

UNITED STATES V. UBS AG: HAS THE UNITED STATES SUCCESSFULLY CRACKED THE VAULT TO SWISS BANKING SECRECY?

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I. INTRODUCTION

Despite the duty charged of Americans to pay their taxes,¹ over \$1 trillion of American assets² are hidden from the Internal Revenue Service (IRS) offshore. This amounts to \$100 billion in U.S. taxes evaded annually.³ These offshore assets have long been almost untouchable by the IRS and other tax authorities, thanks in part to banking secrecy laws in offshore jurisdictions. With a growing tax-gap draining U.S. tax revenue⁴ and a financial crisis on hand, the timing was politically ripe for the Tax Division of the Department of Justice (DOJ) to take action in order to stop offshore tax abuses.⁵ The first front on the DOJ's battle to end tax evasion: Switzerland.⁶

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¹ See generally 26 U.S.C. § 7201 (1982) (providing that any person—corporate or natural—who attempts to evade or defeat taxes imposed by the American tax code is guilty of a felony and subject to a fine or imprisonment).

² STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 109TH CONG., *TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS AND SECRECY 1* (Comm. Print 2006), <http://levin.senate.gov/newsroom/supporting/2006/PSI.taxhavenabuses.080106.pdf>.

³ STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 110TH CONG., *TAX HAVEN BANKS AND U.S. COMPLIANCE 1* (Comm. Print 2008), http://hsgac.senate.gov/public/_files/071708PSIReport.pdf.

⁴ Press Release, Office of United States Senator Carl Levin, Levin, Coleman, Obama Introduce Stop Tax Haven Abuse Act (Feb. 17, 2007), available at <http://levin.senate.gov/newsroom/release.cfm?id=269479>.

⁵ The worldwide financial crisis of 2008 and 2009 severely damaged the economies of the United States and other countries that rely on tax revenues. The G-20 and Organization for Economic Cooperation and Development (OECD) are working hard to end tax evasion; increasing tax information sharing and transparency is on the agenda of both organizations. The mounting international pressure on the Swiss from the United States and others led to their decision to settle with the IRS. As a result, the Swiss have entered into new tax information sharing agreements, thereby being removed from the OECD list of tax havens.

⁶ Switzerland has long been a popular tax haven because of its variety of low tax rates and a long-standing tradition of banking secrecy. Swiss banking secrecy laws facilitate a non-Swiss citizen's assets to be held in Swiss bank accounts in secret from tax authorities in his or her home country. Thus, Swiss bank accounts have long been used as a vehicle to

For years, the United States struggled to break the fortress of banking secrecy in Switzerland and expose tax evaders by signing various international tax information sharing agreements.⁷ In February 2009, the DOJ sued UBS AG (UBS),⁸ the largest bank of Switzerland.⁹ The DOJ tried to force the bank to disclose the identities of 52,000 American account holders who allegedly hid from the IRS \$14.8 billion worth of assets in Swiss accounts.¹⁰ After a summer of negotiations, the bank and the DOJ settled the case in August 2009, with UBS agreeing to produce the account information of up to 10,000 American account holders suspected of avoiding paying taxes to the IRS.¹¹ This settlement not only resulted in the production of account information for the IRS, but also produced a revised tax treaty between the United States and the Swiss Confederation that provides for sharing more tax information than ever before.¹²

The settlement marks a turning point in the United States' struggle to prosecute tax cheats; it is a significant step toward enabling the United States to pierce Swiss banking secrecy laws that protected American tax evaders for decades. But the

evade U.S. taxes.

⁷ See *infra* Part IV. These past agreements have not led to the type of information sharing the United States envisioned in order to prevent tax evasion. Attempts to put a halt on tax havens using international agreements have not resulted in exposing the billions of dollars and the accompanying lost tax revenue that are concealed overseas from the IRS.

⁸ Press Release, United States Dep't of Justice, United States Asks Court to Enforce Summons for UBS Swiss Bank Account Records (Feb. 19, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-tax-139.html>.

⁹ Lynnley Browning, *A Swiss Bank is Set to Open Its Secret Files*, N.Y. TIMES, Feb. 19, 2009, at A1, available at <http://www.nytimes.com/2009/02/19/business/worldbusiness/19ubs.html>.

¹⁰ David Voreacos & Carlyn Kolker, *U.S. Sues UBS Seeking Swiss Account Customer Names*, BLOOMBERG, Feb. 19, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=a_DEcZ2mRSGo&refer=home.

¹¹ Carrick Mollenkamp et al., *Switzerland, UBS Settle U.S. Tax Case*, WALL ST. J., Aug. 13, 2009, at C1.

¹² The previous standard to share tax information between the United States and Switzerland was limited to cases preventing "tax fraud or the like." See Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income art. 26, U.S.-Switz., Oct. 2, 1996, S. Treaty Doc. No. 105-8 [hereinafter Double Taxation Treaty]. The new standard required in order for the United States and Swiss to share tax information is "such information as may be relevant" in enforcing the domestic tax laws of the contracting parties. See The Protocol Amending the Convention Between the Swiss Confederation and the United States of America for the Avoidance of Double Taxation With Respect to Taxes on Income art. 3, U.S.-Switz., Sept. 23, 2009, <http://www.news-service.admin.ch/NSBSubscriber/message/attachments/16933.pdf> [hereinafter Double Taxation Amendment]. See also discussion *infra* Parts IV.B, V.A.

outcome of the *UBS* case may not lead to the correction of international tax evasion as much as the IRS hopes. The Swiss remain concerned about breaches of their sovereignty—which they see as infringing on their proud tradition of privacy in the banking sector.¹³ Additionally, the revised treaty does not include spontaneous or automatic information sharing provisions; as a consequence, the United States must still formally request tax information from the Swiss authorities to obtain tax information. Furthermore, the United States still faces challenges obtaining information on Americans with assets held in uncooperative tax haven jurisdictions like Panama.

This Note argues that while the settlement between the United States and UBS gives the United States the capability to crack the vault of Swiss banking secrecy—exposing Americans evading taxes levied by the IRS—the treaty between the United States and Switzerland does not enhance tax information sharing as effectively as it could because information must be formally requested instead of being shared on a spontaneous or automatic basis. Part II discusses the work of the Organization for Economic Cooperation and Development (OECD) to increase transparency among taxation authorities. Part III discusses Switzerland as a tax haven and its banking secrecy laws that facilitate tax evasion. Part IV discusses the historical attempts by the United States to pierce Swiss banking secrecy. Part V introduces the *UBS* case and the revised treaty that emerged as part of the settlement and argues that spontaneous or automatic information sharing would enhance transparency between the United States and Switzerland to better combat tax evasion. Finally, Part VI evaluates the challenges the United States faces in its efforts to fight tax evasion in other jurisdictions and addresses the need for international coordination to battle tax evasion.

II. THE OECD'S TAX HAVEN LIST

The OECD is an international organization comprised of thirty member countries whose governments are committed to representative democracy and free-market economy.¹⁴ The OECD provides a forum where representatives of its member states collaborate to compare economic policies, share data,

¹³ See Brief for Government of Switzerland as Amici Curiae Supporting Respondents at 1, *United States v. UBS AG*, No. 109CV20423, 2009 WL 1612394 (S.D. Fla. Apr. 30, 2009).

¹⁴ OECD Home Page, <http://www.oecd.org> (last visited April 6, 2011).

identify good practice, and solve common problems related to economic development, international trade, and taxation.¹⁵ Combating tax evasion is a major concern on the OECD's agenda.¹⁶ The OECD holds various summits to coordinate policy designed to increase transparency in the tax system, to encourage more information sharing between the tax authorities of different sovereigns, and to better equip those tax authorities to reduce international tax evasion.¹⁷

The OECD has set forth four factors to identify tax havens: (1) either no tax or nominal tax on relevant income; (2) a lack of effective exchange of tax information; (3) a lack of transparency by the taxing country; and (4) no substantial activity.¹⁸ To counter the enormous amount of assets that are hidden in tax haven jurisdictions, the OECD developed a model standard of transparency and tax information exchanges¹⁹ that was endorsed by the G-20 Finance Ministers and Central Bank Governors²⁰ in 2004 and by the United Nations in 2008.²¹ This made the OECD model agreement the international standard.

Using this standard of transparency and information exchange between countries, the OECD developed three lists²² of countries that reflected different levels of compliance with the accepted

¹⁵ *Id.*

¹⁶ OECD, Fighting Tax Evasion, <http://www.oecd.org/tax/evasion> (last visited April 6, 2011).

¹⁷ *Id.*

¹⁸ OECD, COUNTERING OFFSHORE TAX EVASION: SOME QUESTIONS AND ANSWERS ON THE PROJECT 11 (2009), <http://www.oecd.org/dataoecd/23/13/42469606.pdf>. The “no substantial activity” factor relates to a taxing country that does not require that taxable activity be substantial, meaning the taxing country “may be attempting to attract investment or transactions that are purely tax driven [and] transactions may be booked there without the requirement of adding value so that there is little real activity” See OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 23 (1998), <http://www.oecd.org/dataoecd/33/0/1904176.pdf>.

¹⁹ OECD, MOVING FORWARD ON THE GLOBAL STANDARDS OF TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES 4 (2009), <http://www.oecd.org/dataoecd/43/57/43775637.pdf> [hereinafter MOVING FORWARD].

²⁰ The G-20, or Group of Twenty, is a group of finance ministers and central bank governors from nineteen countries with economies of major international significance and the European Union. The G-20 meets regularly and discusses issues that arise in the global economy including, for example, economic growth policies, regulation of the world financial system, reacting to and preventing future financial crises, and combating tax evasion. See G-20, What is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited April 6, 2011).

²¹ MOVING FORWARD, *supra* note 19, at 4.

²² The latest version of the OECD PROGRESS REPORT ON JURISDICTIONS IMPLEMENTING THE GLOBAL TAX STANDARD [hereinafter TAX STANDARD PROGRESS REPORT] is available at <http://www.oecd.org/tax/progressreport>.

international standards: (1) a “black list”²³ of tax havens that refused to commit to the international standard;²⁴ (2) a “grey list”²⁵ of jurisdictions that agreed to improve transparency standards concerning the exchange of tax information but had yet to adopt them; and (3) a “white list”²⁶ of countries that have substantially adopted the standards. Once a commitment has been made by a country to implement the international standards, the benchmark that the OECD requires to move a country from the “grey list” to the “white list” is for that country to enter into twelve Tax Information Exchange Agreements (TIEA),²⁷ an agreement between two jurisdictions delineating the legal capacity for the tax authorities of each to exchange information with the other. To eliminate ineffective exchange of information and a lack of transparency, as of 2009, all OECD member countries—including Switzerland—now endorse a standard of transparency that permits “access to bank information, directly or indirectly, for all tax purposes so that tax authorities can fully discharge their revenue raising responsibilities and engage in effective exchange of information with their treaty partners.”²⁸

The OECD has developed a Model Tax Convention²⁹ that includes a provision creating an obligation among signatories to exchange information that is “foreseeably relevant” for enforcing the tax laws of the contracting parties.³⁰ The provision also says a state may not refuse an information request solely based on a lack of domestic tax interest in the information, or solely because the

²³ *Id.*

²⁴ In May 2009, the three remaining jurisdictions on the uncooperative “black list”—Andorra, Liechtenstein, and Monaco—agreed to implement the OECD standards of transparency and effective exchange of information. Thus, today no country remains on the OECD “black list.”

²⁵ TAX STANDARD PROGRESS REPORT, *supra* note 22.

²⁶ *Id.*

²⁷ Lisa Jucca, *Swiss Eyes Tax Haven List Exit as G20 Starts*, REUTERS, Sept. 24, 2009, <http://www.reuters.com/article/GCA-G20Pittsburgh/idUSTRE58N1NR20090924>.

²⁸ OECD, PROMOTING TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES 8 (2010), www.oecd.org/dataoecd/26/28/44431965.pdf [hereinafter PROMOTING TRANSPARENCY].

²⁹ While not all TIEAs are the same, the OECD model has been the basis for over 3000 bilateral tax treaties. *Id.* at 4. The tax information sharing provisions of the OECD model and the United States’ model are almost the same. Compare OECD, *Article 26 of the OECD Model Tax Convention on Income and Capital*, available at http://www.oecd.org/document/53/0,3343,en_2649_33767_33614197_1_1_1_1,00.html [hereinafter *Article 26*] and U.S. Treasury Dep’t, United States Model Income Tax Convention of November 15, 2006 at 39-40, <http://www.irs.gov/pub/irs-trty/model006.pdf>.

³⁰ *Article 26, supra* note 29.

information is held by a bank or other financial institution.³¹ This provision prevents a country requesting information from embarking on a “fishing expedition”³² because it is expected to demonstrate that all domestic means to obtain the information were exhausted and the requested information has some foreseeable relevance.³³ Implementing TIEAs is an essential step to controvert the lack of transparency in low tax rate jurisdictions, such as Switzerland.³⁴

III. SWITZERLAND AS A TAX HAVEN

For more than a century, Switzerland has been a popular destination for the assets of corporations and wealthy individuals. This is mostly due to Switzerland’s low tax rates, a high regard for financial privacy, and economic and political stability.³⁵ As a low-tax corporate domicile, Switzerland is a center for the operations of more than 150 U.S. companies³⁶ with an average corporate tax rate of just 21.2 percent, compared to forty percent in the United States.³⁷ For individuals, the Federal Government of Switzerland levies income taxes ranging from less than one percent to 13.2 percent and Cantons³⁸ levy income taxes between five percent and fifteen percent.³⁹ Both legitimate and illegitimate actors use Swiss

³¹ *Id.*

³² Explaining the obligations Article 26 imposes on countries that adopt this provision of the Model Tax Convention, the OECD makes clear that countries “are not at liberty to engage in ‘fishing expeditions’” or to make frivolous information requests that are unlikely to produce documentation of real relevance to a taxpayer. *Id.*

³³ *Id.*

³⁴ PROMOTING TRANSPARENCY, *supra* note 28, at 8.

³⁵ See generally 1 WALTER H. DIAMOND ET AL., *Switzerland: Tax Exemptions and Reductions*, in TAX HAVENS OF THE WORLD (Matthew Bender 2010).

³⁶ Companies ranging from Johnson & Johnson to Burger King and Google take advantage of legally sheltering income in Switzerland. See Deborah Ball & Cassell Bryan-Low, *Swiss Tax Play Lures Business*, WALL ST. J., Feb. 2, 2010, available at <http://online.wsj.com/article/SB10001424052748703422904575039431012272688.html>.

³⁷ *Id.*

³⁸ Switzerland’s system of Federalism consists of 26 Cantons, which are sovereign member-states of the Swiss Confederation and have all the power not enumerated to the Federal Government by the Swiss Constitution. See HISTORICAL DICTIONARY OF SWITZERLAND, *Cantons in the Federal State since 1848*, <http://www.hls-dhs-dss.ch/textes/f/F26414-1-4.php> (last visited April 6, 2011).

³⁹ DIAMOND, *supra* note 35. Switzerland places tax liability on entities and individuals based on their residence. Entities and individuals can incur taxes on all three levels of Swiss government: Federal, Cantonal, and Communal. This leads to a vast variety in the aggregate rate of taxes levied on entities and individuals. *Id.* A proposed constitutional amendment in 1977 would have simplified the Swiss taxation system by harmonizing tax rates and eliminating tax competition among Cantons. The amendment failed, leaving

banks to conceal assets they prefer not to disclose.⁴⁰ Schemes to illegally evade taxes levied by tax authorities in the home country require a financial institution abroad to preserve the account holder's identity secret.⁴¹

Swiss law in general protects an individual's right to privacy, which is "viewed as encompassing economic as well as purely personal affairs,"⁴² and the Swiss theory of privacy and personal property extends to relationships of confidence between individuals and their physicians, lawyers, and bankers.⁴³ This means that Switzerland's banking secrecy laws have a longstanding reputation as an almost impregnable fortress against tax authorities such as the IRS, preventing it from discovering information about potential cases of Americans illegally evading taxes levied by the IRS and owed to the U.S. Treasury. This makes Switzerland a preferred jurisdiction to which tax evaders flock.⁴⁴

A. Switzerland's Banking Secrecy Laws

Until the 1930s, local Cantonal governments regulated Switzerland's banks.⁴⁵ Banking secrecy on the federal level originated in the context of World War II; Nazi Germany and other neighboring countries sent emissaries into Switzerland to collect information about Jews and other dissidents that could be used against them, or used against Switzerland.⁴⁶ As a consequence of these attempts to collect information, the Swiss Federal Government began to legislate in the banking sector, which included Article 47 of the Swiss Banking Act.⁴⁷ Article 47 of the Banking Act and Article 273 of the Penal Code are the two principal statutes that protect the confidentiality of customer

Switzerland with a tax system where Cantons often compete with each other to attract businesses and wealthy individuals to relocate their domicile, activities or assets. *Id.*

⁴⁰ See Bradley O. Field, *Improving International Evidence-Gathering Methods: Piercing Bank Secrecy Laws from Switzerland to the Caribbean and Beyond*, 15 LOY. L.A. INT'L & COMP. L. REV. 691, 691 (1993).

⁴¹ *Id.* at 694.

⁴² Lutz Krauskopf, *Comments On Switzerland's Insider Trading, Money Laundering, and Banking Secrecy Laws*, 9 INT'L TAX & BUS. LAW. 277, 293 (1991).

⁴³ *Id.*

⁴⁴ Field, *supra* note 40, at 696.

⁴⁵ MAX IKLÉ, SWITZERLAND: AN INTERNATIONAL BANKING AND FINANCE CENTER 97 (Eric Schiff trans., Dowden, Hutchinson & Ross, 1972).

⁴⁶ Krauskopf, *supra* note 42, at 293.

⁴⁷ *Id.*

account information in the Swiss banking system.⁴⁸ These protections are in addition to those afforded by the Swiss Civil Code, the Swiss Code of Obligations, and the Swiss Constitution.⁴⁹

I. Article 47 of the Swiss Banking Act

Article 47 of the Swiss Banking Act was adopted in 1934 and imposes penal sanctions against officers, directors, employees, and agents of a bank who disclose a customer's identity or any other account information without that customer's consent.⁵⁰ In sum, Article 47 imposes penalties for violating the professional relationship of confidence between bankers and clients.⁵¹ The duty of confidentiality between bankers and customers includes confidentiality of the customer's name, the type of accounts held, the transactions that occur with the bank, and any information about the customer's financial situation (including relationships with other banks).⁵² Banking confidentiality extends to all accountholders, whether or not they are Swiss residents.⁵³

The most critical impact of this legislation, from the client's perspective, is that taxation authorities cannot obtain information about the client from the bank. In passing this legislation, the Swiss government "[weighed] the pros and cons of the Banking Secret [and] has in principle decided that the banker's professional duty to secrecy outweighs any financial disadvantages to the exchequer which may arise."⁵⁴ Article 47 punishes both intentional and negligent disclosures of a customer's financial information.⁵⁵ Moreover, it is an *ex officio* offense, meaning the government can prosecute violations of banking confidentiality without the injured party filing a complaint.⁵⁶ This underlies the notion that the Article "punish[es] disclosures that occur due to a lack of appreciation of the notion of secrecy . . . in order to stress the importance of protecting [i]nformation acquired from

⁴⁸ Brief for Government of Switzerland as Amici Curiae Supporting Respondents at 1, *United States v. UBS AG*, No. 109CV20423, 2009 WL 1612394, at *9 (S.D. Fla. Apr. 30, 2009).

⁴⁹ Michele Moser, *Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime*, 27 CASE W. RES. J. INT'L L. 321, 324 (1995).

⁵⁰ Loi sur les banques [LB] [Banking Act] Nov. 8, 1934, RS 952.0, art. 47 (Switz.).

⁵¹ Krauskopf, *supra* note 42, at 294.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ HANS J. BAR, *THE BANKING SYSTEM OF SWITZERLAND* 59 (4th ed. 1973).

⁵⁵ Loi sur les banques [LB] [Banking Act] Nov. 8, 1934, RS 952.0, art. 47 (Switz.).

⁵⁶ Krauskopf, *supra* note 42, at 294.

[c]lients.”⁵⁷ This is another indication of the statute’s purpose, “which is the protection of banking secrecy against any kind of intrusion.”⁵⁸

2. Article 273 of the Swiss Penal Code

Disclosure of confidential information may also trigger Article 273 of the Swiss Penal Code, which criminalizes any disclosure of business secrets to a private or official foreign organization or its agents.⁵⁹ A business secret has been interpreted by the Swiss Federal Supreme Court to include “any data of economic life, provided there is a legitimate interest in keeping the secret... [and] the term may also include relations and transactions of private economy concerning property and income.”⁶⁰ Thus, confidential banking information is considered a business secret and violating Article 273 is punishable by a fine or up to three years in prison.⁶¹ However, prosecution is rare and used only in serious cases where Swiss national interests are endangered.⁶² Akin to Article 47, Article 273 is *ex officio*,⁶³ which indicates the serious intent of the Swiss government to protect confidential information and prevent disclosure. Nonetheless, an international treaty that requires disclosure of privileged information can supersede Article 273.⁶⁴

3. Article 162 of the Swiss Penal Code

Article 162 of the Swiss Penal Code protects confidential

⁵⁷ Paolo S. Grassi & Daniele Calvarese, *The Duty of Confidentiality of Banks in Switzerland: Where it Stands and Where it Goes. Recent Developments And Experience. The Swiss Assistance to, and Cooperation with the Italian Authorities in the Investigation of Corruption Among Civil Servants in Italy (The “Clean Hands” Investigation): How Much is Too Much?*, 7 PACE INT’L L. REV. 329, 340 (1995).

⁵⁸ Krauskopf, *supra* note 42, at 294.

⁵⁹ Code pénal suisse [CP] [Criminal Code] Dec. 21, 1937, RS 311.0, art. 273 (Switz.).

⁶⁰ Krauskopf, *supra* note 42, at 295.

⁶¹ Code pénal suisse [CP] [Criminal Code] Dec. 21, 1937, RS 311.0, art. 273 (Switz.).

⁶² *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517, 524, (S.D.N.Y. 1987).

⁶³ Krauskopf, *supra* note 42, at 295.

⁶⁴ See Marc G. Corrado, Comment, *The Supreme Court’s Impact on Swiss Banking Secrecy: Societe Nationale Industrielle Aerospatiale v. United States District Court*, 37 AM. U. L. REV. 827, 852 (1988). See generally Mario Kronauer, *Information Given for Tax Purposes from Switzerland to Foreign Countries—Especially to the United States for the Prevention of Fraud or the Like in Relation to Certain American Taxes*, 30 TAX L. REV. 47, 53 (1974) (explaining that under Swiss law, treaties supersede previous Swiss statutes and decrees).

information from being disclosed by those who are legally or contractually obliged to maintain its secrecy.⁶⁵ This includes bankers who are contractually obliged to keep the information of clients in confidence.⁶⁶ Unlike Article 273, which is primarily intended to protect Swiss economic and sovereign interests, this provision is designed to protect private parties' interests.⁶⁷ Secrecy under Article 162 is waivable by the party owning the information.⁶⁸ In the context of Swiss banking, the customer owns the secret, not the bank.⁶⁹ Actions for violating Article 162 arise only when the party injured by disclosure of confidential information files a complaint.⁷⁰

4. Article 28 of the Swiss Civil Code

In Switzerland, Article 28 of the Civil Code grants a cause of action to private parties to sue for injunctive relief and/or monetary damages if they have suffered injury caused by disclosure of their personal affairs.⁷¹ In the context of banking secrecy, if a bank discloses confidential customer information, the bank may be subject to tort liability for violating the customer's privacy and contract liability for breaching the covenant of confidentiality.⁷² Additionally, under this provision, if a customer believes a violation of privacy is imminent, he or she can obtain an injunction to prevent disclosure.⁷³

B. Is Swiss Banking Secrecy Absolute?

The Swiss justify confidentiality in their banking system under the notion of privacy in Swiss law that a banker is in a position of confidence—much like a lawyer, doctor, or clergyman⁷⁴—and therefore, ethical considerations require personal affairs to be kept in strict confidence.⁷⁵ But confidentiality is not absolute.⁷⁶ As

⁶⁵ Code pénal suisse [CP] [Criminal Code] Dec. 21, 1937, RS 311.0, art. 162 (Switz.).

⁶⁶ Urs Martin Lauchli, *Swiss Bank Secrecy with Comparative Aspects to the American Approach*, 42 ST. LOUIS U. L.J. 865, 867-68 (1998).

⁶⁷ *Alfadda v. Fenn*, 149 F.R.D. 28, 32 (S.D.N.Y. 1993).

⁶⁸ *Id.*

⁶⁹ Krauskopf, *supra* note 42, at 298.

⁷⁰ *Alfadda*, 149 F.R.D. at 32.

⁷¹ Code civile suisse [CC] [Civil Code] Dec. 10, 1907, RS 210, art. 28 (Switz.).

⁷² Grassi & Calvarese, *supra* note 57.

⁷³ Code civile suisse [CC] [Civil Code] Dec. 10, 1907, RS 210, art. 28a (Switz.).

⁷⁴ BAR, *supra* note 54, at 58.

⁷⁵ *See id.*

⁷⁶ *Id.* at 59-60.

previously mentioned, in Switzerland the customer owns his confidential account information and confidentiality is waivable.⁷⁷ Thus, customer consent can relieve a bank from civil and criminal liability of its obligation to keep information in confidence.⁷⁸ Additionally, Article 47 of the Banking Act allows for disclosure of confidential information when compelled by an order from Swiss governmental authorities for evidential purposes in legal proceedings.⁷⁹ Secrecy is set aside for criminal proceedings, but not for most civil proceedings.⁸⁰

When it comes to tax matters, “neither the federal fiscal law nor any cantonal law allows disclosure of banking secrets. Even in cases of tax evasion banking secrecy remains firm. . . . However, in the case of tax or duty fraud, banking secrecy will be set aside.”⁸¹ This permitted UBS and other Swiss banks to refuse whenever the United States sought information about customers alleged to be evading American taxes.

C. Tax Offenses in Switzerland

Switzerland distinguishes between two different types of tax offenses: tax infringement and tax fraud. Tax infringement is committed when a taxpayer purposefully or negligently files an incomplete tax return.⁸² Tax fraud, on the other hand, is defined under Swiss law as fraudulently manipulating documents with an intention to mislead tax authorities.⁸³ Each offense is punishable by a fine or imprisonment.⁸⁴

⁷⁷ Alfadda, 149 F.R.D. at 32.

⁷⁸ While customer consent will relieve a bank of its criminal liability under Article 162 and criminal penalties under the Banking Act, it is not clear what impact customer consent has on the bank's criminal liability under Article 273, which is intended to protect the secrets of Switzerland from foreign agents, rather than protect an individual's secrets. Krauskopf, *supra* note 42, at 298.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 299. Paragraph 4 of Article 47 of the Swiss Banking Act includes a carve out provision that lifts banking secrecy when Federal and Cantonal Swiss law oblige the disclosure of banking information to government authorities and the courts. Loi sur les banques [LB] [Banking Act] Nov. 8, 1934, RS 952.0, art. 47 (Switz.). Under Swiss law, acts of fraud—including tax fraud—are an exception that falls under this carve out. Krauskopf, *supra* note 42, at 299.

⁸² DIAMOND, *supra* note 35.

⁸³ Loi fédérale sur l'impôt fédéral direct [LIFD] [Federal Taxation] Dec. 14, 1990, RS 642.11, art. 186 (Switz.); Loi fédérale sur l'harmonisation des impôts directs des cantons et des communes [LHID] [Federal Harmonization of Canton and Commune Taxes] Dec. 14, 1990, RS 642.14, art. 59 (Switz.).

⁸⁴ *Id.*

In Switzerland, tax evasion is not a criminal offense.⁸⁵ Switzerland defines tax evasion as a failure to report, or to completely report, income or capital to taxation authorities.⁸⁶ Because tax evasion is not a crime, the Swiss government brings tax evasion cases in administrative proceedings, not a criminal court.⁸⁷ Banking secrecy is upheld in these procedures because the banking secrecy laws of Switzerland do not force bankers or other third parties to provide information to tax authorities.⁸⁸ Taxpayers found guilty of tax evasion in Switzerland are not subject to criminal penalties, but rather usually subjected only to a small fine.⁸⁹ Accordingly, many Americans and other foreign nationals deposit vast amounts of undeclared assets in Swiss banking accounts⁹⁰ with little fear of being caught for evading taxes in their home country.⁹¹

Unlike Switzerland, the United States criminalizes both tax fraud⁹² and tax evasion.⁹³ The fact that Swiss law distinguishes between the two tax offenses frustrates matters for the IRS seeking information to tax or prosecute Americans who evade taxes by placing assets in Swiss accounts; this is because in order for Switzerland to share tax information with the United States, the alleged tax violation must be a crime in both countries.⁹⁴ This is known as the double incrimination standard.⁹⁵ Switzerland

⁸⁵ DIAMOND, *supra* note 35.

⁸⁶ Corrado, *supra* note 64, at 841 n.73.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Not only are Americans required to report income earned on assets in Switzerland, but the existence of bank accounts must be reported to the Department of Treasury as well. Under the Bank Secrecy Act, 12 U.S.C. §§ 1951-1959 (2004), any U.S. person (corporate or natural) with a financial interest in a financial account in a foreign country must file Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts) to report Foreign Financial Accounts to the Department of Treasury. See IRS.gov, *Foreign Financial Accounts Reporting Requirements*, <http://www.irs.gov/newsroom/article/0,,id=168194,00.html> (last visited April 6, 2011).

⁹¹ Corrado, *supra* note 64, at 841.

⁹² 26 U.S.C. § 7206 (1982).

⁹³ 26 U.S.C. § 7201 (1982).

⁹⁴ Stanley I. Rubinfeld, *Protecting Confidentiality—The Exchange of Information Under Income Tax Treaties*, 214 PRACTISING LAW INST. TAX LAW & PRAC. 325, 343 (1984).

⁹⁵ OECD, IMPROVING ACCESS TO BANK INFORMATION FOR TAX PURPOSES 15 n.7 (2000), <http://www.oecd.org/dataoecd/3/7/2497487.pdf> [hereinafter IMPROVING ACCESS]. This OECD report notes that a double incrimination standard is typically not an impediment to sharing tax information when the definitions of tax crimes are similar under the laws of the countries in question. Yet, in cases involving countries such as the United States and Switzerland where tax evasion is criminalized under the laws of the

reacts to tax evasion with a slap on the wrist instead of a criminal penalty, which means Switzerland will not lift banking secrecy to expose tax evaders and share information with the United States.

IV. HISTORICAL ATTEMPTS BY THE UNITED STATES TO PIERCE SWISS SECRECY LAW

The Swiss commitment to banking secrecy makes it difficult for the United States to discover information on tax offenders and others who are suspected of wrongdoing. Switzerland is a civil law country where courts traditionally conduct discovery, unlike the United States, where the parties to a suit carry out discovery. Under Swiss domestic law, foreign authorities are barred from engaging in discovery in Switzerland.⁹⁶ However, international treaties supersede Swiss domestic law and “if a requesting party is able to establish that secrecy holders have a duty to testify under the terms of a treaty, the secrecy holder may be compelled to disclose the requested information.”⁹⁷

A. *The Treaty on Mutual Assistance in Criminal Matters*

While the Swiss have been reluctant to pull back the veil on banking secrecy to aid the IRS in tax evasion cases, Switzerland has entered into two treaties with the United States to facilitate the discovery of information protected by Swiss banking secrecy in limited situations. In 1973, the Swiss Confederation and United States signed the Treaty on Mutual Assistance in Criminal Matters (MACM).⁹⁸ MACM was an attempt to share information between the two countries in order to prosecute offenders for a laundry list of crimes.⁹⁹ MACM was enacted to impede the activities of members of drug cartels and others involved in organized crime who deposited the proceeds of criminal activities in Swiss bank accounts.¹⁰⁰ The treaty permits the United States to compel the

United States but not criminalized under the laws of Switzerland, “it may be impossible . . . for the requesting country to obtain information that is vital to a criminal tax investigation.” *Id.*

⁹⁶ Corrado, *supra* note 64, at 843. See Loi fédérale concernant l'accord avec la Communauté européenne relatif à la fiscalité de l'épargne [LFisE] [Federal Law on EU Agreement on Withholding Tax], Dec. 17, 2004, RS 641.91, art. 16 (Switz.).

⁹⁷ Corrado, *supra* note 64, at 843.

⁹⁸ Treaty on Mutual Assistance in Criminal Matters, U.S.-Switz., May 25, 1973, 27 U.S.T. 2019 [hereinafter MACM].

⁹⁹ See *id.* Part Schedule.

¹⁰⁰ See U.S. Dep't of Justice, *Switzerland-United States: Memorandum of Understanding on Mutual Assistance in Criminal Matters and Ancillary Administrative Proceedings*, Nov.

disclosure of banking information normally protected by Swiss banking secrecy laws if the United States is prosecuting a crime under U.S. law that is also a crime under Swiss domestic law.¹⁰¹ Specifically, disclosure could be compelled where the information requested by the United States concerns the investigation or prosecution of a serious offense;¹⁰² the disclosure of a banking secret is important to prove a fact that is substantially significant;¹⁰³ and the United States made reasonable efforts but was unsuccessful in obtaining the information via other means.¹⁰⁴

Although this treaty cracked the fortress of Swiss banking secrecy, it also included a provision making it inapplicable to violations of tax offenses unrelated to trafficking of weapons and drugs.¹⁰⁵ Thus, unless the United States was investigating serious criminal activity, it could not compel disclosure—permitting tax evaders to continue to hide assets from American authorities. The MACM marked a significant step forward in opening up Swiss bank account information to fight organized crime.¹⁰⁶ But vis-à-vis tax evasion, the MACM did not help the United States stop Americans from hiding their assets abroad in Switzerland.

B. The Treaty for the Avoidance of Double Taxation with Respect to Taxes on Income

In 1996, the Swiss Confederation and the United States signed the Treaty for the Avoidance of Double Taxation with Respect to Taxes on Income (Double Taxation Treaty).¹⁰⁷ The treaty sets forth rules on what is known as double taxation—taxing of the same source of income by two tax authorities in different countries.¹⁰⁸ The Double Taxation Treaty explains how a citizen's foreign income can be subject to taxation in his or her home country, sets maximum tax rates to be administered on various

10, 1987, 27 I.L.M. 480 (1988).

¹⁰¹ MACM, *supra* note 98, art. 4.

¹⁰² *Id.* art. 10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* art. 2.

¹⁰⁶ Krauskopf, *supra* note 42, at 293. The MACM was the first of its kind between the United States and a continental European country.

¹⁰⁷ Double Taxation Treaty, *supra* note 12. This 1996 treaty replaced a previous convention between the two countries dating back to 1951. For a list of various tax treaties the United States has signed with other sovereign countries, see IRS.gov, *United States Income Tax Treaties – A to Z*, <http://www.irs.gov/businesses/international/article/0,,id=96739,00.html>.

¹⁰⁸ BLACK'S LAW DICTIONARY 1500 (8th ed. 2004).

types of income, protects income from double taxation, and provides guidelines for the exchange of tax information between Swiss and American authorities.¹⁰⁹

Article 26 of the Double Taxation Treaty is the US-Switzerland TIEA. Unlike the MACM, Article 26 allows information sharing on tax matters that are not limited to tax offenses related to organized crime, weapons, or drugs.¹¹⁰ The provision calls for exchanging information available to the United States and Switzerland under each country's domestic laws in order to prevent "tax fraud or the like" related to the various income taxes within the scope of the Double Taxation Treaty.¹¹¹ At first glance, this seems to close the loophole left behind by the MACM. However, the phrase "tax fraud or the like" has only complicated American efforts to obtain information under Article 26 from the Swiss authorities.

In 1970, the Swiss Federal Supreme Court interpreted "tax fraud or the like" to encompass, at a minimum, the use of fraudulent or falsified documents, or other means of deception, to intentionally mislead tax authorities to gain an illegal tax advantage.¹¹² The Swiss Court did not extend the seemingly flexible language of "or the like" to include instances of tax evasion.¹¹³ The court found that under the Double Taxation Treaty, there is no duty for Swiss authorities to exchange information for instances of tax evasion.¹¹⁴ Under the Double Taxation Treaty, Swiss and American authorities are required to exchange information only when the facts of the alleged tax fraud or evasion would be sufficient to establish fraud or evasion under the laws of *both* countries.¹¹⁵ This double incrimination standard is a prerequisite that must be met before Swiss authorities are permitted to share information with the United States.¹¹⁶

As the United States and Switzerland do not see eye-to-eye in defining tax crimes, "it may be impossible . . . for the requesting country to obtain information that is vital to a criminal tax

¹⁰⁹ Double Taxation Treaty, *supra* note 12.

¹¹⁰ MACM, *supra* note 98, art. 2.

¹¹¹ Double Taxation Treaty, *supra* note 12, art. 26.

¹¹² Rubinfeld, *supra* note 94, at 342.

¹¹³ *Id.* at 343.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ OECD, IMPROVING ACCESS TO BANK INFORMATION FOR TAX PURPOSES: THE 2003 PROGRESS REPORT 22 n.7 (2003), <http://www.oecd.org/dataoecd/5/0/14943184.pdf>. See IMPROVING ACCESS, *supra* note 95, at 15 n.7.

investigation.”¹¹⁷ The narrow Swiss definition of tax fraud “substantially restricts [Switzerland’s] ability to exchange information in cases that would constitute criminal tax cases in the vast majority of OECD countries,” which includes the United States.¹¹⁸ Accordingly, the definition of “or the like” and the double incrimination standard leave a loophole in the information sharing between the United States and Switzerland, frustrating the IRS’s efforts to prevent tax evasion.

In contrast, the United States has entered into numerous tax treaties with other jurisdictions whose scope includes the prevention of tax evasion.¹¹⁹ In fact, as recently as September 2009, the United States entered into a sweepingly broad TIEA with the Principality of Monaco that requires the contracting parties to exchange information that is “foreseeably relevant” in the administration and enforcement of tax laws.¹²⁰ Broader provisions to further open information sharing channels—such as in the Monaco agreement—are based upon the OECD Model Tax Information Sharing Treaty, which formed a basis for the renegotiated agreement between the United States and Switzerland in the aftermath of the UBS settlement with the IRS.

¹¹⁷ IMPROVING ACCESS, *supra* note 95, at 22 n.7.

¹¹⁸ *Id.* at 9.

¹¹⁹ See generally Convention Between the Government of the United States of America and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Japan, Nov. 6, 2003, S. TREATY DOC. NO. 108-14; Convention with Great Britain and Northern Ireland Regarding Double Taxation and Prevention of Fiscal Evasion, U.S.-U.K.-N. Ir., July 24, 2001, S. TREATY DOC. NO. 107-19; Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.S.-Fr., Aug. 31, 1994, S. TREATY DOC. NO. 103-32; Convention Between the Government of the United States of America and the Government of the Republic of Finland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, U.S.-Fin., Sept. 21, 1989, T.I.A.S. No. 12,101 (1990).

¹²⁰ Agreement Between the Government of the United States of America and the Government of the Principality of Monaco for the Exchange of Information Relating to Tax Matters, U.S.-Monaco, Sept. 8, 2009, art. 1, <http://www.ustreas.gov/press/releases/reports/usmonacotieaenglish.pdf>. Under Article 5 of the Monaco agreement, foreseeably relevant information “shall be exchanged without regard to whether the requested Party needs such information for its own tax purposes or the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the territory of the requested Party.” *Id.* art. 5.

V. *UNITED STATES OF AMERICA V. UBS AG* AND RESULTING
SETTLEMENT

In July 2008, the IRS served a “John Doe Summons”¹²¹ upon UBS in Switzerland seeking the identity of 52,000 American citizens who hold assets in UBS accounts in Switzerland, yet failed to report¹²² to American authorities their interest in the foreign bank accounts.¹²³ The United States alleged that UBS and its team of private bankers actively helped American clients evade taxes in a scheme to defraud the United States.¹²⁴ UBS refused to comply with the summons, citing banking secrecy laws¹²⁵ and arguing that—under the U.S.-Swiss Double Taxation Treaty—the United States is required to make an information exchange request with the Swiss Federal Tax Administration, not probe UBS directly.¹²⁶ Because discovery is conducted by the domestic judicial system—not by the parties to an action¹²⁷—foreign interests are barred from collecting evidence that is within Switzerland’s sovereign territory without the authorization and assistance of Swiss officials.¹²⁸ Therefore, the Swiss argued that the John Doe Summons was an unauthorized attempt to collect evidence within Switzerland and did not comply with U.S.-Swiss international agreements.¹²⁹

After a year of legal and diplomatic disputes, the IRS reached a settlement with UBS that, in essence, pierced the veil of Swiss banking secrecy.¹³⁰ As stipulated by the settlement agreement: the

¹²¹ A John Doe Summons is a summons issued to a third party by the IRS to obtain information about taxpayers to determine their liability without identifying specific individuals. See Summons Enforcement Actions – John Doe Summonses, Internal Revenue Manual, 34.6.3.5 available at http://www.irs.gov/irm/part34/irm_34-006-003.html#d0e538.

¹²² *Foreign Financial Accounts Reporting Requirements*, *supra* note 90.

¹²³ Janet Novack, *UBS Cheats Can Still Come Clean*, FORBES, July 9, 2008, available at http://www.forbes.com/2008/07/08/irs-ubs-taxes-biz-beltway-cz_jn_0709beltway_print.html.

¹²⁴ Petition to Enforce John Doe Summons, *United States v. UBS AG*, No. 109CV20423, 2009 WL 864716 (S.D. Fla. Feb. 19, 2009).

¹²⁵ Brief for Government of Switzerland as Amici Curiae Supporting Respondents at 1, *United States v. UBS AG*, No. 109CV20423, 2009 WL 1612394, at *13-15 (S.D. Fla. Apr. 30, 2009).

¹²⁶ *Id.* at 1-2.

¹²⁷ *Id.* See *supra* Part IV.

¹²⁸ Code pénal suisse [CP] [Criminal Code] Dec. 21, 1937, RS 311.0, art. 271 (Switz.).

¹²⁹ Brief for Government of Switzerland as Amici Curiae Supporting Respondents at 1, *United States v. UBS AG*, No. 109CV20423, 2009 WL 1612394, at *11-13 (S.D. Fla. Apr. 30, 2009).

¹³⁰ See generally Interview by Gwen Ifill with Lynnley Browning, Reporter, *The New York Times*, on PBS News Hour, originally aired on Aug. 19, 2009, available at <http://www.pbs.org/newshour/video/module.html?mod=0&pkg=19082009&seg=5>.

United States agreed that it would withdraw the John Doe Summons with prejudice in return for cooperation from UBS and the Swiss Government; the Swiss Government agreed to sign a Revised Tax Treaty with the United States; and UBS agreed to pay a \$780 million fine, cease its offshore banking activities with Americans, and disclose the identities of 4,450 account holders.¹³¹

A. The Amended Tax Information Sharing Agreement Between the United States and Switzerland

The Protocol Amending The Convention Between the Swiss Confederation and the United States of America for the Avoidance of Double Taxation With Respect to Taxes on Income (Double Taxation Amendment) was agreed upon in September 2009 and includes a new standard upon which the United States and Switzerland are to exchange information in tax matters.¹³² Whereas Article 26 of the Double Taxation Treaty limited the exchange of information “as is necessary” to prevent matters of “tax fraud or the like,”¹³³ the Double Taxation Amendment calls for the tax authorities of the United States and Switzerland to exchange “such information as may be relevant” to administer and enforce the domestic laws of the contracting parties and to effectuate the provisions of the Double Taxation Treaty.¹³⁴ Thus, the Double Taxation Amendment broadens the types of cases eligible for information sharing assistance from the competent governmental authorities to include cases of tax fraud and tax evasion.¹³⁵ Because treaties supersede domestic statutes in Switzerland,¹³⁶ the provisions of the Double Taxation Amendment calling for information sharing trump Swiss banking secrecy laws.

To ease Swiss concerns about broadly expanding the scope of conditions upon which information can be shared, any information request must be accompanied with five prerequisites designed to limit contracting states from engaging in so-called “fishing

¹³¹ David Hilzenrath & Tomoeh Murakami Tse, *Deal Marks End of Era for Swiss Banking*, WASH. POST, Aug. 20, 2009, available at: http://www.washingtonpost.com/wp-dyn/content/article/2009/08/19/AR2009081901395_pf.html.

¹³² Double Taxation Amendment, *supra* note 12.

¹³³ Double Taxation Treaty, *supra* note 12.

¹³⁴ Double Taxation Amendment, *supra* note 12, art. 3.

¹³⁵ Press Release, Swiss Federal Dep't of Justice and Police, Agreement between Switzerland and the USA Concerning UBS: Key Information and Explanations 5 (Aug. 19, 2009) www.ejpd.admin.ch/content/dam/data/wirtschaft/fallubs/rohstoff-e.pdf.

¹³⁶ Kronauer, *supra* note 64.

expeditions.”¹³⁷ Under the Double Taxation Amendment, if the United States requests information from the Swiss authorities in order to enforce American tax laws, it must provide the following along with its request: (1) information (such as a name and address) of the person allegedly violating the U.S. tax laws;¹³⁸ (2) a time frame for which the information is requested;¹³⁹ (3) a statement about what kind of information is sought;¹⁴⁰ (4) the tax reason as to why the information is sought;¹⁴¹ and (5) the name and address of anyone who the United States believes possesses such information.¹⁴²

The larger scope of information exchanges, accompanied by some basic requirements before an exchange of information occurs, increases transparency in sharing tax related information. This is the widest possible scope of an information exchange without one contracting state being so intrusive so as to frivolously acquire information irrelevant to the tax matters of a particular taxpayer on a “fishing expedition.”¹⁴³ This balance bodes well for both the United States, which seeks more information about Americans with assets in Switzerland, and the Swiss Confederation, which is concerned with preserving the integrity of its law from over intrusive, unilateral practices to discover information without the participation or consent of Swiss officials.¹⁴⁴

Under the Double Taxation Amendment, the United States and Switzerland agree to exchange information on request,¹⁴⁵ as opposed to automatic or spontaneous exchange of tax information utilized in other TIEAs.¹⁴⁶ Tax information exchanges on request occur when officials of one contracting state file a request with the officials of another contracting state in order to obtain particular information about a particular taxpayer who is a national of the

¹³⁷ Double Taxation Amendment, *supra* note 12, art. 4.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Double Taxation Amendment, *supra* note 12, art. 4.

¹⁴³ *Id.*

¹⁴⁴ See Brief for Government of Switzerland as Amici Curiae Supporting Respondents at 1, *United States v. UBS AG*, No. 109CV20423, 2009 WL 1612394 (S.D. Fla. Apr. 30, 2009).

¹⁴⁵ *Id.*

¹⁴⁶ OECD, MANUAL ON THE IMPLEMENTATION OF EXCHANGE OF INFORMATION PROVISIONS FOR TAX PURPOSES: MODULE ON GENERAL AND LEGAL ASPECTS OF EXCHANGE OF INFORMATION 6, <http://www.oecd.org/dataoecd/16/23/36647823.pdf> [hereinafter MANUAL ON IMPLEMENTATION].

requesting state.¹⁴⁷

The Double Taxation Amendment does not completely circumvent Swiss banking secrecy. If the Swiss authorities provide information considered secret, that information shall be disclosed only to the authorities involved in assessing those taxes or authorities involved in any related prosecution.¹⁴⁸ Contracting states are not obliged to share information if it would disclose any trade, business, or professional secret, or if disclosure would be contrary to public policy.¹⁴⁹ The Double Taxation Amendment also includes a provision that permits contracting states to gather the information requested even though the State in which the information is located may not need it for its own taxation purposes.¹⁵⁰ Furthermore, American and Swiss taxation authorities may not refuse to supply requested information solely on the grounds that the information has no domestic use.¹⁵¹

Additionally, the business secret exemption does not foreclose release of confidential banking information.¹⁵² If the United States requests information protected by Swiss banking secrecy laws, refusing to share that information on Swiss law grounds will not be sustained.¹⁵³ Domestic authorities need the ability to access—through judicial or administrative processes—information about taxpayers held by banks in order for information exchanges to work.¹⁵⁴ The United States will benefit greatly from the provision stating that neither country may “decline to supply information solely because the information is held by a bank” or other financial institution.¹⁵⁵ Therefore, the Double Taxation Amendment grants that the competent authorities “shall have the power to enforce the disclosure” of information held by banks and other financial institutions.¹⁵⁶

¹⁴⁷ Press Release, U.S. Dep’t of Treasury, Testimony of Treasury Acting International Tax Counsel John Harrington Before the Senate Finance Comm. on Offshore Tax Evasion (May 3, 2007), available at <http://www.treasury.gov/press-center/press-releases/Pages/hp385.aspx>.

¹⁴⁸ Double Taxation Amendment, *supra* note 12, art. 3.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Double Taxation Amendment, *supra* note 12, art. 3.

¹⁵⁴ See generally MANUAL ON IMPLEMENTATION, *supra* note 146, at 15-16.

¹⁵⁵ Double Taxation Amendment, *supra* note 12, art. 3.

¹⁵⁶ *Id.*

B. How Courts Will Interpret the Double Taxation Amendment

Generally, a treaty shall be interpreted in “good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.”¹⁵⁷ In international law, the Vienna Convention on the Law of Treaties (Vienna Convention)¹⁵⁸ is the benchmark standard providing guidance as to how treaties should be interpreted. While the United States never ratified this treaty, courts follow its provisions “‘as an authoritative guide to the customary international law of treaties,’ insofar as it reflects actual state practices.”¹⁵⁹

Treaties are construed liberally within the intent of the contracting parties.¹⁶⁰ Furthermore, courts may look beyond the treaty’s language to determine its meaning.¹⁶¹ Courts give weight to the subsequent practice of the contracting parties¹⁶² and the agreements among those parties that purport to interpret the treaty.¹⁶³ Additionally, courts may give credence to the purpose of the treaty¹⁶⁴ and its negotiation and drafting history (*travaux préparatoires*)¹⁶⁵ to aid them in its ultimate interpretation.¹⁶⁶

¹⁵⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325(1) (1987).

¹⁵⁸ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹⁵⁹ *Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008) (citing *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 79 (2d Cir. 2005)).

¹⁶⁰ *United States v. Stuart*, 489 U.S. 353, 368 (1989). In the context of international law, signatories of treaties are referred to as “contracting parties,” since a treaty is primarily a contract or agreement between two or more sovereigns. See *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*, 954 F.2d 847, 852 (2d Cir. 1992) (finding a treaty is a contract between nations and the Taiwan Relations Act is not a treaty since it was passed by both chambers of Congress, became law upon signature of the President, did not require Taiwanese ratification, and imposed no obligations on Taiwan).

¹⁶¹ *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (when interpreting the Warsaw Convention treaty to determine liability of airline for injuries suffered by passengers, the Supreme Court began analysis with the text of the treaty, then analyzed, *inter alia*, drafting history, the practice of the parties, other international transportation treaties, and how a court in another jurisdiction interpreted the treaty in a different case).

¹⁶² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325(2) (1987).

¹⁶³ *Id.*

¹⁶⁴ *Gonzalez v. Gutierrez*, 311 F.3d 942, 950-51 (9th Cir. 2002) (in a child custody matter, the Ninth Circuit interprets provisions of Hague Convention on the Civil Aspects of International Child Abduction in light of the treaty’s overriding purpose).

¹⁶⁵ In international law, the *travaux préparatoires* of a treaty—a French term—translates into English as “drafting history” or “negotiating history.” *Travaux préparatoires* is similar to American legislative history in interpreting statutory matters.

¹⁶⁶ *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996) (Court relies on statements made at negotiating conferences that led to the Warsaw Convention aid in its interpretation); *Gonzalez*, 311 F.3d at 951 (The Ninth Circuit analyzes drafting history of Hague Convention on the Civil Aspects of International Child Abduction to determine

In 1989, the U.S. Supreme Court interpreted a taxation treaty between the United States and Canada.¹⁶⁷ In *United States v. Stuart*, the Court was guided by its liberal interpretation approach and found that whenever a treaty could be construed multiple ways, “one restricting, the other enlarging . . . rights which may be claimed under it, the more liberal interpretation is to be preferred”¹⁶⁸ In further analysis “to give effect to the purpose which animates it,” the Court determined that one of the purposes behind the treaty is to fight tax evasion by allowing American and Canadian officials to obtain information from each other.¹⁶⁹

While in the *Stuart* case the intent of the treaty was clear on its face,¹⁷⁰ the rationale behind a country’s decision to sign a treaty can also be found in the *travaux préparatoires*. This is a flexible term that includes examining a wide range of documents¹⁷¹ when interpreting a treaty.¹⁷² The *travaux préparatoires* of the Double Taxation Amendment will aid courts as they interpret the tax sharing agreement protocols between the United States and Switzerland, which included ambiguities since its inception.¹⁷³

Among the documents in the *travaux préparatoires* is an agreement from 2003 between the United States and Switzerland¹⁷⁴ to clarify the meaning of “tax fraud or the like.”¹⁷⁵

the Convention’s meaning of “custody”).

¹⁶⁷ *United States v. Stuart*, 489 U.S. 353 (1989). *U.S. v. Stuart* arose out of a cross-border tax dispute. *Id.* The IRS issued a summons on a Washington bank to aid Canadian tax authorities to assess the income tax liability of Stuart, a Canadian national. *Id.* at 356-57. Canadian authorities requested the assistance of the IRS under the Convention between the United States and Canada Respecting Double Taxation of 1942. *Id.* at 356. Upon Stuart’s request, the bank did not comply with the summons under which it was served. *Id.* at 357. Subsequently, Stuart attempted to quash the summons. *Id.* Ultimately, the Court opined that one purpose behind the treaty was to combat tax evasion, which bolstered the Court’s finding in favor of the IRS and enforcement of the summons.

¹⁶⁸ *Stuart*, 489 U.S. at 368 (citing *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940)).

¹⁶⁹ *Id.* at 368.

¹⁷⁰ *Id.* at 370 (Kennedy, J., concurring).

¹⁷¹ These documents include, but are not limited to, memoranda, meeting minutes, legislative hearings, and previous drafts of a treaty.

¹⁷² LORD MCNAIR, *THE LAW OF TREATIES* 410 (1986).

¹⁷³ *See supra* Part IV.

¹⁷⁴ Mutual Agreement of January 23, 2003, Regarding the Administration of Article 26 (Exchange of Information) of the Swiss-U.S. Income Tax Convention of October 2, 1996, U.S.-Switz., Jan. 23, 2003, available at <http://www.treasury.gov/press-center/press-releases/Pages/mutual.aspx>.

¹⁷⁵ The Mutual Agreement of 2003 proffers three examples of “tax fraud or the like” that illustrate, but do not limit, instances that serve as a basis for the exchange of information between the United States and Switzerland:

This phrase impeded the United States' efforts to obtain information from the Swiss.¹⁷⁶ As an agreement subsequent to signing the Double Taxation Treaty clarifying a provision thereof, it can be interpreted as evidence that over time the contracting parties agreed to clarify and liberalize the standards upon which information can be shared to combat tax crimes. Also included in the *travaux préparatoires* is an agreement to amend the tax information sharing provision of the Double Taxation Treaty.¹⁷⁷ The preamble of the agreement clearly manifests that the intent of revising the Double Taxation Treaty is to avoid future disputes between American and Swiss tax authorities in cross-border information sharing.¹⁷⁸ Especially given that the Double Taxation Amendment expands the scope of information sharing to include information that may be relevant, the *travaux préparatoires* of the Double Taxation Amendment and the subsequent agreement to the Double Taxation Treaty show a clear pattern towards greater information disclosure to combat a wider range of tax-related offenses. This pattern of liberalization now includes tax evasion, which—under the previous Double Taxation Treaty—was not explicitly covered by the ambiguous “or the like” phrase.¹⁷⁹

In conjunction with the general principles of treaty interpretation, it is likely that courts in both the United States and Switzerland will honor the revised sharing standard of

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- a) Conduct that is established to defraud individuals or companies, even though the aim of the behavior may not be to commit tax fraud;
 - b) Conduct that involves the destruction or non-production of records, or the failure to prepare or maintain correct and complete records, that a person is under a legal duty (tax or otherwise) to prepare and keep as sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any tax return, if the person has not properly reported such amounts in any such tax return; or
 - c) Conduct by a person subject to tax in the requesting State that involves the failure to file a tax return that such person is under a legal duty to file and an affirmative act that has the effect of deceiving the tax authorities making it difficult to uncover or pursue the failure to file, including the concealment of assets or covering up of sources of income or the handling of one's affairs to avoid making the records that are usual in transactions of the kind.

¹⁷⁶ See *supra* Part IV.B.

¹⁷⁷ Agreement Between the United States of America and the Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America Regarding UBS AG, a Corporation Established Under the Laws of the Swiss Confederation, U.S.-Switz., Aug. 19, 2009, http://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf.

¹⁷⁸ *Id.* at 1.

¹⁷⁹ See Press Release, Swiss Federal Dep't of Justice and Police, *supra* note 135.

“information that may be relevant” in order for both countries to enforce their tax laws and combat more tax crimes than ever before. This will result in the United States gaining greater leverage under the Double Taxation Amendment in its effort against Americans who use Swiss banks to evade taxes. The amendment broadens the circumstances under which information can be requested—now undoubtedly including tax evasion and tax fraud—because tax evasion was contemplated in the *travaux préparatoires* of the Amendment. This expanded scope of information sharing is the direct result of the settlement from *United States v. UBS AG*, which was predicated on tax evasion.

C. Shortcomings of the Double Taxation Amendment

While the expanded scope of the Double Taxation Amendment is an improvement to enhance transparency, it could have further strengthened the ability of the IRS to investigate Americans who conceal assets in Swiss banks and could have served as an even greater deterrent to tax evasion in Switzerland. A provision that calls for either spontaneous or automatic information sharing should have been included in the treaty because it would lead to easier identification of Americans who cheat on their taxes, and provide a deterrent to Americans hiding taxable assets in Swiss bank accounts.

The OECD endorses the use of a spontaneous exchange of information provision among contracting parties in a TIEA.¹⁸⁰ A spontaneous exchange of information requires the active participation of tax authorities to provide the other contracting party with information that is foreseeably relevant to tax matters and has not been previously requested by that contracting state.¹⁸¹ These types of information exchanges normally occur after tax officials in one country conduct a tax investigation or audit on a national of the other country and then send the information to that national’s home country.¹⁸² Since a spontaneous exchange of information by definition is not automatic, established guidelines between the contracting states concerning the circumstances that prompt information exchanges make spontaneous information

¹⁸⁰ See OECD, MANUAL ON THE IMPLEMENTATION OF EXCHANGE OF INFORMATION PROVISIONS FOR TAX PURPOSE, MODULE 2 ON SPONTANEOUS EXCHANGE OF INFORMATION (2000), <http://www.oecd.org/dataoecd/15/44/36647914.pdf>.

¹⁸¹ *Id.* at 3.

¹⁸² *Id.*

exchanges more effective.¹⁸³ For instance, if the United States and Switzerland were to agree that bank transactions by Americans in Switzerland in excess of a certain dollar amount would trigger an exchange of tax information, this would help the IRS oversee income earned by U.S. nationals and aid the IRS to determine if such income was declared on tax returns. Or, as the OECD cites, a spontaneous exchange of information could occur whenever there are grounds to suspect that an action taken by an American would cause a significant loss of tax revenue in the United States.¹⁸⁴ A spontaneous information sharing provision would keep the Swiss taxation authorities alert to Americans trying to cheat the IRS by using Swiss bank accounts.

The OECD also endorses an automatic exchange of information provision between countries.¹⁸⁵ This involves the routine transmission of taxpayer information from the country where the taxable income is produced to the country where the taxpayer is a national.¹⁸⁶ Typically, the type of information that would be exchanged automatically includes ownership of and income from real property, dividends, interest on investments, royalties, capital gains, income from pensions, income from gambling, and wages from employment.¹⁸⁷ If this type of “bulk” information were exchanged on a routine basis between the Swiss tax authorities and the IRS, it would be relatively easy for the IRS to determine if United States nationals declared income produced in Switzerland on their tax return.

Australia’s tax authorities, for example, were able to collect over AUD \$3 million¹⁸⁸ from foreign income during the 2003-04 tax year by comparing the income sent from tax authorities abroad with the income reported by Australian nationals.¹⁸⁹ An automatic exchange of this type of taxpayer information on a regular basis would eliminate the need for formal diplomatic information requests between the contracting parties and speed up the information sharing process. Additionally, if American taxpayers

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ OECD, MANUAL ON THE IMPLEMENTATION OF EXCHANGE OF INFORMATION PROVISIONS FOR TAX PURPOSES, MODULE 3 ON AUTOMATIC (OR ROUTINE) EXCHANGE OF INFORMATION 3 (2006), <http://www.oecd.org/dataoecd/15/43/36648027.pdf> [hereinafter MANUAL ON AUTOMATIC EXCHANGE OF INFORMATION].

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 4.

¹⁸⁸ During 2003-04, with an average exchange rate of AUD \$1 to \$0.6941 USD, this was approximately \$2.1 million USD.

¹⁸⁹ MANUAL ON AUTOMATIC EXCHANGE OF INFORMATION, *supra* note 185, at 3.

know that information on taxable income will be sent to the IRS periodically, they may be more forthcoming to report income in accounts held abroad on their annual tax return.

Australia is not alone among countries that have entered TIEAs with automatic information exchange provisions. In fact, the United States and Mexico operate under a bilateral TIEA where the tax authorities of each jurisdiction are authorized to share information on an automatic, spontaneous, and on request basis.¹⁹⁰ This TIEA allows the taxation authorities to determine which types of information shall be transmitted automatically, spontaneously, or on request in order to administer and enforce the tax laws of their respective jurisdiction. Presently, the United States and Mexico automatically exchange tax information related to dividends, royalties, and interest payments between corporations.¹⁹¹ Canada and the United States automatically exchange some tax information as well. While not an obligation by treaty, the IRS Code provides that information related to interest payments on U.S. bank deposits held by Canadians be furnished to the Canadian tax authorities.¹⁹²

While the Double Taxation Amendment as written improves upon the treaty previously in force and closes loopholes on American tax evaders in Switzerland, the information sharing on request provision is watered down compared to the force a TIEA could have. Spontaneous information sharing would ensure that Swiss taxing authorities would be continually vigilant to share information that was not already requested by the United States. The Swiss, by being pro-active, would fill in possible gaps overlooked by American investigators. With an automatic information exchange, Americans would be deterred from holding assets in Switzerland if they were aware that Swiss authorities could report information to the IRS at anytime without the United States even conducting an investigation. Automatic disclosure of tax information would remarkably bolster the American battle

¹⁹⁰ Agreement for the Exchange of Information With Respect to Taxes, U.S.-Mex., Nov. 9, 1989, 4, T.I.A.S. No. 12404 (entered into force Jan. 18, 1990), http://untreaty.un.org/unts/60001_120000/27/1/00052045.pdf.

¹⁹¹ See Letter from A. Carstens, Mexico Sec'y of Finance to T. Geithner, U.S. Sec'y of the Treasury (Feb. 9, 2009), http://faculty.law.wayne.edu/tad/Documents/Country/mexico-carstens_letter.pdf. See also Ken Stier, *Foreign Tax Cheats Find U.S. Banks a Safe Haven*, TIME, Oct. 29, 2009, available at <http://www.time.com/time/business/article/0,8599,1933288,00.html>.

¹⁹² See 26 C.F.R. §§ 1.6049-6(e)(4), 1.6049-8 (2010).

against tax evasion in Switzerland.¹⁹³

But Swiss authorities vehemently oppose automatic information exchanges, fearing that it would erode the Swiss notion of privacy rights and bare the personal details of clients.¹⁹⁴ Undoubtedly, another reason Swiss officials oppose more liberal information exchange provisions is rooted in concern that their banks will lose clients who will move their assets elsewhere. Banking and financial service is a prosperous business in Switzerland where its banks hold about one-third of the world's \$7 trillion in offshore assets.¹⁹⁵ Moreover, spontaneous or automatic information exchanges shift the onus to share information with the United States to Switzerland, imposing a cost on their taxation authorities to take initiative and communicate information to the IRS. If Switzerland agreed to exchange information on a spontaneous or automatic basis, it would signal its sincerity to end Swiss status as a tax haven and offshore hub for hiding assets.

VI. SYNTHESIZING THE *UBS* CASE AND OTHER TAX HAVENS: HOW CAN TAX EVASION BE TACKLED ELSEWHERE?

A. *The United States Expands its Efforts to Fight Tax Evasion in Other Jurisdictions*

Following the settlement in *United States v. UBS AG*, the IRS offered an amnesty program allowing Americans to disclose their assets abroad and pay a reduced penalty of five percent to twenty percent of their undisclosed assets.¹⁹⁶ This amnesty program was considered a success because it created a surge of 14,700 Americans who came forward and admitted to having undisclosed assets in foreign bank accounts.¹⁹⁷ The participants in the amnesty

¹⁹³ See generally Timothy V. Addison, *Shooting Blanks: The War On Tax Havens*, 16 IND. J. GLOBAL LEGAL STUD. 703, 722 (2009).

¹⁹⁴ Katharina Bart, *Switzerland Rejects Automatic Tax-Data Exchange*, WALL ST. J., Feb. 25, 2010, available at <http://online.wsj.com/article/SB10001424052748704479404575087131517448268.html>.

¹⁹⁵ Lynnley Browning, *Swiss Approve Deal for UBS to Reveal U.S. Clients Suspected of Tax Evasion*, N.Y. TIMES, June 18, 2010, at B3, available at http://www.nytimes.com/2010/06/18/business/global/18subs.html?_r=1&emc=tnt&tntemail0=y.

¹⁹⁶ Lynnley Browning, *Amnesty Deadline Extended for Offshore Accounts*, N.Y. TIMES, Sept. 21, 2009, at B7, available at <http://www.nytimes.com/2009/09/21/business/21tax.html?fta=y>.

¹⁹⁷ Lynnley Browning, *14,700 Disclosed Offshore Accounts*, N.Y. TIMES, Nov. 18, 2009, at B1, available at <http://www.nytimes.com/2009/11/18/business/global/18irs.html?scp=8&sq=&st=nyt>.

program avoided back taxes, fines, and possible prosecution and jail.¹⁹⁸ The IRS reported collecting information from account holders with UBS and other Swiss banks, as well as Americans with bank accounts in other offshore jurisdictions that feared the potential wrath of the IRS.¹⁹⁹ Successfully obtaining disclosures after the *UBS* case begs two questions: where will the IRS turn next; and will its efforts succeed?

With regard to Switzerland, UBS may be just the tip of the iceberg for the IRS crackdown on tax evasion. Since the terms of the Double Taxation Amendment provide the tools and leverage the United States needs to obtain information on accountholders with Swiss assets, it would seem logical for the IRS to move on to other Swiss banks, such as Credit Suisse, to investigate suspected tax evaders.²⁰⁰ The DOJ is using the *UBS* case as a template to decide where to bring its next prosecution by “looking for UBS-style numbers and UBS-style fact patterns, to see if there’s a UBS-style situation.”²⁰¹ To bring the tax evasion battle to other fronts, the IRS hired 800 new employees and deployed staffs to eight overseas offices in other tax haven jurisdictions, including Hong Kong and Panama.²⁰² Wasting no time, the IRS has already launched a criminal investigation into accounts held with Hongkong and Shanghai Banking Corporation—more widely known as HSBC—in Asia, which the IRS suspects is the destination of assets formerly held in Switzerland.²⁰³ These are clear signals that the IRS is widening its war on American tax evaders around the world.²⁰⁴

The United States has TIEAs in force with many jurisdictions traditionally known as offshore tax havens.²⁰⁵ However, some

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Charles P. Wallace, *Flushing Them Out*, PORTFOLIO.COM, Oct. 6, 2009, <http://www.portfolio.com/business-news/portfolio/2009/10/06/irs-war-on-ubs-tax-haven-is-just-the-first-of-many/>.

²⁰¹ Lynnley Browning, *U.S. Widens Tax Inquiry into HSBC*, N.Y. TIMES, July 10, 2010, at B1, available at <http://www.nytimes.com/2010/07/10/business/global/10hsbc.html?emc=tnt&tntemail0=y>.

²⁰² David Voreacos, Carlyn Kolker & Alan Katz, *Hong Kong Is New Target of U.S. Crackdown on Taxes*, BLOOMBERG, Nov. 13, 2009, http://www.bloomberg.com/apps/news?pid=email_en&sid=aoY9mGd1juOY.

²⁰³ *U.S. Turns to Asia in Its Hunt for Tax Evaders*, REUTERS, July 8, 2010, <http://www.nytimes.com/2010/07/09/business/global/09iht-tax.html?emc=tnt&tntemail0=y>.

²⁰⁴ See Wallace, *supra* note 200.

²⁰⁵ Among the jurisdictions with which the United States has TIEAs in force are: Antigua and Barbuda, Aruba, Bahamas, British Virgin Islands, Cayman Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Liechtenstein, Monaco, and the Netherlands

jurisdictions are reluctant to sign an agreement with the United States. For instance, although Panama is committed to implementing the internationally agreed tax standard and has been removed from the OECD black list, a TIEA between the Americans and the Panamanians has not been reached since negotiations began in 2002.²⁰⁶ While Panama may no longer be considered a tax haven in the eyes of the OECD or international community—as a result of entering into at least twelve TIEAs with countries like South Korea²⁰⁷—it has yet to agree to share information with the United States. This presents problems for the IRS. In recognition of this issue, members of Congress are using a TIEA as a condition precedent in order to pass a free-trade agreement with Panama.²⁰⁸ Situations like this expose a flaw in the OECD's classification system to identify which jurisdictions are cooperating to improve transparency and effectuate the exchange of tax information.

The OECD's threshold for a jurisdiction to be removed from its list of tax havens is arbitrary.²⁰⁹ When a country signs twelve TIEAs that meet OECD transparency standards, it does not necessarily follow that the jurisdiction is no longer a tax haven to countries with which it has not entered into a TIEA.²¹⁰ Even though the OECD believes there are no longer any uncooperative tax havens in the world,²¹¹ several American officials disagree.²¹² South Koreans may no longer feel safe placing their assets in Panama to evade South Korean taxes because of a TIEA, but Americans may still use Panama to evade the IRS because there is no agreement to exchange information with the United States. American taxpayers who hold assets in jurisdictions that have TIEAs with the United States could circumvent bilateral TIEAs by shifting assets to a jurisdiction that does not exchange

Antilles. OECD, RECENT TAX INFORMATION EXCHANGE AGREEMENTS (2011), <http://www.oecd.org/dataoecd/43/59/43775845.pdf>.

²⁰⁶ Mark Drajem & Eric Sabo, *Tax Evasion in Panama becomes Roadblock to Trade Pact with U.S.*, BLOOMBERG, May 1, 2009, <http://www.bloomberg.com/apps/news?pid=20601070&sid=aOjRYA47d8ms>.

²⁰⁷ Kim Jae-won, *Tax Pacts with 8 Countries Planned*, KOREA TIMES, Jan. 8, 2010, available at http://www.koreatimes.co.kr/www/news/biz/2010/01/123_58680.html.

²⁰⁸ Drajem & Sabo, *supra* note 206.

²⁰⁹ Gaëtan Nicodème, *On Recent Developments in Fighting Harmful Tax Practices*, 62 NAT'L TAX J. 755 (2009).

²¹⁰ *See id.*

²¹¹ TAX STANDARD PROGRESS REPORT, *supra* note 22.

²¹² Drajem & Sabo, *supra* note 206.

information with the United States.²¹³ This loophole in tax haven classification means that the United States must become more aggressive in negotiating and signing TIEAs in order to put an end to offshore tax evasion—as was the case with Switzerland where it induced the Double Taxation Amendment as part of the UBS settlement.

It remains to be seen if making a TIEA a condition precedent to other international agreements—such as a free trade agreement—will incentivize other tax haven jurisdictions to agree to exchange information with the United States. Whistleblower laws may entice various actors involved in tax schemes²¹⁴ to cooperate with American officials to combat tax evasion.²¹⁵ In 2006, Congress authorized the IRS to reward whistleblowers who provide information in tax cases where at least \$2 million is in question between fifteen percent and thirty percent of the taxes, penalties, and interest collected.²¹⁶ This reward incentive for whistleblowers was cited by Bradley Birkenfeld, a former UBS banker, as a reason why he came forward with information about how UBS aided Americans in their attempt to hide assets in Switzerland.²¹⁷ This information led to the *UBS* case.²¹⁸ The whistleblower law might give employees in offshore banks a way to enrich themselves while also being an effective way to fight international tax evasion.²¹⁹

B. The Need for International Coordination to Combat Tax Evasion

The United States is not alone in its efforts to put an end to offshore tax evasion. Other countries are actively entering into TIEAs and investigating their own nationals suspected of evading taxes.²²⁰ Bilateral treaties with jurisdictions traditionally known as

²¹³ Addison, *supra* note 193, at 718.

²¹⁴ The IRS has received tips from accountants, bankers, and businesspeople to expose tax cheats. Janet Novack & William P. Barrett, *Tax Informants Are On The Loose*, FORBES, Dec. 14, 2009, <http://www.forbes.com/forbes/2009/1214/investment-guide-10-ubs-irs-spondello-tax-informants-on-loose.html>.

²¹⁵ The IRS webpage informing taxpayers that income from abroad is taxable “encourages” reporting actors involved in offshore tax crimes and entices them with a possible reward. IRS.gov, Income from Abroad is Taxable, <http://www.irs.gov/businesses/article/0,,id=180946,00.html> (last visited April 6, 2011).

²¹⁶ Novack & Barrett, *supra* note 214.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See OECD, Tax Information Exchange Agreements, <http://www.oecd.org/document>

tax havens²²¹ increase transparency and reduce the number of jurisdictions where the wealthy can hide assets, knowing the low-tax jurisdiction will share information with their home country. Even Switzerland has pledged to crack down on tax evaders and signed eleven TIEAs in 2009.²²² With more countries signing bilateral TIEAs—and signing more than the OECD's requirement of twelve in order to be lifted from the black list—the amount of jurisdictions hostile to sharing tax information will decrease.

But international coordination to sign bilateral TIEAs is a piecemeal solution to international tax evasion as some countries are either unable or unwilling to enter into a TIEA, or the counterparty is unwilling to negotiate. For example, Italy has a longstanding problem with Italians using its neighboring country to evade taxes.²²³ This caused Italy to take action against Switzerland.²²⁴ The Swiss town of Lugano, located across the Switzerland-Italy border, is a center for Italian offshore banking and a focal point of the Italian taxation authorities' fight to curb tax evasion.²²⁵ Under the laws of Italy, Italian citizens with holdings abroad must declare them and, under certain conditions, they are obliged to repatriate such funds.²²⁶ Similar to the United States, Italy offered a tax amnesty program in 2009 that led to € 95 billion²²⁷ being declared to the Italian tax authority.²²⁸ Almost all of these assets have since been repatriated to Italy and between € 30 and € 40 billion are in the provenance of Swiss banks.²²⁹ This

/7/0,3343,en_2649_33767_38312839_1_1_1_1,00.html (last visited April 6, 2011). See also RECENT TAX INFORMATION EXCHANGE AGREEMENTS, *supra* note 205.

²²¹ Jurisdictions traditionally known as tax havens include Aruba, Turks & Caicos, Anguilla, San Marino, Bahamas, Gibraltar, and Liechtenstein.

²²² Département Federal des Finance, Double Imposition Internationale, <http://www.efd.admin.ch/dokumentation/zahlen/00579/00608/00642/index.html?lang=fr> (last visited April 6, 2011). In 2009, Switzerland entered into TIEAs adhering to OECD standards with Austria, Denmark, Finland, France, Luxembourg, Mexico, Norway, Qatar, Spain and the United Kingdom. As of April 3, 2011, Swiss officials signed TIEAs with Canada, Germany, Greece, Hong Kong, India, Japan, Kazakhstan, the Netherlands, Malta, Poland, Romania, Singapore, Slovakia, South Korea, Turkey, and Uruguay.

²²³ John Tagliabue, *Italy Puts Swiss Haven from Taxes Under Siege*, N.Y. TIMES, Jan. 8, 2010, at A11, available at <http://www.nytimes.com/2010/01/08/world/europe/08lugano.html>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ DIAMOND, *supra* note 35.

²²⁷ With an average exchange rate in 2009 of € 1 to \$1.3944, this was approximately \$136.5 billion USD.

²²⁸ Sabina Cohen & Jennifer Clark, *Italy's Tax Amnesty Spurs Repatriations*, WALL ST. J., Dec. 30, 2009, at A10, available at <http://online.wsj.com/article/SB126208182000808787.html>.

²²⁹ *Id.*

program resulted in an almost € 5 billion tax windfall for Italy.²³⁰ Nonetheless, the Italians share a similar problem vis-à-vis Switzerland as the United States has with Panama: TIEA negotiations are frozen,²³¹ leaving a jurisdiction where tax evaders can stash assets without a formal way for the home country to gather tax information.

Without multilateral negotiations of TIEAs, situations like those faced between Panama and the U.S. as well as Switzerland and Italy are bound to arise. Bilateral treaties to increase tax information exchanges work for the countries that have the expendable political capital to negotiate and a cooperative counter party that agrees to enter into the treaty. But without a cooperative country on the other end of the bargaining table, international tax evasion will remain a problem for that erstwhile country. Thus, real elimination of tax evasion worldwide will require multilateral tax information sharing treaties.

VII. CONCLUSION

Many jurisdictions around the world are facing huge budget deficits and are desperate to increase their tax coffers. Some jurisdictions have decided to increase revenues by battling international tax evasion. Actions taken by the United States against Switzerland to combat the billions of dollars hidden from the IRS in Swiss bank accounts led to a new agreement with Switzerland to share tax information. This Double Taxation Amendment calls for information sharing that increases transparency and rectifies some of the problems that arose during previous attempts to pierce Swiss banking secrecy. Under the new agreement, information will be exchanged even when the alleged offense is not considered a crime in Switzerland and even when a financial institution protected by banking secrecy laws holds the information requested.

As a result of its action, the United States is experiencing a surge in taxpayers disclosing assets hidden abroad behind the veil of Swiss banking secrecy. Consequently, Swiss banks have experienced an outflow of capital.²³² UBS stated that it would no longer serve American clients with private banking services unless

²³⁰ Tagliabue, *supra* note 223.

²³¹ *Id.*

²³² Nelson D. Schwartz, *For Swiss Banks, an Uncomfortable Spotlight*, N.Y. TIMES, Mar. 4, 2009, available at <http://www.nytimes.com/2009/03/05/business/worldbusiness/05swiss.html>.

the clients declare their accounts to the IRS.²³³ Also, UBS has made it clear to employees that the bank will “not provide assistance to clients or colleagues in acts aimed at deceiving tax authorities.”²³⁴ The IRS has pierced banking secrecy in Switzerland, and other tax havens should be on notice that the United States might wage the next battle against tax evasion in their jurisdiction.²³⁵

The aftermath of the *UBS* case has been hailed as a victory for the United States.²³⁶ But without either spontaneous or automatic information sharing, Swiss taxation authorities are not required to be as alert and proactive as they otherwise might be to provide information to the United States about possible tax violations. Additionally, the United States is still required to make formal information requests under the treaty and will have to provide the Swiss with data to ensure the IRS is not merely on a fishing expedition. Moreover, bilateral TIEAs are only as effective in combating tax evasion as the contracting members are committed to entering into them. A multilateral tax information exchange treaty would be a more effective way to shut down tax havens so that one jurisdiction—like Panama—would not remain a tax haven and agree to share information with one country, while remaining a tax haven from the perspective of another country. Despite these flaws, the ability of the United States to obtain information previously non-disclosable under Swiss banking secrecy laws has significantly improved since the MACM and the double incrimination standard—it has finally cracked open Switzerland’s formidable vault of banking secrecy.

²³³ Lynnley Browning, *UBS to Close Secret Bank Accounts Held by U.S. Clients*, INT’L HERALD TRIBUNE, Jan. 10, 2009, at 11.

²³⁴ CODE OF BUSINESS CONDUCT AND ETHICS OF UBS 5 (2010), http://www.ubs.com/1/ShowMedia/investors/corporategovernance/business_conduct?contentId=152516&name=Code%20of%20Business%20Conduct%20and%20Ethics%20of%20UBS.pdf.

²³⁵ Editorial, *If Switzerland Can . . .*, N.Y. TIMES, Aug. 22, 2009, at A16, available at http://www.nytimes.com/2009/08/22/opinion/22sat1.html?_r=1.

²³⁶ Haig Simonian et al., *US Hails Victory in UBS Tax Battle*, FIN. TIMES, Aug. 19, 2009, available at <http://www.ft.com/cms/s/0/35879d72-8cd5-11de-a540-00144feabdc0.html>.

