



LEXSTAT 2009 TNT 95-14

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Tax Notes Today

MAY 20, 2009 WEDNESDAY

**DEPARTMENT:** Court Documents; Other Court Documents

**CITE:** 2009 TNT 95-14

**LENGTH:** 9027 words

**HEADLINE:** #14 2009 TNT 95-14 BUSINESS GROUPS FILE AMICUS BRIEF IN ACTION TO ENFORCE SUMMONS FOR BANK RECORDS. (United States v. UBS AG) (No. 1:09-cv-20423) (United States District Court for the Southern District of Florida) (Section 7604 -- Enforcement of Summons;) (Release Date: MAY 15, 2009) (Doc 2009-11438)

**CODE:** Section 7604 -- Enforcement of Summons;  
Section 7602 -- IRS Examinations

**ABSTRACT:** Five banking and business groups have filed an amicus brief in a U.S. district court in the government's action to enforce a John Doe summons against Swiss bank UBS AG, arguing that enforcement of the summons is inconsistent with the Switzerland-U.S. tax treaty and that compliance with the summons would violate Swiss law.

**GEOGRAPHIC:** United States ; Switzerland

**REFERENCES:** Subject Area:

Criminal violations;  
Fraud, civil and criminal

Cross Reference:

For related coverage, see Doc 2009-11435.

**TEXT:**

UNITED STATES OF AMERICA,  
Petitioner,  
v.  
UBS AG,  
Respondent.

Release Date: MAY 15, 2009

Published by Tax Analysts(R)

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 1:09-CV-20423-GOLD/MCALILEY

**BRIEF OF AMICI CURIAE OF  
INSTITUTE OF INTERNATIONAL BANKERS,  
INTERNATIONAL BANKERS ASSOCIATION OF CALIFORNIA,  
SWISS BANKERS ASSOCIATION,  
THE SWISS-AMERICAN CHAMBER OF COMMERCE, AND  
ECONOMIESUISSE  
IN OPPOSITION TO THE PETITION  
TO ENFORCE JOHN DOE SUMMONS**

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#### INTEREST OF THE AMICI

Amici are (1) two U.S.-based trade associations representing the financial services sector, whose members include, among others, the largest banks in the world, with significant operations in the United States and many other countries, and (2) three international trade associations representing international financial institutions and other businesses that conduct business in Switzerland and/or the United States. Amici share the concern that this matter could set a precedent for imposing conflicting legal obligations that would make it more difficult for their members to operate internationally, and hence would impair the provision of global financial services. Amici's members rely on a stable framework of international law -- including that based on treaties and comity -- to conduct business in multiple jurisdictions. Enforcing the John Doe summons in derogation of the enhanced information exchange provisions in a major tax treaty threatens that legal framework. It also runs the risk that other jurisdictions will follow suit, to the detriment of cross-border commerce. Amici are concerned that the summons will encourage foreign governments to make similar demands on offshore offices of financial institutions with U.S. operations, which would encourage non-resident aliens and foreign entities to withdraw significant deposits from U.S. financial centers.

Amici do not in any way condone the wrongdoing to which UBS AG ("UBS") has admitted as part of its recent settlement with the U.S. Department of Justice. Nor do amici take any position on any factual disputes between UBS and the Internal Revenue Service ("IRS"). The essential question that amici address is whether the IRS may enforce a summons that is contrary to established treaty protocol and principles of comity. Accordingly, amici discuss only the fundamental legal precepts that weigh against enforcement of the John Doe summons.

#### ARGUMENT

The IRS asks this Court to enforce a summons containing a blanket request that is not permitted under the information exchange provisions of the governing tax treaty or any other U.S. tax agreement, and that, contrary to the doctrine of comity, would require compliance in violation of foreign criminal laws. This Court should decline to do so.

First, to enforce the summons in this case, and to permit a sweep of records located in a treaty partner's jurisdiction in violation of that country's laws, would be incompatible with U.S. treaty obligations and should not be permitted under U.S. law. The United States has entered into numerous tax treaties and agreements. Their purpose is to eliminate

tax barriers to international trade and promote the competitive position of U.S. businesses by harmonizing tax regimes among treaty partners and thus ensure that commerce between treaty partner nations will be subject to only one law at a time. A key aspect of those principles are the information-sharing provisions in those treaties and agreements that restrict the type of information collected and prohibit the automatic exchange of all tax-related information collected. Instead, they require the parties to provide mutual assistance in tax investigations only in response to factually specific, narrowly tailored requests. Such agreements also reflect a careful, negotiated balance between tax enforcement and the preservation of financial privacy and data protection in both the United States and abroad.

The U.S.-Swiss Double Taxation Treaty ("U.S.-Swiss DTT") rests on these principles. That Treaty replaced one from the 1950s<sup>1/</sup> and added enhanced information exchange provisions that "expand[] the scope of the exchange of information" between the treaty parties.<sup>2/</sup> Like other bilateral U.S. tax treaties signed in the last 20 years, it limits information exchange to instances in which the treaty partners make targeted requests, and further respects the signatories' financial privacy and data protection laws by providing that information exchange will occur only where there is a particularized basis to reasonably suspect wrongdoing.<sup>3/</sup> (In the U.S.-Swiss DTT, the wrongdoing must be "tax fraud or the like," a threshold somewhat higher than in other U.S. tax treaties.)

Enforcing the IRS summons here would defeat the objective of the administrative assistance provision in the U.S.-Swiss DTT. Notably, if the United States were to receive a similarly broad request from other foreign nation treaty partners, including Switzerland, the United States would reject the request as incompatible with the applicable DTT. And if any foreign nation, including Switzerland, sought to use the U.S. courts to enforce its tax claims, the United States would argue that a U.S. court would not be the appropriate forum for the foreign nation to resolve a claim more appropriately raised through the applicable DTT, and a U.S. court would decline to assist and would instead require the foreign government to proceed under the DTT.

Second, the summons is inconsistent with the well-established doctrine of comity among nations. The IRS is attempting to gather documents through a blanket request for information, in violation of Swiss criminal law and contrary to Switzerland's view -- shared equally by the United States with respect to tax information requests from abroad -- that only focused discovery requests are enforceable. Especially given the existence of a bilateral treaty effectuating that principle, the comity doctrine weighs strongly against enforcement of the summons.

Disregarding established treaty protocols and imposing conflicting obligations upon multinational enterprises, as the IRS urges, also would encourage courts in other jurisdictions to ignore established treaty protocol in taking similar measures against U.S. banks, enforcing subpoenas and similar broad-based information demands served on their overseas offices. Such a result not only would erode the primacy of U.S. law and treaty protocol, but could encourage non-resident aliens and foreign entities to withdraw significant deposits from U.S.-based institutions to the detriment of the U.S. economy. Further, imposing obligations on foreign businesses to violate their home country laws would discourage such businesses from entering the U.S. market. Finally, eschewing the United States' obligations under the information exchange provisions of the U.S.-Swiss DTT would raise doubts about similar provisions in other U.S. tax treaties, discouraging other nations from entering such treaty arrangements with the United States.

#### I. In Light of the Terms and Purpose of the U.S.-Swiss DTT, the Summons Should Not Be Enforced.

The information-sharing provision in the U.S.-Swiss DTT was the product of extended deliberation over a 17-year period.<sup>4/</sup> Ultimately, the two nations agreed that (1) financial privacy laws would not be set aside in the absence of a particularized showing of wrongdoing, and (2) regardless of whether privacy laws were at issue, each nation would not facilitate a fishing expedition by the other, as only specific and focused requests for information would satisfy the treaty. These limitations were incorporated into provisions in the U.S.-Swiss DTT limiting administrative assistance to circumstances in which the requesting state has a "reasonable suspicion" of "tax fraud or the like."<sup>5/</sup> Because the IRS's blanket request for information here lacks any particularized showing of wrongdoing by the underlying accountholders, enforcing the summons would circumvent the specific terms of the U.S.-Swiss DTT.

Permitting such a request would also frustrate the expectations of the treaty's drafters. Almost every double taxation treaty incorporates provisions for the exchange of information.<sup>6/</sup> However, treaty negotiators generally "narrowly define the circumstances in which an exchange is required," Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 501 (2007), especially when "[o]ne state may have bank secrecy legislation that it wishes to maintain," U.N. Dep't of Econ. & Soc. Affairs, *Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries* 58, paragraph 9 (2003). Resolving such disputes "requir[es] sensitive political and economic choices." *Id.* The lengthy negotiating process that produced the U.S.-Swiss DTT incorporated precisely this type of specific limitation. As the ratification history of the U.S.-Swiss DTT shows, the Senate recognized that "the

constraints of Swiss law" restricted the mutual exchange of information, S. Exec. Rep. No. 105-10, at 10 (1997), and also that "exchange of information will not be possible for the purpose of routine enforcement of the tax laws," *id.* at 9. This Court should give substantial weight to such congressional expectations. *United States v. Stuart*, 489 U.S. 353, 367 & n.7 (1989).

Moreover, enforcing the summons would undermine the force of the U.S.-Swiss DTT. Parties to a treaty have a duty to interpret and apply it in good faith, in order to give effect to the agreement's purposes and to safeguard international relations. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW section 321 (1987). In the context of double taxation treaties in particular, the Supreme Court has held that a treaty "should generally be 'construe[d] . . . to give effect to the purpose which animates it.'" *Stuart*, 489 U.S. at 368 (quoting *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940)). Here, the IRS is not just proposing a discovery procedure distinct from the DTT; it seeks to circumvent the treaty in a way that undermines two of its significant purposes. First, the U.S. government's blanket request for the respondent's customer list is just the type of fishing expedition prohibited by the U.S.-Swiss DTT, and the similar information exchange provisions in other U.S. DTTs: "to throw a wide dragnet and designate all transactions" as suspect is inconsistent with the structure of the treaty.<sup>7/</sup> Second, the request seeks "a serious deterioration of banking confidentiality," notwithstanding the DTT's assurances that the United States would respect such confidentiality unless it had individualized suspicion of tax fraud or the like.<sup>8/</sup>

Enforcing the summons also would frustrate the U.S. interest in imposing limitations on the scope of permissible requests for information directed to U.S. businesses. U.S. DTTs "generally do not provide explicitly for automatic or routine exchanges" of broad categories of tax information. *Andersen*, *supra* note 6, paragraph 24.01 [1][a][i]. Instead, requests typically must "specifically identify both the taxpayer and the information requested." *Zagaris*, *supra* note 7, at 349.

This position is reflected in the official technical notes to the U.S. Model Income Tax Convention of November 15, 2006, which "would not support a request in which a Contracting State simply asked for information regarding all bank accounts maintained by residents of that Contracting State in the other Contracting State, or even all accounts maintained by its residents with respect to a particular bank."<sup>9/</sup> The request here -- for information on "all accounts maintained by [U.S.] residents with respect to a particular bank" -- is precisely what the technical notes to the U.S. model treaty preclude.<sup>10/</sup>

Nor is this concern unique to the United States. The OECD's model Tax Information Exchange Agreement ("TIEA") -- widely viewed as reflecting the most current views of the international community in this area -- requires specification of "the identity of the person under examination or investigation" as well as "the tax purpose for which the information is sought."<sup>11/</sup> Highlighting the importance of information exchange issues today, the OECD commentary on its model DTT's information exchange provisions further explains that "Contracting States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer."<sup>12/</sup> Recently, Switzerland and the United States have entered into negotiations to update their DTT, which Switzerland has said are intended to conform the information exchange provisions in the U.S.-Swiss DTT to the OECD model.<sup>13/</sup> The United States has welcomed this development,<sup>14/</sup> which, significantly, would yield an information sharing regime that still would not allow a request like the one the IRS has made here.

Tellingly, when foreign nations seek to use U.S. courts to enforce their tax interests, U.S. courts not only refuse, but -- mirroring Switzerland's position in the instant litigation -- instruct those foreign nations that the correct way to pursue their interests is through the mechanisms set forth in the applicable tax treaties. In deference to such international tax treaties, U.S. courts long have applied the common law "revenue rule" that "generally bar[s] [U.S.] courts from enforcing the tax laws of foreign sovereigns." See *Pasquantino v. United States*, 544 U.S. 349, 352-53 (2005); accord *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1256 (11th Cir. 2003). U.S. courts therefore are "wary . . . of becoming the enforcer of foreign tax policy," beyond the scope of the assistance that the United States has agreed to provide via treaty. *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 113 (2d Cir. 2001). Courts "recognize the give-and-take of policy priorities involved in the negotiating of tax treaties and are therefore reluctant to upset the balance negotiated between [the] two governments." *Id.* at 122 n.22.<sup>15/</sup>

Efforts by the United States to obtain information located abroad by using the judiciary to bypass, rather than proceeding through, applicable tax treaties, are inconsistent with these principles. Just as allowing a foreign government to circumvent a treaty with the United States by resorting to litigation would undermine the applicable, and carefully crafted, bilateral treaty regime, so too would allowing the U.S. government to circumvent a treaty regime and thereby

upset the balance (endorsed by the U.S. executive and legislative branches) achieved between the United States and Switzerland, and by extension between the United States and many other of its tax treaty partners.

In sum, the John Doe summons is incompatible with the manifest import of the U.S.-Swiss DTT that rejects blanket requests like the one the IRS has made here, respects Swiss criminal laws, and contains no provision reserving for the IRS the right to make any requests outside of the treaty mechanism, let alone a request that would undermine the limits on information exchange that the treaty provides./16/

## II. Enforcement of the Summons Would Be Inconsistent with the Doctrine of Comity.

The John Doe summons at issue here also directly conflicts with the comity doctrine, which obligates courts of the United States to give due regard to the legislative, executive, and judicial acts of foreign governments. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). That doctrine is at its strongest where application of U.S. law would create a "true conflict between domestic and foreign law." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 798 (1993) (internal quotation marks omitted). As in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), respondent here would be "subject to criminal sanctions in Switzerland because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws." *Id.* at 211. This is a true conflict: the "fear of criminal prosecution constitutes a weighty excuse for nonproduction," one that is "not weakened because the laws preventing compliance are those of a foreign sovereign." *Id.*

The problem presented here is acute: the summons seeks "to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) (per curiam). There is "little doubt. . . that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders," and "[t]he legal expression of this widespread sentiment is found in basic principles of international comity." *Id.* at 498-99. As the Supreme Court has recognized, a "federal court in this country" should not "treat all the affairs of a [foreign] branch bank the same as it would those of [a U.S. branch]," because "overseas transactions are often caught in a web of extraterritorial activities and foreign law beyond the ken of our federal courts or their competence." *United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965). Thus, courts may not freely order acts if they "would violate foreign law, or place respondent under any risk of double liability." *Id.* (citation omitted)./17/

In this case, each of the five factors set forth in the Restatement (Third) of Foreign Relations Law section 442(1)(c) (1987) as relevant to the comity analysis supports rejection of the summons: (1) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located;" (2) "the importance to the investigation . . . of the documents . . . requested;" (3) "the degree of specificity of the request;" (4) "whether the information originated in the United States;" and (5) "the availability of alternative means of securing the information."

Factor 1: Important interests of the United States and the state where the information is located. The U.S.-Swiss DTT dispositively resolves where to strike the balance between the U.S. interest in tax enforcement and the Swiss interest in financial privacy and avoiding indiscriminate discovery. When a treaty regulates the disclosure of information, complying with its terms necessarily "entails no harm to protected interests of a state party because, by definition, that state has agreed to it." David J. Gerbert, *International Discovery After Aerospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521, 544 (1988). Whether information located in Switzerland and possessed by a resident of Switzerland (i.e., the bank) would be obtainable by the IRS is the very question the U.S. government faced when negotiating the U.S.-Swiss DTT. The U.S. government there agreed that it would respect Swiss criminal laws and the Swiss view of the proper scope of discovery requests, and that the U.S. interest in tax enforcement would be deemed great enough to tip the scales in favor of production only in cases where there is a "reasonable suspicion" of "tax fraud or the like." Significantly, under those circumstances the normal restrictions on information transfer under Swiss law would not apply under the DTT.

Because the U.S. government, through 17 years of negotiations, already calibrated the balance between its own interest in tax enforcement and Switzerland's interests in maintaining financial privacy and in freedom from indiscriminate information requests, this Court need look no farther than the U.S.-Swiss DTT to determine how that balance weighs in this case. "Where treaties exist between nations and a dispute arises because of practices specifically excluded or differentiated in the agreement's obligations, courts should defer to those concrete displays of national interests."/18/ This Court should refuse to enforce a blanket document request and to order a violation of foreign law outside the scope of an existing taxation treaty, because "such treaties and agreements . . . represent the best method of fostering comity." Jones, *supra* note 18 at 500./19/

Looking to the DTT to set the appropriate guidelines for what may be obtained through a summons is consistent with the approach courts have taken domestically with respect to information exempt from disclosure under the Freedom of Information Act ("FOIA"). FOIA does not bar the service of subpoenas on the government, but nonetheless it is improper "to make an end run around FOIA" by using a subpoena to seek government information exempt from FOIA disclosure. *In re Al Fayed*, 36 F. Supp. 2d 694, 695-96 (D. Md. 1999), *aff'd sub nom. Al Fayed v. United States*, 210 F.3d 421 (4th Cir. 2000). As in the FOIA context, when treaty partners have reached a "judgment on the optimum balance between secrecy and disclosure," courts should defer to that balance in considering whether to enforce a summons inconsistent with the treaty regime. *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 596 (E.D. Pa. 1980).

On the other hand, the countervailing foreign interest is heightened where, as here, the summons would apply extraterritorially to compel unlawful action by a foreign entity in its home country. In *In re the Matter of Tax Liabilities: John Does*, No. C-88-0137, 92 TNI 26-24 (N.D. Cal. 1992), when the court was faced with the prospect of forcing Bank of America to violate the laws of another nation, the court declined to do so. There, Hong Kong -- like the Swiss government here -- filed an amicus brief and provided the U.S. State Department with a diplomatic note, both objecting to enforcement of the John Doe summons. The court held that Hong Kong's protest "manifestly establish[ed] that this is a matter of significant interest to Hong Kong" -- such that, "[a]lthough the interest of the IRS is clearly an important one, in balancing the competing interest here the Court is satisfied that the demonstrated interest of Hong Kong outweighs the interest of the IRS." 29 TNI 26-24, at 6. Given this treatment of a U.S. company, a fortiori this Court should not force a foreign company to violate its own home country's law./20/

Factors 2, 3 & 4: Importance of the documents to the investigation, degree of specificity of the request, and origins of information. Of all the cases in which a summons might issue, here the specificity of the request, and the importance of the information requested, is at its lowest. The request is indisputably general and is accompanied by no showing of individualized suspicion or cause: It seeks disclosure of the bank records of tens of thousands of unnamed accountholders, identified only by general descriptions. None of these persons is identified, no specific allegation against any person is made, and no attempt is made to ascertain how many persons there might be, let alone if any might or might not be underreporting their income. All of the records sought originated and are maintained in another country. Under these circumstances, the IRS can scarcely claim that the records sought are so crucial to its law enforcement interests as to support ignoring the countervailing interests of another sovereign. In just such circumstances, the court in *In re the Matter of Tax Liabilities: John Does*, 92 TNI at 26-24, rejected a similar John Doe summons (seeking information from a Bank of America branch in Hong Kong), because the "summons which the IRS seeks to enforce . . . is generic both in its terms and its purpose" and does not "seek evidence of particular identified transactions."/21/

Factor 5: Alternative means to obtain the information. As the D.C. Circuit noted in *In re Sealed Case*, 825 F.2d at 498, it is quite "impossible for the bank to comply with the [court's] order without violating the laws of [Switzerland] on [Switzerland's] soil. . . . The executive branch may be able to devise alternative means of addressing this problem, but the bank cannot." Here, the U.S. government has a panoply of investigative tools at its disposal, specifically the mechanisms it negotiated in the U.S.-Swiss DTT itself. Indeed, the United States and Switzerland now are negotiating for even broader information sharing that will expand the options available to the IRS, as discussed below -- although, even under this new regime to be based on the OECD model (which the United States has endorsed), the type of blanket request used by the IRS here would not be available.

### III. Enforcing the Summons Would Undermine Important Public Policy Goals.

#### A. Disrupting treaty networks and ignoring principles of comity would have detrimental effects on U.S. businesses and the U.S. economy.

The United States has entered into DTTs and TIEAs with many nations to further important commercial and diplomatic goals. As national economies have become more interdependent, business is increasingly conducted across boundaries, and "taxation has become an increasingly international endeavor." Andersen, *supra* note 6, paragraph 1.01 [1]. Nations "rely on bilateral income tax treaties . . . as the primary means . . . to remove tax barriers to international trade," *id.*, and "[a]n active treaty program" is important to "the competitive position of U.S. businesses" and "the overall international economic policy of the United States." Berman, *supra* note 4, at 1065.

Here, the John Doe summons would undermine the primacy of such tax treaties by setting a precedent for treaty partners to act outside of, and contrary to, bilateral agreements governing information exchange. Worldwide financial

stability requires a system "in which financial institutions can perform their key functions -- domestic and international intermediation, wealth and risk management -- without disruption."/22/ "The first concern of any international investor is that a system of predictable and enforceable rules be in place . . ."/23/ These concerns are especially important to international banks and foreign enterprises choosing "to make investments in the U.S. economy" or "to fund . . . U.S. businesses instead of subsidiaries doing business in other parts of the world."/24/ International financial institutions will be reluctant to operate in nations where they cannot rely on treaty standards.

The problem is compounded where nations not only disregard established treaty protocols, but in so doing impose their laws extraterritorially and in conflict with those of another sovereign. The International Chamber of Commerce has observed "the negative impact [of] the extraterritorial application of national laws," which "frequently subjects companies to conflicting or overlapping legal requirements, fosters unpredictability, [and] increases the risks involved in commercial activities."/25/ Such regulatory uncertainty "discourages international businesses from engaging in trade and investment and distorts trade and investment decisions by international businesses."/26/ When companies are placed in an "impossible quandary[,] where compliance with one state's laws constitutes a violation of another's," they may exit the market./27/ This result would disrupt the interconnected and stable markets that are built through treaty networks.

Disregard of taxation treaties by U.S. courts, moreover, could create problems for U.S. companies operating abroad. By channeling evidentiary demands, the current treaty system shields U.S. businesses from the same "impossible quandary." Allowing the IRS to abandon that framework would leave U.S.-based companies with overseas operations unprotected against similarly burdensome demands from foreign governments -- even demands inconsistent with U.S. law. "Making document production a game to determine which nation can squeeze an individual or corporation hardest with sanctions, penalties, or imprisonment does not advance the overall interests of justice." Jones, *supra* note 18, at 504.

If other countries treat banks with U.S. locations in the manner pursued by the IRS here -- that is, if they seek documents that banks maintain in the United States by broadly invoking their jurisdiction over bank branches outside of the United States/28/ -- the ability of banks to provide cross-border financial services would be impaired, and "the United States' receipt of international capital will . . . diminish." Zagaris, *supra* note 7, at 362. Indeed, U.S. financial centers would likely suffer significant capital outflows./29/

B. The summons undermines the U.S. interests in both obtaining and controlling the flow of tax information through bilateral treaties.

The mutual exchange of information among treaty partners is a "cornerstone of United States income tax treaty policy,"/30/ as such provisions are the agreed upon source "of the extraterritorial tax information countries receive." Steven A. Dean, *The Incomplete Global Market for Tax Information*, 49 B.C. L. REV. 605, 649 (2008). By eschewing the treaty process for a summons that is incompatible with the treaty, the IRS jeopardizes the effectiveness of the international tax information-sharing regime. As John Harrington, the U.S. Treasury's leading international tax attorney, has explained,

A healthy information exchange relationship requires us to maintain good relations with our treaty and TIEA partners. Even an ideally drafted agreement is of limited value if the tax authorities do not have a cooperative relationship. For example, if a treaty or TIEA partner believes that the information exchange relationship is not respected or appreciated by the United States, this may have a chilling effect on exchange of information on request. . . ./31/

Showing a lack of deference to the treaty process also may have broader implications, such as making it more difficult for the United States to negotiate other treaties./32/ In the common law "revenue rule" context, this Court has recognized that providing judicial remedies, instead of requiring foreign nations to proceed through applicable tax treaties, "would eliminate [foreign nations'] incentive to negotiate a tax treaty." *Republic of Ecuador*, 188 F. Supp. 2d at 1365.

Finally, the handling of confidential information is "one of the most important features of a tax treaty from the standpoint of the United States." Berman, *supra* note 2, at 1066. Many countries, including the United States, recognize privacy rights in financial information. Out of 83 countries in a recent OECD study, all but 22 had enacted statutes to reinforce common-law or contractual financial privacy rules,<sup>/33/</sup> and many restricted the circumstances in which bank information is available to foreign nations for the purpose of tax administration.<sup>/34/</sup> The IRS's attempt to bypass the treaty mechanism complicates negotiations with these nations and undercuts the balance the United States has struck in this delicate area.

#### CONCLUSION

The petition for enforcement of the summons should be denied.

Dated: May 15, 2009

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#### FOOTNOTES

<sup>/1/</sup> Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., July 9, 1951, 3 U.S.T. 3972.

<sup>/2/</sup> Tax Convention, U.S.-Switz., Oct. 2, 1996, S. Treaty Doc. No. 105-8, at vii (1997) (Letter of Submittal).

<sup>/3/</sup> Similar information exchange provisions appear in all 19 tax treaties signed by the United States since 1996. See Rufus V. Rhoades & Marshall J. Langer, U.S. International Taxation and Tax Treaties section 40.12 (Matthew Bender, 2009) (listing Austria, Switzerland, Thailand, Turkey, Ireland, South Africa, Estonia, Latvia, Lithuania, Venezuela, Denmark, Luxembourg, Slovenia, United Kingdom, Japan, Bangladesh, Belgium, Bulgaria, Iceland).

<sup>/4/</sup> The negotiations "were not easy, nor were they quick," taking "17 years to reach a successful conclusion." Daniel M. Berman, *Covering the World: The Expanding U.S. Tax Treaty Network*, 74 TAXES 1064, 1070 (1996). The information-exchange provision was "[o]ne of the most contentious parts" of the negotiations. Beckett G. Cantley, *The New Tax Information Exchange Agreement: A Potent Weapon Against U.S. Tax Fraud?*, 4 HOUS. BUS. & TAX L.J. 231, 235-36(2004).

/5/ See Mutual Agreement of January 23, 2003, Regarding the Administration of Article 26 (Exchange of Information) of the Swiss-U.S. Income Tax Convention of October 2, 1996, RIA Int'l Tax Treaty 1229, paragraph 5.

/6/ See Dennis D. Curtin, Exchange of Information Under the United States Income Tax Treaties, 12 BROOK. J. INT'L L. 35, 41 (1986); Richard E. Andersen, Analysis of United States Income Tax Treaties, paragraph 1.02[1][a] (updated 2008).

/7/ Bruce Zagaris, The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots?, 35 GEO. WASH. INT'L L. REV. 331, 362 (2003).

/8/ Id.

/9/ U.S. Dep't of the Treasury, United States Model Technical Explanation Accompanying the United States Model Income Tax Convention of November 15, 2006, 86 (2006), at <http://www.ustreas.gov/press/releases/reports/hp16802.pdf> ("U.S. Model TE") (emphasis added).

/10/ Id.

/11/ OECD, Agreement on Exchange of Information on Tax Matters 7 (2002), at <http://www.oecd.org/dataoecd/15/43/2082215.pdf> ("OECD Model Agreement"). The OECD is the Organization for Economic Co-operation and Development; it has 30 member states, including the United States. One of its most important roles has been to develop a model tax treaty that has been the basis for hundreds of bilateral agreements. "Because the OECD Model Treaty is under regular review, this model treaty has become the real 'yardstick' for constructing and revising bilateral income tax treaties around the world." William P. Streng, U.S. Tax Treaties: Trends, Issues, & Policies on 2006 and Beyond, 59 SMU Law Review 853, 862 (Spring 2006).

/12/ OECD, Model Tax Convention on Income and Capital: Condensed Version 349 (2008), at <http://www.oecd.org/dataoecd/14/32/41147804.pdf>. For this purpose, the term "a given taxpayer" does not refer to all taxpayers from the contracting state, but instead means a specifically identified taxpayer.

/13/ See Media Release, Federal Dep't of Foreign Affairs (Switz.), Switzerland to Adopt OECD Standard on Administrative Assistance in Fiscal Matters (Mar. 13, 2009), at <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=25863>.

/14/ See Press Release, U.S. Dep't of the Treasury, U.S., Switzerland Begin Negotiations to Bolster Tax Information Exchange (Apr. 7, 2009), at <http://www.treas.gov/press/releases/tg85.htm>.

/15/ See also Republic of Ecuador v. Philip Morris Cos., 188 F. Supp. 2d 1359, 1367 (S.D. Fla. 2002) (holding that a foreign state's "proper recourse" is "not in the courts but rather in negotiating a tax treaty"), *aff'd sub nom. Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003). When the United States wants to reserve for itself the right to serve a subpoena outside of the treaty mechanism, it knows full well how to do so. See, e.g., Tax Implementation Agreement Between the United States of America and American Samoa, 1988-1 C.B. 408, art. 4, para. 5 (1988) (providing that "notwithstanding the [information exchange mechanisms in the TIA], the United States may exercise its rights under [the Internal Revenue Code to issue, inter alia, a John Doe summons] . . . to obtain information in [the foregoing jurisdictions] without resorting to the procedures set forth in this Agreement.").

/16/ United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir. 1981) recognized that even if the IRS were permitted in certain instances to serve a summons outside of the U.S.-Swiss DTT, the IRS still could not use a summons in a manner that would "negate the very purpose of the treaty." *Id.* at 1286 n.4 (quoting U.S. v. A.L. Burbank & Co. Ltd., 525 F.2d 9, 13 (2d Cir. 1975)), *In Vetco*, the request -- narrowly targeted to reach information that should have been maintained in the United States by Swiss subsidiaries of a U.S. corporation for whom there was clear evidence of fraud -- was held enforceable because it furthered the U.S.-Swiss DTT's purpose. *Id.* at 1286 & n.4. But here, the John Doe summons, a broad, blanket request, not supported by reasonable suspicion of "tax fraud or the like" for each (or, indeed, any) of the thousands of accountholders it covers, would improperly "negate the very purpose of the treaty."

/17/ The decisions in United States v. Bank of Nova Scotia (In re Grand Jury Proceedings), 691 F.2d 1384 (11th Cir. 1982) ("Nova Scotia I") (relating to documents in the Bahamas), and United States v. Bank of Nova Scotia (In re Grand Jury Proceeding), 740 F.2d 817 (11th Cir. 1984) ("Nova Scotia II") (relating to documents in the Caymans), which held certain grand jury subpoenas not to violate comity, are inapposite. There, at the end of the day "the Governor of the Islands, pursuant to . . . the [Caymans] confidentiality statute, authorized the disclosure of the subpoenaed documents," 740 F.2d at 821, and likewise "the Attorney General of the Bahamas authorized the Bank to

release the documents," *id.* at 820 n.2. Here, Switzerland has made clear that the documents cannot be released. The Swiss interest in privacy is thus far stronger, as other courts have recognized. See, e.g., *In re Sealed Case*, 825 F.2d at 498 (distinguishing *Nova Scotia I & II*); *United States v. First Nat'l Bank.*, 699 F.2d 341, 347 (7th Cir. 1983) (distinguishing *Nova Scotia I*).

/18/ C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 506 (1992); see also David E. Teitelbaum, Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 861-62 (1986) (explaining that it "would be insupportable for a court to attempt to 'balance' . . . political choices when two nations have [already done so]. . . . To the extent that the problem requires a political resolution, the courts should recognize their limited authority and attempt to mold their approach to leave political considerations to the other branches").

/19/ In *Nova Scotia I* and *Nova Scotia II*, by contrast, the Court did not have the benefit of an available treaty to guide its application of the comity factors. Those cases were decided in 1982 and 1984, before U.S. agreements with the Bahamas and Caymans went into effect. See U.S. Dep't of State, *Mutual Legal Assistance (MLAT) and Other Agreements*, at [http://travel.state.gov/law/info/judicial/judicial\\_690.html](http://travel.state.gov/law/info/judicial/judicial_690.html) (last viewed May 11, 2009).

/20/ See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW section 403, cmt. g and Illus. 6 (1987). (regarding how competing state interests should be reconciled).

/21/ By contrast, *Nova Scotia I* and *II* considered a specifically targeted subpoena, issued by a grand jury, investigating a particular bank customer's involvement in narcotics trafficking. See *Nova Scotia I*, 691 F.2d at 1386. The "vital role the grand jury plays in our system of jurisprudence" distinguished this case from the broad-based tax related search sought here in the absence of a particularized showing of wrongdoing. *Id.* at 1387.

/22/ Alexei Kireyev, *Liberalization of Trade in Financial Services and Financial Sector Stability 3* (IMF Working Paper WP/02/138, Aug. 2002), at <http://www.imf.org/external/pubs/ft/wp/2002/wp02138.pdf>.

/23/ U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty 3* (Oct. 2008), at [http://www.ita.doc.gov/investamerica/Litigation\\_FDI.pdf](http://www.ita.doc.gov/investamerica/Litigation_FDI.pdf).

/24/ *Id.* at 5.

/25/ Int'l Chamber of Commerce, *Task Force on Extraterritoriality, Policy Statement: Extraterritoriality and Business 1* (July 13, 2006), at <http://www.iccwbo.org/uploadedFiles/ICC/policy/trade/Statements/103-33%205%20Final.pdf>.

/26/ *Id.* at 2.

/27/ *Id.* at 3; see also Daniela Levarda, Note, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery*, 18 FORDHAM INT'L L.J. 1340, 1340, 1342 (1995) (explaining that "[e]xtraterritorial discovery orders issued unilaterally by domestic courts are a primary source of conflict in international litigation," and this conflict "has become an impediment to international economic development.").

/28/ For example, Mexico has expressed an interest in a broad based exchange of tax information with the United States, see Letter from A. Carstens, Secretary of Finance to T. Geithner, Secretary of the Treasury (Feb. 9, 2009), and therefore might be tempted to serve orders on offices of U.S. banks in Mexico, requiring those offices to provide records of accounts established by their citizens in the United States.

/29/ See *Members of Congress Oppose Reporting Requirements for Interest Paid to NRAs*, TAX NOTES TODAY, Jan. 9, 2003, 2003 TNT 6-38 (quoting a letter signed by 17 members explaining that "American financial institutions have attracted approximately one trillion dollars from overseas," and that automatic information sharing on U.S. deposits from non-resident aliens would "drive capital to other jurisdictions").

/30/ Curtin, *supra* note 6, at 41; accord Andersen, *supra* note 6, paragraph 1.02[1][a]; see also IRS, *United States Income Tax Treaties -- A to Z* (Dec. 18, 2008), at <http://www.irs.gov/businesses/international/article/0,id=96739,00.html> (listing 66 current U.S. tax treaties).

/31/ U.S. Dep't of the Treasury, Testimony of Treasury Acting International Tax Counsel John Harrington Before the Senate Finance Committee on Offshore Tax Evasion (May 3, 2007), at <http://www.treas.gov/press/releases/hp385.htm>.

/32/ The current nominee to be Legal Adviser of the State Department has stated this principle in broader terms. See Harold Hongju Koh, On American Exceptionalism, 55 STAN. L. REV. 1479, 1500-01 (2003) (noting that "[u]nilateral. . . decisions to break or bend one treaty commitment thus rarely end the matter, but more usually trigger vicious cycles of treaty violation," and that a United States perceived as "contemptuous of both its treaty obligations and its treaty partners" will face substantial difficulties in obtaining future assistance, and cannot expect other nations "to help it solve the myriad global problems that extend far beyond any one nation's control").

/33/ OECD Global Forum on Taxation, Tax Co-Operation: Towards a Level Playing Field, tbl. B.1 (2008) (including, among others, Argentina, Austria, Chile, China, Costa Rica, Cypress, Czech Republic, Denmark, Finland, France, Greece, Guatemala, Iceland, Korea, Lichtenstein, Luxembourg, Malaysia, Mexico, Norway, Panama, Philippines, Poland, Portugal, Russian Federation, Singapore, Spain, Sweden, Switzerland, Turkey, the United States, and Uruguay).

/34/ Id. at tbl. B-2 (for example, nations that limit information sharing to criminal tax matters include, among others, Austria, Belize, Liechtenstein, Luxembourg, New Zealand, Switzerland and Uruguay; others, such as Hong Kong and Cyprus, require a domestic tax interest before allowing information sharing).

END OF FOOTNOTES

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