Yossarian's Nightmare: A "Catch-22" Between American Grand Jury Powers and Swiss Nondisclosure Laws - A New Solution

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INTRODUCTION

Yossarian looked at him soberly and tried another approach. "Is Orr crazy?"
"He sure is," Doc Daneeka said.
"Can you ground him?"
"I sure can. But first he has to ask me to. That's part of the rule."
"Then why doesn't he ask you to?"
"Because he's crazy," Doc Daneeka said. "He has to be crazy to keep flying combat missions after all the close calls he has had. Sure, I can ground Orr. But first he has to ask me to."
"That's all he has to do to be grounded?" Yossarian asked.
"That's all. Let him ask me."
"And then you can ground him?" Yossarian asked.
"No. Then I can't ground him."
"You mean there's a catch?"

. . . Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

United States criminal actions involving foreign entities often require production of documents located abroad. Resolution of these disputes depends on whether such documents are obtainable. In many instances, however, foreign nondisclosure laws prohibit compliance with United States grand jury document subpoenas. An example of such a conflict involves legal actions between the United States and subsidiaries of Swiss corporations in which a United States grand jury must contend with Swiss nondisclosure laws.

A United States grand jury may subpoena documents located abroad, however, enforceability of this subpoena becomes a difficult
issue when the subpoena requires a foreign party to violate its domestic nondisclosure laws. Party litigants who possess the requested documents face a "Catch-22" similar to Yossarian's; whichever order is obeyed precipitates a violation of the other nation's law. Furthermore, if the nondisclosure laws are observed, proper adjudication of the dispute may prove impossible.

This Comment explores the conflict between the broad powers of a United States grand jury and the strict nondisclosure laws of Switzerland. Part I provides a brief overview of the powers of the grand jury and the relevant provisions of the Swiss Penal Code. Part II surveys past solutions to this conflict and comments on their ineffectiveness. Part III critiques United States courts recent efforts to reconcile the broad powers of the grand jury with the restrictive prohibitions of Swiss law. Part IV discusses nonjudicial proposals to resolve this conflict. Finally, Part V recommends that the United States and Switzer-

F.2d 897, 900 (2d Cir. 1968) (involving subpoena of German bank records in an antitrust action); see also First Nat'l City Bank v. IRS, 271 F.2d 616, 620 (2d Cir. 1959) (ruling that a national bank with a Panama branch could not defeat IRS summons for production of foreign records on grounds that the subpoena violates Panamanian law), cert. denied, 361 U.S. 948 (1960); SEC v. Minas de Artemisa, S.A., 150 F.2d 215, 218-19 (9th Cir. 1945) (requiring Mexican subsidiary to produce books and records located in Mexico for SEC investigation); In re Equitable Plan Co., 185 F. Supp. 57 (S.D.N.Y. 1960) (requiring the production of evidence from Canada), modified on other grounds sub nom. Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); Societe Internationale v. Brownell, 225 F.2d 532 (D.C. Cir. 1955) (ordering production of Swiss company's records located in Switzerland despite prohibitions of Swiss law), rev'd on other grounds sub nom. Societe Internationale v. Rogers, 357 U.S. 197 (1958); In re Grand Jury Subpoenas Duces Tecum, 72 F. Supp. 1013 (S.D.N.Y. 1947) (issuing grand jury subpoena duces tecum for Canadian corporation's business records).


4. See Maggio v. Zeitz, 333 U.S. 56 (1948), vacating In re Luma Camera Service, Inc., 157 F.2d 951 (2d Cir. 1946). The Supreme Court vacated the Second Circuit's finding of civil contempt for a bankrupt's failure to comply with a turnover order. Id. at 77. The Second Circuit affirmed the district court's finding of contempt despite commenting that: "[a]lthough we know that [the bankrupt] . . . cannot comply with the order, we must keep a straight face and pretend that he can, and thus must affirm orders which first direct [the bankrupt] . . . 'to do an impossibility, and then punish him for refusal to perform it.'" In re Luma Camera Service, Inc., 157 F.2d 951, 955 (2d cir. 1946), quoted in Note, Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law, 63 COLUM. L. REV. 1441, 1470-71 (1963) [hereinafter Note, Limitations on the Federal Judicial Power].

5. This article only addresses the issue of whether a United States court, having personal jurisdiction over a party, can order that party to produce documents located overseas. It does not address the issue of whether a United States court has the jurisdiction to compel the party's compliance.
land negotiate a bilateral treaty requiring Swiss companies transacting business in the United States and United States companies doing business in Switzerland to keep duplicates of all business records available in each country for production.

I. UNITED STATES GRAND JURY AND SWISS NON-DISCLOSURE LAWS

A. POWERS OF THE GRAND JURY

The United States Constitution requires a grand jury indictment to shield persons from unfounded or arbitrary criminal charges. The Constitution also provides for a criminal investigation unimpeded by restrictions imposed on a trial court. To this end, the grand jury conducts ex parte investigations to determine whether probable cause exists to believe an individual committed a crime and, therefore, whether a prosecutor should institute criminal proceedings.

The grand jury possesses the authority to subpoena witnesses to testify and to require a witness to provide physical evidence. The federal circuit courts are split with respect to whether the government, in obtaining judicial enforcement of a grand jury subpoena, must make some showing that the material sought is relevant to the investigation.

6. See United States v. Mandujano, 425 U.S. 564, 571 (1976) (plurality opinion) (dictum) (observing that a grand jury protects against arbitrary and oppressive action because it requires a group of peers to bring charges).


8. See Kastigar v. United States, 406 U.S. 441, 443 (1972) (reaffirming the government's power to compel persons to appear and testify before grand jury); In re Grand Jury Proceedings (United States v. Field), 532 F.2d 404, 408 (5th Cir. 1976) (stating that a grand jury's authority to subpoena witnesses is essential) (citing Branzburg v. Hayes, 408 U.S. 665, 666 (1973)).

9. See Fed. R. Crim. P. 17(c) (promulgating that "[a] subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein").

10. Compare In re Grand Jury Subpoena Duces Tecum (Dorokee Co.) 697 F.2d 277, 281 (10th Cir. 1983) (requiring preliminary demonstration that material sought is relevant and regarding the sworn testimony of an F.B.I. agent as a sufficient showing) and In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 92 (3d Cir. 1973) (requiring preliminary showing by affidavit that each item is relevant to a grand jury investigation and not sought for another purpose before the government can obtain handwriting exemplars, fingerprints, and mugshots) with In re Grand Jury Subpoena (Slaughter), 694 F.2d 1258, 1260 (11th Cir. 1982) (allowing the government to obtain records without showing that the information is relevant to investigating an attorney's
A party litigant must control the documents that a grand jury seeks to obtain. A party's refusal to obey a grand jury order may result in a finding of contempt and a fine or imprisonment for up to eighteen months.

B. RELEVANT PROVISIONS OF SWISS LAW

Articles 271, 273, and 292 of the Swiss Penal Code and article 102 of the Swiss Constitution deal with foreign-based attempts to obtain documents. According to the government of Switzerland, these provisions reflect Swiss hostility toward foreign governments' efforts to enforce their judicial processes within Switzerland without acting in cooperation with the Swiss government.

1. Swiss Penal Code Article 271

Article 271 forbids a Swiss citizen from acting in cooperation with a foreign state without authorization from the Swiss government. In particular:


[I]f a corporation has power, either directly or indirectly, through another corporation or a series of corporations, to elect a majority of the directors of another corporation, such corporation may be deemed a parent corporation and in control of the corporation whose directors it has power to elect to office. If any corporation herein under the subpoena duces tecum has that power it has control necessary to secure the documents demanded by the government.

Id. at 285.


(1) Whoever performs, without permission, acts for a foreign state on Swiss territory which are within the authority of an administrative agency or a public official,

Whoever performs such acts on behalf of a foreign party or another foreign organization,
practice, this article prohibits attorneys or foreign officials from taking evidence on Swiss territory and prohibits direct service of documents by mail or through Swiss lawyers. The government of Switzerland maintains that article 271 restricts actions within Switzerland to carry out the demands of a foreign subpoena.

2. Swiss Penal Code Article 273

Article 273 prohibits exploring or making accessible a manufacturing or business secret on behalf of a foreign authority. According to the government of Switzerland, the purpose of article 273 is to protect Swiss sovereignty and the privacy of its citizens. The government of Switzerland defines the term "manufacturing or business secret" as covering all aspects of business life that: (1) are neither commonly known nor generally accessible; (2) the interested person desires to keep secret; and (3) which an objective interest exists in keeping secret. Article 273 is part of the chapter of the Swiss Penal Code relating to crimes against the state and national defense. Because it constitutes an "ex officio" offense, this law requires the Swiss government to enforce it whenever evidence of a violation appears, even absent an

Whoever performs such acts, will be punished by imprisonment, in grave cases by confinement in a penitentiary.

Id.

15. Brief for the Government of Switzerland, supra note 13, at 20. The brief added in a footnote that "[the law applies even if the foreign nation asserts jurisdiction over the party controlling the evidence in Switzerland." Id. at 20, n.5.

16. Id.

17. Id.

18. StGB, CP, art. 273 (Switz. 1976). Article 273 provides:

Whoever explores a manufacturing or business secret in order to make it accessible to a foreign authority or a foreign organization or a foreign private business enterprise or their agents,

Whoever makes a manufacturing or business secret accessible to a foreign authority or a foreign organization or a foreign private business enterprise or their agents,

Shall be punished with imprisonment, in serious cases with penitentiary confinement. The deprivation of liberty can be combined with a fine.

Id.


injured party's complaint.22

3. **Swiss Constitution Article 102**

Article 102 of the Swiss Constitution defines the Federal Council's 23 powers and obligations. According to article 102, section 8, the Federal Council must safeguard the interests of Switzerland in dealings with foreign countries.24 Specifically, the Council handles Switzerland's foreign affairs and relations under international law.25

4. **Swiss Penal Code Article 292**

Article 292 of the Swiss Penal Code makes failure to obey the Swiss government's orders a criminal act.26 Therefore, a Swiss citizen's compliance with a United States grand jury subpoena that involves taking evidence within Switzerland may result in criminal sanctions against the party-litigant.27 Consequently, a Catch-22 arises as compliance with an American grand jury subpoena constitutes a criminal act in Switzerland and noncompliance with a subpoena subjects a party to criminal penalties in the United States.

II. CUSTOMARY INTERNATIONAL LAW APPROACHES TO THE CONFLICT BETWEEN THE POWERS OF THE GRAND JURY AND SWISS NONDISCLOSURE LAWS

Customary international law28 provides three basic principles relevant to conflicts between a court's discovery orders29 and foreign non-
disclosure laws.\textsuperscript{30} \emph{Lex fori}\textsuperscript{31} stands for the principle that the domestic forum controls its own legal procedures.\textsuperscript{32} International comity\textsuperscript{33} holds that domestic courts should not take action that may cause the violation of another country's laws.\textsuperscript{34} State sovereignty\textsuperscript{35} maintains that a

\textit{Fed. R. Civ. P. 26(b)(1)} allows for the discovery of any nonprivileged information "reasonably calculated to lead to the discovery of admissible evidence." \textit{Id. Fed. R. Civ. P. 34(a)} requires the compliance with a subpoena for records or documents that are in the "possession, custody or control of the party upon whom the request is served." \textit{Id.}


31. \textit{Black's Law Dictionary} 819 (5th ed. 1979) (defining \textit{lex fori} as the law of the situs country). \textit{Lex fori}, or law of the jurisdiction in which relief is sought, controls for all matters pertaining to procedural rights. \textit{Id.}


33. \textit{See Somportex Ltd. v. Philadelphia Chewing Gum Corp.}, 453 F.2d 435, 440 (3d Cir. 1971) (discussing the meaning of international comity), \textit{cert. denied}, 405 U.S. 1017 (1972). The Third Circuit stated that international comity is "recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another [nation] . . . [t]his is a nation's expression of understanding which demonstrates due regard both to international duty and convenience, and to the rights of persons protected by its own laws." \textit{Id.}

34. \textit{See Maier, Resolving Extraterritorial Conflicts, or "There and Back Again,"} 25 \textit{Va. J. Int'l L.} 7, 13-16 (1984) (discussing the importance that each nation give its respect to the laws, policies, and interests of others that it would have others give to its own laws in the same or similar circumstances); \textit{J. Story, Commentaries on the Conflict of Laws} \S 35 (Boston 1834) (commenting that a nation should not make its own jurisprudence an "instrument of injustice" to other nations); \textit{see also Comment, Ordering Production of Documents from Abroad in Violation of Foreign Law}, 31 \textit{U. Chi. L. Rev.} 791, 794-97 (1964) [hereinafter Comment, Ordering Production] (discussing international comity and the production of evidence).


The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent in that power which could impose such restriction. \textit{Id. See generally Beale, The Jurisdiction of a Sovereign State}, 36 \textit{Harv. L. Rev.} 241 (1923) (commenting on the limits of a sovereign's jurisdictional claims).
state may not exercise its power in any form within the territory of another state.\textsuperscript{36}

A. Lex Fori

The basic principle underlying \textit{lex fori} is the impropriety of allowing a foreign entity to invoke its own laws and procedures because this enables the nonforum state to circumvent the forum state’s laws and place itself in a better position.\textsuperscript{37} Courts have maintained that “[e]ven if a foreign government were itself a party, it must conform to the laws of the forum and make discovery upon order of the court.”\textsuperscript{38}

The inflexibility of \textit{lex fori} resulted in limited use.\textsuperscript{39} Courts held that this principle generally fails to consider the sovereign rights of the foreign state\textsuperscript{40} such as those of Switzerland in the United States grand jury power-Swiss nondisclosure law conflict.\textsuperscript{41}

B. International Comity

The principle of international comity reflects a broader policy concern that each member of the international community should “do justice [so] that justice may be done in return.”\textsuperscript{42} Its broader perspective made international comity more widely accepted than \textit{lex fori}.\textsuperscript{43} The

\begin{itemize}
  \item \textsuperscript{36} See S. S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (modifying principle of state sovereignty). “[A]ll that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.” \textit{Id.}; see generally \textit{Jurisdiction with Respect to Crime Harvard Research in International Law}, 29 AM. J. INT’L L. Supp. 435, 445 (1935) (listing five basic principles used to determine the existence of jurisdiction).
  \item \textsuperscript{37} See Dixon’s Executors v. Ramsay, 5 U.S. (3 Cranch) 319, 324 (1806). “No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the laws prescribed by the laws of that country.” \textit{Id.}
  \item \textsuperscript{39} See Societe Internationale v. Rogers, 357 U.S. 197 (1958) (eschewing reliance on the \textit{lex fori} principle).
  \item \textsuperscript{40} Federal Maritime Commission v. DeSmedt, 268 F. Supp. 972, 974-75 (S.D.N.Y. 1967). Judge Ryan remonstrated that “I cannot, of course, direct and order anybody to violate the orders of his native land and I don’t intend to do so, and I don’t intend the United States court to be so presumptuous as to attempt to intrude upon the sovereignty of any foreign nation.” \textit{Id.}
  \item \textsuperscript{41} See Comment, \textit{International Paper Chase, supra} note 3, at 160 (applying the \textit{lex fori} principle precludes a court from considering the foreign state’s interests in addition to those of the United States).
  \item \textsuperscript{42} Note, \textit{Foreign Nondisclosure Law, supra} note 30 at 614 n.13 (quoting Russian Socialist Federated Republic v. Cibrario, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923)).
  \item \textsuperscript{43} Cf. Hilton v. Guyot, 159 U.S. 113 (1895) (constituting the first American case to recognize the international comity principle). In 1980 Robert B. Owen, Office of
Second Circuit, for example, regularly applies international comity to quash subpoenas issued for the production of business records. 44

The principle of international comity, however, is also ineffective when applied to the United States-Swiss disclosure conflict. 45 Courts apply the comity principle in so many different contexts that it is no longer considered a viable concept. 46 Various interpretations conclude that comity stands for: (1) a forum's courtesy in recognizing the foreign law; 47 (2) a foreign law's incorporation into the legal system applying it; 48 and, (3) friendly nations' reciprocal recognition of each other's laws. 49 United States courts appear to accept the reciprocal theory as the most plausible definition of comity. 50 Implicit in this definition, however, is the belief that international comity allows foreign de-

Legal Advisor of the United States Department of State, wrote concerning In re Uranium Antitrust Litigation (Westinghouse Electric Corp. v. Rio Algom Ltd.), 617 F.2d 1248 (7th Cir. 1980) that "in future proceedings and this and other cases, the courts should give due consideration to the views of interested foreign governments and take into account appropriate considerations of comity where there is possible conflict between the laws or policies of national states." Leich, Contemporary Practice of the United States Relating to International Law, 76 AM. J. INT'L L. 836, 845 (1982).

44. See, e.g., In re Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962) (modifying a subpoena duces tecum directing a bank to produce records of its Panamanian branch because of an obligation to respect the laws of sovereign states); Ings v. Ferguson, 282 F.2d 149, 152-53 (2d Cir. 1960) (quashing subpoena of records located in Canada because of the possibility that compliance would have required violation of Canadian laws); First Nat'l City Bank v. IRS, 271 F.2d 616, 620 (2d Cir. 1959) (holding that proof of a violation of Panamanian law would have allowed the subpoena to be vacated), cert. denied, 361 U.S. 948 (1960). The court in Ings took the position that "upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws, should not take such actions as may cause a violation of the laws of a friendly neighbor or, at least an unnecessary circumvention of its procedures." Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960).

45. See Comment, Ordering Production, supra note 34, at 794-97 (discussing inadequacies in the international comity principle).


47. Comment, Ordering Production, supra note 34, at 795.

48. Id. (citing R. Livermore, Dissertations of the Question Which Arise from the Contrariety of Positive Laws of Different States and Nations (1828)).

49. Comment, Ordering Production, supra note 34, at 795 n.18 (citing J. Story, Conflict of Laws § 35). But cf. Hilton v. Guyot, 159 U.S. 113, 227-28 (1895) (noting that while international law is founded on mutuality and reciprocity, a judgment entered in a foreign country, and therefore based on foreign law, is not entitled to full credit or to be deemed conclusive when sued on in the United States).

50. See Comment, Ordering Production, supra note 34, at 795 (maintaining that United States courts generally follow the reciprocal theory of international comity). But see Restatement (Second) of Conflict Laws § 98 comment (e) (1971) (maintaining that reciprocity requirements for the enforcement of foreign judgments are generally disfavored today).
fendants to take unjust advantage of their nondisclosure laws.\textsuperscript{51} Moreover, this theory fails to respect adequately the forum state's interest in procuring information necessary to properly adjudicate a conflict.\textsuperscript{52}

International comity has proven as ineffective as the principle of \textit{lex fori}.\textsuperscript{53} Applied to the subpoena-nondisclosure law conflict, the United States has a limited ability to procure the requested documents. In deference to Swiss nondisclosure laws, United States courts might be unwilling to enforce a grand jury subpoena.

\section*{C. State Sovereignty}

State sovereignty is based on the premise that a state must exclusively control its territory in order to protect it.\textsuperscript{54} Moreover, customary international law prohibits a state from interfering with another state's sovereignty.\textsuperscript{55} Based on the state sovereignty principle, if a United States grand jury issued a subpoena requiring a Swiss corporation to violate Swiss laws, the Swiss government could claim that the subpoena infringed on its sovereign rights and thus violated customary international law.\textsuperscript{56} Accordingly, a United States court could quash the subpoena and deprive a United States grand jury of the requested information.

The state sovereignty principle is now diluted.\textsuperscript{57} Most authorities now

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\item \textsuperscript{51} See Societe Internationale v. Rogers, 357 U.S. 197, 208 (1958) (advocating the use of a good faith test to determine whether a defendant is unjustly taking advantage of foreign nondisclosure laws). The good faith test was put forth in response to the perception that comity enabled a party to place itself in a more favorable position because of foreign laws. \textit{Id}.
\item \textsuperscript{52} Comment, \textit{Ordering Production}, supra note 34, at 796; see also The Island of Palmas Case (Neth. v. U. S.), 2 R. Int'l Arb. Awards 829, 839 (1928) (acknowledging that \textit{a sine qua non} of statehood controls acts or things located in a state's territory).
\item \textsuperscript{53} See Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900) (suggesting "[c]omity persuades; but it does not command"). International comity is ineffective, because it allows a United States court to order an action that may cause the violation of foreign laws. \textit{Id}.
\item \textsuperscript{54} The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824), quoted in Onkelinx, \textit{Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs}, 64 Nw. U.L. REV. 487, 490 (1969). "The laws of [a] nation . . . can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction." \textit{Id}.
\item \textsuperscript{55} See S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (stating "[t]he first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State").
\item \textsuperscript{56} See Note, \textit{International Paper Chase}, supra note 3, at 161 n.63. (maintaining that a "domestic judicial order compelling a party to produce documents in contravention of another sovereign's nondisclosure laws may constitute a violation of customary international law").
\item \textsuperscript{57} See Onkelinx, \textit{supra} note 54, at 490 (observing that territorial jurisdiction is no
recognize a state's right to exercise jurisdiction over threatening conduct occurring outside its territory. Like the principle of international comity, however, state sovereignty prohibits a court from properly adjudicating international claims.

The recent dilution of the state sovereignty principle rendered it inapplicable to the problem of a grand jury's power to subpoena foreign-based documents. If the grand jury claimed that the illegal activity had an impact in the United States, then in subpoenaing business records a grand jury would not exceed the customary international law limits placed on its jurisdiction. It appears, therefore, that the state sovereignty principle is equally ineffective in trying to reconcile the power of a United States grand jury with the limits of the Swiss nondisclosure laws. Similar to the other customary international law approaches, state sovereignty is incapable of solving the "Catch-22" because it favors one country over another. When a basic conflict of rights exists between two countries, resorting to favoritism is not a proper solution.

III. RECENT JUDICIAL ATTEMPTS TO RECONCILE THE BROAD POWERS OF THE UNITED STATES GRAND JURY WITH RESTRICTIVE SWISS LAW

Two recent federal circuit court cases illustrate the need for a new solution to the United States-Swiss conflict. In both cases, the courts
struggled to balance the competing interests of the American grand jury and the government of Switzerland. Moreover, the decisions highlight the "Catch-22" the Swiss corporate defendants presently face.

A. UNITED STATES v. VETCO

In United States v. Vetco, the Ninth Circuit considered the issuance of Internal Revenue Service (IRS) summonses to Vetco, Inc. (Vetco) and its accountants, Deloitte, Haskins & Sells (DH&S). The summonses ordered the parties to produce books and records of Vetco's foreign subsidiaries, including Vetco's Swiss subsidiary, Vetco International, A.G. (VIAG). Upon failure to comply, the IRS filed an action in federal district court to enforce the summonses. The district court ordered Vetco and DH&S to produce the requested records and on their refusal to comply, imposed a $500 per day fine until Vetco and DH&S produced the documents.

On appeal to the Ninth Circuit, Vetco and DH&S claimed possible Swiss penalties for violating article 273 of the Swiss Penal Code excused them from complying with the summonses. Vetco and DH&S also argued the United States Supreme Court's interpretation of article 273 in Societe Internationale v. Rogers supported their claim.

64. United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981) (amending technical changes and republished at 691 F.2d 1281). Because the technical changes in the decision are not relevant to this Comment, all citations to Vetco will refer to its first publication.
66. Id.
67. Id. at 1327.
68. Id.
69. Id.
70. See supra note 18 and accompanying text (providing the pertinent part of article 273 of the Swiss Penal Code).
72. Societe Internationale v. Rogers, 357 U.S. 197 (1958). In Societe Internationale, a Swiss company sued to recover property confiscated by the United States government during World War II. Id. at 198-200. The United States requested discovery of a Swiss banking firm's records that allegedly conspired with the plaintiff. Id. at 199. The Swiss government enjoined the plaintiff from producing the requested documents. Id. at 200. The United States district court dismissed the action when the plaintiff failed to produce the documents. Id. at 202. The Supreme Court, however, held that the district court could not dismiss a plaintiff's complaint for failure to comply with a discovery request when the plaintiff made good faith efforts to comply. Id. at 207-08, 12; see United States v. Vetco, Inc., 644 F.2d 1324, 1329 (9th Cir. 1981) (recounting the decision in Societe Internationale).
73. United States v. Vetco, Inc., 644 F.2d 1324, 1329 (9th Cir. 1981). The court in Societe Internationale stated that: "[F]ear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." 357 U.S. 197, 211 (1958), quoted in
The court in Vetco, however, distinguished both the holding and the facts of Societe Internationale. The court stated that the holding in Societe Internationale did not erect an absolute bar to summons enforcement and contempt sanctions whenever foreign law prohibits compliance with a United States grand jury summons. Rather, the court in Vetco agreed with the Supreme Court’s ultimate conclusion in Societe Internationale that enforcement of a summons depends “upon the circumstances of a given case.”

Concerning the facts in Societe Internationale, the court in Vetco acknowledged that the plaintiff in Societe Internationale made an extensive good faith effort to comply with the discovery request, but the Swiss government frustrated those efforts. In contrast, the Vetco court held Vetco and DH&S did not make a good faith effort to comply with the summonses. In addition, the Swiss government did not act to impede the party’s cooperation as it had in Societe Internationale. The court in Vetco further distinguished Societe Internationale because that case involved a civil discovery order, whereas Vetco involved IRS summonses issued pursuant to a potential criminal investigation and, the court held that, criminal summonses served a more pressing national function than civil discovery.

The court in Vetco ruled out a per se exemption from compliance with a summons. Instead, the court applied a balancing test to determine the circumstances under which foreign criminal liability served as

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74. United States v. Vetco, Inc., 644 F.2d 1324, 1329 (9th Cir. 1981). The court in Societe Internationale added, however, that its ruling would not apply “to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control.” Societe Internationale v. Rogers, 357 U.S. 187, 205-06, quoted in United States v. Vetco, Inc., 644 F.2d 1324, 1329 (9th Cir. 1981).

75. United States v. Vetco, Inc., 644 F.2d 1324, 1330 (9th Cir. 1981). “This case is not controlled by Societe Internationale.” Id.

76. United States v. Vetco, Inc., 644 F.2d 1324, 1329 (9th Cir. 1981). “This case is not controlled by Societe Internationale.” Id.

77. United States v. Vetco, Inc., 644 F.2d 1324, 1329 (9th Cir. 1981). In Societe Internationale, the Master found that “the plaintiff . . . has shown good faith in its efforts [to comply with the production order]”. Societe Internationale v. Rogers, 357 U.S. 197, 201 (1958).


80. Id.

81. Id.

82. Id.
a valid defense to enforcement of the summonses. The court considered five factors: (1) the vital national interests of each state; (2) the extent of the hardship inconsistent enforcement imposed; (3) the location of the documents, the nationality of the affected party and the expectation of compliance; (4) the importance of the documents; and (5) the availability of alternative means of compliance.

Focusing on the first factor of its balancing test, the Ninth Circuit found that the United States had a strong interest in collecting revenue and prosecuting tax fraud. The court conceded Switzerland's interest in preserving the secrecy of business records but determined that this interest was diminished when it involved subsidiaries of United States firms. Further, the court held that article 273 of the Swiss Penal

83. Id. at 1330-31. The court in Vetco derived the "balancing test" from the Restatement (Second) of Foreign Relations Laws of the United States § 40 (1965), that provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of the enforcement jurisdiction in light of such factors as

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

Id.

Section 40 of the Restatement had received judicial approval before the decision in Vetco. See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 997 (10th Cir. 1977) (balancing Canada's interest in protecting information about nuclear energy located in that country against the United States interest in civil discovery in a price fixing action); In re Grand Jury Proceedings (United States v. Field), 432 F.2d 404, 407 n.2 (5th Cir.) (balancing Cayman Islands interest in bank secrecy against the United States interest in preventing tax evasion), cert. denied, 429 U.S. 940 (1976); United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968) (balancing German bank secrecy laws invoked as a defense and the United States interest in unfettered discovery in an antitrust action); see also Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979) (reviewing the use of the balancing test in antitrust litigation discovery); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 613 (9th Cir. 1976) (balancing relevant considerations rather than bestowing complete immunity on all conduct with same imprimitur of a foreign government under the Act of State doctrine).


85. Id. at 1331. The court held that the United States interest in prosecuting fraud committed by United States nationals operating through foreign subsidiaries was similar to Switzerland's interest with respect to the activities of its own nationals. Id.

86. Id. The court emphasized that: (1) Swiss criminal law was only intended to reach situations in which a Swiss party objected to revealing the requested information; and (2) Switzerland's secrecy interest was reduced by the requirement that the IRS maintain the confidentiality of the documents. Id.; see also Timberlane Lumber Co. v.
SWISS NONDISCLOSURE LAW

Code did not impose a great hardship on Vetco or DH&S.\(^7\)

Thereafter, the court in *Vetco* examined the remaining criteria of the balancing test and determined that they also weighed in favor of requiring compliance with grand jury subpoenas.\(^8\) First, the court held that although the documents were located in Switzerland, activities related to their production would take place in both Switzerland and the United States.\(^9\) Second, although VIAG was a Swiss concern, it was a controlled subsidiary of a United States corporation.\(^0\) Third, the court considered the importance of the documents to the requesting party and held that the IRS sufficiently demonstrated the relevance of the records to its investigations.\(^1\) Fourth, the court considered alternate means of acquiring the requested information and found that no adequate substitute existed.\(^2\) Ultimately,\(^3\) the court held that the United

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\(^7\) Id. at 1331-32. A representative of the Swiss Federal Attorney submitted an affidavit stating enforcement of an IRS summons might constitute duress and hence serve as a defense against possible criminal charges in Switzerland. Id. at 1332. In addition, the court in *Vetco* noted that this dilemma could have been avoided if Vetco had kept certain records required by United States law. See id. (acknowledging that the Internal Revenue Code requires United States companies to maintain records of foreign subsidiaries to the extent necessary to determine whether tax on subpart F income is due).

\(^8\) Id. at 1332.

\(^9\) Id.

\(^1\) Id.

\(^2\) Id.

\(^3\) Id. at 1332-33; see SEC v. Minas de Artemisa, S.A., 150 F.2d 215, 218-19 (9th Cir. 1945) (holding that a court will consider alternate means of obtaining documents where compliance with a Securities and Exchange Commission subpoena would violate Mexican law).

The court addressed each alternative the Appellants suggested. United States v. Vetco, Inc., 644 F.2d 1324, 1332-33 (9th Cir. 1981). Vetco and DH&S could have sought consent to disclose from interested third parties, but such a procedure would have limited the information received and would have been time-consuming and costly. Id. at 1324, 1332. The court examined the possibility of using letters rogatory, but noted that Switzerland had previously refused to provide information to a United States tax fraud investigation when that information was not available under the Convention for the Avoidance of Double Taxation, May 24 - Sept. 27, 1951, 2 U.S.T., T.I.A.S. No.2316, 127 U.N.T.S. 227 [hereinafter “Tax Convention”]. Id. at 1333; see X & Y Bank v. Swiss Federal Tax Administration, Judgment of May 16, 1975, Bundegericht 101 BGE I 160, 76-1 U.S.T.C. § 9452, at 84, 213-84 (ruling by Swiss Federal Supreme Court that the Convention does not require Switzerland to transmit all information required under United States law); see also Tax Convention, art. VI, which reads, in pertinent part, “[n]o information shall be exchanged which would disclose any trade, business, industrial or professional secrets or any trade process.”; \cf\ STGB, Cp, art. 274 (Switz. 1976) (containing language similar to that of article VI of the Convention).

Next, the court determined that masking the names of interested third parties would not be appropriate because information about such parties was relevant to a subpart F
States had a powerful interest in obtaining the summoned documents and that Switzerland had only a slight interest in nondisclosure. Accordingly, the court held that Vetco and DH&S must comply with the IRS summonses.

The Ninth Circuit's holding in *Vetco* follows a trend away from routine deferral to foreign law based on principles of international comity. Instead, the holding in *Vetco* balances the competing interests of affected states. Federal court decisions following *Vetco* predominately hold that the interests of justice associated with United States grand jury investigations outweigh foreign countries' prohibitions against dis-

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93. *United States v. Vetco, Inc.*, 644 F.2d 1324, 1333 (9th Cir. 1981). In addition to the foreign illegality and Convention defenses, the court considered appellants' contention that the district court erred in that it failed to enter findings of fact and conclusions of law, and that the district court's production order denied DH&S due process. *Id.* The court treated these additional issues as questions of procedure and resolved them against Vetco and DH&S. *Id.*

94. *United States v. Vetco, Inc.*, 644 F.2d 1324, 1333 (9th Cir. 1981) (holding that the United States interest in enforcing the subpoena outweighs the contrary Swiss interest). *Id.*

95. *See supra* notes 36, 57-58 and accompanying text (observing the trend away from routine deferral to international concern).


In *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) and *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), cases in which the Second Circuit Court of Appeals applied the principle of international comity to deny discovery requests, the persons to whom summonses were issued were not parties to the actions and alternate means to obtain the requested information were present. The Ninth Circuit Court of Appeals in *Vetco* recognized these factors as significant. *United States v. Vetco, Inc.*, 644 F.2d 1324, 1330-31 n.8 (9th Cir. 1981). The court in *Vetco* neither ignored nor rejected the argument for applying principles of comity, but chose to distinguish the facts before it from those present in the Second Circuit cases. *Id.*; *see supra* note 44 (discussing Second Circuit cases).
closure. Swiss authorities, however, are unlikely to accept a balancing test that overwhelmingly favors the United States. Consequently, an alternative that satisfies both Swiss and United States interests must include an authoritative body not having to balance the competing interests of the United States and Switzerland. A treaty requiring entities to keep business records in each forum provides an acceptable alternative.

B. Marc Rich & Co., A.G. v. United States

In *Marc Rich and Co. v. United States*, Marc Rich and Co. (Marc Rich), the Swiss parent company of its wholly-owned American subsidiary, Marc Rich and Co. International Ltd., raised the applicability of article 273 of the Swiss Penal Code. The grand jury, investigating an alleged tax evasion scheme involving the Swiss company and its American subsidiary, subpoenaed Marc Rich to produce documents concerning certain oil transactions. Marc Rich moved to quash the subpoena on the grounds, *inter alia*, that article 273 of the Swiss Penal Code prohibited the production of the material demanded. The district court denied the motion to quash the sub-

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99. See infra notes 100-26, and accompanying text (indicating that the Swiss government is likely to take stricter measures where a Swiss national is concerned). Compare *Marc Rich & Co., A.G. v. United States*, 707 F.2d 663 (2d Cir.) (involving a Swiss national where Switzerland seized the subpoenaed documents), *cert. denied*, 463 U.S. 1215 (1983), with *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir. 1981) (involving a Swiss subsidiary of American company where Switzerland released the records).


101. *Id.*; see supra note 18 and accompanying text (providing pertinent provisions of article 273 of Swiss Penal Code).

102. *Id.* at 665.

103. *Id.* The subpoena called for various business records relating to the Swiss corporation’s crude oil transactions in 1980 and 1981. *Id.*

104. *Id.* Marc Rich also moved to quash the subpoena on the grounds that it was not subject to the personal jurisdiction of the court. *Id.* The jurisdiction of the court over a foreign defendant is beyond the scope of this Comment. See generally Note, *The
holding Swiss law did not bar the production of the documents. The district court held Marc Rich in civil contempt and fined the company $50,000 per day until it turned over the documents. The Second Circuit affirmed the contempt decision but failed to address the relevance of article 273 of the Swiss Penal Code.

Swiss authorities, despite the $50,000 per day fine, ordered Marc Rich not to comply with the subpoena and, on three separate occasions, seized various documents the subpoena demanded. In response, Marc Rich again moved to vacate the judgments of contempt on grounds that


In support of its argument to quash the subpoena, Marc Rich submitted the affidavit of Dr. Peter B. Forstmoser. Comment, International Paper Chase, supra note 3, at 154 n.22. In his affidavit, Dr. Forstmoser stated that delivery of the documents to American authorities would violate article 273. Id.; see also Marc Rich Penalty is Continued, N.Y. Times, Oct. 4, 1983, at D2, col. 3 (noting that Switzerland had requested that the district court stay sanctions against Marc Rich pending a bilateral attempt to settle the issue of production of documents); infra note 111 and accompanying text (detailing the Swiss government’s actions after the federal court upheld the subpoena).


106. Id. Judge Sand also refused to quash the subpoena because personal jurisdiction existed over Marc Rich. Id.

107. Id. But cf. Note, Limitations on the Federal Judicial Power, supra note 4, at 1470 (stating that “it is clear that a person cannot be held in criminal or civil contempt for noncompliance [with a subpoena] owing to physical impossibility”).

108. Marc Rich and Co., A.G. v. United States, 736 F.2d 864, 866 (2d Cir. 1984). After the Second Circuit affirmed Judge Sand’s contempt decision, Marc Rich moved to vacate the order on the grounds that Swiss court orders prohibited compliance. Id. The motion was denied and Marc Rich appealed. Id. Shortly thereafter, in August 1983, Marc Rich agreed to comply with the subpoena and not raise Swiss law as a reason for non-production of the documents. Id. Marc Rich’s agreement not to raise the issue of the relevance of Swiss law became part of the court’s order in dismissing the appeal. Id.

110. Marc Rich and Co., A.G. v. United States (I), 707 F.2d 663 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); see also Comment, International Paper Chase, supra note 3, at 162 (stating that “although Marc Rich’s arguments on appeal centered principally on issues of personal jurisdiction, the court of appeals should have considered the competing states’ national interests before exercising enforcement jurisdiction over the Swiss corporation”).

111. Marc Rich and Co., A.G. v. United States (II), 736 F.2d 864, 866 (2d Cir. 1984); see Marc Rich, N.Y. Times, Oct. 4, 1983 at D2, col. 3. Because the Swiss government perceived that the United States had affronted international law, Switzerland’s national sovereignty, and Swiss secrecy laws, the Swiss government seized some of the subpoenaed documents to prevent Marc Rich from complying with the court order. Id.
the Swiss government prohibited compliance with the subpoena.\footnote{112} During the hearing on Marc Rich’s motion, the government of Switzerland appeared before the Second Circuit as \textit{amicus curiae} on behalf of Marc Rich.\footnote{113} The Swiss government contended that: (1) a clear conflict existed between the public laws of Switzerland and those of the United States; and, (2) United States efforts to force compliance with the subpoena violated Swiss sovereignty and international comity.\footnote{114} The government of Switzerland maintained, however, that the United States could obtain the documents if it utilized diplomatic procedures established in the United States-Swiss Treaty on Mutual Assistance in Criminal Matters (1977).\footnote{115}

The Second Circuit, however, failed to address the Swiss government’s concerns.\footnote{116} Once again, the court rejected Marc Rich’s motions to vacate the contempt order.\footnote{117} The court reasoned that: (1) Marc Rich never produced appropriate affidavits attesting to the impossibility of compliance with the subpoena;\footnote{118} (2) Marc Rich agreed in August, 1983, not to raise Swiss law as a reason for noncompliance with the subpoena;\footnote{119} and (3) \textit{res judicata} barred consideration of Swiss law

\footnote{112}Marc Rich and Co., A.G. v. United States (II), 736 F.2d 864, 866 (2d Cir. 1984).
\footnote{113}Id.
\footnote{114}\textit{Id}; see supra notes 6-27 and accompanying text (discussing broad powers of the United States grand jury and Swiss nondisclosure laws); see supra notes 42-63 and accompanying text (stating theories of international comity and state sovereignty).
\footnote{116}Marc Rich and Co., A.G. v United States (II), 736 F.2d 864, 866 (2d Cir. 1984). One explanation for the Second Circuit’s disregard for the Swiss government’s concern is the court’s earlier ruling that it has jurisdiction over a person who causes adverse consequences within a state. Marc Rich and Co., A.G. v. United States (I), 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983). The earlier decision concluded that when the United States is adversely affected by the “wrongful evasion of its revenue laws,” the offense itself supports jurisdiction. \textit{Id.} at 667-68.
\footnote{117}Marc Rich and Co., A.G. v United States (II), 736 F.2d 864, 867 (2d Cir. 1984).
\footnote{118}\textit{Id}. The Second Circuit maintained that if the Swiss government’s seizures had made further compliance impossible, Marc Rich could assert the impossibility defense as a reason for noncompliance. \textit{Id.}

The doctrine of impossibility holds that a person cannot be held in criminal or civil contempt for noncompliance owing to physical impossibility. \textit{See} Kempson \textit{v.} Kempson, 1 N.J.Eq. 303, 48 A. 244 (Ch. 1901) (applying the impossibility doctrine to contempt order); Butcher \textit{v} Coats, 1 U.S. (1Dall.) 304 (Pa. 1788) (same).
\footnote{119}\textit{See supra} note 116 and accompanying text (discussing Marc Rich’s agreement not to raise Swiss law).
and orders not raised on the first appeal.\textsuperscript{120} Focusing on these procedural defects, the Second Circuit chose not to address this complex conflict between United States and Swiss law.\textsuperscript{121}

\textit{Marc Rich} is a useful example of how to reconcile the powers of the United States grand jury inquiry with Swiss nondisclosure laws. Further, it indicates how the Swiss government might react to a future American grand jury attempt to obtain documents from a Swiss company within Switzerland.\textsuperscript{122} It is important to note, however, that the Swiss government intentionally limited its argument to the facts of \textit{Marc Rich}.\textsuperscript{123} The Swiss government may act differently if faced with

\begin{itemize}
  \item \textsuperscript{120} Marc Rich and Co., A.G. v. United States (II), 736 F.2d 864, 867 (2d Cir. 1984). "Since Rich has had numerous opportunities to bring this issue [Swiss law] to the court of appeals and has not done so, the principle of \textit{res judicata} bars it from doing so now." \textit{Id.}
  \item \textsuperscript{121} \textit{Id.} On October 11, 1984, Marc Rich pleaded guilty to thirty-eight counts of making false statements to federal authorities and two counts of tax evasion. See Baum & Schmitt, \textit{Marc Rich & Co., Former Unit Plead Guilty}, Wall St. J., Oct. 12, 1984, at 3, col. 1. Marc Rich agreed to pay the United States $150 million and to forfeit $21 million in fines paid pursuant to Judge Sand's contempt order. \textit{Id.} at 20, col. 2. Marc Rich also waived the right to claim the $150 million payment as tax liability in the future. \textit{Id.}
  \item \textsuperscript{122} \textit{See Olsen, Discovery in Federal Criminal Investigations, 16 N.Y.U. J. INT'L L. & POL. 999, 1003 (1984) (providing two other cases that suggest the Swiss government's possible future behavior).}
  \item In United States v. Lemire, the Justice Department sought evidence and investigative assistance from Switzerland in a matter involving a commercial fraud scheme against the Raytheon Company. United States v. Lemire, 720 F.2d 1327, 1330 (D.C. Cir. 1983). The defendants bribed Raytheon employees with more than one million dollars to guarantee the awarding of shipping subcontracts for a major Raytheon air defense project in Saudi Arabia. \textit{Id.} at 1332-33. These shipping subcontracts contained inflated charges of more than two million dollars. \textit{Id.} The defendants diverted this money to a Swiss bank account. \textit{Id.} at 1332.
  \item The Department of Justice's request for the information was filed pursuant to the Criminal Assistance Treaty. \textit{Id.} It took nearly three years before all the essential items of evidence were obtained. \textit{Id.} Moreover, the United States requests received only minimal cooperation. \textit{Id.}
  \item The insider trading investigation in \textit{Banca Della Svizzera Italiana} required a Swiss corporation ("BSI") doing business for undisclosed principals on the New York Stock Exchange to disclose the identity of the investors, notwithstanding that such disclosure would violate Swiss nondisclosure laws. SEC v. \textit{Banca Della Svizzera Italiana}, 92 F.R.D. 111, 112-13 (S.D.N.Y. 1981). BSI refused to comply with the order, alleging as a defense that bank secrecy laws of Switzerland barred compliance. \textit{Id.} at 113.
  \item The Swiss government, however, expressed no opposition to release of the records. \textit{Id.} at 117. In response to BSI inquiries, the Swiss Federal Attorney General said only that a "foreign court could not change the rule that disclosure required the consent of the one who imparted the secret that BSI might thus be subject to prosecution." \textit{Id.} at 117-18. The Swiss government did not confiscate the records as it did in \textit{Marc Rich}. \textit{Id.} at 118. Rather, the Swiss government did not even suggest that the United States halt discovery. \textit{Id.; see also Olsen, Discovery in Federal Criminal Investigations, 16 N.Y.U. J. INT'L L. & POL. 999, 1016 (1984) (providing Swiss government's attitude to United States' request for certain records in BSI).}
  \item \textsuperscript{123} Reply Brief for the Government of Switzerland at 6, Marc Rich and Co.,
a factually distinct situation.\textsuperscript{124}

Clearly, however, the Swiss seizure of documents from Marc Rich after both the trial and appellate court upheld the grand jury subpoena seems extraordinary. Plausible explanations for the United States Attorney's Office's persistence in pursuing the subpoena, rather than in using diplomatic means, are that the United States Attorney: (1) underestimated the resolve of the Swiss in enforcing their laws; (2) anticipated that the use of diplomatic means would be too time consuming; or (3) believed that the available diplomatic means would not provide assistance in a criminal tax evasion matter. At the very least, it is now more likely that a United States Attorney's Office would first pursue diplomatic means before resorting to a grand jury subpoena.\textsuperscript{125} The government of Switzerland attempted to encourage a diplomatic resolution in \textit{Marc Rich} \textsuperscript{126} and in the future, diplomatic solutions may prevail. Accordingly, an examination of the applicability and utility of diplomatically negotiated solutions to United States-Switzerland conflict is essential.


[S]hould examine the possibility of developing and committing [itself] to use cooperative channels wherever they are effective and adequately prompt. I understand this to be the existing policy of the Department of Justice. . . . We cannot afford to legislate, regulate, enforce, adjudicate or negotiate without attention to the needs of [the international] system and its public and private members.

\textsuperscript{126} See supra note 115 and accompanying text (discussing Swiss government's efforts to encourage the United States Attorney's Office to use diplomatic channels).
IV. NONJUDICIAL MEANS OF OBTAINING THE DOCUMENTS

Most commentators advocate the use of diplomatic means to reconcile the United States-Swiss conflict. 127 The most relevant treaty between the United States and Switzerland on obtaining evidence from within the applicable country’s boarders is the Criminal Assistance Treaty.128 Indeed, this is the treaty the Swiss government encouraged the United States Attorney’s Office to use in Marc Rich.129 A second treaty to the obtaining of documents located abroad is the convention for the Awardance of Double Taxation.130 Unfortunately, neither treaty solves the “Catch-22” created when an American grand jury subpoenas documents of a subsidiary of a Swiss corporation located in Switzerland.131

A. UNITED STATES-SWITZERLAND TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

The Treaty between the United States and Switzerland on Mutual Assistance in Criminal Matters (Criminal Assistance Treaty)132 assists both countries in enforcing crimes that are punishable offenses in both


129. See supra note 115 and accompanying text (providing the Swiss government’s position that the best way to obtain the requested documents is through the Criminal Assistance Treaty).

130. See supra note 92.

131. This Comment only addresses those non-judicial means most relevant to the procuring of foreign based documents. The international agreements addressed are: (1) Treaty on Mutual Assistance on Criminal Matters, May 25, 1973, United States-Switzerland 27 U.S.T. 2019, T.I.A.S No. 8302; and, (2) Convention for the Avoidance of Double Taxation: Taxes on Income, May 24, 1951, United States-Switzerland, 2 U.S.T. 1751, T.I.A.S. No 2316. Bilateral agreements negotiated with countries other than Switzerland are beyond the scope of this Comment. See generally Note, Discovery of Documents Located Abroad, supra note 97, at 770-74 nn. 160-70 (discussing the use of treaties on the production of documents).

132. Criminal Assistance Treaty, supra note 115. The United States and Switzerland signed the treaty in Bern, Switzerland on May 25, 1973, but it did not become legally binding until January 23, 1977. Id.
nations. Such assistance includes effecting the production of records or articles of evidence. The Criminal Assistance Treaty ostensibly accomplishes most proceedings that normally take place within the requesting state such as grand jury or agency investigations.

Since the enactment of the Criminal Assistance Treaty in 1977, the United States has made more than two hundred requests for the release of certain business records. These requests include orders for disclosure of bank records, identification of criminal suspects, and...
assistance from Swiss authorities in ongoing investigations. Swiss compliance with United States requests depends on: (1) adhering to proper Criminal Assistance Treaty procedures; and (2) not threatening Swiss “sovereignty, security or similar essential interest.”

140. See United States v. Johnpoll, 739 F.2d 702, 707-08 (2d Cir. 1984) (requesting the Swiss government’s assistance in arranging telephone depositions of witnesses for an investigation concerning stolen securities).

141. See Criminal Assistance Treaty, supra note 115, at art. 18 (detailing procedures for the production of business records). Article 18 provides:

1. If the production of a document, including a book, paper, statement, record, account or writing, or extract therefrom, other than an official document provided for in Article XIX, of whatever character and in whatever form is requested, the official executing the request shall, upon specific request of the requesting state, require the production of such document pursuant to a procedural document. The official shall interrogate under oath or affirmation the person producing such document and examine it in order to determine if it is genuine and if it was made as a memorandum or record of an act, transaction, occurrence, or event, if it was made in the regular course of business and it was the regular course of such business to make such document at the time of the act, transaction, occurrence or event recorded therein or within a reasonable time thereafter. The official shall cause a record of the testimony taken to be prepared and shall annex it to the document.

2. The official shall certify as to the matters set forth in paragraph 1, he shall certify as to the procedure followed and his determinations and shall authenticate his attestation the document, or a copy thereof or extract therefrom, and the record of testimony taken. Such certification and attestation shall be signed by the official and state his official position. The seal of the authority executing the request shall be affixed.

3. Any person subsequently transmitting the authenticated document shall certify as to the genuineness of the signature and the official position of the attesting person or, if there are any prior certifications, of the last certifying person. The final certification may be made by:

a. an official of the Central Authority of the requested State;

b. a diplomatic or consular official of the requesting state stationed in the requested State; or

c. a diplomatic or consular official of the requested State stationed in the requesting State.

5. Where a request under this Article pertains to a pending court proceeding, the defendant, upon his application, may be present or represented by counsel or both, and may examine the person producing the document as to its genuineness and admissibility. In the event the defendant elects to be present or represented, a representative of the requesting State or a state or canton thereof may also be present and put such questions to the witness.

6. Any document, copy thereof, entry therein or extract therefrom authenticated in accordance with this Article, and not otherwise inadmissible shall be admissible as evidence of the act, transaction, occurrence or event in any court in the requesting state without any additional foundation or authentication.

7. In the event that the genuineness of any document authenticated in accordance with this Article is denied by any party to a proceeding, he shall have the burden of establishing to the satisfaction of the court before which the proceeding is pending that such document is not genuine in order for the document to be excluded from evidence on such ground.

Id. at art. 18.

142. Id. at art. 3, para. 1(a).
cooperation with the United States under this treaty is predominantly voluntary.

The extreme procedural burden placed on the requesting state undermines the success of the Criminal Assistance Treaty. This burden discourages full use of the Treaty. In United States v. Lemire, for example, the request for Swiss investigative assistance was extremely "complex and time consuming." Using the Criminal Assistance Treaty, it took the United States Attorney's Office nearly three years to obtain the requested evidence. Use of the Criminal Assistance Treaty also resulted in a lengthy delay of two years in United States v. Davis. Time, therefore, is an important consideration when using the Criminal Assistance Treaty. Attorneys are generally reluctant to resort to a treaty to procure important documentary evidence if the Treaty results in undue delay between the request and compliance.

The Criminal Assistance Treaty has limited applicability to various controversies, and contains two escape clauses. In Marc Rich, the government of Switzerland urged the United States to use the Criminal Assistance Treaty to obtain subpoenaed documents. Although the United States Attorney's Office ignored the Swiss government's suggestion, use of the Treaty would not have resolved the conflict.

143. See Olsen, supra note 122, at 1003-04 (noting in United States v. Lemire, 720 F. 2d 1327 (D.C. Cir. 1983), that the prosecutor risked running the statute of limitations when Switzerland required many supplementations of his bank records request).
144. United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983); see supra notes 122, 143 and accompanying text (discussing the facts and procedural burdens the prosecutor faced in Lemire).
145. See Olsen, supra note 122, at 1003-05 (discussing the onerous burden the prosecutor bore in attempting to obtain bank records located in Switzerland).
146. See id. (discussing Swiss investigations in Lemire).
149. Criminal Assistance Treaty, supra note 115, at art. 2 (listing violations for which compulsory measures are available is annexed thereto. Id.
150. Id. There are two escape clauses to the application of the Treaty. Id. at art. 3. Article 3 (Discretionary Assistance) holds that a country may refuse assistance to the extent that: "[t]he requested state considers that the execution of the request is likely to prejudice its sovereignty, security or similar essential interest." Id. at art. 3, para. 1(a). Article 9 (General Provisions for Executing Requests) states that the terms of the treaty are subordinate to domestic law and national interests. Id. at art. 9, para. 2.
151. See supra note 115 and accompanying text (discussing Switzerland's insistence that the United States Attorney's Office use the Criminal Assistance Treaty).
152. See Criminal Assistance Treaty, supra note 115, at art. 2, para. 1(e)(5) (providing that the Criminal Assistance Treaty is inapplicable to violations of tax laws); see also infra note 169 and accompanying text (discussing the Swiss government's attitude
tax evasion, the crime Marc Rich allegedly committed, is not an offense for which Switzerland can give assistance. The inapplicability of the Criminal Assistance Treaty in tax matters rendered the Treaty useless in Marc Rich. Moreover, the Treaty is also irrelevant for all other crimes not listed among the Treaty’s schedule of offenses. The Criminal Assistance Treaty, therefore, is not a viable solution to the “Catch-22” conflict because it does not apply to all circumstances.

The Treaty’s two escape clauses further reduce the Criminal Assistance Treaty’s effectiveness. Article III allows a state to refuse assistance whenever it deems the request for documents prejudicial to state sovereignty. Moreover, article IX allows a state to subordinate the terms of the Criminal Assistance Treaty to each state’s domestic law and national interest. The escape clauses allow either state to avoid specific Treaty provisions.

According to article 273 of the Swiss Penal Code, preservation of a manufacturing or business secret is in Switzerland’s national inter-

153. Criminal Assistance Treaty, supra note 115, at art. 2, para. 1(c)(5). See generally Ellis & Pisani, supra note 148, at 200-01 (stating the offenses for which requests for assistance “shall not apply” under the Criminal Assistance Treaty).


155. See Ellis & Pisani, supra note 148, at 199 (commenting that Criminal Assistance Treaty requires a listing of the act among the schedule of offenses before any assistance is provided).

156. See supra notes 152-55 and accompanying text (noting limited applicability of the Criminal Assistance Treaty). It is interesting to note that the Criminal Assistance Treaty only includes names of offenses. Criminal Assistance Treaty, supra note 115, at art. 2. The Treaty does not define any offenses. This is likely to cause confusion when courts attempt to administer Treaty provisions.

157. See supra note 150 (discussing the two escape clauses provided in the Criminal Assistance Treaty).

158. Criminal Assistance Treaty, supra note 115, at art. 3, para. 158; see supra note 150 (discussing article 3 and article 9 escape clauses in the Criminal Assistance Treaty).

159. Criminal Assistance Treaty, supra note 115, at art. 9, para. 2.

160. See Note, The Marc Rich Case, supra note 104, at 127 (observing that language in the Criminal Assistance Treaty subordinating the Treaty to domestic law and national interests provides an easy means for a country to avoid Treaty provisions). But see Wall St. J., Aug. 15, 1983, at 3, col. 4 (providing statement of Swiss legal advisor (Mr. Leutert) concerning use of Criminal Assistance Treaty in Marc Rich). Mr. Leutert estimated that the United States has been granted nearly all of its 250 requests under the Criminal Assistance Treaty. He added that at no time did the United States government request assistance in Marc Rich. Id. In Marc Rich, the United States government argued, however, that tax matters were explicitly excluded from the scope of the Criminal Assistance Treaty. Brief for the Government of the United States at 25, Marc Rich and Co., A.G. v. United States (1), 707 F.2d 663 (2d Cir.), cert. denied, 463 U.S. 1215 (1983). The United States government thereby concluded that the Criminal Assistance Treaty was inapplicable in Marc Rich. Id.
The Criminal Assistance Treaty, through articles III and IX, permits Switzerland to subordinate the Treaty's terms in order to preserve that national interest. According to the Treaty's terms, Switzerland can seize documents any time its interests are threatened and thus resist a grand jury subpoena. The "Catch-22", therefore, remains.

Resolution of the Swiss-United States conflict depends on whether compliance with a request is discretionary. If compliance is at the discretion of the requested state, as in the Criminal Assistance Treaty, the "Catch-22" will remain unsolved. If, on the other hand, a state must comply with a request regardless of the various interests at stake then a treaty has a greater probability of remaining viable because it can satisfy each party's concerns.

B. CONVENTION FOR THE AVOIDANCE OF DOUBLE TAXATION: TAXES ON INCOME

The Convention for the Avoidance of Double Taxation: Taxes on Income (Tax Convention), provides for the exchange of information to

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161. See supra note 18 and accompanying text (discussing article 273 of the Swiss Penal Code).
162. Criminal Assistance Treaty, supra note 115, at art. 3, para. 1(a) and art. 9, para. 2 (allowing either Switzerland or the United States to subordinate the terms of the Criminal Assistance Treaty to preserve their national interests or domestic laws).
163. Id. In the "Catch-22", where an American grand jury subpoena directly challenges Swiss non-disclosure laws, a sovereignty/national interest concern is always at issue. The Criminal Assistance Treaty fails to remedy this basic element of the Switzerland-United States conflict because it allows either nation to refuse the release of documents if they invoke either of the Treaty's two escape clauses (articles 3 and 9). See generally Comment, A Comparative Analysis of the Efficacy of Bilateral Agreements in Resolving Disputes Between Sovereigns Arising From Extraterritorial Application of Antitrust Law: The Australian Agreement, 13 GA. J. INT'L & COMP. L. 49, 78 (1983) [hereinafter Comment, Comparative Analysis] (acknowledging that it is a reasonable reaction to construe the inclusion of an escape clause as effectively negating any binding character of a treaty); Davidow and Chiles, The United States and the Issue of the Binding of Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices, 72 AM. J. INT'L L. 247, 268 (1978) (viewing consultation procedures with escape clauses as an approach to conflict resolution that is used to disguise a basic unwillingness to surrender national discretion).
164. See supra note 163 and accompanying text (noting that agreements containing escape clauses are incapable of resolving an international conflict).
165. See supra notes 157-63 and accompanying text (illustrating that discretionary compliance is fatal to a treaty designed to provide assistance in a "Catch-22").
166. See infra notes 215-19 and accompanying text (advocating the adoption of a new bilateral treaty without any escape clauses).
prevent tax fraud between the United States and Switzerland. Swiss legal precedent, however, often renders assistance (exchange of information) ineffective. In 1975, for example, the Swiss Federal Supreme Court (Bundesgericht) held that Swiss tax authorities had complied with an IRS business records request when they furnished a summary of their findings without any documentation. The Court reasoned that Switzerland's obligation was to exchange information, not to provide comprehensive legal assistance. The Swiss attitude toward compliance with the Tax Convention undermines the Convention's effectiveness in dealing with the "Catch-22" between a United States grand jury subpoena and Swiss nondisclosure laws. Even if the Tax Convention is used, a United States Attorney's Office may not obtain the needed documents. Swiss authorities could either ignore the request because tax evasion is not a criminal offense in Switzerland, or furnish minimal information, adhering to the Swiss Federal Supreme Court's earlier holding. The attitude of United States courts


168. Tax Convention, supra note 167, at art. 16, para. 1.

169. See Seemann, Exchange of Information Under International Tax Conventions, 17 Int'l L. 333, 343 (1983) (observing that in Switzerland, neither tax evasion nor tax fraud is a crime). Hence, neither qualifies for assistance under the Criminal Assistance Treaty. Id. Furthermore, the Swiss regard tax evasion as a less serious offense than tax fraud and not meriting international enforcement action. Id.

170. X & Y v. Confederation (Swiss) Tax Administration, 37 AFTR 2d §§ 76-1282 (Swiss Confederation Supreme Court, no. 30 1975). The United States complained that the summary of Swiss findings was incomplete and was not acceptable in an American court. Seemann, supra note 169, at 343.

171. X & Y v. Confederation (Swiss) Tax Administration, 37 AFTR 2d §§ 76-1282 (Swiss Confederation Supreme Court, no. 30 1975).

172. See id. (providing an example of United States inability to obtain desired information using the Tax Convention).

173. Id.

174. Id.; cf. Tax Convention, supra note 167, at art. 16, paras. 1 and 3 (providing Swiss authorities with two alternatives to refuse compliance with a United States request). Article 16, paragraph 1, provides in pertinent part:

(1) The competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary for carrying out the provision of the present Convention or for the prevention of fraud or the like in relation to the taxes which are the subject of the present Convention. . . . No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process.

Id. at art. 16, para. 1. Article 16, paragraph 3 provides:

(3) In no case shall the provisions of this Article be construed so as to impose upon either of the contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either contracting
holding the treaty not the exclusive means of obtaining tax information from Switzerland further weakens the Tax Convention's effectiveness. 178

Failure to require use of the Tax Convention for all tax matters reduces the Convention's binding effect on party-litigants and negates the Tax Convention's independent power to compel production of foreign-based tax records. 179 Moreover, parties recreate the "Catch-22" between Switzerland and the United States in these matters when they look to the courts for guidance. Enforcement of a tax document request pursuant to the Convention again depends on whether compliance is consistent with a state's national interests. 177

V. RECOMMENDATIONS

Customary international law approaches to the grand jury-nondisclosure law conflict fail because each method tends to favor one country over the other.178 Judicial attempts to solve the "Catch-22" also fail because: (1) they require balancing of competing interests that are virtually impossible to balance (Vetco); 179 and (2) they eventually challenge the resolve of each nation (Marc Rich). 180 Traditional diplomatic efforts are unsuccessful because they: (1) are too time-consuming; (2) are inapplicable to too many situations; (3) permit voluntary compliance through escape clauses; and (4) depend on the judicial process for

State or which would be contrary to its sovereignty, security or public policy, or to supply particulars which are not procurable under its own legislation or that of the State making the application. Id. at art. 16, para. 3.

175. See United States v. Vetco, Inc., 644 F.2d 1324, 1328 (9th Cir. 1981). Vetco argued that the Swiss-United States Tax Convention precluded the use of an IRS summons to obtain records held in Switzerland. Id. The court in Vetco held, however, that there is nothing in the Convention that bars the use of IRS summonses to gather information. Id. at 1328-29. The court in Vetco also observed that there was no indication of exclusivity in the Convention's legislative history. Id.

176. Cf. Seemann, supra note 169, at 338 (observing that even if the requesting nation meets all requirements set forth in the Tax Convention, it is not guaranteed that the requested information is forthcoming).

177. See supra notes 159-65 and accompanying text (noting that a treaty that subjects compliance with an information request to a state's national interests is incapable of resolving a "Catch-22").

178. See supra notes 28-63 and accompanying text (maintaining that the approach of customary international law to this "Catch-22" is ineffective because a governing body must ultimately choose one basic right over another).

179. See supra notes 64-99 and accompanying text (discussing the inadequacies of the balancing test articulated in Vetco).

180. See supra notes 100-26 and accompanying text (discussing the undesirable results in Marc Rich after underestimating the resolve of the Swiss government).
enforcement. Commentators propose various solutions, but courts have failed to accept any one suggestion.

Any attempt to reconcile the broad powers of the American grand jury with the restrictive prohibitions of Swiss non-disclosure law must overcome deficiencies of the prior solutions. A new solution, therefore, is needed to resolve the Swiss-United States conflict. A modified version of the foreign-business copy reproduction legislation is one viable solution.

A. NEW BILATERAL TREATY MODIFYING PAST LEGISLATION

In 1952, Congress introduced legislation requiring foreign companies transacting business in the United States, and United States companies doing business abroad, to keep duplicates of all records in the United States available on demand for production. The legislation failed because opposition in the international community saw this legislation as a direct infringement on their sovereign rights. The abundance of

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181. See supra notes 127-77 and accompanying text (establishing the major deficiencies of the relevant treaties to the United States-Switzerland conflict).


183. See H.R. Res. 7339, 82d Cong., 2d Sess., 98 CONG. REC. 3332 (1952) (originally requiring production of documents abroad from United States corporations). The bill also required forcing corporations to enter into an agreement to produce documents related to their business. Id. The bill failed largely because of international outrage that demanded a reciprocal burden on United States companies to produce their documents in a foreign locale. See generally Comment, Foreign Nondisclosure Laws, supra note 30, at 621-22 (discussing the reasons for the bill's original failure).


successfully negotiated treaties and bilateral agreements since 1952, however, suggests that international hostility towards a similar enactment has subsided and successful negotiation of a new agreement between the United States and Switzerland is now more likely.

The new bilateral treaty would differ from the unsuccessful 1952 legislation in that the treaty would require corporations to keep duplicate business records in both Switzerland and the United States. Swiss companies doing business in the United States, as a prerequisite to those operations, would keep copies of all business records in the United States. Similarly, United States companies transacting business in Switzerland, as a prerequisite to conducting business there, would maintain copies of all business records in Switzerland. The 1952 legislation only required foreign companies to keep copies of their records available in the United States. The legislation imposed no reciprocal burden on United States companies conducting business abroad to keep a set of records in each foreign location.

In addition to the reciprocal record requirement, the new agreement must include other provisions. First, it would amend the Federal Rules of Evidence to facilitate the introduction of duplicate business records. Second, it would amend the tax code to allow a business
expense deduction for the cost of keeping a duplicate set of records. Third, it would establish detailed notification and consultation procedures to reduce friction between the United States and Switzerland. Fourth, it would require each country to judicially and administratively assist the other regarding document requests. Fifth, it would prohibit Switzerland from automatically blocking compliance with a United States request provided that prior notice of the request is given to Swiss authorities. Finally, for all documents allegedly pertaining to security interests, the new treaty would require in camera inspection to determine whether the documents must remain confidential.

B. Analysis of Proposed Bilateral Treaty

Provisions concerning reciprocal enforcement and in camera inspection of confidential materials address Swiss concerns regarding infringement of their national sovereignty due to the broad reach of the American grand jury. Furthermore, likelihood of the treaty’s success is great because: (1) reciprocal enforcement does not favor one country over the other; (2) corporate compliance is a prerequisite to conducting business in the respective countries; (3) courts would not have to balance competing interests; (4) the resolve of each government would no longer apply; and (5) no escape clauses exist to frustrate compliance.

Rules of Evidence to facilitate the introduction of duplicate records).

191. Cf. Note, A Comparative Analysis, supra note 163, at 63 (observing that notification procedure was instrumental in easing tensions between the United States and Australia).

192. See supra notes 169-71 and accompanying text (observing that the Tax Convention’s exchange of information requirement resulted in the United States’ inability to obtain requested information). Judicial and administrative assistance should allow the proposed treaty to circumvent the Tax Convention’s deficiency.

193. See Note, A Comparative Analysis, supra note 163, at 63-64, 74-75 (maintaining that a similar provision in Australian Agreement is essential to bilateral agreement’s effectiveness).

194. Cf. Fed. R. Civ. P. 26(c) (providing for in camera inspection to maintain trade secrets). This provision attempts to achieve the same success as in domestic civil litigation.

195. See supra notes 13-27 and accompanying text (discussing Swiss penal provisions designed to block the reach of the American grand jury).

196. See supra notes 28-63 and accompanying text (citing favoritism towards one nation’s interests as reason for customary international law’s failure to resolve this “Catch-22”).

197. See supra notes 64-99 and accompanying text (noting that the balancing test was incapable of resolving disputes).

198. See supra notes 100-26 and accompanying text (noting that United States Attorney’s Office’s underestimation of Swiss resolve led to the creation of this “Catch-22” in Marc Rich).

199. See supra notes 100-26 and accompanying text (noting that United States
1. Reciprocal Enforcement

The 1952 legislation failed because it only burdened foreign corporations. While it required a foreign company to keep business records in the United States, United States firms did not have a similar obligation abroad. As a result, foreign governments believed the legislation infringed their sovereign rights.

Sovereignty is a significant issue in the "Catch-22." Switzerland perceives a grand jury subpoena for Swiss business records as a threat to its sovereignty. The new agreement, however, would dissipate some of these tensions. Swiss companies would not have a greater burden because, under the proposed treaty, United States companies would have the same obligation in Switzerland. Both nations are more likely to agree to a treaty in which both are faced with equal burdens. Moreover, a duplicate copy requirement would substantially assist each government in its criminal investigations of foreign businesses.

2. Treaty As A Prerequisite to Doing Business

Companies that desire to conduct business overseas would have to comply with the treaty. This prerequisite to transacting business would also solve the problems associated with Swiss nondisclosure laws. Subpoena requests would apply to records kept within the United States. A company that keeps copies of all its records within the

Attorney's Office's underestimation of Swiss resolve led to the creation of this "Catch-22" in Marc Rich).

200. See supra note 183 and accompanying text (establishing nonreciprocal burden as a major reason for earlier legislation's failure).

201. Id.

202. See supra notes 183-84 and accompanying text (observing the international hostility toward the 1952 bill because it was perceived as threatening a sovereign's independence).

203. See supra note 18 and accompanying text (maintaining that Swiss nondisclosure laws are designed to protect the sovereign rights of Swiss citizens).

204. See supra notes 13-21 and accompanying text (noting Swiss sovereignty as a basis for nondisclosure laws).

205. See supra notes 188-90, 192 and accompanying text (discussing provisions of new treaty that specifically addresses American and Swiss concerns).

206. See supra notes 188-90 and accompanying text (establishing equal burdens on both Swiss and United States companies in regard to document production).

207. See supra note 183 and accompanying text (observing that nonreciprocal burden is major reason for earlier legislation's failure).

208. See supra notes 164-77 (suggesting that a way to resolve compliance problems of earlier treaties is to require companies to comply prior to any conflict).

209. See supra notes 64-126 and accompanying text (discussing judicial problems with having to order compliance despite nondisclosure laws).
domestic forum is subject only to the laws of that forum. Swiss nondisclosure laws would have no impact on the records of a Swiss company doing business in the United States because duplicates of the documents would exist outside Switzerland. The prerequisite requirement would also achieve high compliance rates because a company is more likely to opt to comply with the treaty rather than forsake potential profits. Moreover, a firm has little reason to resist compliance unless it anticipates conducting unlawful activities. In this way, the treaty acts in a preventive manner.

3. Excising Judicial Balancing

Under the proposed treaty, resolution of the conflict between the American grand jury and Swiss nondisclosure laws no longer include the various balancing tests courts used in the past. A fundamental problem of past judicial solutions was requiring courts to balance competing interests incapable of objective balancing. These judicial balancing attempts resulted in nonuniform enforcement and the losing sovereign’s general disregard for the decision.

The new bilateral treaty eliminates judicial balancing. A corporation must make documents available before any business is conducted. Courts, therefore, will not consider restrictive foreign laws in ordering compliance with a subpoena. Rather, they will look only to domestic rules of procedure for guidance.

A court’s role, however, includes enforcing the bilateral agreement. Failure to abide by the treaty’s procedures (e.g., a company does not keep copies of its records in the foreign location) constitutes a per se violation of the agreement. A court’s responsibility includes assessing fines in accordance with the proposed bilateral treaty’s penal provision. The penalty for noncompliance sufficiently outweighs any cost of keeping a duplicate set of records. This function does not entail any balancing of competing interests.

4. Government Resolve No Longer A Factor

A likely reason the United States Attorney’s Office pursued a sub-

210. See supra notes 64-99 and accompanying text (suggesting that judicial balancing is incapable of resolving this conflict because courts cannot objectively balance Swiss and United States interests).

211. Id.

212. Id.; see also Marc Rich and Co., A.G. v. United States (I), 707 F.2d 663 (2d Cir.) (illustrating total disregard in enforcing the subpoena when Switzerland subsequently seized the requested documents), cert. denied, 463 U.S. 1215 (1983).
poena in *Marc Rich* is that the attorneys underestimated the resolve of the Swiss in enforcing their laws. Through the proposed treaty's notification and consultation procedure, a similar miscalculation would not result.\(^{213}\) Instead, Switzerland and the United States would keep each other fully informed as to each document request.

These cooperative provisions are designed to alleviate international tensions and eliminate perceived threats to sovereignty.\(^{214}\) If successful, a nation's resolve would no longer concern the requesting state. Each country would face similar burdens and each country would possess all the relevant information. Consequently, the likelihood of a misunderstanding would diminish and a nation's resolve would not play an important part in achieving compliance.

5. *Escape Clause Elimination*

Eliminating escape clauses is the most controversial part of the proposed treaty.\(^{215}\) Understandably, the United States and Switzerland will demand a degree of flexibility and discretion to protect their vital interests.\(^{216}\) The realization that an escape clause would render a document-production treaty ineffective should temper this reaction.\(^{217}\)

In the business record area, most document requests involve conflicting national interests (i.e., Swiss secrecy concerns and United States investigatory needs).\(^{218}\) Therefore, any request has the possibility of being refused. Companies will instinctively violate a treaty if enforcement seems unlikely. Moreover, attorneys may ignore treaty procedures because their voluntary nature lessens the treaty's usefulness.

A treaty without escape clauses will result in substantial adherence to the treaty provisions as governments must use the mechanisms provided to assist a criminal investigation involving foreign-based business records. Moreover, the treaty will reward attorneys' efforts through timely procurement of the requested information. Furthermore, the

\(^{213}\) See *supra* note 191 and accompanying text (observing that similar provision in Australian Agreement alleviated mounting tensions between Australia and the United States).

\(^{214}\) Id.

\(^{215}\) See Note, *A Comparative Analysis, supra* note 163, at 78-80 (maintaining that escape clause is essential to the Australian-United States treaty).

\(^{216}\) Cf. *id.* (demanding an escape clause to preserve basic sovereign rights in the Australian Agreement).

\(^{217}\) See *supra* notes 156-60 and accompanying text (maintaining that inclusion of two escape clauses in the Criminal Assistance Treaty is the main reason for the Treaty's ineffectiveness).

\(^{218}\) See *supra* note 163 and accompanying text (maintaining that document production requests are likely to involve competing national interests).
treaty’s in camera exception will allow governments to protect their national interests. Unlike an escape clause, however, a nonpartisan body will determine the records’ importance and/or confidentiality. Compliance will not depend on the decision of a biased government body.

CONCLUSION

Corporate defendants face a “Catch-22” when a United States grand jury subpoenas business records maintained in Switzerland. If the corporate defendant complies with the subpoena, it faces criminal sanctions for violating Swiss nondisclosure laws. If the defendant observes the Swiss laws and does not comply with the subpoena it is subject to a finding of contempt, a fine and/or imprisonment in the United States.

Customary international law, judicial decisions, treaties and commentators have all failed to resolve the American grand jury-Swiss nondisclosure law conflict. A new bilateral treaty requiring duplicate copies of all business records kept in the United States and Switzerland would effectively resolve this conflict. The agreement would establish a meaningful flow of cooperation and eliminate the reasons for Swiss nondisclosure laws. The bilateral treaty would achieve these results because it would place equal burdens on each nation thereby making compliance mandatory and limiting a nation’s alternatives for refusing to comply.

It is naive to view this proposed bilateral agreement as a means to eliminate completely the international strife over document disclosure. Transnational cooperation in record production is not easily achieved. The proposed United States-Switzerland agreement, however, addresses the major concerns that presently prevent resolution of the grand jury-nondisclosure law conflict. In confronting the primary obstacles to agreement, it is hoped that the “Catch-22” may be eliminated.

219. See supra note 194 and accompanying text (advocating use of Federal Rule of Civil Procedure 26(e) to act as a guideline for in camera inspection).