

# A SWISS PERSPECTIVE ON CONFLICTS OF JURISDICTION

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## I

### INTRODUCTION

Economic relations between Switzerland and the United States are very substantial. The United States ranks second to the Federal Republic of Germany as the biggest purchaser of Swiss products. Swiss investments in the United States total billions of dollars; quite a few Swiss multinational companies have their biggest subsidiaries in this country, and these subsidiaries often far surpass the operations of the parent company. Furthermore, Swiss banks, forming an important financial center, have very close connections to their U.S. counterparts as well as to the exchanges in New York and Chicago. Given this network of relationships, it is not surprising that the jurisdiction of the two countries often overlaps. This is not by itself particularly worrisome. Problems arise, however, when the two countries are not in agreement as to whether sufficient grounds exist for one country to claim jurisdiction, when the demands of the law of that country contradict the demands of the law of the other. In the Organization for Economic Cooperation and Development (OECD) the term "conflicting requirements" is used to describe both this situation and the situation where one country seeks to *enforce* its law against persons subject to the legislation and territorial jurisdiction of another country. Most often, the generally accepted distinctions in legal theory between jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce are blurred in the actual case. Not surprisingly, what finally troubles the bilateral relations between countries is the exercise of enforcement jurisdiction, the use of "power to carry their commands into effect by bringing consequences to bear upon those who defy them."<sup>1</sup>

Conflicts on the question of who has the "capacity . . . under international law to enforce a rule of law"<sup>2</sup> would, of course, arise even between countries that have the same set of laws and share the same views on sovereignty and jurisdiction. What really keeps diplomats busy, however, is the fact that legal concepts and procedures on both sides of the Atlantic are sometimes very

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1. Vagts, *The Scope of Application and Enforcement of U.S. Laws*, 35 WIRTSCHAFT UND RECHT 76 (1983).

2. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979).

different. Not only does the assumption of jurisdiction encroach on the sovereignty of the other state, but it also imports legal principles and concepts that are foreign and may even contradict the home grown variety.

Other than the sovereignty issue, discussed later, the following major differences between the legal systems of Switzerland and the United States seem to aggravate the problem of conflicts of jurisdiction. (Much of what follows also holds true with respect to problems between the United States and other European countries.) In *civil cases* (accepting the Swiss definition, which does not include administrative cases) there is, first, the *ease* with which U.S. courts assume jurisdiction over foreign persons having "minimum contacts" or "doing business"<sup>3</sup> in the United States. Related to this problem is the concept of "enterprise unity" which leads U.S. courts that undeniably have jurisdiction over a subsidiary to assume jurisdiction over the parent company as well, although both have separate legal personalities and the parent is by itself "not present" in the United States.

The desire to find jurisdiction in a U.S. court is easily explained if one looks at the horrendous amounts awarded as punitive or treble damages to successful plaintiffs in, for example, product liability and antitrust cases. Additionally, a relatively new development involves excessive awards for ordinary claims brought under an overly extensive interpretation of the Racketeer Influenced and Corrupt Organization Act (RICO). Lord Denning has poignantly described this phenomenon: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."<sup>4</sup>

The Swiss company that is drawn into a proceeding before a U.S. court, however, does not only stand to lose a substantial amount of money. More problematical from a foreign relations standpoint is the fact that even in the earliest phase of litigation, the company will be faced by overwhelming demands for documents, the production of which is likely to be forbidden or at least restricted by Swiss law.

In the field of public law (accepting again the Swiss definition, according to which "public" means administrative and penal law) jurisdiction conflicts arise mostly from the fact that although a strong free market philosophy is shared by both countries, the economic-legal environment of the United States is characterized by a host of regulatory agencies such as the Federal Trade Commission, the SEC, the CFTC, the Antitrust Division of the Justice Department, and the International Trade Commission. Furthermore, considerable restrictions exist based on the Export Administration Act, and certain conduct viewed as normal elsewhere is penalized through, for example, the Sherman Act or the Foreign Corrupt Practices Act. The serious conflict potential in some of these regulations is twofold. First, they are sometimes applied to subsidiaries of U.S. companies in Switzerland as a

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3. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

4. *Smith Kline and French Laboratories v. Bloch* [1983] 1 W.L.R. 730, 733-34 (Can. 1982).

foreign policy tool. This application, of course, runs counter to our well known policy of permanent neutrality. Examples that fortunately can be dispensed with are the notorious Soviet pipeline case (no Swiss or U.S. company in Switzerland was involved) and the U.S. freezing of Iranian and Libyan assets that, according to the formulation of the decrees, also covered assets in Swiss branches of U.S. banks.

More commonly, however, these regulations result in the same kind of problem that is encountered in civil suits: investigations leading to requests for documentary evidence. Such requests, irrespective of whether they are founded in civil or public law, face two major and distinct problems. First, the requests violate Swiss sovereignty. Second, they may violate Swiss privacy laws.

## II

### SOVEREIGNTY AND PRIVACY ISSUES

Like many other civil law countries, Switzerland exercises more control over the collection of evidence in foreign or domestic proceedings than does the United States.<sup>5</sup> Consequently, the taking of evidence on Swiss soil is regarded as a domestic judicial function.<sup>6</sup> Compulsory measures against natural or corporate persons located in Switzerland are therefore the sovereign and exclusive right of the Swiss authorities. Article 271 of the Swiss Penal Code<sup>7</sup> prohibits both the taking of evidence on Swiss territory by foreign officials and attorneys as well as direct service of documents by mail or through Swiss lawyers.

The privacy laws are an important element of the Swiss political, legal, and cultural tradition, and, like any laws that create individual rights, they may occasionally benefit those who do not deserve it. Privacy and protection against government intrusion into the private sphere are deeply rooted popular values. An initiative that sought—among other things—to relax the banking secrecy law was significantly defeated two years ago in a popular referendum.<sup>8</sup> Contrary to widespread belief, and different perhaps from the aims of some other countries, the privacy laws in Switzerland were not promulgated to attract foreign capital.

5. Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 78 INT'L & COMP. L.Q. 646 (1969).

6. Frei, *The Service of Process and the Taking of Evidence on Behalf of U.S. Proceedings—The Problem of Granting Assistance*, 35 WIRTSCHAFT UND RECHT 196-98 (1983).

7. Text of Art. 271 StGB (SR 311) (unofficial translation):

1. Anyone who, without authorization, takes in Switzerland for a foreign state any action which is within the powers of the public authorities,  
Anyone who takes such actions for a foreign party or for any other foreign organization,  
Anyone who facilitates such actions,  
Shall be punished with imprisonment, in serious cases with penitentiary confinement.

8. Volksinitiative "gegen den Missbrauch des Bankgeheimnisses und der Bankenmacht" Banken initiative, BB III 1979 ("initiative against abuse of banking secrecy and the power of the banks" defeated by popular vote on May 20, 1984).

Best known of the relevant provisions undoubtedly is article 47 of the Banking Law,<sup>9</sup> which provides for criminal penalties if a banker divulges information concerning a client without the latter's consent. It is important to know, for example, that the bank is not allowed to provide information even to the Swiss equivalent of the Internal Revenue Service except in a case involving tax fraud. Access to privileged information in civil proceedings may be restricted according to the various cantonal (state) laws of civil procedure. The fabled "banking secret," however, is no barrier to a criminal investigation.

The other privacy law that, although it may not be as famous as the Banking Secret law, has an important bearing on international legal relations is article 273 of the Swiss Penal Code.<sup>10</sup> This provision prohibits the exploring and passing on of manufacturing or business secrets to a foreign authority. The term "business secrets" covers all facts of business life (1) which are neither commonly known nor generally accessible, (2) which the person affected desires to keep secret, and (3) in respect to which an objective interest in keeping them secret exists.

In order to shed more light on this provision, the Swiss government in a memorandum submitted to the Legal Advisor of the Department of State has characterized the goals of article 273 as follows:

It is designed, first of all, to protect Switzerland from infringements upon its sovereignty resulting from direct gathering of information or from denunciations to a foreign addressee on the one hand, and from disclosure of information compelled by foreign authorities, on the other. Furthermore, it is designed to protect the Swiss economy, which is affected as such whenever persons or companies falling under the jurisdictional scope of Article 273 are the object of such inquiries. The Swiss Supreme Court has repeatedly emphasized that violating or endangering private business secrets also impairs the interests of the Swiss economy. Thus, the protection of the economic interests of companies affected constitutes indirectly also one of the basic aims of this penal norm.<sup>11</sup>

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9. Text of Art. 47, Banking Law, SR 952.0 (unofficial translation):

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

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

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

4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.

10. Text of Art. 273, STGB (SR 311) of the Swiss Penal Code (unofficial translation):

Whoever explores a manufacturing or business secret in order to make it accessible to a foreign authority or a foreign organization or a foreign private business enterprise or their agents, Whoever makes a manufacturing or business secret accessible to a foreign authority or a foreign organization or a foreign private business enterprise or their agents, Shall be punished with imprisonment, in serious cases with penitentiary confinement. This deprivation of liberty can be combined with a fine.

11. For a reprint of this memorandum, see Harwood & Zagaris, *Marc Rich & Co AG v. United States*, 55 TAXES INT'L, May 1984, at 3, 16.

Two things in the context of extraterritoriality are important to keep in mind with regard to the privacy laws. First, neither the Banking Secret law nor article 273 are what are known as “blocking laws” in the sense of the British “Protection of Trading Interest Act”<sup>12</sup> or Canadian “Foreign Extraterritorial Measures Act,”<sup>13</sup> both of which give the *government* the competence to block a transfer of evidence. The Swiss laws, except in extraordinary circumstances, can only punish the transfer of evidence. Second, there is *no* government entity that can authorize the disclosure of information if the interested parties do not agree. In the case of article 47, the consent of the client is a necessary but sufficient condition to enable bankers to pass on information. In the case of article 273, even the consent of the interested party, that is, the “holder of the secret,” in rather rare cases may not be sufficient. Such a case would occur if the information sought pertains to a *direct* interest of Switzerland as a political or economic entity.

Turning to the historical and political reasons for Switzerland’s attitude and the basis this stand finds in international law, a quote from the Brief as Amicus Curiae with which the Swiss government intervened before the United States Court of Appeals for the Second Circuit in the *Marc Rich* case<sup>14</sup> illustrates the importance of these matters to the Swiss.

Switzerland is a small country which for many centuries has had a high regard for its freedom as a nation and the independence of its individual citizens. The vulnerability inherent in its size has led its people to place a very high premium on measures—military, diplomatic, and legal—to protect against foreign intervention in their affairs. Such measures are considered essential to preserve both the sovereign independence of the nation and the autonomy of individual citizens.

A small country obviously has to rely on international law for the protection of its interests much more than does a major power. The basic purpose of international law is to promote international harmony by setting forth rules which bind all nations. To this end, international rules of jurisdiction are designed to determine the extent to which a state may subject persons or property to its law and courts without giving another state valid grounds to object that it lacks capacity to take such action.

In his separate opinion in the decision of the International Court of Justice in the case concerning the *Barcelona Traction, Light and Power Co.*,<sup>15</sup> Judge Sir Gerald Fitzmaurice not only illuminates the difficulties present in defining the limits to jurisdiction, but more important, clearly states that such limitations persist and demand careful consideration:

[I]nternational law does not impose hard and fast rules on States delimiting spheres of national jurisdiction. . . . It does however (a) postulate the *existence* of limits . . . and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and

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12. 1980, ch. 11.

13. Act of Dec. 20, 1984, ch. 49, 1984 Can. Stat. 1863.

14. *Marc Rich & Co. v. United States*, 736 F.2d 864 (2d Cir. 1984).

15. *Barcelona Traction, Light & Power Co. Case (Belg. v. Spain)*, 1970 I.C.J. 4.

to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.<sup>16</sup>

A foreign element, undoubtedly exists when a state or its courts deal with matters that are not, or at least are not exclusively, within its territorial boundaries.

The territoriality principle, that is, the notion that a state must restrict its rule-making and the enforcement of the decisions of its courts in principle to persons within its territory, is a fundamental rule of international law that dates back many years. Ulrich Huber<sup>17</sup> and Justice Joseph Story<sup>18</sup> of the United States Supreme Court laid the groundwork for this principle, henceforth known also as the Huber-Story Maxim. Although the Huber-Story Maxim is no longer fully sufficient to guide the international lawyer in his search for the proper limitation of a state's authority in the complexities prevailing in today's economic environment, it is still the starting point for any investigation into this subject and any deviation from this principle must be well founded indeed.

There are, to be sure, certain exceptions to the territorial principle. Doctrine and international practice have elaborated other generally accepted bases for jurisdiction, namely, the nationality principle, the protective principle, and the universality principle. Common to all these principles, which may under certain circumstances allow a state to reach outside its territory to apply its authority, is that they have been developed in the field of *criminal law*. It is of utmost importance to keep this in mind in all discussions concerning extraterritorial jurisdiction. The reach—in an official function—outside of its territory by one state inevitably leads to the infringement on the territory by another state. This other state will only admit such behavior when the need to do so is shared, and only to the extent that it serves the realization of corresponding legal values of the international community. The need for the prosecution of criminal acts such as murder and robbery is universally shared by all civilized nations and the apprehension and conviction of the malefactor can be regarded as an act of international interest. It is obvious that the same degree of harmony that prevails in criminal law does not exist in cases of *civil* jurisdiction. Therefore, it is not generally admissible to use these principles *per analogiam* outside the fields of international criminal law.

International law, it must be concluded, does not give generally acknowledged answers to the various jurisdictional issues. As far as *jurisdiction to enforce* is concerned, however, (as mentioned before, this is the area where confrontations between countries arise) the famous *S.S. Lotus* case in the Permanent Court of International Justice still provides the definitive answer: "[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may

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16. *Id.* at 105 (emphasis in original).

17. Huber, *De Conflictibus Legum Diversarum in Diversis Imperiis*, 18 BRIT. Y.B. INT'L L. 64 (1937) (D.J. Davies trans.).

18. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (M. Bigelow rev. ed. 1893) (3d ed. 1846).

not exercise its power in any form in the territory of another State.”<sup>19</sup> This exercise of power in the territory of another State can take various forms, one of which was used by U.S. authorities in *Marc Rich v. United States*.<sup>20</sup>

Marc Rich AG is a company domiciled in Switzerland and established according to Swiss law. The company is *not* controlled by Swiss nationals, nor has the Swiss government any special interest in the company as such. Marc Rich AG had a Swiss subsidiary which did business in the United States. In the course of a grand jury investigation in connection with the violation of pricing regulations and tax fraud, Marc Rich AG was requested to produce various documents in its possession. The company refused, claiming that the disclosure of these documents would violate article 273 of the Swiss Penal Code. Subsequently, the United States District Court for the Southern District of New York imposed a \$50,000 per day contempt fine. Because all appeals failed, Marc Rich AG, in a clear violation of article 273, signed an agreement with the U.S. authorities and started to deliver the documents. However, because of the publicity surrounding this agreement, the Swiss Attorney General (Public Prosecutor) ordered the seizure of the documents in the course of an investigation into a possible violation of article 273. The U.S. authorities were formally advised of this seizure and their attention was drawn to the possibility of obtaining these documents through judicial assistance procedures. Furthermore, informal talks were held in Bern between Swiss and U.S. officials concerned with this matter. At the same time, the United States Department of Energy issued a further subpoena demanding the production of additional documents. This led the highest Swiss executive body, the Federal Council, to take the rather extraordinary measure of seizing the evidence. The Council's power to take this action was based directly on the Federal Constitution.<sup>21</sup> Notwithstanding this action, the United States District Court continued to levy the contempt fine and an appeal by the company, although the Swiss government intervened as *amicus curiae*, was rejected.<sup>22</sup>

All along, the Swiss government made every effort to convince the U.S. authorities that it had no desire to protect Marc Rich AG from any wrongdoing, that the facts as they were presented seemed to indicate that the behavior of the company would be equally punishable in Switzerland, and

19. France v. Turkey 1927 P.C.I.J., (Ser. A.) No. 10, at 18 (the *S.S. Lotus* case).

20. For a detailed history of the case, see Harwood & Zagaris, *supra* note 11, at 3. See also *Marc Rich & Co. v. United States*, 707 F.2d 663 (2d Cir.) (affirming contempt citation), *cert. denied*, 463 U.S. 1215 (1983).

21. Article 102, ¶ 8 states:

The powers and duties of the Federal Council, within the limits of the present Constitution, are more particularly the following:

...

8. It watches over the interests of the Confederation abroad, paying particular notice to its international relations, and has the general charge of foreign affairs.

B. VERF., CONST., COST. FED. art. 102, ¶ 8 (SR 101) (Switz.); 3 A. PEASLEE, CONSTITUTIONS OF NATIONS 958-59 (rev. 3d ed. 1968).

22. *Marc Rich & Co. v. United States*, 736 F.2d 864 (2d Cir. 1984).

that, consequently, the new Swiss Act on International Mutual Assistance in Criminal Matters (IMAC),<sup>23</sup> which had become effective on January 1, 1983, would be applicable.<sup>24</sup> Not until June 11, 1984, a year and a half after the subpoena was issued, did the United States Government make a formal request for judicial assistance. The execution of the request was then delayed because the district court would not withdraw the contempt sanctions. On October 25, 1984, the Department of State notified the Swiss Embassy in Washington that after the U.S. authorities had entered into an agreement with the Marc Rich companies, this last condition was fulfilled. The requested documents were delivered to the U.S. authorities on November 29, 1984.

### III

#### AN ANALYSIS OF POSSIBLE APPROACHES

*Marc Rich* offers several lessons that can help to avoid similar conflicts. It seems obvious that the limitations spelled out in the *S.S. Lotus* and due regard for sovereignty and privacy laws will not be accepted without qualification by other countries, least of all by a major power like the United States, if such acceptance means that legitimate law enforcement efforts are foiled.<sup>25</sup> Solutions therefore have to be found that take into consideration the legitimate interests of the countries involved and that conform with international and national law.

One of the steps taken in the United States has been to submit cases with foreign implications to a balance-of-interests test in which the broader interests of the states that could claim jurisdiction are balanced against each other in order to find the greater interest. The leading cases that set the criteria for this balancing are, of course, *Timberlane Lumber Co. v. Bank of America*,<sup>26</sup> and *Mannington Mills, Inc. v. Congoleum Corp.*<sup>27</sup> The balancing approach, although well intentioned, has not led to a solution of the problem for several reasons.

In the eyes of foreigners, the first and foremost flaw is undoubtedly the track record of this approach. With clockwork regularity, U.S. courts have found the interests of the United States superior to those of foreign nations.<sup>28</sup>

23. Federal Act on International Mutual Assistance in Criminal Matters, SR 351.1 (1981) (translation reprinted in AM. BAR ASS'N NAT'L INST., TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS 492-532 (1984)).

24. A request under the bilateral assistance treaty was ruled out since that treaty does not apply "to violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations." Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, art. II, par. 1(c)(5), 27 U.S.T. 2019, 2027, T.I.A.S. No. 8302.

25. District Judge Milton Pollack has put it bluntly:

It would be travesty of justice to permit a foreign company to invade American markets, violate American laws if they were indeed violated, withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law.

*SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981).

26. 549 F.2d 597, 613 (9th Cir. 1976).

27. 595 F.2d 1287, 1297 (3d Cir. 1979).

28. *Graco v. Kremlin, Inc.*, 101 F.R.D. 503 (1984); *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984); *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), cert.

More fundamentally, it is unclear, and has indeed been questioned by the courts themselves, how a court of law can validly weigh the political, social, or economic interests of a foreign nation. Finally, the fact that a court finds it has jurisdiction does not solve the problem of how it can *enforce* its measures in the foreign country.

A more specialized approach to solving jurisdictional conflicts arising from foreign secrecy laws in the securities field is the *waiver-by-conduct* approach taken by the Securities and Exchange Commission (SEC).<sup>29</sup> Under this concept, the purchase or sale of securities in a U.S. market constitutes an implied consent to disclosure of information relevant to the transaction for purposes of any SEC action that may arise out of the transaction. In a diplomatic note to the Department of State, the Swiss government labelled the approach “unworkable,” “unnecessary,” and “possibly confrontational.”

The Swiss government found the approach unworkable because article 47 of the Swiss Banking Act, which governs the so-called banking secret, does not recognize a tacit waiver of the secrecy privilege. The Swiss bank would therefore still be open to Swiss prosecution if it revealed information sought by the SEC solely on the basis that its client had waived his secrecy privilege by conducting a transaction in U.S. markets. Thus, the bank would still face the choice of either disregarding the SEC’s request for information or violating Swiss criminal law. In addition, the approach is considered confrontational because, as outlined above, the bank is not allowed to reveal the information, and the U.S. authorities will be induced to take compulsory action. This will then create the well-known problems of extraterritorial enforcement jurisdiction and give rise to counter-measures. Finally, the approach is considered unnecessary because, conscious of the SEC’s problems in pursuing illicit insider trading, Swiss and U.S. authorities have arrived at a memorandum of understanding that, together with Convention XVI of the Swiss Bankers Association,<sup>30</sup> provides a mechanism to overcome these problems as long as insider trading is not a criminal offense in Switzerland, since noncriminality precludes comprehensive judicial assistance.

This brings us to the only approach that offers the opportunity for a country both to pursue its interests *and* respect the sovereignty of the other members of the global community in accordance with article 2, paragraph 1 of the United Nations charter:<sup>31</sup> bilateral or multilateral cooperation. It is interesting to note that in the criminal field, where natural persons are concerned, this concept is hardly contested. When a criminal flees from country A to country B, A will not send its police to B to get him back, but will initiate extradition proceedings (provided a treaty exists) and let the police of B arrest and deport the subject. Why not use the same procedure where

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*denied*, 462 U.S. 1119 (1983); *United States v. Vetco, Inc.*, 691 F.2d 1281 (1981), *cert. denied*, 454 U.S. 1089 (1981).

29. 16 Sec. Reg. & L. Rep. (BNA) 1305 (Aug. 3, 1984).

30. *Reprinted in* 22 INT’L LEGAL MATERIALS 7-12 (1983).

31. U.N. CHARTER art. 2, para. 1.

corporations are concerned and evidence is requested? It is obvious that when legal assistance procedures go beyond the relatively narrow domain of extradition, or even criminal matters, the problems multiply. This fact, however, does not mean that countries should resort to unilateral approaches that guarantee confrontation, but not necessarily results.

#### IV

#### THE MAIN OBSTACLES TO A COOPERATIVE APPROACH

There are two major obstacles to implementing a cooperative approach. First, unlike extradition treaties, conventions between states granting a wide array of assistance procedures are not common, especially between civil and common law countries. Switzerland and the United States concluded a bilateral treaty in 1973 (which became effective in 1977) that covers a significant number of crimes and even provides for assistance to the United States in tax evasion cases if organized crime is involved.<sup>32</sup> As mentioned before, Switzerland enacted an autonomous law in 1983 which provides for assistance to any country if certain conditions are fulfilled.<sup>33</sup> This act was ultimately the basis for assistance in the tax fraud matter of Marc Rich AG and could be the basis for returning any assets ex-presidents Marcos and Duvalier may have stashed away in Switzerland. When the SEC ran into difficulties in its investigation of insider trading cases because of Swiss secrecy laws, Swiss and U.S. authorities found a way to overcome these problems. Even in the absence of an existing mechanism, an early warning system for governments involved in potential confrontational cases, followed by consultations in a climate of confidence, will go a long way to avoid or at least minimize conflicts. It will draw the attention of the "requesting" state to the existence of available channels and prevent the "requested" state from being faced with the *fait accompli* of unilateral action, something that experience shows makes it difficult to achieve a mutually acceptable solution. There is no denying, however, that the availability of assistance mechanisms between Switzerland and the United States is limited by the fact that the 1973 bilateral assistance treaty relates only to criminal matters, and that there are differences of conception between the two legal systems as to the very notion of what constitutes a criminal matter. In connection with the so-called dual criminality standard, this ambiguity may make it impossible for Swiss authorities to comply with some U.S. requests, especially since many enforcement actions undertaken by U.S. agencies are actually administrative and not penal proceedings. Although states have historically been very reluctant to grant assistance in administrative proceedings for various reasons, the time may come when we have to reconsider this position.

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32. Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302.

33. See *supra* note 21.

Assistance in civil cases is somewhat hampered by the fact that no treaty relation, bilateral or multilateral, exists between Switzerland and the United States in this respect. Switzerland treats U.S. requests as if the Hague Convention on Civil Procedures of March 1, 1954 applied.<sup>34</sup> The United States, however, is *not* a party to this Convention. The Swiss Federal Council has, however, decided to join the Hague Evidence Convention, to which the United States belongs.<sup>35</sup> Current problems arising from the interpretation of that Evidence Convention by U.S. courts—*Anschuetz* or *Club Med*<sup>36</sup> come to mind—seem to indicate that not all our problems would be solved by this step either.

The second obstacle is that even if the mechanisms are in place, assistance procedures take time. In *Marc Rich*, continuous Swiss reminders to use IMAC were invariably rejected by the New York prosecutors because, it was argued, that procedure would take too much time. Quite frankly, after months and months of the same reply, this particular argument began to lack credibility.

It must be admitted, however, that in other cases, perhaps because of too many appeal possibilities, the procedure took much too much time. The prime example that makes us all shudder is, of course, the *Santa Fe* case, in which the SEC had to wait for three years before it finally got the requested evidence.<sup>37</sup>

It is unavoidable that obtaining evidence abroad is a bit more complicated and maybe more cumbersome and time consuming than the taking of evidence domestically. Yet, such inconvenience is a price worth paying to avoid confrontation. The Comprehensive Crime Control Act of 1984 recognizes this fact and provides for the suspension of the statute of limitations to permit the United States to obtain foreign evidence.<sup>38</sup>

Nevertheless, it is obvious that the delays inherent in foreign assistance procedures have to be reasonable. Otherwise, this instrument ceases to be a valid and efficient way for legitimate law enforcement. The Swiss authorities have recognized that fact and plan to undertake several quite far-reaching steps to streamline the procedure. It is clear, however, that concerns for due process put a certain limit on this endeavor.

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34. Civil Procedure Convention, Mar. 1, 1954, 286 U.N.T.S. 265.

35. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (Switzerland signed on May 21, 1985).

36. *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), *judgment vacated and case remanded for further consideration in light of Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 107 S. Ct. 3223 (1987); *Club Mediterranee v. Dorin*, 93 A.D.2d 1007, 462 N.Y.S.2d 524 (1983), *appeal dismissed*, 469 U.S. 913 (1984).

37. SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of Santa Fe International Corporation, No. 81 Civ. 6553 (S.D.N.Y. 1981).

38. 18 U.S.C. § 3292 (Supp. III 1985).

## V

## CONCLUSION

A major concern of the Swiss authorities remains the apprehension that even if reliable, effective, and timely mechanisms of assistance are put into place, U.S. authorities might not regard them as an *exclusive* means of obtaining evidence, but rather as an *additional* instrument in their procedural arsenal. The aim of ongoing consultations with U.S. authorities is therefore twofold: to render the mechanisms more effective *and* to assure that they really are used exclusively. Hopefully, it will be recognized by all involved that the way to solve conflicts of jurisdiction is by cooperative efforts and not by unilateral action.