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U.S.-Swiss Relations in the Context of Swiss Banking Secrecy

Until World War I, bilateral relations between the United States and Switzerland could be described as rather friendly. Often referred to as 'sister republics,' the two countries shared common democratic values and a sense of uniqueness with respect to their republican governments in a world dominated by autocracy. The first serious rupture between the two countries occurred during and in the immediate aftermath of World War II. The major cause of this rupture was the refusal of Switzerland to participate in the Safehaven program, designed to track down and block German assets in neutral countries and later to use them for post-war reparations. The repercussions of the involvement of Switzerland in the transfer of Nazi gold as well as the safekeeping of German assets had profound consequences for U.S.-Swiss relations in the 1990s, fueling a conflict over the dormant accounts of holocaust victims. All major disagreements between the United States and Switzerland are connected to the concept of Swiss banking secrecy, which is defined in a most rigorous way compared to international legal standards. The implementation of Swiss banking secrecy as defined in Swiss Banking Law facilitates tax misconduct by foreign nationals. Since 2007, the bilateral relations between Switzerland and the U.S. have been determined by ongoing IRS investigations into the involvement of Swiss banks in aiding U.S. citizens in tax evasion and tax fraud, which is facilitated by the enforcement of stringent bank secrecy laws within the Swiss banking system. The U.S. legal actions against Swiss banks proved that the American government is determined to enforce its laws in Switzerland despite it being a sovereign foreign country. The conflicts with the U.S. over banking secrecy, which, among other findings, unveiled the conduct of the Swiss during World War II, have shed light on the true nature of this phenomenon. Switzerland is struggling to defend the values so fundamental to its banking culture, but at the same time it is forced to succumb to international and especially U.S. pressure and implement various internal and international regulations, which impose a constraint on the practice of banking secrecy.

Introduction

Until World War I, bilateral relations between the United States and Switzerland could be described as rather friendly. Often referred to as 'sister republics,' the two countries shared common democratic values and a sense of uniqueness with respect to their republican governments in a world dominated by autocracy (Hutson 66). A certain breach in this amicable relationship appeared when the United States entered World War I and restricted exports to neutral Switzerland, which in turn never ceased to trade with the central powers. However, a more serious rupture between the two countries occurred during and in the immediate aftermath of World War II. Swiss exports aided the Nazi war effort throughout the whole war, but the major cause of this rupture was the refusal of Switzerland to participate in the Safehaven program, designed to track down and block German assets in neutral countries and later to use them for post-war reparations. The repercussions of the involvement of Switzerland in the transfer of Reichsbank's gold as well as the safekeeping of German assets had profound consequences for U.S.-Swiss relations in the 1990s, fueling a major conflict over the dormant accounts of Holocaust victims.

All major disagreements between the United States and Switzerland are connected to the concept of Swiss banking secrecy, which is defined in a most rigorous way compared to international standards practiced among developed countries worldwide (Guex, "The Origins…" 244). The implementation of Swiss banking secrecy as defined in Swiss Banking Law facilitates tax misconduct by foreign nationals. A recent dispute between the United States and Switzerland is a direct result of the persistent enforcement of stringent bank secrecy laws within the Swiss banking system. Since 2007, the bilateral relations between the two countries have been on a less friendly footing and are determined by ongoing IRS investigations into the involvement of Swiss banks in aiding U.S. citizens in tax evasion and tax fraud.

The origins and the foundations of Swiss banking secrecy law

A common misperception prevails about the origins of Swiss banking secrecy. It refers to laws passed in 1933 in Nazi Germany, which forced domestic residents to disclose all their foreign assets and enabled the confiscation by the regime of foreign-held assets of Jewish residents. A banking secrecy law was introduced in 1934 supposedly in order to protect Jewish money deposited in Swiss banks as a result of capital flight from Nazi Germany. This misperception was fabricated by the Swiss banks themselves in the 1960s and officially endorsed by the Swiss Federal Council in 1970 (Guex, "The Origins…" 265). It is still widespread in Swiss society, in both popular and scientific publications. Rolf H. Weber, in his 2002 article published by the American Bar Association, quotes precisely this reason as the cause of banking secrecy provisions in the 1934 Swiss Banking Act (Weber 1215).

Swiss banking secrecy law was not introduced in 1934; its origins are much older. The Swiss Banking Act of 1934 consolidated and fortified regulations pertaining to banking secrecy which were already common practice within the Swiss banking sector. Banking secrecy in Switzerland has a long tradition. It was incorporated into cantonal law as early as the 18th century, when Switzerland's self-governing cantons codified the already practiced culture of discretion towards aristocrats and royalty who entrusted Swiss banks with their money. Since the sixteenth century, Swiss economies generated a surplus of savings which were put to the use of private banks. The trade of banking in Switzerland flourished throughout the seventeenth century, when Swiss financial institutions supplied the capital needed to finance the French Court (Gantenbein et al. 38). The service provided to the French kings had to be done with the utmost discretion and therefore contributed to creating the foundations of banking secrecy in Switzerland. In 1713, the Great Council of Geneva adopted banking regulations which required the maintenance of customer data, at the same time prohibiting the release of this information by banks without the approval of the Great Council.

General provisions referring to the rights to privacy of personal information were incorporated in the Swiss constitution of 1848 as well as the Swiss Civil Code of 1907. Article 28 of the Swiss Civil Code states that "any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement,"[1] therefore granting any person whose privacy has been violated the right to undertake legal action. Until 1934, banking secrecy was therefore subject to civil, rather than criminal law. The connection to criminal law was first made with the codification of banking law by means of the Federal Act on Banks and Savings Banks (commonly known as the Banking Act of 1934). The famed Article 47 (b) of the Banking Act explicitly links any breach of banking secrecy to the Criminal Code, stating in its original version as follows:

> Anyone who in his capacity as an officer or employee of a bank, or as an auditor or his employee, or as a member of the banking commission or as an officer or employee of its bureau intentionally violates his duty to observe silence or his professional rule of secrecy or anyone who induces or attempts to induce a person to commit any such offence, shall be liable to a fine of up to 20,000 francs or imprisonment of up to six months, or both. If the offender acted with negligence he shall be liable to a fine of up to 10,000 francs (following the translation provided in Mueller 362).

The original provision was altered to adjust the penalty levels to modern circumstances, whereupon the imprisonment limit was increased up to three years and the fine for negligence was raised to 250,000 Swiss francs. In the case of repeated offence within a five-year period of a prior conviction the fine shall amount to 45 times the daily wages of the offender (see Federal Act on Banks and Savings Banks, Art. 47 (b)). Two important implications result from Article 47 (b) of the Banking Act: the first states that a Swiss banker is punishable for any violation of bank secrecy whether it occurs in Switzerland or abroad, and the second that only Swiss judicial authorities are endowed with the power to lift Swiss banking secrecy (Aubert 284).

The tax increases in various European countries at the turn of the twentieth century offered Swiss banks a chance of gaining a competitive advantage over well--established financial centers such as London, Paris and Berlin. This was to be done by offering foreign residents a possibility to evade domestic taxation by allocating their assets in Switzerland. As a result, banking secrecy gained an unprecedented level of importance for the economy; this common practice became crucial in attracting foreign capital inflows to Switzerland, therefore playing a key role in international competition for capital on financial markets. A campaign was started to promote Switzerland as a tax haven for wealthy Europeans.

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[1] Swiss Civil Code, Part One: Law of Persons, Art. 28 B. Protection of Legal Personality Against Infringements.

With the adoption of the Swiss Constitution of 1848, by means of which a league of sovereign states converted to create a federal state, various powers were distributed over different levels of government. In the course of this distribution, direct taxation remained at the discretion of individual cantons, whereas indirect taxation was placed in the hands of the central government. The formation of tax privileges in Switzerland resulted from the competition among the various cantons, and from this rivalry, combined with the practice of banking secrecy, Switzerland gradually emerged as one of the world's first offshore centers (for a detailed account of this process see Chavagneux et al.).

The aftermath of World War I saw massive increases in taxation in France, Italy, and Germany, and this in turn led to an influx of foreign capital to Swiss banks. Attracted by moderate taxes, political stability and neutrality, and last but not least by a culture of banking secrecy, foreign depositors massively escaped domestic fiscal burdens and located their assets in Switzerland. The capital flight from domestic economies did not gain the approval of French, Belgian, Italian or German authorities, and pressure on the Swiss to limit banking secrecy was exercised.

The driving force behind the introduction of the 1934 law was not Hitler's rise to power and the Nazi regulations introduced in Germany the previous year but rather the global financial crisis at the beginning of the 1930s and its implications for the Swiss banking system. Notwithstanding the restructuring of the banking sector, the Swiss authorities, pressured by the middle class and the powerful Swiss Farmers' Union, planned for a new banking law which would include provisions concerning the general oversight of the financial system. In exchange for endorsing the concept of banking supervision, Swiss bankers demanded explicit legal restrictions with respect to banking secrecy to be incorporated into the new law in order to protect access to individual accounts' information from any party, including the federal officials. Bankers feared that the weakening of banking secrecy provisions by allowing for inspection of customer information would cause a withdrawal of both Swiss and foreign deposits, leading to a capital flight on a greater scale (Guex, "The Origins…" 246-247). Another important event, which undoubtedly provided incentives for explicit and legal protection of banking secrecy, was the so-called Paris Affair. In October 1932, a Paris branch of Basler Handelsbank was searched by French authorities. The seized documents revealed that the Basler Handelsbank actively aided French customers in tax evasion circumventing French tax law. The amount in question was exorbitant, with the value of assets estimated at over one billion French francs. French authorities established a list of names involved in the scandal, which comprised over 1,000 customers, including prominent French politicians, clergy and businessmen. The search extended to two other Swiss banks. A legal suit was filed against Basler Handelsbank, and its assets in France were frozen (Gantenbein et al. 110). During the whole investigation, Swiss federal authorities unconditionally rejected any judicial cooperation with the French authorities. Nevertheless, in the aftermath of the Paris Affair, the Swiss financiers called for a legal reinforcement of banking secrecy. The Swiss Federal Council provided for a first draft of the new banking law in February of 1933, whereby an article on banking secrecy was already contained in the document. Despite undergoing numerous changes before being finally ratified, the Banking Act of 1934 included the provision on banking secrecy in an unaltered form compared to the draft version proposed in February, 1933 (Guex, "The Origins…" 244).

Swiss banking secrecy during World War II and its repercussions

During World War II, Swiss banks facilitated the settlement of transactions and the transfer of gold, currencies, and commodities for Nazi Germany, thereby acting as clearinghouses within the wartime financial system. This was due to two major reasons: first of all, the Swiss franc remained the only internationally convertible currency throughout the entire war, and secondly it remained a strong currency. The Nazi regime required a steady supply of foreign currency to furnish exports essential for maintaining Germany's war effort and this was provided for by exchanging the Reichsbank's[2] gold for Swiss francs in Switzerland. The gold that the Reichsbank accumulated came from various sources, including sources outside of Germany, primarily from national gold reserves of the occupied countries. As regards private individuals' gold, as of the early 1930s, the German government pursued a policy intended to increase its gold holdings by restricting the possession of gold and by confiscating privately owned gold of both German citizens and citizens of occupied states. Beginning in 1942, an SS captain named Bruno Melmer supervised 76 deliveries of valuables including gold to the Reichsbank for credit to an account of the SS revenue office. This so-called 'Melmer Gold' consisted of personal items of inmates of Auschwitz and other concentration camps, including wedding rings, gold watches, spectacle-rims, jewelry, religious objects, and gold from dental work. The estimates of the value of this gold vary widely from 2.5 (used by the Bergier Commission[3] in its calculations) to 4 million USD. The 'Melmer' gold did not include all of the gold stolen in the eastern concentration and extermination camps. The Bergier Commission also used the description 'Other Private Holdings' to indicate the sum of 71.7 million USD, which was calculated as the residual balance necessary to equalize total credits and debits of the Reichsbank during the war. This sum included "gold seized from individuals through executive fiat, levies, laws not falling under the jurisdiction of the Four-Year Plan, and gold taken from concentration camp victims" but not accounted for by other categories. In addition, "gold was bought by Germany on the black market – in occupied Europe as well as in neutral countries, including Switzerland – by selling other property (in particular diamonds) taken from the victims of persecution and referred to unashamedly in German documents as Jewish jewelry or *Judenschmuck*" ("Gold Transactions in the Second World War: Statistical Review with Commentary…" 2, 8, 9).

The issue of gold looted from concentration camp victims would become a crucial argument in the debate between the Swiss and the U.S. Government in the 1990s. The Reichsbank delivered 1,654.6 million francs in gold to the Swiss National Bank in the period from January 1, 1939 to June 30, 1945. Out of this amount, the SNB acquired 1,224.2 million, corresponding to about three-fourths of all Reichsbank gold deliveries during the war. The remaining balance consisted of the Reichsbank's

[2] The Reichsbank was the Central Bank of Germany from 1876 to 1945. Established from the Bank of Prussia, it was a privately owned bank but was under government management.

[3] The Bergier Commission is the name commonly used in reference to the Independent Commission of Experts established by the Swiss government to investigate Swiss financial activities during World War II and chaired by Jean François Bergier.

deposits of gold at the Bern depot whereby Swiss banks served as a transition channel for moving the gold into the depots of other central banks, especially the Portuguese and Swedish national banks, as well as into the gold depot of the BIS ("Gold Transactions in the Second World War: Statistical Review with Commentary…" 17).

In addition to gold transactions of the Reichsbank via the SNB, the German Central Bank shipped gold directly to Swiss commercial banks. The seizure of the Reichsbank's records by the U.S. occupying forces enabled them to put the amount of these transactions into perspective. According to American calculations in 1946, gold valued at about 20.3 million USD, or 87.3 million Swiss francs (exchange rate: 1:4.3), was delivered to Swiss commercial banks between mid-1940 and May 1945. This was the estimate quoted in negotiations preceding the signing of the 1946 Washington Agreement. However, a review of the Reichsbank's records by the Bergier Commission estimated the value of gold deposited in Swiss commercial banks to be closer to 61 million USD. The discrepancy in the two figures can be partially explained by the different timelines applied for the calculation. The Allies' calculation begins in mid-1940 and does not take into consideration the substantial deposits of gold made in the first half of 1940. The date of 30 April 1940 was chosen by the Allies as the starting point for Allied claims for the restitution of gold by Switzerland, and 30 June 1940 was chosen as a starting point for the calculations ("Gold Transactions in the Second World War: Statistical Review with Commentary…" 18-19).

At the same time when the German Reichsbank conducted its gold affairs, individual Germans and German corporations prepared for imminent defeat in the war by allocating their assets in foreign countries, thereby protecting them from seizure by the Allies. The Swiss financial sector served either as an intermediary or the ultimate destination for the assets of German citizens.

The U.S. government feared the revival of a German aggression resulting from German economic power. The assets looted in occupied countries by the Nazis and safely located in foreign countries including the neutrals would serve this purpose well. In order to prevent such a resurgence of Nazi Germany, a special program was devised in Washington. Operation Safehaven, designed by the Foreign Economic Administration primarily to track down German assets in neutral countries and prevent them from being re-used by the Nazis targeted Switzerland as one of the key fields of German financial expansion. The German assets, which the Foreign Economic Administration estimated to total 300 million USD, were to be put under Allied control and later used to provide reparation payments and reconstruction funds for war-ravaged countries (Meier H. 348). In August 1945, the American government requested the right of ownership or control of all German assets in Switzerland. The authority over all enemy assets was to be held by the Allied Control Council as the de facto government of Germany. The Swiss Federal Council declined the request, which according to the Council had no legal foundations. In October, 1945, the Allied Control Council passed a regulation which established a German External Property Commission, which was granted all titles and rights to German property outside of Germany, owned by German citizens. However, the Swiss Federal Council further refused to recognize the rights of ownership or control of the Allies over German property in Switzerland (Meier H. 350-354). Finally, the U.S. government proposed a meeting in Washington to discuss the disputable issue. The negotiations initially planned for one week lasted for over two months.

The Washington Agreement, signed on May 25, 1946[4], aimed to regulate three major issues: the acquisition of gold by the Swiss National Bank from the German Reichsbank, the German assets in Switzerland and the abolition of wartime economic restrictions, which the Allies implemented against Switzerland. In the course of the negotiations, the Allied heads of delegation demanded an amount of 130 million USD, the equivalent of 560 million Swiss francs, as compensation for the looted gold and two thirds of the funds acquired through the liquidation of the German assets. The Swiss delegation reiterated with an offer for 250 million Swiss francs (equivalent to 58 million USD) and half of the proceeds from the liquidation of German assets (Meier H. 360). This proposal was finally accepted. The agreement was a partial success for the Swiss negotiators with respect to banking secrecy laws. The Swiss proposal to make a complete census of German assets located in Switzerland or in the hands of Swiss companies and subsequently to expropriate them anonymously was rejected (Guex, "The Origins…" 263). The Swiss banks were obliged to disclose the names of the German asset holders and communicate them to the Allies, thereby lifting the banking secrecy rule; however, Switzerland managed to secure that as a Swiss-controlled organ the Swiss Compensation Office should carry out the liquidation of German property. The provision of the Agreement pertaining to the release of Swiss assets held and frozen in the U.S. made no mention of an obligatory disclosure of the names of the asset-holders. This was an issue of major importance for the Swiss.

By Executive Order 8785 of June 14, 1941, the Roosevelt administration declared frozen all assets of continental European countries. The purpose of this order was to prevent the liquidation of potentially looted assets. These frozen assets were subject to licensing whereby the owners of the assets could apply for a license and retrieve the assets under the supervision of the Treasury Department. In the case of Switzerland, a substantial number of the frozen assets were held in anonymous numbered accounts and, in line with the Swiss banking secrecy law, the Swiss banks refused to reveal the identity of the owners, despite pressure from the U.S. Treasury (Meier H. 279). This issue was critical to Swiss bankers due to the fact, among other reasons, that out of 5 billion Swiss francs frozen in the U.S., roughly 2 billion belonged to French citizens (Guex, "The Origins…" 264). Had the names of these asset-holders been revealed, they would have reached French fiscal authorities and in accordance with French law these assets would be subject to heavy taxation in compliance with French fiscal law, whereas the owners might have been prosecuted for tax fraud. This would have definitely constituted a major blow to the credibility of Swiss banking.

In 1947, Switzerland paid the lump sum of 250 million Swiss francs in gold to the Allied Reparations Fund without recognizing any legal basis for the Allied claims and declaring instead its willingness to contribute its share to the reconstruction of Europe (Meier H. 361), therefore circumventing and further refuting the validity of the concept of looted gold. The wartime economic sanctions against Switzerland were lifted completely by 1948. But the provisions concerning the liquidation

[4] The Washington Agreement consisted of an accord of seven articles and an annex which specified the provisions of the accord. Together, these documents are sometimes referred to more formally as the Washington Accord. The accord entered into force on June 27, 1946.

of German assets were never carried out. According to the Washington Agreement, the German owners were to be compensated for their assets, although in the course of negotiations the Allied side demanded a liquidation of these assets without any compensation. The German assets were to be sold in Swiss francs, and the German owners compensated in German currency. Unfortunately, the rate of exchange for this conversion had not been determined by the Washington negotiations, and the dispute over this issue delayed a settlement by a few years. The increasing importance of the economic rehabilitation of Germany in the face of the Cold War contributed to further moderating the approach of the U.S. government towards the issue of German assets, and eventually the Washington Agreement was replaced by two separate agreements: one signed on August 26, 1952 between Switzerland and Germany and the other signed two days later between Switzerland and the Allies. The German Federal Republic agreed to pay the Allies a lump sum of 121.5 million Swiss francs, which in turn was acquired by the German government through a loan taken out with a Swiss banking consortium. The German owners of assets exceeding 10,000 Swiss francs were able to retrieve access to their property upon paying one--third of its value to the government of West Germany, thereby creating a fund for the compensation of the liquidation payments. For assets valued at less than 10,000 Swiss francs, a compensation payment by German owners was not required. East Germany did not participate in the agreements (Meier H. 368-370).

Unfortunately, neither the Washington Agreement nor the Agreements of 1952 settled all wartime disputes (see Rubin 69-76 for a detailed analysis of the shortcomings of the agreement). The way the Swiss authorities handled the implementation of the provisions of the agreement and the subsequent insufficient effort of the Swiss to clarify and deal with the controversies of the country's wartime economic conduct, especially with respect to the financial sector, had overwhelming consequences for the political dispute of Switzerland with the United States in the 1990s, and as a result of this dispute for the international image of Switzerland. The unsettled issues of Switzerland's wartime economy and the moral ambiguity of Swiss neutrality during World War II opened the door to Holocaust-related claims which exploded in a legal, political and economic conflict with the U.S. of unprecedented scale. Again the concept of banking secrecy was fundamental to the understanding of the controversy.

The preliminary initiative in this conflict was taken by Jewish organizations, substantially supported by the U.S. Government. The campaign started by Edgar Bronfman, the President of the World Jewish Congress, was backed by powerful politicians within the U.S. Senate and the Clinton Administration. Why did the issue of Holocaust-related claims resurface with such strength after over 50 years? Some authors point out the end of the Cold War as the triggering mechanism. During this period, the ideological division between the East and the West suppressed any potential controversies over ethical issues. Neutral Switzerland was by implication a member of the Western camp. For political reasons, although the Western decision-makers were well aware of Switzerland's wartime conduct, they preferred to ignore the issue (Cowell 140). In the political debate concerning Holocaust-related claims, two different matters have been raised: the first is the issue of the so-called 'dormant accounts' – the accounts belonging to war victims which were not claimed by their heirs, or to which access was denied them by bankers. These assets were therefore left at the disposal of Swiss banks. The second issue concerns the 'looted gold,' which was stolen from Holocaust victims by the Nazis during World War II. At the time of the conflict, Switzerland had neither escheat laws nor a statute of limitations on bank deposits; this meant that if the deposits were unclaimed, they remained with the bank forever. In accordance with the Swiss principle of direct and immediate succession, "the heirs become entitled without delay to all rights over the estate of the deceased and they are of course entitled to all assets of the deceased deposited in a bank" (Mueller 364). However, in order to prevent any potential fraud, the heirs are required to furnish the bank with three obligatory documents: a death certificate, the name of the depositor's bank, and a bank account number. The fulfillment of these requirements was not possible in the case of Holocaust victims for obvious reasons – concentration camps simply did not issue such certificates. As a result, many claimants were rejected by the Swiss banks (Gantenbein et al. 139). Between the end of World War II and 1995, a few attempts were made to resolve the issue of dormant accounts: in 1947, upon the request of the Swiss Bankers Association, banks reported balances worth a total of merely 487,000 Swiss francs; in 1959, as a result of an investigation, this figure rose to below 1 million Swiss francs; in 1962, a Federal resolution called the Registration Decree was passed, upon which Swiss financial institutions were required to report all dormant accounts belonging to foreign or stateless persons to a special entity created for this purpose, the so-called Claims Authority. Assets worth up to 10 million Swiss francs were reported to the Claims Registry by 1968 (Gantenbein et al. 139).

In 1974, the unclaimed funds of the Registry were distributed to the Swiss Federation of Jewish Communities and the International Committee of the Red Cross (for a detailed account of the Swiss efforts to regulate the issue of dormant accounts, see Weber 1220-1221). No further attempts were made on the part of Swiss authorities to resolve the issue of dormant accounts until 1995, when, in reaction to publications in the press referring to dormant accounts, the Swiss Bankers Association (SBA) issued its Guidelines on the Treatment of Dormant Accounts, Custody Accounts, and Safe--Deposit Boxes Held in Swiss Banks. The new regulation entered into force on January 1, 1996. As a result of this regulation, in February 1996 an additional 776 heirless accounts were identified, with assets of 38.7 million Swiss francs (Weber 1215). But this action came too late; the issue of dormant accounts in Switzerland had already been brought before the United States Senate Committee on Banking, chaired by Alfonse D'Amato, a republican senator from New York, who endorsed the campaign of Jewish organizations.

On May 2, 1996, an independent commission, the Independent Committee of Eminent Persons (ICEP), was established with the former chairman of the Federal Reserve, Paul Volcker, as the head of the Committee. The Independent Committee of Eminent Persons or the Volcker Commission[5], as it came to be known, conducted the largest bank audit in the history of world finance. The Swiss Federal Banking Commission provided a legal basis for the investigation in order to avoid a potential

[5] The Independent Committee of Eminent Persons was established in May 1996 by a Memorandum of Understanding signed by the Swiss Bankers Association (SBA), the World Jewish Congress and the World Jewish Restitution Organization (WJRO). The Committee consisted of three members and two alternates appointed by the SBA, and three members and two alternates appointed by WJRO. Paul A. Volcker, former Chairman of the U.S. Board of Governors, was chosen as the Chairman of the Committee (Bradfield 233).

violation of banking secrecy by Swiss banks, which were required to make public the names and other information on residents' and non-residents' accounts defined as dormant since 1945.

The Volcker Commission investigated 4.1 million accounts reported by Swiss banks as belonging to non-Swiss residents which were either open or opened between 1933 and May 1945 and had been inactive for a period of more than 10 years, audited 59 Swiss banks and inspected 300,000 still-existing dormant accounts. The cost of this three-year audit, including internal bank expenses, amounted to 800 million Swiss francs, and was fully covered by Swiss banks. The Volcker Commission finally concluded its findings in December, 1999: the total number of accounts with a probable or possible relationship to Holocaust victims amounted to 53,886 ("Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks: Report of the Independent Committee of Eminent Persons" 7-10). The Commission estimated that the current value of these accounts amounts to between 643 million USD and 1.36 billion USD and urged Swiss banks to publish the names of 25,187 account holders as defined in the top three categories of the conducted study ("Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks: Report of the Independent Committee of Eminent Persons" 20). In October 1996, two class action suits were filed against the Union Bank of Switzerland. The U.S. announced its own investigation into the matter of dormant accounts and Nazi gold. The investigation was led by Stewart Eizenstat and William Slaney. As counteraction to these investigations, the Swiss Parliament established in December, 1996 an Independent Committee of Experts under the chairmanship of Swiss professor and historian Jean François Bergier. The aim of the Bergier Commission, as it was called, was to provide within a period of 5 years detailed findings on the involvement of the SNB and Swiss banks in international gold transactions, currency trade, flows of goods, looted goods and art dealings during World War II and in its immediate aftermath (Weber 1216). In 1996, the World Jewish Congress filed a class action lawsuit against three Swiss banks. In October 1997, the New York City Comptroller banned the Union Bank of Switzerland from participating in a billion-dollar bond offering to help finance the city's budget (Sanger, "New York Punishes…"). Members of the U.S. Congress threatened to delay or prevent the merger of UBS and Swiss Bank Corporation. Similar economic pressure directed at Swiss banks in the U.S. finally led UBS and Credit Suisse to succumb to an agreement (Gantenbein et al. 145). The final Settlement Agreement was signed on January 26, 1999. Swiss banks, mainly UBS and Credit Suisse, were to pay 1.25 billion USD into a Settlement Fund. As of October 31, 2014, almost the total amount of the funds was allocated to 457,100 claimants (see "Holocaust Victim Assets Litigation Case No. CV 96-4849: Swiss Banks Settlement Fund Distribution Statistics as of October 31, 2014…").

Tax evasion issues between the U.S. and Switzerland: IRS investigations and tax affairs in the banking sector

Being one of the world's oldest tax havens and endowed with a well-established practice and regulation of banking secrecy, the Swiss financial system attracts foreign citizens striving to escape domestic taxation. The provisions regarding banking secrecy were not established in order to protect criminal activity, and Swiss banks were always required to provide information to Swiss authorities in criminal cases. It is important, however, to clarify what exactly constitutes criminal activity in each country. The answer to this question might not be the same in Switzerland and abroad. Insider trading and money laundering became criminal offences in Switzerland only in 1988 and 1990, while the financing of terrorism became penalized by the Criminal Law only in 2003. The same consideration applies to the distinction between tax fraud and tax evasion. Although a multitude of federal and cantonal tax laws exist in Switzerland, they have one common feature: the Swiss tax authorities must rely on the assessment data provided by the taxpayer himself. This is based on the logical assumption that the taxpayer knows his financial situation, but also that he is honest enough to disclose it. If the assessment seems to be insufficient, the revenue service might require the furnishing of further evidence or a personal interrogation. The assessment of taxes is an administrative procedure, therefore a legal obligation for third parties to supply information in assessment proceedings does not exist, except for a few explicit cases (Meier W. 23). Swiss tax authorities therefore have no legal basis to obtain financial data directly from banks. This self-declaration principle is applicable only to individuals and not legal entities.

Tax evasion is not a crime in terms of the Penal Code. Tax fraud, on the other hand, can be either pursued within an administrative procedure, or is subject to a criminal procedure. Contrary to this, in the United States tax evasion constitutes a crime that may give rise to substantial monetary penalties, imprisonment, or both.

§7201 of the U.S. Internal Revenue Code states: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution." In addition, the Currency and Foreign Transactions Reporting Act of 1970, commonly referred to as the Bank Secrecy Act, "(…) requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering. Specifically, the act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding $10,000 (daily aggregate amount), and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities" ("FinCENs Mandate from Congress"). The United States taxes its resident citizens, non-resident citizens and resident aliens on their worldwide income. It is one of the two countries in the world to do so (the other one being Eritrea). In addition to reporting worldwide income, every U.S. citizen or resident must also report in his U.S. tax return form all foreign bank and investment accounts in accordance with the Bank Secrecy Act.

The United States and Switzerland first signed a tax treaty in 1951, but this agreement did not include a precise regulation of the exchange of information, as only reports or summaries of the underlying information could be transmitted back to the requesting state. However, according to the U.S. jurisprudence, such documents cannot be introduced into evidence since the originals are required for the purpose of evidence. The 1951 treaty included an interpretation of tax fraud in accordance with Swiss law, which was too narrow and not sufficient for application to the American law (Hull 281). After years of negotiations, the two countries decided on a new tax treaty and the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income was signed on October 2, 1996. Article 26 of the Convention provides for an exchange of information between the authorities of the Contracting States insofar as this information is necessary to prevent tax fraud. This exchange included authenticated copies of original documents. The concept of tax fraud was defined in Paragraph 10 of the Protocol, which was signed on the same day as the Tax Convention and incorporated by reference therein. The problematic aspect of the convention was the definition applied by each country to 'tax fraud.' Specifically, under U.S. law a tax-payer has a duty to include information on a tax declaration and the failure to do so constitutes tax fraud. The Swiss definition, however, refers to falsified or forged documents and a common scheme of fraud. ("Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income Signed at Washington on October 2, 1996 and the Protocol Signed at Washington on October 2, 1996" 91-95). An attempt to resolve this discrepancy in the definition of tax fraud was made by means of a mutual agreement signed on January 23, 2003 by the authorities of the United States and Switzerland, which specified 14 cases of tax fraud and provided guidance as to what constitutes tax fraud according to the agreement (Hull, Oberson 281-282). Based on Article 26 of the 1996 Tax Convention, this mutual agreement is not a stand-alone treaty but rather an interpretive annex to the existing tax treaty, aimed at expanding the scope of the exchange of information. Together, these two legal acts were aimed at improving information-sharing by the American and Swiss authorities. In the case of the U.S., the underlying objective was to curb tax fraud, while in the case of Switzerland it was to improve the reputation of the country, which was broadly perceived as being a haven for money laundering and tax fraud. Unfortunately, these measures came too late.

In 2006, the U.S. Senate Permanent Subcommittee on Investigations (PSI) released a report which uncovered the offshore activities of wealthy American citizens. The revenue loss resulting from unpaid taxes in the case of individual (as opposed to corporate) tax evasion amounted to between 15-23 and 40-70 billion USD, depending on the method used for the calculation (the base taken for this calculation is 1.5 trillion USD of non-U.S. holdings held by wealthy U.S. citizens, but the calculation depends on the chosen rate of return and applied tax rate) (Gravelle 741-742). Although this report did not specifically refer to Switzerland, it spurred widespread interest in the problem of tax havens and led to IRS initiatives targeting offshore tax schemes, tax evasion and offshore tax centers, including Switzerland. Four major IRS investigations into the offshore activities of Swiss banks followed: the UBS, Credit Swiss, Wegelin and HSBC Swiss affairs.

In 2008, the Tax Division of the United States Department of Justice commenced an investigation of UBS AG, Switzerland's largest bank ("Offshore Compliance Initiative"). This investigation was prompted by the revelations of Bradley Birkenfeld, an American Citizen and UBS Geneva-based director responsible for wealthy American clients, who pleaded guilty to conspiring with a Californian real estate billionaire to evade taxes by concealing 200 million USD worth of assets in Switzerland and Lichtenstein. In his court testimony, Birkenfeld indicated that U.S. citizens held 20 billion USD in undeclared UBS accounts (see "Federal Judge Approves IRS Summons for UBS Swiss Bank Account Records"). Birkenfeld's revelations encouraged an investigation by the United States Senate Permanent Subcommittee on Investigations into tax haven banks and banking secrecy laws. The result of this investigation was a report published in July 2008 entitled *Tax Haven Banks and U.S. Tax Compliance*. According to this report, the total amount of revenue losses due to offshore tax evasion could amount to as much as 100 billion USD.

In February 2009, UBS entered into a deferred prosecution agreement and pleaded guilty on charges of conspiring to defraud the United States by impeding the IRS. UBS agreed to a 780 million USD settlement payment and the disclosure of customer names. In 2009, the bank disclosed only 250 names out of the 19,000 U.S. accounts believed to be held at the bank. In 2008, a U.S. District Court Judge authorized the IRS to serve a so-called John Doe summons on the Swiss bank (John Doe does not identify or charge any specific individual with a crime, it is a blanket summons). The summons required UBS to provide records of U.S. taxpayers with accounts at UBS Switzerland. Following the summons, in August 2009 an agreement was concluded between the United States of America and the Swiss Confederation which required UBS to disclose customer data of "approximately 4,450" open or closed accounts ("Agreement Between the United States of America and the Swiss Confederation on the request for information from the Internal Revenue Service of the United States of America regarding UBS AG, a corporation established under the laws of the Swiss Confederation"). In January 2010, the Swiss Federal Administrative Court ruled that UBS could not disclose the information as agreed upon in the 2009 agreement with the U.S. Finally, the Swiss parliament ratified the agreement. However, this did not end various legal proceedings and charges against the Swiss bank, which continued until 2011 and beyond. The most recent investigation concerns the so-called bearer securities, which are anonymous and could be used to facilitate tax evasion for USB clients (Braithwaite, Chon).

The legal action conducted by U.S. authorities against UBS was the first in a series of proceedings against Swiss banks. Wegelin & Co., a partnership of Swiss private bankers and the oldest Swiss private banking institution, closed down in 2013 after 272 years in business. Following a guilty plea at the end of a criminal investigation, Wegelin & Co. agreed to pay 57.8 million USD in restitution and fines. The bank aided U.S. taxpayers to avoid taxes on income amounting to 1.2 billion USD over a period of ten years. This case is important from the legal point of view: for the first time, the U.S. Justice Department prosecuted a purely offshore bank (Wegelin had no branches outside of Switzerland) on charges of aiding tax fraud, basing the case solely on U.S. law and not the law of the resident country. The representatives of the bank did not arrive at a February 2012 court hearing in New York, whereby the court declared the bank a fugitive. After the hearing, Wegelin issued a statement in which it clearly indicated its commitment to preserving Swiss banking secrecy laws: "The circumstances create a clear dilemma for Wegelin & Co: If it were to adhere to current U.S. legal practice aimed at Swiss banks, it would have to breach Swiss law" (Browning, De Sa'Pinto).

In May 2014, the second-largest Swiss bank – Credit Suisse – pleaded guilty to federal criminal charges of helping U.S. taxpayers to avoid taxes. The bank was ordered to pay 2.6 billion USD in penalty payments, the largest payment ever in a U.S. criminal tax case. According to a February 26, 2014 Permanent Subcommittee on Investigations Report, Credit Suisse had 22,000 U.S. customers at the peak of its activities, holding accounts worth an estimated 10 to 12 billion USD. At the beginning of 2015, another affair surfaced: in 2007, Hervé Falciani, a specialist from the IT department of HSBC Private Bank, based in Geneva, stole customer accounts' data and fled the country. The data ended up in the hands of French authorities, who shared it with a number of other countries. In December 2014, Falciani was indicted in Switzerland on charges of industrial espionage and violation of banking secrecy laws. As a result of this data leak, the Swiss-based private banking arm of HSBC London is facing a number of investigations from various countries, including the U.S. (Bray; Hamilton; Kocieniewski; Landauro, Letzing).

In reaction to the financial scandals, and pressured by the OECD (the Organization enlisted Switzerland on its gray list of tax haven countries), in 2009 the Swiss Federal Council adopted international standards in accordance with Article 26 of the OECD Model Tax Convention, thereby agreeing to provide administrative assistance in international tax cases on a case-by-case basis, as well as accepting the definition of tax evasion as defined by Article 26. However, this legislation is applicable only to international exchange of information under double taxation agreements and has no effect on Swiss citizens or resident foreigners in Switzerland (Gantenbein et al. 134).

The big banking scandals and the desire to restrain off-shore tax evasion of U.S. citizens are the preliminary reasons behind the introduction of the Foreign Account Tax Compliance Act (FATCA), which was passed by the U.S. Congress on March 18, 2010 and is effective as of July 1, 2014. According to this law, U.S. taxpayers are required to report their foreign assets to the IRS if these assets exceed specified limits. The FATCA also requires Foreign Financial Institutions (FFI) to enter into legal agreements with the IRS according to which they would have to comply with due-diligence, information reporting and tax withholding obligations with respect to accounts held by U.S. taxpayers. According to the Agreement Between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, the objectives of the FATCA Agreement are to: a) implement FATCA with respect to all Swiss financial institutions, b) ensure that all required information about identified U.S. accounts will be reported to the IRS. Switzerland has opted for the so-called model two of the bill, which protects privacy more efficiently since client data is exchanged only once the U.S. authorities have requested administrative assistance, and the exchange of information occurs directly between the Swiss financial institutions and the IRS, as opposed to an automatic exchange between governmental authorities as in the more widespread model. Swiss financial institutions are obliged to obtain prior consent from the account-holder regarding the reporting of bank information to the IRS. In the case when the account-holder declines consent, the financial institutions may not provide the IRS with any account information, since it would violate the Swiss banking secrecy rules which are still in effect. The financial institutions instead report 'nameless aggregates' and the number of accounts that belong to account-holders who refused their consent. This information then forms the basis of an IRS group request, through which the IRS can demand complete information on account-holders who declined their consent. At the end of this process, the IRS is provided with the information that the financial institution would have reported had it received permission to report in the first place (Byrnes, Munro). This procedure only proves that the adoption of FATCA regulations by Swiss financial institutions constitutes a major breach of the Swiss banking secrecy principle.

The U.S. legal actions against Swiss banks proved that the American government is determined to enforce its laws in Switzerland – a sovereign foreign country. The execution of U.S. political influence overseas has turned from military power to legal taxing power. The extreme case of Wegelin & Co. proved that the U.S. legal authority has the strength of precedence over domestic legal authorities in foreign jurisdictions such as Switzerland. In the campaign against Swiss banks, the U.S. was governed by the need to finance a booming fiscal deficit, as well as by the overall deterring effect the investigations would have on both offshore tax havens worldwide and the U.S. taxpayers who try to conceal their income from the IRS. But the side effect of this campaign is that many Swiss banks no longer accept U.S. citizens as their customers.

Swiss banks have paid a high price for consequently adhering to banking secrecy principles. The controversies involving banking secrecy also had a devastating effect on the public image of Switzerland. Although Swiss banking secrecy is considered a highly controversial practice by the international community, it still constitutes the basis of the Swiss financial system and is highly regarded by Swiss citizens, who take pride in the historical role their country has played in protecting individual rights from powerful governments. The conflicts with the U.S. over banking secrecy, which, among other findings, unveiled the conduct of the Swiss during World War II, have shed light on the true nature of this phenomenon. With roots in civil, commercial, criminal and banking law, the concept of banking secrecy was not designed to encourage illegal behavior but it undoubtedly contributed to facilitating such practices among foreign nationals. Today, Switzerland, still the world's largest offshore financial center with 2.3 trillion USD in assets under management[6], is struggling to defend the values so fundamental to its banking culture, but at the same time it is forced to succumb to international and especially U.S. pressure and implement various internal and international regulations, which impose a constraint on the practice of banking secrecy. The gradual implementation of these regulations and bilateral treaties will affect the Swiss banking system, as it will slowly evolve towards standards commonly prevailing in the Western financial markets. Whether the events of the 1990s and of the last 10 years will, in the end, lead to meaningful changes in Swiss banking secrecy and the whole Swiss financial system remains to be seen.

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