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On August 19, 2009, the prominent Swiss bank UBS entered into a settlement agreement with the United States Internal Revenue Service (IRS) in order to avoid legal action levied against it by the IRS. The crucial and controversial provisions of this agreement require UBS to disclose the confidential identification information of its American clients to allow the IRS to ascertain whether these Americans have committed tax fraud. The global banking and financial communities have taken enormous notice of this settlement agreement. The infamous banking secrecy policies of Switzerland have contributed to the incredibly lucrative banking sector of the Swiss economy. However, the settlement and subsequent changes in Swiss law could potentially and irrevocably harm both the country’s banking sector as well as its international standing. This note seeks to identify the possible international law implications of the UBS/IRS settlement agreement and how this decision will affect U.S. relations with the Swiss. Ultimately, the author’s intent is to contribute to the greater body of knowledge and legal analysis surrounding the outcome of the clash of two nations’ laws.
I. INTRODUCTION

The privacy rights guaranteed to customers by the banks of Switzerland are legendary. The very term ‘Swiss bank account’ conjures images of wealthy magnates, ancient keys and ornate lock boxes filled with gold and jewels. Dating back to the Middle Ages and officially codified in national statutes in 1934, the uniqueness of Swiss banking practices have enticed millions of patrons around the globe to deposit their funds in this country. In doing so, patrons in every country in the world were offered the same secure protection of their confidential information, while their own countries were put in the awkward position of having to fit domestic financial reporting laws around the impenetrable banking secrecy laws of Switzerland. This note will discuss how these seemingly impenetrable laws have been penetrated in the recent IRS v. UBS case. More specifically, it seeks to explain how the recent case is but a stone in the road to American laws’ supersession over other nations’ laws in order to maintain complete control over its citizens’ financial lives.

Although Swiss secrecy practices existed unofficially for decades, the Government of Switzerland formally codified its hitherto informal policies with the enactment of the Swiss Banking Act. The purpose of the Act is to statutorily enforce the privacy interests of banking customers. Regardless of the customer’s

country of citizenship, under Swiss law banking institutions are strictly limited from sharing any information with third parties, including tax authorities (foreign or domestic), foreign governments or even Swiss criminal authorities. Any bank employee found guilty of violating a client’s privacy is severely punished by law.

Unsurprisingly, the clash between Swiss secrecy and foreign frustration has resulted in countries demanding more transparent banking practices. In the past, these demands have resulted in the Swiss bankers voluntarily releasing information about its hitherto confidential clients. However, voluntary cooperation is not the rule today. Recently, the world media has focused its attentions on the Swiss banking system, specifically United Bank of Switzerland (UBS), and its interactions with the United States Internal Revenue Service (IRS). The controversy stems from the IRS’s demands for the UBS to release the secure identification information of over 50,000 of its clients who are subject to the IRS’s regulations. These regulations establish that the IRS can audit these individuals for back tax payments the IRS believes are owed to the United States government. Such a demand directly conflicts with Swiss banking secrecy laws. After months of contentious debates, congressional hearings and preliminary legal actions, the two institutions reached an agreement. On August 18, 2009, UBS agreed to hand over the identities of up to 4,450 of its clients to the IRS. Swiss newspapers have reported that American assets held by UBS will total over $3.7 million in back taxes and penalties. The implications of this decision to disclose the banking

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5 The Swiss Banking Act, supra note 3, at art. 47.
12 The Swiss Banking Act, supra note 3, at art. 47.
14 Dave Rifkin, *A Primer on the “Tax Gap” and Methodologies for Reducing It*, 27
customers’ names are both far-reaching and monumental as they extend into both international law and international commercial law.

The following discussion will provide an overview of the implications of the IRS’s pressure on the Swiss government to force disclosure of its banking clients’ identities and the UBS’s acquiescence to this demand. Part I presents a brief history and background of the Swiss banking secrecy laws and the United States’ banking laws. Part II discusses the specific details and procedural history of United States v. UBS AG. Part III offers additional cases that are similar to United States v. UBS AG and illustrates how these cases are contributing to the ever-expanding jurisdictional reach of the United States. Part IV provides an examination of the future implications of this issue on United States relations with Switzerland. Part V offers an analysis of the impacts on international law resulting from the controversy. Part VI answers the ultimate question of whose sovereignty will yield if a similar case was taken to trial, and the controversy was decided on the merits.

II. BACKGROUND

A. Swiss Bank Secrecy Laws

‘Banking secrecy’ encompasses all measures a bank employs to maintain the confidentiality of its clients’ sensitive information and to protect that information from third parties, both private and governmental. Switzerland’s banking institutions are shrouded in secrecy. The Swiss have developed a highly integrated and technologically advanced method of safeguarding all aspects of their banking customers’ identification information; often, bank accounts are only referred to by a number. Although highly praised by its clients, the secrecy policies of Swiss banks have been challenged by various nations and governments ever since their adoption. Moreover, since at least September 11, 2001, where there has been an increasing reliance on cross-border cooperation relating to money laundering, corruption and terrorist financing cases, the balance between disclosure and privacy has been tipping in favour of the former.


15 Marie Lamensch, Swiss Banking Secrecy: The Erosion of an Institution, 16 N.C J. INT’L COM. REG. 1, 10 (2009).
The veil of secrecy which covers Swiss bank accounts has existed in common law doctrine for decades. The Swiss government began to officially adopt its bank secrecy laws in national legislation in 1934.\textsuperscript{19} The most widely agreed upon catalyst for this national initiative was the escalating violence against the Jews in Nazi Germany.\textsuperscript{20} In the 1930s, Nazi Germany experienced extraordinary hyperinflation and general economic instability.\textsuperscript{21} This insecurity in their nation’s economy led many Germans, in efforts to safeguard their savings, to deposit their funds in banks outside the reach of their unstable nation.\textsuperscript{22} Once the Nazi regime rose to power, it began taking measures to prevent its citizens from depositing their money beyond German borders.\textsuperscript{23} One of the measures implemented by the Nazi Government was the requirement of German citizens to report all assets and failure to do so would result in the death penalty.\textsuperscript{24}

In 1934, three German citizens were executed for violating this law.\textsuperscript{25} In response to these executions, the Swiss officially codified the “secrecy customs of Swiss Bankers” in order to protect their Jewish patrons from Nazi discovery and persecution.\textsuperscript{26} Article 47 of the Swiss Federal Banking Act of 1934 established bankers’ specific duties and new banking regulations with the goal of tightening security to preserve customers’ confidentiality.\textsuperscript{27} The Swiss government continued this trend of secrecy in 1935 with the passage of the Law Concerning the Protection of the Swiss Confederation which “criminalized any disclosure of information obtained in the course of a professional relationship with the bank except as provided by Swiss law”.\textsuperscript{28} Violation of this Act carried criminal penalties and also applied to persons who divulged business secrets.\textsuperscript{29} The ultimate effect of these laws was to allow German citizens, specifically Jews, to deposit their assets in secret and avoid the death penalty imposed by the Nazi regime.\textsuperscript{30}

\textsuperscript{19} Stephanie A. Bilenker, \textit{In Re Holocaust Victims’ Assets Litigation: Do the U.S. Courts Have Jurisdiction Over the Lawsuits Filed by Holocaust Survivors Against the Swiss Banks?}, 21 MD. J. INT’L L. & TRADE 251, 258 (1997).
\textsuperscript{20} Brabec, supra note 2, at 231.
\textsuperscript{21} Mencken, supra note 17, at 468.
\textsuperscript{23} Id.
\textsuperscript{24} Gyandoh, supra note 7, at 94.
\textsuperscript{25} Brabec, supra note 2, at 231.
\textsuperscript{26} Mencken, supra note 17, at 468.
\textsuperscript{28} Jones, supra note 4, at 462.
\textsuperscript{29} Id.
\textsuperscript{30} Gyandoh, supra note 7, at 94.
In addition to the Federal Banking Act, Swiss bank secrecy provisions are also found in the Swiss Civil Code and the Swiss Code of Obligations. For instance, Article 28 of the Civil Code sets forth “the general obligation not to interfere with the private life of others”. The right to privacy applies to both an individual’s and a business institution’s financial information. The Swiss’s legal concept of privacy differs from that of the United States in that the latter includes only those rights to privacy as designated by the United States Supreme Court such as those concerning marriage and abortion. Additionally, Swiss law contains an implied condition of the bank and its customer’s deposit contract that provides that the banker is legally obliged to preserve the confidentiality of all information learned about the client. Recourse is available to the customer under the Civil Code, whereby the injured party (the customer) may initiate legal action against the party responsible for violating the confidentiality provisions, for injury to the individual or claim for damages for breach of contract.

Although other nations will come to view these laws as infringements upon their own financial policies, both of these laws were enacted to protect the Swiss economy and its bank customers’ assets. By establishing their commitment to safeguarding financial information, the Swiss communicated to the citizens of the world that its country would be a safe and secure haven. This attracted many foreign citizens to bank in Switzerland and both cemented and bolstered its economy.

The Swiss bank secrecy laws have no temporal limitations and apply to all banks, private financial institutions and persons who work for or are in contact with the bank in any capacity. If a banker violates any of the provisions of any of the secrecy laws, he/she is subject to imprisonment, heavy fines, and payment of damages. Of course, there are exceptions to Swiss bank secrecy laws which allow for disclosure of confidential banking information, but even these exceptions are narrowly tailored and rigorously regulated. Most of these exceptions involve

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31 Brabec, *supra* note 2, at 234.
33 *Id.*
34 Brabec, *supra* note 2, at 234.
35 Lauchli, *supra* note 32, at 867.
36 *Id.*
37 *Id.*
38 *Id.*
40 *Id.*
41 *Id.*
crimes under Swiss law, including drug trafficking and fraud. However, these exceptions that allow for disclosure are only applicable to acts deemed criminal by Swiss law. This fact is important to note because, although exceptions apply for money laundering, fraud, and terrorist activities, these exceptions do not apply to allegations of tax evasion, because the failure to report income or assets is not a criminal offense in Switzerland. As a result, the Swiss government and all other governments are barred from obtaining information about an individual’s Swiss bank account on the basis of tax evasion. In order to access this information, the authoritative body representing the government who seeks the disclosure must convince a Swiss judge that the person about whom information is sought has committed a serious crime punishable under Swiss law.

To clarify, Swiss bank accounts are not protected by complete anonymity. In fact, anonymous accounts are not possible in Switzerland. Instead, Swiss banks utilize numbered accounts which restrict the holder’s identity to a small number of senior bank personnel. Essentially, it should be understood that it is not so much the accounts themselves that are secreted, but rather the bank employees involved with any transactions concerning the accounts are effectively gagged by the Swiss government from reporting any confidential information.

B. United States Bank “Secrecy” Laws

In stark contrast to the Swiss bank secrecy laws, the United States bank laws discourage and, for the most part, criminalize and prosecute banking secrecy practices. The most relevant law is the Bank Secrecy Act (“BSA”), implemented primarily through the Bank Secrecy Act Regulations. Prior to 1970, a few United States judicial jurisdictions both recognized and supported in courts of law banking secrecy practices. However, in 1970 Congress enacted the Bank Secrecy Act which requires financial institutions to assist the United States government and its agencies in detecting and preventing money laundering. Specifically, the Act and

42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 Lauchli, supra note 32, at 866.
48 Id.
49 Brabec, supra note 2, at 235.
the BSA regulations require financial institutions to keep detailed records of cash purchases and transfers and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities. Similar in form to the Swiss secrecy laws, the penalties for breaking the United States Bank Secrecy Act and BSA regulations are serious and include extremely high fines and long prison sentences.

Several anti-money laundering acts have been enacted to amend the Bank Secrecy Act, the most expansive of which is Title III of the USA PATRIOT Act. Title III, “International Money Laundering Abatement and Anti-Terrorist Financing Act”, provides for additional procedures and regulations to ensure transparent banking practices and thus more easily detected illicit activity. Title III is divided into three subparts. Subpart A implements measures that counter international money laundering. These measures include requiring financial institutions to undertake several new special measures against money laundering (identification is dealt with particularly), restricting or prohibiting the use of certain types of bank accounts, adding further legislation that regulates a financial institution’s dealing with foreign concerns, adding new penalties violations and implementing further regulations that are designed to facilitate and encourage reporting and communication between financial institutions and the United States government.

Subpart B of Title III largely modifies the BSA in an attempt to make it harder for money launderers to utilize the legitimate United States financial sector, and to make it easier for law enforcement and regulatory agencies to police money laundering operations. The BSA was amended to allow the designated officer or agency who receives suspicious activity reports to notify United States intelligence agencies. It also addresses issues of record keeping and reporting by making it easier to undertake the reporting of suspicious transactions; by making it a requirement that financial institutions report suspicious transactions; through the requirement that financial institutions maintain anti-money laundering programs

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53 Id.
54 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
and by better defining anti-money laundering strategy; and by making it a requirement that anyone who does business file a report for any coin and foreign currency receipts that are over US$10,000.62 This subtitle also increases civil and criminal penalties for money laundering as well as introduces penalties for violations of geographic targeting orders and certain recordkeeping requirements.63 The BSA also broadly defines “financial institutions” to include, inter alia, traditional banks as well as certain insurance companies, dealers in precious metals, money services businesses and casinos.64

Subpart C of Title III deals with a number of crimes relating to currency.65 It attempts to prevent bulk cash smuggling and allows for forfeiture in currency reporting cases.66 It also introduces a number of measures to deal with counterfeiting.67 Specifically, this subpart amended the Bank Secrecy Act to clarify extraterritorial jurisdiction matters.68 Now under this current statute, anyone accused of fraudulent monetary actions criminalized by American law, and anyone who conspires with that person outside the jurisdiction of the United States will be prosecuted under American law, specifically under the fraud statute 18 U.S.C. § 1209.69

Additionally, it is helpful to highlight provisions of the Internal Revenue Code. The Internal Revenue Code is the main federal body of domestic statutory tax law of the United States. It includes laws covering income tax, payroll taxes, gift taxes, estate taxes and statutory excise taxes.70 The income tax code provides for measures to determine one’s tax liabilities and how to compute his or her taxable income.71

Finally, the other critical American banking law is our specific treaty with Switzerland, the United States-Switzerland Double Taxation Treaty.72 This treaty provides that American citizens will not have to pay taxes on their property and

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62 Id.
63 Id.
64 Bank Secrecy Act, supra note 52.
65 Intercept and Obstruct Terrorism Act, supra note 55.
66 Id.
67 Id.
68 Id.
69 Id.
71 Id.
income to both Switzerland and the United States. Depending on the person’s specific circumstances including citizenship, employment status and nature of purchases made, the person will pay taxes to one country or the other, but not both. Numerous measures are implemented through this treaty to ensure both that United States citizens are not double-taxed by both nations as well as to ensure that these citizens are prevented from avoiding taxes in either country.

III. STATEMENT OF THE CASE OF UNITED STATES V. UBS AG

In order to fully understand the international law implications of United States v. UBS AG, it is necessary to provide a brief overview of the events surrounding this case. The case began on February 19, 2009, when the United States filed a petition in the United States District Court for the Southern District of Florida, asking the court to enforce an IRS “John Doe” summons to UBS. The IRS served the summons in furtherance of an investigation it was conducting to determine the identities of United States taxpayers who had allegedly failed to report the existence of, and income earned in, undeclared Swiss accounts with UBS.

On February 20, UBS filed a document containing what it termed “background information for the court’s consideration”. In this filing, UBS argued that the IRS was essentially asking it to violate Swiss privacy laws, thereby exposing its employees and the bank to criminal and civil penalties. UBS argued that the petition raised serious issues of international comity due to Swiss financial privacy laws, violated treaties between the United States and Switzerland and violated a prior agreement between the United States and UBS. That same day, the United States filed a response that disputed the arguments made by UBS.

On April 30, UBS then filed a brief that expounded on its arguments against disclosure. In support of UBS, the Swiss government filed an amicus brief. On
June 30, the United States then filed its response. 85 The federal judge had scheduled a hearing for July 13, 2009, to hear arguments on the petition. 86 On July 12, 2009, however, the parties filed a joint motion to stay the hearing, so they could continue to discuss settlement. 87

On August 19, 2009, UBS succumbed to United States pressure and the IRS settled the case. UBS agreed to disclose the hitherto confidential information of up to 4,450 of its clients whom the IRS suspects of hiding assets in Switzerland in order to avoid paying taxes on them in the United States. 88 The method of obtaining such information was pursuant to the existing United States-Switzerland Double Taxation Treaty to the Swiss Federal Tax Administration (SFTA), the IRS would be required to submit a request for administrative assistance. 89 This request will seek information relating to certain accounts of United States persons maintained at UBS in Switzerland. 90

It is expected that approximately 4,450 accounts will be provided to the SFTA in response to this treaty request. 91 The SFTA will decide which of those accounts should be disclosed to the IRS, and such decisions will be subject to judicial review. 92 Upon judicial approval, UBS is required to provide information on the accounts covered by the treaty request to the SFTA and to send notices to affected United States persons encouraging them to take advantage of the IRS’s voluntary disclosure practice and to instruct UBS to send their account information and documentation to the IRS. 93 The United States government pledged to withdraw the John Doe summons with prejudice as to all accounts not covered by the treaty request no later than December 31, 2009, provided that UBS has complied with

84 Id.
85 Id.
86 Id.
87 Id.
90 Id.
91 Id.
92 Id.
93 Id.
those obligations that are required to be performed by that date. Currently, there
has been no allegation that UBS failed to perform any of its duties.

The United States government will withdraw the John Doe summons with
prejudice as to the remaining accounts - those subject to the treaty request - no
later than August 24, 2010, upon the actual or anticipated delivery to the IRS of
information relating to accounts covered by the treaty request that does not differ
significantly from the expected results. In addition, the summons will be
withdrawn with prejudice as to those remaining accounts if at any time on or after
January 1, 2010, the IRS has received information relating to at least 10,000
accounts of United States citizens maintained at UBS in Switzerland.

IV. EXPANDING UNITED STATES JURISDICTION ACROSS THE WORLD

Beginning in 2005 and continuing to the present, the United States has been
able to implement policies which bind other nations. The Supreme Court has
previously cautioned that “We cannot have trade and commerce in world
markets…exclusively on our terms, governed by our laws, and resolved in our
courts”. However despite that warning, the IRS sought to enforce a broad
summons against UBS. In complying with said summons, UBS employees will be
concomitantly violating Switzerland’s criminal laws. It must be highlighted that no
similar summons (i.e., a summons naming no specific taxpayer but instead naming
a ‘John Doe’) has ever been enforced where compliance would simultaneously
degrade international comity by violating foreign criminal law. In fact, in the only
other case in which the IRS attempted to enforce a John Doe summons in order to
compel a foreign bank to break its country’s laws, the court ruled against the IRS
and denied the summons. The settlement of the instant case is only the latest
measure by the United States to reassert its position that its grasp on its citizens
will extend into any country. This trend is more readily apparent in light of the
cases leading up to and paving the way for United States v. UBS AG. Therefore, the
following cases will illustrate how the United States has successfully expanded its
jurisdiction, which concomitantly shrinks foreign sovereignty, resulting in the
longest-arm statutes in tax law.

In 2007 in United States v. Lloyds TSB Bank PLC, the United States Court of the

94. Id.
95. Id.
96. Id.
District of Columbia approved a deferred prosecution agreement which greatly expanded the power of the United States to gain hitherto shrouded information safeguarded in foreign banks.100 Lloyds TSB Bank is a financial institution incorporated, registered and operating under the laws of England and Wales.101 The IRS believed that Lloyds Bank, through its American customers, was violating American banking laws.102 In response to the threat of court action against it by the IRS, Lloyds waived indictment and agreed to the filing of one count of Criminal Information in the United States District Court for the District of Columbia.103 This criminal count charged the Lloyds Bank with knowingly and wilfully violating and attempting to violate regulations issued under the International Emergency Economic Powers Act (IEEPA).104 The IEEPA allows United States presidents to identify any unusual or extraordinary threats that originate outside the United States and to confiscate property and prohibit transactions in response.105

In order to comply with the Prosecution Agreement, Lloyds acquiesced to providing the U.S. government with all available incoming and outgoing payment messages.106 This information was provided in both electronic form and in the form of spreadsheets or other electronic summaries.107 Accompanying these messages was all existing periodic account statements for the holders of those accounts.108 Simply put, this case illustrates that the United States not only extends its jurisdiction to other countries in order to police its people, but also that the country will flex all of its considerable muscle in order to bend another nation’s laws to its own. Thus, Lloyds is significant because the United States successfully exercised jurisdiction over a United Kingdom bank for activities that were legal in the United Kingdom. The theory of the case holds that the United States used the IEEPA Enhancement Act which authorizes penalties for any person, regardless of location and implicitly, nationality, who causes a violation of IEEPA.109 In essence,

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101 US v. Lloyds, id. at 328.
102 Id. at 329.
103 US v. Lloyds, supra note 100.
104 US v. Lloyds, supra note 100, at 330.
106 US v. Lloyds, supra note 100.
107 Id.
108 Id.
Lloyds “caused” United States correspondent banks to process transactions involving Iranian entities in violation of those domestic banks’ obligations under the IEEPA and the Iranian Transactions Regulations. What is distressing to non-United States financial institutions is that the prosecutor in this case was able to assert jurisdiction over activities by a non-United States citizen that occurred outside of the United States.

The trend identified most recently with the Lloyds case has its roots back to at least December 2005, when the United States government entered into a consent decree with the Dutch bank, ABN AMRO. The Federal Reserve Board brought this action against ABN AMRO for failing to implement internal procedures that are compliant with United States economic sanctions and anti-money laundering laws.110 ABN AMRO, a Dutch bank, was one of the largest financial institutions in Europe.111 The bank maintains branches in New York and Chicago which are supervised by the Federal Reserve Board.112 On July 23, 2004, ABN AMRO and its New York Branch entered into a Written Agreement with the Federal Reserve Banks of New York and Chicago to correct and prevent further deficiencies at the New York Branch relating to anti-money laundering policies, procedures, and practices under Title II of the USA PATRIOT Act.113

In response to the requirements of this agreement, ABN AMRO discovered and provided additional information regarding a pattern of previously undisclosed unsafe and unsound practices.114 The Federal Reserve Board deemed these practices to warrant further enforcement action.115 Specifically, the Federal Reserve Board concluded that ABN AMRO lacked adequate risk management as well as legal review policies and procedures to ensure compliance with applicable United States law.116 Further, the Federal Reserve Board found that the bank had failed to adhere to those policies and procedures that it did have in place.117 As a result, one of ABN AMRO’s overseas branches developed “special procedures” for certain funds transfers, check clearing operations, and letter of credit transactions that were designed and used to circumvent the compliance systems established by the

111 Id.
112 Id.
113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
New York and Chicago branches to ensure compliance with United States laws.\textsuperscript{118}

In particular, the “special procedures” circumvented the United States branches’ systems for ensuring compliance with the regulations issued by the Department of the Treasury’s Office of Foreign Assets Control (“OFAC”).\textsuperscript{119} Specifically, it was alleged that the special procedures allowed ABN AMRO to remove references in transactions to sanctioned parties so that the transactions would be processed “clean” through United States correspondent accounts. Had the transactions not been “stripped”, the United States correspondent banks would have rejected or “blocked” the transactions as required by OFAC’s regulations. As in the Lloyds case, the activities by the non-United States branch of the Bank were arguably legal in the jurisdiction where the activity occurred.

The Federal Reserve Board claimed that ABN AMRO failed to adequately review such “special procedures” to determine whether the execution of the procedures was consistent with United States laws and that it lacked effective systems of governance, audit, and internal control to oversee the activities of the Branches with respect to legal, compliance, and reputation risk.\textsuperscript{120} As a result, ABN AMRO failed to adequately document, report, and follow up on negative findings from certain internal audits, failed to produce negative audit findings in a timely manner to the United States Supervisors, and to appropriate internal governing bodies.\textsuperscript{121} Additionally, it failed to follow-up on inquiries referred to the New York Branch from overseas offices regarding compliance with United States law.\textsuperscript{122} Importantly, ABN AMRO overstated to internal auditors, compliance personnel, and the United States Supervisors the extent of due diligence efforts undertaken by certain branches outside the United States with respect to high risk correspondent banking customers and failed to escalate the “special procedures” for review outside of the trade processing business or reporting line.\textsuperscript{123}

Ultimately, ABN AMRO agreed to continue to implement improvements in its oversight and compliance programs with respect to United States law in all countries in which ABN AMRO branches or affiliates do business.\textsuperscript{124} The ABN AMRO sent ripples throughout the international financial sector because the activities of that financial institution were consistent with international banking practices. To this end, the United States has indicated it is investigating at least nine

\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
other non-United States financial institutions for similar activities. Moreover, as of November 21, 2009, financial institutions have changed the way they transmit messages and now use a new “SWIFT” MT 202 Cover in order to ensure that their correspondent banks are aware of all relevant parties to a transaction.\textsuperscript{125}

Clearly, the timeline that these cases establish indicates that the United States jurisdiction is expanding into other countries when United States banking laws and transactions are involved. The international community is obviously and rightfully concerned about this expansion which could legitimately be deemed encroachment. With the advent of online banking, the world is getting smaller while the United States’ reach is getting larger. The United States is using its jurisdiction to apply to foreign actors or governments who have caused activities to occur in this country.\textsuperscript{126} This principle appears to be that which the United States courts have predicated their most recent foreign banking decisions upon. However, upon closer examination this principle is actually a slippery slope down which the entire notion and practice of international comity may fall.

V. CHOCOLATE TO APPLE PIE: COMPARING SWISS AND U.S. BANK SECRECY LAWS

It is important to highlight the striking differences between American and Swiss banking privacy laws in order to fully appreciate the international law consequences of \textit{United States v. UBS AG}. In marked contrast to the intensely guarded privacy awarded banking practices and bank accounts in Switzerland, the United States has severely limited the financial privacy of its citizens.\textsuperscript{127} American law has recognized and appreciated that patrons reasonably expect bank employees to refrain from disclosing the patrons’ personal and confidential information to a third party.\textsuperscript{128} However, this reasonable expectation of privacy ends when the government is the third party. American law mandates banks to collect information from customers and to provide this information for law enforcement and prosecution purposes.\textsuperscript{129} Additionally, distinct from Swiss law which recognizes

\begin{enumerate}
\item[126] Lauchli, \textit{supra} note 32, at 877.
\item[127] Id.
\end{enumerate}
such privilege, American federal and state courts have both rejected the existence of a banker-client privilege which would offer benefits of non-disclosure similar to an attorney-client or husband-wife privilege.130 More simply put, Swiss banking privacy laws and American banking privacy laws are practically polar opposites; Swiss law enforces penalties for violating bank secrecy while American law imposes criminal penalties for failing to pierce banking secrecy.131

These stark differences in national approaches to and treatments of financial privacy have resulted in far-reaching international law implications. The United States and Switzerland are mutually bound to their Tax Treaty of 1996. This recent controversy may fuel one country, or both, to re-examine this treaty and either alter or invalidate it all together.

Additionally, attention must be paid to the ramifications this settlement will have on the relationship specifically between Switzerland and the United States. These implications are twofold; commercial and legal. First, Switzerland is taking what it perceives as an intrusion on the cornerstone of its economy very seriously and United States citizens are paying the price. Its banks make up eleven percent of Switzerland’s gross domestic product (herein “GDP”) and twelve percent of its tax income.132 While the exact number of Americans who bank in Switzerland is in dispute, for decades Americans represent a significant number of Swiss customers. One source states that there are 20,000 to 30,000 Americans who have a combined $100 to $200 million in Swiss banks.133 Another figure avows that there are actually 52,000 Americans keeping assets totalling $14.8 billion in Switzerland.134

The precise number of accounts and sum of assets is impossible to ascertain with absolute certainty, however the absence of this exact detail is largely immaterial. All figures indicate that many Americans held large amounts of funds in Switzerland and they will soon cease to in the very near future. However, opening and maintaining a Swiss bank account is no longer an option for Americans, whether they live in the United States or in Switzerland. As a direct consequence of the litigation between the IRS and UBS, Swiss banks are closing all of their American customers’ accounts and are refusing to open new accounts for Americans.135 In a statement to Swiss newspapers, Pierre Mirabaud, chairman of

130 Lauchli, supra note 32, at 877; see also US v. Prevatt, id. at 402; US v. Grand Jury Investigation, id. at 391-92.
131 Lauchli, supra note 32, at 877.
132 Brabec, supra note 2, at 232.
135 Katharina Jones, Swiss Govt: IRS Lodges Request for UBS Data, WALL ST. J., Sept. 1,
the Swiss Bankers Association said that his bank did not want to have to register with the United States’ Securities and Exchange Commission, which is required if you take on American customers, so it will be more difficult for Americans to bank with Swiss banks.136

This void of bank opportunities doesn’t harm just those Americans residing in the United States who wish to open overseas investment accounts. Rather, the dearth is detrimentally affecting Americans who actually live in Switzerland. One expatriate, Sandra Dysli, an American who has lived in Geneva for 40 years, said that Bank Zweiplus AG and a Geneva branch of Raiffeisen International Bank-Holding AG refused to open investment accounts for her.137 “I was told that I cannot legally be a client because I’m an American,” said Dysli, who retired from the United Nations in 2001. “I couldn’t get an investment account and had everything in cash”.138 The increasing obstacles to Americans’ desire to bank abroad may impact Americans’ decisions to move abroad and thus potentially stem or increase the flow of American expatriates.

Commercially speaking, the United States and Swiss relationship is at risk of rapidly deteriorating. Although there is not a concrete and verifiable method for ascertaining exactly what percentage of Swiss bank clients were Americans, it is easy to predict what that percentage will be in the future – zero. Commercially speaking, when an industry loses a large percentage of its customers the industry faces the danger of collapse.139 Now, specifically with regard to Switzerland, the danger of their entire banking industry collapsing is not well-founded. But this entire controversy has adversely affected the Swiss’ reputation abroad. Bruce Zagaris, a tax lawyer who represents several UBS clients, told the Wall Street Journal that the Swiss reputation for secrecy has “absolutely” been tarnished.140 Mr. Zagaris said that “the Swiss prize their ability to protect customers from the prying eyes of other governments but that this situation has shown that, when faced with legal action, the Swiss, will give up select information”.141 Undoubtedly, this bending to the will of another nation at the expense of its customers will have repercussions on other foreigners who may now think twice about depositing funds in a country whose veil of secrecy has been publicly pierced.

Moreover, the legal consequences of this case are affecting future international


136 Id.
137 Id.
138 Id.
139 Cynthia Blum, Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?, 6 FLA. TAX REV. 579 (2004) (hereinafter Blum).
140 Jones, supra note 88
141 Id.
relations. In response to this crackdown, the United States federal government is considering putting into place even more regulations and requirements for Americans who bank abroad, as well as those institutions with whom they are banking. The United States is proposing increasing reporting and oversight requirements for so-called qualified intermediaries - foreign banks that withhold taxes on behalf of the IRS. However, these mandated increases in reporting may concomitantly increase the cost of compliance and the risk of violating United States laws, which in turn will even further discourage the Swiss from reopening their bank doors to American patrons. Notwithstanding the repercussions of the UBS settlement on United States and Swiss relations, this settlement will impact the United States’ relationship with its own citizens.

VI. THE IMPLICATIONS OF THE UBS SETTLEMENT

A. The U.S. Assumes the Role of the World’s Biggest Brother

After looking to cases preceding United States v. UBS AG, it becomes clear that the instant case is but another stone in the road toward United States’ complete control over its citizens’ financial privacy. Notwithstanding the above discussed international law implications of this policy, the UBS settlement and the progeny it will engender will undoubtedly generate a further move towards bigger and bigger government. This burgeoning of governments is already anticipated by many nations. Specifically, the international community is worried about how foreign banks are now going to affect the rest of the body of international law.

Unsurprisingly, nations are growing more and more concerned over how the decisions to supersede nations’ privacy laws in favour of another nation’s banking disclosure laws (namely the U.S.) will impact other areas of laws that nations may want to penetrate. For instance, under the IRS’s new rules proposed to take effect in 2011, foreign banks must essentially become IRS spies. Pursuant to these rules, foreign banks must actively investigate and report to the IRS, not only information on individual United States clients, but also on legal entities (trusts, corporations, foundations) that Americans control as beneficial owners.

142 Id.
143 Anthony D. Todero, The Stop Tax Haven Abuse Act: A Unilateral Solution to a Multilateral Problem, 19 MINN. J. INT’L L. 241, 269 (2010) (explaining that the interests of other countries, including Switzerland, are jeopardized by these regulations because the regulations heavily impede foreign countries’ abilities to bank with American customers).
States persons are required by law to report all offshore accounts on annual IRS Form 1040, but the IRS claims thousands fail to do so.\(^{146}\) Adding to the woes of offshore banks and their American clients, the United States Securities and Exchange Commission (SEC) is trying to force offshore banks that give investment advice to Americans, even if rendered outside the United States, to register with the SEC, a complex and costly process.\(^{147}\)

Moreover, in the eight years that have passed since September 2001, the United States has dedicated itself to the prevention of terrorism both domestically and abroad. Many international law scholars and politicians believe that the recent escalation of United States power to intrude upon foreign bank secrecy laws is just another tool in the American arsenal against terrorism.\(^{148}\) By claiming that clients banking abroad are financing terrorism directly or indirectly, the United States is able to get its foot in the doors of other countries’ laws and its hand into the pockets of its citizens.

However, the repercussions of the UBS settlement do not bode entirely well for the United States. The fact that UBS complied with the IRS demands for disclosure, subsequently closed all of its American customers’ bank accounts and is refusing to open accounts to Americans in the future could be indicative of the United States’ waning influence in the world sphere. While closing American accounts, the Swiss simultaneously assured customers from other foreign nations that their accounts were secure and would remain so.\(^{149}\) Countries such as Switzerland are no longer scrambling to maintain and safeguard relationships with the United States, largely because of the state of the American economy. Russia and China’s recent actions concerning the dollar also reflect the United States’ waning power in international markets. These countries, among others, are making the call for creating a new international currency, thus supplanting the American dollar as the reserve currency in the world.\(^{150}\) Moreover, the international trade in oil and cotton continues to be denominated in the United States dollar. However, there is currently a push to remove the dollar as the standard for these purchases and replace the dollar with a more widely-accepted and secure currency.\(^{151}\) By

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\(^{146}\) Blum, \textit{supra} note 139, at 608.


\(^{148}\) Provost, \textit{supra} note 145, at 847.

\(^{149}\) Jones, \textit{supra} note 88


\(^{151}\) David A. Curtiss, \textit{Eastern Market: The Interaction Between the Basel Committee on
extending its influence and encroaching upon foreign sovereignty, the United States has concomitantly reduced its world standing and respect among other nations.

In changing the status quo that the world market has enjoyed for over a generation, the international community is poised to change the face of banking in the United States. If the push to replace the dollar with another reserve currency comes into fruition, Americans will be forced to radically alter their banking and purchasing practices.\(^{152}\) Once the United States dollar loses its status as the global reserve currency, the demand for dollars will go down and the currency itself will lose purchasing power.\(^{153}\) Now that the possibility of depositing funds in accounts in Switzerland is foreclosed to Americans, it remains to be seen how the citizens of the United States will react when faced with limited resources for safeguarding their money.

Since the end of World War II the United States has heavily influenced the terms of international trade. As the world adjusts to the current economic crisis, international trade and trading policies are also adjusting as countries attempt to prop up and secure their own currencies and economic states. Once the U.S. caught wind of the possibility that its assets were being held undeclared in a foreign bank, it acted as any other sovereign would; it confiscated them. The length and duration of the implications of this confiscation are yet to be seen.

B. The United States Strengthens its Borders and Banks

Although met with much criticism and ire from foreign nations and its own citizens, the United States government is merely exercising its right, bestowed upon it by its citizens, to police its people. This police power does and always has included the power to maintain secure and accurate tax collections. In strengthening its measures to ensure its citizens abroad are paying their taxes, the United States government is concomitantly strengthening the country and the citizens’ confidence that tax policies apply to all Americans, not just those too poor to vacation or even reside outside of the country.

The United States Treasury has stated that offshore banking, including banking in Switzerland, is an increasing problem for the enforcement of United


\(^{153}\) Id. at 135.
States tax laws.\textsuperscript{154} It noted that addressing the potential for tax evasion through offshore accounts is critical to safeguarding Americans’ confidence in the fairness of the United States tax system.\textsuperscript{155} Therefore, the United States government’s policies of obtaining tax information from all Americans residing and banking abroad is a blanket policy – it is meant to apply to every single American who qualifies to pay taxes. Since tax policies apply universally, Americans will not be able to claim prejudice, unfair treatment, or unconstitutionality as applied to them personally.

Moreover, although it is not a cultural norm for Americans to broadcast their salaries, savings or other financial information, we are no strangers to financial disclosure.\textsuperscript{156} Financial privacy can never be absolute if a person banks at all. Banks and its employees including managers, loan officers, tellers and brokers, necessarily must have access to their customers’ financial information.\textsuperscript{157} Yet the vast majority of Americans utilize banking institutions as depositories for their money.\textsuperscript{158} One may argue that Americans are willing to tolerate banking because of the assurances that the institutions will not share, sell or otherwise broadcast their customers’ financial information.\textsuperscript{159} However, the exact same argument could be made for why Americans should extend this courtesy to the United States government. The United States government both issues and safeguards every citizen’s Social Security number for instance.\textsuperscript{160} Moreover, since the Sixteenth Amendment was enacted in 1913, American citizens have been disclosing the majority of their financial information to the United States government annually, in the form of their tax statements.\textsuperscript{161}

VII. ANSWERING THE ULTIMATE QUESTION: WHOSE SOVEREIGNTY WILL PREVAIL?

After a thorough analysis of the wide-ranging implications the UBS settlement will have on both international banking and comity, it is important to answer the ultimate question of whose sovereignty would prevail if a similar case were brought

\textsuperscript{154} Blum, supra note 139, at 608.  
\textsuperscript{155} Id.  
\textsuperscript{156} Id.  
\textsuperscript{157} Andrew J. DeFilippis, Securing Informationships: Recognizing a Right to Privity in Fourth Amendment Jurisprudence, 115 Yale L.J. 1086, 1105-1107 (2006).  
\textsuperscript{158} Creola Johnson, Welfare Reform and Asset Accumulation: First We Need a Bed and a Car, 2000 Wis. L. Rev. 1221, 1264 (2000).  
\textsuperscript{159} Id.  
\textsuperscript{160} Susan Cleary Morse, Using Salience and Influence to Narrow the Tax Gap, 40 Loy. U. Chi. L.J. 483, 504 (2009).  
\textsuperscript{161} Id. at 504.
before a court of the law. Since the UBS case resulted in a settlement, the case never reached a court and thus the merits of the controversy were not decided. Therefore, a conflict of law analysis addressing these merits would prove prudent for international bankers, customers and legal scholars in order to gain the most complete understanding of these complex issues.

Clearly, the outcome of any such case would depend almost entirely on the law the court utilizes. The law of the United States requires banking disclosure, while the law of Switzerland mandates banking secrecy. Therefore, the penultimate question in such a case is which country’s law will be applied. The first step in answering this question is to decide the point of conflicts of laws. The leading case authority, Klaxon v. Stentor, directs federal courts sitting in diversity jurisdiction to use the forum’s conflicts of law rules. Since the UBS case was brought in the United States District Court of Florida, for purposes of this hypothetical analysis, any Florida precedents will be applied.

Because the case would be brought in United States federal court, Klaxon mandates that the court apply the United States conflicts of law rules, specifically Floridian rules as the case is brought in that district. Florida district courts look to the Second Restatement of Conflicts of Laws for guidance when deciding such questions. According to the Second Restatement, “many States of the United States have enacted statutes which provide that a suit by a sister State for the recovery of taxes will be entertained in the local courts if the courts of the sister State would entertain a similar suit by the State of the forum”. Therefore, since every state would enforce the tax provisions allegedly violated by UBS customers, the Florida district court would accordingly enforce the disclosure provisions.

Consequently, it is important to emphasize the results of the above explained hypothetical. Foreign banks such as UBS would have no choice but to enforce United States judgments against their banks for if they did not, the United States would change its laws to prevent Americans from banking abroad. It seems that

162 Supra Part I.
165 Lear, supra note 163, at 95.
166 Klaxon v. Stentor, supra note 164, at 496 (Federal courts’ jurisdiction is based upon Article III, Section 2 of the United States Constitution which grants federal courts jurisdiction over cases involving citizens of foreign states as parties).
168 Restatement (Second) of Conflicts of Law § 89 cmt. B (1971).
169 Id.
the price of taking on American customers is in fact submitting to their country’s jurisdiction. Thus, foreign banks will have to evaluate whether the costs of entanglement with the United States legal system are worth the benefits of taking on American customers.

VIII. CONCLUSION

Switzerland’s banking secrecy practices have been criticized in the past and undoubtedly will come under international ire in the future. There are international comity arguments which contend that banking secrecy facilitates the commission of terrorism, tax fraud and other monetary-based crimes.\(^{170}\) However, it is difficult to advocate that a sovereign nation must capitulate to international pressure and irrevocably alter an institution that has served as both the model and pinnacle of banking internationally.\(^{171}\) Just as difficult is the position that all other nations must exist at the leave of the Swiss and rely on the latter’s national police and laws to apprehend foreign criminals that pose a real and viable threat to other nations’ security. However, by piercing Switzerland’s prized veil of secrecy with judicial orders, the United States has essentially subjugated another nation’s sovereignty to its own – to the detriment of both international relations and its own citizens’ financial freedom.

Therefore, in order to safeguard access to its citizens’ funds, the United States must draft a tax code which will help it maintain its own police power, but concomitantly will not infringe upon the sovereign rights and economic prosperity of another country.\(^{172}\) Whether the United States likes it or not, it will need international cooperation with these issues. Drafting such a code of compromise will undoubtedly be no small task. But if the United States approaches this goal with the same temerity and dedication that the world has come to expect, it will surely adopt legislation that will serve as the model for international banking relations around the world.

\(^{170}\) Brabec, supra note 2, at 232 (citing an International Monetary Fund agreement to expand its watchdog efforts beyond money laundering to include terrorist activities).
