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# The United States Treaty With the United Kingdom Concerning the Cayman Islands and the Mutual Legal Assistance in Criminal Matters: The End of Another Tax Haven

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**THE UNITED STATES TREATY WITH  
THE UNITED KINGDOM CONCERNING  
THE CAYMAN ISLANDS AND MUTUAL  
LEGAL ASSISTANCE IN CRIMINAL  
MATTERS: THE END OF ANOTHER TAX  
HAVEN**

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### I. INTRODUCTION

Transnational crime is no longer a topic relegated to James Bond movies and suspense novels. International narcotic dealings and money laundering have become a realistic and almost mundane problem for the United States Justice Department. Prosecutors often are faced with the problem of obtaining evidence from abroad. Smart criminals are making it difficult, if not impossible, for law enforcement authorities to reach or obtain evidence by hiding it in foreign countries.<sup>1</sup> Progress has been made in the European sphere through a relatively recent development known as a mutual legal assistance treaty. This type of treaty seeks to improve the effectiveness of judicial assistance and to regularize and facilitate its rendition. On a bilateral or multilateral basis, countries hammer out agreements that allow for reciprocal evidence gathering and other functions that could not be accomplished without the foreign countries' full cooperation.<sup>2</sup> The United States has entered into such agreements with Switzerland, the Netherlands, Italy, and Turkey.<sup>3</sup> Treaties have been signed with Canada, Colom-

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1. See generally Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, 19 INT'L LAW. 189 (1985).

2. *Id.*

3. Shultz, Letter of Submittal, dated July 23, 1987, as printed in the Message from The President Of The United States, August 4, 1987, U.S. Government Printing Office [hereinafter Letter of Submittal]. Among the treaties to which the Secretary of State was referring are: Treaty on Mutual Assistance in Criminal Matters with related notes, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter Swiss Treaty] (entered into force January 23, 1977); Treaty on Mutual Legal Assistance with the Kingdom of the Netherlands, June 12, 1981, United States-Netherlands, \_\_\_ U.S.T. \_\_\_, T.I.A.S. No. 10734; Treaty on Mutual Assistance in Criminal Matters, Aug. 20, 1980, United States-Co-

bia, Morocco and Thailand, but these treaties have not yet entered into force.<sup>4</sup> The Caribbean Basin, until recently, has remained untouched by this transnational phenomenon. Tax specialists and members of the Justice Department have commented on the need for similar treaties with other sovereignties such as Panama, Costa Rica and the Cayman Islands.

The Cayman Islands has proven to be an idyllic location for tax havens. The Cayman Islands is a British colony, so there is little, if any, concern about stability.<sup>5</sup> Moreover, the Cayman Islands is a well-developed financial center.<sup>6</sup> In addition to the long tradition of bank secrecy laws, there exist no exchange controls.<sup>7</sup> Another attractive feature is that travel to the Cayman Islands requires only a one hour flight from Miami International Airport.<sup>8</sup> The Cayman Islands has established sophisticated communications networks using telex machines and excellent long distance telephone services.<sup>9</sup> Advice and counselling can be found in the plethora of lawyers, accountants, bankers, and trust analysts located in the Cayman Islands.<sup>10</sup> Finally, the Cayman government imposes no direct taxes.<sup>11</sup> The Cayman Islands has more banks per capita than any other city in the world.<sup>12</sup> All of these factors contribute to making the Cayman Islands a superb setting for illicit deals and a hiding place for dirty money. As one essayist noted, "[i]t is not as if the Caymans have no laws governing banking institutions . . . . [T]he laws . . . might best be described as 'benevolent' . . . . The Cayman Government has gone to considerable lengths to protect banks from prying eyes."<sup>13</sup> Due to Switzerland's heightened role in

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lombia, Senate Treaty Doc. No. 97-11 (given advice and consent by Senate on Jan. 4, 1982); Convention on Mutual Assistance in Criminal Matters, Oct. 17, 1983, United States-Morocco, Senate Treaty Doc. No. 98-24 (ratified by the President on July 13, 1984); and Treaty on Mutual Legal Assistance in Criminal Matters, March 18, 1985, United States-Canada, reprinted in 24 I.L.M. 1092 (1985).

4. Letter of Submittal, *supra* note 3.

5. Taft, *Non-Treaty Tax Haven*, 192 N.Y.L.J., July 18, 1984, at 1, col. 1.

6. Weiland, *The Use of Offshore Institutions to Facilitate Criminal Activity in the United States*, 16 INT'L LAW. & POL. 1115, 1122 (1984).

7. Taft, *supra* note 5.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* See further Miller, *Why Bankers Love The Cayman Islands*, 38 BUS. & SOC'Y REV. 19, 20 (Sum. 1981); Note, *Preventing Billions From Being Washed Offshore: A Growing Approach to Stopping International Drug Trafficking*, 14 SYRACUSE J. INT'L L. & COM. 65 (1987).

12. Miller, *supra* note 11.

13. *Id.*

the cooperation of international investigations, investors and thieves have been forced to find other places to stash their misappropriated funds. Secrecy havens have "sprung up like mushrooms to meet the needs of a new generation of thieves and drug merchants."<sup>14</sup> The Cayman Islands has proven to be a fertile planting ground.

The United States is continuing in its efforts to combat this international problem. Talks with Cayman officials produced the first mutual legal assistance treaty with a jurisdiction in the Caribbean.<sup>15</sup> The mutual assistance treaty is a major effort on the part of the Administration to extend law enforcement throughout the world in pursuit of drug traffickers, money launderers, and other criminals.<sup>16</sup> The Governor of the Cayman Islands, Peter Lloyd, stated that the treaty between the United States and the Cayman Islands is "a sign to the world that the offshore outlaw has no home in the Cayman Islands."<sup>17</sup> The Governor also said that the government remains committed to safeguarding the "privacy of legitimate financial affairs."<sup>18</sup> Critics of the treaty maintain that "the U.S. has bullied [the Caymans] into the agreement."<sup>19</sup> Publicly, United States officials stated that "[t]he treaty appears to be part of a new strategy by officials of the islands to develop tourism and promote growth of their banking and insurance industries."<sup>20</sup> However, even a cursory glance at the tourism statistics and financial reports reveals that the Cayman government needs no help in boosting its already booming economy.<sup>21</sup> The Reagan Administration has taken a neutral stance by simply characterizing the mutual assistance treaty as "part of a highly successful effort to modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases."<sup>22</sup> Query whose law enforcement authorities truly benefit from this type of treaty.

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14. Weiland, *supra* note 6, at 1115.

15. Treaty between the United States and the United Kingdom and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, read to the Senate Aug. 4, 1987, 26 I.L.M. 536 (1987) [hereinafter *Cayman Treaty*].

16. Day, *Cayman Islands Gives U.S. Access to Bank Records*, Wash. Post, July 4, 1986, at F1.

17. *Id.* at F2, col. 3.

18. *Id.*

19. Pasztor & Nazario, *U.S. Will Gain Access to Bank Records on Cayman Islands Under New Treaty*, Wall St. J., July 3, 1986, at 5, col. 1.

20. *Id.*

21. I. PAGET-BROWN, *COMMERCIAL LAW OF THE CAYMAN ISLANDS* 6 (2d ed. 1985).

22. Letter of Submittal, *supra* note 3, at v.

It also should be noted that the treaty is not only aimed at drug traffickers. A recent Congressional investigation confirmed that the offshore secrecy havens have attracted doctors, lawyers, tax protesters and others who want to keep their money out of Uncle Sam's reach.<sup>23</sup> It is believed that this pervasive problem has the potential to undermine the integrity of American banks and other commercial institutions. It also threatens the integrity of the tax system and deprives the Treasury of badly needed revenue.<sup>24</sup> These are some of the motivating forces behind the United States drive to enter into a treaty with the Cayman Islands and finally put an end to the flow of illegal funds into the Caymans.

The goal of this comment is to highlight the provisions of the United States-Cayman Islands Mutual Assistance Treaty in Criminal Matters. The Cayman Treaty will be compared with the first mutual assistance treaty to which the United States became a party — the Swiss-United States Treaty — in order to give a point of comparison. The Swiss-United States Treaty is the longest and most complicated mutual assistance treaty to date. This is partly due to the complicated banking laws involved and the fact that it was the first treaty of its type negotiated with the United States.<sup>25</sup> Both treaties try to tackle the same problem of either complying with or circumventing the long history of bank secrecy laws. One may attempt to analyze the two treaties by focusing on the parties involved. Switzerland on one hand is a banking empire, whereas the Cayman Islands is a small banking center, know more as a vacation spot. One may conclude that this characteristic resulted in a difference in the negotiations of the two treaties; the apparent conclusions might be that while the United States persuaded the Cayman government to come to the bargaining table and sign such a treaty, Switzerland held the upper-hand in its negotiations with the United States. This may be too simplistic a point of view. Whether or not the United States waived a "big stick" to coerce the Cayman government to agree to more lenient provisions than those afforded to the United States by Switzerland is purely conjecture. One must not forget that the United States learned a great deal from the shortcomings of the Swiss Treaty and was not likely to sign a new treaty riddled with the same errors. Therefore, a

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23. Weiland, *Congress and the Transnational Crime Problem*, 20 INT'L LAW. 1025, 1034 (1986).

24. *Id.* at 1032.

25. Ellis & Pisani, *supra* note 1, at 197-98.

comparison of the two treaties should prove beneficial in order to appreciate the progress made in negotiating this type of treaty.

## II. BRIEF OVERVIEW OF THE CAYMAN ISLANDS AND THE DISCOVERY PROCESS

To comprehend fully the effect of this mutual assistance treaty, it is necessary that one be familiar with the pre-treaty development of both the Cayman Islands secrecy law and the United States discovery process. Banking is one of the Cayman Islands largest commercial industries and a major source of government revenue.<sup>26</sup> The Banks and Trust Companies Regulation Law is the foundation of Cayman secrecy law and provides, in part: ". . . [N]o person shall disclose any information relating to any application by any person under the provisions of this law or to the affairs of a licensee which he has acquired in the performance of his functions under the law."<sup>27</sup> Thus, one who is under a duty to maintain banking information and discloses a client's confidential banking information is "guilty of an offense and liable on summary conviction to a fine not exceeding two-thousand Cayman Islands dollars or to a term of imprisonment not exceeding one year or both."<sup>28</sup> Therefore, anyone under a duty to maintain that confidentiality cannot disclose any information that is being sought pursuant to an investigation without fear of violating Cayman domestic law and being subjected to its accompanying penalties.

The conflict between the prosecution of persons suspected of using the tax haven of the Cayman Islands to violate United States laws and the role of state sovereignty was highlighted in the Fifth Circuit decision of *In Re Grand Jury Proceedings, United States v. Field*.<sup>29</sup> At issue in *Field* was a Cayman banker's invocation of his fifth amendment right against self-incrimination at a grand jury hearing. He exercised this right based on the ground that his testimony, if given, would violate the Banks and Trust Companies

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26. Comment, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example*, 20 TEX. INT'L L.J. 133, 149 (1985).

27. *Id.*, citing the Banks and Trust Companies Regulation Law (Law 8 of 1966). The Law is reprinted in STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 98TH CONG. 1ST SESS., CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES 185 (Comm. Print 1983).

28. Comment, *supra* note 26, at 150.

29. 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 40 (1976).

Regulation Law.<sup>30</sup> The Fifth Circuit addressed this problem first by holding that the fifth amendment did not apply because the grand jury subpoena was "not an attempt to elicit information from [the banker] which would later be used against him in a criminal case."<sup>31</sup> The court then balanced the respective goals of the U.S. transnational investigatory procedures, and the Cayman Islands interest in preserving its domestic ability to maintain confidentiality.<sup>32</sup> The court noted that any testimony concerning banking information was a violation of Cayman law, and determined that the possibility of prosecution by the Cayman authorities was insufficient to invoke the fifth amendment.<sup>33</sup> The court aptly pointed out that, "[i]n a world where commercial transactions are international in scope, conflicts are inevitable. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states."<sup>34</sup>

Underlying *Field* is the deeper and perplexing problem of enforcing United States extraterritorial discovery procedures. This

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30. *Id.* at 405. The Supreme Court has not yet determined whether fear of prosecution by a foreign country is sufficient to invoke the fifth amendment. *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987). In *Sealed Case*, a banker from country A invoked his fifth amendment right against self-incrimination out of fear of criminal prosecution in country B. The banker was not a target of criminal prosecution in the United States, but a grand jury sought testimony concerning confidential information of his prior customers' accounts and transactions in country B who were targets of the criminal justice system. The court held that the banker's fear of prosecution was not "real" because his return to country B would be a voluntary act, that although he had family there, he no longer lived or worked in country B, and that therefore he was in contempt for refusing to testify. 825 F.2d at 497. The court once again balanced the goals of the United States against those of a smaller and less powerful country, and created a self-imposed exile upon a citizen obeying the laws of that country, instead of forcing the prosecuting authorities to seek other means of obtaining the information. For further discussion on the fifth amendment privilege and fear of foreign prosecution see Comment, *Sidestepping Foreign Bank Secrecy Laws: No Sanctuary in the Fifth Amendment and Little in the Interest of Comity*, 10 HOUSTON J. INT'L L. 57 (1987).

31. *Field*, 532 F.2d at 407.

32. *Id.* See Comment, *supra* note 26, at 150. The court used the balancing test set forth in RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 40 (1965). Section 40 requires states that have jurisdiction to consider: (1) the vital national interests of each state; (2) the hardship that inconsistent enforcement would place upon the person; (3) the extent to which the required conduct is to take place in the territory of the other state; (4) the nationality of the person; and (5) the extent to which enforcement can be expected to achieve compliance with the rule prescribed by that state. See also Pisani & Fogelnot, *The United States Treaties on Mutual Assistance in Criminal Matters*, INT'L CRIM. L. (1987) (an in-depth discussion of the mutual assistance treaties with Switzerland, Turkey, the Netherlands, and Italy).

33. *Field*, 532 F.2d at 410.

34. *Id.*



Treaty must address problems which arise due to the conflicting goals of the United States prosecutorial system and the Cayman Islands and United Kingdom law geared at protecting crucial, yet confidential, evidence.

The Cayman Islands has become a haven for illegally obtained funds, regardless of the source.<sup>35</sup> The Cayman Islands has many laws governing the release of confidential information. The most widely cited law is the Confidential Relationships (Preservation) Law (CRP Law). It applies to ". . . all confidential information with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout."<sup>36</sup>

This law was tested in *United States v. Carver*,<sup>37</sup> where the Cayman Court of Appeals overruled the lower court and granted letters rogatory<sup>38</sup> for the production of documents held by a Cayman bank within the jurisdiction of the Cayman Islands.<sup>39</sup> The court developed a "two-step procedure by which confidential information held by banks [and other nonparties] in the Cayman Islands could be obtained through formal requests for international judicial assistance."<sup>40</sup> In the first step, the judge must decide whether the person "can be required to give evidence as to confidential information."<sup>41</sup> Next, the judge must determine "whether, to what extent, and subject to what conditions such a person is to be allowed to give . . . evidence."<sup>42</sup> In *Carver*, the court then or-

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35. Weiland, *supra* note 6, at 1122.

36. The law concerning confidential information in the Cayman Islands is governed by the Confidential Relationships (Preservation) Law (Law 16 of 1976) [hereinafter CRP Law], and the Confidential Relationships (Preservation) (Amendment) Law, 1979 (Law 26 of 1979). Pursuant to these laws, all information in banking records is "confidential information" and may not be released by a bank without free and full consent of the holder of the account or without an Order of the Grand Court of the Cayman Islands. The release of confidential information without such consent or order subjects the bank officer to criminal penalties of a fine not to exceed \$10,000 or imprisonment not to exceed four years or both. See Weiland, *supra* note 6, at 1123-26, and Comment, *supra* note 25, at 151.

37. Weiland, *supra* note 6, at 1126; *United States v. Carver*, No. 5 (Cayman Islands Civil Appeals 1982) (unpublished), *aff'd sub. nom.*, *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983). The decision of the Cayman Islands Civil Appeals Court appears in *Transnational Litigation: Practical Approaches to Conflicts and Accommodations*, A.B.A. Div. PROF. EDUC. NAT'L INST. 1584, 1593 (March 1984) [hereinafter NATIONAL INSTITUTE].

38. For a brief discussion on letters rogatory, see Ellis & Pisani, *supra* note 1.

39. *Carver*, NATIONAL INSTITUTE, *supra* note 36, at 1588-89.

40. Comment, *supra* note 26, at 155.

41. *Id.* at 156.

42. *Id.*

dered the witness to appear and produce the requested documents and further stated that:

. . . [T]he policy of the legislature is that the Confidentiality Laws of the Cayman Islands should not be used as a blanket device to encourage or foster criminal activities. There is nothing in the statute to suggest it is the public policy of the Cayman Islands to permit a person to launder the proceeds of crime in the Cayman Islands, secure from detection and punishment.<sup>43</sup>

Justice Department officials hailed this decision as a landmark ruling for future assistance in United States prosecutions.<sup>44</sup> However, it has not relieved the prosecutor or defense attorney of the necessity of obtaining local Cayman counsel and from proceeding in the Cayman courts using the expensive and time consuming letters rogatory procedure.<sup>45</sup> One commentator noted that the key to the *Carver* opinion is the consideration that "confidentiality must fall in the face of clear criminality."<sup>46</sup> He further stated that, "[t]he first important exception (to the general rule pertaining to judicial assistance) is that it is not enough that proceedings of a criminal nature should be contemplated in the requesting countries; they must have actually been instituted."<sup>47</sup>

Another area of concern which should be alleviated by this treaty is the problem of dual responsibilities (e.g., those imposed by United States jurisdiction over a foreign business located within the United States, and those imposed by Cayman Islands secrecy laws); *Field* revisited. The Eleventh Circuit, in *United States v. Bank of Nova Scotia*,<sup>48</sup> (*Nova Scotia I*) set forth the prevailing doctrine regarding extraterritorial enforcement of United States discovery procedures.<sup>49</sup> In *Nova Scotia I*, a federal grand jury investigating a customer of the Bahamian branch of the bank for tax and narcotics violations issued a subpoena *duces tecum* for records

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43. *Id.*

44. *Id.*

45. *Id.* See also Weiland, *supra* note 6, at 1126-27 (statement of Assistant Attorney General Lowell Jensen).

46. *Id.* at 1127.

47. *Id.* at 1128.

48. In re Grand Jury Proceedings, *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) [hereinafter *Nova Scotia I*].

49. Note, *Extraterritorial Jurisdiction of U.S. Courts Regarding the Use of Subpoenas Duces Tecum to Obtain Discovery in Transnational Litigation: The Search for a Limiting Principle*, 16 INT'L L. & POL. 1135 (1984). To compare the way in which the Seventh Circuit approached these issues in the *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983) (question of conflict with Greek law), see *id.* at 1140-41.

and documents held by the bank's main branch or its branch offices.<sup>50</sup> The subpoena was served on the bank's Miami office and contained a request for documents located in the Bahamas. The bank refused to comply claiming that to do so would violate Bahamian bank secrecy laws.<sup>51</sup> The district court found the bank to be subject to the personal jurisdiction of the United States courts and ordered the bank to comply with the subpoena. The court simultaneously imposed civil contempt sanctions against the Miami office.<sup>52</sup> The bank argued that comity between the two countries precluded enforcement of the subpoena by use of contempt sanctions since the bank was subject to conflicting commands of two sovereigns.<sup>53</sup>

The Eleventh Circuit rejected the bank's argument<sup>54</sup> and stated that, "[a]bsent direction from the Legislative and Executive branches of our federal government, we are not willing to emasculate the grand jury process whenever a foreign nation attempts to block our criminal justice process."<sup>55</sup> A foreign national may invoke the foreign government compulsion defense when a law or court order of his country bars him from complying with a United States discovery order.<sup>56</sup> In order to merit this defense, the court must find that the subpoenaed party has made a good faith attempt to obtain from his government a waiver of its restrictions.<sup>57</sup> However, in *Nova Scotia I* and its progeny this defense has been restricted, and blocking statutes, designed to prevent the enforcement of United States discovery abroad, have been enacted.<sup>58</sup>

The bank was served with another grand jury subpoena *duces tecum* subsequent to *Nova Scotia I*.<sup>59</sup> This subpoena extended its reach into the bank's Cayman Islands branch.<sup>60</sup> The bank did not produce the documents and filed a motion to quash. The district court denied the motion and gave the bank one month to produce

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50. *Nova Scotia I*, *supra* note 48, at 1386.

51. *Id.*

52. *Id.* at 1391.

53. *Id.* at 1389.

54. *Id.* at 1388-89.

55. *Id.* at 1391.

56. Note, *supra* note 49, at 1146.

57. *Id.* (citing *Montship Lines v. Federal Maritime Bd.*, 295 F.2d 147 (D.C. Cir. 1961)).

58. *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied* 469 U.S. 1106 (1985) [hereinafter *Nova Scotia II*]; Comment, *supra* note 26, at 158-63.

59. *Nova Scotia II*, 740 F.2d at 820.

60. *Id.* at 821.

the documents.<sup>61</sup> The bank unsuccessfully petitioned the Grand Court of the Cayman Islands for permission to reveal the requested confidential information.<sup>62</sup> The bank filed another motion to quash, which the district court denied and gave the bank seven days in which to comply.<sup>63</sup> At a later hearing, the bank produced a single document. The court found the bank in contempt and assessed a fine of \$25,000 per day until the bank complied with the subpoena.<sup>64</sup> The Eleventh Circuit stayed the fine pending oral argument.<sup>65</sup> During the stay, the Governor of the Cayman Islands authorized the bank to disclose the documents.<sup>66</sup> The Eleventh Circuit, therefore, remanded the case to the district court. The bank then produced a "Gentlemen's Agreement" entered into by the United States and the Cayman Islands which detailed the procedure to be followed by the United States when requesting confidential information from the Cayman Islands.<sup>67</sup> The district court continued to hold that the existence of this agreement was without consequence to this proceeding, and that the bank failed to act in good faith. The court assessed a civil contempt fine of \$1,825,000 on the bank.<sup>68</sup> On appeal, the Eleventh Circuit agreed with the district court's findings,<sup>69</sup> affirming the district court's decision, and concluding that the "Gentlemen's Agreement" was "nothing more than a nonbinding diplomatic device to reconcile the conflicts in jurisdiction . . . and . . . to obtain a more successful political arrangement."<sup>70</sup>

On July 26, 1984, in response to the litigation involving the the Bank of Nova Scotia, the United States, the United Kingdom, and the Cayman Islands signed and exchanged letters regarding a procedural mechanism by which the Attorney General of the United States could obtain documentary evidence from a Cayman bank. Under this procedure, the maximum turn-around time for

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* The authorization was made pursuant to section 3(2)(b)(iv) of the CRP Law. See, Comment, *supra* note 26, at 159 n.185.

67. *Nova Scotia II*, 740 F.2d at 824. For the text of the Agreement see, Comment, *supra* note 26, at 159 n.187.

68. *Nova Scotia II*, 740 F.2d at 824-30.

69. *Id.* at 830. See also, Comment, *supra* note 26, at 162.

70. *Nova Scotia II*, 740 F.2d at 830.

information requested would be fourteen days.<sup>71</sup> This agreement was limited exclusively to matters falling within article 36 of the Single Convention on Narcotic Drugs.<sup>72</sup> The effective date of agreement was August 27, 1984, and it was scheduled to expire fifteen months later.<sup>73</sup> Due to the possibility of the United States, the United Kingdom, and the Cayman Islands negotiating a comprehensive treaty, the agreement was extended, first on November 29, 1985, again on May 28, 1986, again on November 26, 1986, and most recently on May 29, 1987.<sup>74</sup>

### III. A COMPARISON OF THE PROVISIONS OF THE UNITED STATES - CAYMAN ISLANDS TREATY WITH THE UNITED STATES - SWISS TREATY

The problems of obtaining confidential information from an offshore institution are complex and time consuming. The importance of the mutual legal assistance treaty between the United States and the Cayman Islands can be appreciated more fully by comparing its provisions with those of past treaties, and predicting its future ramifications. One should examine this treaty to evaluate whether it has facilitated the process involved in obtaining necessary documents and testimony in the eleven years since *Field* was decided.

#### A. Article 1 - Scope of Assistance

Article 1 provides for mutual assistance in the "investigation, prosecution, and suppression of criminal offenses."<sup>75</sup> The Treaty

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71. Comment, *supra* note 26, at 162. This transaction is known as the Exchange of Letters Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Cayman Islands and Matters Connected With, Arising From, Related To, or Resulting From Any Narcotic Drugs, as amended by the Protocol Amending the Single Convention on Narcotic Drugs (1961), reprinted in 24 I.L.M. 1110 (1985).

In spite of the United States concern with procuring necessary information from the Cayman Islands, one Court of Appeals recently affirmed the quashing of a subpoena *duces tecum*. In *United States v. Rubin*, 836 F.2d 1096 (8th Cir. 1988), the court held that the quashing of a subpoena *duces tecum* served on a Cayman banker was proper in light of the fact that the records sought were those of Cayman Island residents who were neither the targets of a U.S. criminal proceeding nor subject to the laws of the United States.

72. Comment, *supra* note 26, at 162.

73. *Id.* at 163.

74. Telephone interview with Lois Adler, Department of State Legal Affairs Officer (Nov. 3, 1987).

75. Cayman Treaty, *supra* note 15, at art. 1.

permits cooperation at both investigatory and trial stages; in the United States this includes grand jury proceedings. The Treaty also provides for civil and administrative proceedings relating to narcotic trafficking.<sup>76</sup> This Treaty is solely for "government-to-government mutual assistance," therefore no right is created on the part of private persons to obtain, suppress, or exclude any evidence, or impede the execution of any request.<sup>77</sup> Specifically, the Treaty permits:

- (a) taking the testimony or statements of persons; (b) providing documents, records, and articles of evidence; (c) serving documents; (d) locating persons; (e) transferring persons in custody for testimony; (f) executing requests for searches and seizures; (g) immobilizing criminally obtained assets; (h) assistance in proceedings related to forfeiture, restitution and collection of fines; and (i) any other steps deemed appropriate by both Central Authorities.<sup>78</sup>

These broad provisions greatly simplify the task of retrieving evidence and testimony located in the foreign jurisdiction.

The United States-Cayman Islands Treaty is simpler and more comprehensive than the earlier Swiss Treaty. For example, there is no provision in the Swiss Treaty for executing searches and seizures. When such a need arises, an ancillary administrative proceeding must be conducted, and such an agreement needs to be evidenced by an exchange of diplomatic notes.<sup>79</sup> No such extra step is needed in the United States-Cayman Islands Treaty. The Swiss Treaty has a unique provision which allows for compensation to persons suffering damages resulting from unjustified detention;<sup>80</sup> no such compensation is offered by the United States-Cayman Islands Treaty.<sup>81</sup> In addition, the Swiss Treaty encompasses a principle known as dual criminality, a concept which is diluted in the United States-Cayman Islands Treaty. This principle requires that the offense not only be a crime in the requesting party's jurisdiction, but also be a crime in the requested party's jurisdiction.<sup>82</sup> Those crimes that fall within the scope of the Swiss Treaty are

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76. Letter of Submittal, *supra* note 3, at v. See, Ellis & Pisani, *supra* note 1, at 199.

77. Cayman Treaty, *supra* note 15, at art. 1(3).

78. *Id.* at art. 1(2)a - i.

79. Swiss Treaty, *supra* note 3, at art. 1(3).

80. *Id.* at art. 1(1)(c).

81. Swiss Treaty, *supra* note 3, at art. 4.

82. *Id.* at art. 18, art. 4(3), and those articles dealing with organized crime.

listed in a schedule appended to it.<sup>83</sup> In the United States-Cayman Islands Treaty the crime also must be a crime in the requesting and requested party's jurisdiction. However, the definitions are so broad in the Cayman Treaty that it is difficult to conceive of a crime that is not within this provision, except those crimes that are explicitly excluded by the Treaty.<sup>84</sup>

### *B. Article 2 - Central Authorities*

The Central Authority in each state is "responsible for transmitting, receiving and handling requests under the treaty on behalf of Federal and State Agencies."<sup>85</sup> The Central Authority for the United States shall be the Attorney General or a person designated by him.<sup>86</sup> The Central Authority for the Cayman Islands shall be the Cayman Mutual Legal Assistance Authority or a person designated by it.<sup>87</sup> All requests under this Treaty shall be made by the Central Authority of the requesting party to the Central Authority of the requested party.<sup>88</sup>

The Swiss Treaty procedure is identical.<sup>89</sup> It has been said that "one of the main reasons for the success of the treaty is that Article 28 sets up a central clearinghouse for Treaty requests in each country's Department of Justice, and . . . provides for direct communication between the two Justice Departments."<sup>90</sup> This principle was copied in the United States-Cayman Islands Treaty and enables the countries to address the other's request without creating unnecessary red tape.

### *C. Article 3 - Limitations on Assistance*

Article 3 specifically excludes from the Cayman Treaty's scope:

any matter which relates directly or indirectly to the regulation, including the imposition, calculation, and collection, of taxes;

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83. Cayman Treaty, *supra* note 15, at art. 1.

84. Letter of Submittal, *supra* note 3, at v.

85. Cayman Treaty, *supra* note 15, at art. 2(2).

86. *Id.*

87. Cayman Treaty, *supra* note 15, at art. 2(3).

88. *Id.*

89. Swiss Treaty, *supra* note 3, at art. 28.

90. Chamblee, *International Legal Assistance in Criminal Cases in I TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS*, 188, 226 (1984).

except for any matter falling within Article 19 subparagraphs 3(d) and 3(e) which deals with willfully or dishonestly obtaining money, property, or valuable securities by false pretenses and willfully or dishonestly making false statements to government tax authorities with respect to tax matters arising from unlawful proceeds; or any conduct not punishable by imprisonment of more than one year.<sup>91</sup>

The Treaty also permits a party to deny assistance if the request does not conform with the Treaty. Assistance also is denied where the request relates to a political offense or to an offense under military law which would not be an offense under ordinary criminal law.<sup>92</sup> Assistance may be barred if the request fails to establish "reasonable grounds," i.e., a precise, rational explanation for believing that the requested information is in the territory of the requested party. Assistance also may be barred if the request is contrary to the requested party's public interest.<sup>93</sup> The phrase "public interest" is to be construed narrowly.<sup>94</sup> Therefore, the parties cannot refuse to execute a request on some ambiguous or capricious policy rationale. In addition, the Treaty has alternate avenues of approach to save a request, rather than simply disposing of it, if it encounters one of the above-mentioned barriers. The two parties must determine whether the assistance can be given and, if given, subject to what conditions.<sup>95</sup> If the two parties agree to certain conditions, the requesting party must abide by those conditions. In essence, the Treaty is broadly defined as to scope, but several technical requirements must be met and some areas are excluded completely.

The Swiss Treaty excludes similar areas from its scope; for example, investigations or proceedings dealing with political offenses, and military obligations which are not punishable under ordinary criminal statutes.<sup>96</sup> The Swiss Treaty also excludes the extraditions or arrests of persons convicted of committing a crime and those proceedings which deal with cartel or anti-trust laws.<sup>97</sup> These exclusions, however, are subject to some exceptions.<sup>98</sup>

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91. Cayman Treaty, *supra* note 15, at art. 3(1)a and b, and art. 19(3) and e.

92. *Id.* at art. 3(2)a, b and c.

93. Letter of Submittal, *supra* note 3, at vi.

94. *Id.*

95. Cayman Treaty, *supra* note 15, at art. 3(4).

96. Swiss Treaty, *supra* note 3, at art. 2(1)c.

97. *Id.* at art. 2(1)a, b, and c(4).

98. *Id.* at art. 2(2).



*D. Article 4 - Form and Contents of Requests*

The requesting party is to follow the form and contents of the procedure agreed upon by the Central Authorities.<sup>99</sup> The requests shall be submitted in writing and shall contain:

- (a) the name of the authority conducting the investigation . . . ;
- (b) the subject matter and nature of the investigation . . . ; (c) information concerning the persons involved . . . ; (d) the information relied upon in support of the request . . . ; (e) a description of the evidence, information or other assistance sought . . . ;
- (f) the purpose for which the evidence or information or other assistance is sought; and (g) the identity and presumed location, where known, of any person from whom evidence is sought.<sup>100</sup>

The request should be specific and informative so that the requested party can quickly and efficiently respond. The requesting party is urged to find out all it can from all available sources before soliciting the help of the requested party. If possible, the request shall contain other helpful information "to the extent necessary and possible."<sup>101</sup> The Swiss Treaty has an almost identical provision.<sup>102</sup>

*E. Article 5 - Execution of Requests*

The Central Authority of the requested party, according to Article 5, is obligated to do everything in its power to execute the request promptly.<sup>103</sup> The courts of the requested party shall have

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99. Cayman Treaty, *supra* note 15, at art. 4(1).

100. *Id.* at art. 4(2) a-g.

101. Art. 4(3) of the Cayman Treaty reads:

To the extent necessary and possible, a request shall also include: (a) the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made; (b) available information on the identity and the whereabouts of a person to be located; (c) a precise description of the place or person to be served and of the articles to be seized; (d) a description of the manner in which any testimony or statement is to be taken and recorded; (e) a list of questions to be asked of a witness; (f) a description of any particular procedure to be followed in executing the request; (g) information as to the allowances and expenses to which a person asked to appear in the territory of the Requesting Party will be entitled; and (h) any other information which may be brought to the attention of the Requested Party to facilitate its execution of the request.

Cayman Treaty, *supra* note 15, at art. 4(3).

102. Swiss Treaty, *supra*, note 3, at art. 29.

103. Cayman Treaty, *supra* note 15, at art. 5(1).

jurisdiction to issue subpoenas, search warrants, or other orders necessary to execute the request.<sup>104</sup> Such necessary administrative or judicial action is to be arranged without cost to the requesting party.<sup>105</sup> This provision is particularly useful in the area of international legal cooperation where the cost of retaining counsel abroad to present and process letters rogatory can be prohibitive.<sup>106</sup> The request is to be executed in accordance with the laws of the requested party. If allowed under the laws of the requested party or the Treaty, the requested party will execute the request using the method specified by the requesting party. This is provided for "since those methods may be designed by the requesting party to ensure the admissibility of the evidence collected at trial in its country or enhance the utility of the evidence for specific purposes (e.g., to improve the scientific accuracy of forensic tests)."<sup>107</sup> The article also provides for the postponement of the execution of requests if the execution would interfere with an ongoing criminal investigation within the requested party's jurisdiction.<sup>108</sup> The Central Authority of the requested party shall promptly inform the Central Authority of the requesting party of a denied request or if the request can be carried out only by complying with certain conditions.<sup>109</sup> If the request must be denied completely, the Central Authority of the requested party shall inform the Central Authority of the requesting party the reasons for the denial.<sup>110</sup>

The Swiss Treaty provides for the same type of due diligence effort to comply with the requesting party's request.<sup>111</sup> In contrast, the Swiss Treaty makes no mention of special conditions that might be implemented to save a fatally defective request. Nor does the Swiss Treaty require that an explanation be given for the refusal to execute a request. By including these extra requirements, the United States-Cayman Islands Treaty offers the requesting party a better chance of obtaining some type of cooperation even if the request is flawed. The requesting party also is provided with information of why the request was denied to prevent the same mistakes from being made in the future.

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104. *Id.*

105. Letter of Submittal, *supra* note 3, at vi.

106. *Id.*

107. *Id.*

108. Cayman Treaty, *supra* note 15, at art. 5(4).

109. *Id.* at art. 5(4) and 5(5).

110. *Id.* at art. 5(5).

111. Swiss Treaty, *supra* note 3, at art. 9.

*F. Article 6 - Costs*

In general, Article 6 requires that the requested party render assistance without cost to the requesting party unless the Treaty specifically calls for reimbursement. Those costs subject to reimbursement include travel expenses of witnesses, fees of expert witnesses, fees of counsel, costs of stenographic reports (if not prepared by a salaried government employee) and reasonable costs of interpreters or translators.<sup>112</sup> The Swiss Treaty provides for reimbursement for similar expenditures.<sup>113</sup> There is one significant difference. The Cayman Islands Treaty requires reimbursement for the reasonable cost of providing those documents or records specified in a request.<sup>114</sup> Such costs include those incurred when a United States court issues a subpoena for bank or business records.<sup>115</sup> Since this treaty primarily is aimed at catching those persons who hide their money in the Cayman Islands, it would be a very expensive, one-sided burden on the Caymans to assume the cost of providing bank records. The expenses paid for witnesses should be commensurate with those ordinarily paid in the requesting party's territory, but this provision does not prevent the requesting party from exceeding this base level.<sup>116</sup> A requesting party also may provide a witness with money for an attorney.<sup>117</sup>

*G. Article 7 - Limitations on Use*

As with most mutual legal assistance treaties, the Cayman Islands Treaty provides that evidence obtained from the requested party be used only for the purposes stated in the request unless prior consent is given by the requested party.<sup>118</sup> All evidence should be kept confidential unless otherwise agreed by the Central Authorities.<sup>119</sup> The Cayman Islands Treaty is very sensitive to the issue of confidentiality. This concern is consistent with the tradition of bank secrecy and sensitivity to the privacy of financial matters. Just as the disclosed information is to be kept confidential, so

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112. Cayman Treaty, *supra* note 15, at art. 6(1)a-c, e, f.

113. Swiss Treaty, *supra* note 3, at art. 34(1).

114. Cayman Treaty, *supra* note 15, at art. 6(d).

115. Letter of Submittal, *supra* note 3, at vii.

116. *Id.* at vii.

117. *Id.*

118. Cayman Treaty, *supra* note 15, at art. 7(1); Ellis & Pisani, *supra* note 1, at 208.

119. Cayman Treaty, *supra* note 15, at art. 7(2).

too are the requested party's efforts to obtain such evidence.<sup>120</sup> If the requested party can comply with the request only by destroying confidentiality, it shall inform the requesting party of the situation before proceeding.<sup>121</sup> After the evidence is made public (e.g., at trial) the Treaty places additional restrictions on the future use of that evidence<sup>122</sup> in procedures which include, "inquiries, examinations, audits, efforts to identify targets, or use in any prosecution or proceeding other than that for which assistance was granted."<sup>123</sup> This provision, in effect, ensures fair dealing between the parties and curtails abuse of the Treaty.

Article 5 of the Swiss Treaty contains similar limitations dealing with the use of information obtained under the provisions of the Treaty. Article 5 echos a principle common to extradition treaties, known as the *rule of speciality*. In keeping with this principle, the assistance granted under the treaty is exclusively for the purposes stated in the request.<sup>124</sup> This rule has been maintained in the United States-Cayman Islands Treaty. The rule promotes the notion of fair play by providing for full cooperation to the extent agreed upon, and by prohibiting the use of such evidence for purposes beyond the scope of the Treaty.

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120. *Id.* at art. 7(3).

121. *Id.*

122. Art. 7(4) reads:

Except as may be permitted under paragraph 1, any information of evidence obtained under this Treaty which has been made public in the territory of the Requesting Party in a proceeding forming part of the prosecution of a criminal offense described in the request may be used only for the following additional purposes:

(a) where a trial results in a conviction for any criminal offense within the scope of this Treaty, for any purpose against the person(s) convicted;

(b) whether or not a trial results in a conviction of any person, in the prosecution of any person for any criminal offense within the scope of this Treaty; and

(c) in civil or administrative proceedings, only if and to the extent that such proceedings relate to:

(i) the recovery of the unlawful proceeds of a criminal offense within the scope of this Treaty from a person who has knowingly received them;

(ii) the collection of tax or enforcement of tax penalties resulting from the knowing receipt of the unlawful proceeds of a criminal offense within the scope of this Treaty; or

(iii) the recovery *in rem* of the unlawful proceeds or instrumentalities of a criminal offense within the scope of this Treaty.

Cayman Treaty *supra* note 15, at art. 7(4).

123. Letter of Submittal, *supra* note 3, at vii.

124. Chamblee, *supra* note 90, at 224.

*H. Article 8 - Taking Testimony and Producing Evidence in the Territory of the Requested Party*

Article 8 of the United States-Cayman Islands Treaty provides that a person who is to testify or produce articles of evidence within the territory of the requested party may be so compelled by the laws of that party.<sup>125</sup> Even if the person claims immunity or privilege from testifying under the laws of the requesting party, the evidence nonetheless will be taken. The claim or protest will be made known to the requesting party for its determination.<sup>126</sup> This is a major break from the standard set by the Swiss Treaty. Article 10 of the Swiss Treaty states that a "person may not be so compelled if under the law of either State he has a right to refuse."<sup>127</sup> The Swiss provision might be problematic because of a lack of available authority competent to judge whether that person does indeed have a valid right to refuse under the law of the foreign jurisdiction. No such problem exists under the Cayman Islands Treaty. In addition, the Swiss Treaty is very exact regarding when bank records and business records may be disclosed.<sup>128</sup> The Cayman Treaty is not as specific in dealing with the disclosure of bank and business records.

Article 8 of the Cayman Islands Treaty also provides that interested parties may be present during the taking of evidence.<sup>129</sup> Included within the definition of interested parties is the attorney of the witness involved. All documentary evidence gathered shall be authenticated by a form which is appended to the Treaty.<sup>130</sup> This form is consistent with the evidentiary requirements under United States law.

*I. Article 9 - Providing Records of Government Agencies*

Article 9 permits the requested party to provide to the requesting party authenticated, publicly-available government department and agency records.<sup>131</sup> If such documents are not publicly available, they shall be furnished in the same manner as they would be

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125. Cayman Treaty, *supra* note 15, at art. 8(1).

126. *Id.* at art. 8(2).

127. Swiss Treaty, *supra* note 3, at art. 10(1).

128. *Id.* at art. 10(2).

129. Cayman Treaty, *supra* note 15, at art. 8(4).

130. *Id.* at art. 8(5); Letter of Submittal, *supra* note 3, at vii.

131. Cayman Treaty, *supra* note 15, at art. 9(1) & (3).

to the law enforcement agencies and judiciary of the requesting party.<sup>132</sup> According to one commentary, in order to determine whether files are publicly available, the United States Freedom of Information Act should be a helpful guide; however, a record would not be deemed available to the public solely because it is available under this statute.<sup>133</sup> Therefore, not all records can be obtained by the requesting party. The method used in authenticating these documents conforms with United States law as it is embodied in Rule 902(3) of the Federal Rules of Evidence.<sup>134</sup> The Swiss Treaty requirements differ from those in the Cayman Islands Treaty only in that they are more arduous.<sup>135</sup>

*J. Article 10 - Appearance in the Territory of the Requesting Party*

Article 10 enables the requested party to invite a witness to give testimony in the territory of the requesting party. The witness cannot be compelled to be present in the jurisdiction of the requesting party.<sup>136</sup> The witness' expenses shall be absorbed by the requesting party.<sup>137</sup> A witness who complies with the invitation is immune from service of process while within the territory of the requesting party. He also is protected from any infringement on his freedom based on any conduct committed in either territory prior to the date of departure.<sup>138</sup> This "safe conduct," which acts essentially as a shield against prosecution for previous crimes committed in the territory, ceases ten days after proper notice is given to the witness by the appropriate authority, or if that witness leaves the territory and then voluntarily reenters.<sup>139</sup> The Treaty makes reference only to those crimes committed before departure, not those crimes committed while present in the requesting party's territory. Therefore, crimes such as perjury committed during the giving of testimony can be prosecuted without violating the safe conduct provision.<sup>140</sup> The Swiss Treaty contains similar

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132. *Id.* at art. 9(2).

133. 5 U.S.C. § 552 (1976); Ellis & Pisani, *supra* note 1, at 203, 204.

134. Letter of Submittal, *supra* note 3, at vii.

135. Swiss Treaty, *supra* note 3, at arts. 16(1), 18, 19, 20.

136. Cayman Treaty, *supra* note 15, at art. 10(1).

137. *Id.* at art. 6(2).

138. *Id.* at art. 10(2).

139. *Id.* at art. 10(3).

140. Ellis & Pisani, *supra* note 1, at 208.

provisions.<sup>141</sup>

*K. Article 11 - Transferring Persons in Custody for Testimonial Purposes*

Both the Cayman Treaty and the Swiss Treaty provide for the transfer of persons in the custody of the requested state to the requesting state to testify, provided that: 1) the person in custody consents; and 2) the requested party consents.<sup>142</sup> The Swiss Treaty provides further that the transferee be allowed to use the laws of the requesting state to assure that his . . . custody or return is consistent with the constitution of that state.<sup>143</sup> Both treaties are consistent to the extent that the person in custody and the Central Authority must consent to the transfer, but the Swiss Treaty adds the proviso that "no substantial extension of . . . custody is anticipated."<sup>144</sup> Both treaties provide for the safe conduct and health of the transferee.<sup>145</sup> The Cayman Treaty also makes reference to credit for time served if the transferee consents to the request to testify in the requesting state.<sup>146</sup>

Article 11 enhances the underlying policy of the Cayman Treaty of expediting the prosecutorial efforts of the United States while preserving the sovereign integrity of the Cayman Islands. Persons in the custody of Cayman authorities could provide needed information in a variety of cases, but their constitutional rights will not be jeopardized by the thwarting of due process requirements.

*L. Article 12 - Location of Persons*

Both the Cayman Treaty and the Swiss Treaty provide for assistance in locating persons needed for the investigation, prosecution, or suppression of a criminal activity within the requesting state.<sup>147</sup> This provision is standardized in most mutual assistance treaties. It requires that the requested party take all necessary steps to locate or identify persons, such as witnesses, who are be-

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141. Swiss Treaty, *supra* note 3, at arts. 23 and 27.

142. *Id.* at art. 26(2)(a),(c); Cayman Treaty, *supra* note 15, at art. 11(1).

143. Swiss Treaty, *supra* note 3, at art. 26(4).

144. *Id.* at art. 26(2)(b).

145. *Id.* at art. 27; Cayman Treaty, *supra* note 15, at art. 11(3)(a).

146. Cayman Treaty, *supra* note 15, at art. 11(3)(c).

147. Swiss Treaty, *supra* note 3, at art. 11; Cayman Treaty, *supra* note 15, at art. 12(1).

lieved to be within its territory,<sup>148</sup> regardless of the availability of compulsory measures.<sup>149</sup> This provision strengthens the cooperative spirit of the mutual assistance treaty by providing a mechanism to locate needed individuals without becoming entangled in the complexities of a foreign legal system.

#### M. Article 13 - Service of Documents

The requested party shall furnish any document relating to or forming part of any request for assistance which has been properly made under the provisions of the Cayman Treaty and the Swiss Treaty.<sup>150</sup> The Swiss provision relates to procedural documents, whereas the Cayman provision speaks only of documents. Procedural documents do not include arrest warrants, but do include subpoenas and summonses.<sup>151</sup> The Swiss Treaty makes an exception to the requirement that a requested party personally serve a document, other than on a national of the requesting state, if the person served is a defendant in a criminal proceeding to which the request relates.<sup>152</sup> The Swiss considered this provision to be required by their law and policy, and it has no applicability to extradition or arrests.<sup>153</sup> The Cayman Treaty excludes the service of any subpoena or other process on any person requested to testify before a tribunal in the requesting state.<sup>154</sup> These provisions are not limitations on Section 1783 of the United States Code, which authorizes the issuance of subpoenas in criminal proceedings to United States citizens who are in a foreign country.<sup>155</sup>

#### N. Article 14 - Search and Seizure

Both the Cayman Treaty and the Swiss Treaty permit search and seizure at the request of the requesting party.<sup>156</sup> The request

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148. Letter of Submittal, *supra* note 3, at vii.

149. Technical Analysis of the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters signed May 25, 1973, reprinted in Message From The President Of The United States dated February 18, 1976 at 49 [hereinafter Technical Analysis].

150. Swiss Treaty, *supra* note 3, at art. 22, Cayman Treaty, *supra* note 15, at art. 13.

151. Technical Analysis, *supra* note 149, at 57.

152. Swiss Treaty, *supra* note 3, at art. 22(2).

153. Technical Analysis, *supra* note 149, at 57.

154. Cayman Treaty, *supra* note 15, at art. 13(1).

155. Technical Analysis, *supra* note 149, at 57.

156. Cayman Treaty, *supra* note 15, at art. 14. See Ellis & Pisani, *supra* note 1, at 204 n.85 (stating that this is implied in the Swiss Treaty in article 31(2)).



must contain enough information to justify a search and seizure under the laws of the requested party.<sup>157</sup> One commentator noted that a request from one country to the United States would have to be supported by a showing of probable cause, and corresponding compliance with other country's evidentiary standards.<sup>158</sup> The Cayman Treaty allows an exception to the U.S. hearsay rule. It allows evidence seized to be admitted without additional proof of chain of custody, if every official who has had custody of the seized article certifies the continuity of custody, identity, and integrity of its condition.<sup>159</sup> The Swiss Treaty provision dealing with search and seizure is patterned after Rule 902(3) of the Federal Rules of Evidence.<sup>160</sup>

#### O. Article 16 - Proceeds of Crime

The subject matter of article 16 of the Cayman Treaty is not found in its Swiss counterpart. This article provides assistance with the forfeiture or restitution of proceeds of a criminal offense as defined in the Treaty. The collection of fines imposed as a sentence for a criminal offense also is covered by this provision.<sup>161</sup> The definition of proceeds includes, but is not limited to, money, valuable assets used in the perpetration of a criminal offense, and valuable assets obtained as a benefit of a crime.<sup>162</sup> A temporary restraining order may be issued until an action for the recovery of assets can be commenced.<sup>163</sup>

This provision allows for "assistance in an area in which countries do not necessarily otherwise assist each other in the execution of their penal laws."<sup>164</sup> This article is consistent with laws which provide for the equitable sharing of forfeited property with a foreign government involved in a narcotics investigation.<sup>165</sup> In this treaty, proceeds cover a greater variety of criminal offenses than

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157. Cayman Treaty, *supra* note 15, at art. 14.

158. Ellis & Pisani, *supra* note 1, at 204. See Cayman Treaty, *supra* note 15, at art. 14(1); Letter of Submittal, *supra* note 3, at viii.

159. Cayman Treaty, *supra* note 15, at art. 14(2); Ellis & Pisani, *supra* note 3, at 204. This Note will not discuss Cayman Treaty article 15 and its corollary, Swiss Treaty article 35, which provide for the return of any items furnished by the requested party.

160. Swiss Treaty, *supra* note 3, at arts. 18(4), 20.

161. Cayman Treaty, *supra* note 15, at art. 16(2)c.

162. Letter of Submittal, *supra* note 3, at ix.

163. *Id.*

164. *Id.*

165. *Id.*

prior mutual assistance treaties.<sup>166</sup>

*P. Article 17 - Exclusivity*

Both treaties permit the use of other relevant international agreements or arrangements which may offer alternative means of securing assistance.<sup>167</sup> However, under both treaties, if the assistance falls squarely within the treaty's provisions, the parties must follow the treaty's procedures for obtaining the needed information.<sup>168</sup> The Cayman Treaty provides that any compulsory measures, including a grand jury subpoena for the production of documents in the requested territory, must first comply with the procedures set out in the Treaty before they will be enforced.<sup>169</sup> This provision "addresses a particular Cayman and British concern for respecting Cayman's bank secrecy laws."<sup>170</sup> A notice from the requesting party that a denial of the enforcement will jeopardize a successful investigation or prosecution, marks the commencement of a ninety-day period within which any enforcement request must be fulfilled.<sup>171</sup> This provision seems to favor prosecutorial efforts and weighs against Cayman sovereignty.

Article 17 does not cover administrative summonses, such as those from the Internal Revenue Service or the Securities and Exchange Commission, provided the matter under investigation is not a criminal offense as defined by article 19 of the Cayman Treaty.<sup>172</sup> Article 17 does not limit the right to serve a subpoena or warrant on one who is within the jurisdiction of the United States, even though disclosure may be protected by Cayman secrecy laws.<sup>173</sup>

The Swiss Treaty is more detailed than the Cayman Treaty with regard to the applicability of international agreements and the role of municipal laws in either country. The Swiss Treaty provides that either the United States or Switzerland may conduct

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166. Compare art. 19 of the Treaty, *supra* note 15, at art. 19 with Schedule of Offenses and arts. 6-8 of the Swiss Treaty, *supra* note 3.

167. Swiss Treaty, *supra* note 3, at art. 38; Cayman Treaty, *supra* note 15, at art. 17; Letter of Submittal, *supra* note 3, at ix ("arrangements" include but are not limited to such international organizations as Interpol).

168. Cayman Treaty, *supra* note 15, at art. 17(2); Swiss Treaty, *supra* note 3, at art. 38(1).

169. Cayman Treaty, *supra* note 15, at art. 17(3), (4).

170. Letter of Submittal, *supra* note 3, at ix.

171. Cayman Treaty, *supra* note 15, at art. 17(4).

172. Letter of Submittal, *supra* note 3, at ix.

173. *Id.*

investigations and proceedings in criminal matters in accordance with its own municipal laws. Therefore, alternative means that otherwise become available outside the guidance of the treaty are not limiting.<sup>174</sup> However, the rule that the treaty shall take precedence over any inconsistent provisions of the municipal laws in either country is dominant.<sup>175</sup> The 1951 Income Tax Convention between the United States and Switzerland governs exclusively in income tax investigations, unless the investigation relates specifically to organized crime.<sup>176</sup>

*Q. Article 18 - Consultations*

At mutually agreed upon times, the Central Authorities will meet to keep each other informed as to the status and disposition of the evidence obtained under the respective treaties.<sup>177</sup> The Swiss Treaty is more comprehensive and complex with regard to the process of dispute resolution or interpretation of the treaty and its application. Under the Swiss Treaty, if the Central Authorities cannot resolve these difficulties by mutual agreement, then the dispute shall be submitted to an arbitral tribunal of three members upon request.<sup>178</sup> Each Central Authority shall appoint one arbitrator, who together shall appoint a third neutral arbitrator to act as chairman.<sup>179</sup> If either Central Authority fails to appoint its arbitrator within three months of the request, the President of the International Court of Justice shall select the arbitrator. If the chairman is not chosen within two months he will be selected in the same manner.<sup>180</sup> The decisions of the tribunal shall be binding on both parties.<sup>181</sup>

The Cayman Treaty, in contrast, is much simpler and requires only that the difficulty be resolved by way of consultation. Diplomatic and political branches therefore can lend assistance and by-

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174. Swiss Treaty, *supra* note 3, at art. 38; Technical Assistance *supra* note 149, at 64.

175. *Id.* However, Swiss Treaty art. 38(3) provides for the limited exception regarding economic espionage and bank secrecy. See Articles 3 and 10 for further detail.

176. Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, May 24, 1951, 2 U.S.T. 1751, T.I.A.S. No. 2316. See Technical Analysis, *supra* note 149, at 64.

177. Cayman Treaty, *supra* note 15, at art. 18(1); Swiss Treaty, *supra* note 3, at art. 39(1).

178. Swiss Treaty, *supra* note 3, at art. 39(2).

179. *Id.*

180. *Id.* at 39(3).

181. *Id.* at 39(7).

pass the arbitration process.<sup>182</sup>

#### R. Article 19 - Definitions

This provision delineates all those offenses which fall within the scope of the Treaty. If a request is made pursuant to an investigation for a criminal act that is not included in article 19, then the request cannot be granted.<sup>183</sup> The Cayman Treaty includes criminal offenses which are punishable by imprisonment for more than one year, as defined by the laws of both the United States and the Cayman Islands. These criminal offenses include racketeering, drug trafficking, failing to report transfers of illegally acquired money, fraud in connection with tax shelters, tax evasion, insider trading, and violations of the Foreign Corrupt Practices Act. Any crime that is deemed appropriate may be added to this article in the future.<sup>184</sup> The Swiss Treaty contains a schedule of offenses for which compulsory measures provided under the Treaty are available.<sup>185</sup> The Swiss Treaty schedule is very specific and detailed as to the type of crime that falls within the provisions of the Treaty and leaves little room for creative manipulation or interpretation compared with the Cayman Treaty.<sup>186</sup>

### IV. THE SPECIFIC PROBLEM OF INSIDER TRADING

In article 19(3)g, the Cayman Treaty defines insider trading as "[t]he offer, purchase, or sale of securities by any person while in possession of material non-public information directly or indirectly relating to the securities offered, purchased, or sold, in breach of a legally binding duty of trust or confidence."<sup>187</sup> The significance of this single provision can only be appreciated by reviewing the history of United States-Swiss insider trading problems; the Swiss

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182. Cayman Treaty, *supra* note 15, at art. 18(2).

183. *Id.* at arts. 1, 3, and 4.

184. Cayman Treaty, *supra* note 15, at art. 19(3); Letter of Submittal, *supra* note 3, at ix-x.

185. Swiss Treaty, *supra* note 3, at Schedule of Offenses.

186. Compare *id.* with Cayman Treaty, *supra* note 15, at art. 19.

187. Cayman Treaty, *supra* note 15, at art. 19(3)g. For the specific offenses listed under the Cayman Treaty see the full text of art. 19. See also Klock, *A Comparative Analysis of Recent Accords which Facilitate Transnational SEC Investigations of Insider Trading*, 11 MD. J. INT'L L. & TRADE 243, for a brief discussion concerning insider trading and Switzerland, the United Kingdom, Japan, the Cayman Islands, and Canada, including a reproduced copy of the Cayman Treaty.

Treaty does not contain a provision similar to that in the Cayman Treaty.

On August 31, 1982, the United States and Switzerland signed a Memorandum of Understanding. This Memorandum detailed the method by which violators of U.S. securities laws could be pursued.<sup>188</sup> Insider trading occurs when those with material, nonpublic information trade on the basis of that information.<sup>189</sup> Swiss banks are authorized and permitted to trade on behalf of their customers. Bank records which might reveal trading activity are protected under Swiss bank secrecy laws; therefore, bank customers are sheltered from possible prosecution for insider trading.<sup>190</sup> Swiss bank secrecy laws also forbid the disclosure of the names of customers whose accounts have been involved in bank transactions.<sup>191</sup> Over the past six years, the Swiss have traded over \$8.5 billion of equity and \$337 million in corporate bonds annually. These transactions have created opportunities for market abuse.<sup>192</sup> A detailed analysis of Swiss insider trading is beyond the scope of this comment; however, a brief procedural history is helpful.

The Memorandum of Understanding between the United States and Switzerland had two functions. First, it reaffirmed the commitment between the United States and Switzerland to use and exchange opinions clarifying the availability of assistance under the Swiss Treaty; second, it outlined an agreement among the members of the Swiss Bankers Association (SBA) establishing a procedure by which the Securities and Exchange Commission

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188. Switzerland-United States: Memorandum of Understanding to Establish Mutually Acceptable Means For Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, 22 ILM. 1 (1983) [hereinafter Memorandum]; Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C.J. INT'L & COM. REG. 1 (1983); Raifman, *The Effect of the U.S.-Swiss Agreement on Swiss Banking Secrecy and Insider Trading*, 15 LAW & POL'Y INT'L BUS. 565 (1983); Rushford, *The Effect of Swiss Bank Secrecy on the Enforcement of Insider Trading Regulations and the Memorandum of Understanding Between the United States and Switzerland*, 7 BRIT. COLUM. INT'L & COMP. L. REV. 541 (1984); Note, *Insider Trading Laws and Swiss Banks: Recent Hope for Reconciliation*, 22 COLUM. J. TRANSNAT'L L. 303 (1984) (authored by John Hansen). Unlike a treaty, a memorandum of understanding is not a binding agreement requiring the ratification by the United States Senate and the Swiss Parliament.

189. Rushford, *supra* note 188, at 542 (citing *T.S.C. Indus. v. Northway*, 426 U.S. 438, 449 (1976)); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

190. Rushford, *supra* note 188, at 542.

191. *Id.* at n.16.

192. *Id.* at 543 n.19.

(SEC) could obtain assistance with insider trading investigations that were not covered by the Swiss Treaty.<sup>193</sup> The proposed private agreement among the members of the SBA was designed to deal with requests from the SEC, and was attached to the Memorandum.<sup>194</sup> The Memorandum and Agreement were temporary measures intended to address SEC requests prior to the enactment of a Swiss penal law. This penal law was designed to subject securities violations and insider trading *per se* to criminal prosecution. This fulfilled the Swiss Treaty's mandate of dual criminality.<sup>195</sup>

As noted above, assistance under the Swiss Treaty is available only for offenses that are crimes in both countries. Trading on the basis of inside information was not a crime in Switzerland at the time the Swiss Treaty was enacted, and is not provided for in the Schedule of Offenses.<sup>196</sup> In essence, a Swiss bank customer could engage in insider trading with the assurance that the Swiss bank secrecy laws would protect his or her identity.<sup>197</sup> However, the Memorandum lightened constraints on United States efforts to obtain information regarded as confidential under Swiss law in three major areas. First, the Memorandum addressed the issue of fraud. The schedule of offenses defines fraud as a criminal offense,<sup>198</sup> but it was unclear whether a securities violation was considered fraud under the Treaty. This created a problem because securities violations as characterized by United States law were not criminal offenses under Swiss law.<sup>199</sup> The Memorandum resolved this dilemma by focusing on certain provisions of the Swiss Penal Code which define "transactions effected by persons in possession of material non-public information" to be crimes.<sup>200</sup>

The second problem addressed by the Memorandum con-

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193. *Id.* at 561-62.

194. Raifman, *supra* note 188, at 600. This private agreement is known as Agreement XVI of the Swiss Banker's Association with Regard to the Handling of Requests for Information from the Securities and Exchange Commission of the United States on the Subject of Misuses of Inside Information, dated July 14, 1982, 22 I.L.M. 7 (1983) [hereinafter Agreement]. This Agreement was limited in scope as to the availability and use of evidence that was obtained through the private mechanism established between the SBA and the SEC.

195. Raifman, *supra* note 188, at 609. Rushford, *supra*, note 188, at 562. See Swiss Treaty, *supra* note 3, at art. 4.

196. Raifman, *supra* note 188, at 565; Rushford, *supra* note 188, at 555. Swiss Treaty, *supra* note 3, at Schedule of Offenses.

197. Rushford, *supra* note 188, at 555.

198. Swiss Treaty, *supra* note 3, Schedule, section 19.

199. Rushford, *supra* note 188, at 562 n. 211 and accompanying text.

200. *Id.* at n.215 and accompanying text.

cerned the distinction between the initiation of civil and criminal suits.<sup>201</sup> The Swiss Treaty applies to those offenses considered crimes in both the United States and Switzerland, and those offenses specifically listed in the Schedule of Offenses. Most suits initiated by the SEC are either civil or administrative in nature, and therefore fall between the cracks and escape the purview under the Swiss Treaty.<sup>202</sup> Article II(3)(a) of the Memorandum provides for "mutual assistance in investigations or court proceedings in respect [to] offenses the punishment of which falls or would fall within the judicial authorities of the requesting state . . ." This has been interpreted to extend assistance under the Swiss Treaty, provided the offense is one that "could be prosecuted in criminal courts."<sup>203</sup> Therefore, where the SEC initiates an investigation into suspected insider trading, the Memorandum allows access to the Swiss Treaty because some securities violations may be referred to the Department of Justice for criminal prosecution.<sup>204</sup>

The third area addressed by the Memorandum is the use of information obtained under the Swiss Treaty.<sup>205</sup> Evidence obtained pursuant to a request under the Swiss Treaty was limited to use in criminal proceedings only. This created a problem when the SEC initiated civil proceedings.<sup>206</sup> Article II of the Memorandum states that sometime in the future the United States and Switzerland would, by means of a Diplomatic Exchange of Notes, allow evidence obtained under the treaty to be utilized in proceedings "in which sanctions and remedies are available other than prison sentences and fines imposed in criminal prosecutions."<sup>207</sup> The Ex-

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201. *Id.* at 563.

202. *Id.*

203. *Id.*

204. *Id.* at n.219. Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78) and Rule 10b-5 of the Rules and Regulations under the Securities Exchange Act of 1934 (17 C.F.R. 240.10b-5) are the main provisions regulating insider trading in the United States. Section 16(b) requires insiders (an officer or director of a company that has a class of equity securities registered under the 1934 act) to remit to their companies any profit made on the purchase or sale of company stock made within a single six-month period. However, section 16(b) enforcement must be brought by the corporation or shareholder, and not the SEC. Rule 10b-5 generally allows the SEC to adopt rules and regulations prohibiting the use of "any manipulative or deceptive device" in connection with the purchase or sale of a security. As stated, Swiss bank secrecy laws prohibit disclosure of any information about customers and their transactions including names, amounts, deposit and withdrawal activities, therefore avoiding the reporting requirements of section 16(b) and the identity requirements of Rule 10b-5. Rushford, *supra* note 188, at 552-554.

205. Rushford, *supra* note 188, at 563.

206. *Id.* at 564. See Swiss Treaty, *supra* note 3, at art. 5.

207. Rushford, *supra* note 188, at 564.

change of Notes was signed on November 10, 1987.<sup>208</sup>

The Exchange of Notes specifically refers to the Swiss Treaty and in particular to Article 1, paragraph 3 which provides that assistance under the Swiss Treaty will be given in certain ancillary administrative proceedings against one who commits an offense under the terms of the Swiss Treaty.<sup>209</sup> The Exchange of Notes clearly delineates to which ancillary administrative proceedings the Swiss Treaty was referring, and further clarifies the above-mentioned problems regarding the passage of the Memorandum and accompanying Agreement.

The Exchange of Notes states that if assistance under the Swiss Treaty can be granted with a view towards possible criminal action in the United States, then assistance will be extended to investigations and proceedings initiated by the SEC that involve insider trading offenses.<sup>210</sup> The Exchange of Notes stresses that the Swiss Treaty provides "an important means of obtaining information . . . and should be used to the extent possible."<sup>211</sup> The Exchange of Notes concludes by focusing on possible future assistance under the Swiss Treaty being granted, with a view towards possible criminal proceedings in Switzerland, referring to the possible adoption of a general law under the Swiss Penal Code prohibiting insider trading. With this in mind, the assistance will be granted by competent Swiss authorities with respect to offenses that involve insider trading and are likewise covered by the Swiss

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208. Exchange of Notes between the United States and the Swiss Confederation, signed Nov. 10, 1987, [hereinafter Notes] (unpublished) (available at offices of the University of Miami Inter-American Law Review).

209. *Id.*

210. *Id.* at 2. The Notes allow assistance in the following ancillary proceedings: (1) suits in a court of the United States seeking permanent or preliminary injunctions or temporary restraining orders; (2) suits in a court of the United States seeking other equitable relief ancillary to the relief sought in paragraph (1) above, such as a freeze of assets or the disgorgement of profits gained (or losses avoided) as a result of violative conduct; (3) suits in a court of the United States seeking the imposition of a civil penalty or fine, provided however, that if evidence or information is obtained pursuant to a grant of assistance under the Treaty, such evidence or information shall not be used to secure the imposition of a civil penalty or fine to compel a person to act in a way that would be contrary to Swiss law; (4) suits in a court of the United States for an order commanding a person to comply in the future with provisions of the United States securities laws or the rules and regulations promulgated thereunder; and (5) enforcement proceedings conducted before the SEC or an administrative law judge in which the revocation or suspension of the registration of a regulated entity, or a suspension or bar of a person from being associated with such an entity, as a result of violative conduct is sought. *Id.* at 2-3.

211. *Id.* at 3.



Treaty.<sup>213</sup>

On May 1, 1985, Article 161 of the Swiss Penal Code was proposed as the New Insider Bill.<sup>213</sup> The insider must have knowledge of confidential information in order to fall within Article 161. "This information must be apt to influence in a foreseeable manner and to a considerable degree the price of certain securities on a stock market."<sup>214</sup> The person must then use this information to obtain a pecuniary gain for himself or a third party, including profits or the avoidance of losses.<sup>215</sup> Even if the anticipated price movement fails to occur, the attempt qualifies as a punishable offense.<sup>216</sup>

The effects of Article 161 on United States-Swiss relations in this area will be sweeping. Article 161 replaces the provisional

212. *Id.* at 3-4. The assistance will be conducted by the Swiss authorities and is limited in scope. *See id.* at 3-4.

213. Article 161 Penal Code (new), known as the Swiss Insider Bill, was adopted by both chambers of Parliament on December 18, 1987, and has become law. It reads as follows:

Exploitation of Knowledge of Confidential Facts

1. A person who, in his capacity as a member of the board, an officer, an auditor, or a mandated person of a company or a corporation dominating this company or dominated by it, in his capacity as a member of a public authority or as a public officer, or in his capacity as an assistant to such persons, knows a confidential fact whose disclosure can be anticipated to have a significant influence on the market price of the shares, other securities or equivalent negotiable instruments or interests of the company, or on the market price of options thereof, traded on or ancillary to any Swiss stock exchange, and obtains thereby for himself or a third party a pecuniary advantage through the exploitation of this information, or discloses such a fact to any third party and obtains thereby for himself or a third party a pecuniary advantage, shall be punished by imprisonment or by fine.

2. A person to whom such a fact is communicated directly or indirectly by any person described in subsection 1, and who obtains for himself or a third party a pecuniary advantage through the exploitation of this information, shall be punished by imprisonment for not over one year or by a fine.

3. A fact in the meaning of subsection 1 and 2 may be a pending emission of new participatory rights, a merger or a similar set of circumstances of comparable importance.

4. When it is envisaged to bring together two corporations, subsections 1 and 3 apply to both corporations.

5. Subsections 1 to 4 apply by analogy when the exploitation of the knowledge of a confidential fact relates to shares, other securities or negotiable instruments or interests, or options thereof, of a cooperative corporation or of a foreign company.

Copy received courtesy of K. Hochner, Counselor for the Embassy of Switzerland (March 1988) (available in the offices of the University of Miami Inter-American Law Review).

214. Haymann, *Swiss to Outlaw Insider Trading*, INT'L BRIEFINGS (1987).

215. *Id.*

216. *Id.* *See also* Krauskopf, *The New Insider Bill*, printed by the Swiss Federal Office of Justice, March 20, 1987.

Agreement and Memorandum, because it authorizes requests for a wide range of securities violations to be covered under the Swiss Treaty.<sup>217</sup> This includes insider trading in connection with impending mergers and tender offers, covering not only affiliates of the corporations, but also their tippees.<sup>218</sup> Article 161 is not restricted to the classic definition of insiders, but also includes accountants, lawyers and investment bankers.<sup>219</sup>

The most important implication of Article 161 is that it clearly satisfies the dual criminality requirement of the Swiss Treaty. Prior to this proposal no law dealing with insider trading existed in Swiss history. Article 161 is broader in scope than both the Memorandum and the Agreement. It dispenses with most of the banking industry procedures involved in obtaining confidentiality waivers from Swiss bank customers.<sup>220</sup> The Swiss Treaty removes any doubts and hesitancy that may have been associated in applying the Memorandum and Agreement, by confirming both countries' willingness to prosecute securities violations involving the use of inside information.<sup>221</sup> Furthermore, when the terms are clearly met, the application of Article 161 to the Swiss Treaty overrides any conflicting international arrangements. It establishes a bright-line mechanism by which the United States and the Swiss authorities can mutually prosecute suspected criminals. With the recent Diplomatic Exchange of Notes, ancillary civil matters also can be mutually prosecuted. Therefore, the full force of the Swiss Treaty will be at the disposal of the United States prosecutorial authorities, allowing a broader base from which to draw evidence and information needed in securities violations proceedings.

The foregoing was a brief glimpse at the complex problems of United States prosecutorial efforts to obtain information involved in securities violations and the conflicts created by Swiss bank secrecy principles. An overview is essential, however, to illustrate the problems encountered when two countries with differing views on major issues draft a mutual assistance treaty. Insider trading is a major problem in the United States, and the stock exchanges are becoming increasingly sensitive to any influx of foreign capital. Therefore, where a foreign country such as Switzerland has no ap-

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217. Krauskopf, *supra* note 216, at 6.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

plicable legislation regulating and prohibiting insider trading, unscrupulous investors are shielded from United States prosecution. The Exchange of Notes, along with Article 161, will redefine the role of Swiss bank secrecy, international reliance on these secrecy laws, and the ability of United States prosecutorial authorities to stop securities violations abroad.

With respect to the Cayman Treaty, the comprehensive nature of Article 19 section 3(g) gives the United States a free hand in the investigation and prosecution of any insider trading falling within the definition of Article 19.<sup>222</sup> The Cayman Treaty limits civil and administrative proceedings to matters involving narcotics trafficking.<sup>223</sup> This limitation should be analyzed in light of the underlying purposes in the creation of both the Cayman and the Swiss Treaties.

The Swiss Treaty was the first international agreement aimed at obtaining information needed for criminal prosecutions.<sup>224</sup> Combatting organized crime was the major force behind the creation of the treaty.<sup>225</sup> The Cayman Treaty seems focused on controlling the flow of illegal proceeds from the United States to the Cayman Islands, and it is this problem that Article 19 addresses.<sup>226</sup> The drafters of the Cayman Treaty had the foresight to create broad definitional provisions, and leave themselves room to maneuver

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222. Article 19(3)(h) provides:

Fraudulent securities practices, which means the use by any person willfully or dishonestly of any means, directly or indirectly, in connection with the offer, purchase or sale of any security: (i) to employ any device, scheme, or artifice to defraud; (ii) dishonestly to make any untrue statement of a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading; or (iii) dishonestly to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

The language in this subsection is identical to the language used in Rule 10b-5 promulgated under the Securities and Exchange Act of 1934. 15 U.S.C. §§ 78a - 78kk.

223. Cayman Treaty, *supra* note 15, at art. 1(1).

224. Ford, Letter of Transmittal, Feb. 18, 1976, *reprinted in* the Message From The President Of The United States, U.S. Government Printing Office, at III.

225. Ingersoll, Letter of Submittal, Feb. 5, 1976, *reprinted in* Message From The President Of The United States, U.S. Government Printing Office, Feb. 18, 1976, at vi; Swiss Treaty, *supra* note 3, at arts. 6, 7, 8.

226. In the past ten years, the influx of foreign investors into the United States market has accentuated the problems associated with securities transactions. The problems also have been heightened by the lack of regulation in most foreign countries. Specifically, although the Cayman Islands have a vast number of banks, they are not involved in billion dollar transactions on the United States stock markets. Therefore, the resourcefulness of the insider trading provision (non-civil use) is relatively insignificant.

when problems develop. In contrast, the Swiss Treaty is so limited in scope that years of legal proceedings and political efforts to clarify its applicability to United States discovery proceedings have been a nightmare.

#### V. CONCLUSION

A mutual legal assistance treaty, while having the ability to be a mighty international legal tool, can also prove to be frustrating and ineffective if not meticulously drafted with an eye towards future needs. In the sixteen years since the Swiss Treaty, the United States has gained valuable knowledge and expertise in negotiating and drafting such treaties. This newly acquired knowledge is clearly evidenced in the Cayman Islands Treaty. This treaty was carefully drafted to aid United States prosecutors in their pursuit of drug smugglers and security defrauders who flee to the Caymans with their purloined funds and records. It seems apparent that this treaty was brought into existence because of United States impatience with Cayman secrecy laws and its noncompliance with United States subpoenas. The Islands treaty does not seem to contemplate a situation where the Caymans would be the requesting party rather than the requested party. The treaty may appear mutual on its face by the use of neutral terms, yet one must wonder what brought the Cayman government to the negotiating table. One may cite the mutual desire to halt criminals or the desire of the Cayman government to purge itself of the tax haven stigma. Regardless of its motivation, the Cayman government has signed a treaty that saves the United States many steps in its trek to catch wrongdoers who flee its jurisdiction. Considering the United States need for such a treaty, there is no doubt in the authors' minds that this treaty will be hurried into effect. The Cayman Treaty ". . . will enter into force upon the exchange of instruments of ratification."<sup>227</sup>

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227. Cayman Treaty, *supra* note 15, at art. 20.