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## "But the Americans Made Me Do It!": How United States v. UBS Makes the Case for Executive Exhaustion

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**“BUT THE AMERICANS MADE ME DO IT!”:  
HOW *UNITED STATES V. UBS* MAKES THE CASE FOR  
EXECUTIVE EXHAUSTION**

INTRODUCTION

In 2008, the U.S. government launched an investigation into UBS AG (“UBS”) following the indictment and conviction of one of UBS’s senior bankers on charges of assisting a wealthy American with tax evasion.<sup>1</sup> The banker admitted to traveling regularly from Switzerland to the United States to help wealthy U.S. residents hide assets abroad and evade payment of taxes on income derived from these assets.<sup>2</sup> Shortly thereafter, UBS admitted to assisting wealthy residents of the United States evade taxes.<sup>3</sup> As part of a deferred prosecution agreement with the U.S. Department of Justice (“DOJ”), UBS agreed to provide the U.S. government with the identities of taxpayers residing in the United States who maintained secret accounts abroad with UBS.<sup>4</sup> The United States filed a summons in federal court seeking information from UBS concerning the identities of these unknown taxpayers.<sup>5</sup> Swiss bank secrecy laws, however, explicitly forbade such disclosure.<sup>6</sup> UBS was caught in a classic conflict-of-laws dilemma. On the one hand, UBS and its employees would face potential criminal sanctions if they violated Swiss bank secrecy laws to comply with a U.S. court order.<sup>7</sup> On the other hand, UBS could decline to comply with a potential U.S. court order and face contempt of court

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<sup>1</sup> See Randall Jackson, *Former UBS Banker Indicted in Tax Evasion Case*, 50 TAX NOTES INT’L 519 (2008).

<sup>2</sup> See J.P. Finet & Robert T. Zung, *Former Banker Pleads Guilty to Conspiring to Assist Billionaire Developer in Tax Evasion*, DAILY TAX REP., June 20, 2008.

<sup>3</sup> See J.P. Finet & Alison Bennett, *UBS to Pay \$780 Million to Settle Claim Bank Conspired to Defraud United States*, DAILY TAX REP., Feb. 19, 2009.

<sup>4</sup> *Id.*

<sup>5</sup> See Petition to Enforce John Doe Summons at 4, *United States v. UBS AG*, No. 09-20423 (S.D. Fla. Feb. 19, 2009), 2009 WL 864716 [hereinafter *Petition to Enforce Summons*].

<sup>6</sup> See Brief of UBS AG in Opposition to the Petition to Enforce the John Doe Summons at 16, *United States v. UBS AG*, No. 09-20423 (S.D. Fla. Apr. 30, 2009), 2009 WL 1612393 [hereinafter *UBS Opposition Brief*].

<sup>7</sup> See Kristen A. Parillo, *UBS, Switzerland Urge U.S. Court to Reject IRS Summons*, 54 TAX NOTES INT’L 458, 458 (2009).

sanctions and violation of the deferred prosecution for noncompliance with the court order.<sup>8</sup>

In situations like the one UBS faced, a number of competing interests arise, such as the United States's interest in enforcement of its laws, a foreign state's interests in maintaining compliance with its laws, the importance of the documents to the requesting party, and the potential consequences faced by the requested party in its home state if it complies with a U.S. court order.<sup>9</sup> U.S. courts thus have a dilemma when the United States, through its executive agencies, wants parties to disclose foreign accounts for tax or other investigatory purposes but bank secrecy laws stand in the way of these investigations.<sup>10</sup> While many courts have used balancing tests to solve this problem, they have found that U.S. law-enforcement interests trump the interests of foreign nations.<sup>11</sup> This places a defendant financial institution in the position of either providing client data in violation of its home state's laws to meet the demands of the United States or disregarding U.S. discovery orders to meet its home state's legal requirements.<sup>12</sup>

Currently the Third Restatement of Foreign Relations Law ("Third Restatement") advocates a five-part balancing test for courts to apply when contemplating ordering discovery on a party that would require violation of

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<sup>8</sup> See Memorandum of the United States in Reply to the Response Filed by the Government of Switzerland at 3, *United States v. UBS AG*, No. 09-20423 (S.D. Fla. July 12, 2009) [hereinafter U.S. Reply Memo to Switzerland]. The Swiss government had a large financial interest in ensuring UBS did not face sanctions for its actions because of a massive recapitalization of UBS by the Swiss government. See Dana Cimilluca, *Swiss Move to Back Troubled UBS*, WALL ST. J., Oct. 17, 2008, at A3. In addition, the Swiss government later noted that a criminal prosecution of UBS for failing to disclose account information could bankrupt UBS and "endanger the Swiss economy." See Elena Logutenkova, *UBS Reports Higher Client Outflows, Return to Profit*, BLOOMBERG (Feb. 9, 2010, 11:50 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aldbCSf0R4.k>.

<sup>9</sup> See Roberto Grasso, Note, *The E.U. Leniency Program and U.S. Civil Discovery Rules: A Fraternal Fight?*, 29 MICH. J. INT'L L. 565, 592 (2008).

<sup>10</sup> See Martin Vaughn, *IRS Boosts Scrutiny of Overseas Money*, WALL ST. J., Mar. 25, 2009, at D3.

<sup>11</sup> See *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 547 (S.D.N.Y. 2002) (compelling disclosure when compliance with order would require violation of foreign law); accord *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings Bank of Nova Scotia) (Bank of Nova Scotia III)*, 740 F.2d 817, 826 (11th Cir. 1984).

<sup>12</sup> The Supreme Court has declined to resolve the issue of whether a federal court petitioned by a government agency can, in fact, order a bank to produce documents located abroad that requires the violation of foreign nondisclosure law. See *In re Grand Jury Proceedings*, 946 F.2d 904 (11th Cir. 1991), cert. denied sub nom., *Union Bank of Switz. v. United States*, 502 U.S. 1092 (1992). For a discussion of the prior history and factual issues of the case, see John Turro, *Supreme Court Will Not Review Subpoena of Foreign Bank Records*, 55 TAX NOTES 1011 (1992).

another nation’s laws.<sup>13</sup> One of the factors for a court to weigh in the balancing formula is “the availability of alternative means of securing the [requested] information.”<sup>14</sup> This Comment uses the recent tax investigation into UBS and its account holders as a case study to argue that the alternative means factor from the Third Restatement should be a mandatory step for Executive Branch agencies to exhaust before they can petition a court to compel disclosure of foreign discovery that would require the defending party to violate foreign law. This mandatory step, which this Comment terms *executive exhaustion*, is derived from the concept of administrative exhaustion, in which courts decline to hear cases until the moving party has exhausted all available administrative remedies.<sup>15</sup> The application of executive exhaustion will prevent courts from having to engage in the Third Restatement’s balancing test. By avoiding the Third Restatement’s balancing test, a court can avoid placing parties in a catch-22—following one state’s laws at the expense of violating those of another state.

In Part I, this Comment provides the background to the UBS tax investigation litigation. Part II examines how early courts treated the issue of government requests that required a party to break foreign law. Part III discusses the various Restatements’ sections that have been published to address this issue, particularly the creation of balancing tests. Part IV analyzes how courts have applied the Restatements over time in deciding whether to compel a defendant to turn over information to satisfy U.S. demands. Part V introduces the concept of executive exhaustion and the alternative mechanisms that government agencies can utilize to resolve conflict situations similar the one faced by UBS. Part VI addresses the possible solutions advocated by executive exhaustion to the *UBS* case to demonstrate executive exhaustion’s

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<sup>13</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987). The seven-part test involves the balancing of the following factors:

[T]he importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

*Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Scott C. Idleman, *The Emergence of Jurisdiction Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 74–75 n.402 (noting several situations when federal courts consider the administrative exhaustion requirement jurisdictional). For a thorough explanation and historical analysis of administrative exhaustion, see 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2 (4th ed. 2002).

utility. Part VII concludes the Comment by recommending an implementation of executive exhaustion and explaining how to better strengthen the doctrine.

### I. BACKGROUND TO THE UBS TAX INVESTIGATION BY U.S. AUTHORITIES

UBS is a large Swiss bank that provides a variety of financial services, including private wealth management, Swiss banking, and investment banking.<sup>16</sup> UBS's private wealth management division offers services and products for high-net-worth individuals, and UBS maintains a strong presence in the United States.<sup>17</sup>

The U.S. investigation of UBS truly gained steam in summer 2008 when one of UBS's top private bankers was indicted and pled guilty to assisting wealthy Americans evade taxes through a cross-border private banking program.<sup>18</sup> The DOJ issued a statement of facts in which the banker admitted that, with the support of an unnamed "Swiss bank,"<sup>19</sup> the banker created Swiss bank accounts for U.S. clients for the purpose of avoiding income tax as required by both U.S. law and the Qualified Intermediary Agreement<sup>20</sup> ("QIA") between the "Swiss bank" and the Internal Revenue Service ("IRS").<sup>21</sup> The QIA required UBS to report to the IRS income for its U.S. clients who held U.S. securities.<sup>22</sup> Shortly after the banker's conviction, the

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<sup>16</sup> See *UBS in a Few Words*, UBS (Dec. 10, 2010, 4:41 PM), <http://www.ubs.com/1/e/about/ourprofile.html>.

<sup>17</sup> See *Our Clients & Businesses*, UBS (Mar. 18, 2011, 4:03 PM), [http://www.ubs.com/1/e/about/our\\_businesses.html](http://www.ubs.com/1/e/about/our_businesses.html). UBS private-wealth-management clients have a minimum net worth of \$25 million. See *Private Wealth Management*, UBS, <http://financialservicesinc.ubs.com/wealth/YourRelationshipWithUBS/PrivateWealthManagement.html> (last visited Mar. 19, 2011). UBS has about 8000 financial advisors who manage over \$650 billion in more than 320 branches in the United States and Canada. See *UBS Appoints Robert J. McCann as Chief Executive Officer, Wealth Management Americas & Member of UBS Group Executive Board*, UBS (Oct. 27, 2009, 7:00 AM), [http://www.ubs.com/1/e/media\\_overview/media\\_americas/releases?newsId=172049](http://www.ubs.com/1/e/media_overview/media_americas/releases?newsId=172049).

<sup>18</sup> See Lynnley Browning, *Former UBS Banker Pleads Guilty to Fraud in U.S. Case*, N.Y. TIMES, June 19, 2008, <http://www.nytimes.com/2008/06/19/business/worldbusiness/19iht-tax.4.13838695.html>.

<sup>19</sup> This "Swiss bank" is presumably UBS as, shortly after the guilty plea, the United States petitioned a federal court to order UBS to turn over client information. Petition to Enforce Summons, *supra* note 5, at 4.

<sup>20</sup> See Deferred Prosecution Agreement, Exhibit B at 5, United States v. UBS AG, No. 09-60033 (S.D. Fla. Feb. 18, 2009), available at [http://www.usdoj.gov/tax/UBS\\_Signed\\_Deferred\\_Prosecution\\_Agreement.pdf](http://www.usdoj.gov/tax/UBS_Signed_Deferred_Prosecution_Agreement.pdf) [hereinafter DPA].

<sup>21</sup> See Statement of Facts at 2-3, United States v. Bradley Birkenfeld, No. 08-60099 (S.D. Fla. June 19, 2008), available at <http://www.justice.gov/usao/fls/PressReleases/Attachments/080619-01.StatementofFacts.pdf> [hereinafter Statement of Facts].

<sup>22</sup> *Id.* The U.S. government first created Qualified Intermediary Agreements in 2001 to encourage foreign banks to report income held by U.S. citizens abroad. See PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 110TH CONGR., TAX HAVEN BANKS AND U.S. TAX

United States filed a motion in federal court asking the court for permission for the Internal Revenue Service to serve a “John Doe” summons on UBS.<sup>23</sup> The IRS sought information regarding UBS clients who may have avoided taxpaying responsibilities under U.S. law through their use of UBS’s cross-border banking program.<sup>24</sup> According to the DOJ, “[t]he IRS uses a John Doe summons to obtain information about possible tax fraud by people whose identities are unknown.”<sup>25</sup> The court granted the IRS’s request and permitted the IRS to issue this summons on UBS.<sup>26</sup>

Immediately following this ruling, a senior UBS executive testified before a U.S. Senate subcommittee and acknowledged UBS’s failures to adhere to U.S. law.<sup>27</sup> The executive told the subcommittee that UBS had decided to exit the cross-border banking industry.<sup>28</sup> Shortly after this testimony, the DOJ indicted the head of UBS’s global wealth management division,<sup>29</sup> who allegedly encouraged UBS bankers to hide their U.S. clients’ assets and identities from the IRS.<sup>30</sup>

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COMPLIANCE 3 (2008), available at [http://hsgac.senate.gov/public/\\_files/071708PSIRReport.pdf](http://hsgac.senate.gov/public/_files/071708PSIRReport.pdf). UBS told its clients that it only had to disclose account information to U.S. tax authorities if it received a W-9 tax form from the client. *Id.* at 10. If the client chose not to provide a W-9 form to UBS, UBS would not reveal the client’s identity. *Id.*

<sup>23</sup> Petition to Enforce Summons, *supra* note 5. Congress authorized the IRS to summon “any person having possession, custody, or care of books of account containing entries relating to the business of [a] person liable for tax . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.” 26 U.S.C.A. § 7602(a)(2) (West 2011). To enforce a summons, federal district courts are authorized to “to compel such attendance, testimony, or production of books, papers, records, or other data.” 26 U.S.C.A. §7604(a) (West 2011). Upon application by the IRS, district courts can hold in contempt of court a party who “neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required.” 26 U.S.C.A. §7604(b) (West 2011). Additionally, a Section 7602 summons is usually issued to a party in the United States who has control over the requested documents located in a foreign jurisdiction. See Martin M. Van Brauman, *Foreign Evidence Gathering and Discovery for U.S. Civil Tax Determination Purposes*, 30 INT’L LAW. 589, 595 (1996).

<sup>24</sup> See Press Release 08-579, Dep’t of Justice, Justice Department Asks Court to Serve IRS Summons for UBS Swiss Bank Account Records (June 30, 2008), <http://www.justice.gov/opa/pr/2008/June/08-tax-579.html>.

<sup>25</sup> *Id.*

<sup>26</sup> In the Matter of the Tax Liabilities of: John Does, No. 08-21864 (S.D. Fla. July 1, 2008) (granting permission the IRS to serve UBS and its subsidiaries with a John Doe summons), available at [http://www.justice.gov/tax/UBS\\_Order.pdf](http://www.justice.gov/tax/UBS_Order.pdf). In issuing this order, the court made no mention of a potential conflict-of-laws issue. See *id.*

<sup>27</sup> See Sam Cage, *Offshore US Banking Exit Seen Minor Hit for UBS*, REUTERS, July 18, 2008, available at <http://www.reuters.com/article/idUKL1888634320080718>.

<sup>28</sup> *Id.*

<sup>29</sup> See Carolyn Kolker, *Indicted UBS Official Raoul Weil Declared a Fugitive (Update2)*, BLOOMBERG (Jan. 13, 2009, 8:21 PM), [http://www.bloomberg.com/apps/news?pid=20601087&sid=az9oCSuVN\\_y4&refer=home](http://www.bloomberg.com/apps/news?pid=20601087&sid=az9oCSuVN_y4&refer=home).

<sup>30</sup> See John Pacenti, *DOJ Accuses UBS Exec of Helping Conceal Billions From IRS*, DAILY BUS. REV., Nov. 23, 2008, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202425981179>.

To avoid a possible indictment of the company and additional senior executives, UBS entered into a deferred prosecution agreement (“DPA”) with the DOJ and the IRS.<sup>31</sup> By signing the DPA and avoiding trial in the United States, UBS avoided the possible consequence of being barred from doing business in the United States.<sup>32</sup> As part of the DPA, UBS agreed to pay a fine of \$780 million to various agencies of the United States and exit the cross-border banking program.<sup>33</sup> UBS acknowledged that from 2000 until 2007, it “participated in a scheme to defraud the United States . . . by actively assisting . . . United States individual taxpayers in establishing accounts at UBS” in a manner that concealed the taxpayers’ ownership of these accounts, permitting them to “evade reporting requirements.”<sup>34</sup> UBS also admitted to submitting to the IRS forms it knew to be false or misleading to assist with the account holders’ evasion of U.S. taxes.<sup>35</sup> Additionally, UBS agreed to disclose certain client data pursuant to an order issued by the Swiss Financial Market Supervisory Authority, a Swiss government agency.<sup>36</sup>

The United States recognized UBS’s substantial cooperation with its investigation “while complying with established Swiss legal restrictions governing information exchange.”<sup>37</sup> The United States further noted that UBS was subject to Swiss laws and that Swiss legal authorities could exercise their authority in the matter.<sup>38</sup> Being subject to Swiss laws could affect UBS’s ability to fully cooperate as part of its obligations under the DPA.<sup>39</sup> Still, the DPA required UBS to furnish cross-border account information as requested by the United States.<sup>40</sup> Even though the DPA stated UBS would turn over information when requested by the United States, the United States said it would seek judicial enforcement of the previously issued John Doe

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<sup>31</sup> DPA, *supra* note 20, at 1; *see also* Press Release 09-136, Dep’t of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), <http://www.usdoj.gov/opa/pr/2009/February/09-tax-136.html>.

<sup>32</sup> *See* Joseph M. Erwin, *The UBS Affaire: A Qualified Intermediary and “John Doe” Summons, Steuerbetrug, and Bankgeheimnis*, 38 TAX MGMT. INT’L J. 487, 488 (2009). However, the United States reserved the right to prosecute UBS if UBS later violated the DPA. DPA, *supra* note 20, at 11.

<sup>33</sup> DPA, *supra* note 20, at 3–4.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 6. A Swiss court later deemed this transfer of data “unlawful.” *See* Katharina Bart, *Swiss Court Hits Regulator Over UBS: Tribunal Rules Action Forcing Bank to Give Client Data to U.S. Was “Unlawful,”* WALL ST. J., Jan. 9, 2010, at B3.

<sup>37</sup> DPA, *supra* note 20, at 7.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 7–8.

summons.<sup>41</sup> UBS and the United States also recognized that the agreement would not prevent UBS from arguing that Swiss bank secrecy law barred compliance with the John Doe summons.<sup>42</sup>

After signing the DPA, UBS publicly stated it would challenge any enforcement of the John Doe summons.<sup>43</sup> UBS claimed that “Swiss financial privacy and other laws” prevented the disclosure of this information.<sup>44</sup> UBS believed that the “principles of international comity . . . [would] require [a federal court] to take into account foreign laws” and not enforce the John Doe summons.<sup>45</sup> The United States, on the other hand, gave no credence to UBS’s arguments and petitioned a federal court to enforce the John Doe summons.<sup>46</sup> The DOJ requested that the court order UBS to disclose the identities of up to 52,000 account holders believed to have secret Swiss accounts with UBS.<sup>47</sup>

UBS informed the court that it could not furnish this information on three grounds: (1) Swiss bank secrecy law prohibited the disclosure of the requested information; (2) the 1996 Convention for the Avoidance of Double Taxation between the United States and the Swiss Confederation (“1996 Treaty”) provided alternative mechanisms for obtaining the requested information without judicial intervention; and (3) a QIA between UBS and the IRS did not provide for such disclosure.<sup>48</sup> UBS argued that the current request was not a specified instance of client disclosure under its QIA.<sup>49</sup> UBS claimed that by failing to include this type of situation in the QIA, the IRS could not now compel UBS to turn over this information as part of the contractual terms of the Agreement.<sup>50</sup> UBS continued to protest the potential enforcement of the

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<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.* at 8–9.

<sup>43</sup> *See UBS Intends to Challenge Enforcement of IRS “John Doe” Summons*, UBS (Feb. 19, 2009, 8:00 PM), [http://www.ubs.com/1/e/media\\_overview/media\\_global/search1/search10?newsId=162372](http://www.ubs.com/1/e/media_overview/media_global/search1/search10?newsId=162372).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Petition to Enforce Summons*, *supra* note 5, at 1.

<sup>47</sup> *See* Press Release 09-139, Dep’t of Justice, United States Asks Court to Enforce Summons for UBS Swiss Bank Account Records (Feb. 19, 2008), <http://www.justice.gov/opa/pr/2009/February/09-tax-139.html>; *see also* William P. Barrett & Jack Novack, *52,000 Had Secret UBS Accounts*, FORBES.COM (Feb. 19, 2009, 3:35 PM), [http://www.forbes.com/2009/02/19/ubs-fraud-offshore-personal\\_finance-taxes\\_ubs.html](http://www.forbes.com/2009/02/19/ubs-fraud-offshore-personal_finance-taxes_ubs.html).

<sup>48</sup> *See* Background Information for the Court’s Consideration Prior to the Scheduled Status Conference at 3–4, *United States v. UBS AG*, No. 09-20423 (S.D. Fla. Feb. 20, 2009), *available at* [www.securityprivacyandthelaw.com/uploads/file/UBS%20Position.pdf](http://www.securityprivacyandthelaw.com/uploads/file/UBS%20Position.pdf) [hereinafter *UBS Background Information Filing*].

<sup>49</sup> *Id.*

<sup>50</sup> *UBS Opposition Brief*, *supra* note 6, at 7–12.

John Doe summons and stressed that, in the interest of international comity, the court should decline to enforce the summons.<sup>51</sup>

The Swiss government also weighed in on the John Doe summons enforcement matter by filing an amicus brief asking the court to decline to enforce the petition.<sup>52</sup> The Swiss government stated that: (1) Swiss law criminalizes the release of financial account information and anyone who intentionally violates Swiss bank secrecy law “shall be sentenced to imprisonment of up to three years or a fine”; and (2) Swiss law prohibits assisting foreign authorities with discovery actions on Swiss territory without Swiss authorization.<sup>53</sup> The Swiss government said that the existing 1996 Treaty between the United States and Switzerland served as the legal mechanism for resolving the IRS John Doe summons.<sup>54</sup> The Swiss government claimed that the John Doe summons amounted to a “fishing expedition.”<sup>55</sup> Unlike previous requests for information that the Swiss government permitted UBS to release, the requests in the John Doe summons were too broad because they did not specifically name the accounts required.<sup>56</sup> The Swiss government stated that because the John Doe summons was so broad, UBS could not comply with the summons in a manner consistent with existing Swiss laws.<sup>57</sup> The Swiss government also brought to the court’s attention that it had delivered a diplomatic note to the U.S. Department of State (“State Department”) stating that enforcement of summons would interfere with negotiations to amend the 1996 Treaty.<sup>58</sup> The Swiss government urged the court to decline enforcement of the summons on the grounds of international comity.<sup>59</sup>

The 1996 Treaty between the United States and the Swiss Confederation provided for the exchange of information between the United States and

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<sup>51</sup> See *id.* at 21.

<sup>52</sup> See Amicus Brief of Government of Switzerland at 21, *United States v. UBS AG*, No. 09-20423 (S.D. Fla. Apr. 30, 2009), 2009 WL 1612394 [hereinafter Amicus Brief of Switzerland].

<sup>53</sup> *Id.* at 2–3.

<sup>54</sup> *Id.* at 11–13.

<sup>55</sup> *Id.* at 15–16, 19.

<sup>56</sup> *Id.* at 17–18. A request for the exchange of information usually requires a “clear identification of the person(s)” about whom information is being sought. See ANNEX: CRITERIA FOR GRANTING ASSISTANCE PURSUANT TO THE TREATY REQUEST, available at [http://www.financialtaskforce.org/wp-content/uploads/2009/11/Swiss\\_US\\_UBS\\_Annex-Final.pdf](http://www.financialtaskforce.org/wp-content/uploads/2009/11/Swiss_US_UBS_Annex-Final.pdf) (last visited Mar. 19, 2010).

<sup>57</sup> *Id.* at 18.

<sup>58</sup> Amicus Brief of Switzerland, *supra* note 52, at 20.

<sup>59</sup> *Id.* at 19.

Switzerland in cases of tax fraud.<sup>60</sup> An accompanying Memorandum of Understanding (“1996 MOU”) to the 1996 Treaty stated that, with respect to the Article 26 Exchange of Information clause, the United States could seek cooperation through other legal means to obtain assistance in certain cases of tax fraud, “such as the Swiss Federal Law on the International Mutual Assistance in Criminal Matters.”<sup>61</sup> Information obtained through this method could be disclosed in public court proceedings or judicial decisions.<sup>62</sup> The 1996 MOU also stated that “in cases of tax fraud Swiss banking secrecy does not hinder the gathering of documentary evidence from banks or its being forwarded under the Convention to the competent [U.S. authorities].”<sup>63</sup> Article 26 mandated that the United States and Switzerland “exchange information” to carry out the provisions of the 1996 Treaty “for the prevention of tax fraud or the like in relation to the taxes which are the subject of the present Convention.”<sup>64</sup> However, Article 26 contained a limitation on the exchange of information:

In no case shall the provisions of this Article be construed so as to impose upon either of the Contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either Contracting State or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application.<sup>65</sup>

Here, the Swiss government said that the United States was asking a federal court to order UBS to turn over information in direct disregard for the existing 1996 Treaty.<sup>66</sup>

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<sup>60</sup> Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Signed at Washington, October 2, 1996, Together with a Protocol to the Convention U.S.-Switz., at 4, Oct. 2, 1996, S. TREATY DOC. NO. 105-8 (entered into force Dec. 19, 1997), available at <http://www.irs.gov/pub/irs-trty/swiss.pdf> [hereinafter 1996 Treaty]. For a complete legislative history of the 1996 Treaty, see CHRISTIAN L. WIKTOR, TREATIES SUBMITTED TO THE UNITED STATES SENATE: LEGISLATIVE HISTORY, 1989–2004, at 208 (2006).

<sup>61</sup> 1996 Treaty, *supra* note 60, at 16.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 16. The “competent authority” in the United States for the administration of tax treaties is the Director of the International Large and Mid-size Business Division of the IRS. See John A. Townsend, *Tax Treaty Interpretation*, 55 TAX LAW. 219, 228 (2001).

<sup>64</sup> 1996 Treaty, *supra* note 60, at 39.

<sup>65</sup> *Id.* at 39.

<sup>66</sup> Amicus Brief of Switzerland, *supra* note 52, at 11.

The Swiss government realized that there was a likelihood that the court would order UBS to turn over client information and, through its Federal Department of Justice and Police, stated it would prevent UBS from complying with any potential order.<sup>67</sup> The Swiss government announced that it would go as far as “issuing an order taking effective control of the data at UBS” to prevent compliance with any possible U.S. district court order compelling disclosure.<sup>68</sup> Switzerland filed a brief with the court challenging an IRS claim that UBS would not face criminal prosecution in Switzerland if it complied with a potential court order.<sup>69</sup> The Swiss government called the IRS’s assertion simply “incorrect” and noted that Swiss courts had most recently issued a conviction for the violation of Swiss bank secrecy laws in November 2007.<sup>70</sup>

Concerned about what would occur if the petition was granted to enforce the summons and the Swiss government prevented UBS from complying, the court ordered the IRS and the DOJ to consult with other divisions of the Executive Branch, including the State Department and the White House.<sup>71</sup> The court wanted to know how the IRS and DOJ would respond to an “act of state” by Switzerland—its seizure of the client data currently in UBS’s possession.<sup>72</sup> The IRS and DOJ responded that the court should enforce the summons and leave it to UBS to decide whether it would comply.<sup>73</sup> Furthermore, the IRS and DOJ argued that because Switzerland had yet to issue a blocking order preventing UBS’s compliance, there was no act of state to preclude

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<sup>67</sup> See Response of Amicus Curiae Government of Switzerland to Petitioner’s June 30 Submission, United States v. UBS AG, No. 09-20423 (S.D. Fla. July 7, 2009) [hereinafter Government of Switzerland’s Response to the United States]; see also Daniel Pruzin & J.P. Finet, *Swiss Government Warns It Will Stop UBS from Handing Over Client Data to U.S.*, INT’L TAX MONITOR, July 9, 2009.

<sup>68</sup> Government of Switzerland’s Response to the United States, *supra* note 67, at 3; see also Lisa Jucca, *Swiss to Stop UBS Handing Over Data in U.S. Tax Row*, REUTERS, July 8, 2009, available at <http://www.reuters.com/article/idUSTRE5672DM20090708>.

<sup>69</sup> Government of Switzerland’s Response to the United States, *supra* note 67, at 4; see also Pruzin & Finet, *supra* note 67.

<sup>70</sup> Government of Switzerland’s Response to the United States, *supra* note 67, at 1; see also Pruzin & Finet, *supra* note 67.

<sup>71</sup> See Supplemental Order Concerning Response by Government of Switzerland, United States v. UBS AG, No 09-20423 (S.D. Fla. July 8, 2009) (ordering the U.S. Attorney’s Office for the Southern District of Florida to consult with the Executive Branch, the State Department, and other relevant government agencies to respond to Switzerland’s arguments that it would seize the data in UBS’s possession) [hereinafter Order to Consult with Executive Branch]; see also Pruzin & Finet, *supra* note 67.

<sup>72</sup> Order to Consult with Executive Branch, *supra* note 71. Federal courts are precluded from sitting in judgment of a foreign power’s actions within its sovereign territory. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 442 n.2 (1963). But see *Lyondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A.*, 2003 WL 21878798, at \*8–9 (S.D.N.Y. Aug. 8, 2003) (declining to apply the act-of-state doctrine where the parties’ contract made actions commercial, as opposed to governmental).

<sup>73</sup> U.S. Reply Memo to Switzerland, *supra* note 8, at 3.

enforcement of the summons.<sup>74</sup> If UBS were unable to comply, the DOJ and IRS were ready to ask the court to take the necessary steps to vindicate its authority, including asking the court to hold UBS in contempt and order monetary sanctions.<sup>75</sup> Evidently, the DOJ and the IRS were prepared to pursue the matter until UBS turned over the sought-after client data—regardless of whether UBS would violate foreign law in doing so.<sup>76</sup>

In light of the distinct possibility that UBS could face conflicting obligations if the court compelled disclosure, the Swiss government, the United States, and UBS came to an out-of-court agreement to resolve the issue of the John Doe summons—comprised of two documents, the Settlement Agreement and the Treaty Request Agreement.<sup>77</sup> In the Treaty Request Agreement, the United States and the Swiss Confederation established that the United States would submit a treaty request pursuant to the existing 1996 Treaty covering roughly 4450 accounts held by UBS.<sup>78</sup> The United States would send the request to the Swiss Federal Tax Administration (“SFTA”), and the SFTA would forward the request to UBS.<sup>79</sup> UBS would then provide the requested account information to the SFTA to review, and the SFTA would then transmit the relevant information to the requesting authority from the United States.<sup>80</sup> If “the actual and anticipated results differ[ed] significantly from what [could have been] reasonably be expected” within 370 days of signing the Treaty Request Agreement, then the United States could take appropriate rebalancing measures, including withdrawal from the Treaty Request Agreement or reopening of the John Doe proceedings against UBS.<sup>81</sup>

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<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.*

<sup>77</sup> Settlement Agreement between the United States, the Internal Revenue Service, and UBS AG, United States of America v. UBS AG, No. 09-20423 (Aug. 19, 2009), *available at* <http://www.usdoj.gov/opa/documents/bank-agreement-consent.pdf> [hereinafter Settlement Agreement]; Agreement Between the United States of America and the Swiss Confederation on the Request for Information From the Internal Revenue Service of the United States of America Regarding UBS AG, a Corporation Established Under the Laws of the Swiss Confederation, U.S.-Switz., Aug. 19, 2009, *available at* <http://www.usdoj.gov/opa/documents/us-swiss-agreement.pdf> [hereinafter Treaty Request Agreement].

<sup>78</sup> Treaty Request Agreement, *supra* note 77, at 2–3. For a description of the agreed upon criteria for selecting the 4450 of the possible 52,000 accounts, see ANNEX, *supra* note 56.

<sup>79</sup> Treaty Request Agreement, *supra* note 77, at 2–3.

<sup>80</sup> Data processing pursuant to the Treaty Request Agreement is subject to “final decisions” by the SFTA. *Id.*

<sup>81</sup> *Id.* at 4; *see also* Daniel Pruzin, *U.S. Official Rules Out Renegotiations of Accord with Switzerland on UBS Data*, INT’L TAX MONITOR, Feb. 9, 2010.

The Settlement Agreement between the United States and UBS required UBS to respond to requests from the SFTA in a timely manner to assist with the information exchange mechanism created by the United States and Swiss government.<sup>82</sup> Provided that UBS met its obligations in a timely manner, the IRS agreed it would stop enforcement of the John Doe summons against UBS and dismiss with prejudice those accounts in the John Doe summons not covered by the Treaty Request Agreement.<sup>83</sup> The Settlement Agreement favored UBS, because the United States would end up with the client information for at most 4450 UBS accounts—and not the 52,000 accounts initially sought by the United States in the John Doe summons.<sup>84</sup>

The agreed-upon exchange of information hit a sudden and unexpected roadblock in January 2010 when Switzerland's Federal Administrative Court ruled that the Swiss government could not turn over UBS client data to the United States.<sup>85</sup> An unnamed UBS client challenged the SFTA's decision to turn over information to the United States pursuant to the Treaty Request Agreement.<sup>86</sup> The court ruled that a U.S. citizen's failure to file a specific W-9 tax form with the IRS did not constitute "tax fraud" in Switzerland, but merely "tax evasion."<sup>87</sup> The court held the Swiss government could not disclose the UBS client data because the Treaty Request Agreement was made pursuant to the 1996 Treaty, which mandates the transfer of information in cases of "tax fraud"—but not tax evasion.<sup>88</sup> The court also found that the Treaty Request Agreement constituted an "understanding" and not a formal amendment to the 1996 Treaty.<sup>89</sup>

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<sup>82</sup> Settlement Agreement, *supra* note 77, at 1–2.

<sup>83</sup> *See id.* at 1, 3, 5.

<sup>84</sup> *Id.* at 2; *see also* Press Release 09-139, Dep't of Justice, United States Asks Court to Enforce Summons for UBS Swiss Bank Account Records (Feb. 19, 2009), <http://www.justice.gov/tax/txdv09139.htm>. Notably, the Swiss government likely had an ulterior motive during these negotiations because the day after signing this agreement with the United States settling the UBS tax dispute, the Swiss government sold its stake in UBS to reap a \$1.13 billion profit from its recapitalization of the Swiss bank. *See* Katharina Bart, *Switzerland's Profit on UBS: \$1.13 Billion: Zurich Secures 30% Annualized Return on Sale of Its Stake in the Bailed-Out Bank*, WALL ST. J., Aug. 21, 2009, at C2.

<sup>85</sup> *See* Alison Bennett & Daniel Pruzin, *Key Switzerland Court Ruling Excludes Some UBS Data from Handover to IRS*, INT'L TAX MONITOR, Jan. 25, 2010.

<sup>86</sup> *See* Daniel Pruzin, *Latest Court Ruling on UBS Case Poses Dilemma for Swiss Government*, INT'L TAX MONITOR, Jan. 26, 2010.

<sup>87</sup> Bennett & Pruzin, *supra* note 85.

<sup>88</sup> *Id.*

<sup>89</sup> *See* Daniel Pruzin, *Switzerland Says It Can Hand Over Data on Only 250 Secret Accounts with UBS*, INT'L TAX MONITOR, Jan. 28, 2010.

Following the court ruling, the Swiss government said it would pursue urgent diplomatic talks with the United States to salvage the Treaty Request Agreement and convert the Agreement into a treaty.<sup>90</sup> However, the United States said that it would not renegotiate the Treaty Request Agreement with the Swiss, finding the agreement to be ““perfect.””<sup>91</sup> In response to the court’s ruling and U.S. unwillingness to renegotiate the Treaty Request Agreement, the Swiss Federal Council said it would submit the Treaty Request Agreement to the Swiss Parliament for approval as Swiss law.<sup>92</sup> The Swiss Parliament approved the Treaty Request Agreement in June 2010.<sup>93</sup> A Swiss administrative court upheld the approved Treaty Request Agreement as both ““binding”” and having the status of an official state treaty.<sup>94</sup>

## II. EARLY CASES IN U.S. COURTS INVOLVING COURT ORDERS REQUIRING A PARTY TO VIOLATE FOREIGN NONDISCLOSURE LAWS

Before looking at how a court would decide whether to compel disclosure in the UBS case, it is necessary to analyze how courts, particularly the Supreme Court, have previously treated similar situations. More important to this Comment is the analysis of how this particular type of conflicts law regarding disclosure has evolved from courts frequently denying disclosure to the current law in which courts do not hesitate to compel disclosure.

The Supreme Court first looked at the issue of compelled discovery orders that would require a party to violate foreign non-disclosure laws in *Soci t  Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*.<sup>95</sup> In *Soci t  Internationale*, a plaintiff Swiss holding company had its

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<sup>90</sup> *Id.*

<sup>91</sup> Pruzin, *U.S. Official Rules Out Renegotiations of Accord with Switzerland on UBS Data*, *supra* note 81. Regardless of renegotiation, if the DOJ received the client information of at least 10,000 American UBS accounts held in Switzerland, the United States agreed to completely drop its John Doe summons. *Id.*

<sup>92</sup> Daniel Pruzin, *Swiss Government to Seek Parliamentary Approval for UBS Accord*, *Skirt Court Ruling*, INT’L TAX MONITOR, Feb. 25, 2010. The Treaty Request Agreement will be proposed to the Swiss Parliament to circumvent the Swiss court decision prohibiting the transfer pursuant to the existing Treaty Request Agreement. *See* Deborah Ball, *Switzerland Tries to Save Tax Accord by U.S., UBS*, WALL ST. J., Feb. 25, 2010, at C1.

<sup>93</sup> Klaus Willie, *Swiss Parliament Approves UBS Tax Treaty, Ending Standoff*, BLOOMBERG (June 17, 2010, 11:59 AM), <http://www.bloomberg.com/news/2010-06-17/swiss-parliament-approves-ubs-tax-agreement-with-u-s-bypassing-referendum.html>.

<sup>94</sup> Elena Logutenkova, *Treaty on UBS Accounts Is ‘Binding,’ Court Says, Rejects Appeal*, BLOOMBERG BUSINESSWEEK (Jul. 19, 2010, 11:52 AM), <http://www.businessweek.com/news/2010-07-19/treaty-on-ubs-accounts-is-binding-court-says-rejects-appeal.html>.

<sup>95</sup> 357 U.S. 197 (1958).

complaint dismissed with prejudice by a federal district court when the holding company claimed it could not comply with an order to produce pretrial documents due to Swiss bank secrecy laws.<sup>96</sup> The U.S. Court of Appeals for the D.C. Circuit affirmed the district court's decision.<sup>97</sup> The Supreme Court granted certiorari and reversed,<sup>98</sup> holding that the company's complaint should not be dismissed due to noncompliance with the district court's production order.<sup>99</sup> The Court accorded deference to the fact that the plaintiff's noncompliance with the district court's order was "due to *inability*, and not to willfulness, bad faith, or any fault of [the plaintiff]."<sup>100</sup> The Court noted that the "fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."<sup>101</sup> The Court informed lower courts that a party who has information located abroad should not be punished for noncompliance with discovery orders when foreign laws prohibit such disclosure.<sup>102</sup> The Court noted that circumstances similar to the one before the Court could excuse compliance with production orders.<sup>103</sup> However, the Court did not specifically instruct lower courts how to determine when a party attempted to comply in good faith with a request, or discuss the appropriate standard for determining sanctions.<sup>104</sup> This absence of guidance has led lower courts to use numerous methods when addressing government requests that would require production of documents in violation of foreign law.<sup>105</sup>

Shortly after the Court ruled in *Société Internationale*, the Court of Appeals for the Second Circuit decided on a similar case involving court orders that would require a party to disclose information in violation of foreign law.<sup>106</sup> In *First National City Bank of New York v. Internal Revenue Service* ("First National City"), the IRS sought bank records from the Panamanian branch of a U.S. bank to help with a tax investigation of a Panamanian corporation.<sup>107</sup> The

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<sup>96</sup> *Id.* at 203.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 197.

<sup>99</sup> *Id.* at 212.

<sup>100</sup> *Id.* (emphasis added).

<sup>101</sup> *Id.* at 211.

<sup>102</sup> *Id.* at 212; see also Patrick M. Connorton, Note, *Tracking Terrorist Financing Through Swift: When U.S. Subpoenas and Foreign Privacy Law Collide*, 76 FORDHAM L. REV. 283, 286 (2007).

<sup>103</sup> *Société Internationale*, 357 U.S. at 212; see also Connorton, *supra* note 102, at 286.

<sup>104</sup> Keith Y. Cohan, Note, *The Need for a Refined Balancing Approach When American Discovery Orders Demand the Violation of Foreign Law*, 87 TEX. L. REV. 1009, 1013 (2009).

<sup>105</sup> *Id.*

<sup>106</sup> *First Nat'l City Bank of N.Y. v. Internal Revenue Serv.*, 271 F.2d 616 (2d Cir. 1959).

<sup>107</sup> *Id.* at 618.

district court modified the IRS’s summons to cover only those bank records physically located in the United States and held that the files located in Panama were beyond the reach of the summons.<sup>108</sup> The Second Circuit reversed and reinstated the original summons for the files, stating that if production of the records from Panama would violate Panama’s laws and constitution, then the bank should not be compelled to produce these records.<sup>109</sup>

In the subsequent case of *Ings v. Ferguson*, the Second Circuit relied on *First National City* in a civil case to deny a plaintiff’s request for a subpoena for banking records held by a Canadian bank when disclosure of this information would violate Canadian provincial law prohibiting banks from sending documents outside of Quebec to comply with foreign subpoenas.<sup>110</sup> The court noted that other measures existed for seeking evidence located in foreign countries, such as letters rogatory.<sup>111</sup> The court stated that the “fundamental principles of international comity” dictated that courts should not take action that could “cause a violation of the laws of a friendly neighbor.”<sup>112</sup> The court created a per se ban against any orders to disclose records that would require the violation of foreign law.<sup>113</sup>

In *Application of Chase Manhattan Bank* (“*Chase Bank*”), the U.S. government sought banking information from a bank through a grand jury subpoena duces tecum and the bank responded it could turn over information located in the United States, but it could not turn over information located in one of the bank’s branches in Panama.<sup>114</sup> The Second Circuit adhered to its previous line of decisions and affirmed the district court’s ruling permitting domestic discovery while denying discovery of bank records located at the defendant bank’s Panamanian branch.<sup>115</sup> The court found *First National City* and *Ings* controlling, and remarked that courts “have an obligation to respect the laws of other sovereign states even though they may differ in economic and

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 619–20.

<sup>110</sup> See *Ings v. Ferguson*, 282 F.2d 149, 151 (2d Cir. 1960).

<sup>111</sup> *Id.* at 152. A letter rogatory is a request “[t]o the appropriate authority” in the country where the requested information is located that explains that: (1) the requested information is necessary to adjudicate the matter in the United States; and (2) the information is sought for a “proper purpose.” See Roger J. Magnuson & Kent J. Schmidt, *American-Style Discovery in International Locations*, in INTERNATIONAL JUDICIAL ASSISTANCE IN CIVIL MATTERS 204 (Suzanne Rodriguez & Bertrand Prell eds., 1999).

<sup>112</sup> *Ings*, 282 F.2d at 152.

<sup>113</sup> See Connorton, *supra* note 102, at 298.

<sup>114</sup> *Application of Chase Manhattan Bank*, 297 F.2d 611, 612 (2d Cir. 1962).

<sup>115</sup> *Id.* at 613.

legal philosophy from our own.”<sup>116</sup> While the concept of international comity remains important for courts to consider, subsequent cases have given less deference to international comity as an absolute bar to ordering the production of documents located abroad in violation of another nation’s laws.<sup>117</sup>

### III. THE APPLICATION OF THE RESTATEMENTS BY U.S. COURTS IN DISCOVERY-CONFLICTS LITIGATION

Before the Supreme Court ruled in *Société Internationale*, the First Restatement of Conflict of Laws (“First Restatement”) Section 94 explained that U.S. courts should decline to exercise jurisdiction in cases where the exercise of jurisdiction would require a party to perform an act that would violate the laws of a foreign state.<sup>118</sup> The Supreme Court’s opinion in *Société Internationale* and the Second Circuit’s opinions in *First National City* and *Ings* appear to be in accord with this principal, even though they do not mention Section 94 of the First Restatement.<sup>119</sup>

Three years after the last Second Circuit case denied discovery of foreign bank records in *Chase Bank*, the American Law Institute published the Second Restatement of Foreign Relations Law of the United States (“Second Restatement”), which contained a balancing test.<sup>120</sup> Scholars note that the balancing test in the Second Restatement is intended to clarify the various

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<sup>116</sup> *Id.*

<sup>117</sup> See Karen A. Feagle, *Extraterritorial Discovery: A Social Contract Perspective*, 7 DUKE J. COMP. & INT’L L. 297, 302–03 (1996). The U.S. Supreme Court defined international comity as:

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or other persons who are under the protection of its laws.

*Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Even though comity is not an “absolute obligation,” courts “exercise extra vigilance to demonstrate due respect for any sovereign interest expressed by a foreign state.” Grasso, *supra* note 9, at 599 (citing *In re Rubber Chems. Antitrust Litig.*, 486 F. Supp. 2d 1078, 1081 (N.D. Cal. 2007)).

<sup>118</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 94 (1934).

<sup>119</sup> *Société Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 197 (1958); *accord* *First Nat’l City Bank of N.Y. v. Internal Revenue Serv.*, 271 F.2d 616, 618 (2d Cir. 1959); *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960); *Application of Chase Manhattan Bank*, 297 F.2d at 613.

<sup>120</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 39 (1965); *see also* Connorton, *supra* note 102, at 298.

approaches used by U.S. courts in discovery conflicts situations.<sup>121</sup> The Second Restatement’s Section 39, which covers discovery-conflicts situations, took a position radically different from Section 94 of the First Restatement.<sup>122</sup> Section 39 states that courts are not precluded from exercising jurisdiction even if such an exercise will subject a party to liability in another jurisdiction.<sup>123</sup> Section 39 also recognizes that in some situations, while enforcement of jurisdiction is possible, the “principles of avoiding hardship and of comity may call for abstention from the exercise of jurisdiction.”<sup>124</sup> Section 39 indicates that a court should look at the five factors described in Section 40 in deciding whether to exercise jurisdiction, which are:

- (a) the vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.<sup>125</sup>

In 1987, the Supreme Court ruled on a commercial international discovery dispute in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa* (“*Aérospatiale*”), a case regarding a plane crash in Iowa.<sup>126</sup> The plaintiffs sued the French manufacturers of the plane, alleging that the defendants had manufactured a defective plane, and sought discovery from the defendants in federal district court in Iowa.<sup>127</sup> In response to foreign discovery requests that did not comply with the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”), the manufacturers responded that they could not comply with the discovery requests because French criminal law prohibited disclosure of information located in France.<sup>128</sup> After balancing the interests of

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<sup>121</sup> See C. Todd Jones, *Compulsion Over Comity: The United States’ Assault on Foreign Bank Secrecy*, 12 NW. J. INT’L L. & BUS. 454, 485 (1992).

<sup>122</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 39 (1965).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* § 39 cmt. b (1965).

<sup>125</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

<sup>126</sup> *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987).

<sup>127</sup> *Id.* at 524–25.

<sup>128</sup> *Id.* at 525–26.

the United States in protecting its citizens from harmful products and the French interest in protecting its citizens from intrusive discovery requests, the court denied the petitioner's motion for a protective order.<sup>129</sup> The defendants then sought a writ of mandamus from the Court of Appeals for the Eight Circuit, which it denied.<sup>130</sup> The Supreme Court granted certiorari, vacated the Eight Circuit's decision, and remanded the case to the district court.<sup>131</sup> After a lengthy analysis of the Hague Convention, the Court concluded that the Hague Convention did not deprive the district court of jurisdiction to compel disclosure of evidence physically located in a signatory nation.<sup>132</sup> In doing so, the Court recognized that litigation in U.S. courts was much broader than in foreign jurisdictions, and that U.S. courts should not refuse to utilize the Hague Convention.<sup>133</sup> However, the Court declined to mandate use of the Hague Convention over the Federal Rules of Civil Procedure.<sup>134</sup>

After *Aérospatiale*, the Third Restatement's Section 442 modified the Second Restatement's Section 40 balancing-test criteria.<sup>135</sup> The Third Restatement informs courts that it is permissible to order various sanctions such as contempt for failure to comply with production orders, but asks courts to consider the following factors before ordering the production of information located abroad:

the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.<sup>136</sup>

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<sup>129</sup> *Id.* at 526–27.

<sup>130</sup> *In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120, 125–26 (8th Cir. 1986).

<sup>131</sup> *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 547.

<sup>132</sup> *Id.* at 539–40.

<sup>133</sup> *Id.* at 542.

<sup>134</sup> *Id.* at 542–44. The Court noted with importance that “American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.” *Id.* at 546.

<sup>135</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(b)–(c) (1987); see also *U.S. Department of State Circular: Obtaining Evidence Abroad*, in 1 INT'L BUS. LIT. & ARB. 1095, 1097 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-739, 2006).

<sup>136</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(b)–(c) (1987).

The Third Restatement offers a specific list of criteria for a court to look at when balancing the national-interests factor.<sup>137</sup> Among the things a court should consider are: any expressions of interest by the foreign state regarding disclosure; communications from the foreign state regarding confidentiality with respect to the information sought; and the significance of the regulations regarding disclosure in the foreign state.<sup>138</sup>

#### IV. THE APPLICATION OF THE RESTATEMENTS BY U.S. COURTS IN DISCOVERY-CONFLICTS LITIGATION

Following the publication of the Second and Third Restatements, courts were quick to adopt the balancing tests when U.S. agencies requested documents and information located abroad.<sup>139</sup> In applying these balancing tests, courts routinely compelled discovery and held private actors in contempt or sanctioned them for noncompliance when these actors claimed that compliance was impossible due to foreign law prohibiting disclosure.<sup>140</sup> Analysis of the opinions ordering disclosure is necessary to understand the situation in which UBS could have found itself if the district court had granted disclosure.

In *United States v. First National City Bank*, the Second Circuit distanced itself from its previous line of cases that barred production orders when compliance would require violations of foreign law.<sup>141</sup> The court applied the Second Restatement’s Section 40 balancing test in an antitrust action where the United States subpoenaed a defendant bank’s German offices for documents concerning the bank’s clients.<sup>142</sup> The court noted that although defendant bank faced possible civil contract liability under German law if it divulged its clients’ account information, it did not face criminal liability like the defendant in *Soci t  Internationale*.<sup>143</sup> The court found that there was no German

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<sup>137</sup> *Id.* at § 442 cmt. c (1987); *see also* Connorton, *supra* note 102, at 298.

<sup>138</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 cmt. c (1987); *see also* Connorton, *supra* note 102, at 298.

<sup>139</sup> Connorton, *supra* note 102, at 300.

<sup>140</sup> *See* *United States v. First Nat’l City Bank*, 396 F.2d 897 (2d. Cir. 1968); *accord* *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings Bank of Nova Scotia) (Bank of Nova Scotia III)*, 740 F.2d 817 (11th Cir. 1984); *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings) (Bank of Nova Scotia I)*, 691 F.2d 1384 (11th Cir. 1982); *United States v. Vetco Inc.*, 691 F.2d 1281 (9th Cir. 1981); *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544 (S.D.N.Y. 2002).

<sup>141</sup> *See* *First Nat’l City Bank*, 396 F.2d 897; *see also* Jones, *supra* note 121, at 490.

<sup>142</sup> *First Nat’l City Bank*, 396 F.2d at 901; *see also* Jones, *supra* note 121, at 490.

<sup>143</sup> *First Nat’l City Bank*, 396 F.2d at 901.

criminal statute in place prohibiting the disclosure and no other scheme in place that would punish the defendant bank for the violation of German bank secrecy laws.<sup>144</sup> The court held that, because of the lack of severe penalties, the defendant bank failed to prove that noncompliance with the United States's subpoena was justified.<sup>145</sup> In applying the Second Restatement's Section 40, the court found that the German government's failure to weigh in on the issue by not filing a brief with the court or sending a message to the State Department was indicative of the lack of the severity of the penalties.<sup>146</sup> This lack of diplomatic intervention, coupled with the importance to the U.S. government of enforcement of criminal antitrust laws, favored enforcement of the subpoena, and the court affirmed the district court's decision to hold the defendant in civil contempt.<sup>147</sup>

In *Securities and Exchange Commission v. Banca Della Svizzera Italiana*,<sup>148</sup> the Securities and Exchange Commission ("SEC") petitioned the district court to compel the defendant Swiss bank to respond to discovery requests and answer interrogatories in an insider-trading and accounting-fraud suit.<sup>149</sup> In response to these requests, the Swiss bank suggested alternative means by which the SEC could obtain the information sought.<sup>150</sup> After finding these alternatives futile and wasteful of time, the court announced in an informal opinion that it would issue an order compelling disclosure, to be followed by "severe contempt sanctions" if the bank failed to comply.<sup>151</sup> The bank then secured a waiver of Swiss confidentiality and furnished some, but not all, of the requested information.<sup>152</sup> The court then applied the Second Restatement's Section 40 balancing test after the bank's repeated failure to fully comply with SEC's requests.<sup>153</sup> In examining the various factors, the court made special note of the fact that "[t]he Swiss government . . . though made expressly aware of this litigation, has expressed no opposition," and that the State Department did not oppose the SEC's efforts to obtain information

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<sup>144</sup> *Id.* at 902.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 903-05.

<sup>147</sup> *Id.*

<sup>148</sup> *Securities and Exchange Commission v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

<sup>149</sup> *Id.* at 112.

<sup>150</sup> *Id.* at 113.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 114.

through discovery.<sup>154</sup> The court condemned the Swiss bank’s attempted use of “foreign law to shield it from the reach of [U.S.] laws,” and ordered the bank to answer the SEC’s interrogatories.<sup>155</sup>

Other courts have followed the Second Circuit’s rationale and the Second Restatement’s balancing test when looking at bank secrecy laws. For example, the Court of Appeals for the Eleventh Circuit in *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia* (“*Bank of Nova Scotia I*”)<sup>156</sup> denied the defendant Bank of Nova Scotia’s claim that the production of client records pursuant to a grand jury subpoena would violate Bahamian bank secrecy laws.<sup>157</sup> The district court found the bank in contempt of court for failing to comply with its order to turn over the foreign banking records to the government.<sup>158</sup> The Eleventh Circuit, following its previous adoption of the Second Restatement’s Section 40, affirmed the lower court’s sanction and order.<sup>159</sup> The court found that the U.S. interests in the grand jury proceeding regarding possible tax and narcotics violations outweighed any Bahamian interests at stake.<sup>160</sup> The court affirmed the finding that the “[b]ank had not made a good faith effort to comply” and stated that it refused to “emasculate the grand jury process whenever a foreign nation attempts to block [the U.S.] criminal justice process.”<sup>161</sup> Interestingly, the court noted that, in cases where judicial decisions have international repercussions, federal courts are open to Legislative and Executive Branch opinions and guidance.<sup>162</sup> The court expected the Bahamian government would communicate any complaints to the Legislative and Executive Branches of the United States, which would then pass these messages on to the judiciary.<sup>163</sup>

Just one year after the Eleventh Circuit’s decision in *Bank of Nova Scotia I*, the Bank of Nova Scotia was caught in another bank secrecy conflict situation

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<sup>154</sup> *Banca Della Svizzera Italiana*, 92 F.R.D. at 117.

<sup>155</sup> *Id.* at 119.

<sup>156</sup> *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings) (Bank of Nova Scotia I)*, 691 F.2d 1384 (11th Cir. 1982).

<sup>157</sup> *Id.* at 1391.

<sup>158</sup> *Id.* at 1385.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1389.

<sup>161</sup> *Id.*

<sup>162</sup> *Bank of Nova Scotia I*, 691 F.2d at 1388; *see also In re Sealed Case*, 825 F.2d 494, 499 (D.C. Cir. 1987) (per curiam) (welcoming Legislative or Executive Branch guidance); W. Clifton Holmes, Comment, *Strengthening Available Evidence-Gathering Tools in the Fight Against Transnational Money Laundering*, 24 *NW. J. INT’L L. & BUS.* 199, 215 (2003).

<sup>163</sup> *Bank of Nova Scotia I*, 691 F.2d at 1388.

with the United States in *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia* (“*Bank of Nova Scotia II*”).<sup>164</sup> On the Bank of Nova Scotia’s initial appeal challenging an order of contempt for failing to turn over banking records located in the Bahamas pursuant to a court order, the Eleventh Circuit seemed more amenable to balancing the interests in favor of the bank.<sup>165</sup> The court felt inclined to balance these interests in the bank’s favor because the Cayman Islands, Canada, and the United Kingdom—none of which had filed briefs with the district court—all submitted amicus briefs to the court.<sup>166</sup> The appellate court remanded the case to the district court with the hope that all interested parties would fully assist the district court by filing the appropriate petitions with the district court.<sup>167</sup>

On the appeal after remand, an Eleventh Circuit panel applied the Second Restatement’s Section 40 to uphold sanctions of civil contempt and fines against the defendant bank for failing to produce the information requested by U.S. authorities.<sup>168</sup> While the court noted that several of the amici-states had filed petitions with the district court regarding their views about the diplomatic ramifications of the case, the appellate court received no evidentiary support of these claims.<sup>169</sup> The court noted the importance of federal criminal law and stated, “Enforcement of the subpoena is consistent with the grand jury’s goals of investigating criminal matters.”<sup>170</sup> The court also noted that it could not “simply . . . acquiesce . . . [to] the proposition that [U.S.] criminal investigations must be thwarted whenever there is [a] conflict with the interest of other states.”<sup>171</sup>

In *United States v. Vetco*,<sup>172</sup> the Ninth Circuit affirmed a district court’s order enforcing an IRS summons for information requiring a U.S. corporation’s Swiss subsidiary to break Swiss business—not bank-secrecy—laws.<sup>173</sup> The IRS claimed that the U.S. corporation had failed to include its

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<sup>164</sup> *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings) (Bank of Nova Scotia II)*, 722 F.2d 657 (11th Cir. 1983) (per curiam).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 658–59.

<sup>167</sup> *Id.* at 659.

<sup>168</sup> *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings Bank of Nova Scotia) (Bank of Nova Scotia III)*, 740 F.2d 817, 826 (11th Cir. 1984).

<sup>169</sup> *Id.* at 824.

<sup>170</sup> *Id.* at 829.

<sup>171</sup> *Id.* at 828.

<sup>172</sup> *United States v. Vetco*, 691 F.2d 1281 (9th Cir. 1981).

<sup>173</sup> *Id.* at 1283.

corporate subsidiary’s income as part of its tax return.<sup>174</sup> The IRS issued a summons to determine whether Vetco was avoiding its tax reporting responsibilities and Vetco refused to comply with the summons.<sup>175</sup> In weighing the competing national interests, the court concluded that “the United States has a powerful interest in obtaining the summoned documents, and that Switzerland has a small interest in insisting that they not be produced.”<sup>176</sup> The court also noted that the Swiss interest in protecting the secrecy of business records was diminished when the defendant corporation was a subsidiary of a U.S. corporation doing business in Switzerland.<sup>177</sup> Finally, the court stated it was unaware of any case where an IRS summons had resulted in criminal prosecution in Switzerland, which justified the production order because the alleged harm facing the company was not an actual concern.<sup>178</sup>

Consistent with previous opinions and orders, courts in recent times have frequently granted motions to compel foreign discovery from U.S. corporations when the defendant corporation was accused of violating U.S. law and the corporation claimed that disclosure of the requested information would violate foreign law.<sup>179</sup> One court concluded that “[c]ourts consistently hold that the [U.S.] interest in law enforcement outweighs the interests of the foreign states in bank secrecy and the hardships imposed on the entity subject to compliance.”<sup>180</sup>

However, courts do not always find that U.S. interests are the ultimate deciding factor, and have declined to enforce discovery requests on behalf of the U.S. government when enforcement would require the private actor to break the laws of another country. The Court of Appeals for the D.C. Circuit, in *In re Sealed Case*, reviewed a district court’s order of sanctions and compulsion of discovery when a bank and a bank manager refused to respond to a subpoena duces tecum in a grand jury investigation regarding possible money laundering violations.<sup>181</sup> “Country X” owned the bank and the banking records sought were located in “Country Y.”<sup>182</sup> The bank secrecy laws in Country Y made it a criminal violation to disclose the requested

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*; see also Jones, *supra* note 121, at 472.

<sup>176</sup> *Vetco*, 691 F.2d at 1290–91.

<sup>177</sup> *Id.* at 1289.

<sup>178</sup> *Id.*; see also Jones, *supra* note 121, at 472.

<sup>179</sup> *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 547 (S.D.N.Y. 2002).

<sup>180</sup> *Id.* at 554.

<sup>181</sup> *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987) (per curiam).

<sup>182</sup> *Id.* at 495. The terms “Country X” and “Country Y” are verbatim terms from the opinion. *Id.*

information.<sup>183</sup> Representatives from Country X, through a *note verbale*,<sup>184</sup> made a request to the State Department that the U.S. government not compel disclosure from the bank.<sup>185</sup> The court reversed the lower court's issuance of sanctions against the bank and stated that it was uncomfortable with the idea that "a [U.S.] court of law should order a violation of law, particularly on the territory of the sovereign whose law is [at issue]."<sup>186</sup> Notably, the court indicated that future statutory guidance from Congress on this difficult and uncertain area of law would be a "welcome improvement."<sup>187</sup>

In *United States v. First National Bank of Chicago*,<sup>188</sup> the Court of Appeals for the Seventh Circuit applied the Second Restatement's balancing-test analysis and reversed a district court's grant enforcing an IRS summons when a Greek bank would face criminal liability for disclosure of client information located in Greece.<sup>189</sup> After balancing the factors, the court found that Greece's interest in bank secrecy outweighed the U.S. interest to collect, rather than determine, tax liability.<sup>190</sup> The court distinguished this case from the Eleventh Circuit's decision in *Bank of Nova Scotia I*, noting that there: (1) the appellate court had the benefit of a lower court finding of bad faith on the defendant bank's behalf; (2) balancing of the U.S. interest in criminal enforcement of narcotics and tax laws outweighed the Bahamian interest; and (3) the information subpoenaed could be handled by a bank branch in the United States.<sup>191</sup> Finding none of those elements present before the court in *First National Bank of Chicago*, the court refused to enforce the summons against the bank.<sup>192</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> A *note verbale* is "[a]n unsigned diplomatic note, usu[ally] written in the third person, that sometimes accompanies a diplomatic message or note of protest to further explain the country's position or to request certain action." BLACK'S LAW DICTIONARY 1163 (9th ed. 2009). Diplomatic notes involving discovery disputes are generally reserved for matters of importance, such as vital foreign industries or corporations. See GARY BORN & PETER RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 913 (4th ed. 2007).

<sup>185</sup> *In re Sealed Case*, 825 F.2d at 496.

<sup>186</sup> *Id.* at 498. However, the court affirmed the order compelling the bank manager to testify on the grounds that the "remote and speculative possibilities" of punishment for violating Country X's laws were not enough to invoke Fifth Amendment protection—and were also "voluntarily assumed." *Id.* at 497.

<sup>187</sup> *Id.* at 499; see also Holmes, *supra* note 162, at 209–10.

<sup>188</sup> *United States v. First Nat'l Bank of Chi.*, 699 F.2d 341 (7th Cir. 1983).

<sup>189</sup> *Id.* at 342.

<sup>190</sup> *Id.* at 344.

<sup>191</sup> *Id.* at 346–47.

<sup>192</sup> *Id.* at 347.

V. COURTS SHOULD REQUIRE EXECUTIVE EXHAUSTION BEFORE AN EXECUTIVE BRANCH AGENCY CAN PETITION TO ENFORCE A REQUEST FOR DOCUMENTS IN VIOLATION OF FOREIGN LAW

Given that foreign laws prohibiting disclosure are merely one factor for a court to consider when applying the Second and Third Restatements, a requesting U.S. agency can exercise considerable sway in a court's balancing inquiry by asserting that the information sought is vital to U.S. interests and unavailable through alternative means.<sup>193</sup> The balancing tests found in the Second and Third Restatements permit courts to exercise jurisdiction and place defendants in the position of breaking one nation's laws to comply with the demands of U.S. courts. The fact that courts regularly exercise jurisdiction after concluding that U.S. law enforcement interests outweigh foreign bank secrecy laws places the compelled party in an untenable position.<sup>194</sup> A court should decline to exercise jurisdiction until it is satisfied that the agency seeking discovery abroad has exhausted all alternative means for obtaining the information.<sup>195</sup> This would give deference to the “fundamental principles of international comity” by mandating that the requesting government agency have no other avenue other than judicial involvement to obtain the information.<sup>196</sup> All alternative means should be examined and utilized because of the likelihood the court will compel disclosure when petitioned by the U.S. government.<sup>197</sup> As one court recently noted in deciding to disregard foreign law prohibiting disclosure: “Courts consistently hold that the [U.S.] interest in law enforcement outweighs the interests of the foreign states in bank secrecy and the hardships imposed on the entity subject to compliance.”<sup>198</sup>

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<sup>193</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(b)–(c) (1987); see also Van Brauman, *supra* note 23, at 594.

<sup>194</sup> See *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968) (compelling disclosure when compliance with the order would require the violation of foreign bank-secrecy law); accord *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544 (S.D.N.Y. 2002); *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings Bank of Nova Scotia) (Bank of Nova Scotia III)*, 740 F.2d 817, 826 (11th Cir. 1984); *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia (Bank of Nova Scotia D)*, 691 F.2d 1384 (11th Cir. 1982); *United States v. Vetco*, 691 F.2d 1281 (9th Cir. 1981).

<sup>195</sup> The Supreme Court, in a commercial civil suit, declined to mandate the Hague Convention as an exclusive mechanism. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 (1987). This Comment, however, focuses specifically on government requests in criminal and enforcement proceedings, not civil litigation between private parties.

<sup>196</sup> See *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960).

<sup>197</sup> See *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d at 555.

<sup>198</sup> *Id.* at 554; see also Frank C. Razzano, *Conflicts Between American & Foreign Law: Does the “Balance of the Interests” Test Always Equal America's Interests?*, 37 INT'L LAW. 61, 66–67 (2003).

Some courts have been extremely critical of the Second Restatement's balancing test, one even going as far as to say that federal courts have "little expertise" in evaluating the interests of a foreign country and calling the Restatement's balancing test "inherently unworkable."<sup>199</sup> Judge Easterbrook of the Seventh Circuit was particularly critical of the Third Restatement's balancing test:

I would be most reluctant to accept an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste. Although it is easy to identify many relevant considerations, as the ALI's Restatement does, a court's job is to reach judgments on the basis of rules of law rather than to use a different recipe for each meal.<sup>200</sup>

Remarks like Judge Easterbrook's indicate that application of the Restatement's balancing test should be the last option for courts.

As an alternative, this Comment offers the theory of executive exhaustion. Subpart V.A begins this discussion by analogizing executive exhaustion to administrative exhaustion and the rationale behind its utility as a judicially created jurisdictional limit. Subpart V.B explains the mechanics of executive exhaustion in practice. Subparts V.B.1 and V.B.2 comprehensively analyze the various routes an agency can use to obtain information abroad when foreign law would prohibit such disclosure.

#### A. *From Administrative Exhaustion to Executive Exhaustion*

The Third Restatement's Section 442(1)(c) enumerates a list of criteria for courts to balance when deciding whether to order the production of information located abroad.<sup>201</sup> One of the listed criteria a court should consider is the availability of an alternative means of securing the information.<sup>202</sup> Exhaustion of this alternative means by the Executive Branch is analogous to the concept of administrative exhaustion currently used in federal courts. The Supreme Court discussed the issue of administrative exhaustion in *Myers v. Bethlehem Shipbuilding Corp.*,<sup>203</sup> a case that concerned a district court's grant

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<sup>199</sup> See *Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979); see also Connorton, *supra* note 102, at 286.

<sup>200</sup> *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring) (emphasis omitted).

<sup>201</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987).

<sup>202</sup> *Id.*

<sup>203</sup> *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

of a preliminary injunction prohibiting the defendant National Labor Relations Board (“NLRB”) from holding hearings on a plaintiff corporation’s alleged unfair labor practices.<sup>204</sup> In holding that the district court lacked the appropriate subject matter jurisdiction to hear the case, the Supreme Court reversed, stating, “[There is a] long-settled rule of judicial administration that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.”<sup>205</sup> The Court held that the plaintiff corporation should have first challenged the appropriateness of the NLRB hearings through the appropriate administrative means and should have exhausted all of its available remedies before seeking judicial relief in federal court.<sup>206</sup> This basic approach of administrative exhaustion has been reaffirmed in subsequent cases.<sup>207</sup>

The doctrine of administrative exhaustion is founded on the principles of deference to agency functions, agency expertise, and judicial efficiency.<sup>208</sup> Exhaustion is often required in cases seeking review of administrative decisions to:

prevent[] premature [court] interference with agency processes, so that the agency may function efficiently and so that [the agency] may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.<sup>209</sup>

Requiring the parties to exhaust all administrative remedies ensures that the reviewing court will not address an unripe issue, nor an issue that is better resolved through an agency with the proper level of expertise. Administrative exhaustion serves a gatekeeper function by only allowing those disputes that have reached a certain point of impasse to progress to federal court for judicial review.<sup>210</sup> Additionally, agencies have a considerable amount of experience

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<sup>204</sup> See *id.* at 43–46.

<sup>205</sup> *Id.* at 50–51; see also PIERCE, JR., *supra* note 15, § 15.2. In some areas of law, Congress has decided that exhaustion of administrative remedies is a statutory prerequisite before initiating certain Section 1983 civil rights actions in federal district court. See Prison Reform Litigation Act, 42 U.S.C.A. § 1997e(a), (c)(2) (West 2011).

<sup>206</sup> *Myers*, 303 U.S. at 50–52; see also PIERCE, JR., *supra* note 15, § 15.2.

<sup>207</sup> PIERCE, JR., *supra* note 15, § 15.2 (citing *McKart v. United States*, 395 U.S. 185 (1969); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980)).

<sup>208</sup> See Charles D. Schmerler, *International Litigation Management*, in *INTERNATIONAL CORPORATE PRACTICE: A PRACTITIONER’S GUIDE TO GLOBAL SUCCESS* 10-1, 10-28, § 10:7.2 (Carole Basri ed., 2008).

<sup>209</sup> See *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

<sup>210</sup> See *Schanzer v. Rutgers Univ.*, 934 F. Supp. 669, 673 (D.N.J. 1996) (citing *Ostapowicz v. Johnson*, 541 F.2d 394, 398 (3d Cir. 1976)) (explaining the gatekeeping purpose of administrative exhaustion).

and expertise to resolve certain issues.<sup>211</sup> Before permitting a party to file in federal court, the court is better off deferring to the agency to ensure that agency has utilized its “experience and expertise” to arrive at a final conclusion.<sup>212</sup>

Executive exhaustion builds off of administrative exhaustion to ensure that a court is hearing only issues that are properly before it, thus preventing the court from exercising jurisdiction in matters where alternative means exist to resolve the issue.<sup>213</sup> Another rationale behind executive exhaustion is a separation-of-powers issue—if the court’s decision will affect foreign policy, perhaps the court is better off abstaining from hearing the issue until the Executive Branch has no other alternative.<sup>214</sup> The Supreme Court’s statement that the President is the “sole organ of the [United States] in the field of international relations” reinforces the idea that a court should require exhaustion before hearing cases where U.S. foreign relations could be impacted.<sup>215</sup>

Executive exhaustion would require the requesting party—in this case, a member of the Executive Branch—to exhaust all its available means of obtaining the information sought. The party would have to undertake a good-faith effort to exhaust alternative means before filing a motion to compel disclosure in situations where the disclosing party faces a possible conflict-of-laws situation, such as to disclose and face sanctions in the country where the information is located, or to refuse to disclose and risk contempt of court sanctions and possible prosecution in the United States. The alternative measures available to the requesting government party include treaty mechanisms, interagency assistance, and diplomatic cooperation via the State Department. The rationale behind executive exhaustion lies in the concept of comity.<sup>216</sup> The comity element of executive exhaustion will initially prevent agencies from filing requests compelling disclosure with the courts and then

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<sup>211</sup> See *McKart*, 395 U.S. at 194 (noting that the agency should have first opportunity to apply its expertise before federal court review); *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004).

<sup>212</sup> See *Wilbur*, 355 F.3d at 677.

<sup>213</sup> PIERCE, JR., *supra* note 15, § 15.2.

<sup>214</sup> Foreign policy is primarily for the Executive Branch—and to some extent the Legislative Branch—to decide. U.S. CONST. arts. I, § 8, cl. 3, II, § 2; see also Seth Korman, *The New Deference-Based Approach to Adjudicating Political Questions in Corporate ATS Cases: Potential Pitfalls and Workable Fixes*, 9 RICH. J. GLOBAL L. & BUS. 85, 88 (2010).

<sup>215</sup> J. Richard Broughton, *Judicializing Federative Power*, 11 TEX. REV. L. & POL. 283, 295 (2007) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

<sup>216</sup> See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (defining comity).

using the pending motion as leverage to get a defending party to settle or disclose.<sup>217</sup> If a party from whom disclosure were sought were to invoke a claim that foreign law prohibited the requested materials, then the executive exhaustion requirement would apply to the government.<sup>218</sup> Once the party invoked the claim, the executive exhaustion criteria would have to be satisfied before a court could decide whether to compel disclosure.

### *B. The Mechanics of Executive Exhaustion*

When a government agency goes to court seeking extraterritorial discovery that requires a party to breach foreign nondisclosure laws, the court, under the doctrine of executive exhaustion, should stay the judicial proceeding and require the moving agency to exhaust all alternative means of acquiring the information. This stay would occur before the court exercised its judicial authority to compel disclosure, assuming there existed appropriate grounds to compel disclosure.<sup>219</sup> Courts should require that the agency make a good-faith effort to seek alternative measures such as utilizing existing treaties.<sup>220</sup> If this step is unsuccessful, then the enforcing agency should seek assistance from the diplomatic corps of the United States. Only if this final step fails should the court permit the U.S. agency to seek an order compelling discovery from the party whose compliance would result in a violation of foreign law. Currently, the U.S. government has many tools it can utilize, such as the formal document request, memorandums of understanding, and exchange-of-information treaties to obtain information located abroad.<sup>221</sup> Only if the alternative measures required by executive exhaustion fail should a court move to the balancing test advocated by the Restatement.

The Subparts that follow detail the exhaustion process. Subpart V.B.1 discusses the Hague Convention and the letters-rogatory process as an alternative method of procuring evidence from abroad. Subpart V.B.2

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<sup>217</sup> UBS signed a deferred prosecution agreement in which it admitted to conspiring to defraud the United States and the IRS in violation of 18 U.S.C. § 1731. DPA, *supra* note 20, Exhibit B, at 5. Joseph M. Erwin provides an interesting discussion regarding UBS’s culpability with respect to the QIA violations. Erwin, *supra* note 32, at 488–91 & n.18.

<sup>218</sup> “The party relying on foreign law has the burden of showing that such law bars production.” *See* United States v. Vetco, 691 F.2d 1281, 1289 (9th Cir. 1981).

<sup>219</sup> The Third Restatement’s Section 442 permits a federal court, when authorized, to order disclosure of information located outside the United States. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(a) (1987). How a court should balance the factors is beyond the scope of this Comment.

<sup>220</sup> *See infra* Parts V.B.1–2.e.

<sup>221</sup> Van Brauman, *supra* note 23, at 589.

identifies various interagency efforts that can be used by an agency seeking information abroad when foreign statutes prevent such disclosure. The Executive Branch's interagency avenues include the Department of Justice's Office of International Affairs (discussed in Subpart V.B.2.a); the Department of Drug Enforcement Administration (discussed in Subpart V.B.2.b); and the Securities and Exchange Commission (discussed in Subpart V.B.2.c). Subpart V.B.2.d highlights the ability to use informal agreements to obtain foreign discovery. Subpart V.B.2.e discusses the alternative method, if these other mechanisms prove unsuccessful, of resorting to diplomacy via the State Department as a final means of resolving the agency's quest for information located abroad.

*1. Exhaustion Step 1: The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*

Mechanisms such as treaties, agreements, protocols, and conventions covering the exchange of information serve as alternative means of securing information located abroad. The most prominent of these agreements is the Hague Convention.<sup>222</sup> The Hague Convention describes the processes for extraterritorial evidence-gathering in civil and commercial matters.<sup>223</sup> In some instances, the Hague Convention may be the only means for a requesting agency to obtain from another country information protected by nondisclosure laws.<sup>224</sup> The United States, Switzerland, and many other nations are parties to this agreement,<sup>225</sup> which provides for the taking of evidence, including documents, located abroad.<sup>226</sup> The Hague Convention creates a mechanism to accommodate the differences between nations while assisting with the taking of foreign discovery.<sup>227</sup> The party seeking discovery must file a motion with the court in which the matter is pending, asking the court for assistance with the request.<sup>228</sup> The court then sends a letter rogatory to a foreign tribunal

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<sup>222</sup> Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Hague Convention]; *see also* Schmerler, *supra* note 208, at 10-28, § 10:7.2; Connorton, *supra* note 102, at 298.

<sup>223</sup> *See generally* Hague Convention, *supra* note 222.

<sup>224</sup> Van Brauman, *supra* note 23, at 594.

<sup>225</sup> *Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, TRAVEL.STATE.GOV, [http://travel.state.gov/law/judicial/judicial\\_689.html](http://travel.state.gov/law/judicial/judicial_689.html) (last visited Mar. 20, 2011).

<sup>226</sup> Schmerler, *supra* note 208, at 10-28, § 10:7.2.

<sup>227</sup> DETLEV F. VAGTS, WILLIAM S. DODGE & HAROLD HONGJU KOH, *TRANSNATIONAL BUSINESS PROBLEMS* 36 (4th ed. 2008).

<sup>228</sup> Schmerler, *supra* note 208, at 10-28, § 10:7.2.

requesting documents from that jurisdiction.<sup>229</sup> The foreign tribunal is bound to comply with the request unless the request falls under three exceptions, one of which is when “the sovereignty or the security of the foreign state is at issue.”<sup>230</sup>

Some issues arise with the Hague Convention that may make it an undesirable avenue for the party seeking information located abroad. First, the letters-rogatory process requires that the matter must be already pending before a judicial body.<sup>231</sup> This may force the requesting agency to bring a formal action against the party possessing the documents located abroad before the agency is ready to initiate such an action, which could work against the investigatory strategy of the agency. Second, the request must be carefully drafted and precise enough for a foreign judge to be convinced to respond.<sup>232</sup> Third, the receiving court does not need to comply with the request or justify the rationale behind its decision.<sup>233</sup> Information that is provided, if at all, is often provided out of comity.<sup>234</sup> Fourth, obtaining information through the Hague Convention may be time-consuming and unpredictable, which can serve as an obstacle to the requesting agency’s investigation, especially if there is a statute-of-limitations concern.<sup>235</sup> Letters rogatory may often take more than one year to be executed by the foreign nation.<sup>236</sup> At least one court has recognized that judicial assistance is not an equivalent means for obtaining evidence because of its time, cost, and “uncertain likelihood of success.”<sup>237</sup>

Further complicating requests under the Hague Convention is the fact that civil law nations treat civil tax enforcement as falling under special administrative tribunals, thus making the Hague Convention inapplicable when courts request tax-specific information from civil law countries at the behest of

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See Ian L. Schaeffer, Note, *An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws*, 75 *FORDHAM L. REV.* 1829, 1835 (2006).

<sup>232</sup> See BORN & RUTLEDGE, *supra* note 184, at 913.

<sup>233</sup> Schaeffer, *supra* note 231, at 1835.

<sup>234</sup> See Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 *WM. & MARY BILL RTS. J.* 209, 224 (2002).

<sup>235</sup> Schmerler, *supra* note 208, at 10-28, § 10:7.2. UBS agreed to toll any criminal statute of limitations in its deferred prosecution agreement with the United States. DPA, *supra* note 20, at 11. UBS also agreed to waive any statute-of-limitations defense. *Id.*

<sup>236</sup> *Preparation of Letters Rogatory*, TRAVEL.STATE.GOV, [http://travel.state.gov/law/judicial/judicial\\_683.html](http://travel.state.gov/law/judicial/judicial_683.html) (last visited Mar. 20, 2011).

<sup>237</sup> See *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia (Bank of Nova Scotia I)*, 691 F.2d 1384, 1390 (11th Cir. 1982).

government enforcement agencies.<sup>238</sup> Hague Convention requests that violate the receiving state's sovereignty, coupled with many states' beliefs that tax matters do not fall under the reach of the treaty, have the effect of rendering the Hague Convention practically useless to countries such as the United States that seek information to enforce their domestic tax laws regardless of where such information is located.<sup>239</sup> However, lawyers in general have been satisfied with the Hague Convention's effectiveness in obtaining discovery from abroad.<sup>240</sup> In an American Bar Association survey of lawyers who utilized the Hague Convention for obtaining evidence from abroad, 74% of the respondents had positive results using the Hague Convention and would use it again.<sup>241</sup> More notably, 64% of respondents received evidence or a letter of determination within four months, and 81% within six months.<sup>242</sup> While the Hague Convention may have its drawbacks,<sup>243</sup> it is not as ineffective as it may seem.<sup>244</sup>

In situations where the Hague Convention does not cover the information requested or proves to be unproductive, the requesting government agency should next examine whether there is an alternative treaty, agreement, or diplomatic instrument between the two nations that would govern the requested information. The United States has signed many agreements and conventions regarding the exchange of information, especially when issues of taxes are concerned.<sup>245</sup> Often these treaties and agreements require different U.S. agencies to make requests on their foreign counterparts.<sup>246</sup>

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<sup>238</sup> See Alexander F. Peter, *U.S. Cross-Border Discovery in International Tax Proceedings: An Overview from a European Comparative Law Perspective*, 58 TAX LAW. 881, 912-13, 915 (2005).

<sup>239</sup> See Thomas F. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183, 1190 n.47 (2004).

<sup>240</sup> See Glenn P. Hendrix, *Ten Rules for Obtaining Evidence from Abroad*, in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 103, 109 (Barton Legum ed., 2005).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> "Discovery under the Hague Evidence Convention is time consuming and somewhat unpredictable. There is little way to predict if, when, or how a foreign state's central authority will act upon a letter rogatory or other request, and therefore the predictability desired . . . is difficult to achieve." Schmerler, *supra* note 208, at 10-28, § 10:7.2. Additionally, there is the possibility that the information sought may not comply with the foreign jurisdiction's view on discovery, and the central authority may reject the request for information. *Id.*

<sup>244</sup> Hendrix, *supra* note 240, at 109.

<sup>245</sup> See Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, for the Exchange of Information Relating to Taxes, U.S.-U.K., March 10, 2006, 2001 U.S.T. LEXIS 156; Agreement Between the Government of the United States of America and the Government of Antigua and Barbuda for the Exchange of Information With Respect to Taxes, U.S.-Ant. & Barb., Dec. 6, 2001, T.I.A.S. No. 13,178; Convention Between The United States of America and The Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., Oct. 2, 1996, 1996 U.S.T.

## 2. *Exhaustion Step 2: Interagency Assistance Through Mutual Legal Assistance Treaties and Informal Cooperation*

The first step of executive exhaustion would require the requesting government agency to turn to other Executive Branch agencies capable of assisting in obtaining the requested information. By using multilateral treaties and informal procedures, agencies are capable of obtaining evidence and, in some cases, piercing bank secrecy.<sup>247</sup>

### a. *The Department of Justice’s Office of International Affairs*

One useful organization for government agencies seeking information abroad is the DOJ’s Office of International Affairs (“OIA”), which advises and assists the DOJ with international criminal matters and coordinates “all international evidence gathering.”<sup>248</sup> Prosecutors can contact OIA regarding the particular method for obtaining evidence from abroad.<sup>249</sup> OIA works in concert with the State Department on issues of negotiating treaties, agreements, and conventions pertaining to international criminal matters.<sup>250</sup> One particular benefit of using OIA is its permanent presence in foreign countries such as Italy, Mexico, and El Salvador, and its maintenance of exchange agreements with France, the United Kingdom, and Japan.<sup>251</sup> The benefit of having these permanent posts abroad means DOJ officials abroad can build up a network of contacts with their foreign counterparts who are able to assist the U.S. government in situations where parties are facing nondisclosure laws, such as bank secrecy laws.<sup>252</sup>

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LEXIS 74. For an informative discussion of these various tax information exchange treaties, see Van Brauman, *supra* note 23, at 604–05.

<sup>246</sup> Van Brauman, *supra* note 23, at 604–05. Oftentimes, the requesting agencies are called “competent authorities” in the agreement. *Id.* at 605.

<sup>247</sup> Jones, *supra* note 121, at 473.

<sup>248</sup> *Office of International Affairs*, U.S. DEP’T JUSTICE, <http://www.justice.gov/criminal/about/oia.html> (last visited Mar. 20, 2011).

<sup>249</sup> *Methods of Obtaining Evidence Abroad*, in CRIMINAL RESOURCE MANUAL, UNITED STATES ATTORNEYS’ MANUAL § 9.274, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00274.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00274.htm).

<sup>250</sup> *Office of International Affairs*, *supra* note 248. Mutual Legal Assistance Treaties are treaties and require diplomatic negotiation, treaty drafting, and a domestic implementation process such as Senate ratification or passage of implementing legislation. See Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE ROLE OF INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 177, 190 (Michael Byers ed., 2000).

<sup>251</sup> *Office of International Affairs*, *supra* note 248.

<sup>252</sup> See OFFICE OF THE ATTORNEY GENERAL, U.S. DEP’T OF JUSTICE, THE ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE: 2001–2009, at 42 (2009), available at <http://www.justice.gov/opa/documents/doj->

Additionally, the Office of International Affairs serves as the designated point of contact between the United States and foreign nations who have signed Mutual Legal Assistance Treaties (“MLATs”).<sup>253</sup> These treaties are intended to “supplement . . . international law enforcement assistance . . . [and] intended to be used as a more effective and efficient substitute for letters rogatory.”<sup>254</sup> MLATs permit the DOJ and its counterparts to request the assistance of each other in gathering evidence.<sup>255</sup> The United States currently maintains MLATs with over fifty-six nations, including Switzerland.<sup>256</sup>

While OIA seems to be an advantageous resource for U.S. agencies to use in criminal investigations, its use is usually limited to criminal matters and may be of little use in civil matters.<sup>257</sup> With few exceptions, MLATs used by OIA are intended for use only in criminal investigations.<sup>258</sup> Investigating agencies would need an MLAT to be in existence and for the MLAT to provide for the specific assistance required.<sup>259</sup> These treaties usually do not cover political, military, and in some instances, tax investigations.<sup>260</sup> Finally, OIA requests require patience from the requesting agency because the requests go through a lengthy process consisting of various domestic and foreign legal channels.<sup>261</sup> To the United States, MLATs do not represent complete solutions when trying to obtain evidence from abroad.<sup>262</sup>

For U.S. agencies to gain any benefit from OIA in civil investigations, the U.S. government would have to expand the scope of OIA’s authority to encompass civil matters. However, an expansion of scope to encompass civil

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accomplishments.pdf; see also Press Release 09-608, Dep’t of Justice, Stanford Financial Group Executives and Former Chairman of Antigua Bank Regulator Indicted for Fraud and Obstruction (June 19, 2009), <http://www.justice.gov/opa/pr/2009/June/09-crm-608.html> (highlighting assistance provided by OIA in indicting high-level executives of a financial services company).

<sup>253</sup> Snow, *supra* note 234, at 226; see also Kris Dekeyser et al., *Coordination Among Antitrust Agencies*, 10 SEDONA CONF. J. 43, 63 (2009) (discussing OIA and MLATs).

<sup>254</sup> MICHAEL ABBELL & BRUNO A. RISTAU, 3 INTERNATIONAL JUDICIAL ASSISTANCE 131, § 12-4-2 (1995); see also *U.S. Department of State Circular: Obtaining Evidence Abroad*, *supra* note 135, at 1104.

<sup>255</sup> Kenneth M. Breen & Thomas R. Fallati, *Securities Fraud*, CHAMPION, Sept.–Oct. 2007, at 43, 44.

<sup>256</sup> Treaty on Mutual Assistance in Criminal Matters, U.S.–Switz., May 25, 1973, 27 U.S.T. 2019; see also Holmes, *supra* note 162, at 205.

<sup>257</sup> David B. Anders & Carol Miller, *Issues Arising in Cross-Border Investigations*, in INTERNAL INVESTIGATIONS 2008: LEGAL, ETHICAL & STRATEGIC ISSUES 53, 70 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1679, 2008).

<sup>258</sup> Snow, *supra* note 234, at 212–13. However, the Hague Convention covers certain civil and commercial requests. See Hague Convention, *supra* note 222.

<sup>259</sup> Snow, *supra* note 234, at 212–13.

<sup>260</sup> Jones, *supra* note 121, at 474.

<sup>261</sup> JOHN MADINGER, MONEY LAUNDERING: A GUIDE FOR CRIMINAL INVESTIGATORS 290 (2d ed. 2006).

<sup>262</sup> Jones, *supra* note 121, at 474.

law enforcement matters could backfire, as it could lead to an overwhelming number of requests to the foreign authorities. The flood of requests could make foreign agencies less likely to comply because of the amount of work involved or the feeling that the requests are primarily a one-way street—with all the information going to the United States. Thus, civil enforcement agencies like the IRS may be left without any recourse when it comes to utilizing MLATs to pursue tax investigations. This can be particularly vexing because some MLATs entered into by the United States have dual criminality clauses that do not bind a requested state to provide assistance unless the conduct would have been an offense within the requested state’s borders.<sup>263</sup> However, some recent MLATs have excluded this dual criminality clause, permitting the U.S. government to seek more information than would have been permitted under more traditional MLATs.<sup>264</sup> Nonetheless, MLATs represent a faster and more reliable mechanism for obtaining information from abroad in comparison to the letters rogatory.<sup>265</sup> In addition, MLATs can be particularly useful relative to the Hague Convention because of the particularity in the drafting language between two parties versus the broad language of a multi-party convention.<sup>266</sup>

*b. The Drug Enforcement Administration’s Foreign Field Divisions and Foreign Cooperation Investigations*

Another avenue for agencies to use in investigations of financial institutions is that of the Foreign Field Offices of the Drug Enforcement Administration (“DEA”),<sup>267</sup> which are located all over the world, including Switzerland,<sup>268</sup> Barbados,<sup>269</sup> and Hong Kong.<sup>270</sup> The DEA’s advanced

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<sup>263</sup> Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime*, 44 WAYNE L. REV. 1401, 1418 (1998).

<sup>264</sup> *Id.*

<sup>265</sup> James E. Johnson, *The Long Arm of the Law*, in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, *supra* note 240, at 214.

<sup>266</sup> See Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT’L L. 192, 228 (2009).

<sup>267</sup> See *Foreign Field Divisions*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/pubs/international/foreign.html> (last visited Mar. 20, 2011).

<sup>268</sup> *Foreign Field Divisions: Europe*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/pubs/international/europe.html> (last visited Mar. 20, 2010).

<sup>269</sup> *Drug Enforcement Administration Bridgetown Country Office*, EMBASSY U.S.: BARB. & E. CARIBBEAN, <http://barbados.usembassy.gov/dea.html> (last visited Mar. 20, 2011); see also U.S. GENERAL ACCOUNTING OFFICE, GAO 99-108, DRUG CONTROL: DEA’S STRATEGIES AND OPERATIONS IN THE 1990S (1999), available at <http://www.gao.gov/archive/1999/gg99108.pdf>.

<sup>270</sup> *Foreign Field Divisions: Far East*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/pubs/international/fareast.html> (last visited Mar. 20, 2011).

capabilities to track suspicious international monetary transactions could prove useful to the IRS in tax evasion cases. The most common forms of money laundering are narcotics trafficking and tax violations.<sup>271</sup> For ongoing government investigations, requesting agencies could possibly “piggyback” on an existing DEA wiretap to uncover the identity of those parties evading tax responsibilities or engaging in other violations of U.S. law where their identity would be protected by foreign bank secrecy laws.<sup>272</sup> The DEA has engaged with its foreign counterparts to permit DEA agents to operate in fifty-eight foreign nations through foreign cooperation investigations.<sup>273</sup> In addition to stationing agents abroad, the DEA has used bilateral investigations and intelligence-gathering to track drugs and illegal profits from drugs.<sup>274</sup> The DEA and other U.S. agencies with foreign bureaus have used their experienced and knowledgeable contacts abroad to obtain information for use in U.S. courts.<sup>275</sup> Scholars have recognized that the United States has been an “international pioneer” with its placement of liaison officers overseas and in its development of bilateral working groups for combating transnational crime.<sup>276</sup> The DEA’s success in the area of tracking narcotics assets could very well translate into the ability to assist its fellow executive agencies when there is a suspicion that the assets may be involved with illicit narcotics.<sup>277</sup>

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<sup>271</sup> Holmes, *supra* note 162, at 201.

<sup>272</sup> See Mark G. Young, Note, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 *FORDHAM L. REV.* 1017, 1026 n.27 (2001). Any such use of wiretaps would have to comply with federal laws pertaining to wiretaps. See generally *id.* But see Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 *U. PITT. L. REV.* 753, 784 (2006) (highlighting that the U.S. PATRIOT Act has greatly expanded the ability to perform electronic surveillance and wiretaps); Pamela Seay, *Practicing Globally: Extraterritorial Implications of the USA Patriot Act’s Money-Laundering Provisions on the Ethical Requirements of US Lawyers in an International Environment*, 4 *S.C. J. INT’L L. & BUS.* 29 (2007) (noting that the U.S. PATRIOT Act permits investigative agencies to share information and certain wire and electronic communications).

<sup>273</sup> See *Foreign Cooperative Investigations*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/programs/fci.htm> (last visited Mar. 20, 2011).

<sup>274</sup> *Id.*

<sup>275</sup> MADINGER, *supra* note 261, at 290.

<sup>276</sup> Zagaris, *supra* note 263, at 1404.

<sup>277</sup> President Nixon created the DEA by executive order in July 1973. See Exec. Order No. 11,727, 38 *Fed. Reg.* 18,357 (July 6, 1973). Congress found that the forfeiture and seizure of international assets derived from the sale of illegal and dangerous drugs is a necessary function of the DEA. 28 U.S.C.A. § 509 (West 2011). Additionally, Congress authorized the Treasury Department to support law enforcement training activities abroad to bolster investigations and prosecutions of transnational offenses. *Id.*

c. *Obtaining Evidence Through the SEC Memorandum of Understandings with Foreign Nations*

The SEC maintains Memorandums of Understandings (“MOUs”) through which it can request assistance from its foreign regulatory counterparts for obtaining evidence located abroad.<sup>278</sup> SEC MOUs establish “clear mechanisms” for the cooperation and exchange of information between the foreign counterparts.<sup>279</sup> MOUs are easier to use than MLATs because MOUs are less formal and allow agencies to avoid the process of treaty drafting.<sup>280</sup> MOUs also are negotiated fairly quickly and are easy to implement.<sup>281</sup>

The SEC can utilize mechanisms other than MOUs for obtaining foreign discovery such as informal ad hoc arrangements to achieve foreign cooperation in investigations and enforcement matters.<sup>282</sup> The SEC also maintains its own OIA that advises and assists the SEC’s Enforcement Division with international investigations involving securities issues.<sup>283</sup> Perhaps most useful to an agency requesting the SEC’s assistance is the SEC’s ability to engage in “bilateral dialogues” with its regulatory counterparts to enhance cooperation and technical assistance efforts.<sup>284</sup>

While these SEC MOUs may be useful to the requesting agency to coordinate with the SEC, the requesting agency may be hamstrung by the fact that the SEC usually only engages in MOUs with countries possessing major markets.<sup>285</sup> Thus, SEC MOUs may not be a viable alternative when sought from countries that are traditional banking havens without advanced stock-market capabilities.<sup>286</sup> Regardless, the SEC is another agency through which an Executive Branch agency can seek cooperation and assistance without petitioning a federal court to compel disclosure in *UBS*-like situations. In fact,

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<sup>278</sup> Anders & Miller, *supra* note 257, at 71. Some courts have held that the SEC’s regulatory abilities are not bound by the same limits that bind U.S. district courts. See David M. Stuart & Charles F. Wright, *The Sarbanes-Oxley Act: Advancing the SEC’s Ability to Obtain Foreign Audit Documentation in Accounting Fraud Investigations*, 2002 COLUM. BUS. L. REV. 749, 757–58 n.27.

<sup>279</sup> See *Office of International Affairs Outline and Bibliography*, in *THE SEC SPEAKS IN 2009*, at 1065, 1081 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1063, 2009). Because SEC subpoenas are subject to territorial restrictions, the SEC frequently uses alternatives to subpoenas such as MOUs when seeking documents from abroad. Stuart & Wright, *supra* note 278, at 764.

<sup>280</sup> Slaughter, *supra* note 250, at 190.

<sup>281</sup> *Id.*

<sup>282</sup> Anders & Miller, *supra* note 257, at 71.

<sup>283</sup> See *Office of International Affairs Outline and Bibliography*, *supra* note 279, at 1068.

<sup>284</sup> *Id.* at 1082–83.

<sup>285</sup> Jones, *supra* note 121, at 479; see also Stuart & Wright, *supra* note 278, at 765.

<sup>286</sup> Jones, *supra* note 121, at 479; see also Stuart & Wright, *supra* note 278, at 765.

the SEC has had remarkable levels of recent cooperation with its assistance requests, having made 594 requests to foreign authorities and itself responded to 414 requests from abroad.<sup>287</sup>

*d. Informal Agreements Between U.S. Agencies and Their Foreign Counterparts*

In situations where MLATs are not in place, the DOJ and other agencies could resort to informal cooperation. Scholars have noted that informal requests usually achieve greater success more quickly than formal requests.<sup>288</sup> Such informal methods include persuading the foreign nation to join the United States in a joint investigation and making a treaty-type request even though no treaty is in place.<sup>289</sup> The latter method has been successful in at least one DEA operation in Mexico, where a treaty was not yet in place, but the Mexican authorities cooperated as if there was one in place.<sup>290</sup>

*e. Diplomatic Cooperation: Turning to the State Department to Assist with Obtaining Information Through Diplomacy*

If other interagency efforts prove futile, the requesting agency may always turn to the State Department to assist in investigations requiring information located abroad. The State Department is the official arm of the Executive Branch for dealing with diplomatic relations.<sup>291</sup> The United States currently has hundreds of embassies, consulates, and diplomatic missions around the

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<sup>287</sup> See *Office of International Affairs Outline and Bibliography*, *supra* note 279, at 1087. While statistics for responses and requests have been published, this publication does not contain how many of these requests, if any, were denied by foreign authorities. Nonetheless, the SEC has received “significant assistance” with its request to the Swiss Banking Commission and the Swiss Federal Ministry of Justice in certain matters. *Id.* at 1089.

<sup>288</sup> Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT’L & COMP. L. 1, 10 (1997).

<sup>289</sup> *Id.* at 10–11.

<sup>290</sup> *Id.* Another alternative method of acquiring information from abroad, albeit unconventional, is by purchasing it. See *Liechtenstein’s Shadowy Informant: Tax Whistleblower Sold Data to the US*, SPIEGEL ONLINE (Feb. 25, 2008), <http://www.spiegel.de/international/business/0,1518,537640,00.html>. Germany paid a confidential informant \$3.4 million for details about German UBS clients to assist with Germany’s tax investigation into UBS. See David Crawford et al., *German Data Buy Irks Swiss*, WALL ST. J., Feb. 8, 2010, at A15. The Swiss claim this data was stolen and should be returned. *Id.* More informers have offered to sell UBS client data to the German government and German authorities are weighing whether to purchase additional client data. *Id.*

<sup>291</sup> See LOCH K. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS* 8–9 (1984); *Department Organization*, U.S. DEP’T ST., <http://www.state.gov/r/pa/ei/rls/dos/436.htm> (last visited Mar. 20, 2011).

world.<sup>292</sup> State Department officials have high-level negotiating abilities with foreign governments and officials.<sup>293</sup>

In some instances, the State Department may be a necessary point of contact for preexisting agreements such as the Hague Convention, because some nations require letters rogatory to come directly from the State Department instead of a U.S. court.<sup>294</sup> In these instances, the State Department may have more success with the request than other agencies because it serves as the point of contact when foreign tribunals request documents located in the United States.<sup>295</sup> The existing relationship between the foreign ministries and the State Department may lead to situations in which a nation is more receptive to State Department requests versus requests from a U.S. court.

One area in which the State Department can be of particular help to a requesting agency is in negotiating a topic-specific treaty or agreement with a foreign nation.<sup>296</sup> With a bilateral treaty, the treaty is negotiated between the United States and each particular nation, as opposed to a multilateral convention open for signing to many parties.<sup>297</sup> The ability for the State Department to negotiate treaties turns on a variety of factors, such as the country involved, the subject, and the expectations the country has for the treaty.<sup>298</sup> One significant downside of creating new treaties is the amount of time involved in the negotiation, drafting, and Senate ratification of the treaty.<sup>299</sup> Additionally, a failure to fully understand the parties' expectations can result in disagreements over treaty interpretation.<sup>300</sup> The State Department's ability to negotiate precise treaties represents the final executive exhaustion option to assist the requesting agency with the procurement of evidence abroad.

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<sup>292</sup> *Websites of U.S. Embassies, Consulates and Diplomatic Missions*, U.S. DEP'T ST., <http://www.usembassy.gov> (last visited Mar. 20, 2011).

<sup>293</sup> Slaughter, *supra* note 250, at 190.

<sup>294</sup> Van Brauman, *supra* note 23, at 609.

<sup>295</sup> 28 U.S.C. § 1781 (2006).

<sup>296</sup> *Department Organization*, *supra* note 291.

<sup>297</sup> DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 27 (2d ed. 2006).

<sup>298</sup> Robert Thornton Smith, *Tax Treaty Interpretation by the Judiciary*, 49 *TAX LAW.* 845, 877 (1996).

<sup>299</sup> Slaughter, *supra* note 250, at 190. In certain instances, implementation legislation is required for the treaty to become domestic law in the United States. *Id.*

<sup>300</sup> See John Merrills, *The Mutability of Treaty Obligations*, in *INTERROGATING THE TREATY: ESSAYS IN THE CONTEMPORARY LAW OF TREATIES* 89, 89, 101 (2005) (discussing the expectations of parties during negotiation and how new events can influence treaty interpretation).

### 3. *Treaty Interpretation: The Downside to the Hague Convention, MLATs, and Other Bilateral Agreements*

Just as issues arise in contract interpretation, issues can arise regarding how to interpret the treaties that concern the exchange of information.<sup>301</sup> The Vienna Convention on the Law of the Treaties (“Vienna Convention”)<sup>302</sup> is widely acknowledged as the international agreement governing treaty interpretation.<sup>303</sup> While the U.S. Senate has not officially ratified the Vienna Convention, the Vienna Convention “represents general[] . . . principles” that the United States has been “willing to accept.”<sup>304</sup> The Executive Branch of the United States has utilized the Vienna Convention on numerous occasions to resolve treaty interpretation issues, even though it is not in force against the United States.<sup>305</sup> Additionally, the State Department has announced on several occasions that it views the Vienna Convention as “codifying existing law.”<sup>306</sup> The United States, as part of its general acceptance of the Vienna Convention through practice and the governing norms of customary international law, is likely to resort to the Vienna Convention to resolve disputes arising from international treaties.<sup>307</sup>

The Vienna Convention is important to all treaties because it regulates treaty interpretation.<sup>308</sup> Article 31 of the Vienna Convention, which discusses the general rule of interpretation, states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>309</sup> This approach makes the implicit assumption that the parties to the treaty use the same word to mean the same thing, which can often lead to disputes resulting from the inconsistent meaning each nation gives to the terms at issue.<sup>310</sup>

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<sup>301</sup> Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 833 (2007).

<sup>302</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (entered into force Jan. 27, 1980).

<sup>303</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 (1987). See generally Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988).

<sup>304</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. a (1987).

<sup>305</sup> Maria Frankowska, *supra* note 303, at 298.

<sup>306</sup> *Id.* at 299.

<sup>307</sup> *Id.* at 298.

<sup>308</sup> Vienna Convention, *supra* note 302, arts. 31–33; see also Frankowska, *supra* note 303, at 292.

<sup>309</sup> Vienna Convention, *supra* note 302, art. 31.

<sup>310</sup> Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1282 (2005).

When ambiguities in treaty interpretation arise, the Vienna Convention permits the parties to look at the preamble, annexes, any related treaties, and subsequent agreements between the parties, and states that any “special meaning shall be given to a term if it is established that the parties so intended.”<sup>311</sup> While the parties may arrive at a “meeting of the minds” during diplomatic negotiations on the purpose of the treaty, specific terms, if not properly defined, could lead to future disputes between countries when it comes to enforcement of certain provisions.<sup>312</sup> Treaties could suffer from defects of multilingual misinterpretations or the more subtle multicultural interpretation, where “even within a single language, a complicating factor is that different cultures and legal cultures vary in terms of how precisely people write.”<sup>313</sup>

Another issue that complicates treaty interpretation is the potential issue of conflicting intents—the intent of the negotiating diplomats and the intent of the Senate during ratification—leaving the Executive Branch in the possible position of interpreting the treaty in a manner contrary to the advice and consent of the Senate.<sup>314</sup> Treaty interpretation has resulted in disputes in numerous matters, including those involving interpretation of bilateral tax treaties,<sup>315</sup> trade disputes,<sup>316</sup> and extradition treaties.<sup>317</sup>

#### 4. *If Executive Exhaustion Fails or Proves Futile*

Undoubtedly there will be those instances in which the requesting agency’s treaty mechanisms and negotiation through diplomatic means will prove fruitless, and courts will have no choice but to make the ultimate decision of whether to exercise jurisdiction and compel the defending party to disclose. As one court stated as a preface to its memorandum and order compelling foreign disclosure among private parties in an antitrust action: “We have delayed this ruling in the hope that the question here decided might be amicably resolved

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<sup>311</sup> Vienna Convention, *supra* note 302, art. 31.

<sup>312</sup> Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 27, 29 (2005) (citing *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902)); Mahoney, *supra* note 301, at 833.

<sup>313</sup> Glashausser, *supra* note 310, at 1281 (emphasis omitted) (internal citations omitted).

<sup>314</sup> See U.S. CONST. arts. II, § 2, I, § 8, cl. 3; David J. Bederman, *Revivalist Canons and Treaty Interpretations*, 41 UCLA L. REV. 953, 1026–28 (1994) (discussing the issue of dual intents).

<sup>315</sup> See, e.g., *United States v. Stuart*, 489 U.S. 353 (1989) (interpreting a tax treaty).

<sup>316</sup> See, e.g., Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009).

<sup>317</sup> See, e.g., *Birmingham v. Dir. of the Serious Fraud Office*, [2006] EWHC (Admin) 200, [2007] 2 W.L.R. 635 (Eng.) (analyzing an extradition treaty).

among the parties to these actions and the foreign governments involved . . . . But our hope has turned to despair. This litigation must proceed.”<sup>318</sup>

Courts have concluded there are exceptions to the court-created doctrine of administrative exhaustion, such as futility and inadequate administrative remedy.<sup>319</sup> The futility exception covers those situations in which litigants should be excused from exhausting available administrative remedies when it is clear the agency would rule against them.<sup>320</sup> Executive exhaustion would parallel administrative exhaustion in that there would be certain instances, such as futility, in which the court would have discretion to excuse a failure to exhaust available remedies and would then hear the petition to compel disclosure.<sup>321</sup>

## VI. APPLICATION OF EXECUTIVE EXHAUSTION TO *UNITED STATES V. UBS*

### A. *The 1996 Treaty on the Exchange of Tax Information Between the United States and Switzerland*

Ever since 1951, the United States has been extremely dissatisfied with its inability to pierce Swiss bank secrecy laws because Switzerland has interpreted tax fraud provisions in exchange-of-information treaties more narrowly than the United States.<sup>322</sup> Swiss law makes a distinction between tax fraud and tax evasion.<sup>323</sup> The Swiss government treats tax fraud as the criminal offense of filing falsified tax documents to mislead tax authorities, and it treats tax evasion as a civil misdemeanor of failing to declare income.<sup>324</sup>

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<sup>318</sup> *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1142 n.\* (N.D. Ill. 1979) (citation omitted).

<sup>319</sup> See PIERCE, *supra* note 15, at 972, 977–78.

<sup>320</sup> See RONALD A. CASS, COLIN S. DIVER & JACK M. BEERMANN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 349 (4th ed. 2002).

<sup>321</sup> While this Comment advocates executive exhaustion as a mandatory procedure before proceeding to federal court, courts would retain minimal discretion to excuse exhaustion for situations when exhaustion would be futile. *But see* *Buford v. Sun Oil Co.*, 319 U.S. 315 (1943) (requiring federal courts to abstain from hearing a case when there exists complex state administrative procedures to avoid conflicting interpretation of state law). For a comprehensive discussion regarding the *Buford* abstention doctrine in federal district courts, see ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* 802–07 (5th ed. 2007).

<sup>322</sup> See W. Warren Crowds, *U.S., Switzerland Sign Income Tax Treaty*, 13 *TAX NOTES INT’L* 1983, 1991 (1996).

<sup>323</sup> See Bradley J. Bondi, *Don’t Tread on Me: Has the United States Government’s Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws?*, 30 *NW. J. INT’L L. & BUS.* 1, 5–6 (2010).

<sup>324</sup> *Id.* U.S. law does not make this distinction. 26 U.S.C.A. § 7201 (West 2011).

Accordingly, Swiss courts, using Swiss law as a reference, have interpreted fraud to mean the submission of false documents to mislead tax authorities.<sup>325</sup> Under this narrow definition of fraud, Swiss courts did not believe that the 1951 Treaty between the United States and Switzerland required Swiss courts to turn over information to the United States in U.S. tax fraud investigations.<sup>326</sup> The United States and Switzerland signed the 1996 Convention for the Avoidance of Double Taxation between the United States and the Swiss Confederation to replace and supersede the existing treaty regarding the avoidance of double taxation which had been in place since 1951.<sup>327</sup>

When President Clinton sent the 1996 Treaty to the Senate for ratification, it included a Letter of Submittal from the State Department and an accompanying Memorandum of Understanding (“1996 MOU”).<sup>328</sup> The State Department noted that the 1996 MOU “provides clarification with respect to the application of the [1996 Treaty] in specified cases.”<sup>329</sup> The State Department also noted that Article 26, concerning the exchange of information between the two states, would explain when the U.S. authorities would be permitted to receive information from Swiss banks in instances of tax fraud.<sup>330</sup> The 1996 MOU stated that Article 26 of the 1996 Treaty “shall apply in cases where a Contracting State may need to resort to other legal means applicable to mutual assistance between the Contracting States in matters involving tax fraud, such as the Swiss Federal Law on International Mutual Assistance in Criminal Matters.”<sup>331</sup>

The 1996 Treaty provides no definition for “tax fraud,” but the attached Protocol does provide a definition, which states that the United States and Switzerland agree that “‘tax fraud’ means fraudulent conduct that causes or is intended to cause an illegal and substantial reduction in the amount of the tax paid to a Contracting State.”<sup>332</sup> While this definition of tax fraud seems straightforward, the 1996 Treaty and the accompanying Protocol apparently contradict each other because of additional text in Article 26:

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<sup>325</sup> XAVIER OBERSON & HOWARD R. HULL, SWITZERLAND IN INTERNATIONAL TAX LAW 264 (3d ed. 2006).

<sup>326</sup> See Crowds, *supra* note 322, 1991.

<sup>327</sup> 1996 Treaty, *supra* note 60, art. 29.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at Letter of Transmittal. The 1996 MOU includes hypothetical scenarios in which information would be exchanged between the United States and Switzerland. *Id.* at Memorandum of Understanding.

<sup>330</sup> *Id.* at Letter of Transmittal.

<sup>331</sup> *Id.* at Memorandum of Understanding.

<sup>332</sup> *Id.*

In no case shall the provisions of this Article be construed so as to impose upon either of the Contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either Contracting State or which would be contrary to its sovereignty, security or public policy.<sup>333</sup>

While the 1996 Treaty covers instances of tax fraud where Americans evade taxes through Swiss banks, because of the sovereignty clause in Article 26, Swiss authorities could ostensibly construe any request that would violate Swiss law as not being covered by the treaty, including requests that violate Swiss bank secrecy law.<sup>334</sup> It is quite possible that this internal treaty conflict may be chalked up to a treaty-drafting error because the language of tax treaties are usually negotiated solely by the Treasury Department,<sup>335</sup> whereas the 1996 Treaty was negotiated by both the Treasury Department and the State Department.<sup>336</sup>

In 2003, in yet another effort to strengthen its exchange-of-information policy under Article 26 of the 1996 Treaty, the United States and Switzerland signed an additional Memorandum of Understanding (“2003 MOU”).<sup>337</sup> One reason for the strengthening of the 1996 Treaty was the events of September 11, 2001, which increased the U.S. focus on terrorist financing and money

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<sup>333</sup> *Id.*

<sup>334</sup> Jones, *supra* note 121, at 461 n.37 (citing Bundesgesetz über die Banken und Sparkassen [Federal Law on Banks and Savings Banks], Nov. 8, 1934 (Switz.)). Article 47 of the 1934 Banking Law states:

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, authorized agent, liquidator or commissioner of a bank, as representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 Swiss francs [approximately U.S. \$46,000].
2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 Swiss francs [approximately U.S. \$28,000].
3. The violation of professional secrecy remains punishable even after termination of the official employment relationship or the exercise of the profession.

*Id.*

<sup>335</sup> The Treasury Department’s ability to negotiate treaties by itself arises from the complicated and technical nature of taxation agreements. Townsend, *supra* note 63, at 220.

<sup>336</sup> 1996 Treaty, *supra* note 60, at 5. However, such “contrary to public policy” provisions are not uncommon. See Van Brauman, *supra* note 23, at 605.

<sup>337</sup> Mutual Agreement of January 23, 2003, Regarding the Administration of Article 26 (Exchange of Information) of the Swiss-U.S. Income Tax Convention of October 2, 1996, U.S.-Switz., Jan. 23, 2003, available at <http://www.treasury.gov/press-center/press-releases/Pages/mutual.aspx> [hereinafter 2003 MOU].

laundering.<sup>338</sup> One would expect that the United States and Switzerland would have clarified the potential conflict in this treaty between the sovereignty clause and the definition of tax fraud, but they made no such clarification.<sup>339</sup> Notably, the 2003 MOU failed to address this issue, forcing readers of the 2003 MOU to refer to the Protocol of the 1996 Treaty instead.<sup>340</sup> Additionally, the hypothetical situations listed in the 1996 MOU and the 2003 MOU fail to provide for situations in which the requesting agency would issue a blanket request on a foreign bank without having the identity of the account-holder.<sup>341</sup>

### *B. U.S. Interagency Efforts to Get Information Regarding the John Doe Account Holders*

While the IRS and the DOJ likely consulted with OIA before issuing the summons, it is surprising that OIA did not take a more active role in the investigation of UBS.<sup>342</sup> The U.S. Attorneys' Manual explicitly states that prosecutors must contact OIA before unilaterally issuing a subpoena that would require a party to produce information located abroad when production would violate another country's laws.<sup>343</sup> Only after being ordered by the court did the IRS and the DOJ consult with other executive agencies regarding alternative means to pursuing enforcement of the John Doe summons in federal court.<sup>344</sup> Even after consulting with other executive departments, the IRS and DOJ still took the position that the court should balance the interests towards enforcing the summons, placing the obligation on UBS to decide whether it would comply with the order.<sup>345</sup> One agency that the IRS and DOJ did not

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<sup>338</sup> See Beckett G. Cantley, *The New Tax Information Exchange Agreement: A Potent Weapon Against U.S. Tax Fraud?*, 4 HOUS. BUS. & TAX L.J. 231, 240 (2004).

<sup>339</sup> 2003 MOU, *supra* note 337.

<sup>340</sup> Cantley, *supra* note 338, at 236.

<sup>341</sup> 1996 Treaty, *supra* note 60, at Memorandum of Understanding; 2003 MOU, *supra* note 337, app.

<sup>342</sup> OIA is not mentioned as part of the DOJ's "accomplishments" in the UBS investigation. See OFFICE OF THE ATTORNEY GENERAL, *supra* note 252, at 66, 68.

<sup>343</sup> *Subpoenas*, in CRIMINAL RESOURCE MANUAL, UNITED STATES ATTORNEYS' MANUAL, *supra* note 249, § 9.279(B).

<sup>344</sup> Order to Consult with Executive Branch, *supra* note 71; see also Pruzin & Finet, *supra* note 67. In a footnote in their brief to enforce the summons, the IRS and DOJ remarked that they had consulted with the Executive Branch, including the State Department. U.S. Reply Memo to Switzerland, *supra* note 8, at 2 n.2.

<sup>345</sup> U.S. Reply Memo to Switzerland, *supra* note 8, at 2-3; see also Pruzin & Finet, *supra* note 67. Scholars have noted that assertions of extraterritorial discovery by the U.S. courts have been largely responsible for the creation of blocking statutes—laws designed to obstruct American discovery abroad. See Cynthia Day Wallace, *'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?*, 37 INT'L LAW. 1055, 1066 (2003) (citing CYNTHIA DAY WALLACE, *THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION* ch. XIV, § 2(b)(I) (2002)).

mention contacting was the SEC, which has the authority to seek information from UBS because UBS is a registered private issuer in the United States.<sup>346</sup> In fact, UBS agreed to pay a \$200 million disgorgement penalty to the SEC as a part of its \$780 million fine in the DPA.<sup>347</sup> Considering that the SEC has had success with its MOUs and ad hoc arrangements with foreign regulators, the IRS and DOJ likely should have consulted with the SEC regarding the procurement of information from a registered corporation like UBS.<sup>348</sup>

### C. *The IRS's John Doe Summons*

While the John Doe summons represented a coercive move by the DOJ to compel information from UBS, it was not necessarily guaranteed to succeed. The first hurdle to the U.S. government's request was that several courts have recognized the Swiss bank secrecy law as a legitimate law reflecting important Swiss public policy interests.<sup>349</sup> Another hurdle was that the Swiss government, by filing an amicus brief with the court, would likely have garnered more favor with the court in a Restatement balancing test when the court balanced the factor concerning the important interests of the state where the information is located.<sup>350</sup> In addition to submitting a note to the State Department protesting enforcement of the John Doe summons, the Swiss government told the court it would prevent UBS from complying with any order compelling disclosure.<sup>351</sup> Nonetheless, the significant U.S. interests at stake in this matter could have very well balanced towards a court order compelling disclosure.

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<sup>346</sup> The SEC has authority over issuers registered in the United States under the Securities Act of 1934, 15 U.S.C.A. § 78d, Sec. 13(a) (West 2011). UBS complies with U.S. securities law by regularly filing disclosure forms. *See SEC Filings*, UBS (Mar. 16, 2011, 11:10 AM), [http://www.ubs.com/1/e/investors/sec\\_filings.html](http://www.ubs.com/1/e/investors/sec_filings.html). Some of the arguments posited in this Comment regarding actions the IRS and DOJ may have taken are conjectural due to the lack of media publicity regarding the prosecutorial decisions involved in the matter.

<sup>347</sup> DPA, *supra* note 20, at 3.

<sup>348</sup> Under Section 19 of the Securities Act, the SEC can take evidence and require production of any books, papers, or other records that it deems relevant to an inquiry. Securities Act of 1933, 15 U.S.C.A. § 77s (West 2011).

<sup>349</sup> Anders & Miller, *supra* note 257, at 64.

<sup>350</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987); *see also* Anders & Miller, *supra* note 257, at 64–65.

<sup>351</sup> U.S. Reply Memo to Switzerland, *supra* note 8, at 1.

*D. Diplomatic Resolution of the UBS Case: Demonstrating Executive Exhaustion in Practice*

Recognizing that the *UBS* matter was sensitive to international relations, the Swiss government noted in its brief that the motion to compel disclosure from UBS was interfering with diplomatic negotiations.<sup>352</sup> If the court had required the IRS and DOJ to exhaust their alternatives, both agencies likely would have come to the conclusion that with the interests at stake for both the United States and Switzerland, the UBS matter represented a case that should have been resolved out of U.S. courts. If the court had decided that UBS was entitled to the protection of Swiss bank-secrecy laws and denied disclosure, the ability for the U.S. government to enforce its tax law on Americans with Swiss bank accounts would have been tremendously weakened. On the other hand, if UBS were ordered to turn over its account records to the U.S. government, a U.S. court would have insulted Swiss sovereignty over its banks.<sup>353</sup> Compliance with the court order by UBS also would have placed it in the position of facing multiple counts of criminal liability in Switzerland.<sup>354</sup> If UBS instead had remained faithful to Swiss law and refused to comply with a U.S. court order compelling disclosure, it would have faced tremendous consequences, such as being held in violation of its deferred prosecution agreement and potentially subject to contempt-of-court sanctions.<sup>355</sup> The "high-level negotiations" leading to an agreement by the State Department, the IRS, and the Swiss government represented a diplomatic resolution to the potential extraterritorial application of U.S. jurisdiction in an extremely sensitive matter.<sup>356</sup> Additionally, by utilizing diplomatic channels, the U.S. government achieved a new agreement with Switzerland that provided for a future *UBS*-like situation, which the 1996 and 2003 MOUs lacked.

#### CONCLUSION

The diplomatic processes utilized to resolve the *UBS* matter prove that executive exhaustion is a viable alternative to placing a U.S. court in the difficult position of having to weigh the competing interests of the United States and a foreign state in a motion to compel disclosure. The fact that the

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<sup>352</sup> Amicus Brief of Switzerland, *supra* note 52, at 10.

<sup>353</sup> See Erwin, *supra* note 32, at 496.

<sup>354</sup> *Id.* at 494 n.66.

<sup>355</sup> *Id.* at 498 n.99.

<sup>356</sup> See Nancy J. Moore & Daniel Pruzin, *Federal Judge Postpones UBS Trial; U.S., Swiss Governments Negotiating*, INT'L TAX MONITOR, July 14, 2009.

court asked the IRS and the DOJ to consult with various executive and government agencies, including the White House and the State Department, before continuing with their petition indicates that federal courts are aware of the various international interests at stake in certain high-profile litigation.<sup>357</sup> The responses from the IRS and DOJ barely acknowledged consultation with other agencies and continued to repeat previous assertions that enforcement of the summons was necessary to acquire the UBS client data.<sup>358</sup> Even after the United States, the Swiss government, and UBS came to an agreement regarding the transfer of data, the independent Swiss judiciary held that the UBS client data could not be transferred pursuant to the Treaty Request Agreement because the agreement was not actually a treaty—and thus not officially Swiss law.<sup>359</sup> If the Swiss government was unable to transfer data pursuant to an agreement it drafted and signed, how did the IRS and the DOJ realistically believe that UBS would be able to comply with a possible order compelling disclosure? An order compelling disclosure would have resulted in a full-blown diplomatic disaster, with the Swiss seizing UBS client data and the IRS and DOJ moving to have contempt-of-court sanctions imposed against UBS.<sup>360</sup>

In light of the powerful international interests at stake when it comes to an order compelling disclosure of information in violation of foreign law, it is imperative that Executive Branch agencies seek all alternative means before petitioning a court for disclosure. Federal courts should be the last resort for compelling disclosure when an Executive Branch agency seeks information from abroad that would require the violation of foreign law. In future *UBS*-like cases,<sup>361</sup> the court should require that the agency consult with other agencies and exhaust its alternatives. Executive exhaustion will allow the court to best

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<sup>357</sup> Order to Consult with Executive Branch, *supra* note 71, at 1; *see also* Pruzin & Finet, *supra* note 67.

<sup>358</sup> U.S. Reply Memo to Switzerland, *supra* note 8, at 2–4.

<sup>359</sup> Pruzin, *supra* note 92. After this ruling, the Swiss Parliament approved the Treaty Request Agreement, which was subsequently upheld by the Swiss courts. *See* Logutenkova, *supra* note 94.

<sup>360</sup> U.S. Reply Memo to Switzerland, *supra* note 8, at 4–5; Pruzin & Finet, *supra* note 67. Some scholars have questioned how the United States and its courts would react if a foreign nation sought to circumvent U.S. grand jury secrecy by compelling disclosure abroad. Jones, *supra* note 121, at 505–06 (citing John L. O'Donnell, Jr., *The Secrets of Foreign Bankers and the Federal Investigation: Tottering Balances*, 20 CASE W. RES. J. INT'L L. 509, 539 (1988)).

<sup>361</sup> As of February 2011, the United States is investigating the British bank HSBC for violations similar to those in the *UBS* case. *See* Lynnley Browning, *HSBC Is Said to Be the Focus of a Tax-Evasion Investigation*, N.Y. TIMES (Jan. 26, 2011), <http://www.nytimes.com/2011/01/27/business/global/27hsbc.html>. The DOJ is also contemplating issuing a *UBS*-like summons on HSBC. *Id.*

avoid the Restatements' balancing tests and the possibility of ordering a party to infringe a sovereign nation's laws.

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