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The Impact of Swiss Principles of Mutual Assistance on Financial and Fiscal Crimes

Abstract

Contrary to what is generally believed, Switzerland can not refuse assistance to a foreign country on the ground of bank secrecy. Switzerland's international cooperation in criminal cases is circumscribed by its principles of mutual assistance. These principles act as firewalls in protecting fiscal secrets and incidentally limit more effective co-operation in dealing with international financial crimes. They also apply to administrative assistance and reduce the ability of foreign regulators to obtain important information to supervise their markets. Except in the case of tax fraud, Switzerland will not provide any international assistance in fiscal crimes. The Swiss principles of mutual assistance can not be circumvented by using Switzerland's double taxation arrangements. The situation is exacerbated by the very broad Swiss anti-economic espionage laws which seriously impede investigatory activity of foreign governments and their agents in Switzerland.

Keywords

sovereignty, economic espionage, bank secrecy, fiscal offences, financial crimes

THE IMPACT OF SWISS PRINCIPLES OF MUTUAL ASSISTANCE ON FINANCIAL AND FISCAL CRIMES

*Dr David Chaikin**

Contrary to what is generally believed, Switzerland can not refuse assistance to a foreign country on the ground of bank secrecy. Switzerland's international co-operation in criminal cases is circumscribed by its principles of mutual assistance. These principles act as firewalls in protecting fiscal secrets and incidentally limit more effective co-operation in dealing with international financial crimes. They also apply to administrative assistance and reduce the ability of foreign regulators to obtain important information to supervise their markets. Except in the case of tax fraud, Switzerland will not provide any international assistance in fiscal crimes. The Swiss principles of mutual assistance can not be circumvented by using Switzerland's double taxation arrangements. The situation is exacerbated by the very broad Swiss anti-economic espionage laws which seriously impede investigatory activity of foreign governments and their agents in Switzerland.

Key words

Sovereignty, economic espionage, bank secrecy, fiscal offences, financial crimes, Swiss principles of mutual assistance, reciprocity, dual criminality, speciality, proportionality, double taxation arrangements.

1 Introduction

Until the advent of double taxation treaties, nation States refused to provide any assistance to other States in tax matters. The lack of co-operation in fiscal matters was tied to concepts of sovereignty.¹ This was reflected in the general principle of common

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¹ For example, the rule that an Australian court will not enforce a foreign penal, revenue or public law is based on the notion of refusing to enforce a 'foreign governmental interest.' See *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 42, 46-7.

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law that prevented courts from providing assistance in the direct or indirect enforcement of foreign sovereigns' tax laws.²

The Swiss concept of sovereignty as applied to financial matters is broad in scope and robust in application. Swiss financial sovereignty reaches its zenith point in its unique laws against economic espionage. These laws seriously impede the ability of foreign countries to gather information about the financial affairs of individuals or legal entities in Switzerland. They ensure that foreign countries are completely dependent on the Swiss authorities for uncovering financial secrets in Switzerland. They complement and reinforce Swiss bank secrecy laws.³

The only legal and acceptable way to pierce Swiss bank secrecy laws is to rely on one of the Swiss avenues of international co-operation. The Swiss principles of mutual assistance in criminal matters provide ground rules for Swiss co-operation with foreign countries in the investigation of criminal offences. Swiss law prohibits assistance in fiscal offences, and the Swiss principles of mutual assistance act as firewalls for protecting fiscal secrets. These principles also have the incidental effect of frustrating the transmission of financial information by Switzerland to foreign law enforcement agencies and foreign regulators.⁴

Switzerland has signed double taxation arrangements with 66 countries which in theory should result in an increase in co-operation in tax matters. However, the Swiss government does not allow these agreements to be used to assist the collection of tax for foreign countries.⁵ Although Switzerland's modern tax treaties provide for co-

² See *Government of India v Taylor* [1955] AC 491.

³ A violation of Swiss bank secrecy is an offence under article 47 of the Swiss Penal Code 1934. See D Chaikin, 'Fiscal and Policy Effects of Swiss Bank Secrecy Laws' (2005) 15 *Revenue Law Journal* 55. Available at <<http://www.bond.edu.au/law/rlj/contents/Vol15.pdf>> at 3 April 2006. See generally M Aubert, *Swiss Bank Secrecy: General Extent and Recent Developments*, (Stämpfli & Cie, Bern, 1997).

⁴ See D Chaikin, 'Policy and Legal Obstacles in Recovering Dictator's Plunder' (2005) 17.2 *Bond Law Review* 27. Available at <<http://www.bond.edu.au/law/blr/vol17/BLR17-2.pdf>> at 3 April 2006.

⁵ An exception to this general proposition is the Swiss-EU Agreement on Taxation of Savings 2004. Under this Agreement the Swiss authorities have agreed with the EU to collect withholding tax for citizens and residents of EU states that have bank accounts in Switzerland, but have refused to disclose the identity of those citizens or residents. See the Agreement between the European Community and the Swiss Confederation providing for Measures equivalent to those laid down in Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, CE/CH/en 2, 29 December 2004.

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operation in cases of tax fraud, these treaties can not be used to overcome its traditional principles of mutual assistance.

2 Unilateral measures and Swiss economic espionage laws

There are a number of broadly worded statutory provisions in Switzerland that are designed to protect Swiss sovereignty and deter unauthorised investigations in Switzerland. The most important provision is article 273 of the Swiss Penal Code, which was enacted in 1934 to deter German agents of the Nazi Government from penetrating Swiss banks.⁶

Article 273 provides that:

Any person who tries to discover a manufacturing or business secret in order to give it to a foreign government or individual, or to a foreign company, or to the agents of any of the above, shall be punishable by imprisonment or, in serious cases, by reclusion, and/or by a fine.

Article 273 is directed at protecting all the elements of the Swiss national economy for which there is a Swiss interest of non-disclosure to foreign public authorities or foreign private entities.⁷ Moreover, one of the aims of article 273 is to protect Swiss sovereignty from the direct searching of confidential information on Swiss territory. The Swiss courts have interpreted article 273 as prohibiting the gathering of evidence or information for the purpose of a legal proceeding or in preparation of the commencement of a legal proceeding in a foreign country.⁸ The courts have also ruled that the provision prohibits the carrying out of unauthorised investigation or the obtaining of information in Switzerland for the purpose of enforcing a law of a foreign State.

⁶ See M Perrenoud, R López, F Adank, J Baumann, A Cortat, S Peters, *The Swiss Financial Center and Swiss Banks during the Nazi Period, The Major Swiss Banks and Germany (1931-1946)* Chronos Verlag, Zurich, Volume 13.

⁷ See L Frei, *Article 273 of the Swiss Penal Code: The Problem of the Necessary Nexus with Switzerland* Unpublished Memorandum, Swiss Federal Department of Police, Bern, 1 September 1984. Dr Frei supplied his memorandum to the author.

⁸ See cases cited in affidavit of Dr P Altorfer dated 29 September 1997 submitted to the US District Court Central District of California, *In Re Thelma L Argenal v Union Bank of Switzerland et al*, Case No CV 97-6605R(MC×), Hon Manuel L Real presiding. Robert Swift, counsel for Argenal, supplied this affidavit to the author.

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The phrase 'manufacturing or business secret' is not limited to obvious confidential information such as bank secrets. The Swiss courts have considered that the phrase covers 'all facts of business life in Switzerland which are neither commonly known nor generally accessible, which the interested person desires to keep secret, and in respect to which there is an objective interest in keeping them secret exists'.⁹

Article 273 prohibits foreign governments and their agencies from gathering non-public business and financial information in Switzerland, and also criminalises the facilitation of access to such information to a foreign individual or entity. One of the consequences of Article 273 is that a foreign party can not rely on its Swiss lawyers, accountants or investigators to carry out an adequate financial investigation in Switzerland. This is in stark contrast with the scope of investigations in many countries.¹⁰

Article 273 applies to summons, subpoenas or other compulsory processes issued by a foreign judicial, administrative or law enforcement agency and which seek delivery of a 'manufacturing or business secret' within the jurisdictional scope of article 273.¹¹ It protects Swiss business secrets against foreign court orders and thereby creates a potential conflict of jurisdiction.

In the late 1970s and early 1980s, American courts issued orders against Swiss banks' offices in the United States requiring them to disclose the identity of their clients who were suspected of engaging in insider trading.¹² The American position was justified on the basis that these orders were empowered by US law and did not violate any known principle of international law. The Swiss Government disagreed, arguing that the American court orders violated its national sovereignty and contravened article 273 of its Penal Code. Both sides were locked into a controversial dispute which was

⁹ L Frei, above n 7, 2, relying on the decision in *Swiss Federal Attorney v A*, 98 BGE IV 209, 7 September, 1972.

¹⁰ See, generally, D Chaikin, 'Asset Tracking in Australia', *International Tracing of Assets*, BAK Rider and A Ashe (Eds), FT Law & Tax 2002.

¹¹ See discussion of Article 273 in *Australian Securities Commission v Bank Leumi* (1995) 18 ACSR 639 where Sackville J held that Swiss financial institutions were obliged to comply with tracing or disclosure orders of the Australian Securities Commission requiring the identification of their clients even though this would likely result in a contravention of Swiss law. The *Bank Leumi* case is analysed in D Chaikin, 'Penetrating Foreign Nominees: A Failure of Strategic Regulation?' (2006) 19(2) *Journal of Corporate Law* (forthcoming).

¹² See, for example, *SEC v Banca della Svizzera Italiana* 92 FRD 111 (SDNY 1981) discussed in A Lowenfeld, *International Litigation and the Quest for Reasonableness*, (Oxford University Press, New York, 1996) 166-79.

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settled by way of compromise in 1982. The United States undertook not to resort to unilateral measures under rule 37 of the Federal Rules of Civil Procedure in exchange for Switzerland entering into a Memorandum of Understanding (MOU) in relation to insider trading.¹³ The MOU was perceived by US negotiators as a more effective mechanism for handling US prosecutors and regulatory agencies requests for obtaining information and evidence concerning insider trading.¹⁴

There are other Swiss statutory provisions that impose limitations on the gathering of financial information in Switzerland. For example, article 271(1) of the Swiss Penal Code criminalises any conduct in Switzerland carried out on behalf of a foreign State, foreign party or foreign organisation, in circumstances where the conduct is reserved for the Swiss public authorities. Under Swiss law, actions within the exclusive jurisdiction of the Swiss public authorities include the interviewing of witnesses, the taking of evidence, and the service of documents. A contravention of article 271(1) carries a maximum penalty of 3 years imprisonment, or in serious cases, a maximum penalty of 20 years imprisonment.

The Swiss authorities have used articles 271 and 273 against a number of countries which have sought Swiss banking information. This happened in 1990 when the Philippine Government authorised its agents to penetrate two of the largest Swiss banks by using the services of a Swiss computer expert.¹⁵ The Philippine Government suspected that the Swiss banks had lied about the existence of multi billion dollar accounts of former President Ferdinand Marcos. After receiving data about alleged secret cash and gold bank accounts, the Philippine Government disclosed to the Swiss authorities the identity of its Swiss-based informant. An examining magistrate in the

¹³ Memorandum of Understanding between Switzerland and the United States signed at Washington, 31 August 1982, reproduced in (1983) 22 *ILM* 1. This MOU has now been replaced by a Memorandum of Understanding between Switzerland and the US on Mutual Assistance in Criminal Matters and Ancillary Administrative Procedures, 10 November 1987, reproduced in (1988) 27 *ILM* 480.

¹⁴ See SEC Historical Interview with Michael Mann, conducted by Wayne Carroll, 13 June, 2005.

<<http://www.sechistorical.org/collection/oralHistories/interviews/mann/MannMichaelTranscript06132005.pdf>> at 15 September 2005. See also D Chaikin, 'Securities Laws and Extraterritoriality in the United States', B Rider (Ed), *Regulation of the British Securities Industry*, (Oyez, London, 1986) 174-188.

¹⁵ The facts of the Marcos espionage case are based on the judgment of the First Criminal Panel of the Higher Regional Court of Munich, *In the matter of the Extradition of Reiner Jacobi*, Case No 68/91, Unpublished, 17 July 1991. The judgment was translated by Dr R Resch, attorney of Munich, and supplied to the author.

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canton of Zurich, who was responsible for investigating the Marcos case in Switzerland on behalf of the Philippine Government, refused to verify these claims. Instead, the Zurich magistrate in his capacity as a prosecutor charged the foreign agents of the Philippine Government with economic espionage under articles 271 and 273 of the Penal Code. Subsequently, after a failed attempt to extradite the principal foreign agent from Germany, the Swiss authorities dropped the charges and claimed that the whole matter was a hoax, for there had been no penetration of the Swiss banks!

The Marcos case is a cogent illustration of the frustration that foreign countries have with the Swiss notion of sovereignty and its system of financial investigations. It is not a unique case, for economic espionage directed against financial institutions (and the secrets of their clients) is a major concern of the Swiss government and its security agencies.

Over a 10 year period between 1989 and 1999, the Swiss authorities recorded 39 incidents of economic espionage from developed countries (United States, France and Israel), transitional economies (Russia, Romania, Poland and the former Yugoslavia), African countries (Zaire, Rwanda and South Africa) and Asian countries (India, Korea and the Philippines).¹⁶

Resorting to unilateral measures offends Swiss sovereignty and is a risky option for foreign States. If the Swiss government discovers that a foreign government has obtained confidential financial information contrary to its laws, it will not act on that information and may terminate co-operation with the country concerned, not only in relation to an existing criminal case, but potentially in all mutual assistance matters.¹⁷

¹⁶ The official Swiss statistics on economic espionage are taken from a Swiss government publication entitled *Report on the Protection of the State for the year 1999*, Swiss Federal Department of Justice and Police, Bern, 2000. Leakage of secret client data from Swiss banks is not unusual. See for example, M Stoll, 'Banking secrecy disclosed: Four spies arrested', *SonntagsZeitung*, Zurich, 13 November 1999. The German journalist, Peter Mueller, translated the news articles and supplied them to the author.

¹⁷ For example, in 1991 the Zurich District Attorney suspended all mutual assistance to the Philippines in relation to the Marcos case because of the 'serious violation of the sovereignty of the Canton of Zurich and of the contempt of the provisions governing letters rogatory.' The District Attorney threatened not to co-operate with the Philippine Government in future cases until the matter was resolved. See letter from Peter Cosandey, Zurich District Attorney, to Beat Frey of the Swiss Federal Office for Police Matters, 19 July 1991. The Philippine Government supplied the author with a copy of this letter.

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The inappropriateness of unilateral measures is recognised by article 4(2) of the UN Convention against Corruption 2003 which provides:¹⁸

Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

Article 4(2) of the UN Corruption Convention enshrines the principle that the exercise of law enforcement functions in a foreign State without its consent is a violation of international law.¹⁹ It reinforces the importance of sovereignty as a limitation on the conduct of nation States. It points to the domestic law standard of the requested country as the basis for determining the international lawfulness of a requesting State's investigatory behaviour. This provision represents a symbolic victory for Swiss interests which wish to maintain a tight control on the process of gathering financial information in Switzerland. It will inhibit countries which are contemplating using unilateral measures to discover information pertaining to financial assets in Switzerland. The consequence is that foreign governments are very dependent on the quality of Swiss-government investigations carried out under mutual assistance arrangements in determining the outcome of asset search enquiries.

3 International mutual assistance in criminal matters

International mutual assistance²⁰ is the process by which States seek and obtain co-operation from other States in the gathering of evidence for the investigation and prosecution of criminal offences. It may involve the tracing, freezing and confiscation of illicit assets where such assets have been moved outside the country of origin.

International co-operation in criminal matters is provided through four mechanisms:

- (i) multilateral treaties and arrangements;
- (ii) bilateral treaties and arrangements;

¹⁸ The UN Corruption Convention was open for signature on 9 December 2003 and has 126 signatories as at 21 August 2005. It is not in force because it has not secured the ratification of 30 states. The Convention is found at http://www.unodc.org/unodc/en/crime_convention_corruption.html at 21 August 2005.

¹⁹ American Law Institute, *The Foreign Relations Law of the United States, Restatement of the Law*, (ALI, St Paul, 1990), para 431-3.

²⁰ See D Chaikin, 'Mutual Assistance in Criminal Matters: A Commonwealth Perspective' Report published in the *Memoranda of the Meeting of the Commonwealth Law Ministers*, Commonwealth Secretariat, London, 1983; D McClean, *International Co-operation in Civil and Criminal Matters*, (Oxford University Press, 2002).

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- (iii) domestic laws; and
- (iv) law enforcement arrangements.

Switzerland has more experience in the practical aspects of mutual assistance than any other country. This is largely due to the volume and range of mutual assistance requests that Swiss authorities deal with every year. This in turn is a reflection of the billions of dollars of illicit assets, flight capital and tax evasion monies, which are hidden in Switzerland by foreigners.²¹

Switzerland is a party to the European Convention on Mutual Assistance in Criminal Matters 1959²² which it ratified in 1966. It has played a leading role in the policy development of multilateral agreements which have provisions on international mutual assistance. It has signed bilateral mutual assistance treaties with a number of countries, including the United States, Canada and Australia.²³

In 1981 Switzerland enacted the federal *International Mutual Assistance in Criminal Matters Act ('IMAC Act')* which came into force on 1 January 1983. The *IMAC Act* recognises that international mutual assistance requests in Switzerland are executed through the procedural requirements of the 26 cantons. This results in a complexity in the mutual assistance process because of the differing procedural rules in the various cantons.

International co-operation is available through police-to-police arrangements under the auspices of ICPO-Interpol.²⁴ There is also an expanding field of collaboration through administrative assistance between supervisory authorities concerning banks, stock exchanges, investment funds and money laundering. These arrangements

²¹ See D Chaikin, 'Policy and Legal Obstacles in Recovering Dictator's Plunder' (2005) 17.2 *Bond Law Review* 27-47. Available at <<http://www.bond.edu.au/law/blr/vol17/BLR17-2.pdf>> at 3 April 2006.

²² See the official website of the European Convention on Mutual Assistance in Criminal Matters at <<http://conventions.coe.int/treaty/en/Treaties/Html/030.htm>> at 26 November 2005.

²³ See, for example, the Treaty between Australia and Switzerland on Mutual Assistance in Criminal Matters, Bern, 25 November 1991, and Mutual Assistance in Criminal Matters (Switzerland) Regulations 1994 (Cth).

²⁴ For a discussion of international police co-operation, see D Chaikin, above n 20. Switzerland's relationship with Interpol is governed by Art 351 ter-sexies of the Criminal Code (SR 311.0) and the Ordinance on the National Central Bureau Interpol Switzerland, 1 December 1986 (SR 351.21). The official website of the General Secretariat of Interpol is <www.interpol.int> at 3 April 2006.

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facilitate a more direct and timely exchange of information and in certain limited instances authorise the relaxation of Swiss bank secrecy.

Contrary to what is generally believed, Switzerland can not refuse assistance to a foreign country on the ground of bank secrecy. As the following discussion shows, Swiss legal co-operation provides an opportunity to pierce bank secrecy. The principles of mutual assistance in Switzerland, such as dual criminality, speciality and proportionality, impose strictures on the release of banking information. Their practical effect is to provide an additional layer of insulation for the core content of Swiss bank secrecy, namely the protection of fiscal secrets in Switzerland.²⁵

(a) Principle of reciprocity

Prior to 1983 Switzerland did not provide mutual assistance in a criminal matter to a country with which it had no bilateral or multilateral arrangement. The effect of this limitation was that Switzerland did not generally use its internal criminal procedures to assist foreign countries investigating financial crime. There was the possibility of filing a civil claim, but the procedural hurdles were enormous and bank secrecy was preserved. Consequently, illicit monies deposited in Switzerland by dictators and military rulers in South America and Asia in the 1950s through to the early 1980s were protected against discovery and recovery.²⁶

Switzerland is not unique in requiring foreign countries to provide reciprocal assistance as a precondition for granting mutual assistance.²⁷ Switzerland has a legitimate interest in ensuring that it is not always the provider of mutual assistance, but also that in similar circumstances it would be the recipient of assistance.

Article 8 of the IMAC Act provides that international assistance depends on whether the requesting State grants reciprocity. Where Switzerland has a treaty relationship

²⁵ For an analysis of the fiscal and policy effects of Swiss bank secrecy, see D Chaikin, above n 3.

²⁶ D Chaikin, above n 4.

²⁷ See, for example, s 7(3)(e) of the *Mutual Assistance in Business Regulation Act 1992 (Cth)*, where the federal Attorney-General of Australia must consider whether the foreign regulator would be likely to comply with a similar request made by the Australian regulator and whether any arrangement with the foreign regulator to that effect exists. For a discussion of Australia's co-operation in corporate securities matters, see D Chaikin, above n 10.

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with a requesting State, reciprocity is assumed to exist. Reciprocity may also be found in ad hoc arrangements entered into by Switzerland with a requesting State.²⁸

Switzerland also provides assistance in criminal matters to foreign States on the basis of Swiss domestic law without the existence of a treaty relationship. In such cases the Swiss authorities will require the country to give a guarantee of reciprocity: the foreign country must state that it can execute a Swiss request in similar circumstances.²⁹ Furthermore Switzerland may waive the requirement of reciprocity in exceptional cases, for example, in terrorist matters.

(b) Principle of dual criminality

Switzerland gives assistance in relation to criminal matters according to Swiss conceptions of criminality. The ability of Switzerland to provide wide ranging mutual assistance depends on whether the crime alleged by the requesting State satisfies the principle of dual (double) criminality.

The dual criminality principle requires that the relevant conduct alleged in the foreign request amounts to a crime not only in the requesting State but also in Switzerland, assuming hypothetically it was committed there. The principle allows a requested State to refuse assistance for conduct that it does not recognise as criminal. This approach is consistent with the reciprocal nature of mutual assistance.

The principle of dual criminality is a widely accepted standard in mutual assistance in criminal matters treaties.³⁰ Whereas in most States dual criminality is a discretionary

²⁸ For example, Switzerland entered into a Memorandum of Understanding with India to provide mutual assistance in the tracing of Swiss bank accounts in the Bofors scandal, which involved an alleged bribe of \$US50 million by a Swedish company to secure a 1987 arms contract to sell Howitzer field guns to the Indian army for \$US1.4 billion.

²⁹ See Federal Department of Justice and Police, *International Mutual Assistance in Criminal Matters Guidelines*, (Bern, 2001) 6. For a copy of the *IMAC Act*, see <<https://www.imolin.org/amlid/showLaw.do?print=yes&country=SWI&language=ENG&law=6121>> at 5 April 2006.

³⁰ See United Nations Model Treaty on Mutual Assistance in Criminal Matters (Annex to Resolution 45/117 of 14 December 1990) and complementary provisions (Annex I to Resolution 53/112 of 9 December 1998). See also UNDCP's Model Mutual Assistance in Criminal Matters Bill 2002 (for common law countries), Model Law on Mutual Legal Assistance 2002 (for states of the civil or continental legal tradition).

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ground for refusing mutual assistance,³¹ the Swiss legal system enshrines the dual criminality principle as a mandatory ground for refusing assistance in the case of compulsory measures such as accessing bank secrets.

Under article 64(1) of the Swiss *IMAC Act*, compulsory measures of assistance are only available if the facts of the case show that the foreign crime ‘contains the elements, other than intent or negligence, of an offence punishable under Swiss law.’

According to the Swiss rationale of the dual criminality principle, intrusive measures directed against a person’s privacy is not justified where the conduct complained of would be lawful if committed in Switzerland. If the dual criminality principle is not satisfied, Swiss magistrates are prohibited from ordering compulsory measures, such as searches, seizure of evidence, summons, and the release of persons from bank, business or professional secrecy.

Dual criminality is not satisfied in the case of fiscal offences such as tax evasion and exchange control violations because they are not criminal offences in Switzerland. There is also an express prohibition in article 3 of the *IMAC Act* for granting assistance ‘if the subject matter of the (foreign) proceeding is an offence which appears to be aimed at reducing fiscal duties or taxes, or which violates regulations concerning currency, trade or economic policy.’ There is an exception to this prohibition if the assistance is sought for the exoneration of a person who is a target of a tax proceeding.³²

In contrast, tax fraud is a criminal offence in Switzerland and may be the subject of a mutual assistance request.³³ Under Swiss law the concept of tax fraud is complex and subject to numerous judicial pronouncements. It is a narrower concept than the notion of tax fraud in countries such as Australia. The Swiss requirement of tax fraud is

³¹ For example, under s 8(2)(a) of the *Mutual Assistance in Criminal Matters Act 1987 (Cth)* the Australian Attorney-General may refuse assistance to a foreign country which makes a request where the ‘(a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Australia, would not have constituted an offence against Australian law.’

³² See article 63 (5), article 64(2) and article 3 of the *IMAC Act*.

³³ Article 3 par 3 of the *IMAC Act* provides that assistance is available ‘if the subject of the proceeding is a duty or tax fraud.’ Tax fraud is defined for the purposes of the *IMAC Act* by reference to Article 14 par 4 of the *Swiss Federal Law on the Administrative Penal Law*.

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based on the German concept of 'Arglist' which may be defined as 'craftiness, cunning, guile, malice'.³⁴

Under Swiss law there is no tax fraud unless there is a misrepresentation coupled with 'Arglist', that is a further deceptive act to support the misrepresentation. Tax fraud will usually involve the 'misrepresentation of facts that are essential to the tax assessment' by the use, or intention to use, forged or falsified documents, and other types of fraudulent deceit, such as a scheme of lies, directed at illegally and substantially reducing tax.³⁵

The mere failure to declare income or the making of an untrue or incomplete tax return is not considered tax fraud in Switzerland. Indeed, the tax return is generally not considered to be a document for the purposes of the Swiss tax fraud doctrine. The falsification of other financial documents, such as profit and loss statements, ledgers, invoices and receipts will amount to tax fraud if committed for the principal purpose of evading taxes.³⁶

The Swiss authorities are very cautious when providing assistance in cases of tax fraud. Where the Swiss Federal Tax Administration is satisfied that the foreign request satisfies the dual criminality principle, bank secrecy may be set aside. The *IMAC Act* limits the assistance that may be granted for foreign criminal proceedings for tax fraud to the collection of information and evidence. It is not permissible under the *IMAC Act* for the Swiss authorities to freeze the tax fraudster's assets in Switzerland or to enforce a criminal judgment based on a tax fraud proceeding.

In theory the principle of dual criminality may result in a denial of assistance for foreign offences which are not crimes in Switzerland. However, Swiss law does not require a complete identity of the penal provisions of the requesting State and Switzerland. The requirement is that the conduct in the mutual assistance request amounts to a criminal offence under Swiss law if the conduct had occurred in Switzerland.³⁷ For example, a foreign request for assistance in a tax fraud matter may

³⁴ See special German definition of fraud in Webster's online dictionary. Available at <<http://www.websters-dictionary-online.org/Fr/Fraud.html>>, <<http://www.websters-dictionary-online.org/translation/fraud>> at 10 May 2005.

³⁵ Swiss Supreme Court judgment BGE Vol 110 IV p 24, 18 January 1984. See, generally, L Frei, 'Overcoming Bank Secrecy: Assistance in Tax Matters in Switzerland on Behalf of Foreign Criminal Authorities' (1988) 9 *NY Sch J Int'l & Comp L* 107.

³⁶ *Ibid* 125-6.

³⁷ Federal Department of Justice and Police, above n 29, par 5.3 and cases cited therein.

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not be denied merely because Swiss law does not have the 'same duties or taxes or fiscal requirements'.³⁸ It is sufficient if there is suspicion that all the elements of tax fraud under Swiss law are satisfied.

The principle of dual criminality has become a less important obstacle, with a consequential weakening of bank secrecy, as Switzerland has enacted new laws dealing with financial crimes in the 1980s and 1990s. For example, the crimes of money laundering and organised crime under Article 305 bis and Article 206 ter respectively of the Swiss Penal Code, which were enacted in 1990, are of significant practical utility in satisfying the dual criminality test.³⁹

Another relatively new Swiss crime is bribery of foreign public officials. This crime was enacted so as to implement Switzerland's obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁴⁰ Where the dual criminality principle is satisfied, Switzerland can co-operate with countries that are investigating the bribery of foreign public officials. According to Transparency International,⁴¹ Switzerland has launched an investigation into two cases under the OECD Convention and referred a number of cases to countries, such as the United States, for investigation. The Swiss measures are an improvement on past practice, but there are numerous procedural and law enforcement problems in Switzerland in detecting the laundering of bribes through Swiss banks.⁴²

Dual criminality continues to be a significant obstacle in the case of Swiss financial crimes which have a narrower scope than their foreign counterparts. An example of

³⁸ Ibid 10.

³⁹ For example, article 305 bis provided the legal basis for the Swiss criminal investigations of Pavel Lazarenko, former Prime Minister of Ukraine, Pavel Borodin, former Kremlin chief property manager under former Russian President Yeltsin, and Benazhir Bhutto, former Prime Minister of Pakistan, and her husband, Mr Asif Ali Zardari. Article 206 ter provided the basis for the investigation of the family of Sani Abacha, the former military ruler of Nigeria. See D Chaikin, above n 21.

⁴⁰ The OECD Convention entered into force on 15 February 1999. It has been ratified by all 30 OECD member countries and six non-member countries. The Convention can be found at <<http://www.oecd.org>>.

⁴¹ *Progress Report on OECD Convention Enforcement, Foreign Bribery Cases and Investigation* (Transparency International, Berlin, 28 February 2005).

⁴² See *Report on Implementation of the OECD Anti-Bribery Convention, Switzerland: Phase 2*, (OECD, Paris, February 2005), para 52-67. Available at <<http://www.oecd.org/dataoecd/43/16/34350161.pdf>> at 10 August 2005.

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this problem is insider trading where the Swiss law has a narrower field of application than the equivalent provision in many countries, including Australia.

Article 161 of the Swiss Penal Code prohibits certain classes of persons (such as members of the board of directors, management, auditors, or mandated lawyers) from making use of or disclosing to third persons price sensitive and confidential information. The phrase 'confidential information' in Article 161 means 'the imminent issue of new participation rights, mergers and similar circumstances of comparable importance'.

In contrast, the Australian law of insider trading is not limited to a specified class of persons. Furthermore, the term 'inside information' is defined in s 1042A of the *Australian Corporations Act 2001 (Cth)* as '(a) the information (that) is not generally available, and (b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value' of a particular financial product.

The Australian definition of 'insider trading' applies comprehensively to cases of insider trading abuse, whereas the Swiss definition of 'confidential information' is so narrowly worded that it would not apply to many instances of price sensitive information. Consequently, there have been few prosecutions of insider trading in Switzerland and even fewer cases of mutual assistance by Switzerland to foreign countries in relation to insider trading.⁴³

The Swiss Federal Banking Commission has recommended that the dual criminality principle be relaxed because it continues to be an obstacle to the provision of assistance to foreign regulators in cases of insider trading and market manipulation.⁴⁴ However, Swiss bankers view double criminality as a vital firewall against further dilution of Swiss bank secrecy. By requiring compliance with dual criminality in non-core areas (such as market regulatory offences) Swiss bankers argue that they are in a

⁴³ See R Malacrida and R Watter, 'Swiss Corporate Finance and Capital Markets - Legal Aspects' *Swiss Commercial Law Series*, P Vogt (Ed), Vol 12, (Helbing & Lichtenhahn Verlag, Basle, 2001) 42.

⁴⁴ Swiss Federal Banking Commission *Annual Report*, Bern, 2003. See also D Zuberbühler, 'Regulatory Challenges for Swiss Banking Secrecy', Paper delivered at a conference on Foreign Banks in Switzerland, Foreign Bankers Association, Zurich, 21 June 2002. Available at <<http://www.ebk.admin.ch/e/archiv/2002/pdf/neu05e-02.pdf>>, <<http://www.ebk.admin.ch/e/archiv/2002/aktuelles2002.html>> at 10 December 2005.

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stronger position to assert that fiscal offences should never be the subject of mutual assistance.

(c) Principle of speciality

Under article 3 of the *IMAC Act*, Switzerland refuses to grant international legal assistance for investigations and proceedings which relate to political offences, military offences and fiscal offences. The express prohibition on assistance in relation to these offences is reinforced by the principle of speciality under article 67(1) of the *IMAC Act*. This principle provides that a requesting State may not use documents and information obtained through Swiss assistance for the purpose of prosecution for any offence for which mutual assistance is not permissible (ie political, military or fiscal offences).

Where the facts relate to ordinary criminal offences but are connected to political, military or fiscal offences, Swiss assistance is granted on the condition that the Swiss material, including banking documents, are used only for investigating or prosecuting ordinary criminal offence in the requesting State.

The Swiss principle of speciality is given greater force in fiscal matters. The Swiss Supreme Court has held that any non-public Swiss material can not be directly or indirectly used in any fiscal administrative proceeding or any criminal proceeding based on purely fiscal elements in the requesting State.⁴⁵ This means that foreign tax authorities in the requesting country may not use Swiss bank documents to issue a tax assessment, even if they have obtained the Swiss banking material on the basis of an investigation into tax fraud. It also means that the Swiss material may not be used in a tax evasion proceeding in the foreign country.

Switzerland is unique in that it applies the principle of speciality to international mutual assistance requests, whereas most countries apply this principle only in relation to international extradition.⁴⁶ The Swiss insistence on the principle of speciality is another illustration of the protection of the core value of Swiss bank

⁴⁵ See cases cited in Federal Department of Justice and Police, above n 29, 14.

⁴⁶ For example, s 42 of the *Extradition Act 1988 (Cth)* provides for the principle of speciality in cases where a person is extradited to Australia. In contrast, there is no provision for speciality under the *Mutual Assistance in Criminal Matters Act 1987 (Cth)*.

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secrecy. It adds another layer of complexity to the mutual assistance process and contributes to the delay in processing requests.⁴⁷

The principle of speciality has been more significant in regulatory-type and tax matters than in cases of corruption or laundering of illicit monies. The principle of speciality reinforces the notion of financial privacy by limiting the use of information and documents in the requested State. A breach of the principle of speciality by a foreign State may result in the termination of future mutual assistance by the Swiss authorities.

(d) Principle of proportionality

The principle of proportionality must also be observed in the execution of mutual assistance requests. Under the principle of proportionality, intrusions into the sphere of privacy protected by the law are allowed only to the extent to which this is necessary. According to this principle, Swiss authorities should not provide any information beyond that necessary to execute the request by the foreign country.⁴⁸

The principle of proportionality requires that the names of third parties be disclosed only to the extent that those parties are involved in the facts being investigated. Until 1996 Swiss law also provided that Swiss authorities should review all documents prior to their transmission to the requesting State to ensure that secrets held by 'non-participatory third parties' were protected.

In 1990 the Swiss Supreme Court considered the meaning of the phrase 'non-participatory third parties' in relation to the Liechtenstein foundations that controlled the Swiss bank accounts of former Philippine President Ferdinand Marcos. The Swiss Supreme Court held⁴⁹ that the Liechtenstein foundations were not 'non-participatory third parties' because:

- (a) they have receiving assets of criminal provenance, whether or not in good or bad faith (and)

⁴⁷ Switzerland has dealt with the problem of delay in its 1996 revisions to the *IMAC Act*. For example, article 38 par 2 of the *IMAC Act* permits persons involved in foreign criminal prosecutions to renounce the protection granted by the principle of speciality.

⁴⁸ See cases cited in Federal Department of Justice and Police, above n 29, 15.

⁴⁹ *Estate/Heirs of Ferdinand Marcos, Imelda Romualdez - Marcos and Aquamina Corporation v Republic of the Philippines*, Supreme Court, BGE Vol 116lb p 452, 21 December 1990. The Philippine Government supplied a translated copy of this judgment to the author.

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- (b) they are not a third party because they are only a fictitious albeit formally independent legal entity which was created and controlled by the defendant (Marcos) in order to continue to control the criminally acquired assets.

According to the Swiss Supreme Court, confidential information concerning the alter egos or the fictitious entities of criminal suspects may be supplied by Switzerland to the requesting State without violating the principle of proportionality.

Under Swiss mutual assistance procedures, it is examining magistrates in the relevant canton who execute compulsory measures and decide the scope of mutual assistance. For example, Swiss magistrates will examine bank documents to determine which documents (or which parts of documents) should be transmitted to the requesting country. Some examining magistrates have relied on the principle of proportionality as a basis for extensively editing bank documents prior to their transfer to a foreign country. Swiss federal government officials have criticised the practice of cantonal magistrates who automatically exclude the disclosure of bank secrets of persons who are not specifically mentioned in the mutual assistance request.⁵⁰ This practice has caused delays and reduced the quality of the documentation available to foreign law enforcement agency.

For example, in 1991 the Solicitor General of the Philippines, Francisco Chavez, criticised the Zurich examining magistrate in the Marcos case for denying the Philippine Government access to vital bank documents relating to the Marcos family and their cronies.⁵¹ Mr Chavez argued that the arbitrary application of Swiss principles had undermined the tracing and recovery of the illicit Marcos monies. According to the Philippine Government, the Swiss authorities refused to hand over bank documentation concerning 51 bank accounts that had been identified from records found at the Presidential Palace in Manila.⁵² The records supplied by the Swiss authorities related to US \$356 million of Marcos assets frozen in two Swiss banks, which according to the Philippine Government amounted to a little more than 10% of the estimated \$3.5 billion in Switzerland.⁵³

⁵⁰ See L Frei, above n 35, 121-2.

⁵¹ Interview by the author with F Chavez in Manila, Philippines, 23 September 1999.

⁵² See Presidential Commission on Good Government, *Consolidated Report on Swiss Documents*, Unpublished Memoranda, PCGG, Manila, 1991. Mr Chavez supplied the author with a copy of this memorandum.

⁵³ There are differing estimates concerning the size of the illicit Marcos assets in Switzerland and elsewhere. See D Chaikin, 'Tracking the Proceeds of Organized Crime: the Marcos case' Transnational Crime Conference organised by the Australian Institute of Criminology,

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The misuse of the 'non-participating party' requirement has been dealt with by the Swiss Parliament. In 1996 the term 'non-participating state' was removed from the *IMAC Act*. Under the amendment the criterion for determining whether to send a document to a requesting country is whether it is of potential relevance to the foreign criminal proceeding.⁵⁴

Although the principle of proportionality has been shorn of its extreme edges, it continues to prevent the speedy and automatic exchange of non-public Swiss documentation. The principle of proportionality gives examining magistrates considerable discretion in determining the quantity and quality of documents that will be sent to the requesting country. The process of editing of documents that is justified by the principle of proportionality may result in the non-disclosure of the forensic keys to unravelling the location of the proceeds of crime.

4 International administrative assistance

Foreign countries may use an alternative mechanism for obtaining assistance from Swiss authorities in relation to certain types of offences, such as securities frauds. For example, under the *Stock Exchange Act 1995 (SESTA Act)*,⁵⁵ the Swiss Federal Banking Commission may provide administrative assistance to a foreign securities regulator for an investigation of suspected market abuses. The Swiss Banking Commission may provide non-public information and documents to a foreign supervisor if the following conditions are satisfied.⁵⁶

The first requirement is that the foreign regulator who receives information or documents from the Swiss Banking Commission must agree to be bound by official

Canberra, 9 March, 2000. Available at <<http://www.aic.gov.au/conferences/transnational/chaikin.html>> at 4 April 2006.

⁵⁴ J Natterer, 'Switzerland's International Mutual Legal Assistance in Criminal Matters' Transparency International Working Paper, Basel, 1998. Available at <http://www.transparency.org/working_papers/natterer/natterer.html> at 10 May 2005. See article 10 of IMAC which permits the transfer of information concerning the financial privacy of a person who is not involved in a foreign criminal proceeding, if it seems 'imperative to establish the facts and if the seriousness of the offence justifies it'.

⁵⁵ The Swiss Federal Act of 24 March 1995 on Stock Exchange and Securities Trading, which entered into force on 1 February 1997.

⁵⁶ Article 38 of the *SESTA Act*. The Swiss Banking Commission is required to apply the same conditions in all cases of administrative assistance to foreign regulators. See, for example, article 23 sexies of the Federal Banking Law and article 63 of the Law on Investment Funds.

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and professional secrecy. This confidentiality principle prevents a foreign regulator from receiving any confidential information from Switzerland, unless that regulator is obliged to maintain secrecy.

There are two other conditions that reflect the application of the principle of speciality. It is a requirement for administrative assistance that the foreign securities regulator guarantees that it will use the information exclusively for the purpose of direct supervision of its exchanges and securities trading. The third precondition prevents Swiss bank secrets from being passed by the foreign regulator to law enforcement agents generally and especially to tax authorities in the foreign State, without the express authorisation of the Swiss Banking Commission.

Unlike the situation in many countries, clients of Swiss banks are entitled to be informed that the Swiss Banking Commission has decided to transmit bank client information to a foreign regulator. The client may appeal against the Banking Commission's decision to the Swiss Supreme Court.

From 1997 to 2001, in 34 of its 62 decisions concerning administrative assistance to foreign regulators, the Swiss Supreme Court granted in part, or in full, an appeal by clients of Swiss banks.⁵⁷ This suggests that in over 50% of cases, clients of Swiss banks have successfully resisted the transmission of client related information to foreign regulators.

In 2000, the Swiss Supreme Court dealt a mortal blow to the system of administrative assistance when it found that the US Securities and Exchange Commission (SEC) was not entitled to administrative assistance in a case of suspected insider trading relating to the takeover bid of ABB for Eltag Bailey.⁵⁸ The Supreme Court held that the practice of the SEC of publishing its civil actions in a litigation release⁵⁹ violated the Swiss principles of confidentiality and speciality. The Court held that the SEC policy of publicly identifying the defendants and other parties, as well as detailing the

⁵⁷ D Zuberbühler, above n 44.

⁵⁸ *W, X, Y & Z v Swiss Banking Commission*, Reference Number 2A.355/1999/leb, Supreme Court, Public Law Division II, 1 May 2000, at 19.

⁵⁹ The SEC's litigation releases provide information about civil lawsuits brought by the Commission in federal court. The SEC is a strong proponent of a policy of publicity as a regulatory and enforcement tool and considers that privacy has no role to play in this subject. See the SEC's litigation page which also includes information about SEC enforcement actions and trading suspensions. Available at <<http://www.sec.gov/litigation.shtml>> at 5 April 2006.

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suspected securities offences, was a grave violation of Swiss principles in that Swiss bank customer information was available on the SEC website, which could be accessed by tax authorities in the customer's country of residence.

Following the Swiss Supreme Court decision, administrative assistance in the form of exchange of Swiss banking information was suspended by the Swiss authorities in their dealings with the SEC. The Supreme Court decision has implications for other foreign securities regulators that take enforcement action involving the publication of information concerning customers of Swiss banks. Under the present state of law, foreign securities regulators will be restricted to making applications for assistance under the *IMAC Act*.

5 Double taxation arrangements

Another mechanism for international co-operation is the system of bilateral double taxation agreements. Switzerland has entered into Double Taxation (DT) Arrangements with 66 countries, including Australia, Japan, Indonesia, Malaysia, New Zealand, United States and the United Kingdom. The DT Arrangements provide for an exchange of information, albeit in a limited fashion.

Under article 24 of the 1981 Australia/Swiss DT Agreement, information is exchanged 'as is necessary' for carrying out the provisions of the Agreement.⁶⁰ The information which may be supplied under article 24 is information at the disposal of the competent authorities under their taxation laws in the normal course of administration. There is a requirement that all information which is exchanged is treated as secret. Indeed, article 24(1) prohibits the disclosure of information to 'persons other than those concerned with the assessment and collection of the taxes which are the subject of this Agreement'.

The information sharing provision of the Swiss DT Agreement with Australia is limited to information that is required by the Agreement. Unlike other member countries of the OECD,⁶¹ Switzerland does not transmit customer banking information for the purpose of exchange of information under its bilateral DT treaties. Switzerland considers that the information exchange provisions of its tax treaties have a very

⁶⁰ Article 24 of the Agreement between Australia and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income 1981, ATS 1981 Number 5.

⁶¹ Luxembourg also does not transmit bank information under its tax treaties. See *Improving Access to Bank Information for Tax Purposes*, (OECD, Paris, 2000), 40. Available at <<http://www.oecd.org/dataoecd/3/7/2497487.pdf>> at 30 June 2005.

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limited function, namely to ensure that there is no double taxation, for example in the case of withholding taxes.

Where an individual or organisation has renounced the benefits of a Swiss DT Agreement, there is no scope for any exchange of information. In any event, the only information that will be transmitted by the Swiss authorities to a foreign tax treaty party is that which is authorised by the Swiss Federal Tax Administration.

Since Switzerland does not supply confidential information about bank customers to foreign tax authorities under its DT Agreements, it is opposed to the automatic exchange of bank information to treaty partners, which is the practice in countries such as Australia and the United Kingdom.

Switzerland will not exchange information under its DT Agreements for the purpose of enforcing domestic tax laws of a foreign country. The only exception to this is where the DT agreement provides for administrative assistance for tax fraud matters.

Switzerland's modern DT arrangements with the United States (1996), Germany (2003) and Norway (2005) contain specific provision for the exchange of information in cases of tax fraud. Similarly the Swiss-EU Agreement on Taxation of Savings 2004 deals with the exchange of information where there is a reasonable suspicion of tax fraud.⁶²

For example, it is specifically provided in the Swiss DT Arrangement with Germany that banking secrecy is not an obstacle to the supply of documents and the exchange of information 'in cases of tax fraud.' However, before the Swiss tax authorities will supply any information to the German authorities, it must be shown that there is 'a direct connection between the fraudulent conduct and the requested administrative assistance measure.'⁶³ The idea behind this clause is that Switzerland will not allow its

⁶² Under article 10 of the Swiss-EU Agreement reasonable suspicion may be based on documents, testimonial information from the taxpayer, information obtained from third persons that has been independently corroborated or otherwise likely to be credible, and circumstantial evidence.

⁶³ See Article VII (d) of the Protocol to the Double Taxation Treaty between Switzerland and Germany which entered into force on 1 January 2003. Tax fraud is defined in article VI (3) as fraudulent behaviour subject to imprisonment under the laws of both States.

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DT arrangement to be used as a vehicle for a tax fishing expeditions because this entail a potential breach of Swiss bank secrecy.⁶⁴

There is some confusion as to the meaning of the term 'tax fraud' under Swiss law. Under article 10 of the Protocol to the US/Swiss DT Convention, 'tax fraud' is defined as 'fraudulent conduct that causes or is intended to cause an illegal and substantial reduction in the amount of the tax paid to a Contracting State.'⁶⁵ The Protocol states that fraudulent conduct is assumed, albeit by way of illustration, in two situations:

- (a) when a taxpayer uses, or has the intention to use, a forged or falsified document such as a double set of books, a false invoice, an incorrect balance sheet or profit and loss statement, or a fictitious order or, in general, a false piece of documentary evidence, and
- (b) in situations where the taxpayer uses, or has the intention to use a scheme of lies (Lügenrechtheit) to deceive the tax authority.

The Protocol is supplemented by a 2003 US/Swiss Memorandum of Agreement that provides more detailed general descriptions of tax fraud and includes fourteen illustrations as to what constitutes tax fraud.⁶⁶ The United States expects that the broader definition of tax fraud will result in the transmission of more information from the Swiss authorities.⁶⁷ On the other hand, Swiss commentators have argued that

⁶⁴ See, however, the proposed new Article 5 of the OECD Model Double Taxation Convention which provides that bank secrecy is not secret information for the purposes of the OECD Model Convention. Switzerland, Austria, Belgium and Luxembourg have made specific reservations to this Article.

⁶⁵ See Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with respect to taxes on income, signed at Washington, 2 October 1996, together with a Protocol to the Convention general effective date under Article 29 being 1 January 1998. The Double Taxation Convention and Protocol is found at <<http://www.irs.gov/pub/irs-trty/swiss.pdf>> at 20 July 2005.

⁶⁶ See Mutual Agreement of 23 January, 2003, Regarding the Administration of Article 26 (Exchange of Information) of the DT Convention. Available at <<http://www.treas.gov/press/releases/mutual.htm>> at 20 July 2005.

⁶⁷ See *Criminal Tax Manual*, US Department of Justice, Washington DC, 2001, para 41.07, wherein it is argued that the Protocol 'expands the concept of tax fraud to include many of the badges of fraud set forth in *Spies v United States*, 317 U.S. 492, 499 (1943)'. Available at <<http://www.usdoj.gov/tax/readingroom/2001ctm/41ctax.htm>> at 20 July 2005.

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the definition of tax fraud in the Protocol does not expand the current meaning of tax fraud under Swiss law.⁶⁸

Although Switzerland's more modern DT Arrangements provide for co-operation in cases of tax fraud, these arrangements can not be used to circumvent the Swiss principles of mutual assistance in criminal matters. Where a foreign government is carrying out a criminal investigation into tax fraud, the Swiss authorities will only provide assistance based on the application of the principles of double criminality, speciality and proportionality.

6 Conclusions

The Swiss legal infrastructure of international co-operation is flawed because it has been designed to protect fiscal secrets. The development by Switzerland of a comprehensive system of international co-operation in criminal matters is handicapped by its fundamental principles of mutual assistance. The principles of dual criminality, speciality and proportionality may protect the core content of Swiss bank secrecy, namely fiscal privacy, but they have the incidental effect of hampering more fulsome and efficient co-operation in financial crimes generally. Although the Swiss principles may be justified by notions of sovereignty and financial privacy, they provide grounds for Swiss banking clients to delay, if not impede, effective and timely assistance from the Swiss authorities.⁶⁹ The situation is exacerbated by the very broad Swiss economic espionage laws that seriously impede investigatory activity of foreign governments or their agents in Switzerland.

⁶⁸ See PR Altenburger, *Exchange of Information Switzerland's Position Evolves Over Time*, 25 May 2000. Available at <http://www.altenburger.ch/pdf/pub_steuern03.pdf> and <http://www.altenburger.ch/en/pub_steuern.asp> at 20 July 2005.

⁶⁹ For the grave problem of delay in Swiss mutual assistance proceedings, see D Chaikin, above n 4, 34-6.