

1995

## International Agreements and Understandings for the Production of Information and Other Mutual Assistance

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### Recommended Citation

*International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, 29 INT'L L. 780 (1995)  
<https://scholar.smu.edu/til/vol29/iss4/6>

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## **International Agreements and Understandings for the Production of Information and Other Mutual Assistance**

To regulate and police the U.S. securities markets in an era of globalization, the Securities and Exchange Commission (SEC or Commission) has developed new approaches for obtaining a wide variety of information from abroad. The SEC's attempts in the early 1980s to secure foreign-based evidence in several notorious insider trading cases often were frustrated by the assertion of foreign secrecy laws. Although the federal courts assisted the SEC by compelling the production of the foreign-based information, that unilateral approach was time-consuming and expensive. In part because of its success in U.S. courts, the SEC was able to begin a dialogue with foreign securities officials and other law enforcement authorities, and it developed informal case-by-case understandings that facilitated the production of information from other countries.

The ad hoc nature of a case-by-case approach highlighted the need for more formal mechanisms that would foster international cooperation and provide greater assurance of the availability of assistance. This article describes the importance of bilateral and multilateral agreements the SEC has used to obtain foreign-based information and documents, and the SEC's experience with those mechanisms. Because those mechanisms were not specifically tailored to the SEC's investigation and litigation needs and did not provide optimal assistance, the SEC initiated regulator-to-regulator discussions that resulted in the SEC's own formal understandings.

On November 15, 1988, the SEC released a Policy Statement on Regulation of International Securities Markets.<sup>246</sup> The Policy Statement, approved unanimously by the Commission, identifies areas of regulatory concern presented by the continued internationalization of the securities markets and sets forth principles and goals central to achieving a truly global market system. In the Policy

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246. 53 Fed. Reg. 46,963 (Nov. 21, 1988).

Statement the SEC first articulated an integrated approach to addressing internationalization.

The SEC has maintained an active leadership role in developing international understandings designed to enhance cooperation among securities regulators. The SEC also has worked, on a bilateral and multilateral basis, and within international organizations, to develop a coherent and effective approach to coordinating enforcement matters, such as how to address complex frauds. Moreover, in connection with its efforts to provide assistance to foreign authorities, the SEC recommended, and Congress enacted, legislation that authorizes the SEC to conduct investigations on behalf of foreign securities authorities, using subpoena authority if necessary.<sup>247</sup>

## I. Bilateral Treaties for the Production of Evidence

The United States has entered into treaties with many countries to provide mutual assistance in criminal matters. As of March 15, 1995, thirteen Treaties on Mutual Legal Assistance in Criminal Matters (MLAT) were in force.<sup>248</sup> Eleven MLATs have been signed but are not yet effective because they have not been ratified by the U.S. Senate or the appropriate foreign legislative body, or both.<sup>249</sup> The SEC has used these "criminal" treaties because U.S. federal securities laws are both civil and criminal in nature.<sup>250</sup>

The SEC has ensured that these agreements specifically cover securities law offenses and has used the agreements in SEC investigations to obtain information and documents to assist it in determining whether U.S. federal securities laws have been violated. The SEC also has used information and documents obtained under the treaties as evidence in actions the SEC filed in U.S. federal courts against persons accused of violating federal securities laws. The following sections describe several of the treaties currently in effect.

247. Pub. L. No. 100-704 (signed into law on Nov. 19, 1988).

248. The 13 MLATs (effective dates noted in parentheses) are with the following countries: Argentina (Feb. 9, 1993); Bahamas (July 18, 1990); Canada (Jan. 24, 1990); Cayman Islands (Mar. 19, 1990—extended by diplomatic note to Anguilla, the British Virgin Islands and the Turks and Caicos Islands on Nov. 9, 1990, and to Montserrat on Apr. 26, 1991); Italy (Nov. 13, 1985); Mexico (May 3, 1991); Morocco (June 23, 1993); The Netherlands (Sept. 15, 1983); Spain (June 30, 1993); Switzerland (Jan. 23, 1977); Thailand (June 10, 1993); Turkey (Jan. 1, 1981); and Uruguay (Apr. 14, 1994).

249. The nonratified MLATs are as follows (dates of signing given in parentheses): Austria (Mar. 2, 1995); Organization of American States (OAS) MLAT and Protocol on Assistance in Tax Cases (Jan. 10, 1995); Hungary (Dec. 1, 1994); Philippines (Nov. 13, 1994); United Kingdom (Jan. 6, 1994); South Korea (Nov. 23, 1993); Panama (Apr. 11, 1991); Nigeria (Sept. 9, 1989); Jamaica (July 7, 1989); Belgium (Jan. 28, 1988); and Colombia (Aug. 20, 1980).

250. *See, e.g.*, Exchange Act § 27, "Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred."

## A. TREATY BETWEEN THE UNITED STATES AND SWITZERLAND

The Treaty on Mutual Assistance in Criminal Matters Between the Swiss Confederation and the United States<sup>251</sup> (Swiss Treaty) was the first mutual assistance treaty of its kind to which the United States was a party. It “provides for broad assistance in . . . criminal matters . . . includ[ing] assistance in locating witnesses, obtaining statements and testimony of witnesses, production and authentication of business records, and service of judicial or administrative documents.”<sup>252</sup> Six exchanges of letters interpreting certain language in its provisions supplement the Swiss Treaty.

The Swiss Treaty, which is available only to the governments of the United States and Switzerland,<sup>253</sup> is employed either during an investigation or after initiation of a proceeding. Except for cases of organized crime, the offenses investigated must meet a dual criminality standard, that is, they must be criminal in nature in both the requesting and the executing states. Although the Swiss Treaty applies to a full range of matters that meet the dual criminality requirement, it does not cover customs, tax, and antitrust law.<sup>254</sup> The SEC, an administrative agency, may use the Swiss Treaty if the SEC’s request pertains to an investigation of conduct that might be dealt with in a criminal proceeding, such as insider trading. The Swiss Treaty, however, is not the exclusive means for obtaining records maintained or generated in Switzerland.<sup>255</sup>

1. *Operation of the Swiss Treaty*

Article 3 of the Swiss Treaty provides that the state granting assistance may refuse such assistance to the extent the request is likely to “prejudice its sovereignty, security or similar essential interests.” Although banking secrecy is considered an essential Swiss interest, unless the person about whom the information is requested is not connected with the offense, or unless the secret itself is of special importance to the Swiss economy, assistance is generally granted under the Swiss Treaty. Assistance may be refused, however, if the request is made for the purpose of prosecuting a person for acts of which the person already has been acquitted in the requested state.

Article 4 provides that compulsory measures are applied if the request’s criminal offense is an offense in both the United States and Switzerland, and if the offense described is among the thirty-five serious crimes denoted in the annex to the Swiss Treaty. Article 5 provides that information received pursuant to the

251. Done May 25, 1973 (effective 1977), U.S.-Switz., 27 U.S.T. 2019 [hereinafter Swiss Treaty].

252. LETTER OF SUBMITTAL, S. EXEC. F., 94th Cong., 2d Sess. (Feb. 18, 1976).

253. See Swiss Treaty, *supra* note 251, arts. 1, 2.

254. *Id.* art. 2.

255. See *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987) (rejecting a witness’s contention that the Swiss Treaty provides the exclusive means for obtaining company records that were maintained or generated in Switzerland).

Swiss Treaty, unless otherwise agreed to by diplomatic note,<sup>256</sup> must be used as evidence in a criminal proceeding before it can be introduced in a civil proceeding. Article 5 is the product of the tension that arose from the U.S. position that information furnished under the Swiss Treaty should be available for all uses, and the Swiss view that information gained under the Swiss Treaty should be used solely for the purpose for which it was furnished. The article accepts the Swiss view regarding limitations on use, with certain exceptions allowing for further use of the information, but only after the state providing the information is advised of the intended use, and where the same crimes are involved. Under article 5, governmental authorities may use the requested information in proceedings concerning civil damages or in any continuing criminal investigation covered by the Swiss Treaty, provided that such information is not introduced into evidence.

In the exchange of interpretive letters that accompanied the Swiss Treaty, the parties agreed that article 5 is not "intended to restrict the use of information which has become public any more than the use of information which has become public would be restricted in the requested State."<sup>257</sup> In addition, the parties agreed that the limitations of article 5 constituted solely an agreement between governments, and could not be used by any person to suppress or exclude any evidence gained under the Swiss Treaty.

Article 8 provides that the designated central authorities, the U.S. Department of Justice and the Swiss Department of Justice and Policy, will process the requests. If the U.S. central authority receives a request, and the U.S. Justice Department determines that the Swiss Treaty applies, the Justice Department can execute the request without any further procedures.<sup>258</sup> The procedure in Switzerland differs because, concurrent with the ratification of the Swiss Treaty, the Swiss passed additional implementing legislation that created specific rights of appeal for individuals who wish to oppose execution of U.S. treaty requests. Although this legislation does not bar the ultimate execution of the request, it introduces significant time delays to the Swiss Treaty request process.

## 2. *Challenges to Use of the Swiss Treaty*

Despite express language in the Swiss Treaty barring its use as a basis for nongovernmental motions to suppress or exclude evidence obtained under the treaty, criminal defendants have challenged such evidence as a violation of the Swiss Treaty. The courts have rejected those challenges because article 37(A) of the Swiss Treaty expressly provides that private parties have no standing to

256. See *infra* notes 283-85 and accompanying text.

257. President's Message to the Senate Transmitting the Treaty with the Swiss Confederation on Mutual Assistance in Criminal Matters and Exchanges of Interpretive Letters, 94th Cong., 2d Sess. 57-118 (1976).

258. See 28 U.S.C. §§ 1781-1782 (1988).

raise the issue.<sup>259</sup> The courts also have found the use of such evidence to be consistent with fairness and due process, since defendants retain the right to challenge the value of the evidence.<sup>260</sup>

In *Barr v. United States Department of Justice*<sup>261</sup> the Second Circuit rejected a challenge to a freeze of assets by the Swiss Government pursuant to a request to freeze assets under the Swiss Treaty. The court held that the freeze of assets did not violate the Swiss Treaty and did not deprive the appellant of his constitutional rights.<sup>262</sup> In denying Barr's request for an injunction directing the United States to withdraw its treaty request, the court noted that although the Swiss Treaty does not specifically list the freeze of assets of a criminal defendant as an available measure in the Swiss Treaty, both the U.S. and Swiss Governments "believe that such a freeze is one of the mutual assistance measures embraced by the Treaty."<sup>263</sup> The court concluded that this understanding was entitled to deference, citing the Vienna Convention on the Law of Treaties.<sup>264</sup>

### 3. *Experience under the Swiss Treaty in Insider Trading Cases*

Notwithstanding the very high threshold for SEC requests caused by the dual criminality standard and the absence of specific securities laws in Switzerland until 1995 (except for its insider trading law, described below), the SEC has been successful in using the Swiss Treaty in some of its most serious cases. Swiss criminal law contains three specific antifraud provisions that arguably provide protection similar to the antifraud provisions of the Securities Exchange Act of 1934 (Exchange Act). Although the Swiss provisions may be more restrictive than the U.S. common law concerning insider trading, they have been relied upon as a basis for granting treaty requests in matters involving possible trading by a person while in possession of material nonpublic information, in violation of U.S. securities laws. Switzerland's insider trading law, which went into effect on July 1, 1988, provides substantial coverage for the fact situations the SEC has encountered involving trading through Swiss banks.

In 1982, when the SEC made its first request under the Swiss Treaty in *SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of Santa Fe International Corp.*<sup>265</sup> (the *Santa Fe* case), discussed below, no insider trading law existed in Switzerland. Nevertheless, Switzerland granted the SEC's request and provided evidence important to the outcome of the case. An exchange of opinions between the governments of the United

259. See *United States v. Johnpoll*, 739 F.2d 702, 714 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *United States v. Davis*, 767 F.2d 1025, 1029 (2d Cir. 1985).

260. See *United States v. Davis*, 767 F.2d at 1030-33.

261. 819 F.2d 25 (2d Cir. 1987).

262. *Id.* at 28.

263. *Id.*

264. *Id.* (citing to art. 31(3)(6) (1969)).

265. No. 81 Civ. 6553 (WCC) (S.D.N.Y. Feb. 26, 1986), *aff'd*, 817 F.2d 1018 (2d Cir. 1987).

States and Switzerland, along with the Swiss Federal Court's opinion in *Santa Fe* and other cases, established that the SEC could request and receive assistance from Switzerland in the area of insider trading.

a. The *Santa Fe* Case

After entry of a preliminary injunction in the *Santa Fe* case,<sup>266</sup> the SEC sought to learn the identities of certain account holders (the unknown purchasers) who had directed purchases of Santa Fe stock and options through Swiss banks just prior to the announcement of a merger. The banks refused to answer the SEC's questions on the ground that to do so would violate Swiss bank secrecy laws. On March 22, 1982, the SEC formally submitted a request for assistance under the Swiss Treaty to the government of Switzerland.

The unknown purchasers, using Swiss procedures, opposed cooperation under the Treaty, and on January 26, 1983, the Swiss Federal Court denied the SEC's request.<sup>267</sup> The court accepted the facts as stated in the SEC's request and focused on whether the allegations constituted a *prima facie* case of an offense for which assistance could be granted under the Swiss Treaty. The Swiss Federal Court held that SEC requests could properly be processed under article 1 of the Swiss Treaty, even though the SEC did not have the authority to prosecute them criminally. The court concluded that the SEC's requests were in furtherance of an investigation in advance of a possible criminal referral, based on the criminal penalties available under U.S. securities laws and the SEC's authority to refer a case for criminal prosecution.

The Swiss court concluded, however, that the SEC had failed to establish the requisite violations of Swiss law. The court further held that the facts as demonstrated in the SEC's request did not parallel the three Swiss criminal statutes that might relate to insider trading: harm to a person owed a contractual or legal obligation; fraud to procure personal gain by causing others to harm themselves; or abuse of a business secret by a party obligated to honor it.

The court noted that a person aware of secret information, who uses it to his or her advantage without revealing it to a third party, may not be guilty of violation of a business secret, since the secret had not been revealed and no profit was realized from the revelation. The court concluded that although the trading in the *Santa Fe* case could violate Swiss law, the court could not make the requisite determination of dual criminality because the SEC was unable to allege whether the traders were insiders or tippees. The opinion left open an avenue for a second request, based upon the court's analysis that although an insider could trade while in possession of nonpublic information, a tippee who purchased stock would violate Swiss law. Accordingly, on July 27, 1983, the SEC alleged additional facts in support of its request for assistance under the Swiss Treaty.

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<sup>266</sup>. *Id.*

<sup>267</sup>. 22 I.L.M. 785 (1983).

On May 16, 1984, after all appeals were exhausted by the defendants, the Swiss Federal Court, in an unpublished opinion, ruled that the new request adequately demonstrated that the traders were tippees, not insiders.<sup>268</sup> Consequently, it granted the SEC's request, and the SEC finally learned the identities of the unknown purchasers. Just after those names were revealed, however, the purchasers appealed the ruling to prevent further disclosure of documents or testimony. That appeal to the Swiss Consultative Commission, the Swiss Justice Minister, and ultimately the Swiss Federal Council, took nine additional months before the issue finally was resolved in favor of the SEC. The SEC ultimately received documents responsive to its request, two years after its original inquiry. On February 26, 1986, all remaining defendants agreed to settle the SEC's action and disgorge \$7.8 million in profits. Six of the eight defendants consented to the entry of final judgments of permanent injunction restricting each from violations of the Exchange Act. The remaining two defendants agreed to disgorge their profits from the transactions at issue.

Since the *Santa Fe* case, the Swiss Federal Court has affirmed on numerous occasions the SEC's ability to use the Swiss Treaty for investigations involving insider trading and other offenses involving Section 10(b) fraud.

b. *SEC v. Musella*<sup>269</sup>

*SEC v. Musella* is another example of the SEC's use of the Swiss Treaty for purposes of discovery in a suit involving insider trading. In connection with a treaty request in that matter, the Swiss Federal Court, on appeal from the Federal Office for Police Matters (FOPM), in an unpublished opinion, upheld the grant of access as requested by the SEC. It reasoned, in part, that "documents . . . [that are deposited with a Swiss broker] in Switzerland quite obviously are subject to Swiss civil law and as such are the property of the bank or financial institution which either has issued or received same."<sup>270</sup> The Federal Court also observed that, in its estimation, the tipper in an insider trading case violates business secrecy within the meaning of the Swiss Penal Code, and thus tippers are also subject to Swiss criminal liability.

c. *SEC v. Banca Della Svizzera Italiana*<sup>271</sup> (the *St. Joe* case)

On October 22, 1986, in connection with the *St. Joe* case, the Swiss Federal Court orally considered a request for information by the SEC relating to trading in the securities of St. Joe Minerals Corporation by Giuseppe Tome, an Italian national residing in Switzerland, and Lombardfin S.p.a., a U.S. registered broker-dealer located in Italy. The trading in question occurred just prior to the announce-

268. Unpublished, Swiss Federal Court, A 1/84 (May 16, 1984).

269. No. 83 Civ. 342 (CSH) (S.D.N.Y.), [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,536 (S.D.N.Y. 1989).

270. *Id.*

271. 92 F.R.D. 111 (S.D.N.Y. 1981).



ment of a tender offer by Joseph E. Seagrams & Sons for all the outstanding shares of St. Joe. The Federal Court summarily dismissed the petitions to deny assistance, and confirmed that the Swiss Treaty applied to requests by the SEC when the dual criminality standard was met.

In its written opinion, the Federal Court elaborated upon prior decisions, holding that a Swiss court should accept as true the facts alleged in a request for mutual assistance. When such facts created a reasonable suspicion that criminal conduct occurred, the Swiss Treaty should provide assistance. The court further held that third parties who were uninvolved in the crimes alleged in a treaty request could be required to give evidence when it could be shown that such third parties had an actual bond to the facts alleged in the request.

The court noted that information obtained under the Swiss Treaty could be used both in criminal proceedings in the United States as well as in ancillary administrative proceedings, such as SEC actions seeking injunctions and disgorgement. The court stated, however, that use of the information in an SEC proceeding needed to be confirmed through an exchange of diplomatic notes. Finally, the court held that a Swiss court, upon request, had the authority under the Swiss Treaty to grant an order to preserve the status quo, blocking the removal of any allegedly ill-gotten gains from accounts in Switzerland.

d. *In the Matters of X against Decisions of the FOPM*

In two unpublished decisions, *In the Matters of X Against Decisions of the FOPM*,<sup>272</sup> regarding a similar request for assistance in an SEC insider trading investigation, the Swiss Federal Court rejected challenges to the SEC's request for assistance under the Swiss Treaty. The request sought information and documents from a Swiss financial institution about transactions in several securities. The court reiterated that judicial assistance could be rendered in insider trading cases in which the insider passed confidential information to a third party, since such conduct could be considered a betrayal of business secrets in violation of the Swiss Penal Code. The court concluded that the importance of the matter justified the use of coercive measures in the execution of the request, and it rejected the argument that purely practical difficulties, such as the amount of work and the financial burden to be incurred in responding to the request, were grounds for denying the request. The court noted that extra work was involved with any such request for judicial assistance.

4. *Use of the Swiss Treaty in Market Manipulation and Failure to Register Cases*

a. *The Matter of X*<sup>273</sup>

On March 18, 1985, the Swiss Federal Court considered and allowed an SEC treaty request in *The Matter of X*. The SEC's investigation concerned the issuance

272. Unpublished, Swiss Federal Court, A 408/1986/TS (Jan. 12, 1987); Unpublished, Swiss Federal Court, A 57/1987/Bä (Apr. 15, 1987).

273. Unpublished, Swiss Federal Court, A 473/84/Ct (Mar. 18, 1985).

and distribution of unauthorized and unregistered securities by several individuals, resulting in proceeds to the individuals in excess of \$3 million. The parties challenging the SEC's treaty request contended that they acted in good faith when they issued the securities. The court noted that Swiss authorities were bound by the fact representations in the request, provided that such representations did not contain obvious mistakes, omissions, or contradictions. The court refused to be drawn into an evaluation of the merits of the underlying U.S. case, drawing a comparison to extradition, and stating that a request for judicial assistance merely must show that a criminal act may have occurred. Similarly, the court refused to honor a claim for business confidentiality, reasoning that because such a defense is not available against Swiss authorities when a crime has occurred, it similarly should not be available where a foreign request is made for judicial assistance. Finally, the court ruled that the Swiss Treaty's requirement that a criminal proceeding exist prior to the grant of assistance would be met if Swiss authorities knew that a criminal investigation of the matter would be initiated.

b. *In the Matter of X against Decision of May 16, 1986, of the FOPM*<sup>274</sup>

In this matter the SEC obtained information pursuant to the Swiss Treaty in an investigation involving the parking of securities. The SEC's request alleged that by engaging in a scheme to park the shares of a company in an initial public offering, and coordinating the timing of the purchase and sale of the shares, the subject brokerage firm restricted the supply of the shares offered on the market and produced a rise in the price of the shares. The SEC sought information about certain Swiss bank accounts whose holders the SEC suspected may have colluded in the scheme.

The Swiss Federal Court rejected the account holder's request to vacate the decision of the FOPM to grant the treaty request. The court rejected each argument raised by the account holder, and reiterated that a Swiss authority does not have to rule on the veracity of the facts alleged in the request. The court noted that because the U.S. investigation was in its preliminary stages, the request could be founded on suspicions. The court held that it was not necessary for the affected party (here, the account holder) to have participated in the alleged criminal conduct, and that in this regard, the Swiss authorities were bound by the facts alleged in the request. The court also held that the dual criminality requirement was met, concluding that the facts set forth in the request satisfied the objective conditions of the relevant Swiss Criminal Code violations of fraud and disloyal management. The court rejected the account holder's final objection, concluding that the requested measures of assistance were not disproportionate and that the measures were indispensable for discovering the requested information.

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274. Unpublished, Swiss Federal Court, A 414/86 (May 12, 1987).

## 5. *Use of Swiss Treaty in Complex Matters*

### a. *SEC v. Arnold Kimmes*<sup>275</sup>

In August 1989 the SEC brought this action against Thomas Quinn, other individuals, and two corporations in connection with large-scale securities fraud in the marketing and sale of low-priced securities (so-called penny stocks). At approximately the same time, the SEC requested under the Swiss Treaty the assistance of Swiss authorities in obtaining documents relating to, in part, accounts maintained at various banks located in Switzerland by Quinn and others. Swiss authorities provided the SEC with a large volume of documents in response to the request, and their assistance was extremely useful to the SEC's action. Quinn was permanently enjoined, and his assets were frozen pursuant to court order.<sup>276</sup>

### b. *Use of Experts*

In a February 1992 unpublished opinion, the Swiss Federal Court rejected an appeal of an FOPM order for the provision of legal assistance to the SEC.<sup>277</sup> To facilitate the investigation, the SEC and FOPM agreed to retain experts to assist the Swiss magistrate in conducting an investigation of a complex (and document intensive) case in Switzerland on behalf of the SEC. The experts' work was to include issuing subpoenas, taking testimony, attending meetings with representatives of the SEC and the Swiss Government, and providing other assistance to the examining magistrate. Among other things, the appellants objected to the use of the experts to review and select important documents, and to the presence of SEC representatives at the interrogation of witnesses.

The court rejected the appellants' arguments that instructions to the experts were too vague and that the experts effectively functioned as SEC assistants. The court also concluded that it was useful for SEC representatives to be present at the interrogation of witnesses. Nevertheless, it was careful to note that, absent a special application, such representatives could not be present during the experts' review and selection of documents, as this might violate the Swiss *Übermassverbot* (law prohibiting an excess grant of authority). To the authors' knowledge, this is the first time a Swiss federal court addressed these issues. The outcome is encouraging for the quality of future assistance available under the Swiss Treaty.

### c. *Insider Trading Regarding Company Earnings*

In a December 1992 opinion the Swiss Federal Court rejected the appeal of an FOPM order to provide legal assistance to the SEC in a matter involving the alleged

275. No. 89 C 5942, 1995 U.S. Dist. LEXIS 888 (N.D. Ill. Jan. 23, 1995).

276. On June 21, 1993, the Seventh Circuit affirmed the district court's permanent injunction against Quinn and freeze of Quinn's assets [note: the 1989 preliminary injunction (PI) became permanent when the district court judge merged the PI into a final judgment against Quinn in granting the Commission's unopposed motion for summary judgment]. *SEC v. Quinn*, No. 92 Civ. 2657 (7th Cir. June 21, 1993).

277. Unpublished, Swiss Federal Court, 1A.122/1991/Kr (Feb. 3, 1992).

illegal use of insider information concerning a 42 percent drop in a company's earnings.<sup>278</sup> The court upheld the assistance, concluding that the dual criminality requirement of the Swiss Treaty was satisfied in accordance with article 162 of the Swiss Criminal Code. Article 162 provides that "whoever shall reveal an industrial or commercial secret that he had the obligation to keep by law or by contract . . . and whoever shall draw profit from such a revelation . . . shall be punished." The Federal Court stated that "within the meaning of this provision, a secret is any particular knowledge that is not known or easily accessible to the public and that its owner has a legitimate interest in keeping secret," and that "it is obvious that a third person who has drawn profit from this information shall be punishable under article 162 paragraph 2 of the Criminal Code." The court noted, however, that the requirements of article 162 would not be met if insiders used the information for their own benefit and did not provide it to third persons. The court then stated that the so-called noninsiders or third persons would probably include, within their scope, the "managers and directors of a legal person," thus including within the scope of article 162 persons normally considered insiders.

The court also concluded that the law prohibiting the use of insider information, article 161 of the Swiss Criminal Code, was not applicable to the facts of the case. The court noted that paragraph 3 of the article defines the term "confidential facts" (that is, insider information) as including the "imminent issue of new shares, a corporate merger or an analogous case of similar importance." After reviewing the legislative history of the article and paragraph 3 thereunder, the court concluded that knowledge of decreased earnings was not the kind of confidential fact contemplated by article 161.

This case also is significant because unlike the holding in the *Santa Fe* case, the Swiss court granted assistance even though the Treaty request did not articulate violations of the relevant Criminal Code provision. Under the Swiss Treaty, legal assistance may be granted whenever there is a founded suspicion of a crime under Swiss law. In *Santa Fe*, the court concluded that it could not make the requisite determination of dual criminality because the SEC had been unable to allege whether the traders were insiders or tippees, forcing the SEC to allege additional facts.<sup>279</sup> In contrast, the court stated in the December 1992 opinion under discussion that the requirement of

founded suspicion . . . does not imply that the requesting party has the obligation to prove commission of a crime, but merely the obligation to demonstrate sufficiently the circumstances on which its suspicions are founded in order to permit the party to which the request has been made to distinguish the request from an inadmissible request geared to indiscriminate seeking of evidence.

Furthermore, the court implicitly recognized the right of SEC personnel to attend hearings and the taking of testimony in Switzerland pursuant to a treaty request.

278. Unpublished, Swiss Federal Court, 1A.120/1992 (Dec. 21, 1992).

279. See case cited *supra* note 265.

SEC personnel cannot be present during the examination of documents that may not be relevant to the SEC's inquiry or that would not be relevant to a violation of the Swiss Criminal Code provisions that serve to satisfy the dual criminality requirement. Only the Swiss magistrate may ask questions during the hearing.

#### 6. *Recovery of Assets under the Swiss Treaty*

In *SEC v. Eurobond Exchange, Ltd.*,<sup>280</sup> the SEC alleged, among other things, that more than \$1 million of unregistered securities had been sold unlawfully to the public. The proceeds from the fraudulent sales were frozen in Switzerland in connection with a request for assistance under the Swiss Treaty. The SEC obtained a final judgment against Gerald Rogers and others who had sold the securities, and an order requiring that the proceeds from the sales be transferred to a court appointed receiver for return to defrauded investors.<sup>281</sup> Although the Swiss Treaty does not cover the return of assets to defrauded investors (only assets belonging to the requesting state are covered), a Swiss magistrate determined that the proceeds frozen in the *Eurobond* case could be returned to U.S. investors pursuant to Article 74 of the Swiss Federal Law on International Legal Assistance in Criminal Matters of March 20, 1981.<sup>282</sup>

#### 7. *Further Undertakings Pursuant to the Swiss Treaty*

##### a. The Diplomatic Notes

i. 1987. During the August 1982 negotiations between the United States and Switzerland concerning the Memorandum of Understanding Between the United States and Switzerland (Swiss MOU),<sup>283</sup> the United States and Switzerland agreed that under certain circumstances the Swiss Treaty could be used to provide assistance in SEC investigations relating to serious violations of U.S. securities laws. The principal issue concerned the Swiss Treaty's requirement that before evidence from entities such as Swiss banks can be provided under the Swiss Treaty, a showing must be made that the alleged offense would be a violation of the criminal laws of both the United States and Switzerland. The two countries agreed that because U.S. securities laws have both criminal and civil application, the SEC could use the Swiss Treaty to request assistance for use in SEC investigations, where the conduct involved was serious enough that, if proven, a referral

280. Civil Case No. 90-378 DT (C.D. Cal.), *aff'd*, *SEC v. Eurobond Exchange, Ltd.*, 13 F.3d 1334 (9th Cir. 1994).

281. The Ninth Circuit affirmed, holding that the investment program was an investment contract subject to the federal securities laws. The Ninth Circuit also rejected appellant's argument that the Treaty for Extradition of Criminals Between the United States and Switzerland (May 4, 1990) barred the SEC's civil action. The court based its decision on the defendant-appellant's failure to raise timely a defense of lack of personal jurisdiction and the Swiss Government's representation that the Rule of Specialty did not apply to the subject civil action.

282. Unpublished, Office of the Prosecuting Attorney IV, Canton of Zurich, Reg. No. 731/92 (July 11, 1992) (Order).

283. See *infra* note 293 and accompanying text.

of the matter for criminal prosecution could be made. Although this understanding solved the SEC's initial problem of obtaining information at the investigatory stage, the Swiss Treaty limited use of such evidence to criminal cases or cases "ancillary" thereto.

To ensure that the SEC would not be prevented from using information received under the Swiss Treaty in insider trading cases, in August 1982 the two governments agreed that such SEC cases would be considered ancillary to criminal proceedings. For a matter to be officially considered ancillary, however, the Swiss Treaty requires that diplomatic notes be exchanged by the parties. After more than four years of negotiations, diplomatic notes were exchanged on November 10, 1987.

The diplomatic notes ensured that, notwithstanding that the Swiss MOU would go out of effect when insider trading became expressly illegal in Switzerland, the SEC could still obtain and use information under the Swiss Treaty in insider trading cases.

ii. 1993. On November 3, 1993, the U.S. and Swiss Governments exchanged diplomatic notes that expanded the scope of available assistance between the SEC and Swiss authorities.<sup>284</sup> Pursuant to the notes, the SEC may now use information obtained in Switzerland under the Swiss Treaty as evidence in civil and administrative proceedings involving a wide array of securities-related offenses. The new notes provide that, where assistance is granted under the Swiss Treaty in criminal matters, it also is granted in connection with SEC investigations and proceedings involving "offenses in connection with the offer, purchase or sale of securities such as trading of securities by persons in possession of material non-public information."<sup>285</sup> Essentially, the 1993 exchange of notes will ensure that information the SEC receives from the Swiss in the course of a noninsider trading investigation may also be used by the SEC as evidence in proceedings that the SEC initiates.

b. Memorandum of Understanding between the United States and Switzerland on Mutual Assistance in Criminal Matters and Ancillary Administrative Proceedings, Executed November 10, 1987<sup>286</sup> (1987 Swiss MOU)

Concurrent with the exchange of diplomatic notes in 1987, the United States and Switzerland reaffirmed, in the 1987 Swiss MOU, their interest in providing mutual assistance in criminal matters and ancillary administrative proceedings. This understanding was intended to help avoid or minimize conflicts arising from the exercise of jurisdiction in law enforcement matters. In the 1987 Swiss MOU, both governments undertook to communicate and consult when necessary; to inform each other when seeking evidence in the territory of the other in a criminal

284. Int'l Series Release No. 626 (Dec. 28, 1993).

285. *Id.*

286. 27 I.L.M. 480.

matter arguably within the scope of agreements such as the Swiss Treaty; to use best efforts in avoiding unilateral compulsory measures; to consult with each other prior to using compulsory measures; and to exercise moderation and restraint in using unilateral compulsory measures. The 1987 Swiss MOU also reaffirmed the parties' intentions to provide mutual assistance in combating organized crime. Moreover both parties agreed that the Swiss Treaty procedure should be used as a first resort whenever available and to the extent possible, and that the United States and Switzerland would use their best efforts to improve the practical availability and effectiveness of the Swiss Treaty and other instruments.

The 1987 Swiss MOU further evidences the progress the United States and Switzerland have made in providing mutual assistance to each other.

**B. TREATY ON MUTUAL LEGAL ASSISTANCE BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE UNITED STATES<sup>287</sup> (NETHERLANDS TREATY)**

Unlike the Swiss Treaty, the Netherlands Treaty does not have a list of applicable offenses, and generally does not require dual criminality. The assistance to be provided under the Netherlands Treaty includes locating persons, serving judicial documents, providing records, taking testimony, producing documents, and executing requests for search and seizure. Assistance may be refused for political offenses or where execution of the request "would prejudice the security or other essential public interests" of the requested state. Evidence and information obtained under the Netherlands Treaty may not be used "for purposes other than those stated in the request," but this use restriction may be waived with the prior consent of the executing state.

In the last few years, the Netherlands has passed legislation such as prohibiting fraudulent practices in the sale and trading of securities that will provide the basis for the granting of assistance in securities cases.

**C. TREATY ON EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE UNITED STATES AND THE REPUBLIC OF TURKEY<sup>288</sup> (TURKISH TREATY)**

The Turkish Treaty applies to all offenses that fall within the jurisdiction of judicial authorities of the requesting state. The Turkish Treaty provides assistance in locating persons; serving judicial documents; effecting the taking of testimony, the production of documents, and the service of process; and compelling the appearance of witnesses before a court of the requesting state. Assistance may be refused for political or military offenses or where the executing state considers that execution of the request "is likely to prejudice its sovereignty, security, or

287. *Done* June 12, 1981, U.S.-Neth., T.I.A.S. No. 10,734 (entered into force on Sept. 15, 1983).

288. *Done* June 7, 1979, U.S.-Turk., T.I.A.S. No. 9891.

other similar essential interests." Use of materials obtained under the Turkish Treaty is limited to the purposes of investigations, criminal proceedings, and damage claims concerning the offense that is the subject of the proceeding or investigation in the requesting state.

**D. TREATY BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS<sup>289</sup> (ITALIAN TREATY)**

The Italian Treaty provides for mutual assistance in criminal investigations and proceedings concerning a broad range of offenses. Significantly, persons not in custody in the requested state may be required by the requested state, pursuant to a request, to appear there for testimony if the requesting state certifies the testimony is relevant and material.

**E. TREATY BETWEEN THE GOVERNMENT OF CANADA AND THE UNITED STATES ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS<sup>290</sup> (CANADIAN TREATY)**

The Canadian Treaty provides for mutual legal assistance in all matters relating to the investigation, prosecution, and suppression of criminal offenses. The treaty does not require dual criminality, and specifically provides for assistance regarding securities offenses under Canadian provincial law or U.S. law. The assistance includes locating persons or objects, serving documents, taking testimony, providing documents and records, and executing requests for searches and seizures. Importantly, the Canadian Treaty has virtually no limitations on the use of evidence obtained through its processes.

**F. TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING THE CAYMAN ISLANDS RELATING TO MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS<sup>291</sup> (CAYMAN ISLANDS TREATY)**

The Cayman Islands Treaty offers cooperation and mutual legal assistance in criminal investigations and prosecutions that involve offenses punishable by more than one year of imprisonment under the laws of either the United States or the Cayman Islands. The treaty also authorizes cooperation regarding specific crimes, including insider trading, fraudulent securities practices, racketeering, and failure to report international currency transfers or financial transactions in connection with any criminal offense covered by the Treaty. The Cayman Islands Treaty

289. Entered into force on Nov. 13, 1985, S. EXEC. 98-25, 98th Cong., 2d Sess.

290. Mar. 17, 1985, U.S.-Can., 24 I.L.M. 1092 (U.S. Senate advice and consent received Oct. 24, 1989; entered into force Jan. 24, 1990).

291. July 3, 1986, U.S.-U.K., 26 I.L.M. 536 (U.S. Senate advice and consent received Oct. 24, 1989; entered into force Mar. 19, 1990).



includes the following mutual assistance: the taking of testimony; provision of documents, records, and articles of evidence; serving of documents; locating of persons; and immobilizing of criminally obtained assets. The Cayman Islands, it should be noted, are a British Crown colony.

The Cayman Islands Treaty contains several limitations on assistance. For example, assistance will not extend to conduct not punishable by imprisonment of more than one year. Assistance may be denied when the request does not establish reasonable grounds for believing that the specified criminal offense has been committed, or when execution of the request is contrary to the public interest of the requested party.

**G. TREATY BETWEEN THE UNITED STATES AND THE COMMONWEALTH OF THE BAHAMAS ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS<sup>292</sup>  
(BAHAMIAN TREATY)**

The Bahamian Treaty provides a full range of mutual legal assistance in criminal, civil, and administrative investigations and prosecutions that involve conduct punishable as a crime under the laws of both the United States and the Bahamas, or under the laws of the requesting state by one year's imprisonment or more, provided that it arises from certain enumerated activity, including fraud and violations of the law relating to financial transactions. Assistance available includes the taking of testimony; provision of documents, records, and articles of evidence; serving of documents; locating of persons; exchanging of information; and immobilization of forfeitable documents. Assistance may be denied when the request would prejudice the security or public interests of the requested state, when the request relates to a political offense, or when the request does not establish reasonable grounds for believing that the specified criminal offense has been committed.

**II. Memoranda of Understanding, Communiqués, and Other Arrangements between the SEC and Foreign Governments or Authorities**

In the early 1980s, when assertions of foreign secrecy laws frustrated SEC attempts to secure foreign-based evidence in several notorious insider trading cases, the SEC resorted to the federal courts to compel the production of the foreign-based information. That unilateral approach, however, was time consuming and expensive and strained international relations. Partly because of the SEC's success in U.S. courts, the Commission was able to begin a dialogue with foreign securities officials and other law enforcement authorities to develop informal case-by-case understandings that facilitated the production of foreign-based infor-

<sup>292</sup> June 12-Aug. 18, 1987, U.S.-Bah., S. Doc. No. 17, 100th Cong. (U.S. Senate advice and consent received Oct. 24, 1989; entered into force July 18, 1990).

mation. The ad hoc nature of that approach highlighted the need for more formal mechanisms that would provide greater assurance of assistance and foster cooperation. As a result, the SEC began focusing on using existing bilateral and multilateral agreements to satisfy its information needs. In some cases, the SEC found that because those mechanisms were not specifically tailored to its investigation and litigation needs, the existing agreements provided inadequate assistance. Accordingly, the SEC initiated discussions for its own formal understandings.

The SEC has signed fourteen memoranda of understanding (MOUs) for the sharing of information and for facilitating cooperation in SEC and foreign authority investigations and judicial proceedings. MOUs provide the SEC with direct access to information held by a counterpart in a foreign country. The memoranda formalize methods for requesting and providing information in connection with SEC and foreign authority efforts to administer and enforce their respective securities laws. Whereas treaties require a lengthy negotiation process and ratification, MOUs take less time to negotiate and do not require ratification. MOUs generally are nonbinding arrangements between like-minded regulators and are intended to facilitate mutual assistance in a variety of matters. Unlike some of the bilateral MLATs, the SEC's MOUs do not require the subject matter of the request to involve offenses under the laws of both countries. MOUs are a pragmatic approach to obtaining information and assistance, and requests usually are processed expeditiously. The SEC currently is negotiating additional MOUs with other countries and intends to build on existing MOUs to further strengthen its enforcement and regulatory capabilities.

The SEC also has signed more limited communiqués with foreign authorities. Although less comprehensive than MOUs, communiqués similarly provide a framework for cooperation between the SEC and its foreign counterparts, and some are intended to be interim arrangements pending the signing of a comprehensive MOU. In other situations in which an MOU or communiqué might not have been appropriate, but the SEC decided to formalize a relationship, the SEC has issued joint statements with foreign authorities.

In the last few years, the SEC has provided technical assistance to emerging securities markets and has entered into understandings to facilitate such technical assistance and, in some cases, to facilitate obtaining of information for regulatory and enforcement purposes. The SEC's MOUs with Argentina and Mexico also contain technical assistance provisions.

## A. MOUs

### 1. *MOU between the United States and Switzerland*<sup>293</sup> (Swiss MOU)

On August 31, 1982, the governments of Switzerland and the United States signed the Swiss MOU to establish mutually acceptable means for addressing

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<sup>293</sup> Int'l Series Release No. 2, 43 SEC Docket 141 (Aug. 31, 1982).

the problems of insider trading. The Swiss MOU was necessary because insider trading was not specifically a violation of Swiss law; therefore, the Swiss Treaty was not always available for such cases. The Swiss MOU, however, recognized the continued availability of the Swiss Treaty for insider trading litigation and investigations.

The Swiss MOU mandated the establishment of a provisional arrangement in the form of a separate private agreement among members of the Swiss Bankers' Association (SBA), who trade on U.S. securities markets under the aegis of the SBA, to provide the SEC with assistance. That agreement, known as Convention XVI, provided that, under certain circumstances, the signatory banks may disclose and furnish information to the SEC, working through the FOPM, without violating Swiss bank secrecy laws.<sup>294</sup> Convention XVI was terminated on July 1, 1988, when the Swiss insider trading law went into effect, although the agreement remained in effect until December 31, 1988. Although the Swiss MOU no longer is in effect, the authors believe that the understanding was extremely effective and that the SEC learned much from the experience. The Swiss MOU can be used as a model for developing future relationships with foreign jurisdictions and for future MOUs.

Pursuant to Convention XVI, requests for assistance under the Swiss MOU were sent to a three-member commission of inquiry appointed by the SBA. The Swiss commission examined each request and determined whether the request met certain basic thresholds, and presented sufficiently suspect circumstances. Convention XVI provided that its procedures would be available if within twenty-five trading days prior to a public announcement of a proposed merger, consolidation, sale of substantially all of an issuer's assets, or other similar business combination (business combination) or the proposed acquisition of at least 10 percent of the securities of an issuer by open market purchase, tender offer, or otherwise (acquisition), a customer gave to a bank an order to be executed in the U.S. securities markets for the purchase or sale of securities, call options, or put options for securities of any company that was a party to a business combination or the subject of an acquisition.

Upon receipt of a request from the Swiss commission, the bank would freeze the relevant customer's accounts up to the amount of the profit realized in the transaction, would inform the customer, and would give the customer an opportunity to respond to the allegations contained in the request. Within forty-five days, the bank would forward the requested report to the Swiss commission. The Swiss commission then would forward the report to the FOPM for transmission to the SEC. However, if the customer independently established, or the bank's report established, to the reasonable satisfaction of the Swiss commission, that the cus-

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294. To implement Convention XVI, Swiss banks sought provisional waivers of the secrecy laws from their customers that allowed disclosure of a customer's name where the conditions of Convention XVI were met.

tomers did not make the purchases or sales that were the subject of the SEC's request, or if the Swiss commission determined that the customer was not an insider under a definition provided in Convention XVI, the FOPM would not transmit the report to the SEC.

Convention XVI defined an insider as (i) a member of the board, an officer, an auditor, or a mandated person of the company, or an assistant to any of them; or (ii) a member of a public authority or a public officer who, in the execution of his or her public duty, received information about the company; or (iii) a person who, on the basis of information about an acquisition or a business combination received from a person described in (i) or (ii) above, was able to act for the latter or to benefit himself or herself from inside information.

The Swiss commission itself also submitted a report to the SEC. After delivery of the Swiss commission's report to the SEC and after either a resolution of the SEC's underlying dispute with the customer, or termination of the SEC's investigation of the customer, the blocked funds and accrued interest would be released.

The Swiss MOU provided that information gained pursuant to Convention XVI could be used only by the SEC and the Department of Justice and would not be disclosed "to any other administrative body in the United States or to the public, except to the extent necessary for administrative or judicial purposes of the specific case."

An insider trading action brought by the SEC illustrates the usefulness of the Swiss MOU. In *SEC v. Harvey Katz, Marcel Katz, Elie Mordo, & Fred Aizen*<sup>295</sup> the SEC alleged that Marcel Katz, in the course of his employment as an analyst at Lazard Frères & Co., obtained material, nonpublic information relating to a proposed merger between RCA Corporation and General Electric Company. The complaint filed by the SEC further alleged that Marcel Katz subsequently disclosed this information to his father, Harvey Katz, and that Harvey Katz in turn disclosed this information to Elie Mordo, who resided abroad, and to Fred Aizen, Harvey Katz's stockbroker. Mordo then purchased 100,000 shares of RCA stock through a Swiss bank, Union Bank of Switzerland.

In settling the action, Harvey Katz consented to an injunction and agreed to disgorge \$1,035,425 and to pay a civil penalty of \$2,111,168 pursuant to the Insider Trading Sanctions Act of 1984 (ITSA). Under the ITSA, Marcel Katz agreed to pay a civil penalty of \$173,891, Mordo consented to disgorge \$1,087,532, and Aizen consented to pay \$60,000 and a civil penalty of \$20,000.

The SEC used the Swiss MOU and Convention XVI to identify Mordo as the purchaser of RCA common stock through the Geneva office of Union Bank of Switzerland. The SEC's request was reviewed by the SBA, the Swiss Federal Court (Swiss Supreme Court) and the Swiss Federal Council, all of which affirmed

<sup>295</sup>. No. 86 Civ. 6088 (S.D.N.Y. 1986).

the SEC's right to obtain the evidence sought. During those deliberations, the profits that Mordo later surrendered in the U.S. civil action were frozen. This was the first civil action filed by the SEC that used the procedures developed pursuant to the Swiss MOU.

Convention XVI of the SBA was unique. The assistance available through it, and the mechanism for obtaining that information, was tailored specifically to the securities enforcement issue the agreement was designed to address: insider trading. While Convention XVI was limited to certain types of insider trading and provided only narrow assistance, the agreement worked both conceptually and in practice. Because the convention had express standards, it could be applied fairly and quickly. Also, because the agreement was applied by a Swiss commission that was sensitive to both the needs of the SEC and the privacy concerns of bank customers, it could produce a balanced view of the evidence. This balance reduced the ability of either party to abuse the process. The approach applied in Convention XVI thus provides a useful model for future agreements.

Switzerland's Insider Trading Law<sup>296</sup> went into effect on July 1, 1988. Prior to July 1, insider trading could have been punishable in certain circumstances as an unlawful use of business secrets in violation of article 162 of the Swiss Penal Code. The new law expands the situations for which insider trading is prosecuted, and appears to cover the full range of circumstances for which insider trading is unlawful in the United States. The insider trading law makes unlawful the use, for personal gain, of confidential information about the issuance of new securities, mergers, or other matters of comparable significance, by persons acting in their capacity as directors, officers, or agents of companies, or as government officials or civil servants, or their assistants, and by tippees of such persons. The law requires disclosure of confidential information that could have a foreseeable and significant effect on the price of the subject securities or options on such securities.

2. *Memorandum of the SEC and the Securities Bureau of the Ministry of Finance of Japan on the Sharing of Information*<sup>297</sup>  
(Japanese Memorandum)

On May 23, 1986, the SEC signed a memorandum with the Securities Bureau of the Japan Ministry of Finance concerning the exchange of information relating to securities regulation and enforcement. In the Japanese Memorandum each agency agreed to facilitate the other's "respective requests for surveillance and investigatory information on a case-by-case basis." The Japanese Memorandum designates a specific contact person in each agency to enhance regular communication and processing of requests. The Japanese Ministry of Finance and the SEC announced, in a January 12, 1989, press release, that to enhance further the

296. CODE PENAL art. 161 (Switz.).

297. Int'l Series Release No. 5, 43 SEC Docket 184 (May 23, 1986).

implementation of their Memorandum and “to ensure the coordination of market oversight and enforcement of both U.S. and Japanese securities laws, the parties agreed to establish a working group to provide a forum for discussion on a regular basis.”<sup>298</sup> Although the Japanese Memorandum is far less specific than other MOUs, the SEC has been able to obtain information under the Memorandum.

3. *MOU between the SEC and the Ontario Securities Commission (OSC), Commission des Valeurs Mobilières du Québec (QSC) and the British Columbia Securities Commission (BCSC)*<sup>299</sup> (Canadian MOU)

The Canadian MOU, signed on January 7, 1988, was the first of a new generation of MOUs signed by the SEC. Like the agreements with The Netherlands and France and the SEC's most recent MOUs, discussed below, the Canadian MOU is one of the most comprehensive MOUs or agreements signed by the SEC to date. It exceeded the scope of cooperation and the subject matter covered in the Swiss MOU and the 1986 UK MOU (discussed below). The Canadian MOU reflects the signatories' determination to foster mutual assistance, and because it is a third generation understanding, the authors believe that the SEC benefited from its experience with earlier MOUs.

The Canadian MOU is one of the most significant developments in a history of informal cooperation, including providing mutual assistance in investigations among its signatory securities regulatory authorities. The Canadian MOU provides that assistance will be available in cases involving (i) insider trading; (ii) misrepresentation or the use of fraudulent, deceptive, or manipulative practices in connection with the offer, purchase, or sale of any security; (iii) the duties of persons to comply with periodic reporting requirements or requirements relating to changes in corporate control; (iv) the duties of persons, issuers, or investment businesses to make full and fair disclosure of information relevant to investors; (v) the duties of investment businesses and securities processing businesses pertaining to both their financial, operational, or other requirements and their duties of fair dealing in the offer and sale of securities and the execution of transactions; and (vi) the financial and other qualifications of those engaged in, or in control of issuers, investment businesses, or securities processing businesses.

Requests for assistance must allege that a requesting authority is investigating a possible violation of its laws relating to the subjects listed above. When the required allegations are made, the other authority will provide assistance in obtaining information located within the foreign jurisdiction.

The Canadian MOU provides that the parties will provide each other with the fullest mutual assistance possible for investigations, litigation, or prosecution of cases where information needed by one authority is located in the territory of

298. SEC News Release 89-3.

299. Int'l Series Release No. 6, 43 SEC Docket 186 (Jan. 7, 1988).

the other. Assistance available under the Canadian MOU includes (i) providing access to information in official agency files; (ii) taking the evidence (testimony) of persons; and (iii) obtaining documents from persons. The SEC, OSC, and the BCSC exchanged letters in conjunction with the signing of the Canadian MOU in which they undertook to seek express authority to conduct investigations on behalf of a foreign securities regulatory authority absent an independent violation of domestic law (the QSC already had that authority). The OSC,<sup>300</sup> QSC, BCSC, and SEC now all have such legislative authority.

Enforcement efforts aimed at cross-border securities violations historically required voluntary cooperation of witnesses or the initiation of costly and often time-consuming litigation. The authorities were unable to compel witnesses located in the territory of the other authority to testify or produce documents. Under the Canadian MOU, the securities regulators agree to investigate, using subpoena power where necessary, on behalf of one another, to ensure that the necessary information is obtained.

The Canadian MOU contemplates that testimony will be taken pursuant to the laws of the responding authority. When an MOU is used to gather evidence for trial, such a procedure will, in all likelihood, not affect its admissibility.<sup>301</sup> Issues of privilege, however, such as the application of the Fifth Amendment, are reserved for consideration by the courts of the responding country. In cases where evidence already has been gathered by one of the Canadian authorities for its own purposes, whether a United States privilege could be asserted to exclude its use by the SEC is questionable.<sup>302</sup>

The United States and Canada historically have taken different approaches to protecting an individual's right against self-incrimination during compelled testimony. Those differences may affect the ability of U.S. criminal authorities to use testimony obtained by the SEC in Canada under the MOU. In Canada, a witness must testify, even if testifying would incriminate the witness. The witness has the right, however, not to have incriminating evidence obtained in one proceeding used in any other proceeding. In the United States, the Fifth Amendment to the U.S. Constitution provides a witness with protection from self-incrimination, but, if the witness testifies, that testimony can be made available to, and used by, federal prosecutors (U.S. attorneys) and state prosecutors. Thus, Canadian law would give the SEC access to a greater range of information, which it could use for its own civil investigations and proceedings or for assisting in a criminal proceeding against

300. In 1994 the government of Ontario amended part VI, section 11(1), of the Ontario Securities Act to provide the OSC explicit authority to "by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient . . . (b) to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction."

301. See *United States v. Salim*, 855 F.2d 944 (2d Cir. 1988) (depositions taken pursuant to French procedures admissible as evidence at trial).

302. See *United States v. Phillips*, 479 F. Supp. 423 (M.D. Fla. 1979) (illegally obtained wiretap evidence gathered by Canadian police deemed admissible in U.S. criminal proceeding).

another person, than it normally would have under U.S. law. Ironically, the information could not be used in a criminal matter against the declarant.<sup>303</sup> The state of Canadian law on this point is discussed in more detail below.

Section 13 of the Canadian Charter of Rights and Freedoms (Charter) provides that "[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."<sup>304</sup> This right acts as a counterbalance to long-standing Canadian law that a witness cannot refuse to answer questions on grounds of self-incrimination.<sup>305</sup> Thus, persons compelled to give information under section 128(1) of the Securities Act of British Columbia<sup>306</sup> cannot refuse to answer questions.<sup>307</sup> In proceedings in criminal and penal matters, however, any person charged with an offense has the right "not to be compelled to be a witness in proceedings against that person in respect of the offence."<sup>308</sup>

The right of a witness in Canada who testifies in a proceeding not to have incriminating evidence used against that witness in any other proceeding is narrow. That right only attaches to the declarant, does not restrict the use of information obtained derivatively from testimony, and apparently does not prevent the use of the testimony to impeach the witness in other proceedings. In *Kuldip v. The Queen*<sup>309</sup> the Canadian Supreme Court held that testimony given at a criminal trial may be used to impeach the accused on cross-examination at a retrial on the same charges in order to undermine the witness's credibility, although not to prove or disprove the truth of the earlier statement. It is possible, therefore, that compelled testimony in a securities investigation may be admissible for impeachment purposes in a criminal matter. Moreover, the court in *Branch & Levitte* held that section 128(1) of the Securities Act of British Columbia does not violate the Charter just because evidence derived from a witness's compelled testimony may be used against the witness in other proceedings.<sup>310</sup>

Like most SEC MOUs, the Canadian MOU provides that the contents of requests for assistance, the information gathered in response to such requests, and any other matters arising during the operation of the MOU will be held in confi-

303. The MOU provides that a requesting authority may use information obtained under the MOU for "assisting in a criminal prosecution." See *supra* note 299, art. 6, para. 1(b). The MOU also recognizes, however, that its signatories "may not in all circumstances possess the legal authority to provide the assistance contemplated" in the MOU, *id.* art. 2, para. 3, and that a requested authority may deny assistance "on grounds of public interest." *Id.* art. 3, para. 4.

304. CAN. CONST. (Constitution Act, 1982) (Canadian Charter of Rights and Freedoms) § 13.

305. See Evidence Act, R.S.C. § 5 (Can.); Evidence Act, R.S.C. § 4 (B.C.).

306. Securities Act, R.S.B.C. § 128(1) (1985).

307. See *British Columbia Sec. Comm'n v. Branch & Levitte*, 43 B.C.L.R.2d 286 (1990), *aff'd sub nom. Branch & Levitte*, Vancouver Registry #CAO12166 (C.A. B.C. Jan. 30, 1992), *appeal dismissed*, file no. 22978 (Can. Apr. 13, 1995).

308. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) § 11(c).

309. 3 S.C.R. 618 (1990).

310. *Branch & Levitte*, *supra* note 307.



dence by the securities authorities. The Canadian MOU requires each regulatory authority to take active steps to preserve that confidentiality with respect to third parties. The MOU provides that when the requesting authority has terminated its investigation, it will return all nonpublic documents received from another securities regulator under the Canadian MOU.

The Canadian MOU has been an effective tool for obtaining and providing mutual assistance. For example, the MOU played an important role in two related actions filed by the SEC in 1993. In the first action, *SEC v. Ramon D'Onofrio*,<sup>311</sup> the SEC alleged that the defendants manipulated the price of the stock of Kinesis, Inc., on the U.S. over-the-counter market, creating the appearance of an active market for Kinesis stock by employing fraudulent and deceptive devices. The defendants included the promoters, their investment banking firms, the transfer agent, one broker-dealer, and four registered securities sales representatives. Among the fifteen defendants against whom the SEC obtained final judgments of permanent injunction were two Canadian nationals who were directors of Griffin-Hayhurst Ltd., a securities boiler room located in Marbella, Spain, and the Canadian registered representative who serviced the D'Onofrio nominee accounts used to effect the alleged prearranged manipulative trades. Griffin-Hayhurst sold Kinesis stock to investors in Europe, the Middle East, Asia, and Australia.<sup>312</sup> In the second action, *SEC v. Edifice America Corp.*,<sup>313</sup> the SEC alleged that the defendants participated in a fraudulent and deceptive scheme in which the defendants attempted to induce investments in Edifice America Corporation by a U.S. insurance company and through U.K. financial institutions and a Swiss investment banker.<sup>314</sup>

Finally, in connection with the entry of consent injunctions in *SEC v. OEX, Inc.*,<sup>315</sup> the SEC acknowledged the assistance of the BCSC as being instrumental in its investigation and prosecution.<sup>316</sup> In that action, the SEC alleged that the defen-

311. No. 93 Civ. 2628, SVW(Ex) (C.D. Cal., filed May 5, 1993); Litigation Release No. 13627 (May 6, 1993). The district court issued final judgments of permanent injunction against 15 of the 16 defendants in the action. The SEC dismissed the complaint as to one registered representative who consented to the entry of a cease and desist order by the SEC. Pursuant to default judgments, the court ordered Ramon D'Onofrio to surrender \$700,000 and Joseph Garofalo \$200,000 of ill-gotten gains from the manipulation. Litigation Release No. 13987 (Mar. 1, 1994).

312. In a related matter, a Canadian national who concealed his Kinesis shareholdings in a Bahamian Bank, and his Delaware holding company, consented to an order barring them from violating the beneficial ownership provisions of federal securities laws. In the Matter of Bernard C. Sherman and Shermfin Corp., Exchange Act Release No. 34738 (July 14, 1994).

313. No. 93 Civ. 2629, SVW (CTx) (C.D. Cal., filed May 5, 1993), Litigation Release No. 13628 (May 6, 1993). The district court issued final judgments of permanent injunction against Edifice, Mark D'Onofrio, a D'Onofrio investment banking company, and a Canadian national. Litigation Release No. 13988 (Mar. 1, 1994).

314. In both the *D'Onofrio* and *Edifice* matters, the SEC also received substantial assistance from the Central Office of Police of the Principality of Andorra, the Ministerio de Economía y Hacienda of the Kingdom of Spain, and Her Majesty's Treasury and the Department of Trade and Industry of the United Kingdom. The assistance included the compulsion of testimony and the production of bank records and other documents.

315. No. 88 Civ. 2076 (W.D. Ark.), Litigation Release No. 11975 (Jan. 25, 1989).

316. *Id.*

dants engaged in the fraudulent sale of stock in two Arkansas private companies and a public shell company traded on the Vancouver Stock Exchange. In a matter related to the SEC's action against OEX, Inc., the BCSC issued a cease trade order against the securities of Electromagnetic, Inc., and ordered certain individuals to resign as directors or officers of reporting issuers and not to resume such offices for a period of time.<sup>317</sup> During the BCSC proceeding that resulted in the BCSC orders, the BCSC admitted into evidence the deposition transcripts of several people from the U.S. action against OEX, Inc. The individuals ordered to resign as officers and directors appealed the BCSC decision, arguing, among other things, that the deposition transcripts were inadmissible because these people did not have a right to cross-examination and thus were denied a fair hearing. The British Columbia Court of Appeal rejected that challenge and held that admission of the deposition transcripts did not constitute a breach of fundamental justice.<sup>318</sup>

4. *MOU between the SEC and the Brazilian Comissão de Valores Mobiliários (CVM)*<sup>319</sup> (*Brazilian MOU*)

On July 1, 1988, the SEC signed an MOU with the Brazilian Comissão de Valores Mobiliários, the SEC's counterpart in Brazil. The Brazilian MOU is identical in almost every respect to the Canadian MOU, but differs in that it contains additional language making explicit the parties' intention to use the MOU mechanism to conduct compliance inspections of investment businesses such as brokers and investment companies that engage in business in both jurisdictions.

5. *Agreement between the United States and the Kingdom of the Netherlands on Mutual Administrative Assistance in the Exchange of Information in Securities Matters and the Establishment of a Framework for Consultations between the SEC and the Ministry of Finance of the Netherlands (Netherlands Agreement)*;<sup>320</sup> and *the Communiqué Regarding the Implementation of the Netherlands Agreement and the Establishment of a Framework for Consultations between the SEC and the Ministry of Finance of the Netherlands*<sup>321</sup> (*Netherlands Communiqué*)

On December 11, 1989, the SEC and the Ministry of Finance of the Netherlands (MOF), on behalf of their respective governments, signed the Netherlands Agreement, which provides the same type of comprehensive assistance in securities matters as the Brazilian and Canadian MOUs. The comprehensive assistance provisions of the Netherlands Agreement similarly are implemented for the SEC by the amendments contained in section 6 of the Insider Trading and Securities

317. In the Matter of O.E.X. Electromagnetic Inc., No. CA011910 (C.A. B.C. May 23, 1990).

318. *Id.*

319. Int'l Series Release No. 7, 43 SEC Docket 206 (July 1, 1988).

320. Int'l Series Release No. 115, 45 SEC Docket 715 (Jan. 12, 1990).

321. Int'l Series Release No. 406, 51 SEC Docket 1876 (July 1, 1992).

Fraud Enforcement Act of 1988 (ITSFEA).<sup>322</sup> Unlike the SEC's earlier MOUs, the Netherlands Agreement is a binding agreement under international law as opposed to a statement of intent to cooperate. This form of agreement ensures that in The Netherlands, where the securities regulatory process is in a developing stage, the full powers of the Dutch Government are available to execute requests for assistance. The Netherlands Agreement provides that the SEC and the Dutch competent authorities will provide each other with the greatest possible measure of administrative assistance in obtaining and exchanging information relating to investigations of possible securities law violations. Accordingly, the Netherlands Agreement expressly provides that mutual cooperation in criminal matters between the parties will continue to be governed exclusively by the Netherlands Treaty.<sup>323</sup> On May 19 and 22, 1992, pursuant to article 11 of the Agreement, the parties made the necessary notifications that they had complied with the procedures constitutionally required for the entry into force of the Agreement in the United States and The Netherlands.

The SEC Chairman and the Minister of Finance for The Netherlands signed the Netherlands Communiqué on July 1, 1992, the date the Netherlands Agreement entered into force. The Netherlands Communiqué states, among other things, the mutual intentions of the parties to engage in consultations about subjects of mutual interest to protect investors by ensuring the efficiency and integrity of the securities markets of the United States and The Netherlands. The Netherlands Communiqué is similar in form to the French Understanding.<sup>324</sup> The signatories to the Netherlands Communiqué expressed their desire to enhance communication between the SEC and the securities authorities of The Netherlands. The Netherlands Communiqué contemplates consultations that will assist in developing "mutually agreeable approaches for strengthening the securities markets of the United States and the Kingdom of The Netherlands, and will help avoid conflicts that may arise from the application of differing regulatory practices."

6. *Administrative Agreement between the SEC and the Commission des Opérations de Bourse of France (COB) (French Agreement);*<sup>325</sup>  
*Understanding Regarding the Establishment of a Framework for Consultations between the SEC and the COB*<sup>326</sup> (French Understanding)

On December 14, 1989, the SEC and its French counterpart, the COB, signed the French Agreement, which is similar to the Netherlands Agreement both in its comprehensive scope and in its status as a binding agreement. The French Agreement provides that the SEC and the COB may utilize their respective com-

322. See *infra* notes 368-71 and accompanying text.

323. See *supra* note 287 and accompanying text.

324. See *infra* note 326 and accompanying text.

325. Int'l Series Release No. 117, 45 SEC Docket 726 (Jan. 12, 1990).

326. Int'l Series Release No. 116, 45 SEC Docket 724 (Jan. 12, 1990).

pulsory powers to assist each other in matters within the scope of the MOU, as authorized, respectively, by ITSFEA and by the French Law of August 2, 1989, which expanded the powers of the COB and gave it the authority to gather information on behalf of foreign securities authorities.

Contemporaneously with the signing of the French Agreement, the SEC and the COB signed the French Understanding, which goes beyond the provisions of the French Agreement and represents a significant new step in international cooperation in securities matters. In the Understanding, the SEC and the COB recognize that the interdependence of the U.S. and French securities markets makes essential the establishment of a framework, in addition to the mutual assistance provisions of the French Agreement, to enhance communication about all matters relating to the operation of the securities markets of their respective countries. The Understanding reflects the agreement between the SEC and the COB to engage in mutual consultations about subjects of common interest to coordinate market oversight and to resolve differences that may exist between their respective regulatory systems. The French Understanding is the first formal understanding between the SEC and a foreign securities authority regarding matters beyond the enforcement of the securities laws. It provides a framework for the two authorities to take active steps to address a wide range of issues concerning the stability and integrity of the U.S. and French securities markets.

The French Agreement entered into force on January 31, 1991, upon an exchange of letters in which the SEC and COB notified each other that each had taken all domestic measures necessary to implement the agreement. For the United States, that involved the enactment of the International Securities Enforcement Cooperation Act<sup>327</sup> and ITSFEA, which are discussed below. Six months after the SEC and COB entered into the French Agreement, the Commodity Futures Trading Commission (CFTC) signed an almost identical agreement regarding mutual assistance and the exchange of information.<sup>328</sup>

7. *MOU between the SEC and the Comisión Nacional de Valores of Mexico (CNV) on Consultation, Technical Assistance, and Mutual Assistance for the Exchange of Information*<sup>329</sup> (Mexican MOU)

The SEC signed an MOU with the CNV on October 18, 1990. The Mexican MOU is broad in scope and encompasses assistance in enforcement matters, the provision of technical assistance, and consultations about all matters relating to the operation of the securities markets in the United States and Mexico. Its provisions regarding assistance in securities enforcement matters are similar to those contained in the Canadian and Brazilian MOUs. The Mexican MOU recognizes that each authority may not have the legal authority to provide all forms of assistance contemplated in the MOU. To the extent an authority lacks legal powers to provide

327. See *infra* notes 373-76 and accompanying text.

328. See CFTC Release No. 325/-90 (June 6, 1990).

329. Int'l Series Release No. 181, 47 SEC Docket 1128 (Oct. 22, 1990).

the assistance requested, each authority agrees to seek to obtain such authority or to seek the assistance of other governmental agencies that do have such authority.

The Mexican MOU also states that the CNV and SEC intend to begin negotiations, subject to the fulfillment of necessary internal procedures, with a view toward signing a binding agreement.

8. *MOU between the SEC and the Norway Banking, Insurance & Securities Commission (BISC) Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws*<sup>330</sup> (Norwegian MOU)

The Norwegian MOU, signed on September 24, 1991, provides for consultation and mutual assistance in the administration and enforcement of U.S. and Norwegian securities laws. It formalizes the intent of the SEC and the BISC to cooperate and to provide assistance in the full range of securities matters, not just enforcement matters. It also provides a framework for consultations concerning the operation of the MOU and matters of mutual interest regarding the countries' respective securities markets.

The Norwegian MOU is particularly significant because it provides for an enhanced level of cooperation in the execution of requests for assistance. A representative of the requesting authority "may prescribe specific questions" to be asked of a witness during testimony taken in the country of the requested authority and, subject to approval by the requested authority, "may be present at the taking of testimony." A representative of the requesting authority "may be present at the inspection or examination" of the books and records of, among other things, an investment business and, subject to approval by the requested authority, "may participate in that inspection or examination." The requesting authority may submit to the responding authority a request "that a person or persons designated by the requesting Authority be permitted to conduct the testimony of any person, or conduct an inspection or examination." Finally, where the responding authority grants a request that specifies that the laws of the state of the requesting authority require the opportunity for counsel for the witness or any party to the proceeding to pose questions to the witness, "the requested authority will use its best efforts to ensure that such an opportunity will be given."

9. *MOU on Exchange of Information between the SEC and the CFTC and the U.K. Department of Trade and Industry (DTI) and Securities and Investments Board (SIB) on Matters Relating to Securities*<sup>331</sup> (UK MOU)

On September 25, 1991, the SEC, the CFTC, the DTI,<sup>332</sup> and the SIB signed an expanded MOU. The UK MOU supersedes an MOU that was signed in 1986 (1986

330. Int'l Series Release No. 321, 49 SEC Docket 1747 (Sept. 30, 1991).

331. Int'l Series Release No. 323, 49 SEC Docket 1767 (Sept. 30, 1991).

332. See *infra* note 541 and accompanying text. The DTI was the SEC's counterpart for federal regulation of the securities markets in the United Kingdom. The Financial Services Act (FSA), which was passed by Parliament in 1986, gave the DTI increased responsibility for the oversight and enforcement of British securities laws. In June 1992 the functions and staff of the DTI's Financial Services Division were transferred to H.M. Treasury.

UK MOU).<sup>333</sup> The 1986 UK MOU was viewed as an interim arrangement because, at the time, none of the signatories could compel information on behalf of the other foreign regulator, and because of the 1986 UK MOU's limited scope (for example, assistance was limited primarily to providing market information). The DTI later obtained the power to assist overseas regulatory authorities by compelling the testimony of witnesses and the production of documents.<sup>334</sup> That power is parallel to that acquired by the SEC pursuant to section 21(a)(2) of the Exchange Act. The 1991 UK MOU, among other things, accounts for this additional authority.

The UK MOU makes assistance available in virtually all types of cases that could arise under the securities and futures laws of the United States and the United Kingdom.<sup>335</sup> Assistance will be available in the following areas: violations of laws regarding the disclosure obligations that arise from the acquisition of shares in companies; fraud or manipulation in connection with the offer, purchase, or sale of securities, futures, and options (including foreign futures and options products); and the failure of persons and entities to make fair and accurate reports to regulatory authorities.

The UK MOU contemplates that the signatories will use all available authority to provide assistance to each other, including: providing access to information in files; questioning or taking the testimony of designated persons; obtaining specified information and documents from persons; conducting compliance inspections or examinations of investment businesses; and permitting the representatives of the requesting authority to participate in the conduct of the inquiries made by the requested authority. The parties agreed to use subpoena authority where necessary to obtain the information requested by another party.

The UK MOU expresses each signatory's intention to gather information upon request regarding all matters relating to possible violations of the requesting authority's securities laws or regulations, using subpoena powers, if necessary. Such assistance includes providing access to agency files, taking testimony and obtaining information and documents from persons, and conducting compliance inspections or examinations of investment businesses. Assistance will be provided without regard to whether the subject matter of the request constitutes a violation of the requested authority's laws or regulations. The UK MOU also contains

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333. Int'l Series Release No. 4, 43 SEC Docket 176 (Sept. 23, 1986).

334. Companies Act, 1989, § 82 (Eng.).

335. On August 15, 1988, the SEC, the New York Stock Exchange (NYSE), the NASD, the Chicago Board of Options Exchange, Inc., and the American Stock Exchange (AMEX) entered into an MOU with the U.K. SIB, the Association of Futures Brokers and Dealers, the Financial Intermediaries Managers and Brokers Regulatory Association, the Investment Management Regulatory Organization, the Securities Association Limited, and the Bank of England (Financial Regulation MOU). The Financial Regulation MOU provides that, upon request, U.S. authorities will make available to U.K. authorities certain information concerning the capital position of broker-dealers. By making this information available, the Financial Regulation MOU allows U.K. regulators to "disapply" their capital adequacy rules in relation to U.S.-regulated broker-dealers that conduct business in the United Kingdom.

provisions that enable the SEC to participate in the taking of testimony and conducting inspections. Like all the SEC MOUs, the UK MOU contemplates the confidentiality of information exchanged thereunder, and that the parties will protect the information from unnecessary public disclosure.

On May 1, 1995, the SEC and the Investment Management Regulatory Organisation (IMRO) (the U.K.'s self-regulating body for the fund management industry) signed, within the framework of the UK MOU, a Declaration on Cooperation and Supervision of Cross-Border Investment Management Activity (Declaration).<sup>336</sup> The Declaration will facilitate the SEC's ability, pursuant to the UK MOU, to inspect the records of U.K.-based investment advisors registered with the SEC. The Declaration likewise will facilitate IMRO's ability to inspect records of U.S.-based investment advisors registered with IMRO. The Declaration is the first formal arrangement for the supervision of cross-border fund management activity, which is an increasingly significant portion of the securities industry in both countries.<sup>337</sup>

Several actions brought by the SEC illustrate the usefulness of the UK MOU. In *SEC v. Collier*,<sup>338</sup> the SEC filed a complaint, pursuant to which both defendants consented to, and the court ordered, injunctions under section 10(b) of the Exchange Act and Rule 10b-5 thereunder.<sup>339</sup> The complaint alleged that defendant Geoffrey Collier misappropriated information from his employer, a British investment bank, and purchased securities on the London Stock Exchange through accounts in the United States. Collier allegedly made the purchases through defendant Michael Cassell, a director and registered representative of an American broker-dealer.

This case is significant because it alleged violations of U.S. securities laws based on information misappropriated in a foreign country, and on insider trading conducted on a foreign securities exchange. The SEC alleged that conduct significant to the violation occurred in the United States, including trading through a U.S. broker in an attempt to avoid detection in Great Britain, and the allegedly unlawful scheme involving Cassell, who was associated with a U.S. broker-dealer. Under the conduct test applied by many U.S. courts, this activity constituted a sufficient jurisdictional basis for the court to exercise jurisdiction over this matter.

In *In the Matter of European American Corp. (Euramco)*,<sup>340</sup> the SEC temporarily

336. Int'l Series Release No. 806, 59 SEC Docket 698 (May 3, 1995).

337. In a related development, on July 17, 1995, the SEC and the SIB announced a joint initiative to conduct in-depth studies of the financial, operational, and management controls used by selected securities firms that conduct significant cross-border derivatives activities. The initiative represents the first international regulatory effort, involving all the relevant securities and banking regulators, to analyze the management controls necessary to manage risk across a financial services group's foreign and domestic affiliates. See SEC News Release 95-131; *SEC and SIB Announce Joint Initiative to Improve Oversight of Global Securities Firms*, FIN. TIMES, July 18, 1995, at 4.

338. No. 88 Civ. 4505 (C.D. Cal. July 26, 1988), Litigation Release No. 11817 (July 26, 1988).

339. Upon filing this action, the SEC acknowledged the valuable assistance of the DTI, pursuant to the 1986 UK MOU, during the investigation leading to the filing of its action.

340. Exchange Act Release No. 26881 (June 1, 1989).

suspended trading in the securities of Euramco because of questions raised about the adequacy and accuracy of publicly disseminated information concerning, among other things, Euramco's business activities, operations, acquisition, and valuation of assets, and whether Euramco had reporting obligations under section 12 of the Exchange Act. The SEC publicly acknowledged the assistance received from the SIB in this matter pursuant to the 1986 MOU.

In a related matter, the SIB initiated a legal action in the United Kingdom against a Swiss broker, Pantell S.A., which sold Euramco securities.<sup>341</sup> After the requested relief was granted, Euramco filed an action in a U.S. federal court, *European American Corp. v. Securities & Investments Board*,<sup>342</sup> alleging that the SIB wrongfully interfered with Euramco's contractual relationships by causing the company to default on a contract to acquire a gold mine in Panama; converting its property by freezing funds that properly belonged to Euramco rather than Pantell; disseminating false and misleading information concerning Euramco; and conspiring to deprive Euramco of its constitutional rights. In a friend-of-the-court brief, the SEC supported the SIB's ultimately successful motion to dismiss the action on grounds of sovereign immunity, citing the SIB's authority to promulgate rules and regulations for investment business in the United Kingdom, and to investigate, to discipline, and to initiate civil and criminal actions in the United Kingdom to enforce U.K. laws.<sup>343</sup>

10. *MOU between the SEC and the Comisión Nacional de Valores of Argentina on Consultation, Technical Assistance, and Mutual Assistance for the Exchange of Information*<sup>344</sup> (Argentine MOU)

The Argentine MOU, signed on December 9, 1991, provides for consultation and mutual assistance in the administration and enforcement of U.S. and Argentine securities laws. The Argentine MOU also provides for consultations between the signatories on all matters relating to the operation of the securities markets of their respective countries, and on the operation of the Argentine MOU. In addition, like the Mexican MOU, the Argentine MOU contains provisions for technical assistance.

11. *MOU between the SEC and the Comisión Nacional del Mercado de Valores of Spain Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws*<sup>345</sup> (Spanish MOU)

The Spanish MOU, signed on July 8, 1992, provides for consultation and mutual assistance in the administration and enforcement of U.S. and Spanish

341. *Securities & Inv. Bd. v. Pantell, S.A.*, [1990] Ch. 426, [1989] 3 W.L.R. 698 (Eng. 1989, reported in *THE TIMES* (London), Mar. 10, 1989).

342. No. 89 Civ. 2333-JGP (D.D.C.), Int'l Series Release No. 120 (Apr. 5, 1990).

343. See SEC Press Release No. 90-19, Memorandum Opinion, *European Am. Corp., Inc. v. Securities & Inv. Bd.*, No. 89 Civ. 2333 (MB) (D.D.C. July 11, 1991).

344. Int'l Series Release No. 354, 50 SEC Docket 0878 (Dec. 18, 1991).

345. Int'l Series Release No. 429, 51 SEC Docket 2838 (July 30, 1992).



securities laws. The Spanish MOU also provides for consultations between the signatories on all matters relating to the operation of the securities markets of their respective countries, and on the operation of the Spanish MOU.

12. *Understanding between the SEC and the Commissione Nazionale per le Società e La Borsa (CONSOB) of Italy*<sup>346</sup> (Italian MOU)

The Italian MOU, initialed in Milan in November 1992 and signed on May 5, 1993, was designed to facilitate the exchange of information between the SEC and the CONSOB, the Italian securities regulator. The Italian MOU is similar in scope and subject matter to the MOUs with Brazil, Canada, The Netherlands, Spain, and the United Kingdom. The CONSOB has a limited ability to compel information from persons or entities not regulated by the CONSOB. The CONSOB, however, is able to compel information from any person or entity involved in suspected insider trading or market manipulation.<sup>347</sup>

13. *Understanding between the SEC and the Superintendencia de Valores y Seguros (SVS) of Chile*<sup>348</sup> (Chilean MOU)

The Chilean MOU, signed on June 3, 1993, unlike some of the SEC's other comprehensive MOUs, does not provide specifically that a requesting authority may be present at the taking of testimony or statements.<sup>349</sup> The authors do not believe, however, that this will affect negatively or substantively the quality of assistance provided to the SEC by the SVS. The Chilean MOU provides that the requesting authority may prescribe questions both before and during the taking of testimony.

14. *MOU Concerning Consultation and Cooperation in the Administration and Enforcement of U.S. and Australian Securities Laws, between the SEC and the Australian Securities Commission (ASC)*<sup>350</sup> (Australian MOU)

The Australian MOU, signed on October 20, 1993, differs from other comprehensive MOUs recently signed by the SEC<sup>351</sup> in that the Attorney General of Australia (AAG) plays a major role in the implementation of the Australian MOU. Clause 1, paragraph 1(a) of the Australian MOU states that the "ASC's ability to exercise coercive powers on behalf of foreign regulators is governed by the Mutual Assistance in Business Regulation Act 1992" (MABRA).<sup>352</sup> Under

346. Int'l Series Release No. 547, 54 SEC Docket 0357 (May 18, 1993).

347. Italian Law 157/1991.

348. Int'l Series Release No. 548, 54 SEC Docket 737 (June 3, 1993).

349. Compare, e.g., Spanish MOU cl. 3, § 4, ¶ 4, *supra* note 345, with Chilean MOU art. III, § 4, ¶ 5, *supra* note 348.

350. Int'l Series Release No. 599, 55 SEC Docket 0841 (Oct. 20, 1993).

351. See, e.g., Norwegian MOU, *supra* note 330; Spanish MOU, *supra* note 345; Argentine MOU, *supra* note 344; and Chilean MOU, *supra* note 348.

352. *Supra* note 350.

MABRA's provisions, the compelling of testimony on behalf of the SEC requires an affirmative action by the AAG, in consultation with the ASC. An SEC request for assistance under the Australian MOU, however, is considered by the AAG pursuant to section 8 of MABRA, which provides standards consistent with the MOU.

Pursuant to part 2, section 6.(2)(a) of MABRA, compelled statements obtained by the ASC for foreign regulators cannot be used as evidence in criminal proceedings against the declarant or in proceedings against the declarant for the imposition of a penalty. The statements can be used for all other purposes, including as a basis for seeking derivative evidence against the declarant or as evidence against a third party. The SEC can use compelled testimony as part of its investigation, and hence has access to information that otherwise is beyond its reach at the investigative stage. If civil or administrative proceedings seeking a penalty commence, the SEC has available other means for obtaining the same testimony in a form that can be used in the proceeding. Moreover, if the testimony is essential to the SEC's case against the declarant, the SEC can use it in an injunctive or administrative proceeding, but cannot seek a penalty in such a proceeding.

## B. COMMUNIQUÉS CREATING FRAMEWORKS FOR COOPERATION

### 1. *Trilateral Communiqué on Cooperation between the SEC, the U.K. DTI and SIB, and the Securities Bureau of the Ministry of Finance of Japan*<sup>353</sup>

On September 21, 1990, the SEC and securities regulators from the United Kingdom and Japan issued a communiqué in which the signatories stated their: (i) intention to continue to coordinate their efforts to maintain safe and sound securities markets; (ii) agreement of a need to maintain balance between the stock and derivative markets to avoid adverse effects on the stability of the stock markets; (iii) intention to encourage cross-border business between their markets by pursuing mutual recognition of regulatory systems; (iv) agreement on the desirability of regularly exchanging information to facilitate the monitoring of multinational firms with operations in their respective capital markets; (v) intention to utilize fully their domestic powers to assist each other in the oversight of their respective domestic markets and the enforcement of their respective securities laws; and (vi) intention to meet regularly on a trilateral basis to continue discussions about matters of mutual interest.

### 2. *Communiqué on the Exchange of Information and the Establishment of a Framework for Cooperation between the SEC and the Swedish Financial Supervisory Authority (SFSA)*<sup>354</sup>

On June 27, 1991, the SEC signed a Communiqué on the Exchange of Information and the Establishment of a Framework for Cooperation with the Swedish

353. Int'l Series Release No. 159, 47 SEC Docket 791 (Oct. 1, 1990).

354. Int'l Series Release No. 322, 49 SEC Docket 1764 (Sept. 30, 1991).

Bank Inspection Board. After signing that communiqué, the Swedish Bank Inspection Board merged with the Swedish Insurance Inspection Board, and is now called the Swedish Financial Supervisory Authority (*Finansinspektionen*). On September 24, 1991, the SEC signed a superseding communiqué with the SFSA.

In the communiqué the SEC and the SFSA declared their intention to provide mutual assistance to the fullest extent permitted by the laws or regulations of their respective jurisdictions. Such assistance is designed to facilitate the performance of market oversight functions and the investigation, litigation, or prosecution of securities matters in both countries. The SEC and the SFSA also declared their intention to consult and, to the extent legally possible, provide assistance concerning the surveillance and operation of their securities markets and market participants. To the extent the SEC or the SFSA lack authority to provide assistance, efforts will be made either to obtain such authority or to seek assistance from other government agencies authorized to provide the assistance requested.

The communiqué also states that the SEC and the SFSA contemplate that, as an interim understanding, the communiqué will serve as a basis for the development of a more comprehensive MOU in the future.

3. *Communiqués between the SEC and the Financial Services Board of the Republic of South Africa (FSB) and the Securities Regulation Panel of the Republic of South Africa (SRP) on the Exchange of Information and the Establishment of a Framework for Cooperation and Consultation; Declaration of the SEC and the FSB Concerning the Development of a Comprehensive MOU on Cooperation Concerning Securities Matters; Declaration of the SEC and the SRP Concerning the Development of a Comprehensive MOU on Cooperation Concerning the Regulation of Takeovers, Mergers, and Insider Trading; and the Declaration of the SEC and the Office for Banks of the Republic of South Africa (OFB) on Cooperation Concerning Securities Matters*<sup>355</sup>

On March 2, 1995, the SEC signed understandings with the FSB, SRP, and OFB, key South African authorities responsible for overseeing South Africa's securities markets. These understandings establish a cooperative and consultative relationship that is fundamental to effective market regulation, oversight of cross-border offerings, and enhanced enforcement. Like the Swedish communiqué, these understandings express the intent of the signatories to provide mutual assistance to the fullest extent legally possible.

The declarations establish a detailed understanding regarding future, comprehensive MOUs. The signatories declared their intention that the MOUs would cover the full range of laws governing the offer, purchase, and sale of securities, and would contain a mechanism for requesting and obtaining a full range of

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355. Int'l Series Release No. 794, 58 SEC Docket 3006 (Apr. 18, 1995).

investigatory assistance. Moreover, the signatories declared that information provided under the MOUs would be subject to the confidentiality and use provisions specified in the MOUs, and that assistance would be granted under the MOUs without regard to whether the type of conduct described in a request for assistance would constitute a violation of the laws or regulations of the state of the authority receiving a request for assistance.

### C. JOINT STATEMENTS RELATING TO COOPERATION IN REGULATORY MATTERS

#### 1. *Joint Statement on the Establishment of Improved Cooperation between the SEC and the Commission of the European Communities*<sup>356</sup>

On September 23, 1991, the SEC and the Commission of the European Communities (EC), now referred to as the European Union (EU),<sup>357</sup> issued a joint statement regarding mutual cooperation. In the joint statement, the SEC and the EU declared their intention to work together to facilitate the exchange of information and the provision of mutual assistance by the SEC and the relevant national authorities of the EU Member States regarding the administration and enforcement of U.S. and EU members' securities laws.

In addition, the SEC and the EU declared their intention to consult regularly on matters of mutual interest concerning the operation and oversight of the securities markets in the United States and the EU. The joint statement provides for a regular dialogue between the SEC and the EU to review developments in securities markets and to discuss principles underlying securities regulation in the United States and the EU.

#### 2. *Joint Statement Setting Forth an Agenda for Oversight of the Over-the-Counter (OTC) Derivatives Market*<sup>358</sup>

On March 15, 1994, the SEC, the CFTC, and the U.K. SIB issued a joint statement setting forth an agenda for oversight of the OTC derivatives market. This first international understanding among securities and futures regulators for developing and coordinating an approach to the OTC derivatives market demonstrates the need and ability of regulators to work in a coordinated fashion to address some of the most complex issues arising in the markets today.

356. Int'l Series Release No. 320, 49 SEC Docket 1746 (Sept. 30, 1991).

357. The entry into force, on November 1, 1993, of the Maastricht Treaty on European Union introduced some changes in terminology regarding the EC and some of its institutions. The EU is now the umbrella term referring to a three-pillar construction encompassing the EC and the two new pillars: (1) Common Foreign and Security Policy (including defense); and (2) Justice and Home Affairs (notably cooperation between police and other authorities on crime, terrorism, and immigration issues). As before, the EC encompasses all policies such as the single market, derived from the founding treaties. The term EU, however, is preferred in view of the difficulties of delineating what is strictly EC or EU business.

358. Int'l Series Release No. 94-17.

The joint statement identifies ways in which the SEC, the CFTC, and the SIB can cooperate in their regulatory approaches to the OTC derivatives market and sets forth several common goals to be achieved by the three authorities. The seven-point program includes: improving international oversight of OTC derivatives trading through enhanced information sharing; improving risk management by promoting the use of legally enforceable netting arrangements; addressing concerns about excess leverage by promoting the establishment of prudent risk-based capital charges and increased use by firms of stress simulations of severe market conditions; promoting the development and use of sound management controls as part of an effort to monitor and control firms' activities and risk; encouraging strengthened standards for customer protection; examining the regulatory framework for multilateral clearing arrangements; and promoting improved standards for accounting recognition, measurement, and disclosure. Finally, the authorities stated their intent to work actively with other domestic and international securities, futures and financial regulators to promote wider regulatory cooperation.

#### D. TECHNICAL ASSISTANCE

##### 1. *Emerging Securities Markets*

The SEC has provided information and technical assistance to foreign authorities about securities matters, including the development and regulation of securities markets. Recent developments in Eastern and Central Europe and the former Soviet Union have highlighted and focused attention on the critical need of countries with emerging securities markets. Through several initiatives, the SEC has redoubled its efforts to address the needs of, and respond to requests for assistance from, emerging securities markets.

In 1991 the SEC organized and held at its offices in Washington, D.C., the first International Institute for Securities Market Development to provide training for foreign government officials responsible for the development or regulation of emerging securities markets. Subsequent institutes have been held at the SEC every year.<sup>359</sup> The faculty of the institutes consists of senior SEC officials, other senior U.S. government officials, experts from self-regulatory organizations, and representatives from other international organizations.

In 1994 the SEC held its first International Training Institute: Program of Enforcement and Market Oversight (Enforcement Institute). The Enforcement Institute, expected to take place annually, is designed to provide staff of foreign securities regulators and relevant law enforcement officials with practical training

359. In 1994 more than 80 officials representing 50 countries attended the program including, for the first time, representatives from Bermuda, Kazakhstan, Kyrgyzstan, Moldova, Slovenia, South Korea, and Uzbekistan. In 1995 approximately 100 delegates from 57 emerging market economies attended the Institute.

in the areas of SEC investigative techniques, market surveillance, inspections of investment companies and advisers, and examinations of broker-dealers.<sup>360</sup> Staff from the SEC, the NYSE, and the National Association of Securities Dealers (NASD), together with representatives from industry, developed the content of the Enforcement Institute and participated as speakers.

The SEC also has provided technical assistance to Eastern Europe by sending SEC staff as advisers to several countries in the region under a program funded by the U.S. Agency for International Development. In addition, the SEC participates in several short-term assistance projects for countries in Latin America and the Caribbean, as well as several countries in other regions.

## 2. *Understandings and Communiqués*

- a. Understanding between the SEC and the Republic of Hungary State Securities Supervision and the Securities Trading Committee of the Budapest Stock Exchange Regarding the Provision of Technical Assistance for the Development of the Hungarian Securities Markets<sup>361</sup> (Hungarian Understanding)

On June 22, 1990, the SEC and Hungarian securities regulators signed an understanding concerning the provision of technical assistance to Hungary. The Hungarian Understanding contemplates the training of personnel and the provision of information and advice relating to the development of systems, mechanisms, and procedures for: order handling, trade recording and comparison; quotation and transaction data transmission; clearance and settlement; regulatory requirements relating to market professionals and capital adequacy; accounting and disclosure; effective market surveillance and enforcement programs; and investor protection. This assistance is explicitly conditioned upon the availability of resources and domestic authorizing legislation. The Hungarian Understanding further contemplates that the parties will communicate reciprocally and cooperate with each other concerning all matters related to the operation of their markets and the protection of investors.

- b. Understanding between the SEC, the Inter-American Development Bank (IADB), and the United Nations Economic Commission for Latin America and the Caribbean (UNECLAC)<sup>362</sup> (IADB and UNECLAC Understanding)

The IADB and UNECLAC Understanding, signed on September 26, 1991, concerns the provision of technical assistance for the development of securities markets in Latin America and the Caribbean. It is precedent setting in that it provides for

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360. In the past, the SEC invited foreign securities regulators to participate in the SEC's Annual Enforcement Training Program. The Enforcement Institute was started in part because of the unique interests and needs of foreign authorities.

361. Int'l Series Release No. 129, 46 SEC Docket 1076 (June 27, 1990).

362. Int'l Series Release No. 324, 49 SEC Docket 1780 (Sept. 30, 1991).

a unique collaboration between the SEC, IADB, and UNECLAC, thus establishing a mechanism for the SEC to render technical assistance more effectively.

The understanding provides for consultations with the U.S. securities industry to establish the types of technical assistance needed, including systems for order handling, trade recording, and quotation and transaction data transmissions, as well as regulatory requirements pertaining to market professionals, market surveillance, and enforcement. In addition, the signatories undertake to conduct studies to identify areas in which assistance may be provided, including legal and accounting infrastructure and methods for strengthening supervisory bodies.

c. Communiqué between the SEC and the Costa Rican Comisión Nacional de Valores (CNV) on the Provision of Technical Assistance for the Development of the Costa Rican Securities Markets, the Exchange of Information, and the Establishment of a Framework for Cooperation<sup>363</sup>

On October 10, 1991, the SEC signed a communiqué on technical assistance and international cooperation with the CNV. The communiqué creates a framework for the provision of technical assistance, the exchange of information, and consultation involving the operation of the securities markets in the United States and Costa Rica.

In the communiqué, the SEC and the CNV declare their intent to provide mutual assistance to the fullest extent permitted by the laws or regulations of their respective jurisdictions. Such assistance is designed to facilitate the performance of market oversight functions and the investigation, litigation, or prosecution of securities matters in both countries. To the extent that either party lacks authority to provide assistance, efforts will be made to obtain such authority or to seek assistance from other government agencies authorized to provide the assistance requested.

The communiqué provides for, among other things, technical assistance concerning systems to promote the formation of capital, including both public and private placement markets; training, clearance, and settlement mechanisms; and systems for order handling, trade recording, quotation, and transaction data transmission.

d. Understanding between the SEC and the Indonesian Capital Market Supervisory Agency (BAPEPAM) Regarding the Provision of Technical Assistance for the Development of the Indonesian Securities Markets and Mutual Cooperation<sup>364</sup> (Indonesian Understanding)

Signed on March 24, 1992, this understanding concerns technical assistance and cooperation with the BAPEPAM, and is the first such understanding with an emerging market nation in Asia. The Indonesian Understanding resembles the Hungary Understanding.

363. Int'l Series Release No. 331, 49 SEC Docket 2002 (Oct. 16, 1991).

364. Int'l Series Release No. 376, 51 SEC Docket 183 (Mar. 24, 1992).

The Indonesian Understanding provides for communication and cooperation on all matters relating to the operation of the U.S. and Indonesian securities markets and the protection of investors. Both the SEC and BAPEPAM express their commitment to use their best efforts to provide mutual assistance to facilitate the effective administration and enforcement of their respective securities laws and regulations.

- e. MOU between the SEC and the China Securities Regulatory Commission (CSRC) Regarding Cooperation, Consultation, and the Provision of Technical Assistance<sup>365</sup> (Chinese Understanding)

The Chinese Understanding, designed to formalize a cooperative and consultative relationship between the SEC and Chinese securities regulatory authorities, establishes a framework between the SEC and the CSRC to provide technical assistance for the development of the Chinese securities markets. It also provides for mutual enforcement assistance relating to activities in U.S. and Chinese securities markets.

Because Chinese securities laws and regulations are still being formulated and adopted, the Chinese Understanding does not address certain issues that may be affected by subsequent legal developments regarding the scope of the CSRC's powers. In the Chinese Understanding, the authorities undertake expressly to review its operation on a regular basis and, when new Chinese securities laws take effect, to consider whether the MOU should be supplemented or superseded.

#### E. OTHER UNDERSTANDINGS

1. *MOU between the SEC and the Institut Monétaire Luxembourgeois (IML)*<sup>366</sup>

On May 23, 1990, the SEC signed an MOU with the IML that provides for the exchange of information between the parties relating to trades cleared through Centrale de Livraison de Valeurs Mobilières, S.A. Luxembourg (CEDEL) for the PORTAL trading system. The PORTAL system was designed to handle secondary trading of certain unregistered securities in transactions exempt from the registration and prospectus delivery requirements of the Securities Act.<sup>367</sup>

### III. Implementing MOUs

#### A. COMPELLING THE PRODUCTION OF INFORMATION AND THE INTERNATIONAL SECURITIES ENFORCEMENT COOPERATION ACT

The internationalization of U.S. securities markets has created enormous opportunities for the SEC to develop new initiatives in the enforcement area. Those

365. Int'l Series Release No. 662, 56 SEC Docket 1981 (Apr. 28, 1994).

366. Int'l Series Release No. 137, 46 SEC Docket 1715 (Aug. 8, 1990).

367. See Exchange Act Release No. 27956 (Apr. 27, 1990); Exchange Act Release No. 33326, Int'l Series Release No. 622, 1993 WL 527988 (Dec. 13, 1993).



initiatives are consistent with the SEC's mandate to preserve fair and honest markets in the United States, and are sensitive to the need for maintaining the United States as a major securities trading center. For example, as part of its efforts to assist foreign authorities, the SEC in 1988 proposed, and Congress enacted, legislation authorizing the SEC to conduct investigations on behalf of foreign securities authorities, using subpoena authority if necessary. Congress enacted section 21(a)(2) of the Exchange Act<sup>368</sup> (ITSFEA), which empowers the SEC to conduct a formal investigation upon the request of a foreign securities authority without regard to whether the facts stated in the request constitute a violation of U.S. law. On June 21, 1988, a measure similar to the SEC's proposal was introduced in the Senate,<sup>369</sup> and on June 29, 1988, the SEC's proposal was introduced in the House of Representatives.<sup>370</sup> Both the House and the Senate held hearings on the bill, and the Senate Banking Committee favorably reported out the bill. The House Energy and Commerce Committee reported out the investigatory assistance section of the bill (discussed below). That legislation (Act) was enacted on October 22, 1988, as section 6 of ITSFEA.

The Act does not require that a matter under investigation on behalf of a foreign securities authority<sup>371</sup> also constitute a violation of U.S. law. Because U.S. securities laws are broader than the securities laws of most other countries, a "dual criminality" requirement, if applied on a reciprocal basis by other nations, would tend to limit the applicability of bilateral agreements to a narrow range of cases and hence limit the SEC's ability to obtain assistance from other nations.

The Act requires that the SEC, in deciding whether to provide the requested assistance, consider whether the foreign authority has agreed to provide reciprocal assistance to the SEC. It allows the SEC to refuse to process any request on grounds that the request violates the public interest. Further, the Act provides witnesses with all the protection and remedies afforded to witnesses in SEC proceedings. Accordingly, witnesses could obtain access to a formal order identifying the basis and subject matter of an investigation. Further, a witness could resist enforcement of an unnecessarily burdensome subpoena. In accordance with SEC practice, any challenge to an SEC subpoena is reviewable by the SEC as part of the authorization process for a subpoena enforcement action.

A memorandum submitted in support of the proposed legislation states that the SEC anticipates that any person resisting the subpoena would make his or

368. Pub. L. No. 100-704, signed into law November 19, 1988.

369. S. 2544, 100th Cong., 2d Sess. (1988).

370. H.R. 4945, 100th Cong., 2d Sess. (1988).

371. Section 3(a)(50) of the Exchange Act, 15 U.S.C. § 78c(a)(50) (Supp. 1995), broadly defines the term "foreign securities authority" to include "any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters."

her reasons known at the time he or she initially resists the subpoena.<sup>372</sup> This information would be available to the SEC for its consideration before a decision was made to institute a subpoena enforcement action. Accordingly, the SEC would have an opportunity to review the matter and the facts as argued by the subject of the subpoena, before seeking a court determination. The memorandum further notes the SEC belief that by providing a witness with the same rights and protections provided to witnesses in SEC investigations, the proposed legislation resolves any potential constitutional due process and Fourth Amendment concerns. Because testimony would be taken pursuant to existing investigative procedures, a witness would be entitled to assert all relevant rights and privileges of the United States. In addition, a witness would be entitled to assert privileges available in the country seeking the evidence even in cases in which the United States does not recognize the privileges. Issues of privilege would be preserved on the record for later consideration by a court of the requesting authority. The memorandum stated that the SEC anticipates that foreign countries providing reciprocal assistance to the SEC will follow a similar procedure.

#### B. THE INTERNATIONAL SECURITIES ENFORCEMENT COOPERATION ACT OF 1990<sup>373</sup>

The SEC's 1988 recommendation also contained three provisions that were approved in 1990 in substantially similar form by the House of Representatives and the Senate. Those provisions, along with two new provisions, were introduced as the International Securities Enforcement Cooperation Act of 1989<sup>374</sup> in the House of Representatives in February 1989, and as the International Securities Enforcement Cooperation Act of 1989<sup>375</sup> in the Senate in March 1989. In December 1990, the U.S. Congress enacted the International Securities Enforcement Cooperation Act (ISECA), that among other things, amended section 24 of the Exchange Act.<sup>376</sup> ISECA has improved substantially the SEC's ability to cooperate with the securities regulators of other countries.

New subsection 24(d) of the Exchange Act provides a basis for withholding disclosure under the Freedom of Information Act (FOIA) of certain records obtained from a foreign securities authority. This exemption complements existing exemptions from disclosure under the FOIA. Information obtained from a foreign securities authority, therefore, that does not satisfy the specific requirements of subsection (d) also may be withheld if any other FOIA exemption applies.

372. 134 CONG. REC. S8318-30 (daily ed. June 21, 1988) (submitted by Sen Riegle); Letter from SEC Chairman Ruder to George Bush, President of the U.S. Senate (attachment A at 12) (June 3, 1988).

373. Pub. L. No. 101-550, 104 Stat. 2713 (1990).

374. H.R. 1396, 100th Cong., 2d Sess. (1988).

375. S. 646, 100th Cong., 2d Sess. (1988).

376. 104 Stat. 2713.

The subsection (d) exemption may be claimed when a foreign securities authority provided the requested information, and when the foreign securities authority has in good faith determined and represented to the SEC that disclosure of such information would violate the laws applicable to the foreign securities authority.

The ISECA clarifies the SEC's authority to provide foreign and domestic securities authorities with nonpublic information and authorizes the SEC to obtain reimbursement from a foreign authority for expenses incurred in providing assistance to that authority. Finally, the SEC and self-regulatory organizations may impose sanctions on a securities professional found by a foreign court or securities authority to have engaged in illegal or improper conduct.

#### IV. Cooperation in the Absence of an MOU

##### A. GERMANY

In a diplomatic note, dated March 22, 1994, the German *Ausswärtiges Amt* (Foreign Office) confirmed that the SEC is qualified to make requests for assistance under the German *Gesetz über die internationale Rechtshilfe in Strafsachen* (Law Governing International Legal Assistance in Law Enforcement Matters) (IRG).<sup>377</sup> The IRG authorizes the Justice Ministry to seek through the relevant state (*Länder*) governments, among other things, documents and testimony on behalf of a foreign law enforcement authority in connection with an investigation.

The confirmation from the *Ausswärtiges Amt* responds to a letter dated November 16, 1993, from the SEC to the German *Bundesjustizministerium* (Federal Ministry of Justice). The U.S. Embassy in Bonn delivered the letter to the *Ausswärtiges Amt* with a diplomatic note dated November 22, 1993. That letter explained in detail the competence and functions of the SEC and sought confirmation that the SEC was an agency qualified to seek legal assistance pursuant to the provisions of the IRG.

This groundbreaking exchange of diplomatic notes established the first official mechanism for the SEC to seek legal assistance from Germany for SEC investigations. German criminal authorities have already provided assistance to the SEC in several cases under this new mechanism, including witness testimony and the confiscation of documents. Although the SEC may want to obtain investigatory assistance in insider trading cases from the newly created *Bundesaufsichtsamt für den Wertpapierhandel* (Federal Supervisory Office for Securities Trading) (BAWe),<sup>378</sup> where relevant evidence is located in Germany, the SEC may continue to seek assistance for most of its fraud investigations through the *Bundesjustizministerium*.

377. BGBl. I 2071-89 (Dec. 23, 1982) (F.R.G.); Int'l Series Release No. 691.

378. See *infra* notes 538-41 and accompanying text.

B. GUERNSEY; SEC v. PACIFIC WASTE MANAGEMENT, INC.<sup>379</sup>

This case reflects an extraordinary example of international cooperation in the investigation of serious or complex fraud. Key information for the SEC's investigation in this matter was obtained pursuant to orders issued on behalf of the SEC by Her Majesty's Procureur (Guernsey/Channel Islands) pursuant to the Criminal Justice Law.<sup>380</sup> In March 1993, pursuant to orders issued by Her Majesty's Procureur on behalf of the SEC, the SEC staff took the testimony of employees of various financial institutions in Guernsey and obtained documents. The information acquired in Guernsey resulted in, among other things, the discovery of an account in the name of a shell corporation, Dunne Finance, Ltd., at the Guernsey bank.<sup>381</sup>

On April 7, 1993, the SEC filed a complaint in the District Court for the District of Nevada.<sup>382</sup> The complaint names as defendants Pacific Waste Management, Inc. (Pacific Waste), a Nevada corporation; Bruno Victor de Vincentiis, a resident of Vancouver, British Columbia; Bruce C. Simpson, a resident of Perth, Australia; and John B. Aldred and Fred V. Schiemann, both residents of Reno, Nevada. Dunne was named as a relief defendant. The complaint alleged that investors were told that Pacific Waste had the ability and the business purpose to begin immediately construction, and then operation, of a toxic waste disposal (TWD) plant in the Republic of Palau. The SEC staff determined, upon consultation with the U.S. Department of the Interior (DOI) and Environmental Protection Agency (EPA), and the government of the Republic of Palau, that the TWD plant was not under construction, that the documents necessary to obtain DOI or EPA approval to commence construction had not even been submitted, and that Pacific Waste was a shell corporation without any valuable assets, income, or substantive business operations. In addition, false and misleading statements were made to investors regarding Pacific Waste's alleged acquisition of other companies.

The Nevada district court issued a temporary restraining order that, among other things, temporarily froze the defendants' assets, enjoined them from selling the securities of Pacific Waste, and prevented them from violating U.S. securities laws. On the same day, the court issued an order temporarily sealing the proceedings in the matter (the seal was lifted on April 16, 1993). The court issued a preliminary injunction on April 26, 1993, and entered a final judgment against de Vincentiis and Dunne on May 26, 1994.<sup>383</sup>

379. No. CV-N-93-232-ECR (D. Nev.), Litigation Release No. 13617, Int'l Series Release No. 535 (Apr. 21, 1993) (ancillary proceeding between the SEC and Dunne Finance Ltd., Royal Court of Guernsey (Ordinary Div.) (Channel Islands)).

380. (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991.

381. For a more detailed description of the SEC's ancillary proceeding against Dunne, see *supra* note 225 and accompanying text.

382. *Supra* note 379.

383. SEC v. Pacific Waste Management, Inc., No. CV-N-93-232-DWH (judgment of permanent injunction and other relief) (D. Nev. May 26, 1994).

## V. Other Understandings to Facilitate Cooperation

### A. INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (IOSCO)

IOSCO was established in 1974 as the Inter-American Association of Securities Commissions and Similar Organizations. In an effort to facilitate discussion among a broader base of securities regulators, IOSCO expanded its membership to include regulators from all over the world, and currently has 121 members.<sup>384</sup> IOSCO provides the major international forum for mutual consultation and collaboration about regulatory issues relevant to the development of securities business, including growing cross-border business. IOSCO aims to facilitate the efforts of national regulators in ensuring that such business is conducted by adequately capitalized firms through safe and sound market systems, with investors afforded proper protection. The SEC has been an active participant in IOSCO since its inception and currently is a member of its executive committee.

The recent work of IOSCO's Technical Committee concerning enforcement and the exchange of information is particularly interesting. This work greatly reinforces the initiatives of the SEC in the international cooperation and enforcement areas. In 1990 the Technical Committee issued a report entitled "Report Addressing the Difficulties Encountered While Negotiating and Implementing Memoranda of Understanding."<sup>385</sup> That report was based on a review of responses of members of the Technical Committee to a comprehensive questionnaire regarding the exchange of information, and on the experience of IOSCO members in the area of international cooperation. The report identified eight main issues, such as differences in the regulatory structures of countries, that arise and should be addressed in the negotiation of MOUs. The report provides a window for identifying and understanding the differences among the SEC's MOUs and the MOUs of regulators of other countries.

In 1991 the Technical Committee issued another significant report regarding MOUs, entitled "Principles For Memoranda of Understanding." The report endorses a set of principles that can be used in the negotiation and implementation of MOUs, and reflects the SEC's approach to promoting international cooperation through the use of regulator-to-regulator MOUs. The principles constitute an important step toward fulfilling IOSCO's long-held goal of fostering reciprocal assistance among members in the areas of market oversight and fraud prevention.

The Technical Committee has focused upon specific types of securities law enforcement scenarios with international implications, and has identified money laundering as an important issue with broad implications for securities and futures markets. In particular, at IOSCO's 1992 Annual Conference, the Technical Com-

384. There are 84 full and associate members and 37 affiliate members.

385. A copy of this or other IOSCO reports may be obtained by writing the Secretary General of IOSCO at: C.P. 171, Tour de la Bourse, 800 Square Victoria, 45e étage, Montreal, Quebec H4Z 1C8, Canada.

mittee issued a report (which the President's Committee of IOSCO adopted) addressing how securities regulators can contribute to global efforts to combat money laundering and how the securities and futures markets can best be protected against being used to perpetrate money laundering schemes. In preparing this report, the Committee's working party consulted extensively with members of the Financial Action Task Force (FATF), which has promulgated recommendations designed to prevent and detect money laundering activity that would be applicable to financial regulators and institutions.

Based on the work of the FATF, the working party identified the following central issues that should be considered in developing tools for combating the use of the securities and futures markets for money laundering: customer identification; record keeping and the ability to reconstruct transactions; detecting and reporting suspicious transactions; preventing control of securities and futures firms by criminals; development of programs for intermediaries to guard against money laundering; use of cash in securities and futures transactions; and cooperation and coordination among domestic and international authorities.

During IOSCO's 14th Annual Conference held in Tokyo in 1994, the Technical Committee released a report entitled "Report on Issues Raised for Securities and Futures Regulators by Under-Regulated and Uncooperative Jurisdictions." Part 1 of the report identifies the needs of regulators regarding these jurisdictions and describes obstacles that may hamper the flow of information. Part 2 describes the methods used to obtain needed information from these jurisdictions, and Part 3 suggests possible courses of action to improve the present situation.

To address the issues considered in the report, the President's Committee adopted a resolution, prepared by the Technical Committee, entitled "Resolution on Commitment to Basic IOSCO Principles of High Standards and Mutual Cooperation and Assistance." This resolution asks all members to prepare a written assessment of their ability to provide mutual assistance and cooperation to foreign securities and futures regulators. In addition, new members are required to confirm that they are willing to comply with IOSCO's principles and that they will provide assistance in accordance with IOSCO by-laws and resolutions. This resolution clearly states IOSCO's intention to monitor closely the ability of its members to obtain assistance from other jurisdictions and to take appropriate steps to improve the situation.

## B. THE COUNCIL OF SECURITIES REGULATORS FOR THE AMERICAS (COSRA)

During a meeting held in Cancun, Mexico, in 1992, securities regulatory authorities of North, South, and Central America, and the Caribbean, announced their intention to create a new organization, COSRA, to provide a forum for mutual cooperation and communication in the Americas and to enhance efforts of each country in the region to develop and foster the growth of fair and open securities markets.

COSRA's charter states that the organization will concentrate its activities in several areas. These areas will include the proposal and implementation of regulatory, legal, and structural reforms to facilitate broad-based participation in the securities markets and to provide a means for privatization, where appropriate, of state-owned businesses in the Americas. Further, COSRA will focus on the integrity of securities markets through coordination of, and cooperation in, market surveillance and enforcement of the laws and regulations of the countries of the Americas.<sup>386</sup>

In June 1993, at their second annual meeting, COSRA members reached an agreement on important principles for the regulation of secondary markets and international cooperation in the supervision of investment advisers. Those principles include transparency in transaction reporting, audit trails, clearance and settlement, and cross-border surveillance of investment advisers. Each of these principles is intended to promote and enhance market integrity and investor confidence, while advancing market development and international market consistency.

In June 1994, at their third annual meeting, COSRA members developed and announced a "Framework for Cooperation in the Americas," in which they stated their intentions to (i) use the fullest authority possible to assist other COSRA members in obtaining documents and testimony relevant to any enforcement or regulatory inquiries being conducted by another COSRA member; (ii) use all reasonable efforts to obtain the legal authority, if it does not exist, to provide the assistance contemplated under the framework; and (iii) continuously review and assess the degree of assistance that can be provided with a view to enhancing cooperation among the members.

C. AGREEMENT BETWEEN THE BANKING AND SECURITIES SUPERVISORY  
AUTHORITIES OF THE NORDIC COUNTRIES ON THE PRINCIPLES FOR  
COOPERATION IN AREAS AFFECTING THE SECURITIES MARKET<sup>387</sup>  
(NORDIC AGREEMENT)

On May 31, 1988, the banking and securities regulatory authorities from Denmark, Finland, Iceland, Norway, and Sweden entered into an agreement similar in many respects to the SEC's MOUs with foreign authorities. The signatories to the Nordic Agreement agreed to cooperate with each other in exchanging information and records necessary for the supervision of their securities markets.

386. A copy of the COSRA charter, or any other COSRA agreement, resolution, or report, can be obtained by writing: Superintendent, Department of Internationalization & Development, Comissão de Valores Mobiliários, Rua 7 de Setembro, 111-31º andar, Rio de Janeiro, RJ 20159-900, Brazil.

387. Done in Copenhagen, May 31, 1988. The signatories included the Finanstilsynet of Denmark; the Sedlabanki Islands of Iceland; the Bankinspektionen of Sweden; the Bankinspektionen of Finland; and the Kredittilsynet of Norway.

The parties also stated their intent "to remove or reduce any obstacles which may exist to the transfer of information and records" according to the agreement.<sup>388</sup>

**D. COUNCIL OF EUROPE CONVENTION ON INSIDER TRADING<sup>389</sup>**  
(COUNCIL CONVENTION)

The Council Convention opened for signature in April 1989. The Council Convention signals a recognition by signatory countries of the need for international cooperation in the investigation and prosecution of insider trading as defined by each signatory. The convention does not establish specific regulatory requirements for signatories, but instead sets forth a framework for exchanges of information and mutual assistance among the members.

Because its primary purpose is to foster cooperation, the Council Convention's definition of insider trading is intentionally broad and flexible in order to encompass the various regulatory structures of its signatories. Like the SEC's MOUs, the convention provides that information is to be gathered in accordance with the domestic procedures of the country whose assistance is requested, and places certain limitations upon the permissible uses and disclosure of the information.

**VI. The Hague Convention on Evidence Gathering and Letters Rogatory**

**A. U.S. COURT-ORDERED DISCOVERY UNDER THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS<sup>390</sup>**  
(HAGUE CONVENTION)

The United States and many other countries are contracting nations to the Hague Convention. The Hague Convention encompasses three of the most common devices for foreign discovery: letters rogatory, evidence taking by a consular official, and private commissioners. The Hague Convention can be utilized only in connection with judicial proceedings, not investigations, and, therefore, cannot be used by the SEC in investigations. Moreover, most of the contracting nations have exercised their prerogative, under article 23 of the Hague Convention, to refuse to execute letters rogatory for the purpose of pretrial discovery of documents. Pretrial discovery of testimony may be had if it is relevant to trial, a difficult burden to meet at the early stages of U.S. litigation, where the evidence sought may be preliminary and necessary to obtain dispositive proof. For a request under the Hague Convention to succeed, the specific documents and testimony being sought may need to be identified, which sometimes is not possible before obtaining information from the foreign jurisdiction. Several courts have held that

<sup>388</sup>. *Id.* at 2.

<sup>389</sup>. Convention on Insider Trading, *opened for signature* Apr. 20, 1989, Europ. T.S. No. 130.

<sup>390</sup>. *Opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7,444.



28 U.S.C. section 1782,<sup>391</sup> the enabling provision for the execution of letters rogatory in the United States, does not require a pending judicial proceeding; therefore, a Hague Convention request may be used in connection with an investigation.

Even when the SEC has obtained the evidence requested pursuant to the Hague Convention, the time and expense expended to obtain the information generally is substantial. Therefore, the SEC usually defers to the use of bilateral mutual assistance agreements, MOUs, or in district court proceedings, the Federal Rules of Civil Procedure.

Internal foreign restrictions on evidence gathering adopted by all but four of the contracting states present further obstacles to foreign discovery in securities cases. The United Kingdom, for instance, has one of the more liberal enabling provisions under the Hague Convention. This provision, known as the Foreign Evidence Act,<sup>392</sup> establishes the procedures for execution of letters rogatory pursuant to the Hague Convention. Unlike the U.S. provision for execution of letters rogatory, the Evidence Act directs U.K. courts executing letters rogatory in civil matters to narrow discovery, for example, to particular documents,<sup>393</sup> and allows the secretary of state to abrogate cooperation for state security reasons.<sup>394</sup>

In *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*<sup>395</sup> British companies appealed the execution of letters rogatory in an American contract dispute that had prompted the institution of a separate U.S. antitrust action. The English attorney general intervened in the appeal, stating that as a matter of policy the government opposed cooperation with U.S. antitrust suits. The House of Lords rejected reference to the antitrust suit as a ground to refuse assistance to discovery in the contract dispute. The House of Lords refused, however, to give effect to the routine language used in U.S. discovery that asked for "any memoranda, correspondence or other documents" relevant to the described documents, because such language constituted "fishing."<sup>396</sup>

In the *Asbestos Insurance Coverage* cases<sup>397</sup> the House of Lords considered the appeal of a decision to execute letters rogatory issued under the Hague Convention in class action personal injury suits. The U.K. Court of Appeal had authorized production of categories of documents in part. The House of Lords reversed, holding that a compendious description of several documents would not meet the requirement that a document be described with particularity. Secondly, it held that the party seeking the documents would have to establish that the docu-

391. For a thorough analysis of this provision, see Stahr, *Discovery Under 28 U.S.C. § 1782 For Foreign and International Proceedings*, 30 VA. J. INT'L L. 597 (1990).

392. The Evidence (Proceedings in Other Jurisdictions) Act, 1975, ch. 34 (U.K.).

393. *Id.* § s(4)(b).

394. *Id.* § s(3)(3).

395. [1978] 1 All E.R. 434 (Eng.).

396. *Id.* at 443-44, 463.

397. [1985] 1 W.L.R. 331 (Eng. C.A. 1984) (Fraser, M.R.).

ments existed and were likely to be in the possession of the person from whom they were sought.<sup>398</sup> When the existence of a document is conjectural, production will be denied. Regarding oral testimony, the House of Lords ordered that if the witnesses were in a position to give relevant testimony, it would not rule in advance whether the information sought should be in any way restricted.<sup>399</sup>

In *In Re State of Norway*<sup>400</sup> the U.K. House of Lords reversed the decision of the Court of Appeal<sup>401</sup> that refused to give effect to letters rogatory issued by a Norwegian city tax court in connection with a probate proceeding. The Court of Appeal had held that the Hague Convention could not be utilized because the Norwegian court proceedings were not "proceedings in any civil or commercial matter" within the meaning of the Hague Convention and the Foreign Evidence Act. The House of Lords considered the legislative history of the Foreign Evidence Act and the use of the term "proceedings in any civil or commercial matter" in other conventions, and concluded that the term should not be given a restrictive meaning.

The House of Lords noted that if the term "proceedings in any civil or commercial matter" were given a restricted construction, it "would involve a profound departure from the established legal practice of conferring a very broad jurisdiction upon the courts in the United Kingdom to enable them to provide assistance for courts in other jurisdictions by obtaining evidence for them."<sup>402</sup>

In his opinion, Lord Goff noted that it was difficult to attribute a uniform meaning or "internationally acceptable definition" to "civil or commercial matter" in civil law countries.<sup>403</sup> He concluded that the term should be construed by reference to whether the subject proceedings were proceedings in a civil or commercial matter under the laws of both countries, and noted "that in the ordinary way the English court should be prepared to accept the statement of the requesting court that the evidence is required for the purpose of civil proceedings."<sup>404</sup> Under English law, "proceedings in any civil matter should include all proceedings other than criminal proceedings, and proceedings in any commercial matter should be treated as falling within proceedings in civil matters."<sup>405</sup>

The House of Lords also rejected the contention by the witnesses whose testimony was being sought that the letters of request, or their execution, amounted to "the enforcement, direct or indirect, of a foreign revenue law."<sup>406</sup> Lord Goff stated that he could not "see any extra-territorial exercise of sovereign authority

398. *Id.* at 337-38.

399. *Id.* at 339-40.

400. [1989] 2 W.L.R. 458 (Eng. C.A. 1988) (Goff, M.R.).

401. *In re State of Norway's Application* (No. 2), [1988] 3 W.L.R. 603.

402. [1989] 2 W.L.R. at 469-70.

403. *Id.* at 471.

404. *Id.* at 474.

405. *Id.* at 475.

406. *Id.* at 477.

in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue laws of Norway in Norway itself."<sup>407</sup> The House of Lords concluded that the letter of request, which had been modified during the appeal process, could not be rejected as a "fishing expedition"; rather, it was "in substance a request for what, by English law, would be regarded as assistance in obtaining evidence."<sup>408</sup> Lord Goff also accepted the decision of the Court of Appeal that the letter of request should not be denied on the ground that it would compel the witnesses to breach their duty of confidentiality as bankers.

The House of Lords' opinion substantially supports the view that U.K. courts will consider a proceeding brought by the SEC under the U.S. securities laws to be a "civil or commercial matter" within the meaning of the Hague Convention, thus, enabling the SEC to utilize the Hague Convention in the United Kingdom. In the *Santa Fe* case, discussed below, the SEC prevailed on this issue when the British High Court of Justice concluded that an SEC district court proceeding was a "civil or commercial matter." The second *State of Norway* Court of Appeal opinion, however, added some uncertainty to the issue. The House of Lords' opinion also confirms that requests under the Hague Convention can be drafted in a manner that avoids their being labelled "fishing expeditions."

## B. SEC EXPERIENCE UNDER THE HAGUE CONVENTION

The following examples illustrate the SEC's mixed results in utilizing the Hague Convention to obtain information and testimony from several countries.

### 1. *United Kingdom*

In *SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for, the Common Stock of Santa Fe International Corporation*<sup>409</sup> (*Santa Fe*) the SEC applied to the British courts for assistance. It sought documents and testimony pursuant to the Hague Convention from third-party witnesses resident in London. Those witnesses included a hotel, a credit card company, and two individuals who had acted as stockbrokers for purchases of Santa Fe securities just prior to the announcement that Santa Fe had agreed to merge with Kuwait Petroleum Corporation. The witnesses had all refused to provide the evidence voluntarily, on the grounds that without a court order or subpoena they owed a duty of confidentiality to their customers.

The SEC sought and received letters rogatory in a U.S. court seeking assistance from England pursuant to the Hague Convention. Upon presentation of this request, an English master granted the SEC's request and ordered the evidence to

407. *Id.* at 478.

408. *Id.* at 479.

409. 817 F.2d 1018 (2d Cir. 1987).

be given. Accordingly, the credit card company and hotel produced the documents sought. The two individuals refused, however, arguing that the SEC's requests were improper under the terms of the Hague Convention and that if they testified, they would violate the Luxembourg bank secrecy law because at the time the purchases were made, they were employees of a London-based Luxembourg bank.

Seven months later, after extensive briefing and four days of oral argument, the High Court of Justice, Queens Bench Division, ordered the two individuals to testify.<sup>410</sup> The court held that the information was relevant, based upon affidavits submitted by the SEC, and that it was sought for a civil prosecution, as required by the Foreign Evidence Act. In this respect, the court relied upon the careful consideration already made by the U.S. judge before issuing the letters. Nor was it likely the bankers would be prosecuted under the Luxembourg bank secrecy statute. The court refused to give effect to a foreign privilege with no parallel in British law. Finally, the court held that British bank secrecy laws would not apply because, based on the facts of the case, such an application was not in the public interest.<sup>411</sup>

## 2. *France*

In *In the Matter of the Testimony of Costandin Nasser*<sup>412</sup> the SEC used the Hague Convention to gather evidence for trial from a witness residing in France. The witness was a close business associate of one of the defendants in *Santa Fe*. The SEC had learned that the witness had been with the defendant at or near the time the defendant traded Santa Fe securities. The witness and the defendant also had common business associates who were possibly involved in the case, including a director of the company in whose securities the defendant had traded.

The SEC identified both a business and residence address for the witness in Paris, France, and requested testimony from the witness relating to his knowledge of the defendant's activities, securities trading, and business associations. The SEC initiated the process on June 2, 1983, by motion for issuance of letters of request under the Hague Convention for assistance from the courts of England and France. The SEC's motion was granted, sealed by the district court, and sent to the SEC's attorneys in Paris. The motion was granted by the French Ministry of Justice on August 26, 1983. Upon granting the motion, the Ministry of Justice transmitted the request to a civil investigating judge authorized to gather the requested evidence. On January 18, 1984, the civil investigating judge convened a hearing on the execution of the request. Attorneys for the SEC and the defendant appeared at the hearing, but the witness did not appear. Accordingly, the SEC's French attorney sought imposition of a fine. The judge reserved ruling

410. Reprinted in 34 I.L.M. 511 (1984).

411. *Id.* The British *Santa Fe* application for letters rogatory took nine months to complete.

412. Tribunal admin. de Paris, 6ème section—2ème chambre, No. 51546/6 (Dec. 17, 1985).

on this question, stating that he would again have the witness served for a further hearing.

On March 12, 1984, the witness filed a brief (*recours gracieux*) with the French Ministry of Justice protesting the procedure by which his evidence was being sought, and requesting administrative review of the Ministry of Justice's decision to transmit the request. Thereafter, on September 26, 1984, the Ministry of Justice confirmed its initial decision and ordered that the proceedings go forward.

On January 25, 1985, the witness appeared through counsel at a second proceeding, held before the French civil judge. In the interim, however, the witness had filed a request for review by an administrative court (*recours contentieux*) against the initial decision by the Ministry of Justice to transmit the letters of request, as well as the Ministry's September 26, 1984, confirmation. Since such a request did not stay the action, counsel for the SEC again sought imposition of a fine against the witness for his failure to appear. The civil judge again deferred this decision for consideration until after the administrative court ruled.

On December 17, 1985, the administrative court confirmed the SEC's right to obtain the evidence sought under the Hague Convention, thus overcoming the initial hurdle in the request for evidence. In December 1985 the SEC was engaged in serious settlement negotiations to resolve the *Santa Fe* case, and the Commission determined not to pursue the request. *Santa Fe* was resolved by entry of a consent injunction on February 26, 1986, almost three years after the letter of request was issued, and without any compliance under the Hague Convention by the witness in France.

In *SEC v. Fondation Hai*<sup>413</sup> and *SEC v. Unifund SAL*,<sup>414</sup> related insider trading cases, the SEC used the Hague Convention to seek French telephone records and testimony and documents from several persons residing in France. The witnesses included officers of the French company involved in the merger that was the basis for the insider trading allegations, and other persons residing in France believed to have information relevant to the litigation.

The court record details the difficulties faced by the SEC in obtaining complete responses to these Hague Convention requests.<sup>415</sup> The May 25, 1990, declaration describes the proceedings for executing one of the letters rogatory in France. The witness that testified during that proceeding recommended to one of the defendants the purchase of the stock of Rorer Group, Inc., prior to the public announcement of its proposed merger with the French corporation. The witness's responses were incomplete; when the French magistrate propounded additional questions to him submitted by the SEC, the witness refused to answer. Although

413. 736 F. Supp. 465 (S.D.N.Y. 1990).

414. 910 F.2d 1028 (2d Cir. 1990).

415. See Declaration of Thomas Newkirk, dated May 25, 1990, filed in support of the SEC's motion to postpone the trial date.

the French magistrate subsequently ordered the witness to produce the documents requested by the SEC, the witness refused.

The SEC also sought production of the telephone records of eleven persons it believed had evidence relevant to its case. This request was the first made by the SEC under the Hague Convention for telephone records from France. Although the SEC had been told that such telephone records might be available for certain telephone exchanges in Paris, the French Ministry of Justice informed the SEC's French counsel that its letters rogatory seeking the telephone information would not be transmitted for execution by the French Ministry of Justice.<sup>416</sup>

In *SEC v. Arnold Kimmes*<sup>417</sup> the SEC brought an action against Thomas Quinn, thirteen other individuals, and two corporations in connection with a large-scale securities fraud in the marketing and sale of penny stocks. At the time, Quinn was incarcerated in Paris, France, in connection with an ongoing French criminal investigation.

On July 17, 1990, a letter of request issued by the district court was filed with the French central authority. The letter requested the production of certain documents, including bank records, and testimony. In an order dated November 20, 1990, the French judge refused to execute the letter of request on the grounds that Rule 11 of the French Criminal Code required that matters relating to French criminal investigations remained confidential until the case was brought to trial, that the facts relevant to the civil action before the district court were identical to those covered by the French judge's criminal investigation in France, and that a 1984 French bank secrecy law protected certain information from disclosure in civil actions.

### 3. Italy

Shortly before the trial in *SEC v. Banca Della Svizzera Italiana*<sup>418</sup> (the *St. Joe* case, *supra*) the SEC sought documents and testimony in Italy and Guernsey pursuant to the Hague Convention. The U.S. district court issued letters rogatory to the Ministry of Foreign Affairs of Italy requesting the production of documents from, and the taking of testimony of, an SEC registered broker-dealer located in Milan, Italy, and certain individuals affiliated with that broker-dealer. By decree of the court of appeal of Milan, dated September 10, 1985, the letter rogatory was authorized and directed to be carried out on October 2, 1985. At the beginning of the proceedings in the praetor's court of Milan, lawyers for the witnesses formally objected to the letters rogatory and submitted a legal memorandum in support of their arguments. The witnesses argued that the pending action in the United States was not a civil action but an administrative proceeding;

416. See Aug. 24, 1990, Newkirk Affidavit, and Declaration of Thomas C. Newkirk in Support of Plaintiff's Petition for Rehearing, dated Aug. 24, 1990.

417. 799 F. Supp. 852 (N.D. Ill. 1992).

418. 92 F.R.D. 111 (S.D.N.Y. 1981).

therefore, they contended, the letters rogatory did not comply with the Hague Convention. The praetor concluded that the U.S. proceeding was a civil matter, as required by the Hague Convention, and ordered the implementation of the letters rogatory. The witnesses then responded to questions put by the praetor. The praetor refused to compel the witnesses to produce the requested documents because the Italian law implementing the Hague Convention does not permit such compulsion. However, he "invited" the witnesses to produce the requested documents.

#### 4. *Israel*

In connection with *SEC v. Antar*,<sup>419</sup> as part of its efforts to locate Antar's assets in 1991, the district court granted the SEC's motion for a request to Israeli authorities for banking information under the Hague Convention. An Israeli judge granted the district court's request and ordered the production of documents by and the taking of testimony from Bank Leumi of Israel. The documents and testimony obtained as a result of the Israeli judge's order indicated that some of Antar's money had been transferred to the First National Bank of Israel (FNBI) and Bank Leumi Trust Company (Leumi Trust). The Israeli judge also issued a tracing order requiring the production of documents and the taking of testimony from both FNBI and Leumi Trust. Based on the resulting information, the SEC determined that Antar had transferred what appeared to be large sums of money to a Swiss account under the name David Jacob Levi Cohen. At the request of U.S. officials, in late 1991 Swiss authorities froze an account containing more than \$32 million. Antar retained a Swiss lawyer in a bid to lift the freeze. When that failed, he personally appeared before Swiss authorities as Cohen and claimed that the millions in the account had been legally earned through the sale of gemstones. The SEC staff realized that "Cohen" was Antar's alias when Swiss authorities showed the SEC a photograph of Antar (who was posing as Cohen) from a Brazilian passport used by Antar, but issued in the name of Cohen. That information contributed to the eighteen-count indictment returned on June 11, 1992, by a Newark federal grand jury and unsealed on June 24, 1992.<sup>420</sup> The

419. 831 F. Supp. 380 (D.N.J. 1993).

420. On July 20, 1993, a jury in the criminal case of *United States v. Eddie Antar*, Crim. No. 92-347 (D.N.J. Dec. 9, 1993), found Antar guilty on 17 counts of a federal indictment charging conspiracy to commit securities fraud and mail fraud, securities fraud, mail fraud, and conspiracy to commit racketeering. The jury also found Mitchell Antar (Eddie Antar's brother), a former member of the office of the president and a director of Crazy Eddie, guilty on six counts. Allen Antar, a former employee of Crazy Eddie, was acquitted on all counts. On April 12, 1995, a three-judge panel of the U.S. Court of Appeals for the Third Circuit reversed the *criminal* convictions and sentences of both Eddie and Mitchell Antar and remanded the case for a new trial before a different district judge. *United States v. Mitchell Antar & Eddie Antar*, Nos. 94-5228 & 94-5230, 1995 U.S. App. LEXIS 8083 (3d Cir. Apr. 12, 1995). In its ruling, the court said that the presiding district court judge in the matter had displayed prejudice against both men through a statement he made during a post-verdict sentencing hearing held in April 1994. The court cited the judge's statement that it had been his "object" in the case "to get back to the public that which was taken from it as

discovery of Antar's Swiss bank account through the Hague Convention request to Israel led not only to Antar's arrest in Israel on June 24, 1992, based on an extradition request from the United States, but also to the locating and freezing of over \$60 million in accounts controlled by Antar.<sup>421</sup>

### C. USE OF LETTERS ROGATORY IN THE UNITED STATES

#### 1. *Foreign Utilization of Letters Rogatory Pursuant to 28 U.S.C. § 1782*

U.S. courts have reached different results in interpreting when a foreign request for assistance pursuant to 28 U.S.C. § 1782 may be granted.<sup>422</sup> One of the key issues addressed by the courts considering section 1782 is whether a request can be made by a foreign government during the investigation stage, or whether a judicial proceeding must be pending at the time of the request for assistance. In two recent cases considering this issue, discussed below, the courts held that a judicial proceeding need not be pending. The Second, Eleventh, and District of Columbia Circuit Courts of Appeals all have agreed it is not necessary that a proceeding be pending at the time the evidence is sought. The Second and District of Columbia Circuits have disagreed, however, as to whether the proceeding must be merely contemplated or whether it must be imminent, and whether a request for assistance must be made by a tribunal or merely an interested person.

In *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*<sup>423</sup> the district court denied a motion to quash an order issued pursuant to a letter of request from the Crown Prosecution Service in England, which was conducting an investigation that arose out of a criminal proceeding in England. On appeal, the District of Columbia Circuit affirmed the district court's order, holding that "[p]roceedings in court need not be pending for a foreign prosecutor

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a result of the fraudulent activities of this defendant [Eddie Antar] and others." The appeals panel concluded that this was evidence of impermissible prejudice from the very beginning of the criminal proceedings.

421. Since Antar's arrest, in addition to the \$32 million frozen in accounts controlled by Antar in Switzerland, authorities in Canada, France, Israel, Luxembourg, and the United Kingdom have cooperated and assisted in either freezing or obtaining information about the location of Antar's assets in those countries. For example, in early May 1993 the SEC, with the assistance of the Quebec Securities Commission, succeeded in having over US \$1.1 million of Antar's ill-gotten gains repatriated to the United States for eventual distribution to defrauded investors. See Litigation Release No. 13649 (May 25, 1993).

422. Section 1782 states, in relevant part, as follows:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the documents or other thing be produced, before a person appointed by the court.

28 U.S.C. § 1782(a) (1988).

423. 683 F. Supp. 841 (D.D.C. 1988), *aff'd, in part, remanded*, 870 F.2d 686 (D.C. Cir. 1989).



to obtain assistance as an 'interested person' under section 1782."<sup>424</sup> The court held it sufficient "that the proceeding in the foreign tribunal and its contours be in reasonable contemplation when the request is made."<sup>425</sup> The circuit court noted that courts repeatedly have held that a foreign legal affairs ministry, attorney general, or other prosecutor "fits squarely within the section 1782 'interested person' category."<sup>426</sup> The court observed that by amending an earlier version of section 1782 to delete the word "pending" after "judicial proceeding," the statute intended "that by making assistance generously available through the good offices of U.S. officials and courts, our country would set an example foreign courts and authorities could follow."<sup>427</sup> The court explained that the evidence being sought must be for use in a foreign or international tribunal, and although it is not necessary that a proceeding be pending at the time of the request, it is necessary that the evidence "is eventually to be used in such a proceeding,"<sup>428</sup> and that "judicial proceedings in a tribunal must be within reasonable contemplation."<sup>429</sup> Noting that "parties involved in judicial proceedings are accorded notice and an opportunity to participate in the taking of evidence,"<sup>430</sup> the circuit court remanded to the district court with instructions that the evidence be taken in a form appropriate "for use in a proceeding" in a British court.

In *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*<sup>431</sup> the district court similarly denied a motion to quash a subpoena issued pursuant to section 1782. The Eleventh Circuit agreed with the district court's conclusion that the request by the director of public prosecutions of Trinidad and Tobago in connection with an ongoing criminal investigation was proper, and that section 1782 did not require that a request be made by a foreign tribunal. On this issue, the district court noted that to the extent *Fonseca v. Blumenthal*,<sup>432</sup> discussed below, held otherwise, it disagreed with that holding.<sup>433</sup> The circuit court noted that amendments to section 1782 in 1964 expanded the ability of U.S. courts to grant assistance, reflecting "a congressional desire to increase the power of district courts to respond to requests for international assistance."<sup>434</sup> The court stated further that those amendments were intended "to broaden prior law and permit federal courts to assist bodies of a quasi-judicial or administrative

424. 870 F.2d at 693.

425. *Id.* at 687.

426. *Id.* at 690.

427. *Id.*

428. *Id.* (quoting Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 (1965)).

429. *Id.* at 691.

430. *Id.* at 693.

431. 648 F. Supp. 464 (S.D. Fla. 1986), *aff'd*, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 784 (1989).

432. 620 F.2d 322 (2d Cir. 1980).

433. 648 F. Supp. at 465 n.2.

434. 848 F.2d at 1154.

nature and foreign investigating magistrates.’’<sup>435</sup> The court concluded that it was not necessary that a proceeding be pending at the time the evidence was sought.<sup>436</sup> In *In re Letters Rogatory from the Tokyo District Court, Tokyo, Japan*<sup>437</sup> cited with approval by the Eleventh Circuit in *Trinidad & Tobago*, the Ninth Circuit concluded that the district court should execute letters rogatory issued in aid of an ongoing investigation of Japanese income tax laws by the Tokyo District Public Prosecutor’s Office.

In *Fonseca v. Blumenthal*<sup>438</sup> the Second Circuit held that the requesting authority, the superintendent of exchange control of the Republic of Colombia, was not a tribunal within the meaning of section 1782. Therefore, it reversed the district court’s order granting the motion to execute letters rogatory. The court, relying on *In re Letters Rogatory (India)*,<sup>439</sup> concluded that the superintendent’s interest in the investigation was ‘‘inconsistent with the concept of impartial adjudication intended by the term ‘tribunal.’’’<sup>440</sup> The court did not address the operative language of section 1782, relied on by the court in *Request for Assistance from Ministry of Legal Affairs* and noted by the court in *Request from the Crown Prosecution Service*, that an order may be made ‘‘upon the application of any interested person.’’

*In re International Judicial Assistance for Federative Republic of Brazil v. Morgan Guaranty Trust Co.*<sup>441</sup> concerns Brazilian authorities’ investigation, in response to press reports, of the alleged embezzlement of over \$4 million by Antonio Gebauer from accounts maintained by six Panamanian corporations at the Morgan Guaranty Trust Company of New York. According to the press reports, the accounts were controlled by Brazilian citizens. A Brazilian judge issued a letter rogatory, ultimately forwarded to the U.S. District Court for the Southern District of New York, reciting ‘‘that a police investigation was under way to determine ‘possible offenses of tax evasion related to an alleged defalcation on bank accounts maintained by Brazilian citizens’ at Morgan.’’<sup>442</sup> The district court granted the request and appointed commissioners to execute the letter rogatory. One of the commissioners obtained a grand jury subpoena requiring Morgan to produce documents. The appellants moved to quash the subpoena, contending that, in the absence of a pending court proceeding, the evidence sought ‘‘was not ‘for use in a proceeding in a foreign or international tribunal,’ as [purportedly] required by . . . [section] 1782.’’<sup>443</sup> The district court upheld the subpoena and

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435. *Id.*

436. *Id.* at 1155.

437. 539 F.2d 1216 (9th Cir. 1976).

438. 620 F.2d 322 (2d Cir. 1980).

439. 385 F.2d 1017 (2d Cir. 1967).

440. 620 F.2d at 324.

441. 936 F.2d 702 (2d Cir. 1991).

442. *Id.* at 703.

443. *Id.*

the Second Circuit reversed. In contrast to the standard set forth in *Crown Prosecution*, the appellate court held that, although section 1782 does not require that the proceeding be pending, the foreign "adjudicative proceedings [must] be imminent—very likely to occur and very soon to occur" before section 1782 could be used to collect evidence.<sup>444</sup> The court stated that there was "nothing in the record to show that adjudicative proceedings are very likely and very soon to be brought against any particular perpetrators of [the alleged] . . . illicit acts."<sup>445</sup> The court based its holding on the Brazilian prosecutor's identification of four individuals as targets of the investigation, but referred only to "possible violations" by those persons and "possible prosecution" of them. Further, the prosecutor gave no assessment of the likelihood or timing of formal proceedings against them.

## 2. *Effect of U.S. Law on Efforts to Assist Foreign Governments*

In *Young v. United States Department of Justice*<sup>446</sup> the Second Circuit considered the applicability of the Right to Financial Privacy Act<sup>447</sup> (RFPA) to law enforcement officials designated commissioners for obtaining evidence for a foreign authority. In *Young* the U.S. Attorney's Office obtained banking information relating to the appellants and provided it to the attorney general of Bermuda, who used it to indict the appellants. The Youngs, the appellants, subsequently pleaded guilty to violations of Bermuda law. The Second Circuit affirmed the district court's dismissal of the Youngs' claim that the U.S. attorney violated the RFPA by failing to comply with certain notice provisions of that Act. The court held that the RFPA "does not apply to court-appointed commissioners, who would otherwise qualify as 'government authorities' under the RFPA, when they seek information from financial institutions with court-ordered subpoenas."<sup>448</sup>

## VII. Private Agreements for Cooperation

As markets begin to overlap in terms of time and the securities they trade, a logical step for internationalization is the establishment of formal surveillance sharing agreements (SSAs) between the markets. An SSA is a private agreement between two securities markets that requires the parties to the SSA to provide each other with information about market trading activity, clearing activity, and the identity of the ultimate purchasers of securities. The SSA thus provides a mechanism that extends the ability of U.S. exchanges to monitor and have access to surveillance information on products that are trading on a cross-border basis.

444. *Id.* at 706.

445. *Id.* at 707.

446. 882 F.2d 633 (2d Cir. 1989).

447. 12 U.S.C. §§ 3401-3422 (1988).

448. 882 F.2d at 639.

Given the speed with which markets move today, and the need for immediate access to information in the surveillance of those markets, SSAs provide an important analogue to MOUs. These agreements, originally utilized in connection with SEC approval of linkages between U.S. and foreign securities exchanges, are now a particularly important element in the listing and trading of derivative products.<sup>449</sup> SSAs are in effect today between U.S. exchanges and exchanges in the United Kingdom, France, Canada, The Netherlands, Hong Kong, Sweden, Chile, Brazil, Spain, and Japan.

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449. See *infra* notes 505-18 and accompanying text.