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Philip O. Erwin

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The International Securities Enforcement Cooperation Act of 1990: Increasing International Cooperation in Extraterritorial Discovery?

INTRODUCTION

With the globalization of financial markets and the advent of world-wide telecommunications, the international trade of securities has become a frequent and important aspect of business. The United States, whose laws in the area of securities are among the most sophisticated in the world, has sought to regulate effectively these securities transactions. Congress's latest step toward that goal was the enactment of the International Securities Enforcement Cooperation Act of 1990 (ISECA).¹

United States courts have often been called upon to enforce U.S. securities laws over foreign individuals and foreign transactions bearing a connection to the United States.² In so doing, however, the courts have frequently given little weight to principles of international law and comity.³ This has caused the United States problems in asserting jurisdiction, and carrying out and enforcing discovery in international securities cases.⁴

These problems have been particularly acute during the discovery phase of any resulting litigation.⁵ Conflicts of law problems have arisen where parties to a lawsuit in a U.S. court have sought production of documents held in a foreign country and subject to foreign non-disclosure laws.⁶ In attempting to address this

⁴ Id.
⁵ See Bornstein & Dugger, supra note 2, at 396, 412.
issue, U.S. courts have fashioned different tests to determine whether U.S. law or foreign law should apply in a given case. The often arbitrary and conflicting decisions of the different circuits have not only caused friction between the United States and other countries, but have impeded the enforcement of international securities transactions by the U.S. Securities and Exchange Commission (SEC).

The SEC has turned to mutual assistance treaties, inter-agency Memoranda of Understanding (MOUs), and various other enforcement agreements to better address extraterritorial violations of U.S. securities laws. These arrangements have proven helpful and removed many obstacles to the SEC's international enforcement of U.S. securities laws. There are, however, limitations to the negotiation and enforcement of such instruments. Through ISECA, Congress has enabled the SEC to address more adequately the deficiencies of the aforementioned enforcement agreements.

ISECA grants the SEC significant discretion in maintaining the confidentiality of foreign documents and disclosing confidential U.S. documents to foreign securities agencies and governments. It also expands the SEC's ability to limit the securities activities of individuals based on the judgment of a foreign court. Congress gave the SEC these new powers to foster cooperation between the SEC and its foreign counterparts in the area of securities law enforcement. Thus, through ISECA, Congress hoped to facilitate extraterritorial discovery in U.S. securities cases.

This Comment examines ISECA and whether it is an adequate response to the problem of evidence-gathering in international securities cases. Part I of this Comment examines the existing case law on evidence-gathering in international securities cases, and how the courts have handled discovery in the absence of explicit legislative guidance. Part II introduces MOUs and other enforcement agreements the SEC has entered into in response to discovery problems. Part III discusses ISECA and whether it

7 See id. at 317–22.
8 See id. at 326–28.
9 See Bornstein & Dugger, supra note 2, at 413–17.
10 Id. at 413, 415.
11 See generally ISECA, supra note 1.
13 Id. §§ 78o(b), 80a(9)(b).
adequately supplements the agreements examined in Part II. This Comment concludes that while ISECA will promote international cooperation in evidence-gathering in U.S. securities cases, the United States should place more emphasis on a multinational approach to the issue.

I. EVIDENCE GATHERING IN TRANSNATIONAL SEC INVESTIGATIONS AND SECURITIES CASES

A. Procedure

United States securities laws impose a duty on the SEC to investigate complaints and other indications of violations of securities laws.14 Investigations are usually undertaken by the appropriate enforcement division.15 During an investigation, the SEC may issue subpoenas requiring sworn testimony and production of documents and records pertinent to the investigated matter.16 This subpoena power may be enforced by an Order of Compliance if the requested party refuses to comply.17 When an investigation reveals a possible violation of a securities law, the SEC can seek a civil injunction in a federal district court to prohibit the alleged violation,18 or commence an administrative proceeding.19

The SEC, however, has only civil authority. When an investigation indicates a criminal violation, the SEC can only refer the facts of the investigation to the Department of Justice with a recommendation for prosecution of the violators.20 The U.S. At-

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15 Jennings & Marsh, supra note 14, at 52.
16 Id. at 53.
17 Id. at 55.
18 Id.
19 Id. at 54. After such a hearing, the SEC may take specific action, including revocation, expulsion, and censure of the securities activities of an individual. Hearings are held before an SEC-appointed Administrative Law Judge, and may be reviewed by the SEC. The law permits any party to the hearing to appeal the decision of the SEC in the appropriate U.S. Court of Appeals. Id. at 54–55.
20 Id. at 55.
torney may then use evidence arising from the investigation to seek a federal grand jury indictment.\textsuperscript{21}

Although these procedures are straightforward for domestic investigations and cases, many problems arise once the SEC attempts to apply them extraterritorially.\textsuperscript{22} The securities laws contain no provisions governing extraterritorial evidence-gathering during SEC investigations or the discovery period of securities cases.\textsuperscript{23} In response, U.S. courts have established tests to determine when requested foreign-based evidence is subject to discovery or investigation.\textsuperscript{24}

\section*{B. Blocking and Secrecy Laws}

The SEC, through its investigative powers or during litigation, often requests information from foreign jurisdictions concerning the identities and assets of persons who have allegedly violated U.S. securities laws. Foreign governments often resist such requests through their own laws,\textsuperscript{25} often in the form of blocking and secrecy laws.\textsuperscript{26}

Blocking laws generally prohibit the disclosure, copying, inspection, or removal of documents located in the foreign jurisdiction.\textsuperscript{27} Foreign governments often punish violations of blocking laws with criminal sanctions.\textsuperscript{28} Some blocking laws operate

\textsuperscript{21} Id.
\textsuperscript{22} Haseltine, supra note 6, at 312.
\textsuperscript{25} Haseltine, supra note 6, at 312–14. Occasionally foreign countries lack equivalents to U.S. laws. An example of the incompatibility of U.S. and foreign laws is the failure of many countries to enforce their own insider trading laws. This failure prevents the SEC from seeking evidence under dual criminality treaties, which require evidence sought by one jurisdiction from another to relate to a crime punishable in both jurisdictions. Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 313.
automatically to prevent the release of information to a foreign requesting state under certain circumstances. A French statute, for example, prohibits disclosure or use of certain information absent authorization. Other blocking laws' prohibitions are applied only when a representative of the host jurisdiction invokes them to prevent disclosure to the requesting authority. These laws protect the host jurisdiction's national interests. Consequently, private parties generally cannot waive prohibitions against disclosure.

Secrecy laws are intended to protect individual rights to privacy, as well as broader national interests. Individuals may waive these rights. An enacting government, however, will not grant a waiver if it feels that disclosure of certain information is detrimental to its national interest.

Secrecy laws are common in banking; they prohibit banks in the host jurisdiction from disclosing information concerning their clients. If banking secrecy laws are designed to protect a private interest in the confidentiality of information, rather than the public interest, they generally may be waived by bank customers. Customers may waive the confidentiality of information as long as the bank does not breach its duty to a third party. Switzerland

29 Bornstein & Dugger, supra note 2, at 410.

30 Harvey M. Silets & Susan W. Brenner, "Compelled Consent": An Oxymoron with Sinister Consequence for People who Patronize Foreign Banking Institutions, 20 CASE W. RES. J. INT'L L. 435, 442 (1988). France enacted its blocking statute on July 16, 1980. It contains four sections. The first section prohibits French nationals from disclosing to a foreign entity any information which might impair France's sovereignty, security, or economic interests. The second section requires anyone seeking to disclose information to do so through means prescribed by French law. The third section requires any person within the scope of the first two sections to notify the "competent" French minister of any request for information. The last section sets out the applicable criminal sanctions in case of a violation of the statute. Id. at 442 n. 21.

31 Bornstein & Dugger, supra note 2, at 410.

32 Silets & Brenner, supra note 30, at 442 n.21. The French blocking statute was adopted to protect French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction, particularly by U.S. courts.

33 See Bornstein & Dugger, supra note 2, at 410.

34 Id.

35 Id. at 410–12.

36 Haseltine, supra note 6, at 314.

37 Bornstein & Dugger, supra note 2, at 411. Such information may take the form of records of transactions, customer identification, or customer account numbers.

38 Id.
is well known for its strict bank secrecy laws, which provide for criminal sanctions in the event of a violation.

Foreign bank secrecy laws also directly affect SEC investigations and oversight. Foreign banks do not fall under the restrictions of the Glass-Steagall Act, which prohibits U.S. commercial banks from dealing in securities, including the purchase, sale, and underwriting of most stock. Therefore, foreign banks may engage in securities transactions as agents, as broker-dealers, and in certain cases, as underwriters for their clients.

C. United States Approach to Conflicts of Law Problems

1. SEC Action

The SEC's Division of Enforcement attempted to resolve the problem secrecy laws pose by proposing "a waiver by conduct" rule in 1984. Under the proposed rule, any person effecting a purchase or sale of securities in the United States was deemed to have consented to disclosure of relevant evidence in any proceeding or investigation arising out of the transaction. Critics described the proposal as incompatible with international law, as well as ineffective in countries with bank secrecy laws. As a result, the proposed rule was eventually abandoned.

39 Silets & Brenner, supra note 30, at 443–48. The Swiss government enacted its Banking Act to protect the assets of persecuted Jews from the German Nazi government during the 1930s. The Act prohibits the disclosure of customer transactions, and of bank communications with its customers and others regarding those transactions. Violation of the statute is a criminal as well as a civil offense. Under certain circumstances, however, a bank may be relieved of its secrecy obligation. Bank customers may waive their banking secrecy protections or the bank may be compelled by a competent government authority to disclose the protected information. In either case, the bank may be legally directed to disclose protected information to the government or third parties. Id.

40 See Bundesgesetz über die Banken und Sparkassen of Nov. 8, 1934, art. 47, AS 808, RO 808, RU 808 (Swiss Banking Law). Antigua, the Bahamas, Barbados, the Cayman Islands, Luxembourg, Panama and Singapore also have strict banking secrecy laws which have transformed them into some of the largest money havens in the world. Silets & Brenner, supra note 30, at 445–47 n.29.


44 Id. at 292.

45 See Bornstein & Dugger, supra note 2, at 411.
2. Judicial Solutions

In dealing with foreign obstacles to extraterritorial discovery, U.S. courts have most often resolved conflicts between domestic and foreign law in favor of the former. The courts have reasoned that the SEC's need for specific information to pursue possible violators of securities laws outweighs the restrictive purpose of conflicting foreign law. The courts have felt that such foreign law only reflects a general policy against cooperation with other states. The U.S. judicial favoritism toward domestic law, however, has not always led to disclosure of the requested information. Rather, it has often offended the sovereign rights of the foreign states involved.

In general, there is no uniform test applied throughout the U.S. circuit courts for determining whether foreign blocking and secrecy laws should prevent extraterritorial discovery. Most circuit court decisions, however, use or refer to two standards: (1) the "good faith" test developed by the Supreme Court in Société Internationale v. Rogers; and (2) the factor analysis test based on the Restatement (Second) of Foreign Relations (Restatement).

In Société Internationale, the Supreme Court addressed the issue of whether sanctions were appropriate where the plaintiff had failed to comply with a discovery request for documents on the grounds that doing so would violate Swiss banking law. The

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46 Michael D. Mann & Joseph G. Mari, Developments in International Securities Law Enforcement and Regulation 34 (Oct. 24, 1990) (SEC Securities Regulation Seminar document, unpublished manuscript, on file with the Boston College International and Comparative Law Review). The Federal Rules of Civil Procedure (FRCP) delineate federal courts' discovery powers. Rules 26-37 of the FRCP address the general category of "depositions and discovery." Under these rules, the parties may act independently of the court in carrying out their discovery as long as they follow procedural guidelines. Although discovery may be initiated and completed without dispute by the parties, Rule 37 provides for enforcement by a court in the event that a party fails to comply with a discovery request. Sanctions may also be imposed for non-compliance with a discovery request. FED. R. CIV. P. 26-37.

47 Mann & Mari, supra note 46, at 32.

48 See Piñera-Vázquez, supra note 3, at 482-84.

49 357 U.S. 197, 208-12 (1958).

50 Restatement (Second) of Foreign Relations § 40 (1965) [hereinafter Restatement (Second)].

51 357 U.S. at 200. A Swiss holding company brought suit in the United States under the Trading with the Enemy Act, seeking the return of property seized by the Alien Property Custodian during World War II. The plaintiff was required to produce certain documents and records pursuant to a discovery request in a U.S. court. The plaintiff refused to comply on the grounds that doing so would violate Swiss penal law. The
Supreme Court resolved the issue by determining that the plaintiff had made a full effort to comply with the discovery request. The plaintiff demonstrated that disclosure would violate Swiss secrecy laws and that Switzerland had a strong interest in enforcing its secrecy laws. Therefore, the Court found that the plaintiff had not acted in bad faith and that the case should proceed.

The Court further held that U.S. courts may not use such harsh sanctions as dismissal with prejudice absent extreme circumstances.

In addition to the good faith test, the courts have used the factor analysis approach set forth in section 40 of the Restatement. The section 40 factors most commonly referred to by courts include: (1) the national interests of each nation involved; (2) the comparative hardship placed on the parties; and (3) a good faith showing that criminal sanctions will result from compliance with U.S. discovery orders.

question before the Supreme Court was whether sanctions against the plaintiff for failing to produce the records would be appropriate. Id. at 198–203.

52 Id.
53 Id.
54 Id. at 212.

Section 40 of the Restatement (Second) lists the following factors that should be used in determining whether a foreign source should comply with a court order for discovery: (a) the vital national interests of each of the states; (b) the extent and 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 another 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. Restatement (Second), supra note 50, § 40.

The Restatement (Second) was revised in 1987 to include an expanded and more detailed factor analysis for the conflict of laws question. Restatement (Third) of Foreign Relations (1987) [hereinafter Restatement (Third)]. Due to its relatively recent adoption, however, courts have not referred to the Restatement (Third) as much as the Restatement (Second). The Restatement (Third) goes beyond the § 40 analysis and offers a more detailed approach; three sections are relevant in addressing a conflict of laws problem. Section 403 of the Restatement (Third) addresses the limitations on a court's jurisdiction to prescribe domestic law abroad, and emphasizes reasonableness. Section 441 addresses the defense of foreign state compulsion in relation to activities generally. Finally, § 442 sets forth U.S. law on foreign state compulsion when requests for the disclosure of information located in one country is sought in connection with a legal proceeding in another. Restatement (Third), supra, §§ 403, 441, 442.

56 See Nova Scotia I, 691 F.2d at 1389–90; Westinghouse, 563 F.2d at 997; Banca Della Svizzera Italiana, 92 F.R.D. at 117–19.
Since *Société Internationale*, the circuit courts have used the good faith test and the Restatement analysis among other factors in their decisions. The Second Circuit, for example, has established a method of analysis concerning production orders directed at a plaintiff or witness. The court orders production when foreign secrecy laws appear to be used as a shield for criminal activity. The Second Circuit’s test also considers a party’s good faith, competing national interests, and principles of international comity.

The D.C. Circuit has followed the Second Circuit’s approach closely. The D.C. Circuit has explicitly recognized the international ramifications of compliance and given foreign interests more serious consideration. The Eighth, Ninth, and Tenth Circuits have applied the Second Circuit method and the Restatement factors similarly.


58 See *United States v. Davis*, 767 F.2d 1025, 1033–36 (2d Cir. 1985). During an investigation by the U.S. government, the defendant was served with a subpoena requesting certain documents which were located in a bank in the Cayman Islands. The defendant refused to comply asserting that the bank would be subject to criminal prosecution in the Cayman Islands for violating its secrecy laws. *Id.* at 1033. See also *United States v. First National City Bank*, 396 F.2d 897, 901–03 (2d Cir. 1968). In *First National*, the appeals court affirmed the district court’s order enforcing an antitrust grand jury subpoena seeking documents located in the United States and Germany. *Id.* at 905. The defendant refused to comply arguing that to do so would violate German secrecy requirements in contract and tort law. *Id.* at 899. The court reasoned that because the defendant had chosen to place its records in a foreign state, where it might be exposed to adverse civil consequences, it must accept being subject to criminal discovery in the United States as well. *Id.* at 904–05.

59 *Davis*, 767 F.2d at 1035.

60 *Id.* at 1033–36; *First National City Bank*, 396 F.2d at 902–03.

61 See *In re Sealed*, 825 F.2d at 498–99. The district court found a bank and the manager of the bank’s branch in “Country Y” in contempt for failing to respond to a grand jury subpoena order. The bank and its manager claimed that they failed to comply with the subpoena out of fear of Country Y’s secrecy laws. The circuit court, reasoning that the manager could only be punished by Country Y’s authorities if he voluntarily returned to the foreign country, affirmed the contempt order against him. The court reversed the contempt order against the bank. It found that the subpoena required a foreign person to violate the laws of another foreign sovereign on that sovereign’s own territory. *Id.* at 497. The court also considered that the bank was merely a third party and not the focus of the criminal investigation. *Id.* at 498.

The Eleventh Circuit, on the other hand, has repeatedly refused to consider the international comity concerns of the Second Circuit’s analysis. In *United States v. Bank of Nova Scotia (Nova Scotia I)*, a bank was requested to produce certain records situated in its Antiguan and Bahamanian branches concerning a legal proceeding to which it was not a party. The bank refused on the grounds that production would violate Bahamanian secrecy laws. The court, without explanation, decided that U.S. interests far outweighed Bahamanian interests. The court did not determine the existence of any real threat of criminal sanctions against the bank. The court in *Nova Scotia I* did not even consider factors such as the neutrality of the bank and its status as a non-party to the suit.

In a subsequent case involving the Bank of Nova Scotia, the same court completely disregarded a statement submitted by a foreign government delineating its interest in upholding its secrecy laws. The court reasoned that a bank operating in the United States must abide by U.S. laws regardless of the foreign interest at stake.

The Seventh Circuit took a different approach to the analysis of obstacles to extraterritorial discovery. It considered one factor the Eleventh Circuit did not. In *United States v. First National Bank* F.2d 992, 997–99 (10th Cir. 1977) (court of appeals reversed district court’s contempt order for failure of Delaware corporation to produce documents in Canada because such action might violate Canadian criminal law; 10th Circuit held as matter of comity Westinghouse’s need for evidence was not critical enough to overcome Canada’s interest in enforcing its own explicit statute).

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64 *Nova Scotia I*, 691 F.2d at 1386. In *Nova Scotia I*, a federal grand jury conducting a tax and narcotics investigation issued a subpoena *duces tecum* upon a branch of a Canadian bank in Miami, Florida. The subpoena required the bank’s branches in Antigua and the Bahamas to produce certain records. The bank refused to produce the documents on the grounds that it would violate Bahamanian secrecy law. The bank suggested that the U.S. government could instead seek judicial assistance from the Supreme Court of the Bahamas. The bank also argued it was unfair to require a mere investor to incur criminal liability in the Bahamas. *Id.* at 1386–88.

65 *Id.* at 1388.

66 *Id.* at 1391.

67 *Id.* at 1389.

68 See generally *id.* at 1386–91.


70 *Id.* at 828.
of Chicago, the Seventh Circuit recognized that the party against whom discovery was sought was not a party to the suit.\textsuperscript{71} The court found that it was fundamentally unfair to hold a non-party witness to the same standard as an actual party facing foreign criminal liabilities.\textsuperscript{72} The court also showed greater consideration of the potential repercussions of complying with foreign law.\textsuperscript{73}

As the case law indicates, resolution of conflicts of law questions in the area of extraterritorial discovery varies not only by circuit, but even within the same circuit. Results may vary as courts take different factors into consideration and subject them to inconsistent interpretation. Even in those cases where the conflict is resolved in favor of U.S. law, there is still a chance that compliance with U.S. law will not occur. Thus, courts are often able only to enforce sanctions on persons or objects directly under their territorial jurisdiction. The SEC, if it is to successfully investigate and gather evidence in cases where foreign laws apply, must turn to other means of evidence gathering. These other means are discussed below.

II. INTERNATIONAL AGREEMENTS AND THE REGULATION OF SECURITIES TRANSACTIONS

The SEC has turned to treaties and agreements between the United States and other nations in order to remove foreign obstacles to extraterritorial discovery. These treaties and agreements provide for mutual assistance in cases involving securities and SEC investigations.\textsuperscript{74} Additionally, the SEC has sought to use multilateral treaties such as the Hague Convention on the Taking of Evidence Abroad,\textsuperscript{75} and other more traditional methods such

\textsuperscript{71} United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 346 (7th Cir. 1983).
\textsuperscript{72} Id. The court held that the defendant bank had established that Greek bank secrecy laws would apply where the Internal Revenue Service had requested disclosure of certain records held by a branch of the bank in Athens, Greece. The court stated that the case did not involve vital U.S. interests or the grand jury process, and, after balancing the Restatement (Second) § 40 factors, found in favor of the bank. Id. at 346–47.
\textsuperscript{73} Id. at 346.
\textsuperscript{74} Mann & Mari, supra note 46, at 58, 70–73.
\textsuperscript{75} For a discussion of the use of the Hague Convention, see John M. Fedders, Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad, 18 INT'L LAW. 89, 93–100 (1984). The author states:

There are two Hague Conventions which may be of assistance to the SEC in cases involving foreign persons or entities. The convention concerning "Service of Judicial and Extrajudicial Documents" was completed in 1965, and entered into force in the United States in 1969. Although in principle the convention
The SEC has entered into agreements with foreign securities agencies providing for the exchange of information on alleged securities violations. Many of these treaties and agreements specifically address the extraterritorial discovery and conflicts of law problems. More recent accords, however, also address broader issues of market regulation.

A. Mutual Assistance Treaties

The United States has entered into several bilateral treaties with foreign nations to provide mutual assistance in criminal matters. The SEC has worked to ensure that all these agreements specifically cover conduct which is illegal under U.S. securities laws. The SEC may utilize these treaties for the production of information in an investigation or during a judicial proceeding, such as discovery, which may eventually lead to criminal proceedings.

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provides for the discovery of testimony and documents, many of the signatories have conditioned their assent to the convention with the reservation that no "pre-trial" discovery may take place. Others have refused to grant any document production under the convention. The convention concerning "Taking of Evidence Abroad" was completed in 1970, and ratified by the United States in 1972. This convention can provide assistance in obtaining evidence. Given the nature of the commission's proceedings, however, it has been employed rarely . . . .

Id. at 99–100.

The use of letters rogatory in this context is described in Fedders, supra note 75, at 99:

The [SEC] rarely makes formal requests by means of letters rogatory for assistance from a U.S. federal court to an appropriate foreign court. Letters rogatory are of limited use. As is true with respect to rule 37 requests, a matter must be pending before a U.S. district court before letters rogatory may be used. Most often, foreign cooperation is needed to complete an investigation prior to commencing such a lawsuit. Finally, letters rogatory may take considerable time, and there is no assurance that a foreign court can, or will, comply with the request . . . .

76 The use of letters rogatory in this context is described in Fedders, supra note 75, at 99:

77 Mann & Mari, supra note 46, at 3–5, 73–88.

78 See id. at 58–88.

79 Id. at 91–92.

80 See, e.g., Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.–Switz., 27 U.S.T. 2019 [hereinafter Swiss Treaty]; Treaty on Mutual Legal Assistance, June 12, 1981, U.S.–Neth., T.I.A.S. No. 10,734 [hereinafter Dutch Treaty]. These treaties cover a variety of crimes. Mann & Mari, supra note 46, at 58. They are designed to assist the signatory nations in enforcing their criminal laws in spite of jurisdictional and enforcement problems that arise in international cases. Treaties are also in effect with the Commonwealth of the Bahamas, Canada, the Cayman Islands, Italy, and Turkey. Id. In addition, the United States has ratified agreements with Belgium, Colombia, Mexico, Morocco, and Thailand. The United States and the signatory nations have not yet exchanged instruments of ratification for those treaties. Id.

81 Mann & Mari, supra note 46, at 58.

82 Id.
The Treaty on Mutual Assistance in Criminal Matters between the Swiss Confederation and the United States (Swiss Treaty)\(^83\) was the first mutual assistance treaty which the United States invoked.\(^84\) Recourse to the Swiss Treaty is available only for the governments of the United States and Switzerland.\(^85\) Except for cases involving organized crime, the offenses investigated under the Swiss Treaty must be considered crimes under both the requesting and the requested state's laws.\(^86\) Thus, the SEC may use the Swiss Treaty during an investigation only if the matter investigated is a potential violation of both U.S. and Swiss laws that could lead to a criminal proceeding.\(^87\)

The Swiss Treaty also limits assistance under other provisions.\(^88\) If the person about whom information is sought is unconnected with the offense, or the secret itself is of special importance to a Swiss interest, assistance may be denied.\(^89\) Assistance may also be refused if evidence is requested for the purpose of prosecuting a person for acts of which he or she was acquitted in the requested state.\(^90\)

Until recently, SEC recourse to the Swiss Treaty was unavailable for insider trading cases.\(^91\) When the United States and Switzerland first enacted the Treaty, Switzerland had few securities laws, covering only limited and highly specific circumstances.\(^92\) Fur-

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83 Swiss Treaty, supra note 80.
85 Swiss Treaty, supra note 80, at arts. 1, 2.
86 Id. at art. 4.
87 Id. Under the Swiss Treaty, a request is handled between central authorities: the U.S. Justice Department and the Swiss Justice and Police Department. If a request is made to the United States, the U.S. Justice Department determines whether the Treaty applies. The Swiss government has passed legislation creating rights of appeal for private individuals wishing to contest U.S. requests under the Treaty. Id. at arts. 4, 8. See also Mann & Mari, supra note 46, at 60–61.
88 See Swiss Treaty, supra note 80, at arts. 3, 5. Article 5 is the result of a disagreement between the United States and Switzerland regarding the use of information acquired under the Swiss Treaty. The U.S. view is that such information should be made available for all uses, while the Swiss feel that information acquired under the Treaty should be used solely for the purpose for which it was furnished. Article 5 incorporates the Swiss viewpoint with certain exceptions. Mann & Mari, supra note 46, at 60.
89 Swiss Treaty, supra note 80, at arts. 3, 5.
90 Id.
91 Mann & Mari, supra note 46, at 62. Prior to 1988, insider trading violations were punishable only as an unlawful use of business secrets in violation of Article 162 of the Swiss Penal Code. Id. at 77.
92 Id. at 62, 63.
thermore, Switzerland did not have any laws criminalizing insider trading. As a result, the SEC could seldom satisfy the dual criminality requirement of the Swiss Treaty.

Similar to the Swiss Treaty are the Treaty on Mutual Legal Assistance between the Kingdom of the Netherlands and the United States (Dutch Treaty), and the Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters (Cayman Treaty). These treaties do not, however, provide a specific list of common offenses or contain a dual criminality requirement. Under the treaties, evidence may not be used for purposes other than those specified in the request, but the restriction may be waived by prior consent of the requested state. Under the Cayman Treaty, although there is no dual criminality requirement, the conduct must be punishable by more than one year imprisonment under either U.S. or Cayman Islands law before assistance will be granted.

The Treaty between the Government of Canada and the United States on Mutual Legal Assistance in Criminal Matters (Canadian Treaty), goes a step further than the Cayman Treaty. It not only drops the dual criminality requirement, but also provides automatic assistance for violations of specific U.S. and Canadian securities laws. Furthermore, under the Cana-

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93 Id. at 77. Switzerland’s Insider Trading Law became effective on July 1, 1988. This law, embodied in Article 161 of the Swiss Penal Code, expanded the scope of Article 162 by providing for a greater number of situations for which insider trading can be prosecuted. The new law makes unlawful the use, for personal gain, of confidential information regarding the issuance of new securities, mergers, and acquisitions, by persons acting in their capacity as insiders or by tippees of such persons. Id. at 78.
94 See Santa Fe, supra note 84, ¶ 99,424.
95 Dutch Treaty, supra note 80.
97 See supra notes 95, 96.
98 Mann & Mari, supra note 46, at 70, 72.
99 Cayman Treaty, supra note 96, at art. 3.
101 Mann & Mari, supra note 46, at 71. Similarly, a treaty between the United States and the Bahamas provides for assistance in cases involving conduct considered a crime under both U.S. and Bahamian law, or punishable as a crime under the laws of the requesting state by at least one year’s imprisonment. Treaty on Mutual Legal Assistance in Criminal Matters, Aug. 18, 1987, U.S.–Bah., Sen. Treaty Doc. 100–17.
102 Canadian Treaty, supra note 100, at annex.
Treaties establishing mutual assistance in criminal matters have provided substantial help in gathering extraterritorial evidence. These treaties, however, cover a wide range of crimes of which securities fraud constitutes only a small portion. Invoking these treaties may be time-consuming and unhelpful to the SEC where the securities laws of the foreign nation are not comparable to U.S. laws. In particular, the SEC is unable to use such treaties where the alleged securities violation is only a civil offense in the United States.

In response to these problems, the SEC has enacted mutual assistance agreements with its foreign counterparts. These assistance agreements, discussed below, are specifically tailored to the needs of each securities regulatory agency. Therefore, they tend to be more efficient and effective than treaties.

B. Inter-Agency Memoranda of Understanding

The SEC’s alternative to the sometimes cumbersome and ineffective procedures provided by treaties in the area of evidence gathering has been the MOU. MOUs provide for the sharing of information and the cooperation between the SEC and foreign securities agencies in investigation and litigation. Unlike treaties, MOUs are non-binding agreements between like-minded regulators intended to facilitate mutual assistance in the area of securities law enforcement. Unlike some of the bilateral trea-

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103 Mann & Mari, supra note 46, at 71.
104 See id. at 58–72.
105 Id.
106 Id. at 58.
107 Id. at 73, 74.
108 Bornstein & Dugger, supra note 2, at 414. The SEC has also sought to help other nations revise or update their securities laws in order to create greater homogeneity in the international exchange market and to facilitate the use of existing mutual assistance treaties and MOUs.
109 Id. at 413–17.
110 Id. at 413–14. To date, the SEC has entered into MOUs with Brazil, Canada, France, Japan, the Netherlands, Switzerland, and the United Kingdom. Mann & Mari, supra note 46, at 73. The SEC has also entered into a more limited understanding with the Italian Commissione Nazionale per le Societa e la Borsa, which expresses the signatories’ intention to cooperate in securities matters. Communiqué on Exchange of Information with the Commissione Nazionale per le Societa e la Borsa, Sept. 20, 1989, 44 SEC Docket 1319, cited in Mann & Mari, supra note 46, at 73, 86.
ties, MOUs do not require the subject matter of the requested information to be an offense in both countries.\textsuperscript{111} MOUs are a practical approach to obtaining assistance, and requests are usually processed quickly.\textsuperscript{112}

The SEC enacted its first MOU in 1982. The Memorandum of Understanding between the United States and Switzerland (Swiss MOU) resulted from problems relating to the limited use of the Swiss Treaty in insider trading and civil cases.\textsuperscript{113} The Swiss MOU provided for the establishment of a separate agreement with the Swiss Bankers Association, known as Convention XVI, which created a procedure for disclosure of certain requested information.\textsuperscript{114} Convention XVI was terminated in 1988 when Switzerland passed laws to regulate insider trading.\textsuperscript{115} Although no longer in effect, the Swiss MOU has been extremely useful to the SEC in the gathering of evidence and could be used as a model for other MOUs.\textsuperscript{116}

The Memorandum of Understanding between the SEC, the Ontario Securities Commission, Commission de Valeurs Mobilières du Québec, and the British Columbia Securities Commission (Canadian MOU)\textsuperscript{117} and the Memorandum of Understanding between the SEC and the Brazil Comissao de Valores Mobiliarios (Brazil MOU)\textsuperscript{118} represent the most comprehensive MOUs to date.\textsuperscript{119} They provide coverage for a wider range of activities than previous MOUs.\textsuperscript{120} Under the Canadian and Brazilian MOUs, the signatory nations may assist in investigations

\textsuperscript{111} See Mann & Mari, \textit{supra} note 46, at 74–86.
\textsuperscript{112} Id. at 74.
\textsuperscript{114} Agreement XVI of the Swiss Bankers’ Association With Regard to the Handling of Requests for Information From the SEC on the Subject of the Misuse of Inside Information, Aug. 31, 1982, 22 I.L.M. 7. See also Mann & Mari, \textit{supra} note 46, at 75–76.
\textsuperscript{115} Mann & Mari, \textit{supra} note 46, at 74, 77–78.
\textsuperscript{116} Id. at 74. See, e.g., SEC v. Katz, No. 86 Civ. 6088 (S.D.N.Y. 1986).
\textsuperscript{118} Memorandum of Understanding Between the SEC and the Brazil Comissao De Valores Mobiliarios, July 1, 1988, 43 SEC Docket 206; see Mann & Mari, \textit{supra} note 46, at 81.
\textsuperscript{119} See Mann & Mari, \textit{supra} note 46, at 78–81.
\textsuperscript{120} Id.
and help disclose information relating to specified securities violations.121

Its success with MOUs in discovery matters has led the SEC to formulate other international agreements with even broader scope.122 The latest agreements fashioned by the SEC go beyond enforcement and are another step toward more effective regulation of international securities transactions.123 In particular, the SEC has concluded stricter and more dependable mutual assistance agreements, and multilateral accords for the general regulation of the international securities markets.124

C. Other Enforcement Agreements

The Commission des Operations de Bourse (COB), France's securities regulatory agency, recently signed an agreement—the “French Understanding” (Understanding)—with the SEC.125 The Understanding goes well beyond previous bilateral agreements and represents a significant advance in international cooperation in securities matters.126 In the Understanding, the SEC and the COB agreed upon the need for a framework to enhance communications in all matters relating to operations of securities markets.127 The Understanding represents the first formal arrangement between the SEC and a foreign securities authority dealing with matters beyond the enforcement of securities laws.128

The SEC has also signed a trilateral understanding with Japan and the United Kingdom.129 The SEC, the United Kingdom's Department of Trade and Industry, and Japan's Securities Bureau of the Ministry of Finance signed a Communiqué pledging cooperation among its signatories.130 In the Communiqué, the

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121 Id.
122 Id. at 91–104.
123 Id.
124 Id.
126 Id. at 3.
127 Mann & Mari, supra note 46, at 82.
128 Id.
130 Mann & Mari, supra note 46, at 87.
three agencies state their intention to work toward better regulation of international stock markets.\textsuperscript{131}

The SEC, as a member of the International Organization of Securities Commissions (IOSCO), recently participated in drawing up a new accord on cooperation.\textsuperscript{132} The new accord calls for the negotiation of mutual assistance treaties among member nations of IOSCO and for the enactment of legislation to support the treaties.\textsuperscript{133} These international agreements demonstrate that the SEC has made significant progress in its regulation of international securities transactions. In order to continue this fast-paced progress, however, it became necessary for Congress to pass legislation to facilitate the SEC's regulatory authority over international securities transactions. Congress responded to this need with ISECA.

III. The International Securities Enforcement Cooperation Act of 1990

A. Background

The United States has enacted legislation amending its securities laws to prevent the impairment of SEC regulation of international securities transactions. This legislation allows the SEC greater latitude in complying with existing MOUs and in entering into more forceful and binding ones.\textsuperscript{134} The legislation is embodied in section 6 of the Insider Trading Fraud Enforcement Act of 1988 (ITSFEA)\textsuperscript{135} and in ISECA.\textsuperscript{136}

ISECA was first introduced in Congress as the International Securities Enforcement Cooperation Act of 1988.\textsuperscript{137} The 1988 version of the bill included four provisions. First, it granted the

\textsuperscript{131} Id.
\textsuperscript{132} Id. at 87–88.
\textsuperscript{133} Accord on Cooperation Among International Organization of Securities Commissions (IOSCO) Membership, 45 SEC Docket 168, cited in Mann & Mari, supra note 46, at 87–88. In November 1986, the Executive Committee of IOSCO adopted a SEC proposal on cooperation among the securities agencies of all nations ratifying the proposal. The SEC formally ratified the adopted proposal on March 18, 1987, and 22 other Member States have ratified it to date. Mann & Mari, supra note 46, at 87–88.
\textsuperscript{134} See generally ISECA, supra note 1.
\textsuperscript{136} ISECA, supra note 1.
SEC legal authority to invoke its investigative powers on behalf of a foreign governmental authority. Second, it permitted the SEC to assure confidential treatment for records received from foreign agencies as a result of a mutual assistance agreement. Third, it clarified the SEC's rulemaking authority regarding access to SEC documents by foreign and domestic officials. Finally, the 1988 bill enabled the SEC and other self-regulatory organizations (SROs) to institute administrative proceedings against any broker or other professional dealing in securities, based upon a foreign court's finding that the broker or other professional engaged in illegal conduct. 138

The 100th Congress enacted only the first provision of the 1988 bill, as part of ITSFEA. 139 That provision, section 6 of ITSFEA, permits the SEC to provide foreign securities authorities with assistance in investigating possible violations of foreign securities laws. 140 It requires the SEC to take two factors into account in deciding whether to provide assistance to a requesting foreign authority. The SEC must determine whether the requesting authority has agreed to provide the SEC with reciprocal assistance in securities matters. 141 The SEC must also determine that compliance with the request would not prejudice the public interest of the United States. 142

The three remaining provisions of the 1988 bill were reintroduced, along with two new provisions, as ISECA. 143 First, ISECA empowered SROs, such as stock exchanges, to exclude persons convicted of a felony from membership in the organization. Second, the legislation authorized the SEC to accept reimbursement for expenses incurred during investigations done on behalf of foreign securities authorities. 144 The bill became law on November 15, 1990. 145

139 See ITSFEA, supra note 135; see also Legislative History, supra note 137, at 3895.
140 ITSFEA, supra note 135.
141 Id.
142 Id. The SEA states that the SEC may provide assistance at the request of a foreign authority if the authority states that it is conducting an investigation which is necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters which the authority administers or enforces. Id.
143 Legislative History, supra note 137, at 3895–907.
144 Id. at 3908–11.
B. Provisions of ISECA

ISECA's general purpose is to strengthen international cooperation in the enforcement of both foreign and domestic securities laws.\textsuperscript{146} It amends the Securities and Exchange Act of 1934 (SEA), the Investment Company Act of 1940 (ICA), and the Investment Adviser Act of 1940 (IAA) in several ways to achieve its goal of increased international cooperation.\textsuperscript{147} Each provision of ISECA addresses a perceived problem in the international regulation and enforcement of securities laws.\textsuperscript{148}

There are four key provisions of ISECA. The first provision exempts confidential documents received from foreign authorities from disclosure under the Freedom of Information Act (FOIA)\textsuperscript{149} and other laws under certain conditions.\textsuperscript{150} The second provision makes explicit the SEC's rulemaking authority to provide non-public documents and other information to domestic and foreign law enforcement officials.\textsuperscript{151} The third provision grants the SEC and SROs explicit authority to bar, suspend, or place limitations on securities professionals based upon the findings of a foreign court or foreign securities authority that such persons committed specified types of violations.\textsuperscript{152} The final pro-

\textsuperscript{146} Legislative History, \textit{supra} note 137, at 3889. In the House Report, the SEC views the main purpose of ISECA as “enhanc[ing] the ability of the [SEC] to prevent and detect violations of U.S. securities laws that are committed at least in part abroad and whose investigation may require the SEC to obtain substantial foreign-based evidence.” \textit{Id.}

\textsuperscript{147} \textit{Id.} at 2715–21.

\textsuperscript{148} Legislative History, \textit{supra} note 137, at 3911–22.

\textsuperscript{149} Freedom of Information Act, 5 U.S.C.S. § 552 (Law. Co-op. 1966) [hereinafter FOIA].

\textsuperscript{150} ISECA, 15 U.S.C.A. § 78x(d); see also Legislative History, \textit{supra} note 137, at 3910–12.

\textsuperscript{151} ISECA, 15 U.S.C.A. § 78x(c); see also Legislative History, \textit{supra} note 137, at 3912–14.

\textsuperscript{152} ISECA, 15 U.S.C.A. § 78o(b)(4); see also Legislative History, \textit{supra} note 137, at 3914–20. ISECA also authorizes SROs, to prohibit any person convicted of a felony from becoming a member of the organization or associating with a member. A SRO may also place conditions on membership or association. ISECA, 15 U.S.C.A. § 78c(b)(6); see also Legislative History, \textit{supra} note 137, at 3914–20. The SEA provides self-regulatory organizations (SROs), subject to SEC scrutiny, the right to disqualify persons convicted of specified felonies and misdemeanors from membership with the SRO or participation or association with an SRO member. 15 U.S.C.A. § 78c(a)(39). The section of ISECA which amends § 3(a)39 of the SEA, provides that a person is subject to statutory disqualification with respect to membership, or association with a member of a SRO if said person is an ex-felon, regardless of the nature of the felony. ISECA, 15 U.S.C.A. § 78c(a)(39)(F). ISECA also expands the grounds on which SROs can deny persons membership, or association with members of the SRO in two ways: 1) by including certain foreign disci-
vision authorizes the SEC to accept reimbursement for investigatory expenses incurred while providing assistance to foreign government authorities.\footnote{ISECA, 15 U.S.C.A. § 78d; see also Legislative History, supra note 137, at 3920–21.} These provisions are examined below.

1. FOIA Exemption

Pursuant to certain MOUs reached between the SEC and foreign authorities, documents which would normally be confidential under the laws of a foreign authority may still be obtained by the SEC.\footnote{ISECA, 15 U.S.C.A. § 78x(c); see also Legislative History, supra note 137, at 3910–12.} The underlying policy is that governmental use of otherwise confidential documents should be permitted for the prosecution of securities law violators.\footnote{Legislative History, supra note 137, at 3910–12.} A problem could arise, however, when the SEC decides not to prosecute the violators. Under such circumstances FOIA could be used to compel the SEC to disclose information it obtained from foreign securities sources as “records obtained from other sources.”\footnote{Id. FOIA obligates the SEC to disclose documents acquired from any source, including foreign securities agencies, unless they fall under a particular FOIA exemption. Id. at 3910.} The SEC’s inability to ensure the confidentiality of furnished documents not used in the prosecution of a securities law violator could inhibit foreign securities agencies’ compliance with certain MOU provisions. Moreover, foreign securities agencies may be precluded by their domestic laws from engaging in mutual assistance agreements, such as MOUs, which do not explicitly provide for the protection of confidential information.\footnote{Id. at 3910.}

To remedy this potential problem, ISECA provides for a FOIA exemption for certain information acquired from foreign sources.\footnote{Id. at 3911–12.} Under the exemption, the SEC may withhold from disclosure documents obtained from foreign securities agencies if the foreign authority has represented to the SEC, in good faith,
that public disclosure of such records would be contrary to the laws of the foreign country. The SEC must also show that it obtained such records pursuant to procedures similar to those it would use in connection with the enforcement or administration of U.S. securities laws or through an established MOU.

In its proposal for the legislation, the SEC noted that the exemption would, in no way, undermine the purpose of FOIA. Indeed, the absence of a FOIA exemption would preclude various foreign securities agencies from entering into MOUs and, therefore, no confidential information would be available for disclosure through FOIA. Thus, the exemption would not affect the number of documents subject to FOIA disclosure. In sum, foreign agencies are likely to be more cooperative in upholding existing MOUs and entering into new mutual assistance agreements once document confidentiality is assured.

2. Rulemaking Authority

Another problem ISECA addresses concerns the disclosure of information between the SEC and foreign securities authorities. The problem arises when the SEC holds information deemed confidential under FOIA and not subject to disclosure. Under the SEC’s Rules of Practice, the Division of Enforcement Director is authorized to provide access to non-public information in the SEC’s investigative files to domestic and foreign government authorities, SROs and other specified persons. In addition, des-

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160 Id. ISECA adds a new subsection (e) to § 24 of the SEA which lists certain “savings provisions” regarding the confidentiality of disclosures allowed by ISECA. Id. § 78x(e). First, the new legislation does not change the certification and notice requirements of the Right to Financial Privacy Act (RFPA), as limited by § 21(h) of the SEA with respect to transfers of records. Under § 1112(a) of the RFPA, the SEC may not transfer to other federal agencies financial records obtained through RFPA procedures without written certification that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency or department. Second, the section does not prevent the SEC from complying with an information request from Congress or an order from a U.S. court in an action commenced by the SEC or the United States. Id.
161 Legislative History, supra note 137, at 3910.
162 Id.
163 Id.
164 Id.
165 Id. at 3912–14.
166 17 C.F.R. 202.5(b) (1990), cited in Legislative History, supra note 137, at 3912 n.6. There are several other rules and regulations allowing access to otherwise confidential information. For example, Administrative Regulation 19–1(1)(b) provides that “the pro-
Ignored members of the SEC staff are permitted to "engage in discussions" concerning non-public documents with persons specified by the Rules of Practice.\textsuperscript{167}

In 1975, Congress amended the SEA to limit access to non-public information.\textsuperscript{168} The literal language of amended SEA section 24(b) called for documents not to be disclosed if deemed confidential under FOIA.\textsuperscript{169} The legislative history accompanying the amendment, however, indicates that it was intended only to ensure that all requests for confidential treatment of information be subject to FOIA rules and not preclude disclosure of certain non-public documents.\textsuperscript{170}

In general, the SEC receives an access request before the staff makes a confidential treatment determination, and the problem posed by the broad interpretation of section 24(b) is not at issue.\textsuperscript{171} Occasionally, however, it can pose a serious obstacle to the SEC's ability to comply with foreign authorities' requests for information.\textsuperscript{172} ISECA gives full discretion to the SEC in the guise of rulemaking authority.\textsuperscript{173} This authority grants flexibility to the SEC in adjusting its access rules in the future.\textsuperscript{174} Specifically, the legislation gives the SEC general rulemaking authority to grant access to records in its possession to both domestic and foreign persons, as long as they provide appropriate assurances of confidentiality.\textsuperscript{175} The provision ensures that the SEC will not provide

\begin{footnotes}
\item[167] 17 C.F.R. 203.2, cited in Legislative History, supra note 137, at 3912 n.6.
\item[168] Legislative History, supra note 137, at 3913-14.
\item[169] Id. FOIA sections B and C provide certain guidelines for government agencies to determine whether documents and records should be deemed confidential and not subject to mandatory disclosure. See FOIA, 5 U.S.C. § 552(b)-(c).
\item[170] Legislative History, supra note 137, at 3913.
\item[171] Id.
\item[172] Id. Other statutory provisions may create similar problems inhibiting the SEC's ability to grant access to information. Section 210(b) of the IAA, supra note 23, prohibits the SEC staff from making public any information obtained in an examination or investigation pursuant to that Act, unless expressly authorized by the SEC. Section 45(a) of the ICA, supra note 23, provides for a similar prohibition. Legislative History, supra note 137, at 3913.
\item[173] ISECA, 15 U.S.C.A. § 78x(c); see also Legislative History, supra note 137, at 3913-14.
\item[174] ISECA, 15 U.S.C.A. § 78x(c).
\item[175] Id.
\end{footnotes}
records for purposes other than those stated in the access request. MOUs usually specify the limitations placed on the use of furnished information. ISECA supersedes the previous provision of the SEA which arguably precluded the disclosure of certain non-public documents. Thus, with the explicit authority, the SEC will be able to negotiate better MOUs. These MOUs will likely have more specific provisions on access to information. Additionally, foreign authorities will be inclined to reciprocate and provide similar provisions.

3. Authority to Bar, Suspend, and Place Limitations on Securities Professionals

Another problem ISECA addresses is the growing tendency of the SEC to enforce judgments against violators of U.S. securities laws abroad. As the SEC steps up such enforcement, it will have to provide reciprocal treatment for foreign authorities who seek to enforce their own findings and judgments in the United States. In some cases, foreign authorities may have little interest in enforcing their own securities laws or preventing a violator from participating in another country's securities markets. Nonetheless, the SEC may still want to impose administrative sanctions against such professionals to control the increased foreign investment presence in the United States. The SEA gave the SEC substantial authority to curtail the securities activities of certain convicted criminals and other wrongdoers for illegal or improper conduct in the United States. The SEA, however,

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176 Legislative History, supra note 137, at 3914 n.9. SEC policy requires the requesting authority to state the purpose for which the solicited information will be used, and to certify that it will not be subject to public use except for the purpose specified. Where the SEC has entered into MOUs, it usually specifies the public use of information acquired through the MOUs.

177 Id.

178 Id. at 3914–20.

179 Id. at 3915. There has been a dramatic increase in the number of U.S. investment companies that trade foreign securities. This increase has resulted in increased activity by broker-dealers, investment advisers, and other securities professionals in foreign markets. In addition, the activities of foreign professionals in U.S. markets has significantly increased. As a result, the SEC is likely to be faced with a growing number of professionals working in U.S. markets whom a foreign agency or court has found to have engaged in illegal or improper activities abroad. Id. at 3915 n.10.

180 Id. at 3915. Under § 15(b)(4) and (b)(6) of the SEA, the SEC may censure; limit the activities, functions, or operations of; suspend for up to 12 months; revoke the registration of any broker or dealer; or bar from association with any broker or dealer; any person: (1) found to have violated the federal securities laws, rules, or regulations thereunder;
was silent on the SEC's authority to impose sanctions where the misconduct is based on foreign findings of foreign law violations.\textsuperscript{181} ISECA authorizes the SEC, based upon findings of a foreign court or securities authority to censure, revoke the registration of, or impose employment restrictions upon securities professionals registered to do business in the United States.\textsuperscript{182} This new authorization clarifies the scope of the SEC's punitive power which was arguably limited to illegal and improper activity in the United States.\textsuperscript{183} Although it was once possible for professionals having violated foreign securities laws to escape SEC review, now any professional having violated equivalent U.S. securities laws will be subject to SEC scrutiny.\textsuperscript{184} In addition, the SEC now has explicit authority to consider convictions by a foreign court of competent jurisdiction for certain non-securities related crimes as a basis for imposing sanctions against securities professionals.\textsuperscript{185} With these provisions, the SEC can better monitor international securities markets by regulating their participants.

4. Reimbursement

Just as it is important to provide the SEC with the authority to cooperate with foreign securities agencies, it is essential to make such authority practical. In order for the SEC to exercise properly

\textsuperscript{181} There are certain SEA provisions which the SEC can utilize to impose sanctions in such circumstances. See, e.g., ISECA, 15 U.S.C.A. §§ 78o, 80a.

\textsuperscript{182} Id. The SEC may act on the finding of a foreign court, securities authority, or regulatory authority that a professional has made false or misleading statements or reports filed with the foreign authority; violated foreign statutory or regulatory provisions regarding securities and commodities transactions; and aided, abetted, or otherwise caused another to violate such statutory provision or failed to supervise a person who has violated such provisions. Id. § 78o(b)(4). ISECA also expands the list of offenses in the SEA to include any convictions by a foreign court of competent jurisdiction for any crime enumerated previously or a "substantially similarly equivalent" foreign activity. Id. § 78o(b)(4)(B)(iii).

\textsuperscript{183} Id. § 78o(b)(4). ISECA contains similar amendments to § 9(b) of the ICA and § 203(e) of the IAA, regarding sanctions against investment advisors. ISECA adds to 3(a)50 of the SEA a new subsection 5(1) which redefines the term foreign "financial regulatory authority." ISECA similarly expands the definitions of foreign financial regulatory authority and of foreign securities authority in both the ICA and the IAA. Id.; see also Legislative History, supra note 137, at 3919.

\textsuperscript{184} Legislative History, supra note 137, at 3918–20.

\textsuperscript{185} Id. at 3917.
its authority, additional funds are necessary, especially in light of
the potential increase in investigations, evidence-producing pro-
cedures, and general administrative work. ISECA provides for
full reimbursement to the SEC for any expenses incurred during
investigations carried out on behalf of a requesting foreign au-
thority.\footnote{ISECA, 15 U.S.C.A. § 78d.}

C. \textit{ISECA's Effectiveness as a Response to the Problem of
Extraterritorial Discovery in U.S. Securities Cases}

Since the days of \textit{Société Internationale}, there has been an evo-
lution in extraterritorial discovery techniques under U.S. securi-
ties laws. This evolution has led the SEC away from relying on
the application of domestic law by U.S. courts, and toward a policy
of mutual agreements with foreign nations and government agen-
cies. Faced with the unsuccessful foreign application of U.S. se-
curities laws, the SEC first turned to the use of treaties providing
for dual criminality laws. Later treaties were broader in scope
and more flexible in application. As the need for even greater
cooperation and specificity grew, the SEC turned to MOUs. Most
recently, the SEC has entered into agreements which provide for
even greater authority and discretion by regulatory agencies.

The evolution in extraterritorial discovery techniques has been
characterized by increased cooperation between the SEC and its
foreign counterparts. The procedures and rules found in coop-
eration agreements are the result of negotiations among participat-
ing governments. This approach has proven effective, and
satisfied principles of international comity.

ISECA attempts to continue this approach. Its primary goal is
to allow the SEC to better implement existing MOUs and enter
into new and more effective agreements with its foreign counter-
parts. Congress believed that these steps would result in easier
and more effective enforcement of U.S. securities laws in the
international arena.\footnote{Legislative History, \textit{supra} note 137, at 3889.} In the context, however, of facilitating
extraterritorial discovery, there are limitations on ISECA's ability
to continue to promote increased international cooperation.

For example, under the first provision of ISECA, the SEC has
the power to exempt from the disclosure requirements of FOIA
certain documents and records acquired from foreign agencies.
In turn, the SEC expects these same foreign agencies to give increased access to heretofore undisclosed information.\textsuperscript{188} Thus, the new guarantee of confidentiality would help remove obstacles to extraterritorial discovery. The FOIA exemption, however, is conditional. ISECA requires a showing of "good faith" by a foreign authority that public disclosure of the information would violate its national laws.\textsuperscript{189} Presumably, the process of determining good faith is left in the hands of the SEC. It is thus conceivable that sensitive information given to the SEC by foreign authorities will not be FOIA-exempt. The good faith standard and possible public disclosure of information might dissuade foreign authorities from providing the information in the first place.

In order for the SEC to exempt foreign information from FOIA disclosure, ISECA also requires the SEC to obtain the information pursuant to specified procedures. The procedures must be those the SEC would normally follow in enforcing U.S. securities laws through an existing MOU.\textsuperscript{190} This requirement might also inhibit cooperation by foreign authorities. Even if a foreign authority has satisfactorily demonstrated in good faith the need for confidentiality, a FOIA exemption may be denied where the SEC fails to follow proper procedures.

ISECA’s second provision seeks to complement the first by allowing the SEC to grant foreign agencies access to information that would normally be confidential under FOIA.\textsuperscript{191} The SEC expects that foreign agencies will reciprocate with broader disclosure policies.\textsuperscript{192} The rulemaking authority of the second provision gives the SEC discretion to release otherwise confidential information if the requesting persons, domestic or foreign, assure that confidentiality will be maintained as determined by the SEC.\textsuperscript{193} This condition poses difficulties similar to those of the first provision: it establishes an SEC-based decision-making process to which a foreign securities regulatory agency may be subject.

ISECA’s FOIA provisions were drafted in response to foreign concerns.\textsuperscript{194} While this attentiveness does foster increased inter-

\begin{enumerate}
\item Id. at 3911–12.
\item ISECA, 15 U.S.C.A. § 78x(d).
\item Id. § 78x(d).
\item See supra notes 149–64 and accompanying text.
\item Id.
\item See supra notes 165–77 and accompanying text.
\item International Securities Enforcement: Hearing on H.R. 1396 Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong.,
\end{enumerate}
national cooperation, it does not reflect a true multinational cooperative effort. ISECA does not provide for joint or multinational cooperation in determining if and when documents will be disclosed.\footnote{See id. at 3913–14; see also supra text accompanying notes 166–76.}

The third provision, granting the SEC and certain SROs the power to penalize securities professionals based on a foreign securities agency’s or foreign court’s authority, ostensibly serves to improve market regulation, not extraterritorial discovery.\footnote{See supra notes 178–85 and accompanying text.} Although this power can be useful in connection with the implementation of MOUs or enforcement agreements with other nations, standing alone it has certain deficiencies. Unlike the SEC’s power to limit the securities-related activities of persons convicted of a crime in the United States, this power is not as easily justified when applied to persons convicted of a crime by a foreign court.\footnote{Legislative History, supra note 137, at 3915. The SEC already possesses substantial authority to restrict the securities activities of certain persons convicted of criminal charges in this country.}

Until recently, foreign countries did not consider criminal violations of U.S. securities laws important enough to merit commensurate treatment under their laws. As a result, the penalty and stigma associated with recently enacted securities laws in those countries may not be comparable to that of similar laws in the United States. It follows that sanctions imposed by the SEC would be disproportionate to the foreign crime. To a lesser degree, this rationale also applies to the new provisions allowing the SEC to base sanctions on foreign convictions for non-securities related crimes.

In both cases, the discretion of deciding when and where sanctions will be imposed is left entirely to the SEC. Foreign authorities probably would want to participate in determining the punishment for violations of their laws by their nationals. For the SEC to regulate the securities market more effectively, it is important that U.S. criminal convictions be carried out in foreign

1st Sess. 79–83 (1989) (letter from David S. Ruder, SEC Chairman, to Rep. Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance). In the letter, Chairman Ruder refers specifically to countries “A” and “B” which insisted upon assurances of nondisclosure prior to providing the SEC with confidential documents. In addition, the letter notes that country B refused to sign any agreement providing for the exchange of documents unless Congress passed legislation containing a FOIA exemption. \textit{Id.} at 81.
courts. The SEC has a vested interest in how foreign governments treat U.S. convictions. If the foreign judgment carries with it only a minor penalty, restricted participation in the U.S. securities market may be unfair under the foreign law.

ISECA's provisions also fail to take into account the basis for many foreign laws. Under ISECA, the SEC can assess the need for secrecy and confidentiality of foreign documents. ISECA, however, fails to consider that many foreign nations have different notions of privacy. Overlooking the cultural basis of foreign security requirements will be detrimental to international comity if obstacles to extraterritorial discovery such as foreign blocking and secrecy laws are examined strictly from a U.S. perspective.

ISECA, on its own, could go further in increasing multinational cooperation in the area of enforcement of securities laws and extraterritorial discovery. More progress could be achieved by relying more heavily on treaty-like instruments which could encompass both the binding nature of treaties and the efficient and tailored attributes of MOUs. Such instruments are already taking shape in the international arena as the next generation of enforcement agreements are being formed between the United States and foreign nations. Whatever legislation Congress passes to grant the SEC more discretionary powers in international enforcement of U.S. securities violations, it should continue to allow the SEC greater leeway in entering new agreements with its foreign counterparts. Although ISECA purports in part to accomplish this goal, it sets up standards and requirements without enough participation from those it affects: the governments of foreign nations.

CONCLUSION

The best way the SEC can achieve its goal of effective international regulation of U.S. securities transactions is to continue with the negotiation and implementation of mutual assistance agreements. Until recently these agreements primarily provided for assistance in the gathering of evidence. It is possible, however, to broaden the scope of such agreements to include assistance in matters of more general regulation such as registration, stock market controls, and greater enforcement of sanctions arising in

199 See supra notes 125–33 and accompanying text.
civil and criminal cases. For the SEC to accomplish these broader aims, it is necessary for Congress to give the agency the appropriate authority.

Congress enacted ISECA in order to give the SEC the power necessary to implement existing mutual assistance agreements and enter into new, more expansive accords. It is important, however, to realize that ISECA alone is insufficient to meet the broader aims of international cooperation in securities laws. Although ISECA provides the SEC important new discretionary powers, more can be done to increase cooperation in extraterritorial discovery. To make ISECA more effective, the SEC must continue to implement MOUs and other cooperation agreements, and replace unilaterally established procedures. Congress and the SEC should promote a multinational approach to improving extraterritorial discovery.

*Philip O. Erwin*