1. INTRODUCTION

It is not possible to read the papers of Mr. Greene and Mr. Pitt, and their colleagues, without a sense of admiration for their depth of learning and research. It is, therefore, with some hesitation that one must approach the task of commenting on their work. This piece is meant to be comment, and no more, because the state of the subject is now such that it is hardly possible to do justice to all the issues raised by them in the confines of a space less than book-length. These issues include the proper territorial scope of securities legislation; differing national attitudes to securities regulation; the role and utility of banking security in the modern world; the impact of foreign blocking legislation; the potential role of consents and waivers; the scope of domestic subpoena and discovery powers and their relationship to international conventions; the role of the Hague Evidence Convention; and the effectiveness of multilateral and bilateral agreements, formal or informal, in the area of securities regulation.

Some of these issues are so complex and interlocking that it is certain that there are no easy global solutions to the problems which we discuss. If this writer subscribes to the more conservative conclusions of Mr. Greene and his colleagues, rather than to the more novel suggestions of Mr. Pitt and his colleagues, it is not due to any difference between them in their goals. The difference is essentially one of means, not ends.

This paper will endeavor to contribute to the debate by discussing the following matters: (1) some thoughts on the hypotheticals; (2) sub-
stantive jurisdiction; (3) the quest for evidence at home and abroad; (4) the SEC as litigant in the United Kingdom; (5) conclusions and possibilities.

2. SOMETHING ON THE HYPOTHETICALS

2.1. Disclosure and False Accounting

Like the market transaction example, the hypothetical directly raises a problem of evidence or proof, and only incidentally addresses a question of substantive or prescriptive jurisdiction. For reasons which will be more fully discussed later in this paper, if the foreign country is England, the Hague Evidence Convention and the United Kingdom blocking statute are almost certain to be entirely irrelevant. The Evidence (Proceedings in Other Jurisdictions) Act 1975, which incorporates the Hague Evidence Convention, will be of little or no utility because it applies only to a request issued on behalf of a foreign court in civil proceedings which have either been instituted or are contemplated; the prevailing attitude within the United Kingdom is that it applies only to evidence (and not discovery) for the purpose of such proceedings. The blocking statute will therefore be irrelevant because it is extremely unlikely that the Secretary of State’s powers will be exercised in such a case. The primary conditions for exercise of these powers are that the foreign requirement to produce documents or information infringes the jurisdiction of the United Kingdom, is otherwise prejudicial to national sovereignty, or compliance would be prejudicial to the security or foreign relations of the United Kingdom government. Although the powers may also be exercised if documents are otherwise required in connection with pending civil or criminal proceedings, or if the foreign requirement is for discovery, experience suggests that the powers will only be exercised in cases of perceived infringement of jurisdiction or sovereignty, and will not be used to prevent the provision of documents or information where there is no such infringement.

It cannot be doubted that, in the circumstances of the hypothetical, the United States has jurisdiction both to prescribe that consolidated financial statements of a United States corporation present a true and
fair view, and to initiate in the United States whatever steps may be necessary to enforce compliance with its accounting rules. This proposition does not require the support of the revised Restatement's view that the United States has jurisdiction to apply its law to foreign corporations which are substantially owned or controlled by nationals of the United States. For the hypothetical does not envisage the application of United States law to the British subsidiary: the question is about the effective application of United States law to the consolidated financial statements of the United States parent.

In practice, the problem may be illusory. The audit work of major multinationals is increasingly concentrated in the hands of the major accounting firms. These firms operate in many countries (sometimes in separate partnerships in each country, or as one international firm) and all have a presence in the United States. In Arthur Andersen & Co. v. Finesilver and Ohio v. Arthur Andersen & Co., a well-known firm of international accountants was compelled by the United States court to produce material from its Geneva office which seemingly was held in its capacity as accountants for IOS Limited, a Canadian corporation with its principal place of business in Geneva. The Tenth Circuit described the firm, which had its principal offices in Chicago, as "an international organization of accountants with offices throughout the world," and ordered production despite resistance on the grounds of Swiss secrecy law.

In the final resort, therefore, a United States court may well be able to reach the records through the auditors of the subsidiary, even if they are not the auditors of the parent. This is not to prejudge the question discussed below, of whether it is possible to reach documents abroad by subpoena issued in the United States to a person who is resident there through a branch (or sometimes a subsidiary) where that branch has no connection with the relevant transaction. It may be a serious matter to order a United States branch of a Cayman Islands

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4 Restatement (Revised) of Foreign Relations Law § 418 (Tent. Draft No. 2, 1981). It does not, therefore, involve the potential conflict of jurisdiction to which United States legislation can give rise to in this context; see, e.g., 53 Brit. Y.B. Int'l L. 442-46 (1982) (the dispute between the British and United States governments over the application of the anti-boycott legislation to the U.K. subsidiary of the 3M Company).


7 546 F.2d at 340.

8 Id. at 342. In reviewing the trial court's imposition of sanctions, the court of appeals noted that the firm had failed to bring forward adequate evidence of the applicability of Swiss law, and that its reliance on Swiss law was not in good faith. 570 F.2d at 1376.

9 See infra notes 42-83 and accompanying text.
bank to produce Cayman Islands records in connection with alleged drug-related offenses in the United States, where production of the records is rendered unlawful by the law of the Cayman Islands and where the branch of the bank in the United States had nothing to do with the transaction. A similarly serious result may occur if the New York subsidiary of a Swiss bank is ordered to reveal the name of the customer for whom its parent bank had made purchases on the New York Stock Exchange. By contrast, it is difficult to see how there could be conflict with United Kingdom law and policy for a United States court to order production by the United States office of the English auditor.

First, under English law, an auditor owes a duty to the members of the company which it audits (i.e., to the parent company). Indeed, it is the duty under English law of an auditor of a subsidiary "to give to the auditors of the holding company such information and explanation as those auditors may reasonably require for the purpose of their duties as auditors of the holding company." This provision, however, applies only if the subsidiary is incorporated in Great Britain and the holding company is registered under the Companies Act 1985. Secondly, it should not be assumed (as is often assumed in discussion of the enforcement of United States securities laws in the international context) that Country X (in this case the United Kingdom) has a primitive system of corporate law which, if it does not encourage, at least tolerates conduct which would be regarded as criminal in the United States. As in other areas, this is not so in the case of the hypothetical. Under the Companies Act 1985, "[e]very company shall cause accounting records to be kept" which "shall be sufficient to show and explain the company's transactions, and shall be such as to . . . disclose with reasonable accuracy, at any time, the financial position of the company at that time," and "the profit or loss account shall give a true and fair view of the profit or loss of the company for the financial year." The auditors are required to make a report to the members of the company which states, inter alia, whether the profit and loss account has been properly prepared in accordance with the legislation and whether, in their opinion,

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11 See *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981) (where the parent company was treated as if it were present in the United States through the branch). *Id.* at 112, 119.

12 Companies Act 1985, ch. 6, § 392(1)(a).

13 *Id.* § 221 (re-enacting earlier legislation).

14 *Id.* § 228(2).
a true and fair view is given in the profit and loss account of the company's profit or loss for the financial year.\textsuperscript{15} Criminal penalties are laid down for non-compliance with these provisions, and an officer of the company commits an offense if he knowingly or recklessly makes a false statement to the auditor of the company.\textsuperscript{16}

As a result, if the allegations mentioned in the hypothetical are supported by evidence, there would be material which could be placed before the British authorities either to found a prosecution or to justify the appointment of inspectors to investigate the affairs of the company. Inspectors may be appointed if the company's affairs have been conducted with an intent to defraud, the management of the company has been guilty of fraud in relation to the company or its members, or "the company's members have not been given all the information with respect to its affairs which they might reasonably expect."\textsuperscript{17} The inspectors have wide powers to obtain documents and information, both from officers of the company and from others who may be in possession of relevant information. Obstruction of the inspectors is treated as contempt of court.\textsuperscript{18}

Even if these avenues fail, it should not be beyond the powers of imagination of the SEC to devise remedies which could take advantage of the fact that the British subsidiary is capable of being effectively controlled by its United States parent. If the parent can be ordered to exercise its powers (e.g., to appoint or remove directors) then much of its information could be obtained through the parent. Indeed, it is possible (but by no means certain for reasons which will be mentioned later in this paper\textsuperscript{19} in connection with the decision in \textit{Schemmer v. Property Resources Ltd.}\textsuperscript{20}) that the SEC could reach much of the material by having a receiver appointed in relation to the parent in the United States; the receiver could then exercise the powers of the parent company over the subsidiary.

2.2. \textit{Market Transaction and Insider Dealing}

This hypothetical also primarily raises a question of investigation, evidence, and proof. It does not seriously raise the question, discussed thoroughly by Mr. Pitt and his colleagues, of the territorial scope of United States securities legislation in the context of prescriptive juris-

\textsuperscript{15} \textit{Id.} \textsuperscript{\textsection} 236.
\textsuperscript{16} \textit{Id.} \textsuperscript{\textsection} 393.
\textsuperscript{17} \textit{Id.} \textsuperscript{\textsection} 432(2).
\textsuperscript{18} \textit{Id.} \textsuperscript{\textsection\textsection} 434, 436.
\textsuperscript{19} \textit{See infra} notes 84-90 and accompanying text.
\textsuperscript{20} [1975] Ch. 273.
It cannot be doubted that the United States has jurisdiction (in the international sense) to prescribe rules prohibiting dealing on the United States Stock Exchanges in shares of companies listed on those exchanges by persons (whether they are inside or outside the United States) who are privy to confidential information about pending tender offers for such companies. It may be that one could imagine some difficult borderline cases, but the hypothetical raises no such difficulties. If a crime has been committed, then if the purchaser is a United States citizen or resident, jurisdiction can easily be justified on the basis that a United States citizen or resident has misused confidential information obtained in the United States by making illicit profits through deals on a United States Stock Exchange. It is not easy to imagine a clearer case of prescriptive jurisdiction. Nor is the task made substantially less difficult if the insider is a foreigner who is a “tippee.” Here it is not necessary to resort to the controversial “effects” basis of jurisdiction to conclude that the United States has legislative jurisdiction to prohibit trading on its Stock Exchanges by foreigners who are unlawfully in possession of information derived directly from United States sources which they know to be illicitly obtained. Here, too, depending on the facts, there may be borderline cases, but the basic principle cannot be in doubt.

Nor is this a case where there is a basic conflict between the policies of the United Kingdom and the United States. It has already been seen that false accounting is no less an offense in English law than it is under the law of the United States. Similarly, by the Company Securities (Insider Dealing) Act 1985,21 consolidating relevant provisions in the Companies Acts 198022 and 1981,23 insider dealing is prohibited and made subject to criminal sanctions. The position at common law was by no means clear. In Percival v. Wright,24 it was held that a director did not owe a duty of good faith disclosure to the individual shareholder by virtue of his position. Accordingly, it was sometimes said that a director who misused confidential information would not be held accountable to the company for any profit made and would not

21 Ch. 8.
22 Ch. 62.
23 Ch. 62, § 1.
24 [1902] 2 Ch. 421.
be responsible to shareholders either from whom he purchased and made a profit on the basis of inside information, or to whom he sold, and who sustained a loss in ignorance of facts of which the director was aware, which facts made those shares less valuable. But it is more than arguable that a director, or other officer, who made illicit profits as a result of inside information owed a duty of good faith to the company of which he was an officer, and consequently would at least be accountable to the company for any profit made.

This puts securities enforcement in a different category than that of the enforcement of the antitrust laws. Although the United Kingdom does have antitrust laws, there is a strong tendency of both the domestic legislation and, to a lesser extent, the community legislation, not to prohibit export cartels. Accordingly, an export cartel of the type alleged in the *Westinghouse Uranium Contract* litigation was tolerated, if not encouraged, by the laws of many countries outside the United States. As the Attorney General emphasized in the *Westinghouse* case, offenses in the antitrust category were not offenses which were universally recognized as unlawful, and the assertion of extraterritorial jurisdiction in antitrust matters represented an extension of the economic policy of one state which was likely to conflict with that of other states. In the debates on the Protection of Trading Interests Bill, the Secretary of State for Trade spoke of how "fundamentally unsatisfactory" it was for United States law "unilaterally to pass judgement on economic problems which by their very nature [we]re of concern to more than one country"; in referring to the treble antitrust damages, the British government indicated that they were "totally out of proportion to the alleged mischief, particularly where the activities concerned were entirely legal where they occurred."

But whatever the differences between the United Kingdom and the United States over the proper delimitation of jurisdiction in antitrust matters and the conflicting policies of the substantive laws, the enforcement of securities legislation may involve different, and perhaps less difficult, questions. Within the proper limits of international jurisdiction there is a common cause.

The market transaction hypothetical raises the following problems for the SEC if the broker or bank is English and has no presence in the

29 *Quoted in* LOWE, EXTRATERRITORIAL JURISDICTION 177 (1983).
30 *Id.* at 185.
United States: the only connecting factor as far as potential sanctions
are concerned is its account with a United States brokerage firm. It
must be very doubtful\textsuperscript{31} whether the presence of assets unconnected
with the subject matter of the proceedings could justify the assumption
of enforcement jurisdiction (i.e., jurisdiction to issue, serve and enforce
a subpoena). The United Kingdom blocking statute, the Protection of
Trading Interests Act 1980, is not likely to present a problem, for its
primary purpose is to deal with the requirements of production of doc-
uments in the United States: if there is no effective way of making that
demand under United States law, the exercise of powers under the Act
will not be called for. It would be different if the SEC were able, under
threat of sanctions against other assets of the English entity in the
United States, to demand documents or information situated in Eng-
land, since it is very likely that the United Kingdom would regard that
as an improper exercise of international jurisdiction.

The SEC must, therefore, seek its information abroad. The short
answer to the hypothetical is that the only possible available remedies
appear to be either (1) a request by the United States court to be given
effect under the Evidence (Proceedings in Other Jurisdictions) Act
1975, but only in the context of pending or contemplated civil proceed-
ings for injunctive relief and disgorgement of profits, or (2) a request
for information under the 1986 Memorandum of Understanding be-
tween the United Kingdom and the United States. It will be necessary
to revert to these avenues later.

3. SUBSTANTIVE JURISDICTION

To an English lawyer, the starting point on the extraterritorial
application of the United States securities legislation has a familiar
ring. The United States decisions start with the question of legislative
intent, or the court's "best judgment as to what Congress would have
wished if these problems had occurred to it."\textsuperscript{32} But, equally the results
of this enquiry can, to an English lawyer, appear startling. As the pa-
pers before this symposium show, the United States courts have gener-
ally applied a combination of the conduct and effects tests in this area.
Generally the cases have involved fraudulent conduct within the United
States, and the reference to effects within the United States has nor-
mally been used to support a conclusion which could have been justified

\textsuperscript{32} Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir.), cert. denied, 423
on the basis of the conduct within the United States.\textsuperscript{33}

In \textit{Bersch v. Drexel Firestone Inc.},\textsuperscript{34} one of many cases arising out of the IOS frauds, the Court of Appeals for the Second Circuit held that the antifraud provisions of the federal securities laws differed in their application, depending on whether the victims were, first, Americans resident in the United States, whether or not acts or omissions of material importance had occurred in the United States; second, Americans resident abroad, but only if fraudulent acts or omissions of material importance in the United States had significantly contributed to their losses; or third, foreigners resident outside the United States, but only if acts or omissions within the United States had directly caused the losses. This does seem an odd and very nationalistic way to interpret a statute, and it is not easy to see why the acts done in the United States in furtherance of the conspiracy were not in themselves a sufficient basis of jurisdiction. But even more odd is the decision of the same court in \textit{Schoenbaum v. Firstbrook},\textsuperscript{35} holding that the court had subject matter jurisdiction in a derivative action by a United States shareholder of a Canadian company who complained that the defendants (Canadians and Canadian companies) had defrauded the Canadian company by causing it to sell shares, which to the knowledge of the defendants were worth more than the market value. Jurisdiction was justified on the basis that, because the Canadian company was quoted on the New York Stock Exchange, the acts, even if they took place outside the jurisdiction, "were detrimental to the interests of American investors."\textsuperscript{36} If this jurisdiction had been exercised, it surely would have been exorbitant and unjustifiable.

The "effects" doctrine is still regarded with distaste outside the United States, even if that distaste has primarily been expressed in relation to antitrust cases. As the United Kingdom government put it in its \textit{aide-memoire} to the Commission of the European Communities in the \textit{Dyestuffs} case in 1969:

\begin{quote}
[t]he United Kingdom Government [has] for their part consistently objected to the assumption of extra-territorial jurisdiction in anti-trust matters by the courts or authorities of a foreign state when that jurisdiction is based upon what is
\end{quote}


\textsuperscript{34} 519 F.2d 974.

\textsuperscript{35} 405 F.2d 200 (2d Cir. 1968), \textit{cert. denied}, 395 U.S. 906 (1969).

\textsuperscript{36} Id. at 208.
termed the "effects doctrine" — that is to say, the doctrine that territorial jurisdiction over conduct which has occurred wholly outside the territory of the State claiming jurisdiction may be justified because of the resulting economic "effects" of such conduct within the territory of that State. This doctrine becomes even more open to objection when, on the basis of the alleged "effects" within the State claiming jurisdiction of the conduct of foreign corporations abroad (that is to say, conduct pursued outside the territory of that State), such corporations are actually made subject to penal sanctions.37

But, despite the lip service paid to the effects doctrine in several of the cases, and particularly in Schoenbaum v. Firstbrook, it has not proved a serious problem in securities cases because there seems to be no case in which it has been decisive. Even in Schoenbaum v. Firstbrook, the claim was summarily dismissed on the merits. Of course, in those circumstances, it would have been more prudent for the court to have expressed no view on the jurisdiction issue.

In the United Kingdom, it is sometimes said that there is a presumption that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom, and certainly in cases involving criminal sanctions it is not easy to rebut that presumption. In Secretary of State for Trade v. Markus,38 a trust was established in Panama with the ostensible object of investing its capital in food producing industries, and members of the public were invited to invest in the fund by purchasing share units. The organization which sold the share units in the fund was run by a company with offices in London, which directed its efforts to obtaining investments from people abroad, principally in West Germany. Salesmen in West Germany called on prospective investors at their homes. Applications were addressed to the London company, and applicants gave salesmen checks payable to a German bank, or to a share certificate in another fund, together with a power of attorney in favor of the London company authorizing it to cash the certificate and to receive the proceeds on the investor's behalf. The documents were then sent by the salesmen to the London office for processing. The application by the investor was not accepted until the London company had been notified that the money had been credited to its account in Switzerland. The fund was entirely bogus and the state-

37 Quoted in Lowe, supra note 29, at 144.
38 [1976] A.C. 35; cf. Board of Trade v. Owen, [1957] A.C. 602; Attorney General's Reference (No. 1 of 1982), [1983] Q.B. 751 (case held to be not triable since both the unlawful means and ultimate object were outside the jurisdiction).
ments in the brochure were false and fraudulent. Markus was a director of the Panamanian corporation which managed the fund and a director of the company in London which ran the organization selling the share units.

Neither the investors nor the fund were in England. The English connection was that the organization of the fraud took place through London. Markus was charged with conniving at an offense committed by the English company under the Prevention of Fraud (Investments) Act 1958. The offense alleged to have been committed by the company in England was, by false statements, to induce or attempt to induce another person to take part, or offer to take part, in securities transactions. It was held by the House of Lords that, notwithstanding the fact that all the acts of the investors had taken place in Germany, the relevant offenses had been committed within the jurisdiction of the English courts. Although the victims of the offenses had done nothing involving their physical presence in England, they had "taken part" in the arrangements by virtue of the processing of the applications for shares in the fund, which had been done in London. Lord Diplock said that to answer the question whether the facts of the case disclosed any offenses punishable under English law did not call for "any wide roving enquiry into the territorial ambit of English criminal law." This result followed because the offenses with which Markus was charged were "result-crimes" — an offense is committed in England and justiciable by an English court if any part of the proscribed result takes place in England.

Where a penal or regulatory statute is not of the traditional type, a somewhat different approach may be required. Thus, the Companies Act 198539 provides that a public company may, by notice in writing, require a person who has or may have been interested in shares in the company, to confirm that fact or give such further information as may be required. Where such a notice is served on a person who is or was interested in shares and that person fails to give the required information, the company may apply to the court for an order directing that the shares in question be subject to certain restrictions, and there are penal sanctions for contravention of the restrictions. In F.H. Lloyd Holdings PLC,40 the company served notice on a Luxembourg bank seeking the name of the beneficial owner of shares registered in the name of an English nominee company for account of the bank. The bank argued that the words "a person" in the relevant section did not include a

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39 See Companies Act 1985, ch. 6, §§ 212, 216, 455.
foreign corporation which could not and did not carry on business in the United States and had no presence there of any kind. It was held that the Companies Act did not apply to foreign banks which did not carry on any business in England. The company whose shares were in question was an English company whose articles of association constituted a contract, and was governed by English law; between the company and its members with respect to their rights as members, the registered member was an English company and the shares were situated in England. Mr. Justice Nourse said,

[w]hy should a true foreigner, while able to enjoy all the benefits of holding shares in an English company, be intended to escape the burdens? ... I think that this is legislation which gives our courts power to deal with foreigners who are not here as regards these matters, being matters which, according to all principles ought to be adjudicated upon by our courts.\(^4\)

4. **The Quest for Evidence: At Home and Abroad**

Once again the starting point is not in doubt. A court may subpoena a person present within or otherwise subject to its jurisdiction, even if the evidence relates to foreign transactions situated abroad. Probably on almost any working day, there are cases in the major international centers of the common law world where parties or witnesses are being asked in cases with some international element to produce documents situated abroad. Despite that elementary starting point, there is still a penumbra of difficulty: the extent to which the general rule is subject to problems if, for example, there is a difficulty about what “presence” means in this context; if the person within the jurisdiction is a foreign company or firm, and the branch within the jurisdiction had nothing to do with the transactions in question; where the documents or information are situated in a jurisdiction which forbids, or may forbid, their production; or where it is said that, even if the information can be obtained by subpoena, nevertheless it ought to be obtained by proceeding abroad under the Hague Evidence Convention.

There is certainly some indication in the United States cases of a somewhat extended definition of “presence” for the purposes of the jurisdiction to issue and enforce subpoenas. As early as 1945, in *SEC v. Minas de Artemisa S.A.*,\(^4^2\) it was held that a subpoena could be served

\(^{41}\) [1985] Butterworth’s Co. L. Cas. at 299.

\(^{42}\) 150 F.2d 215 (9th Cir. 1945).
on a Mexican company through the Arizona residence of the American citizen who operated it. In *SEC v. Banca Della Svizzera Italiana*, the district court held that jurisdiction existed over the Swiss bank, Banca Della Svizzera Italiana, as a result of its doing business in New York through a subsidiary. The judgment merely records that the assertion that the bank did business through the subsidiary had been denied but that there was a letter from the bank which indicated "that the denial was erroneous and obviously was inadvertent." No further details in the judgment are given, and it is difficult to extract a principle on this aspect of the case.

It is likely that an English court would take a much stricter view of the meaning of "presence" for the purposes of the service of a subpoena. Although the English court may subpoena, with the leave of the court, a witness in Scotland or Northern Ireland, it cannot subpoena a witness in any other country, and personal service must be effected within England. In the case of a foreign corporation, it would have to have a fixed place of business within the jurisdiction to justify the service of a subpoena, and there can be little doubt that the ownership of an English subsidiary would alone not be sufficient to give the English court jurisdiction over the foreign parent for this purpose.

In the United States, of course, there has been much controversy over the question whether there must be some connection between the local operation of the foreign corporation which is the subject of the subpoena and the underlying transaction in relation to which evidence is sought. Also, there can be little doubt that the strong trend of the United States decisions, perhaps the most notable of which are *United States v. Bank of Nova Scotia* and *SEC v. Banca Della Svizzera Italiana*, is to the general effect that no such connection is necessary if the United States' interest requires that the evidence be produced and, perhaps also, if there is no other practicable way of obtaining it. However, in *Laker Airways Ltd. v. Pan American World Airways*, the district court set aside subpoenas served on the New York branch of Midland Bank in connection with its alleged participation in the alleged conspiracy to destroy the business of Laker Airways on the ground, inter alia, that all of the activities of Midland Bank in connec-

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44 Cf. South India Shipping Corp. Ltd. v. Export-Import Bank of Korea, [1985] 1 W.L.R. 585 (C.A.), a case on jurisdiction in an action *in personam*. Process had been duly served on a foreign company doing business outside the jurisdiction, but which had established a place of business in Great Britain.
tion with the matter took place solely in the United Kingdom and the New York branch office had no involvement whatsoever with Laker Airways.

A similar point arose in England in *MacKinnon v. Donaldson Lufkin and Jenrette Securities Corp.* This was a civil fraud action pending in England in which the plaintiff sought documents from the defendants' New York bank, Citibank. The plaintiff obtained a subpoena requiring Citibank, which had a London branch, to have a proper officer give evidence at the trial of the action and produce all relevant documents relating to the account of the defendant. The subpoena was directed to and served on the bank at its London branch. Mr. Justice Hoffman held that, even though Citibank had a branch in London and was present there

> [i]t does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matters on which the court may properly apply its own rules or the things which it can order such a person to do . . . . The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement on a foreigner and, in particular, on a foreign bank. The principle is that the state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction . . . . It seems to me that the subpoena and order in this case, taking effect in New York, are an infringement of the sovereignty of the United States. The need to exercise the court's jurisdiction with due regard to the sovereignty of others is particularly important in the case of banks. Banks are in a special position because their documents are concerned not only with their own business but with that of their customers. They will owe their customers a duty of confidence regulated by the law of the country where the account is kept . . . . If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sov-

ereign was able to apply the greatest pressure.\textsuperscript{49}

It is noteworthy that the decision ultimately rested on the fact that there were alternative legitimate measures available to obtain the evidence in New York.\textsuperscript{50}

But what if there are no alternative procedures, and the way to the evidence is impeded by a foreign blocking statute? No problem, of course, arises when the witness within the jurisdiction is not in fact legitimately subject to the foreign blocking order. Thus in \textit{Spencer v. The Queen},\textsuperscript{51} the Supreme Court of Canada held that the Ontario court could subpoena a resident and citizen of Canada concerning information which he had acquired while manager of a Bahamas branch of the Royal Bank of Canada. The Ontario Court of Appeal had held that the evidence was compellable because there was no evidence before the court that there would be a violation of Bahamian law.\textsuperscript{52} The court held that it was an accepted common law principle that criminal law was territorial in nature in the absence of explicit words and it was likely, therefore, that the Bahamian courts would interpret their legislation so as not to have extraterritorial effect. In any event, it was held that, even if the Bahamian legislation did have extraterritorial effect, "public policy . . . applies to all cases whether they be civil or criminal and foreign laws cannot exempt witnesses, otherwise competent, compellable and present, from giving evidence within their knowledge in our courts."\textsuperscript{53} The Supreme Court affirmed the decision on the latter ground. The judgment of the majority held that to allow the witness "to refuse to give evidence in the circumstances of this case would permit a foreign country to frustrate the administration of justice in this country in respect of a Canadian citizen in relation to what is essentially a domestic situation. Indeed, such an approach could have serious repercussions on the operation of Canadian law generally."\textsuperscript{54}

Similarly, in the English aspects of the \textit{Santa Fe} case,\textsuperscript{55} Mr. Justice Drake avoided the point taken by the witness that to answer the questions would be a criminal offense under the law of Luxembourg by holding that he did not believe that the witnesses would be charged in Luxembourg for a criminal offense based on complying with an En-

\textsuperscript{49} Id. at 657-58.
\textsuperscript{51} [1985] 2 S.C.R. 278 (Can.).
\textsuperscript{52} 145 D.L.R.3d 344 (1983).
\textsuperscript{53} Id. at 357.
\textsuperscript{54} [1985] 2 S.C.R. at 281.
lish order (refusal to comply with which would have involved the risk of contempt proceedings). He thought that "the alleged risk passes from the realms of the improbable to the extreme fanciful." While a very old authority suggests that the existence of a foreign penal law relating to the production of documents would not affect the duty of a witness or litigant in England to disclose material ordered by the court, the true modern rule is perhaps that it is a matter of discretion to be exercised in all the circumstances of the case. If that were the rule, then in practice, if not in theory, it might come close to the present American view. In *MacKinnon v. Donaldson Lufkin and Jenrette Securities Corp.*, Mr. Justice Hoffman refused "to undertake a process of weighing the interests of [England] in the administration of justice and the interests of litigants before its courts against those of the United States." He pointed out

[t]his is an exercise which has frequently been undertaken by the courts of the United States. It is extremely difficult to form in a way which carries conviction outside the forum. Distinguished American commentators as well as foreign observers have not failed to notice that the balance invariably comes down in favour of the interests of the United States. It is equally hard for a court in this country, with a duty to administer justice here, to put objectively into the scales the interests of a foreign country in the integrity of its sovereignty over persons or transactions within its jurisdiction.

While in an exceptional case it may be that the banker-customer relationship might justify the refusal by a witness to answer a question, or produce evidence which would otherwise be required, this is ultimately a matter for the discretion of the court. Thus, in the *Santa Fe* case, Mr. Justice Drake accepted that there might be circumstances in which it would be against the public interest to order disclosure of confidential information since there was

a public interest in maintaining the confidential relationship between banker and client, so that wherever a banker seeks to be excused from answering a question which would involve the breach of that confidentiality, it is proper . . . for the court to consider such a request and to judge it in the context of the circumstances in which it was made.
But there was also a public interest "and a very strong one" in not permitting the confidential relationship between banker and client to be used as a cloak to conceal improper or fraudulent activities — evidence of which would otherwise be available to be used in the legal proceedings. Thus, where proceedings are taking place in England, banks, like all other parties, are subject to the ordinary rules of evidence, and the banker-customer confidentiality can be overridden by court order. For example, where there is a fraud and the name of the perpetrator is unknown, but the proceeds can be traced to a bank account, an order can be made requiring the bank to disclose the identity of its customer and the whereabouts of the proceeds of the fraud.60

The leading case in England on banking confidentiality is the classic decision in *Tournier v. National Provincial and Union Bank of England*,61 where the Court of Appeal held that the exceptions to the duty of secrecy implied in the relationship of banker and customer could be classified under four categories: first, where disclosure is under compulsion by law; second, where there is a duty to the public to disclose; third, where the interests of the bank require disclosure; fourth, where the disclosure is made by the express or implied consent of the customer. It cannot be denied that this is a very weak secrecy rule. The exceptions were, of course, laid down in a purely domestic context; accordingly, the relevant "compulsion by law" means compulsion by English law and the duty to the public to disclose means duty to the English public. Furthermore, when Lord Justice Atkin said that it was plain that "there is no privilege from disclosure in force in the course of legal proceedings," he was referring to English legal proceedings.

Consequently, in the *Marc Rich* case in England,62 Mr. Justice Leggatt was prepared to grant an injunction in favor of Citibank's Swiss customer, restraining Citibank from disclosing in New York confidential information held by it as banker in England for its Swiss customer. It will be recalled that the *Marc Rich* case involved an investigation into the crude oil trading of an American company which was the wholly owned subsidiary of a Swiss company. In proceedings brought

61 [1924] 1 K.B. 461. The *Tournier* decision has also been the source of similar rules in the United States. For substantial inroads into banking secrecy by the U.K. Parliament in the field of financial regulation, see Financial Services Act 1986, ch. 60, §§ 177(8), 178(6).
in the United States by the Department of Justice, subpoenas were served on the Swiss company and its American subsidiary, and subsequently on Citibank in New York. The documents covered by the subpoena served on Citibank in the United States were in fact kept at its London branch in its capacity as bankers to the Swiss company. The Swiss company brought proceedings in England against the London branch of Citibank to restrain it from disclosing confidential information held by it in its capacity as banker. Perhaps it is too cynical to suggest that the interests of both the bank and the customer were served by the English injunction, since the customer was preventing disclosure of its documents and the bank was obtaining the benefit of a potential "foreign governmental compulsion" defense. The case may be regarded as a somewhat artificial device both to prevent production of the material in the United States and to relieve the bank from sanctions in the United States. The artificiality of the device in that case is underlined by the fact that it would be inconceivable for a customer of a bank in England to obtain an injunction restraining production by the bank of documents which are the subject matter of a subpoena in English proceedings. It is by no means easy to see why, in the United States proceedings, it should make a great deal of difference whether the bank is under a duty of confidentiality in general (without an express court order in the foreign jurisdiction) and subject to an injunction (breach of which is punishable) brought in a suit by the customer to enforce that very same duty. It should also be noted that the operation of United Kingdom companies legislation relating to disclosure is not affected by the fact that the person under a duty to disclose is a bank subject to banking secrecy in a foreign jurisdiction.63

The English rules on banking confidentiality should not present a formidable obstacle to the obtaining of evidence in relation to securities violations when that evidence is legitimately sought by the United States. If the question arises in the United States, then the principles which the courts should apply with respect to foreign banking secrecy are now well established and should present no problem. If the question arises in England, either in an action in England or in the execution of letters rogatory for the United States court, it is well established that banking confidentiality is not an obstacle to the ordering of evidence, although in certain circumstances it may be a factor in the exercise of discretion. The English "blocking statute," the Protection of Trading Interests Act 1980, should not present an obstacle to the legiti-

mate enforcement of securities legislation. Its object, in part like its predecessor the Shipping Contracts and Commercial Documents Act 1964, is to prohibit conduct or production of documents or information under circumstances specified by governmental order. It is section 2 of the 1980 Act which is most relevant for present purposes. That section allows the Secretary of State to give directions for prohibiting compliance with requirements for the production of commercial documents or information. It applies to requirements by a foreign court or authority in relation to any commercial document or information which is not within the territorial jurisdiction of the foreign country, and allows the Secretary of State to give directions for prohibiting compliance with the requirement in certain circumstances. Those circumstances are the following: first, where the foreign requirement infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; second, where compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the Government of the United Kingdom with the government of any other country; third, where the requirement is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or fourth, where the requirement is for a person to state what documents relevant to any such proceeding are or have been in his possession, custody or power to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.

Although the last two examples could be used very widely to prohibit compliance with United States orders, in practice it seems likely that the powers of the Secretary of State would only be exercised under the Act in cases which either fall within the first two categories or are at least analogous to them. For example, the fourth category could in theory apply to any proceeding in the United States to which a United Kingdom company is party and where that party is required to give ordinary discovery. This is, of course, the problem in the Aerospatiale case, but it has never been suggested in England that the powers under the 1980 Act would be used to prevent the United Kingdom party from complying with giving discovery in the United States in such a case.64

Are there circumstances in which it is possible that the 1980 Act would be invoked by the United Kingdom government in securities regulation cases? Take, for example, the facts of SEC v. Banca Della Svizzera Italiana.65 If the bank had been an English bank with a New

64 For examples of the use of the power under the 1980 Act, see British Airways Board v. Laker Airways, [1985] A.C. 58.
65 92 F.R.D. at 111.
York subsidiary, it is certainly possible that the United Kingdom government would have regarded the subpoena in that case as infringing the jurisdiction of the United Kingdom at least as regards enforcement jurisdiction. It could hardly be said by the United Kingdom that to regulate the conduct of a British bank which was purchasing shares for its customer on the New York Stock Exchange would be an infringement of United Kingdom sovereignty; however, there must be a serious question as to whether enforcement of a subpoena in the circumstances of that case, particularly where the presence of the foreign bank was assumed as a result of its local subsidiary, constituted an excess of jurisdiction. It should also be emphasized that, in the normal case where a United Kingdom company is subject to the personal jurisdiction of the United States court, it is extremely unlikely that the powers under the 1980 Act would be enforced, even as regards the provision of documents or information situated outside the United States. The Act is not designed as either a cloak for fraud or an obstruction to litigation abroad. It has a specific purpose, mainly founded in concerns about the exercise of antitrust jurisdiction, to give power to prohibit compliance with the application or enforcement of antitrust laws in circumstances where the jurisdiction is regarded by the United Kingdom as excessive. If, in the nature of things, it cannot achieve its goal of prohibiting compliance with the application of these rules or their enforcement, it at least provides a basis for the assertion of a bona fide foreign governmental compulsion defense.

Both of the papers presented discuss the application of the Hague Evidence Convention in the context of the enforcement of securities legislation. There are a number of qualifications which must be made to their accounts. The first and most important qualification is that the Hague Evidence Convention applies only to "civil or commercial" matters, and the question arises as to whether this expression applies to proceedings by the SEC abroad in countries which are parties to the Hague Evidence Convention. There is very little doubt that under United States law, a claim by the SEC for an injunction and restitution of profits is brought under the equity jurisdiction of the district court and constitutes a civil claim, as opposed to an administrative, penal or criminal proceeding. It has been so regarded in Italy and France and that conclusion is implicit in the English letters rogatory proceedings in the Santa Fe case.

Other proceedings by the SEC to which the 1980 Act may apply

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66 See SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971).
67 In France in the Santa Fe case, and in Italy in the St. Joe Minerals case.
must present a matter of considerable doubt. In *In re Norway's Application*, the English Court of Appeal refused, on a number of grounds, letters rogatory from a Norwegian court in connection with a tax claim. Lord Justice Kerr indicated that to decide whether a matter was a "civil or commercial" matter might depend on four possible approaches: first, a generally accepted international interpretation; second, classification under the law of the requesting court; third, classification under the law of the court addressed; fourth, a combination of the second and third approaches by which the court addressed would satisfy itself that the proceedings concerned a civil or commercial matter under the law of the requesting court (however, the court would only accept this categorization for the purposes of assuming jurisdiction if it was not in conflict with any fundamental principle recognized under the laws of the court addressed). He reached "the reluctant conclusion" that the last approach provided the best answer:

The starting point must surely be the law of the requesting court. If it acts in accordance with principles of international comity, it should refrain from making any request . . . unless the proceedings before it are 'proceedings in a civil or commercial matter' by its own law. But I do not think that the court addressed can be wholly bound by the classification put forward by any requesting court . . . . Accordingly, even if it concludes that the requirements of the classification have been met under the law of the requesting court, I do not think that the court addressed is bound in all cases. If, for instance, proceedings which would clearly be regarded as criminal or penal proceedings by the law of the court addressed are nevertheless characterized as proceedings in a civil matter by the requesting court, then it must be open to the court addressed to decline to accede to the request, if not on jurisdictional grounds, then at least as a matter of discretion.69

A detailed account of the proceedings of the Hague Conference on this question would be out of place in this paper, but it should be noted that this has been a controversial question throughout the history of the Hague Evidence Convention. The documents reveal that there have been very few cases in which the question has arisen. The United States delegation considered any legal proceeding that was not criminal

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68 [1986] 3 W.L.R. 452.
69 *Id.* at 478; this conclusion is criticized by Mann, *Any Civil or Commercial Matter*, 102 LAW. Q. REV. 505 (1986).
as "civil or commercial," whereas other delegations think that the contrast is between "civil and commercial" and "administrative"; there is no general agreement as to what law governs the question of whether a matter is a civil or commercial matter.\textsuperscript{70}

The second general comment concerns the relationship between the Hague Evidence Convention and discovery. Judgment from the Supreme Court is awaited in the \textit{Aerospatiale} case\textsuperscript{71} and therefore it is uncertain whether the Court will hold that a party to United States litigation who seeks discovery against a foreign party in relation to material abroad must proceed by way of the Hague Evidence Convention. This commentator has endeavored to put forth the thesis, not raised in the briefs or arguments before the Supreme Court, that the Hague Evidence Convention was not intended to apply to discovery at all, but rather only to evidence in the strict sense and certainly not as between the parties to litigation. This paper is not the place to develop that argument,\textsuperscript{72} but it can be summarized as follows: first, the position prior to the Hague Conference in 1968 which adopted the 1970 Convention was that discovery was not known in civil law countries, and that English courts had rejected the notion of their being used for discovery in aid of foreign proceedings;\textsuperscript{73} second, the Convention was concluded in 1970 on the initiative of the United States and there had been neither public suggestion by the United States nor discussion at the conference that the Convention was intended for use in discovery either \textit{inter partes} or in relation to third parties. It was unlikely that the majority of delegates at the Conference thought that the expression "evidence" bore any meaning other than its normal usage (i.e., material to prove or disprove facts, rather than material designed to lead to the discovery of facts); third, reservations under Article 23 are not an indication that the Convention, without those reservations, would have applied to discovery; fourth, the Hague Evidence Convention was intended primarily to apply to "evidence" in the sense of material required to prove or disprove allegations at trial, and was not intended to apply to discovery in the sense of the search for material which might lead to the discovery of admissible evidence; and fifth, where the United States court has personal jurisdiction over a foreign litigant, the Hague Evidence Convention does not apply to the production in the

\textsuperscript{70} See \textit{e.g.}, 11th Sess. Doc., Vol. 4, pp. 56-57; 14th Sess. Doc., p. 400.

\textsuperscript{71} 107 S. Ct. 2542 (1987); see Greene, \textit{Problems of Enforcement in the Multinational Securities Market}, this issue, p. 325 at *.

\textsuperscript{72} See Collins, 35 INT'L & COMP. L.Q. 765 (1986).

United States of evidence in that litigant's possession, even though the documents or information sought may physically be located in the territory of a foreign signatory.\textsuperscript{74}

For present purposes it is sufficient to indicate that, in this commentator's view, the Supreme Court should hold that the Hague Evidence Convention has no application to discovery or, even if it does, that it has no application to discovery from parties to the litigation who are \textit{ex hypothesi} subject to the in personam jurisdiction of the United States court. But in the United Kingdom, whatever may be the position in the United States, there is no doubt that the Hague Evidence Convention and the statute\textsuperscript{75} which implements it cannot be used to obtain discovery.

The 1975 Act contains no specific reference to the Hague Convention, but it was clearly designed to implement it.\textsuperscript{76} The 1975 Act provides that the United Kingdom court may give effect to a request for evidence by a foreign court for the purposes of civil proceedings which have been instituted or are about to be instituted. The order for obtaining evidence may make provision, inter alia, for the examination of witnesses, either orally or in writing, or for the production of documents. But the order is not to "require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order."\textsuperscript{77} This very obscure phrase was held by the House of Lords in the \textit{Westinghouse} case\textsuperscript{78} to enshrine the distinction between direct evidence (which may be obtained under the Act) and indirect material (which may not be obtained). Further, by section 2(4) of the Act, it is provided that the order giving effect to letters rogatory shall not require a person (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (b) to produce any documents other than particular documents specified in that order as being documents appearing to the court making the order to be, likely to be, in his possession, custody, or power.

While this reflects the Article 23 reservation made by the United Kingdom and relates only to documents, there can be no doubt that

\textsuperscript{74} See \textit{In re} Anschuetz & Co., GmbH, 754 F.2d 602, 611 (5th Cir. 1985); Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct., 788 F.2d 1408, 1411 (9th Cir. 1986); Graco Inc. v. Kremlin, Inc., 101 F.R.D. 503, 519-520 (N.D. Ill. 1984).
\textsuperscript{75} Evidence (Proceedings in Other Jurisdictions) Act 1975, ch. 34.
\textsuperscript{77} Evidence (Proceedings in Other Jurisdictions) Act 1975, ch. 34, § 2(3).
\textsuperscript{78} [1978] A.C. at 547.
under English law the decision of the House of Lords in the Westing-
house case indicates that the combined effect of sections 2(3) and (4) of
the 1975 Act was to confirm that evidence meant evidence in the strict
sense, and that the Act could neither be used for discovery, even in
relation to specific documents, nor used to seek oral depositions for dis-
covery purposes. Accordingly, as Mr. Justice Woolf stated in In re In-
ternational Power Industries NV, it is clear

that pre-trial discovery, as it is known in the United States,
is not an exercise which this court should order to be per-
formed pursuant to letters rogatory, that pre-trial discovery
is distinct from the obtaining of evidence for the trial and
that the approach of this court must be to allow letters roga-
tory only insofar as they are confined to obtaining evidence
and are not requiring the exercise of pre-trial discovery.

It follows from the 1975 Act and the case law that even if the SEC
seeks material in a civil or commercial matter in England from a third
party, it will not be able to execute letters rogatory unless it can show
that the material is required for evidence in the strict sense for the
purposes of the United States proceedings. It is, of course, true that
terminology is not all important, and that at least some of what is de-
scribed as discovery in the United States is in reality intended as evi-
dence for trial. Moreover, it is clear that the court requested should
not undertake a minute examination whether the material is required
as evidence in the strict sense. Lord Keith said in the Westinghouse
case that the court of request "should not be astute to examine the
issues of the action and the circumstances of the case with excessive
particularity for the purpose of determining in advance whether the
evidence of that person will be relevant and admissible."

Consequently, in most of the important cases on the 1975 Act and
the Hague Convention in the English courts, there has been an objec-
tion taken that the material required is for the purposes of discovery
and not evidence. This frequently happens not only when the request is
made during the interlocutory phases of the foreign proceedings, but
also when the material is required for trial, and the proposed witness
objects on the ground that the material is of a "fishing" character.
The Santa Fe case, to be discussed in the next section, shows that these

79 [1985] Butterworth's Co. L. Cas. 128.
80 Id. at 137.
83 See particularly In re Asbestos Ins. Coverage Cases, [1985] 1 W.L.R. 331; In
obstacles are by no means insuperable and that it should be possible to obtain or negate the existence of unlawful insider dealing or conspiracies between named defendants. The evidence may incidentally throw up the identities of unknown purchasers, but it is not likely that this procedure could be used for the purpose of obtaining the names of unknown purchasers.

5. Litigation by the SEC in the United Kingdom

The SEC's first attempt to enforce its powers in the English courts ended in failure. In Schemmer v. Property Resources Ltd., another case arising out of the IOS frauds, the SEC had begun proceedings under the Securities Exchange Act of 1934 against Mr. Robert Vesco and his confederates, alleging an elaborate scheme of fraudulent practices by persons controlling Value Capital Limited, a Bahamian company. The New York District Court appointed Mr. Schemmer as receiver to take possession of the assets of Value Capital Limited and its subsidiaries (including the shares and assets of another Bahamian corporation). In the proceedings in England, Mr. Schemmer sought to be appointed receiver and manager to receive and administer the English assets of the companies over which he had been appointed receiver by the New York court. The SEC's receiver was not recognized in the English proceedings. The relevant company was not incorporated in the United States, and there was no evidence that the courts of the Bahamas would recognize the New York decree. Mr. Justice Goulding said:

The situation relied on . . . is that [the company] is actively or passively concerned in a violation of the laws of a foreign country, and a court in that country has in consequence appointed a receiver of its assets. Under those circumstances (and in the absence of any other ground of foreign jurisdiction) the English court ought not . . . to regard the appointment as having any effect on assets outside the foreign court's territorial limits. A little imagination will show that any different rule might produce a multiplicity of claims and confusing and unnecessary questions of competing priorities.  

In addition, Mr. Justice Goulding said that there was a further ground for denying the cause of action by Mr. Schemmer. He continued:

The Act of 1934 is, in my judgment, a penal law of the

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84 [1975] Ch. 273.
85 Id. at 288. See also In re Lambert & Pinto (Bahamas, 1986, not reported).
United States of America and, as such, unenforceable in our courts . . . [I]t was passed for public ends and . . . its purpose is to prevent and punish specified acts and omissions which it declares to be unlawful. It was, of course, enacted not merely in the interests of the nation as an abstract or political entity, but to protect a class of the public. In that it resembles the greater part of the criminal law of any country. Like many other penal laws, the Act of 1934 also provides in some cases a private remedy available to the victims of the offences which it forbids, and it may possibly be that a private plaintiff who recovers a judgment in a federal court under the Act of 1934 can enforce it by action here . . . [H]ere, however, I have nothing of that sort. Mr. Schemmer comes before this court, in effect, as a public officer charged to reduce the London funds into possession in order to prevent the commission or continuation of offences against federal law. In my judgment, and in the absence of specific legislation founded on treaties, preventive criminal justice is no more a proper subject of international enforcement than retributive criminal justice. The point would be obvious if the plaintiff here were the plaintiff in the district court, namely the commission (in effect the financial police of the American Union) and its character is not altered by the substitution of Mr. Schemmer, the receiver appointed on the commission's application.86

There can be little doubt that according to the traditional rules of the English conflict of laws, the first holding, that an English court would not recognize an American receiver appointed over a Bahamian company was correct, and perhaps should have been predicted; the second holding is in many ways unfortunate, and is an example of the disinclination of the English courts to enforce foreign public laws.87

The next litigation by the SEC in England was more successful. In the Santa Fe case, the SEC brought civil proceedings in New York alleging that insider trading had taken place prior to the announcement of the takeover of Santa Fe by Kuwait Petroleum Corporation. For the purposes of the New York proceedings, the SEC required evidence which was situated in England (i.e., documents and testimony from employees of a Luxembourg bank with a branch in England). Pursuant to letters rogatory from the District Court, the English court made an

86 Id.
order requiring examination of witnesses who had been employed in London by a Luxembourg bank, International Resources and Finance Bank S.A., through whose London branch purchases of stock and options in Santa Fe had taken place. The employees sought to set aside the order requiring their examination on the ground, inter alia, that they were forbidden by Luxembourg law from revealing the identity of clients of the bank. In that case the relevant information related mainly to the operation of the London branch, and there was considerable doubt as to whether Luxembourg law did in fact forbid the disclosure of the information; whether or not it did forbid it, it was held that there was no real or substantial risk of the applicants being charged with any criminal offense in Luxembourg. However, Mr. Justice Drake did accept that there might be circumstances in which it would be against the public interest to order disclosure of confidential information, since there was

a public interest in maintaining the confidential relationship between banker and client, so that wherever a banker seeks to be excused from answering a question which would involve the breach of that confidentiality, it is proper . . . for the court to consider such a request and to judge it in the context of the circumstances in which it is made. There is . . . also clearly a public interest, and a very strong one, in not permitting the confidential relationship between banker and client to be used as a cloak to conceal improper or fraudulent activities, evidence of which would otherwise be available to be used in legal proceedings, whether here or abroad. 88

Guernsey is, strictly speaking, not part of the United Kingdom at all, but one of the Channel Islands, which have a special and peculiar relationship with the United Kingdom based on the historical fact that the Crown has sovereignty over them by right of the Duchy of Normandy. Although its major industries were once tourism and agriculture, in recent years banking has become its main industry, and it is a matter of some regret that the Channel Islands and the Isle of Man have joined Luxembourg, Liechtenstein, Panama, the Cayman Islands and the Bahamas as off-shore depositories of both well-gotten and ill-gotten gains.

In SEC v. Rea Brothers (Guernsey) Ltd. the SEC sought, through letters rogatory issued by the New York court, evidence from a Guern-

sey bank in connection with the *St. Joe Minerals Corporation* case (the same case which gave rise to the *Banca Della Svizzera Italiana* litigation discussed above). When the letters rogatory were issued, the trial was about to begin in New York. One of the purchases which had been made on the basis of allegedly inside information by one of the defendants was on behalf of a company registered in the Cayman Islands and administered in Guernsey by the bank whose evidence was sought. There was evidence in the American proceedings that one of the alleged conspirators was the beneficial owner of the Cayman Islands company, and the evidence sought by the letters rogatory was required to prove or disprove the allegations of misuse of confidential information by two of the insiders. The bank sought to set aside the order giving effect to the letters rogatory on the grounds, inter alia, that it would breach the banking confidentiality in Guernsey and be prejudicial to the banking community in Guernsey and that the letters of request involved "fishing" for evidence, rather than a request for evidence itself. The Deputy Bailiff, in a judgment given in chambers, indicated that he was not concerned "in any way to make a decision which ha[d] as its object the protection of the Guernsey financial and banking business," but he held that the material was sought in order to discover information rather than merely to gather evidence in the pending proceedings. He refused to follow the decision of Mr. Justice Drake in the *Santa Fe* case on the erroneous ground that the issue of "fishing" had not been raised in that case. The SEC appealed from this decision; meanwhile, the trial in New York had been proceeding without the evidence on this aspect, and ultimately Judge Pollack gave judgment against the defendants. The SEC sought an adjournment of the appeal to the Court of Appeal of Guernsey on the ground, inter alia, that developments in the United States (such as a successful appeal to the Circuit Court of Appeals) might ultimately mean that the evidence was in fact required. The adjournment was refused by the Court of Appeal, and since it was accepted that, in the circumstances prevailing, the evidence was not then required, the appeal was dismissed. It would, of course, be inappropriate for someone who was involved in that case to comment upon the judgment at first instance, except to say that some very substantial and important issues were raised by the appeal which were not dealt with on the merits.

The lesson to be drawn from these cases, and particularly from the success in the *Santa Fe* case, is that the only effective method of proceeding in foreign courts is by an appropriate request under the Hague Evidence Convention. This, of course, takes time. However, the com-
plaints by Mr. Fedders that the delays in obtaining the evidence abroad in the Santa Fe case took three years and, accordingly, that these delays severely impaired the SEC's ability to pursue a case and vindicate United States interest is a somewhat parochial view. No one who has had experience with United States proceedings would regard a delay of three years as in any way extraordinary; excessive zeal on the part of United States enforcement officers may well be counterproductive.

6. CONCLUSIONS AND POSSIBILITIES

Each of the hypothetical cases raises the problem of how the SEC can obtain information when there is no personal jurisdiction, or when there is a doubt about its existence, over the person who is known to have, or suspected of having, such information. The difficulties involved in obtaining such material abroad make this commentator very sympathetic to what might otherwise have been regarded as the somewhat questionable exercise of enforcement jurisdiction, as in SEC v. Banca Della Svizzera Italiana, where an extended concept of presence for jurisdictional purposes seems to have been adopted.

Nor should much sympathy be extended to those who seek refuge behind, or claim to be threatened by the application of, penal secrecy laws in off-shore banking centers. It is one thing to pay respect to Swiss secrecy laws; they have their origin in the protection of basic human rights and not in the facilitation of fraud and crime, and Switzerland is a country with a strong international currency and an indigenous banking business. Can the same respect be due the Cayman Islands? The banking business there consists of branches of foreign banks which act largely as accommodation addresses for the transfer of funds. In legal analysis, perhaps, accounts are held there, but in most cases the transfers of money are purely book entries, involving (in the case of dollars) corresponding entries in the books of a United States bank. It will, of course, be objected that today, at least where large sums of money are concerned, all money transfers are book entries, or combinations of book entries. It may be asked whether the authorities of the major currencies of the world (the lead coming perhaps from the United States, the United Kingdom, Switzerland, the Federal Republic of Germany

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90 Perhaps it should also be noted that the expenses of such operations as quoted by Mr. Greene, supra note 71, pp. 348-49 at n.79, will appear quite modest to anyone who has been involved in corresponding United States proceedings.
and Japan) should not now do something to regulate the off-shore activities of their banks and to give them the choice between complying with lawful demands for information in the major international financial centers or ceasing to do business in the off-shore secrecy centers. Very little sympathy need be extended to the supposed dilemma of banks who set out to make profits in the Cayman Islands.

It is regrettable that the SEC's "waiver by conduct" proposals did not achieve acceptance; however, it was entirely predictable that, if the SEC were to go through an exercise of widespread consultation, a concerted lobby would achieve such a momentum of opposition as to kill the proposal. Mr. Fedders' article\textsuperscript{91} lists and summarizes the comments received as a result of the consultation. A glance at the list will show how inevitable the opposition was. Although, there may have been political reasons for the manner in which the exercise was undertaken, the method of consultation doomed it to failure.

It is clear that banks are going to have to accept that the interests of the investigating state are likely to outweigh the interests of both the customer and the state whose secrecy laws are in question. It is notable that the United Kingdom Parliament, in enacting provisions relating to the duties of persons to cooperate with Department of Trade investigations, has enacted that

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a person shall not be treated . . . as having a reasonable excuse for refusing to comply with a request or answer a question in a case where the contravention or suspected contravention being investigated relates to dealing by him on the instructions or for the account of another person, by reason that at the time of the refusal . . . he was subject to the law of a country or territory outside the United Kingdom which prohibited him from disclosing information relating to the dealing without the consent of that other person, if he might have obtained that consent or obtained exemption from the law.\textsuperscript{92}
\end{quote}
\end{quote}

The final phrase means that refusal of the customer or of the foreign authority to consent to disclosure will not exempt the witness from penalties for failure to answer.

It is clear that the Hague Evidence Convention is of limited value in the present context. A cynic may suggest that the present attention given to the Convention in the United States, in the \textit{Aerospatiale} case

\textsuperscript{91} Fedders, \textit{supra} note 89, at 513-23.

\textsuperscript{92} Financial Services Act 1986, ch. 60, § 178(6) (emphasis added).
and related cases, is exclusively due to the desire by foreign defendants in United States proceedings to make the proceedings difficult for plaintiffs and has nothing to do with international judicial cooperation in litigation. But it is clear from the SEC's experience that whilst the Hague Evidence Convention is of some value (as the Santa Fe case shows) it has the following limitations: it can only be used in civil or commercial matters (it may therefore be limited to use in civil suits for injunctions and disgorgement of profits); it cannot be used in most countries for discovery purposes. Nor is there any realistic possibility that the Hague Evidence Convention can be re-negotiated to deal effectively with international securities enforcement. It will remain what it was designed to be: a Convention for the facilitation of evidence gathering in civil and commercial matters. It will not easily be turned into an international convention for the facilitation of cross-border investigation.

It is also probably regrettably true that a new multinational Convention to deal with the present problem is not a realistic target. It seems, however, based on the limited material publicly available, that the bilateral agreements and undertakings have begun to work effectively. The United States-United Kingdom Memorandum of Understanding of September 23, 1986, is a good example and follows earlier precedents. It cannot be doubted that recent events have vindicated its signature. It is not necessary for present purposes to do more than point out the following features of the Memorandum: first, it deals with the exchange of information to secure compliance with the law in relation to securities and commodities; second, the identity of an alleged wrongdoer does not have to be given if the object of the request is to identify a person guilty of insider trading or market manipulation.

Is there anything more constructive that can be put forward? It was suggested earlier in this paper that what distinguished securities enforcement from antitrust enforcement was the greater degree of shared concerns and goals in the former. It is very striking that many of the objections in the exercise of extraterritorial jurisdiction by the United States first arose in the antitrust context, and have, to the detriment of United States interests, influenced foreign relations to the enforcement of securities laws. But securities enforcement is of a different nature, and the increasing internationalization of financial markets is bound to lead to uniformity of standards and regulations. Although states cannot expect to be able to enforce their criminal laws in foreign countries, the underlying basis of reciprocal enforcement of criminal law, from extradition onwards, is the idea that there should be a common approach to the substantive law. In extradition law, and now in
the securities enforcement field, this common standard is called "double criminality." There is a tendency in the papers presented\(^9\) to treat the requirement of double criminality as an unwarranted impediment, but in fact it makes good sense in the field of criminal or quasi-criminal law. It is true that it held up investigations in Switzerland in the *Santa Fe* case, and that only a somewhat strained interpretation of Swiss law ultimately led to the request under the bilateral treaty being granted. But as more states introduce regulations prohibiting insider dealing, and the international markets begin to integrate, the momentum for uniform regulation will develop. Once there are uniform regulations in the major securities markets, then there will be no policy reasons for impeding mutual assistance to reveal wrongdoing. It is only a short step from there to deal on an international and multilateral basis with evasion through the use of offshore accounts.