three treaties provides that if asked, the requested state must use its "best efforts" to keep requests and their contents confidential,[133] and Article 7 of all three treaties requires that the requesting state keep information or evidence furnished by the requested state confidential if so asked by the requested state.[134] Article 9 of the three treaties provides that the requested party may provide the requesting party with information that is not publicly available, to the extent that it would be available

127. *See* Austrian MLAT, *supra* note 117, art. 1, at 3; Hungarian MLAT, *supra* note 116, art. 1, at 2.

128. *See* Korean MLAT, *supra* note 115, art. 1, at 3.

129. *See id.* annex paras. 7, 8.

130. *See id.* art. 1, at 3; Hungarian MLAT, *supra* note 116, art. 1, at 2.

131. Austrian MLAT, *supra* note 117, art. 1, at 2.

132. ITSFEA, *supra* note 46.

133. *See* Korean MLAT, *supra* note 115, art. 5, at 7; Hungarian MLAT, *supra* note 116, art. 5, at 8; Austrian MLAT, *supra* note 117, art. 5, at 9.

134. *See* Korean MLAT, *supra* note 115, art. 7, at 9; Hungarian MLAT, *supra* note 116, art. 7, at 9, Austrian MLAT, *supra* note 117, art. 7, at 10.

to the requested party's own law enforcement authorities.[135] These three provisions reflect the impact of ISECA's two FOIA provisions: the SEC may withhold information provided by foreign authorities under a treaty request, even if such information would normally be subject to disclosure under FOIA,[136] and the SEC can provide foreign regulators with information that is normally exempt from disclosure under FOIA.[137]

4. *Cost Sharing.* Article 6 of the three treaties provides that costs incurred in granting a request shall be apportioned between the states, with the requested state bearing costs within its own territory, except for expert witness fees, translation and transcription costs, and certain travel expenses, which are to be paid for by the requesting state.[138] ISECA's explicit approval of requests by the SEC to foreign securities authorities for reimbursement for expenses incurred in carrying out requests[139] will allow the SEC to take full advantage of this provision.

C. Summary and Analysis

The three treaties described above make significant progress in clarifying and expanding the use of the mutual assistance mechanism. For example, dual criminality is no longer an obstacle to requests between the signatory states, the scope of assistance that can be requested is far broader than that contemplated by earlier treaties, and new confidentiality and cost-sharing provisions should encourage cooperation between countries by removing two major concerns that existed under earlier treaties. Unfortunately, these new treaties do not adequately address the constitutional concerns raised by *Colello* and elsewhere.

V. FUTURE STEPS

As the SEC enters the twenty-first century, it is confronted with an international securities market that is growing at a frenetic pace. Though this growth needs to be encouraged, concurrent efforts

135. *See* Korean MLAT, *supra* note 115, art. 9, at 10-11; Hungarian MLAT, *supra* note 116, art. 9, at 12, Austrian MLAT, *supra* note 117, art. 9, at 13.

136. ISECA, *supra* note 47, § 78x(d).

137. *Id.*

138. *See* Korean MLAT, *supra* note 115, art. 6, at 8; Hungarian MLAT, *supra* note 116, art. 6, at 9; Austrian MLAT, *supra* note 117, art. 6, at 9-10.

139. ISECA, *supra* note 47, § 78d.

should be made to preserve the integrity of the U.S. market and the protection of U.S. investors. Part of the means of accomplishing this goal is the increased use of international agreements to cooperate with foreign securities regulators both in information-gathering and in enforcement. However, the SEC must keep its eye on the potential pitfalls of such international agreements and avoid stumbling over constitutional hurdles as it did in *Colello*.

As seen above, the new breed of MLATs addresses many of the problems with previous MLATs and MOUs. However, several issues remain. In order to avoid repeated problems of the sort seen in *Colello*, the SEC should go beyond the letter of the law of the treaties and MOUs and adopt internal procedures specifically aimed at fulfilling the requirements of the Constitution. Problem areas include the issues of probable cause for searches and seizures, the due process concerns of notice and hearing, and the right to representation of counsel and cross-examination. The SEC should ensure that all requests made under the various international agreements clearly identify behavior by the person(s) being investigated that meets the probable cause requirements of the Fourth Amendment.[140] The SEC should provide notice and a hearing to a person whose assets are to be frozen pursuant to a request under one of these agreements to reduce the risk of due process violations. As noted in *Colello*, this does not necessarily require notice and a hearing prior to the asset freeze if there is a special need for rapid action, so long as prompt post-deprivation notice is given. Likewise, the SEC should include with every assistance request instructions that the person being investigated be permitted to have counsel present whenever that person is being questioned, as well as for cross-examination of other witnesses being deposed.

VI. CONCLUSION

The growth of the international securities market has been accompanied by a large array of international agreements to police that market. Though well-intentioned, most of these agreements resemble the Swiss Treaty that was held unconstitutional in *Colello*. The new legislation that permits a broadening of the scope of these

140. This requirement should not pose undue difficulties on the SEC, and may often be a question of properly wording the request. This is particularly true in light of the trend towards lowering the requirements for probable cause in administrative proceedings. *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (holding that probable cause may be based on showing that *reasonable* legislative or administrative standards for conducting an inspection are satisfied).

agreements does little to address these concerns. In the future, it is critical that the SEC in entering into MOUs, and the United States in entering into MLATs, pay particular attention to these issues to ensure that future agreements comply with the protections guaranteed under the U.S. Constitution. Furthermore, the SEC should institute procedures that provide persons being investigated under international agreements with the same rights and remedies that they would have under a purely domestic investigation. By so doing, the SEC can avoid further unfortunate results.

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