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## Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy

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# Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy

*Bruce Zagaris* \*  
*Sheila M. Castilla* \*\*

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## I. INTRODUCTION

This Article discusses the emergence of an international regime which monitors and regulates the movement of money, also known as an anti-money-laundering regime. The discus-

sion reviews its evolution and implementation and the extent to which nine governments have amended domestic laws and signed or ratified international conventions, resolutions, and agreements to comply with the international anti-money-laundering regime. The Article then assesses whether current anti-money-laundering initiatives have made a measurable or qualitative difference within the specific countries by reducing money-laundering activity.

The laws and policies of nine countries in the following three regions are reviewed: Caribbean-Latin America (the Bahamas, Ecuador and Uruguay); Pacific-Asia (Australia, Japan, and Hong Kong); and Europe (the United Kingdom, France, and Austria). The Article analyzes the effectiveness of the various conventions and laws that comprise the anti-money-laundering regime and focuses special attention on additional measures that can be taken to counter money-laundering activity.

## II. AN EMERGING REGIME—INTERNATIONAL AND FOREIGN LAWS

An international criminal cooperation regime establishes a set of rules among governments and international organizations that requires cooperation in the investigation, prosecution and adjudication, and execution of judgments in criminal matters.<sup>1</sup> International cooperation on criminal matters is an evolving regime which has recently given rise to a subregime whose purpose is to regulate international money movement.<sup>2</sup> International and foreign laws that regulate the movement of money are a relatively recent phenomenon in international law enforcement.<sup>3</sup> These laws, also known as anti-money-launder-

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1. For a discussion of regimes in international criminal law, see Bruce Zagaris & Constantine Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 *REVUE INTERNATIONALE DE DROIT PENAL* (R.D. INT'L PENAL) 119, 128-32 (1986).

2. For a discussion of the emergence of a subregime on the regulation of international money movement, see Bruce Zagaris & Markus Bornheim, *Chapter on Foreign and International Money Laundering Laws*, 1989 A.B.A. SEC. CRIM. JUST. 162, 189-201. This Article will refer to anti-money-laundering as a regime and subregime, depending on its context.

3. This section is derived partly from Bruce Zagaris & Elizabeth Kingma, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 *EMORY INT'L L. REV.* 446 (1991).

ing laws, reflect a steadfast commitment by governments and international organizations to combat illicit drug trafficking and other forms of illegal criminal activity, especially as conducted by organized crime. Laws are being ratified in several countries in an effort to develop an international criminal cooperation regime.

As the laundering of funds derived from crime increases, the subregime of regulating international money movement is gathering a momentum of its own and is expanding beyond merely narcotics trafficking to encompass other forms of criminal activity.<sup>4</sup> Asset forfeiture, which is intended to deprive the criminal of the benefits of the crime, is a key element of many anti-money-laundering laws. This section of the Article will review the increase of initiatives that regulate international money movement and discuss some of the difficulties inherent in the development of such a regime, especially as it relates to asset forfeiture.

Because anti-money-laundering laws are being developed at such a rapid rate, inconsistencies in legislation occur and present difficulties for international cooperation. Legal systems differ in their organization, procedures, and substantive law. Culture also plays a significant role.<sup>5</sup> Not surprisingly, similar legal systems afford enhanced opportunities for cooperation. Governments following the common-law system, such as Canada, the United States, and members of the British Commonwealth, share a common legal base and have similar concepts and institutions.<sup>6</sup> Likewise, European countries adhering to

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4. For additional discussion of international anti-money-laundering regulation from a U.S. perspective, see Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—A United States Perspective*, 22 GEO. WASH. J. INT'L L. & ECON. 465 (1989).

5. For instance, traditional civil law puts more emphasis on and confidence in the validity and utility of formal definitions and distinctions. The division of law in the civil-law tradition into public law, of which criminal law is a part, and private law, of which real property and obligations are a part, is fundamental and much greater than in common-law systems. These distinctions are sources of problems and misunderstandings. See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 98-99 (1969).

6. The concept of common law is the concept of a growing and always changing system of legal principles and theories. However, the modern tendency toward codification, which was a principle of the Roman and Civil Law, has eroded the jurisdictions with a pure English Common Law, although, some jurists categorize England as still having a pure English Common-Law System. Compare the discussion in RUDOLPH B. SCHLESINGER, *COMPARATIVE LAW* 188-203 (3d ed. 1970)

the Napoleonic Code follow related legal concepts and institutions for resolving disputes connected with, *inter alia*, obligations,<sup>7</sup> property law,<sup>8</sup> and administrative penal law.<sup>9</sup> Governments from disparate legal systems, such as the Islamic legal system and the common-law system, may have more difficulties in understanding and bridging differences in concepts, institutions, procedure, and substance.<sup>10</sup>

Bridging legal systems is extremely difficult because asset-forfeiture laws and cases encompass divergent legal areas.<sup>11</sup> For instance, identifying, tracing, freezing, seizing, and requiring the forfeiture of contraband are usually required to penalize a person who has committed a crime—thus criminal law is immediately implicated. However, countries such as the United States have devised civil *in rem* proceedings for asset forfeiture, which give rise to a separate range of proceedings and procedures.<sup>12</sup> With asset forfeiture, imprisonment and other penal sanctions are not at issue. Therefore, the level of procedural protection afforded property owners is not commensurate

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with that in MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 268-83 (1985).

7. For a discussion of the law of obligations under the civil-law system, see SCHLESINGER, *supra* note 6, at 448-63; see also F.H. LAWSON ET AL., AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 137-48 (2d ed. 1963) (discussing obligations in general); *id.* at 149-99 (referring to contract and quasi-contracts).

8. For a discussion of property law in civil-law countries, see Max Rheinstein, *Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems*, 3 U. CHI. L. REV. 624 (1936).

9. For an excellent discussion of different treatment by different legal systems of administrative penal law, as well as a summary of the treatment of such law in 27 countries, see Mireille Delmas-Marty, *The Legal and Practical Problems Posed by the Difference Between Criminal Law and Administrative Law*, 59 R.D. INT'L PENAL 15 (1988).

10. For an example of the importance of conceptual differences between Western and non-Western legal traditions, see Salah-Eldin Abdel-Wahab, *Meaning and Structure of Law in Islam*, 16 VAND. L. REV. 115 (1962); George M. Barood, *Shari'a: Law of Islam: An American Lawyer in the Courts of Saudi Arabia*, 17 ARAMCO WORLD 26 (1966). Compare these articles with the whole concept of the Western legal tradition as discussed in GLENDON ET AL., *supra* note 6, at 14-39.

11. For a useful discussion on how to bridge the differences among legal systems and to unify and harmonize such systems, see SCHLESINGER, *supra* note 6, at 28-30; see also Symposium, *The International Unification of Law*, 16 AM. J. COMP. L. 1 (1968).

12. Examples of civil *in rem* statutes are the customs forfeiture laws. See, e.g., 21 U.S.C. § 881(d) (Supp. 1993) (civil forfeiture pursuant to Controlled Substances Act); 8 U.S.C. § 1324(b)(3) (1970) (transporting illegal aliens); 18 U.S.C. § 2513 (1970) (communication interception devices).

with the level given to criminal defendants. Civil forfeiture may occur without the benefit of a judicial proceeding. Once seized, the government retains custody until title is determined, and the burden of proof is on the claimant to the property.<sup>13</sup> One of the central difficulties in judicial assistance in asset-forfeiture cases arises from the civil/criminal dichotomy. For instance, requests by United States authorities to seize assets have often been denied by countries which allow criminal forfeiture only, whereas the same seizure would be simply effectuated in the United States through *in rem* procedures. This type of divergence may be solved by international conventions.<sup>14</sup> The Convention on Laundering, Search, Seizure and Confiscation (European Laundering Convention) resolves this problem by obligating requested states to cooperate "to the widest extent possible for the purposes of investigation . . . ."<sup>15</sup>

Another barrier to effective judicial assistance in anti-money-laundering prosecutions stems from the disparate definitions of money laundering and the predicate crimes. Furthermore, asset-forfeiture law extends beyond property rights to contractual rights,<sup>16</sup> thereby involving applicable laws in this field. Another complication is that forfeiture, which occurs

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13. For a useful discussion of the procedural differences between U.S. civil and criminal forfeiture, see Robert Luskin, *Forfeiture Statutes: A Brief Survey and History*, in FORFEITURES AND ASSET FREEZES A COMPREHENSIVE SURVEY OF ASSET FORFEITURES, RESTRAINTS AND THIRD-PARTY RIGHTS, at Tab A (A.B.A. Inst. Crim. Just. 2d ed., 1990) [hereinafter FORFEITURES]; Michael F. Zeldin & Roger G. Weiner, *Forfeiture and Third Party Rights: The Rights and Scope of Recovery of Innocent Third Parties*, in FORFEITURES, *supra* at Tab B; Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, in FORFEITURES, *supra* at Tab P.

14. See, e.g., *Draft Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation from the Proceeds of Crime*, Council of Europe Doc. ACDPC17ADD11.90, Restricted CDPC (80) 17 Addendum 11, at ¶ 15 (July 6, 1990) [hereinafter *Draft Explanatory Report*] (explaining that the convention applies to diverse decisions to confiscate, including decisions by criminal courts, administrative courts, separate judicial authorities, in civil or criminal proceedings totally separate from those in which the guilt of the offender is determined).

15. Convention of Laundering, Searches, Seizure and Confiscation, Nov. 8, 1990, art 7.1, 30 I.L.M. 148, 150 (entered into force Sept. 1, 1993) [hereinafter European Laundering Convention]; see generally *infra* part II.D.2.; see also SCHLESINGER, *supra* note 6, at 28-30.

16. For instance, the European Laundering Convention defines "proceeds" that can be the object of confiscation to include "any economic advantage from criminal offenses." See European Laundering Convention, *supra* note 15, art. 1(a).

outside of the criminal justice system, may involve either civil or administrative procedure.<sup>17</sup>

As intergovernmental organizations continue to strive for conventions and/or uniform legislation on anti-money-laundering, many of the gaps and obstacles that arise from conflicts of laws will be resolved.<sup>18</sup> The first part of this Article outlines the principal efforts of the various international organizations to resolve conflicts and gaps, and the means by which some of the issues are likely to be resolved.

In the normal course of creating anti-money-laundering legislation, the tendency is to agree initially on narrow sets of legal principles and policies and then to broaden them. For instance, one of the initial intergovernmental agreements on anti-money-laundering, the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna UN Drug Convention), was limited in many ways because it was an initial effort and because the participating governments were so diverse. Nevertheless, subsequent efforts draw from the Vienna UN Drug Convention and utilize wherever possible the same terminology and systematic approach of that convention, unless changes are believed necessary for improvement.<sup>19</sup>

Cooperation has increased substantially among regional groups that share similar institutions and legal systems and

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17. The interaction of administrative, civil, and criminal law is especially difficult in non-common-law legal systems in which there is a much greater distinction between public and private law. For example, see the discussion of the historical background of the differences between private and public law in SCHLESINGER, *supra* note 6, at 243-44. See also John H. Merryman, *The Public Law-Private Law Distinction in European and United States Law*, 17 J. PUB. L. 3 (1968).

18. For example, modern day comparative law approaches, in discussing bridging legal gaps, omit discussion of the role of intergovernmental organizations and indeed even international organizational theory. In other words, comparative law is taught independently from international law and international politics, so that the role of intergovernmental organizations in comparative law is not considered. The discussion in this article blends the two disciplines since the contemporary reality of international asset-forfeiture law inextricably involves comparative and international law with international politics.

19. See European Laundering Convention, *supra* note 15. See also SUMMARY DRAFT EXPLANATORY REPORT ON THE CONVENTION ON LAUNDERING, SEARCH, SEIZURE AND CONFISCATION OF THE PROCEEDS ON CRIME, Council of Europe Doc. ACDPC17ADDII.90, Restricted CDPC (90) 17 Addendum II, ¶ 4 (Nov. 8, 1990) [hereinafter SUMMARY DRAFT REPORT] (explaining how the European Laundering Convention emulated the Vienna UN Drug Convention). See also *Model Regulations*, *infra* note 138.



that interact within a common criminal justice organization.<sup>20</sup> The most extensive cooperation has occurred between members of the Council of Europe, the majority of whose governments have similar legal systems based on the Napoleonic Code. One organ of the Council of Europe which is of paramount importance is the Committee on Crime Problems. This institution has convened policy makers in criminal justice for more than thirty years.<sup>21</sup> The Committee on Crime Problems promotes close cooperation on a variety of criminal justice and judicial assistance issues. It affords the Council of Europe's member governments continual opportunities to discuss and plan effective cooperation in a way that most countries cannot.

One key issue that will complicate international judicial assistance and cooperation in money-laundering prosecutions and asset forfeiture is the interaction between international criminal law and international human rights law.<sup>22</sup> International conventions cannot readily resolve the conflicts which arise in this rubric because at issue are fundamental values, as well as different ways of protecting rights under the two branches of the law.<sup>23</sup> An appropriate way to view this is as the need to strike a proper balance between asset seizure for suspects of crimes on the one hand, and notice and opportunity to be heard and basic human rights on the other. This Article will review some of the arguments that are likely to arise in the interaction of criminal law and human rights.

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20. SUMMARY DRAFT REPORT, *supra* note 19.

21. For background on the Council of Europe, the Committee on European Crime Problems, the number of criminal cooperation agreements, and their role in the preparation of the European Laundering Convention, see Hans G. Nilsson, *Money Laundering-The European Situation*, in FORFEITURES, *supra* note 13; for the agreements themselves, see EKKEHARD MÜLLER-RAPPARD & M. CHERIF BASSIOUNI, EUROPEAN INTER-STATE COOPERATION IN CRIMINAL MATTERS (1987).

22. For background on the consistencies and tensions between the fields of international criminal law and international human rights law, see Anthony D'Amato, *International Criminal Law and Human Rights*, in NEW HORIZONS IN INTERNATIONAL CRIMINAL LAW 45-47 (1985); M. Cherif Bassiouni, *International Criminal Law and Human Rights*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 15, 15-32 (M. Cherif Bassiouni ed., 1986).

23. Appropriate limits on international criminal law and the best utilization of international criminal law to prevent the violation of human rights remains to be ascertained. Bassiouni, *supra* note 22, at 31.

### A. *The Influences*

The new conventions, laws, and resolutions of international organizations regulating international money movement reflects the convergence of efforts by governments and international organizations. The most significant work has been undertaken by intergovernmental organizations (IGOs) and has culminated in international conventions. These conventions, for example, the Vienna UN Drug Convention, impose binding obligations on signatory countries. Binding obligations are referred to as "hard law." Some resolutions and reports recommending specific actions are not binding on countries or persons and therefore are referred to as "soft law."<sup>24</sup>

Both hard and soft laws comprise the international anti-money-laundering regime. Although soft laws are not immediately binding, they are usually precursors to hard law. For instance, the Inter-American Drug Abuse Commission (CICAD) and the G-7 Financial Action Task Force (FATF) have promulgated recommendations to combat money laundering.<sup>25</sup> In an era of multinational actors and concerns, use of co-optive or soft power is often preferable to traditional hard power means. Soft power is evident when one nation persuades another to want what it wants and tends to arise from the rules and institutions of international regimes.<sup>26</sup> These constitute only soft law which will very likely become hard law. The FATF's assessments and external policy reviews have encouraged governments to ratify laws and amend policies to meet the anti-money-laundering standards of the FATF recommendations.<sup>27</sup> In addition, CICAD's anti-money-laundering regulations have been enacted into law by Colombia and Ecuador and will possibly become the basis for a convention modeled on the Council of Europe Laundering Convention.

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24. "Hard law is enforceable in a court . . . [whereas] [s]oft law is not judicially enforceable but simply constitutes moral standards and guidelines." Michael C. Small, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 172 n.67 (1985). An example of soft law is international environmental law. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2400 (1991).

25. See *infra* notes 66-85 & 135-57 and accompanying text.

26. Joseph S. Nye, *Soft Policy*, 80 FOREIGN POL'Y 153, 168 (1990) (on the inability of the major nations to control their environments without cooperation from smaller states).

27. See, e.g., *infra* notes 123-27 and accompanying text.

*B. International Politics*

An examination of cooperation between intergovernmental organizations is vital because the major actor and traditional source of power in the international arena—the territorial state—is being eclipsed by nonterritorial actors, such as IGOs, transnational social movements, and multinational corporations. In some countries, the authority of the territorial state is being supplanted by organized crime, including narco-terrorists.<sup>28</sup> The shrinking world has assisted narco-traffickers while nation-states try to cooperate more through forming new international organizations and treaties to combat money laundering. This underscores the notion that the politics of global interdependence is inescapable.<sup>29</sup>

Concomitant with the rise of global interdependence, criminal law enforcement policy has become a priority on nations' foreign policy agendas, especially as it applies to international business and national security. G-7 summit declarations strongly indicate that criminal policy and cooperation have expanded in scope from economics to terrorism, drugs, and more recently money laundering.<sup>30</sup>

Traditional instruments of power cannot deal with these new underworld threats to international political stability. Various international groups will interact and cooperate in an effort to mitigate the threats of organized criminal groups.<sup>31</sup> As resources and events that shape international power change, so also must the approach governments take to acquire and manipulate international power. Countries, such as the

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28. For a useful discussion of the international politics of narco-terrorism, see Peter A. Lupsha, *The Role of Drugs and Drug Trafficking in the Invisible Wars*, in *INTERNATIONAL DRUG TRAFFICKING* 15 (Dennis Rowe ed., 1988); for a discussion of the international politics of narcotics control, see RUFUS KING, *THE DRUG HANG-UP: AMERICA'S FIFTY-YEAR FOLLY* 208-28 (1972); *DRUGS, POLITICS AND DIPLOMACY: THE INTERNATIONAL CONNECTION* 24-28 (Luiz R.S. Simmons & Abdul A. Said eds., 1974).

29. See ROBERT O. KEOHANE & JOSEPH S. NYE, JR., *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 3-4 (1977).

30. See, e.g., *Financial Action Task Force on Money Laundering Report*, *infra* note 66, at 24. See also Nye, *supra* note 26, at 164; Carlos A. Perez, *OAS Opportunities*, 80 *FOREIGN POLY* 52, 55 (1990) (on the need for a collective approach to solving regional problems); Theodore C. Sorenson, *Rethinking National Security*, 69 *FOREIGN AFF.* 1, 3 (1990) (discussing global interdependence and its implications for national defense).

31. See Nye, *supra* note 26, at 164.

United States, which have had substantial influence from a hard power perspective must be careful to hone soft power, which is less expensive and, therefore, becoming more attractive with the same vigor that they have given to developing hard power in the past.<sup>32</sup>

### C. *International Regimes—A Framework for Cooperation*

The purpose of international regimes is to regulate and control certain transnational relations and activities.<sup>33</sup> They have been defined as “norms, rules, and procedures agreed to in order to regulate an issue-area.”<sup>34</sup> Members of international regimes obtain benefits through explicit or tacit cooperation based on common concerns, such as reducing the supply and demand of illicit narcotics, reducing the power of organized criminal groups, and combatting money laundering. Since a regime emphasizes achievement of several specific objectives, international regimes are considered to be more likely to undergo evolutionary changes than IGOs.<sup>35</sup>

A successful regime “reduces the cost of legitimate transactions while increasing the costs of illegitimate ones”<sup>36</sup> (i.e., money laundering and drug trafficking). Today’s dynamic global marketplace and world order present new problems for international regimes. To combat money laundering effectively, international regimes must be flexible, stable, able to make

32. Nye, *supra* note 26, at 168.

33. KEOHANE & NYE, *supra* note 29, at 5.

34. Ernst B. Haas, *Why Collaborate? Issue Linkage and International Regimes*, 32 WORLD POL. 357, 358 (1980). Another definition is found in Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, in INTERNATIONAL REGIMES 273, 273 (Steven D. Krasner ed., 1983) [hereinafter INTERNATIONAL REGIMES]. International regime is a specialized term that originated when international organization theory was developed in the early 1970s. See Robert O. Keohane & Joseph S. Nye, Jr., *Transnational Relations and World Politics*, in 25 INTERNATIONAL ORGANIZATION 325 (1979). The term describes a series of activities that involve mostly governmental actors, but also affect the international trade conducted by nongovernmental actors. See Finlayson & Zacher, *supra* at 275. International regimes have also affected policy-making about oceans. See KEOHANE & NYE, *supra* note 29, at 63-164.

35. WERNER J. FELD ET AL., INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH 37 (2d ed. 1988).

36. See ROBERT O. KEOHANE, AFTER HEGEMONY, COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 107 (1984); see also Robert O. Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES, *supra* note 34, at 141-71.

decisions, expend resources, enact laws, provide judicial assistance, and otherwise cooperate in transnational criminal matters.

#### *D. Intergovernmental Organizations*

The following section on IGOs outlines the roles these organizations play in anti-money-laundering initiatives as they emerge and evolve in the world. The operations of IGOs are discussed, including some of the organizations' attempts both to develop certain components of the anti-money-laundering regime and to link these components with other organizations and territorial actors. This Article includes a discussion of some of the interactions and dynamics between IGOs.<sup>37</sup> These and other elements of analysis are required to discuss regime transformation fully. Analysis of regime transformation is critical in order to speculate about the future of the regime of regulating international money movement and the subregime of asset forfeiture.<sup>38</sup>

### 1. Global Organizations

#### *a. The United Nations*

The United Nations has played an important role in urging the world to suppress illicit drug trafficking.<sup>39</sup> On December 20, 1988, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna UN Drug Convention) was signed by forty-three countries.<sup>40</sup>

37. For a discussion of the institutional and bureaucratic aspects of IGOs and international regimes, see FELD ET AL., *supra* note 35, at 81-120. For a discussion of decision-making processes and policy-making scope of IGOs and international regimes, see FELD ET AL., *supra* note 35, at 121-67.

38. For discussions of regime transformation, see FELD ET AL. *supra* note 35, at 247-48; ROBERT O. KEOHANE, *INTERNATIONAL INSTITUTIONS AND STATE POWER* 74-100 (1989); Oran R. Young, *Regime Dynamics and the Rise and Fall of International Regimes*, in *INTERNATIONAL REGIMES*, *supra* note 34, at 93, 106-12.

39. It has fostered the UN International Drug Program, as well as the UN Drug Commission and the UN Commission on Crime Prevention and Criminal Justice. See, e.g., U.N. DIVISION OF NARCOTIC DRUGS, *DECLARATION OF THE INTERNATIONAL CONFERENCE ON DRUG ABUSE AND ILLICIT TRAFFICKING AND COMPREHENSIVE MULTIDISCIPLINARY OUTLINE OF FUTURE ACTIVITIES IN DRUG ABUSE CONTROL* at 51-72, U.N. Doc. ST/NAR/14, U.N. Sales No. 88.XI.1 (1988).

40. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf/82/15 (1988), *reprinted in* 28 I.L.M. 493

That convention, which took effect on November 1, 1990, is a law enforcement treaty and contains provisions requiring international criminal cooperation including extradition,<sup>41</sup> confiscation,<sup>42</sup> and mutual legal assistance and cooperation between law enforcement agencies.<sup>43</sup> The Vienna UN Drug Convention also establishes money laundering as an offense and makes the aiding and abetting of it an offense. In particular, article 3 provides that the following conduct constitutes criminal activity:

- (b)(i) The conversion or transfer of property, knowing that such property is derived from any offense or offenses established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offense or offenses, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions;
- (b)(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offense or offenses established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offense or offenses.<sup>44</sup>

The Vienna UN Drug Convention requires that mutual legal assistance be rendered for any of the crimes enumerated therein, including money laundering, and states that a requested country cannot refuse to render mutual legal assistance on the basis of bank secrecy.<sup>45</sup>

In preparing and negotiating the Vienna UN Drug Convention, close bonds developed among the negotiators as they

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(1989) [hereinafter Vienna UN Drug Convention]. For a discussion of money laundering and other offenses in the convention, see Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT'L L. & POL'Y 339, 342-48 (1990).

41. Vienna UN Drug Convention, *supra* note 40, art. 6.

42. Vienna UN Drug Convention, *supra* note 40, art. 5.

43. Vienna UN Drug Convention, *supra* note 40, art. 7.

44. Vienna UN Drug Convention, *supra* note 40, art. 3.

45. Vienna UN Drug Convention, *supra* note 40, art. 7.5.

developed common definitions and concepts. These negotiators agreed to extend and refine the asset-forfeiture obligations in other fora, such as those established by the Council of Europe.<sup>46</sup>

Another UN organization that has been instrumental in molding anti-money-laundering legislation is the UN Commission on Crime Prevention and Criminal Justice. At its eighth general meeting on September 7, 1990, the UN Crime Congress (known until 1991 as the UN Committee on Crime Prevention Control) adopted a number of model treaties on international criminal cooperation.<sup>47</sup> One of the treaties adopted defines assistance and cooperation in asset forfeiture,<sup>48</sup> while another provides for mutual assistance in common extraditable offenses and provides simplified procedures for extradition.<sup>49</sup> The latter treaty contains an optional provision that would obligate requested states to determine whether proceeds of alleged crimes are located within their jurisdiction by tracing assets, investigating financial dealings, and obtaining other evidence that might assist in securing the recovery of the proceeds of crime.<sup>50</sup> The requested state would, to the extent allowed by its law, give effect to or allow enforcement of the final order of forfeiture or confiscation of the proceeds.<sup>51</sup>

#### b. INTERPOL

INTERPOL, the International Criminal Police Organization, has been in the forefront of promoting cooperation and assistance between states in the investigation of money laundering. Most significantly, INTERPOL provides technical assistance and training on methods for combatting money laundering—especially in the Caribbean and Latin America.

INTERPOL's Caribbean and Latin American working groups have successfully developed model legislation on money

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46. See *infra* part II.D.2.

47. See Bruce Zagaris, *8th U.N. Crime Congress Adopts Model Treaties on Extradition, Mutual Assistance, Transfer of Proceedings and Supervision, and Cultural Heritage*, 6 INT'L ENFORCEMENT L. REP. 369 (1990) [hereinafter Zagaris, *U.N. Crime Congress*].

48. *Id.* at 372.

49. *Id.* at 371-72.

50. *Id.* at 372.

51. *Id.* at 372. For additional background, see United Nations Press Release UNIS, CP/174 11 September 1990.

laundering. The General Assembly of INTERPOL subsequently adopted model legislation which provides for the temporary freezing of property prior to the filing of criminal charges.<sup>52</sup> Additionally, the legislation authorizes "the issuance of restraining orders, injunctions, and other actions regarding property" which is deemed to be derived from criminal activity.<sup>53</sup> It also provides for the forfeiture of such property to the government of the country where it is located upon conviction of the owner for possession of criminal proceeds.<sup>54</sup> INTERPOL's *Fonds Provenant d'Activités Criminelles* (FOPAC) working group continues to review asset forfeiture and other economic crime issues, particularly as they relate to drug trafficking.<sup>55</sup>

INTERPOL's resolutions to combat international money laundering and implement provisions to forfeit crime proceeds illustrate its continuing leadership in forging a consensus among its members to cooperate against money laundering.<sup>56</sup> INTERPOL recognizes the advantages of closer cooperation with international organizations.<sup>57</sup> After INTERPOL adopted the model legislation on money laundering and forfeiture of assets during its General Assembly in August 1985, it embarked on an extraordinary lobbying campaign to enact the

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52. See Bruce Zagaris, *INTERPOL Adopts Model Legislation on Forfeiting Crime Proceeds*, 2 INT'L ENFORCEMENT L. REP. 65, 67 (1986) [hereinafter Zagaris, *INTERPOL*].

53. *Id.*

54. *Id.*

55. The *Fonds Provenant d'Activités Criminelles* (FOPAC) was established in 1983 to investigate the financial assets of organized crime. Its responsibilities include: systematically gathering financial information, studying financial information to obtain information on organized crime, publishing this information to other organizations combatting organized crime, training individuals in investigative techniques, and furthering cooperation among international organizations that combat organized crime.

56. INTERPOL was one of the first IGOs actively to adopt measures to combat internationally the problem of funds derived from criminal activities, starting with the 1985 Caribbean Resolution. However, the fact that INTERPOL has, like other police organizations, not cultivated public relations and has shunned publicity and political intervention has limited its political influence beyond police organizations. On the latter problem, see Bruce Zagaris, *INTERPOL Secretary General Highlights Action on Money Laundering and Terrorism*, 2 INT'L ENFORCEMENT L. REP. 135, 137 (1986); MICHAEL FOONER, *INTERPOL ISSUES IN WORLD CRIME AND INTERNATIONAL CRIMINAL JUSTICE* 26-27 (1989).

57. For a discussion of IGO interactions with other IGOs and the absence of systematic exploration of such interactions, see FELD ET AL., *supra* note 35, at 188-89.



model legislation outside the INTERPOL community.<sup>58</sup> For example, in September 1985, the model was presented to the Customs Cooperation Council (CCC) during a meeting in Brussels, and the CCC said it planned to distribute it to the Commissioners of Customs in its member countries.<sup>59</sup> To promote anti-money-laundering legislation further, the Secretary General of INTERPOL, Mr. Ray Kendall, has written to the Ministers of Justice and Attorneys General of non-INTERPOL countries to notify them of the model legislation. In February 1986, Mr. Kendall also presented the model legislation to the UN Fund for Drug Abuse Control.<sup>60</sup> INTERPOL has broadened its membership to include former members, Poland and the former Czechoslovakia, and new member, the then Soviet Union, thereby increasing its influence and budget for the regulation of money movement.<sup>61</sup> INTERPOL's active role in shaping the regime of anti-money-laundering illustrates the key role of IGOs in regime transformation.

*c. The G-7 Group and the Financial Action Task Force*

New enforcement initiatives have also been adopted during meetings between leaders of the seven leading industrialized democracies, the G-7.<sup>62</sup> From the beginning, one of their priorities has been to eliminate the money-laundering operations used by drug kingpins to move billions of dollars through the international banking system.

On July 16, 1989, the G-7 issued a communiqué which pledged to enhance international criminal cooperation on four key topics: drugs, money laundering, terrorism, and the envi-

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58. FELD ET AL., *supra* note 35; see also UNITED NATIONS, THE UNITED NATIONS AND DRUG ABUSE CONTROL 85-89 (1987) (describing the role and accomplishments of the UN Fund for Drug Abuse Control (UNFDAC)).

59. See Zagaris, *INTERPOL*, *supra* note 52, at 67.

60. For a discussion of the effort by INTERPOL to lobby for the enactment of the model legislation, see Zagaris, *INTERPOL*, *supra* note 52, at 135-36.

61. For a discussion of the entry of the members of the former socialist bloc and other recent developments relating to drug-related matters, see *59th General Assembly Meeting of INTERPOL Member Countries*, 6 INT'L ENFORCEMENT L. REP. 411, 411-13 (1990).

62. The G-7 Summit is an annual meeting of the heads of government of the leading seven industrial nations (the United States, Italy, France, the United Kingdom, Japan, Canada, and Germany). The agenda is predominantly economic. Traditionally, a statement is released at the end of the summit containing any agreements on policies reached.

ronment.<sup>63</sup> Most important, the communiqué announced the establishment of the Financial Action Task Force (FATF) formed from summit participants and other interested countries to deal with money laundering.<sup>64</sup> The G-7 has been joined by the governments of Australia, Austria, Belgium, Spain, Luxembourg, the Netherlands, Sweden, and Switzerland. The task force is politically significant because it is a step towards "the institutionalization of international cooperation . . . ."<sup>65</sup>

On April 23, 1990, the FATF issued a report containing recommendations for combatting money laundering.<sup>66</sup> These recommendations have important implications for the conduct of employees of international businesses and financial institutions, and a significant impact on the investigation and prosecution of persons accused of money laundering.

The report recommends the following measures to combat money laundering: improving the national legal systems, enhancing the role of the financial system in reporting and monitoring suspicious activity, and strengthening international cooperation.<sup>67</sup> According to the report, the FATF members unanimously agreed that financial institutions' secrecy policies should not inhibit the implementation of the report's recommendations.<sup>68</sup>

The report further states that each country should criminalize drug money laundering as required by the Vienna UN Drug Convention<sup>69</sup> and that member governments should consider "extending the offense of drug money laundering to any other crimes" for which a link to narcotics exists.<sup>70</sup> Alter-

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63. See Bruce Zagaris, *G-7 Countries Agree to Take Action on Drugs Laundering and Terrorism*, 5 INT'L ENFORCEMENT L. REP. 255 (1989).

64. *Id.* at 256.

65. *Id.*

66. *Financial Action Task Force on Money Laundering*, OECD Doc. Feb. 7, 1990 [hereinafter *FATF Report 1*]; see also Bruce Zagaris, *Financial Action Task Force Releases Report to Combat Money Laundering*, 6 INT'L ENFORCEMENT L. REP. 183 (1990). The report is a combined effort of three working groups: money laundering statistics and methods chaired by the United Kingdom, legal questions chaired by the United States, and administrative and financial cooperation chaired by Italy. *FATF Report 1*, *supra*.

67. *FATF Report 1*, *supra* note 66, Recommendation 3.

68. *FATF Report 1*, *supra* note 66, Recommendation 2.

69. *FATF Report 1*, *supra* note 66, Recommendation 4.

70. *FATF Report 1*, *supra* note 66, Recommendation 5. The United Kingdom

natively, the report recommends extending the offense of money laundering to all "criminal offenses that generate significant proceeds, or on certain serious offenses."<sup>71</sup>

Pursuant to the Vienna UN Drug Convention, the FATF Report calls for measures that will enable the competent authorities to "confiscate property laundered, proceeds from and instrumentalities used in or intended for use in the commission of any money-laundering offense, or property of corresponding value."<sup>72</sup> In addition, measures should be adopted authorizing governments to: "(1) identify, trace, and evaluate property which is subject to confiscation; (2) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer, or disposal of such property[;] and (3) take any appropriate investigative measures."<sup>73</sup> The report directs countries to consider imposing monetary and civil penalties or proceedings to void contracts where the parties knew or should have known that the contract's result would prejudice the state's ability to recover financial claims.<sup>74</sup>

The FATF recommendations also encourage improving the role of the financial system in combatting money laundering, (*i.e.*, banks and non-bank financial institutions).<sup>75</sup> The report suggests creating rules requiring these institutions to identify customers and keep certain financial records.<sup>76</sup> Financial in-

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adopted this approach when it enacted the Drug Trafficking Offenses Act, 1986 (DTOA), ch. 32 (Eng.). Other Commonwealth governments such as Hong Kong have emulated the United Kingdom. *See, e.g.*, The Drug Trafficking (Recovery of Proceeds) Ordinance, 1989, §§ 25.6-25.7.

71. *FATF Report 1*, *supra* note 66, Recommendation 5. The United States and Australian laws take the latter approach and criminalize laundering the proceeds of serious offenses.

72. *FATF Report 1*, *supra* note 66, Recommendation 8.

73. *FATF Report 1*, *supra* note 66, Recommendation 8.

74. *FATF Report 1*, *supra* note 66, Recommendation 8.

75. *FATF Report 1*, *supra* note 66, Recommendation 9. An important recommendation which has been adopted establishes a working group to further examine the possibility of creating "a common minimal list of non-bank financial institutions and other professions dealing with cash subject to these recommendations." *See FATF Report 1*, *supra* note 66, Recommendation 11.

76. *FATF Report 1*, *supra* note 66, Recommendation 12. The report also provides that "[f]inancial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international to enable them to comply swiftly with information requests from competent authorities." *FATF Report 1*, *supra* note 66, Recommendation 14. It would require them to also keep records on customer identification, account files, and business correspondence for at least five years after an account is closed. *FATF Report 1*, *supra* note 66, Recommenda-

stitutions suspecting that funds were derived from criminal activity should be allowed or required to report their suspicions promptly to the competent authorities.<sup>77</sup> Additionally, the report mentions discussion of a currency transaction reporting system, such as that implemented by the United States and Australia.<sup>78</sup>

The report urges that competent international authorities (perhaps INTERPOL and the CCC) be responsible for gathering and disseminating information to government authorities about money laundering and money-laundering techniques, and that central banks and bank regulators should do the same in their networks.<sup>79</sup> It further provides that each government should furnish spontaneously or "upon request" information relating to suspicious transactions and the persons and corporations involved in those transactions.<sup>80</sup> Strict safeguards should be implemented to ensure that exchanges of information are consistent with national and international laws on privacy and data protection.<sup>81</sup>

Regarding cooperation between legal authorities, the report is vague. Countries are encouraged to enter into "bilateral and multilateral agreements based on generally shared legal concepts . . . [to] affect the widest possible range of mutual

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tion 14.

77. *FATF Report 1*, *supra* note 66, Recommendation 16. This recommendation complies with the Basle Statement of Principles. *See infra* part II.D.1.e. However, differing opinions existed within the FATF on whether the reporting of suspicious activity should be mandatory or permissive. A few countries strongly believe that reports should be mandatory—possibly restricted to suspicions of serious criminal activities—and combined with administrative sanctions for failure to report. *FATF Report 1*, *supra* note 66, Recommendation 16.

78. *FATF Report 1*, *supra* note 66, Recommendation 23. Specifically, the report recommends the study of "the feasibility of measures to detect or monitor cash at the border . . . subject to strict safeguards to ensure proper use of information" and the freedom of legitimate capital movements. *FATF Report 1*, *supra* note 66, Recommendation 23. Opposition to the implementation of a currency transaction reporting system is mentioned in the report as well. *FATF Report 1*, *supra* note 66, Recommendation 23.

79. *FATF Report 1*, *supra* note 66, Recommendation 31. In addition, it is recommended that national administrations should consider recording, at least in the aggregate, international flows of currency, "so that estimates can be made of cash flows and reflows from various sources abroad." Such information would be made available to the International Monetary Fund and the Bank for the International Settlements. *FATF Report 1*, *supra* note 66, Recommendation 31.

80. *FATF Report 1*, *supra* note 66, Recommendation 32.

81. *FATF Report 1*, *supra* note 66, Recommendation 32.

assistance.”<sup>82</sup> According to the report, countries should implement compulsory measures for mutual assistance in criminal matters including authorizing expeditious action in response to foreign requests to “identify, freeze, seize and confiscate proceeds or other property” connected to money laundering and related crimes.<sup>83</sup> The report encourages creating procedures to avoid conflicts in prosecuting defendants in more than one country and to coordinate seizure and confiscation proceedings which may involve the same confiscated assets.<sup>84</sup> Governments are also urged to establish procedures to extradite individuals charged with a money-laundering offense or related offenses.<sup>85</sup>

On June 22, 1992, the FATF approved its third report.<sup>86</sup> A key accomplishment of the FATF during 1992 was to establish a means of monitoring the progress of its members in implementing anti-money-laundering measures. A small team of experts drawn from other FATF member countries conducts the process and their findings are reviewed by the specialized FATF working groups. The 1993 report described in-depth examinations of eight member countries: Austria, Belgium, Canada, Denmark, Italy, Luxembourg, Switzerland, and the United States.<sup>87</sup> FATF members are also evaluated based on an annual questionnaire regarding their progress in implementing the forty anti-money-laundering recommendations prepared by the FATF in 1990.<sup>88</sup> With respect to the recommendations, the FATF decided not to introduce additional recommendations, but rather to prepare a number of interpretative notes for use in conjunction with the existing recommendations. The FATF has also begun studying possible preventive measures to detect and deter the use of international wire transfers of funds as a means of money laundering.

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82. *FATF Report 1*, *supra* note 66, Recommendations 33 and 34.

83. *FATF Report 1*, *supra* note 66, Recommendations 37 and 38.

84. *FATF Report 1*, *supra* note 66, Recommendation 39.

85. *FATF Report 1*, *supra* note 66, Recommendation 40. The report states that countries may consider simplifying extradition through various suggested procedures. *FATF Report 1*, *supra* note 66, Recommendation 40.

86. *Financial Action Task Force on Money Laundering Report* (Paris, June 1992) [hereinafter *FATF Report 3*] (on file with authors).

87. See *Annual FATF Report Puts Eight Countries Under Microscope*, MONEY LAUNDERING ALERT, Aug. 1993, available in LEXIS, Nexis Library, Intl File.

88. *FATF Report 3*, *supra* note 86, at 3, 7.

FATF policy has been directed toward encouraging worldwide action against money laundering. During 1992 and 1993, FATF members participated in a number of regional meetings to discuss money laundering, including the Caribbean Financial Action Task Force in Kingston, Jamaica, the South East Asia Central Bank Board of Governors in Jakarta, Indonesia, the Asia Money-laundering Symposium in Singapore, and a laundering conference in Warsaw, Poland. Discussions also occurred with various Central and Eastern European countries. In addition, the FATF began developing connections with the UN International Drugs Control Programme and the Council of Europe. Future goals include: the expansion of the mutual evaluation program with a large number of country examinations each year, development of means to counter more sophisticated money-laundering techniques, and implementation of the recommendations to promote a worldwide mobilization against money laundering.

The FATF has developed a three-stage program for improving relations with nonmember countries. The key objective of the program is to introduce the issue of money laundering through "direct contracts with financial centers . . . ." <sup>89</sup> Collective commitment and peer pressure will provide the impetus for the development of regional initiatives. <sup>90</sup> Finally, bilateral initiatives between individual FATF member governments and particular non-member countries will address problems as they are identified. <sup>91</sup>

Several IGOs, such as the European Community (EC) and the Council of Europe, have adopted the FATF's recommendations. The Caribbean FATF is considering adopting the recommendations. This illustrates the efficacy of the "soft law" of influential organizations.

Similar concepts and principles are reflected in the Vienna UN Drug Convention, the FATF Recommendations, and the European Laundering Convention. This development of related concepts concerning the movement of money has occurred in a period of less than two years (a significant accomplishment for

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89. *FATF Report 3*, *supra* note 86, at 3-4.

90. FATF members have been encouraging the implementation of the 1990 *FATF Report* by those dependent, associate or otherwise connected territories with which they have constitutional, historical, or geographical links.

91. *FATF Report 3*, *supra* note 86, at 3-4.

each of the IGOs) and signifies regime transformation, in the parlance of international organization theory. Significantly, the G-7 summit—a relatively new and informal IGO—has become a major player in the formation and transformation of the anti-money-laundering regime.

*d. Organization of Economic Cooperation and Development*

The Organization of Economic Cooperation and Development (OECD) has played an important role in developing guidelines to minimize the overlap of jurisdiction and enforcement laws that inhibit international investment and business transactions. Most of its recommendations are of a general nature and are not binding. Most legislatures and courts do not heed them.

*e. The Basle Committee on Banking Regulations and Supervisory Practices*

In December 1988 the Basle Committee on Banking Regulations and Supervisory Practices (Basle Committee), adopted a statement of principles entitled *Prevention of Criminal Use of the Banking System, Draft Code of Conduct* (the *Principles*).<sup>92</sup> The statement encourages banks to know their customers, spot suspicious transactions, and to cooperate fully with law enforcement authorities. In particular, it states that where banks have good reason to suppose that money held on deposit was derived from criminal activity or that transactions made are themselves criminal in purpose, appropriate measures should be taken. For example, banks should deny assistance, sever relations with the customer, and close or freeze accounts connected with suspicious activity. It also recommends specific means to implement these measures.

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92. The committee is comprised of representatives of the central banks and supervisory authorities of Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, United Kingdom, United States, and Luxembourg). In December 1986, the Basle Committee on Banking Regulation and Supervisory Practices (Basle Committee) requested U.S. representatives from the Federal Reserve, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency to draft a general statement of principles that international bank supervisory authorities could encourage banks to follow. *Prevention of Criminal Use of the Banking System, Draft Code of Conduct*, Basle Committee Doc. BS/88/52 (1988) [hereinafter *Principles*].

A number of regional supervisory authorities in the Caribbean, Latin America, Asia, the Middle East, and Africa were established because of the Basle Committee's work and due to its influence.<sup>93</sup> In the future, international cooperation among bank supervisors is expected to extend to related forms of financial intermediation, such as the writing of insurance and the enforcement of securities and commodities regulations.<sup>94</sup> The Basle Committee is also working closely with international organizations to become more effective in implementing the *Principles*.<sup>95</sup> Although the Basle Committee's work on anti-money-laundering is not as comprehensive as that of the G-7 Summit's FATF, its constituency—international bankers—makes its contributions important.

On July 6, 1992, the Basle Committee issued new minimum standards which apply when governments regulate international banks.<sup>96</sup> Four principal elements are contained in the minimum standards: 1) Any international banking group should be supervised on a "consolidated basis" by a single home country authority, taking account of its operations anywhere in the world;<sup>97</sup> 2) If a bank wants to establish branches in a jurisdiction outside its home country, it will need the consent of both its home country regulator and the regulator in the country playing "host" to the new branches;<sup>98</sup> 3) A home country supervisor should have the right to receive information on the international operations of banks under its supervision, which will require an understanding on the gathering and sharing of information between the home country and host country supervisors;<sup>99</sup> and 4) If a country is unhappy about

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93. For a discussion of the encouragement of the establishment of regional groups of supervisory authorities, see Peter Hayward, *Prospects for Cooperation by Bank Supervisors*, 24 INT'L L. 787, 792 (1990). See also *Report on International Developments in Banking Supervision*, Basle Committee Doc. No. 6, PART IX (Sept. 1988).

94. For a discussion of growing cooperation between the Basle Committee and other supervisory groups involved in financial intermediation, see Hayward, *supra* note 93, at 797-800.

95. See *Principles*, *supra* note 92.

96. BASLE COMMITTEE ON BANKING SUPERVISION, MINIMUM STANDARDS FOR THE SUPERVISION OF INTERNATIONAL BANKING GROUPS AND THEIR CROSS BORDER ESTABLISHMENTS (1992).

97. *Id.* at 3.

98. *Id.* at 4.

99. *Id.* at 5.



the international supervision of a bank whose domicile is elsewhere, it can impose "restrictive measures" on branches of that bank in its territory.<sup>100</sup>

The last measure, if invoked, would mean that a bank regulator who is not satisfied with the adequacy of supervision of a bank whose domicile is elsewhere can take steps to improve supervision, ranging from prohibiting branches from doing business within its jurisdictions to setting a deadline for the bank and its home country regulator to design or implement acceptable standards of supervision.

The standards are only a voluntary code of practice. In an effort to promote them beyond the twelve members of the Basle Committee, Gene Corrigan, past chairman of the Basle Committee and past president of the Federal Reserve Bank, sent copies to authorities in more than one hundred countries to receive their approval of the standards at the annual meeting of the International Monetary Fund in France in October 1992. However, Mr. Corrigan has admitted "that it would be a considerable time before all bank regulators had sufficient resources or expertise to monitor an international banking group effectively."<sup>101</sup>

The new and improved regulatory standards should make bank fraud or deception more difficult and thereby prevent cases similar to that of the Bank of Credit and Commerce International. It is expected that many countries, including some with relatively strong supervisory systems such as the United States, might have to change their laws to adopt the standards.<sup>102</sup>

## 2. Regional Organizations

### a. *The Council of Europe*

The EC Money-laundering Directive was the result of a three-year effort on the part of the Council of Europe. On the

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100. *Id.* at 6. For additional background on the adoption of new minimum supervisory bank standards, see Robert Peston, *Basle Code to Avoid Repeat of BCCI Case*, FIN. TIMES, July 7, 1992, at 3.

101. *Id.*

102. For additional background on the impact of the Basle Committee on countries, see Steven Prokesch, *Regulators Agree on Rules to Prevent More B.C.C.I.'s*, N.Y. TIMES, July 7, 1992, at D1.

first day that the convention was opened for signature, November 8, 1990, twelve governments signed.<sup>103</sup> The fact that so many countries signed immediately, and that four other countries announced their intentions to sign, signals a tremendous success for anti-money-laundering laws and for international anti-crime cooperation in general.

Some of the European Laundering Convention's provisions are far-reaching and have the potential to revolutionize international cooperation and international money movement regulation. In addition to the experts from sixteen Council of Europe countries, the drafters consisted of experts from Australia, Canada, and the United States, as well as INTERPOL, the United Nations, the International Association of Penal Law, the International Penal and Penitentiary Foundation, and the International Society of Social Defense.<sup>104</sup> Although the convention is based on the Vienna UN Drug Convention, it allows signatory countries to criminalize laundering for non-drug-related offenses.<sup>105</sup> The European Laundering Convention also contains important substantive provisions, such as allowing the criminalization of negligent money laundering.<sup>106</sup>

The European Laundering Convention first gathered momentum at the 15th Conference of the European Ministers of Justice in Oslo on June 17-19, 1986, when the penal aspects of drug abuse and drug trafficking were discussed. Discussion centered around the need to eradicate the drug market by freezing and confiscating the proceeds from drug trafficking. As a result, the ministers adopted Resolution No. 1 which recommended that the European Committee on Crime Problems (CDPC) examine "the formulation in the light *inter alia* of the work of the United Nations, of international norms and stan-

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103. European Laundering Convention, *supra* note 15; see also Bruce Zagaris, *Twelve Countries Sign European Laundering Convention*, 6 INT'L ENFORCEMENT L. REP. 380 (1990). The governments which signed the convention were Belgium, Cyprus, Denmark, Germany, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. The governments which plan to sign include France, Finland, Ireland and Switzerland. *Id.*

104. SUMMARY DRAFT REPORT, *supra* note 19, ¶ 4.

105. See SUMMARY DRAFT REPORT, *supra* note 19, ¶ 14. BUREAU OF INT'L NARCOTICS MATTERS, U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT (1991), IV(3)-(4) [hereinafter 1991 NARCOTICS REPORT].

106. European Laundering Convention, *supra* note 15, art. 6.3 ("Each Party may . . . establish also as offences . . . where the offender ought to have assumed the property was proceeds [from crime].").

dards to guarantee effective international cooperation between judicial (and where necessary police) authorities in the detection, freezing and forfeiture of the proceeds of illicit drug trafficking."<sup>107</sup> At its 36th plenary session in September 1987 the CDPC proposed, and the Committee of Ministers authorized, the creation of a Select Committee of Experts on international cooperation as regards search, seizure and confiscation of proceeds from crime.<sup>108</sup> The work of this committee was expedited at the request of the Ministers during the conference of the Pompidou Group in London in May 1989.<sup>109</sup>

The United States is deliberating whether to sign the European Laundering Convention but is hesitant to do so because it would either have to enter reservations on some of the aspects of the convention or enact additional domestic legislation.<sup>110</sup> At least one interested agency, the United States Department of Justice, is aware that legislative action is required to expand the types of crimes committed abroad after which forfeiture may be allowed.<sup>111</sup>

As countries outside the Council of Europe accede to the convention, the potential role of the Council of Europe in influencing the transformation of international anti-money-laundering laws and policy widens. However, the lack of an institutional framework, the failure of outside countries to become involved until recently, and the failure of other countries to participate limits the influence of the Council of Europe in developing anti-money-laundering policy.

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107. SUMMARY DRAFT REPORT, *supra* note 19, ¶ 1.

108. SUMMARY DRAFT REPORT, *supra* note 19, ¶ 2.

109. SUMMARY DRAFT REPORT, *supra* note 19, ¶ 5.

110. In order for the United States to give assistance to requesting states in non-drug-related cases, new domestic legislation will be needed. See Mary Troland, Office of International Affairs, U.S. Department of Justice, and Hans Nilsson, Council of Europe, Addresses at the A.B.A. National Institute on Asset Forfeiture (Dec. 3-4, 1990). For a summary of the remarks, see Bruce Zagaris, *A.B.A. National Institute Considers International and Foreign Law Aspects of Asset Forfeiture*, 6 INT'L ENFORCEMENT L. REP. 435, 437-38 (1990) [hereinafter Zagaris, *A.B.A. National Institute*].

111. For a review of some of the policy issues, see Zagaris, *A.B.A. National Institute*, *supra* note 110, at 437-38.

*b. The European Community*

On December 17, 1990, the EC Finance Ministers proposed a framework directive for money laundering<sup>112</sup> which became final on June 10, 1991, as the Council Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering.<sup>113</sup> The directive called on EC countries to make the laundering of the proceeds from drug trafficking a criminal offense;<sup>114</sup> members were to comply with the directive by January 1, 1993. The directive applies to banks, all other financial service institutions, casinos and currency exchange houses. The directive further provides that EC banks and other financial institutions are not to violate secrecy laws when disclosing banking information in money-laundering cases. The agreement contains the following points: 1) The definition of money laundering will only apply to drug proceeds,<sup>115</sup> although EC members will have the option of also applying it to other areas<sup>116</sup> such as terrorism and kidnapping, and the EC will establish a working party to examine the possibility of extending the directive to other criminal activities; 2) Each EC member will prohibit money laundering, as defined in the directive;<sup>117</sup> and 3) The EC Commission will explore the possibility of associating the new democracies in Eastern Europe with the agreement so that similar measures criminalizing the laundering of proceeds from trafficking will apply in those countries.

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112. This framework directive was the "Proposal for a Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering" that was submitted by the EC Commission to the Council of Ministers (the Council) and the European Parliament (EP) on March 23, 1990. See Commission Proposal for a Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering, COM (90) 106 final at 254; see also Banking: One Step Forward, One Back for Money Laundering Proposal at Council, European Report, No. 1635, at 11-1 (Dec. 5, 1990).

113. See Council Directive of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 1991 O.J. (L 166) 77 [hereinafter EC Money Laundering Directive].

114. *Id.* at art. 2. For additional background, see Lucy Kellaway, *E.C. to Make Drug Money Laundering a Crime*, FIN. TIMES, Dec. 18, 1990, at I16.

115. Vienna UN Drug Convention, *supra* note 40, art. 31A.

116. EC Money Laundering Directive, *supra* note 113, art. 15, provides that Member States can adopt or retain in force stricter provisions in the field to prevent money laundering.

117. EC Money Laundering Directive, *supra* note 113, art. 2.

Member states must ensure that credit and financial institutions identify their customers by means of supporting evidence particularly when opening accounts or offering safe custody facilities.<sup>118</sup> When 15,000 European Currency Units (ECUs) (equal to U.S. \$20,400) or more is held by a financial institution for an occasional customer, proof of identity must be obtained.<sup>119</sup> Member states will be able to impose stricter rules; however, the adverse economic impact of such action may obviously act as a deterrent.

To facilitate investigation into money laundering, member states must ensure that credit and financial institutions keep a copy of requisite identification references for a period of at least five years after the relationship with their customer has ended and for five years after the end of transactions.<sup>120</sup> Member states must also ensure that credit and financial institutions establish internal control and communication procedures and take appropriate measures so that their employees are aware of the provisions of the directive. It also recommends that employees participate in special training programs.<sup>121</sup> Financial and credit institutions and their employees must report suspicious transactions to the designated national authorities and otherwise cooperate fully with authorities.<sup>122</sup>

At present, only three of the twelve members of the EC—Luxembourg, France and the United Kingdom—have enacted laws against money laundering.

The EC directive is not as stringent as United States anti-money-laundering legislation, since the latter relies heavily on routine collection of information by a host of professionals and financial institutions, who must forward such information to the United States Department of Treasury when transactions pass a threshold of \$10,000 (almost one-half the threshold in the EC). However, the directive will pressure other countries to enact legislation against money laundering. For instance, the Caribbean caters to flight capital—money transferred there when the home country is unstable—and it will be under new pressures to enact anti-money-laundering legislation. If the

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118. EC Money Laundering Directive, *supra* note 113, art. 3(1).

119. EC Money Laundering Directive, *supra* note 113, art. 3(2).

120. EC Money Laundering Directive, *supra* note 113, art. 4.

121. EC Money Laundering Directive, *supra* note 113, art. 11.

122. EC Money Laundering Directive, *supra* note 113, art. 5.

Caribbean countries take such action, they probably will do so as a group rather than individually; otherwise, money launderers will take advantage of the countries that do not have such legislation.

The EC's participation in INTERPOL, the Vienna UN Drug Convention, and the G-7 FATF Report, indicates that it is playing an active role in regime transformation independent from the role played by its member states.<sup>123</sup> Developments in the EC will influence regime transformation on international anti-crime cooperation, regulation of international money movement, and asset forfeiture. For instance, the Convention Applying the Schengen Agreement (Schengen Accord) signed June 19, 1990 by five countries, Belgium, France, Federal Republic of Germany, Luxembourg, and the Netherlands<sup>124</sup> allows police from other countries to pursue criminal suspects across their national borders.<sup>125</sup> Signatories to the Schengen Accord will also establish a permanent working group on illicit drug trafficking,<sup>126</sup> to supplement both the Vienna UN Drug Convention and the EC's efforts in this regard.<sup>127</sup> Hence, both in its internal and external policies, the EC will be a powerful player in shaping international anti-money-laundering policy.

### c. Caribbean Financial Action Task Force

On June 8-10, 1990, a Caribbean drug money-laundering conference was held in Oranjestad, Aruba. The leading governments in the region, comprising the CFATF, sent delegates

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123. For additional analysis of the role of the EC in economic integration and the regime transformation for international criminal cooperation, see Scott Carlson & Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551-79 (1991).

124. See Convention Applying the Schengen Agreement of June 14, 1985, June 19, 1990, 30 I.L.M. 143, 146-47 [hereinafter Accord]. For a discussion of the Accord's enforcement provisions, see *Five EC Members Reach Agreement on Schengen Accord*, 6 INT'L ENFORCEMENT L. REP. 226 (1990). The Schengen Agreement of June 1990 was signed to effectuate the ultimate removal of all border controls. See 30 I.L.M. 68, 69. On November 17, 1990, Italy was the sixth state to adopt both the Schengen Agreement and Convention.

125. In some cases, police officers from one country will be able to chase criminal suspects up to ten kilometers (6.21 miles) into a neighboring country. *Five EC Members Reach Agreement on Schengen Accord*, *supra* note 124, at 227.

126. Accord, *supra* note 124, art. 70.

127. Accord, *supra* note 124, art. 71.

and committed themselves to take action against drug money laundering and to consider the forty recommendations of the FATF of the G-7 plus twenty-one additional recommendations of the CFATF.<sup>128</sup>

One of the recommendations stemming from the CFATF provides that a study be conducted to determine the extent of drug and related money-laundering problems in the region.<sup>129</sup> According to the conference report, banks and sea/air transport companies require study.<sup>130</sup> Other provisions recommend that adequate resources be dedicated to fighting money laundering and other drug-related financial crimes. Specialized training of government authorities and law enforcement officials is also required in countries which lack substantial experience in combatting money laundering and other drug-related financial crimes.<sup>131</sup>

Another provision, consistent with Recommendation 5 of the FATF, details how to criminalize money laundering and, in particular, determine what crimes ought to constitute predicate offenses.<sup>132</sup> The Caribbean will likely follow Britain's laws, such as the DTOA, and basic legal concepts, and will make the predicate crimes drug-related crimes. This would criminalize conspiracy to engage in drug trafficking, aiding and abetting drug trafficking, money laundering, and other serious drug-related offenses. Such activities are subject to stringent criminal sanctions in several countries.

Although the United States and other developed countries have tried to schedule meetings with the Caribbean heads of state or other high-ranking officials to establish agreement on the recommendations at a higher level, some Caribbean governments have blocked the scheduling of such a meeting. Sev-

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128. The governments in attendance were: Aruba, the Bahamas, Barbados, Bermuda, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Costa Rica, the Dominican Republic, France, Honduras, Jamaica, Mexico, the Netherlands, the Netherlands Antilles, Panama, St. Vincent and the Grenadines, Trinidad and Tobago, the United Kingdom, the United States, and Venezuela. See Bruce Zagaris, *Caribbean Financial Action Task Force Aruba Meeting Presages Cooperation by Caribbean Jurisdictions*, 6 INT'L ENFORCEMENT L. REP. 217 (1990) [hereinafter Zagaris, *CFATF*]. For a discussion of the recommendations of the Caribbean Financial Action Task Force, see *id.*

129. *Id.* at 218. See also 1991 NARCOTICS REPORT, *supra* note 105, at IV(3).

130. Zagaris, *CFATF*, *supra* note 128, at 218.

131. Zagaris, *CFATF*, *supra* note 128, at 219-20.

132. Zagaris, *CFATF*, *supra* note 128, at 218.

eral Caribbean governments are not amenable to undertaking the recommendations because their countries have important international financial sectors which may be jeopardized by the recommendations. Adopting these recommendations would erode bank secrecy and confidentiality.<sup>133</sup>

Despite the reluctance of some Caribbean governments to take a solid position against money laundering, a workshop was held on May 26-28, 1992, in Jamaica, to discuss the CFATF's compliance with the forty recommendations of the FATF and the twenty-one recommendations of the CFATF. The workshop participants were divided into three groups; each one evaluated data collected from participating countries on legal, financial and technical assistance issues. The groups discussed the development of a legislative framework required by the Vienna UN Drug Convention to combat money laundering. The three work groups produced papers summarizing the results of their work. The workshop participants agreed to convene a ministerial level meeting in October 1992, chaired by Jamaica, to politically endorse the sixty-one recommendations of the FATF and the CFATF and to commit to the implementation of those recommendations and the Vienna UN Drug Convention. The ministers were given an action agenda for securing technical assistance and training from countries experienced in combatting money laundering.<sup>134</sup>

An additional meeting is scheduled to review the progress of each nation in adopting anti-money-laundering measures. The participating governments will self-evaluate—as distinguished from the mutual evaluations of the FATF—their accomplishments and problems encountered in the implementation of the Vienna UN Drug Convention or recommendations.

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133. See, e.g., Bruce Zagaris, *Developments in U.S.-Bahamas Enforcement*, 7 INT'L ENFORCEMENT L. REP. 5, 7 (1991); for a discussion of Panama's need to preserve confidentiality and protect its international financial sector at the expense of cooperation, see Tim Coone, *A Veneer of Normality*, FIN. TIMES, Feb. 18, 1991, at 20-21 (discussing the economy); Tim Coone, *Long Road to Recover*, FIN. TIMES, Feb. 18, 1991, at 20 (describing banking and finance); Lesley Crawford, *An Unequal Partnership*, FIN. TIMES, Feb. 18, 1991, at 21 (writing about U.S. assistance to Panama).

134. For additional background on the Jamaica CFATF workshop, see Bruce Zagaris, *Caribbean Financial Action Task Force Holds Technical Workshop*, 8 INT'L ENFORCEMENT L. REP. 207-11 (1992).



d. *Inter-American Drug Abuse Commission*

The Inter-American Drug Abuse Commission (CICAD) is an autonomous, regional organization within the Organization of American States (OAS). When it was founded, CICAD established an action program to counter the production and use of illicit substances.<sup>135</sup> Since then, the organization has established mechanisms to combat money laundering that may have a long-term impact on money movement enforcement activities.<sup>136</sup>

In February 1991 CICAD convened a group of experts who prepared model anti-money-laundering laws for adoption by its members. The expert group recommended to member countries that legislation be passed which defines as crimes all activities connected with the laundering of property and proceeds related to illicit drug trafficking.<sup>137</sup> The laws should enable authorities to identify, trace, seize, and confiscate property and proceeds related to illicit drug trafficking. The group also urges member states to encourage financial institutions to cooperate with the competent authorities, *inter alia*, to facilitate the identification, tracing, seizure, and confiscation of illegal proceeds from laundering.

The Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses

135. The Inter-American Drug Abuse Commission (CICAD) was established as a result of an OAS conference on drug traffic held in Rio de Janeiro April 22-26, 1986. See *Inter-American Program of Action of Rio de Janeiro Against the Illicit Use and Production of Narcotic Drugs and Psychotropic Substances and Traffic Therein*, Org. of Am. States, ch. IV, § 1(a), OAS Doc. OEA/ser. K/XXXI.1, CICAD/doc. 22 rev. 3 (1986) [hereinafter Action Program]. The General Assembly of the OAS established CICAD in November of 1986. G.A. Res. 813, U.N. GAOR, 41st Sess., Supp. No. 5, U.N. Doc. A/41/53 (1986); see also *Report of the Executive Secretariat on the Status of Execution of the Statutory and Priority Projects (Article 20(e) of the Statute of CICAD): Legal Development Project Meeting of Experts on Reinforcing the Capability of Governments to Prosecute Illicit Drug Trafficking*, OAS Doc. OEA/ser. L/XIV.3.2, CICAD/doc.81 corr.1 (1988); Zagaris & Papavizas, *supra* note 1, at 119 (discussing the need to use a regional organization such as the OAS for cooperation against narcotics trafficking).

136. The General Assembly formally adopted the Action Program at its 16th regular session in Guatemala City in November of 1986. See *Plan of Action: Education in the Campaign Against Drug Abuse*, Inter-American Drug Abuse Control Commission, OAS Doc. OEA/ser. LXIV.3.2, CICAD/doc. 81 add. 2, at iv (1988).

137. *Report of the Executive Secretariat on the Status of Execution of Statutory Activities and of Priority Lines of Action (Article 27(e) of the Statute of CICAD)*, OAS Doc. OEA/ser. L/XIV.2.8 (1990).

(Model Regulations) were approved by CICAD in March 1992, and by the entire membership of the OAS at its General Assembly held May 18-22, 1992, in the Bahamas.<sup>138</sup> The Model Regulations seek to reconcile the differences in the legal systems in the Inter-American region. The framework of the regulations follows the Vienna UN Drug Convention and incorporates, whenever possible, the recommendations tendered by the G-7 FATF.

The Model Regulations broadly define the crime of money laundering to include any and all conversions, transfers, acquisitions, or the possession or use of property by any person who knows, should have known, or who is intentionally ignorant that such property stems from an illicit drug traffic offense or related offenses.<sup>139</sup> A laundering offense is also committed by any person who conceals, disguises, or impedes the establishment of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property and knows, should have known, or is intentionally ignorant that such property is proceeds from an illicit drug traffic offense or related offenses.<sup>140</sup> These provisions address notification requirements,<sup>141</sup> burden of proof,<sup>142</sup> protection of bona fide third parties,<sup>143</sup> and the disposition of forfeited property.<sup>144</sup>

This definition limits the scope of the crime of money laundering to drug-related monies. CICAD considered broadening the offense to cover other criminal proceeds but felt constrained by the Declaration and Program of Action of Ixtapa which restricted its mandate to the drafting of model money-laundering legislation conforming to the Vienna UN Drug Convention.<sup>145</sup>

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138. *Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses*, Inter-American Drug Abuse Control Commission (photocopy on file with authors) [hereinafter *Model Regulations*]. OAS Adopts Money Laundering Proposals, MONEY LAUNDERING ALERT, June 1992, available in LEXIS, Nexis Library, Intl File [hereinafter *Money Laundering Proposals*].

139. *Model Regulations*, *supra* note 138, arts. 2.1-2.2.

140. *Model Regulations*, *supra* note 138, art. 2.3.

141. *Model Regulations*, *supra* note 138, art. 6.2.

142. *Model Regulations*, *supra* note 138, art. 6.4.

143. *Model Regulations*, *supra* note 138, art. 6.

144. *Model Regulations*, *supra* note 138, art. 7; see the introduction to the *Model Regulations*, *supra* note 138; see also *Money Laundering Proposals*, *supra* note 138.

145. See *Western Hemisphere Countries Follow G-7 Lead*, MONEY LAUNDERING

The Model Regulations cover not only banks, but a broad range of "financial institutions and activities," such as brokers and dealers in securities, currency exchange houses, check cashing establishments, and institutions which transmit funds.<sup>146</sup> All financial institutions must identify their clients and maintain appropriate records and information on any and all transactions in excess of a specific amount of cash to be determined by the competent national authority.<sup>147</sup> Financial institutions must also comply promptly with information requests from the competent authorities for use in "criminal, civil, or administrative investigations, prosecutions or proceedings or for use by competent foreign authorities in accordance with domestic law or international agreements in force."<sup>148</sup>

In connection with the reporting of suspicious transactions, the Model Regulations require financial institutions to report all "complex, unusual or large transactions," or patterns of the same, as well as any "insignificant but periodic transactions which have no apparent economic or lawful purpose."<sup>149</sup>

Further provisions hold financial institutions liable for the actions of their "employees, staff, directors, owners, or other authorized representatives" who, acting as such, participate in any money-laundering offense or who refuse to comply with the obligations contained in the Model Regulations.<sup>150</sup> Sanctions applicable to financial institutions include "fine[s], temporary suspension of business or charter, or suspension or revocation of the license to operate as a financial institution."<sup>151</sup> Financial institutions are required to adopt and implement procedures to ensure high standards of integrity of their employees and a system to evaluate the personal employment, and financial histories of its employees. Ongoing training programs, such as "know your client" programs, are also required.<sup>152</sup> Compliance officers must be designated at the

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ALERT, June 1990, available in LEXIS, Nexis Library, Intl File, for a description of the meeting which resulted in the Declaration and Program of Action of Ixtapa, held in April 1990 in Ixtapa, Mexico.

146. *Model Regulations*, *supra* note 138, art. 9.1.

147. *Model Regulations*, *supra* note 138, art. 10.

148. *Model Regulations*, *supra* note 138, arts. 11.1-11.2.

149. *Model Regulations*, *supra* note 138, art. 13.

150. *Model Regulations*, *supra* note 138, arts. 14.1 & 14.3.

151. *Model Regulations*, *supra* note 138, art. 14.2.

152. *Model Regulations*, *supra* note 138, art. 18.2.

management level to function as liaisons with the competent national authorities.<sup>153</sup>

The Model Regulations also delineate the obligations of competent national authorities that regulate and supervise financial institutions. These authorities have the power to grant, deny, suspend, or cancel operations of financial institutions; oversee effective compliance with record keeping and reporting requirements; establish the necessary measures to guard against the acquisition, participation, management, or control of financial institutions by unsuitable persons; verify, through regular examinations, the existence of mandatory compliance programs; provide competent authorities with information obtained from financial institutions in accordance with the Model Regulations; prescribe instructions or recommendations to assist in detecting suspicious transactions; and cooperate closely with competent national and/or foreign authorities in the investigation or prosecutions of money laundering, illicit traffic, or related offenses and violations of laws and administrative regulations dealing with financial institutions.<sup>154</sup>

International cooperation is, in almost every sense, critical to the control of money-laundering operations. Accordingly, the Model Regulations recommend legislation that permits the international issuance of and compliance with requests for assistance in identifying, tracing, freezing, or seizing the property, proceeds, or instrumentalities of an illicit drug trafficking offense, with a view to its eventual forfeiture, or for investigatory purposes.<sup>155</sup> Other types of international cooperation contemplated include obtaining testimony in the requested state, "facilitating the voluntary presence or availability in the requesting state of persons, including those in custody, to give testimony, locating or identifying persons, serving of documents, examining objects and places, executing searches and seizures, providing information on evidentiary items, and executing other measures."<sup>156</sup>

One of the most important provisions of the Model Regulations addresses the issue of bank secrecy. In conformity with the Vienna UN Drug Convention, the Model Regulations pro-

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153. *Model Regulations*, *supra* note 138, art. 15.

154. *Model Regulations*, *supra* note 138, art. 17.1.

155. *Model Regulations*, *supra* note 138, art. 15.1.b.

156. *Model Regulations*, *supra* note 138, art. 18.4.

hibit bank secrecy or confidentiality laws from impeding compliance with any of the provisions of the Model Regulations.<sup>157</sup>

It is likely that the Model Regulations will be emulated by member states. CICAD and the OAS have regular meetings at which drugs and money laundering are discussed. They have also created a small secretariat to dispense a questionnaire to CICAD members to ascertain their current laws and practices related to money laundering. Although CICAD has not significantly influenced asset-forfeiture policy yet, its infrastructure and continuing work will enable it to play an important role in anti-money-laundering regime transformation in the Americas.

#### *e. Caribbean Common Market and Community*

On August 2, 1990, the heads of government of the Caribbean Common Market and Community (CARICOM) convened in Kingston, Jamaica. They discussed the importance of developing mechanisms to protect regional and international banking and financial systems from subversion by international drug traffickers. They issued a communiqué containing several items of importance to international enforcement and committed their governments to supporting strategies that are being developed in this area. They also noted the active participation of many CARICOM states in the CFATF.<sup>158</sup>

### 3. Bilateral Mechanisms

The United States is a party to bilateral mechanisms which provide for asset forfeiture in it and other signatory countries, including MLATs,<sup>159</sup> bilateral narcotics conven-

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157. *Model Regulations*, *supra* note 138, art. 18.

158. See *Caribbean Heads of Government Issue Communiqué*, 6 INT'L ENFORCEMENT L. REP. 336 (1990).

159. See, e.g., Memorandum of Understanding on Mutual Assistance in Criminal Matters and Ancillary Administrative Proceedings, Nov. 10, 1987, U.S.-Switz., 27 I.L.M. 481 (1988) [hereinafter *Mutual Assistance*, U.S.-Switz.]; see also Treaty on Mutual Assistance in Criminal Matters, July 3, 1986, U.S.-U.K.-Cayman Islands, S. TREATY DOC. NO. 8, 100th Cong., 2d Sess. (1988), reprinted in 26 I.L.M. 536 [hereinafter *U.S.-U.K.-Cayman Islands Treaty*]. For a discussion of these U.S. MLATs, see Allan Ellis & Bob Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE 151, 159, 170 (M. Cherif Bassiouni ed., 1986) (discussing Italian and Moroccan treaties providing for asset forfeiture).

tions,<sup>160</sup> and extradition agreements.<sup>161</sup> Recent MLATs have an article which provides that a party may notify another when it has reason to believe that proceeds and fruits or instrumentalities of crime are located in the territory of the other party. The parties are required to assist each other, to the extent permitted by their respective laws, in procedures relating to the immobilization, seizure, and confiscation of the proceeds or instrumentalities of crime, as well as to restitution and the collection of fines.<sup>162</sup>

Bilateral provisions are advantageous because they can be tailored to the requirements and circumstances of the two contracting parties; whereas multilateral conventions must necessarily find a low common denominator between numerous states. Hence, the regime can be more specific when only two parties are involved. Institutions, regular meetings, and planning sessions are important and should be established to maintain and further develop any bilateral agreements in force.

#### 4. Unilateral Mechanisms

The laws of some countries permit identifying, tracing, seizing, freezing, and confiscating funds as a means of assistance to another country. Some countries only render legal assistance for drug-related crimes, while other countries extend assistance to include a broader scope of crimes. The procedural requirements vary. In most cases the unilateral mechanisms are new or have undergone much revision and are influenced by developments of global (e.g., the Vienna UN Drug Convention) or regional (e.g., the European Laundering Convention) organizations. As countries gain experience in administering anti-money-laundering and asset-forfeiture laws, proposals will undoubtedly be made for the implementation and

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160. For a discussion of the U.S.-Mexico bilateral narcotics agreement, see Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT'L L. & POL'Y 339, 348-51 (1990).

161. For a discussion of U.S. extradition agreements, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION U.S. LAW AND PRACTICE* (1987).

162. For an example of an article on immobilizing, securing, and forfeiting of assets, see Article 11 of the Legal Assistance Cooperation Treaty, Dec. 9, 1987, U.S.-Mex., S. TREATY DOC. NO. 13, 100th Cong., 2d. Sess. (1987). See also Mutual Assistance, U.S.-Switz., *supra* note 159, at sec. III.

improvement of the conventions of global and regional organizations.

Domestic legislation that permits unilateral cooperation is the easiest form of judicial assistance since it does not require that a requesting state have a bilateral or multilateral convention mandating assistance. Once a country adopts judicial assistance legislation, many issues arise, such as whether the scope is broad enough, whether the procedure is accommodating and consistent with that in the rest of the world, and whether sufficient human rights protection is available, to name a few.

### III. AN OVERVIEW OF THE SUBSTANTIVE LAW OF ANTI-MONEY-LAUNDERING

Anti-money-laundering law is new and developing quickly.<sup>163</sup> Governments are taking unprecedented steps to encourage countries to enact laws, to assist them in the preliminary stages of investigations, and to help them modernize their procedural laws to fulfill the new bilateral and multilateral treaties. A compilation of a restatement of international anti-money-laundering or a type of international customary anti-money-laundering law would be very useful in providing basic guidelines for the development of such legislation in countries throughout the world. The following are some of the most important principles which must be addressed if a country wishes to enact effective anti-money-laundering legislation.

#### *A. The Requirement to Criminalize the Offense of Money Laundering*

The principle of criminalizing money laundering derives primarily from the Vienna UN Drug Convention. Signatory nations are obliged under international law to criminalize money laundering. The norm of conduct and scienter requirement needed to criminalize participation in money laundering differs among countries. Some countries require the transgressor to understand or have knowledge of the crime, while other treaties or laws criminalize conduct that is only negligent or

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163. Examples are the European Laundering Convention, *supra* note 15 and the FATF Report 1, *supra* note 66; see also SUMMARY DRAFT REPORT, *supra* note 19, ¶ 8.

careless. Hence, it is important to study each convention and law. For example, if a country requests assistance but has a different *mens rea* standard than the requested state, the obligation to cooperate and assist may be undermined.

### *B. The Erosion of Bank and Financial Privacy*

Another principle of anti-money-laundering law is the erosion of the right to financial secrecy. A regime whose objective is to combat money laundering must, by necessity, weaken the right to financial privacy. Exceptions to the right to financial privacy have been imposed throughout the world. In several countries, attorneys and bankers must intrude on financial privacy and understand the business of transactions of their clients under the penalty of being responsible to society for the failure to "know their client" or to recognize "suspicious transactions."<sup>164</sup> That is, if a lawyer or bank does not ask enough questions, he risks the possibility of committing a crime.

### *C. The Requirement to "Know Your Customer"*

A third principle is the requirement to "know your client."<sup>165</sup> The international movement of money is greatly affected by the requirement to obtain detailed information about clients and transactions. In the United States and Australia, this information must be transmitted to the government, which in turn compares it against information stored in a computer database which records tax information and information about potentially criminal, suspicious activity.<sup>166</sup>

France, for example, has more limited requirements; banks and other professionals must only obtain and maintain

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164. See *infra* notes 183-84, 224-25.

165. *FATF Report 1*, *supra* note 66, Recommendation 12.

166. See *infra* notes 200-09 and accompanying text. For U.S. legislation, see 31 U.S.C. § 5318(a) (1988), which gives the Secretary of the Treasury broad powers to require reporting where wrongdoing is suspected. See also Bank Secrecy Act, 12 U.S.C. §§ 1730d, 1951-59 (1991) (requiring banks and other financial institutions to keep records of account holders' names, financial instruments, and major currency and international transactions).

In the United States these reports are known as "Currency Transaction Reports." *FATF Report 1*, *supra* note 66, Recommendation 16. Divergence of opinion existed within the FATF on whether suspicious activity reporting should be mandatory or permissive. See also OFFICE OF THE COMPTROLLER OF THE CURRENCY, *MONEY LAUNDERING: A BANKERS GUIDE TO AVOIDING PROBLEMS* 4, 7 (1989).



for some years information about their clients and certain transactions.<sup>167</sup> If there is a criminal investigation, the banks and professionals must immediately transmit this information to the government.<sup>168</sup> Presently, only banks and professionals must do this, but pressure is being exerted, expressly by the United States and Australia, to require that this information be transmitted automatically to governmental authorities.<sup>169</sup>

To promote the requirement of knowing your customer, Switzerland has terminated the right of registered intermediaries, such as attorneys and accountants, to be able to accept money in the form of deposits from their clients, without revealing the names and identification of such clients. Because Switzerland has a very important financial sector, it is trying to persuade other governments and international organizations to take the same action so that money does not flow from their countries to other countries with more lenient regulations.

#### *D. The Requirement to Identify and Report Suspicious Transactions*

A fourth principle is the requirement to report "suspicious transactions,"<sup>170</sup> which means that a bank must inform the government if it observes suspicious financial activity. If a bank or bank official does not inform the government of the suspicious transaction, the bank or bank official is criminally liable. The requirement to inform on a client is potentially discriminatory because in adopting this requirement, some governments, such as the United States, interpret transactions with countries that have bank secrecy laws or offshore trust regimes as suspicious simply because these countries themselves are suspected of being money-laundering havens.<sup>171</sup>

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167. See *infra* note 296 and accompanying text.

168. As of April 25, 1991, the Swiss government requires that Swiss banks record the beneficial owners of all bank accounts. See David R. Sands, *Swiss Accounts No Longer Discreet*, WASH. TIMES, June 28, 1991, at A1. See also Kanwar M. Singh, *Nowhere to Hide: Judicial Assistance in Piercing the Veil of Swiss Banking Secrecy*, 71 B.U. L. REV. 847 (1991).

169. *FATF Report 1*, *supra* note 66, Recommendation 16. Divergence of opinion existed within the FATF on whether suspicious activity reporting should be mandatory or permissive. See also OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 166, at 4, 7.

170. *FATF Report 1*, *supra* note 66, Recommendation 16.

171. See Bank Secrecy Act, Pub. L. No. 91-508, Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1892b(a)(1), 1951(a) (1991)) (allowing government agen-

It will be important for countries to study the implementation of the suspicious transaction requirement because there is danger that the implementation of this law will harm important financial sectors.

*E. Improving the Regulation of Professionals that Conduct Business in the International Financial Sector*

Another principle is to improve the regulation of professionals operating in the financial sector. By strictly regulating professionals and entities operating in the financial sector, governments may effectively deter money laundering. In many jurisdictions, the owners and operators of companies, trusts, financial institutions, and travel agencies and other persons who manage money are not strictly regulated. However, countries with international banking sectors are beginning to establish regulations for these professionals and entities in an effort to combat money laundering.<sup>172</sup> As has been noted in the preceding paragraphs, the activities of lawyers are implicated in anti-money-laundering efforts.

*F. The Requirement of Asset Forfeiture*

The final principle of anti-money-laundering law is the forfeiture of property.<sup>173</sup> This has become so important that it is itself now considered a subregime—the subregime of international asset forfeiture. Some laws which provide for asset forfeiture cover only criminal activity, but other forfeiture laws include civil and administrative actions. Many countries cooperate with asset-forfeiture provisions only when laws are derived from the penal code. Also, some countries apply these laws only to the proceeds and instrumentalities of drug-related

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cies to obtain individual bank records). Congress provided more privacy for individuals and small partnerships in the Right to Financial Privacy Act, which requires customer authorization or a subpoena before records may be released to the government. Pub. L. No. 95-630, 92 Stat. 3041 (1978) (codified as amended at 12 U.S.C. §§ 3401, 3402, 3408 (1991)).

172. For example, in Ecuador, exchange and brokerage houses are required to submit regular foreign currency activity reports to the Office of the Bank Examiner. See *infra* note 207 and accompanying text; see also *infra* note 300 and accompanying text for a review of French law relating to bankers and other professionals.

173. The Vienna UN Drug Convention, *supra* note 40, art. 5.

crimes. Other countries have more comprehensive laws encompassing all crimes.<sup>174</sup>

#### IV. REVIEW OF THE LAWS AND POLICIES OF SELECTED COUNTRIES

This section discusses the laws, regulations, and policies of nine selected countries in three geographic regions: Latin America/Caribbean, Asia/Pacific, and Europe. The combinations of countries were selected to provide an overview of nations which have enacted comprehensive anti-money-laundering legislation, countries that have recently adopted important measures to combat money laundering, and countries which have strong international financial sectors, and are vulnerable to exploitation by criminals.<sup>175</sup>

In Latin America and the Caribbean, the Bahamas was chosen as the Caribbean country for study because of its long-standing strong international financial and banking sectors, its traditional role as a transshipment point, and its participation in MLATs and other enforcement treaties. Ecuador was selected as one Latin American country for review because of its bank secrecy tradition and its many exchange houses, its borders with the main coca-growing Andean countries and, most importantly, because it has recently taken steps to enact anti-money-laundering laws. Uruguay was chosen as the other Latin American subject because it has a strong international financial sector and bank secrecy laws, has recently concluded mutual assistance agreements, and is in the process of enacting anti-money-laundering legislation.

In the Asia/Pacific region, Australia was selected because it is clearly the country with the most comprehensive anti-money-laundering law and has the most exemplary record of international cooperation, especially with international organizations. Japan was chosen because it is the most powerful financial center in the region and has only recently taken steps to implement the Vienna UN Drug Convention and to enact anti-money-laundering legislation. Hong Kong was selected

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174. See Zagaris & Bornheim, *supra* note 2.

175. The authors would like to extend a special thanks to Heidi Jiménez of CICAD and Carlos Correa, Irene Barrack, Michael E. Yasofsky, Jr. and others at the Office of Financial Enforcement, U.S. Dep't of Treasury. They were extremely helpful and provided extensive nonconfidential material and invaluable suggestions.

because it traditionally has been a key international financial center in the region, is alleged to have been used for laundering funds derived from heroin trafficking, and has recently taken steps to combat laundering.

In Europe, France was chosen because of its recent enactment of comprehensive anti-money-laundering laws. Britain was selected because it is one of the most important international financial centers in the world, has one of the oldest anti-money-laundering laws, and has key international ties through its dependencies and the British Commonwealth. Austria was selected because it is an example of a country that has important bank secrecy laws, is a traditional intermediary country, and is slowly increasing enforcement while its money-laundering business allegedly increases, due to the tightening of anti-money-laundering laws by its competitors, Switzerland, Luxembourg, and Italy.

#### *A. Latin America and the Caribbean*

##### *1. Bahamas*

The Bahamas serves as a sterling example of a Caribbean country which has discouraged use of its financial system for money-laundering activity. In recent years, the Bahamian government has signed and ratified several laws, directives, and MLATs to encourage cooperation between it and the international community in the fight against illicit money laundering. Nevertheless, the Bahamas, like other jurisdictions that have strong international financial sectors, must remain ever vigilant to safeguard the integrity of its financial system.<sup>176</sup> The following paragraphs explicate what laws and agreements are currently in force in the Bahamas and discuss their impact on criminal money-laundering activity.

The most comprehensive of the Bahamas' anti-money-laundering laws was enacted in 1987. The statute, entitled "Tracing and Forfeiture of Proceeds of Drug Trafficking,"<sup>177</sup> provides

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176. For additional information regarding the Bahamas see Scott B. MacDonald & Bruce Zagaris, *Caribbean Offshore Financial Centers: The Bahamas, the British Dependencies, and the Netherlands Antilles and Aruba*, in *INTERNATIONAL HANDBOOK ON DRUG CONTROL* 137, 137-56 (1992).

177. *Tracing and Forfeiture of the Proceeds of Drug Trafficking*, 1987, ch. 86 (Bah.).

for the confiscation of proceeds of drug trafficking, enforcement of confiscation orders, and investigations into drug trafficking as well as ancillary offenses relating to drug trafficking. The salient features of the law are as follows:

1. The statute applies specifically to the proceeds of drug trafficking and money laundering committed in the Bahamas and other countries. It does not extend to any other crimes.<sup>178</sup>

2. The statute criminalizes the following conduct: if a person enters into or is otherwise involved in an arrangement whereby—

(a) the retention or control on behalf of another's (in this section referred to as A) proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

(b) A's proceeds of drug trafficking—

(i) are used to secure funds that are placed at A's disposal, or

(ii) are used for A's benefit to acquire property by way of investment.<sup>179</sup>

3. The scienter requirement is knowing or suspecting that A is a person who carries on or has carried on drug trafficking or has benefitted from drug trafficking.

4. A person guilty of an offense is liable—

(a) on conviction on information, to imprisonment for a term of fourteen years or to a fine of \$25,000 or to both; and

(b) on summary conviction, to imprisonment for a term of five years or to a fine of \$10,000 or to both.

Under the provision for forfeiture of proceeds "the amount to

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178. *Id.* at art. 1.

179. *Id.* at art. 20, 1(a) & (b).

be recovered . . . under the confiscation order shall be the amount the court assesses to be the value of the defendant's proceeds of drug trafficking."<sup>180</sup>

Since enactment of this law, there were twenty-five prosecutions resulting in a total of ten convictions as of 1991. The Bahamas' asset-forfeiture law is among the most comprehensive of its kind in the developing world and should serve as a precursor to further legislation designed to combat all money-laundering activity.

Further money-laundering countermeasures adopted by the Bahamian financial community include those promulgated by The Association of International Banks and Trust Companies in the Bahamas. For example, a memorandum issued on August 15, 1983, requires banks to report to the Central Bank any attempts by persons or corporations to tender cash deposits in excess of \$100,000 if they do not have an existing relationship with the financial institution or have not formally established their credentials.<sup>181</sup> Reporting of such information to the Central Bank relates only to non-account holders; therefore, no secrecy provisions appear to apply to such transactions.

With regard to bank secrecy and recordkeeping, the banks and trust companies are statutorily obligated under section 8 of The Banks and Trust Companies Regulation Act to maintain and allow access to the Central Bank to such books, vouchers, and other records as may be needed for performance of its functions under the act.<sup>182</sup> They are also obliged under the Association of International Banks and Trust Companies' Code of Conduct to follow the "know your customer" rule.<sup>183</sup> However, the Bahamas has not codified a strict and comprehensive "know your customer" requirement.

Some foreign government and international organization officials are eager to see the Bahamas mandate reporting of all

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180. *Id.* at art. 7.1.

181. Memorandum from the Association of International Banks and Trust Companies to All Members (Aug. 15, 1983).

182. Banks and Trust Companies Regulation Act of 1965, 1965 BAH. ACTS NO. 64, as amended by Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 Bah. Acts No. 3, *reprinted in* Nova Scotia I.

183. ASS'N OF INT'L BANKS AND TRUST COS. IN THE BAH., CODE OF CONDUCT FOR MEMBERS OF ASSOCIATION OF INTERNATIONAL BANKS AND TRUST COMPANIES IN THE BAHAMAS, pt. 2 (Jan. 17, 1985).

suspicious transactions. Currently, reporting of suspicious transactions is voluntary. Bahamian law allows bankers to inform authorities of suspicious transactions without fear of legal action by clients aggrieved by the breach in confidentiality.<sup>184</sup> If the banker is aware of the suspicious transaction, failure to report it to the authorities makes him liable for prosecution.<sup>185</sup> It appears that this would reduce the use of the Bahamian financial system for money laundering, but authorities have difficulty proving whether the banker is indeed aware of the suspicious transaction. Furthermore, permissive rather than mandatory reporting undermines the effectiveness of the law.

The United States has exerted pressure on the Bahamas to sign a tax information exchange agreement (TIEA).<sup>186</sup> The Bahamian government is reluctant to do so, fearing that investment will be diverted from the Bahamas to other jurisdictions with tighter tax secrecy laws. The Bahamian government, together with the private sector, has adopted the official position that the benefits of a TIEA are insignificant compared with the detriment to the economy through loss of investment that the agreement would cause. Therefore, such an agreement will not likely be forthcoming.

Despite the Bahamas' reluctance to sign a TIEA, the government did affirm its commitment to combat illicit drug-related activity by adopting a MLAT with the United States in 1987.<sup>187</sup> The portion of the agreement regarding money laundering is found in article 14, which stipulates that a party may notify the other of fruits or instrumentalities of a criminal offense believed to be in the territory of the other party, in order that they shall, to the extent permitted by their law, assist each other in proceedings regarding forfeiture of "fruits and instrumentalities," restitution, or the collection of fines.<sup>188</sup>

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184. Tracing and Forfeiture of the Proceeds of Drug Trafficking, *supra* note 177, art. 20 (Bah.).

185. Tracing and Forfeiture of the Proceeds of Drug Trafficking, 1987, ch. 86, art 20(1) (Bah.).

186. See Bruce Zagaris, *Developments in U.S.—Bahamas Enforcement*, 7 INT'L ENFORCEMENT L. REP. 1, 6 (1991).

187. Treaty with the Bahamas on Mutual Assistance in Criminal Matters, June 12, 1987, U.S.-Bah., 100 U.S.T. 1988.

188. *Id.* at art. 14.

Thus, Article 14 expressly authorizes assistance in the execution of penal laws, an area in which countries do not usually assist each other. The article is consistent with United States law that permits equitable sharing of forfeited property with a foreign government.<sup>189</sup> The Bahamas has signed a similar MLAT with the United Kingdom to increase cooperation in the fight against money-laundering activity.

The Bahamas' commitment to the international effort against money laundering is also demonstrated by its ratification of the Vienna UN Drug Convention, its active participation in CICAD, and in the first meeting of the CFATF in 1990.

The greatest barrier to full enforcement of anti-money-laundering measures is the Bahamas' bank secrecy law which remains among the strongest in the world. None of the laws or conventions override the secrecy law at the present time. The Bahamas also allows the free transfer of bearer shares,<sup>190</sup> which further enables money launderers to hide the identity of the final beneficiary of shares in Bahamian companies. Once these problems are addressed, the Bahamas will no longer remain an attractive haven for money-laundering activity.

## 2. Ecuador

Money-laundering activity in Ecuador has escalated in recent years. While Peru, Bolivia, and Colombia are countries where a large amount of money laundering has traditionally occurred, this activity has spread to other nations as launderers seek safer havens for illicit funds. Ecuador's popularity as a money-laundering center has increased due to the large number of currency exchange houses in the country, many of which are situated along the borders of Colombia and Peru.<sup>191</sup> In response to this problem, Ecuador's government has passed new laws and adopted key measures in a concerted effort to combat the use of its financial system for money-laundering activity. The most comprehensive of Ecuador's laws is the Law on Illicit Narcotic and Psychotropic Substances (Narcotics

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189. See 21 U.S.C. 881(e)(1)(E) (1988); 18 U.S.C. 981(1) (1988).

190. International Business Companies Act, 1990, ch. 2, § 31 (Bah.).

191. BUREAU OF INT'L NARCOTICS MATTERS, U.S. DEPT OF STATE, INT'L NARCOTICS CONTROL STRATEGY REPORT 430 (1992) [hereinafter 1992 NARCOTICS REPORT].



Law)<sup>192</sup> which criminalizes money laundering<sup>193</sup> and provides for penal sanctions, as well as the seizure and confiscation of assets derived from criminal drug-related activities.<sup>194</sup> Ecuador also revised its Bank Secrecy Law in 1988 to prohibit subscription and transfer of bank and company shares to persons who had been named by courts as engaging in illicit trafficking in drugs.<sup>195</sup>

In its effort to combat money laundering and to complement its domestic legislation, the Ecuadorian government ratified the Vienna UN Drug Convention on March 23, 1990. Ecuador is also a member of the OAS which recently adopted model regulations to implement the Vienna UN Convention clauses on money laundering.<sup>196</sup> In addition to these measures, in 1992 Ecuador was a signatory to the Declaration of San Antonio, a document which outlines strategies for narcotics control through cooperative efforts among Bolivia, Columbia, Ecuador, Mexico, Peru, the United States, and Venezuela.<sup>197</sup>

Prior to 1990, unrestricted currency exchange and Ecuador's bank secrecy law made laundering money through its exchange houses very convenient. On September 17, 1990, however, the Ecuadorian legislature enacted the Narcotics Law which made money laundering a distinct criminal offense. The law stipulates that it is a violation to convert or transfer assets or securities originating from drug-related activities (these include cultivation of plants used for the manufacture of narcotics, production of narcotics, and sale of controlled substances), and to use these laundered proceeds.<sup>198</sup> The law further states that anyone who is deemed to be a producer of or an illegal trafficker in narcotic drugs, in psychotropic substances, or in specific chemical precursors, or who is involved in other

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192. Ley Sobre Sustancias Estupefacientes y Psicotrópicas [Law on Illicit Narcotic and Psychotropic Substances] 108, 1990 Registro Oficial [Official Register] No. 523 (Ecuador) [hereinafter Narcotics Law].

193. *Id.* at art. 55.

194. *Id.* at arts. 74-78, 84 & 86.

195. Reformas a la Ley General de Bancos [Reform of the General Banking Law] 006, 1988 Registro Oficial No. 97, Art. 4 (Ecuador) [hereinafter Reform of General Banking Law].

196. See *supra* notes 139-58 and accompanying text.

197. See *San Antonio Drug Summit 1992*, FED. NEWS SERVICE, Feb 22, 1992, available in LEXIS, Nexis Library, Allnws File.

198. Reform of General Banking Law, *supra* note 195, art. 3, §§ 1-9.

crimes covered by this law, and who increases his or her net worth by an amount not in proportion to his income, without substantiating that the increase occurred by legal means, faces a prison term from twelve to sixteen years.<sup>199</sup>

Ecuador's Narcotics Law provides that anyone who intentionally conceals the origin of drug proceeds, contributes to their purchase or sale, or converts or transfers them with the knowledge that they were obtained through the commission of enumerated offenses, shall be punished by imprisonment for up to eight years and fined from twenty to four thousand times the minimum wage in Ecuador.<sup>200</sup> Front operations and straw men are, thus, subject to criminal sanctions under the law. Article 78 further stipulates that

[a]nyone who lends his name or the name of the company of which he is a part for the purpose of acquiring goods by using resources that are derived from offenses punishable under this law, shall be punished by an ordinary maximum prison term of from eight to twelve years, and a fine of four to six thousand times the prevailing minimum wage.<sup>201</sup>

The Narcotics Law also provides for the seizure and confiscation of all assets derived from criminal activity. The judge is required to seize assets from the defendant's accounts at banking and savings and loan institutions, securities, legal tender, and negotiable instruments, such as checks, traveler's checks, bearer bonds, bonds, and money orders or, in general, any negotiable instrument which may be generated from the offenses classified under this law.<sup>202</sup> Seized assets are placed in a special account in the Ecuadorian Central Bank run by the National Commission for the Control of Narcotic and Psychotropic Substances (CONSEP). The assets are kept in custody pending a final judicial decision of the accused's guilt or innocence.<sup>203</sup>

Upon finding a defendant guilty of violating the law, the judge may order the final confiscation of all assets and their

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199. Reform of General Banking Law, *supra* note 195, art. 76.

200. Reform of General Banking Law, *supra* note 195, art. 77.

201. Reform of General Banking Law, *supra* note 195, art. 78.

202. Reform of General Banking Law, *supra* note 195, art. 86(c). *See also* arts. 104(d) and 107.

203. Reform of General Banking Law, *supra* note 195, art. 108.

submission to CONSEP, an autonomous corporate entity functioning under public law which is responsible for administering a fund into which all confiscated assets are channelled. CONSEP is responsible for distributing preventive information to government agencies.<sup>204</sup> CONSEP oversees the prevention, control, and repression of drug trafficking, and rehabilitation of persons who are addicted to narcotics.<sup>205</sup> Article 110 of the Narcotics Law provides for the restitution of assets which CONSEP has held in safekeeping if the accused person is absolved of all criminal activity.<sup>206</sup>

Ecuador's banking laws do not require that the bank "know the client" or report suspicious transactions, but do allow the Central Bank authorities (Bank Examiner) to pay unexpected visits and make unanticipated account examinations of any bank in Ecuador at any time that the Bank Examiner deems necessary for the public interest or at least once a year.<sup>207</sup> Ecuador's bank secrecy law stipulates that all reports by the Bank Examiner shall be in writing and confidential. All employees of the Bank Examiner are also prohibited from revealing information contained in the reports, and violations of this prohibition are criminally punishable.<sup>208</sup> Ecuador's accession to the Vienna UN Drug Convention effectively overrides any bank secrecy laws in effect.<sup>209</sup>

In further efforts to combat money laundering, Ecuador modified its Banking Law in 1988 to prohibit the subscription and transfer of the shares of banks and other entities to persons who have been found guilty by a court of engaging in the illicit traffic in drugs. If such a transfer occurs, the Bank Examiner shall annul it.<sup>210</sup> More recently, in July 1991, the Bank Examiner circulated a memo to exchange houses reminding them that they are obliged to maintain financial records of all purchases and sales of foreign exchange or security brokerage transactions.<sup>211</sup> These records must contain the names

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204. Regulations for the Application of the Law on Narcotic and Psychotropic Substances, Exec. Decree No. 2146-A, art. 23 (Ecuador) [hereinafter Exec. Decree].

205. Narcotics Law, *supra* note 192, art. 13.

206. Narcotics Law, *supra* note 192, art. 110.

207. Ley General de Banco [General Banking Law], 1987 Registro Oficial No. 771, Art. 85 (Ecuador).

208. *Id.* at art. 87.

209. Vienna UN Drug Convention, *supra* note 40, art. 5, § 3.

210. Reform of the General Banking Law, *supra* note 195, art. 4.

211. Republic of Ecuador Central Bank, Circular No. DCV-91-497, MEMO TO

and signatures of persons with whom the transaction is conducted.<sup>212</sup> Exchange and brokerage houses are also required to submit a foreign currency activity report monthly and semi-annually, or at a frequency specified by the Bank Examiner.<sup>213</sup> These measures are precursors to what the international community hopes may become more stringent laws.

Ecuador's cooperation in the international fight against money laundering has been inconsistent. Ecuador has not signed any specific MLATs, but its ratification of the Vienna UN Drug Convention sets forth the extent to which Ecuador will work with foreign governments to exchange information and effectuate law enforcement. At present, Ecuador's Narcotics Law provides for reciprocal judicial assistance.<sup>214</sup> According to that law, Ecuadorian tribunals may request assistance from their foreign counterparts or police departments for a judicial proceeding and for the investigation of criminal offenses. This assistance shall apply to, *inter alia*, arresting and extraditing accused persons, producing evidence, making documents available (including bank documents), making on-site inspections, remitting evidence, identifying and analyzing controlled substances, and confiscating assets.<sup>215</sup> Requests for additional assistance can be implemented by means of diplomacy or via INTERPOL, which is responsible for surveillance and investigation of the crew and officers of vessels.<sup>216</sup>

Additional forms of multilateral cooperation are being discussed in Ecuador further to tighten rules designed to combat money laundering. Admirable strides have already been taken, and Ecuador may become one of South America's most advanced countries in terms of anti-money-laundering legislation and enforcement.

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EXCHANGE HOUSES, (July 9, 1991) (excerpting art. 12(c) of banking regulations) (copy on file with author).

212. *Id.*

213. *Id.*

214. Narcotics Law, *supra* note 192, art. 118.

215. Narcotics Law, *supra* note 192, art. 118.

216. Narcotics Law, *supra* note 192, art. 118; *see also* Exec. Decree, *supra* note 204, art. 71.

### 3. Uruguay

Uruguay is one of the most important financial centers in South America due to its strong bank secrecy laws,<sup>217</sup> few restrictions on dollar accounts, lack of foreign exchange controls, and favorable tax treatment of income and deposits. However, law enforcement officials recognize that Uruguay's current laws render its financial system open to abuse by narcotics traffickers.<sup>218</sup> Uruguayan legislative and judicial authorities have also recognized the severity of the problem and have taken major steps to combat money laundering. Although money laundering is not yet a criminal offense in Uruguay, in April 1992 the legislature introduced a bill to make the laundering of drug trafficking proceeds a crime. In further efforts to combat money laundering, Uruguay has signed an MLAT with the United States<sup>219</sup> which provides for seizure and confiscation of assets which are the proceeds of crime.

In addition, the Uruguayan government has signed the Vienna UN Drug Convention. In March 1992, Uruguay (which is the current president of CICAD) hosted CICAD's expert group which drafted the model regulations to implement the Vienna UN Drug Convention clauses on money laundering. The remainder of this section will elaborate on the measures Uruguay has taken to combat money laundering and the potential effects ratification of the Vienna UN Drug Convention will have on its legal system.

The Uruguayan judicial system has taken great strides to curtail money-laundering activity through its financial system. In June 1992 Uruguay's Criminal Appellate Tribunal confirmed the indictment and denied release from prison of a man, E.S., charged with concealing the importation of illicit narcotics and serving as an accomplice to extradited drug trafficker Ramon Puentes Patiño. E.S. is also accused of laundering funds by creating nominee, or front, companies investing in real estate and transferring bank deposits. The Appellate Tribunal refused E.S.'s request for release from prison even

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217. CODIGO PENAL § 3 (Uru.).

218. 1992 NARCOTICS REPORT, *supra* note 191, at 433.

219. Treaty between the Government of the Oriental Republic of Uruguay and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, May 6, 1991, U.S.-Uru., S. TREATY DOC. 19, 102nd Cong., 1st Sess., arts. 2.f, 2.g & 2.i [hereinafter U.S.-Uru. Treaty].

though the charges against him are only provisionally established. To prove that E.S. participated in the alleged crimes, Uruguay sent a judicial request for evidence to Spanish authorities. E.S.'s guilt or innocence rests on the return and evaluation of this evidence. Uruguayan officials are quick to point out that E.S. cannot be incarcerated indefinitely and hope that the evidence solicited from Spain will soon be forthcoming.<sup>220</sup>

While money laundering is not now a distinct crime in Uruguay, the nation's signing and ratification of the Vienna UN Drug Convention will require Uruguay to pass a specific law criminalizing money laundering.

On April 1, 1992, Uruguay introduced a bill designed to conform with the provisions of the Vienna UN Drug Convention outlawing money laundering. The bill states that:

[o]ne who knows or should know the illicit origin, converts or transfers goods, products or instruments which derive from any of the crimes provided by this law, or crimes connected with such, shall be punished by twenty months to ten years in prison. If one knows or should know the illicit origin, acquires, possesses, has under his control, uses in whatever way, or realizes any type of transaction with the goods, products or instruments which derive from the crimes provided in this law, or are the product of such crimes, he/she will be subject to twenty months to ten years in prison.<sup>221</sup>

The bill further stipulates that

[o]ne who knows or should know the illicit origin, removes, hides, or alters the indicators, or in whatever way impedes the actual determination of the nature, origin, place, destination, movement, or ownership of goods, products or instruments which derive from any of the crimes provided for in this law, or crime connected, or of the relative rights of such goods, products or instruments resulting from the activities punished in the preceding articles, will be punished by a term from twelve months to six years in prison.<sup>222</sup>

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220. *Confirman prisión del cómplice de Puentes Patiño en el lavado de dólares* [Imprisonment of Puentes Patiño's Accomplice in Money Laundering Confirmed], EL OBSERVADOR, June 9, 1992.

221. A.b. No. 10591, ch. 9, art 56, Uru. Legislature (Apr. 1991) (photocopy on file with author).

222. *Id.* at arts. 54-56.

Further legislation is needed to conform with article 5, section 3 of the Vienna UN Drug Convention, which provides that each signatory "shall empower its courts or other competent authorities to order that bank, financial or other commercial records be made available or be seized" and that bank secrecy will be overridden in the case of such an order.<sup>223</sup> Uruguay has a very strong bank secrecy law. Under Uruguay's bank secrecy law, financial institutions are forbidden to give any kind of information concerning funds, securities, or information confidentially received, except in case of a written authorization from the client. Whoever violates these provisions will be sentenced to imprisonment from three months to three years.<sup>224</sup> Uruguay will have to provide legislation that overrides bank secrecy in order to deter money launderers from using its financial system for illicit activity.

Until recently, Uruguayan banks were not regulated by any "know your customer" or "suspicious transactions" reporting requirements. In June 1991, Uruguay's Central Bank issued recommendations to prevent criminals from hiding assets derived from illicit activity.<sup>225</sup> According to the recommendations, financial institutions should require identification from all clients opening accounts and be aware of unusual activity, such as large cash deposits and important increases in cash transfers. However, banks are not required to report these data to any central authority.<sup>226</sup>

Uruguay demonstrated its commitment to improving cooperation in criminal matters by signing a MLAT with the United States.<sup>227</sup> The scope of mutual legal assistance to be rendered increases the investigation and trial of crimes related to drug-trafficking, including searching for, freezing, and confiscating drug-trafficking proceeds as well as instruments used in

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223. Vienna UN Drug Convention, *supra* note 40, arts. 7.2(f) & 7.5 ("A party may not decline to render mutual legal assistance under this article on the ground of bank secrecy.").

224. Sistema de Intermediación Financiera [Financial Intermediation System] § 15.322, 1982 Diario Oficial 59 (Uru.).

225. BANCO CENTRAL DEL URUGUAY, COM. NO. 91/47 RECOMENDACIONES PARA PREVENIR EL BLANQUEO DE CAPITALS PROVENIENTES DE ACTIVIDADES ILICITAS [RECOMMENDATIONS TO PREVENT THE HIDING OF ASSETS DERIVED FROM ILICIT ACTIVITY] (June 1991).

226. 1992 NARCOTICS REPORT, *supra* note 191, at 434.

227. U.S.-Uru. Treaty, *supra* note 219.

the drug trade.<sup>228</sup> Assistance will also be provided when the action that prompts the investigation, trial, and legal procedures is a crime in both the petitioning and petitioned governments.<sup>229</sup> The agreement does not allow the official of the petitioning government to perform acts in the territory of the petitioned government that, in accordance with the petitioned government's laws, are reserved to its officials.<sup>230</sup> Nor does the agreement allow citizens to obtain, suppress, or exclude evidence, or to refuse to comply with a request for assistance.<sup>231</sup>

The assistance will consist of the following: supplying information, documents, or other evidence;<sup>232</sup> receiving testimony or depositions,<sup>233</sup> and conducting expert appraisal and inspections of objects and sites; locating or identifying persons;<sup>234</sup> adopting measures aimed at seizing or freezing assets; complying with requests for verification;<sup>235</sup> freezing, confiscating, and transferring forfeited assets;<sup>236</sup> transferring persons in custody for testimony or other purposes clearly indicated in the petition; executing requests for searches and seizures;<sup>237</sup> and assisting in any other way not forbidden by the laws of the petitioned government.<sup>238</sup>

In sum, Uruguay has taken decisive measures to deter narcotics trafficking and curtail money-laundering activity through its financial system. MLATs, judicial prosecution for money launderers, and bills which criminalize money laundering and enact provisions of the Vienna UN Drug Convention are very significant steps. In the future, Uruguay can be expected to balance the exigencies of its international financial sector with its constitution and legal system and to continue its momentum towards stricter enforcement and closer cooper-

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228. U.S.-Uru. Treaty, *supra* note 219, at v. & arts. 1 & 22.

229. U.S.-Uru. Treaty, *supra* note 219, art. 5.

230. U.S.-Uru. Treaty, *supra* note 219, art. 1.3.

231. U.S.-Uru. Treaty, *supra* note 219, art. 1.4.

232. U.S.-Uru. Treaty, *supra* note 219, arts. 15, 21.

233. U.S.-Uru. Treaty, *supra* note 219, arts. 15-16.

234. U.S.-Uru. Treaty, *supra* note 219, art. 20.

235. U.S.-Uru. Treaty, *supra* note 219, art. 23.

236. U.S.-Uru. Treaty, *supra* note 219, art. 22.

237. U.S.-Uru. Treaty, *supra* note 219, art. 21.

238. U.S.-Uru. Treaty, *supra* note 219, art. 2.j.



ation with other governments in deterring money-laundering activity.

## *B. Pacific-Asia*

### 1. Australia

Australia is one of the few countries in the world which has enacted anti-money-laundering legislation as comprehensive as that of the United States. Under Australia's Proceeds of Crime Act, money laundering is a distinct criminal offense covering domestic and international transactions.<sup>239</sup> Australia has had a cash transactions reporting system in place since 1988, and the nation is currently considering legislation to require that cash dealers and non-bank institutions report international transfers and record international wire transfers. Asset forfeiture is also covered in the 1987 Proceeds of Crime Act.<sup>240</sup> Although Australia's comprehensive anti-money-laundering legislation serves as a deterrent, it has not completely eradicated use of the country's financial system by money launderers. Australia has been used as a money transfer point for traffickers moving United States profits to Hong Kong, and as a point from which money is wired to secret European bank accounts.<sup>241</sup>

As an extension of its Mutual Assistance in Criminal Matters Act,<sup>242</sup> a MLAT is now being negotiated between the United States and Australia to facilitate seizure of drug-related assets.<sup>243</sup> Australia signed the Vienna UN Drug Convention in February 1989. The following section analyzes Australia's anti-money-laundering laws and the impact such legislation has had in reducing criminal activity.

The Proceeds of Crime Act provides for the seizure and confiscation of assets derived from illegal activity, not just drug-trafficking offenses. Assets may be restrained and kept under the control of an Official Trustee.<sup>244</sup> A restraining order is granted where the court is satisfied that there are rea-

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239. Proceeds of Crime Act, No. 87, § 81 (1987) (Austl.).

240. *Id.* §§ 19, 20.

241. 1992 NARCOTICS REPORT, *supra* note 191, at 436.

242. Mutual Assistance in Criminal Matters Act, No. 85 (1987) (Austl.).

243. U.S.-Switz. Treaty, *supra* note 159.

244. The Proceeds of Crime Act, No. 87, § 19 (1987) (Austl.).

sonable grounds for believing that the property is tainted because of its relation to the criminal offense, or that the defendant directly or indirectly derived a benefit from the offense. It requires that the offender be convicted of the offense or is about to be charged with an indictable offense before confiscation can occur.<sup>245</sup> Confiscated assets are channeled into a special trust fund established to support drug education and rehabilitation and law enforcement projects.

The Proceeds of Crime Act stipulates that a person may be indicted if he engages in a transaction involving the proceeds of crime or "receives, possesses, conceals, disposes of or brings into Australia the proceeds of crime."<sup>246</sup> One may also be indicted for structuring a transaction to avoid the reporting requirements established by the Cash Transaction Reports Act (CTRA), or failing to comply generally with those reporting requirements.<sup>247</sup>

The CTRA was designed to monitor the movement of currency within Australia, and also into and out of Australia,<sup>248</sup> in order to create a trail that can be followed by law enforcement officials while investigating crimes. The act came into effect progressively during 1990 and 1991. The CTRA mandates that details of suspicious financial activity and major cash movements be reported to the Australian Cash Transaction Reports Agency<sup>249</sup> where they will be analyzed and made available to law enforcement authorities in Australia.<sup>250</sup> The CTRA prohibits the use of false name accounts with banks and other cash dealers<sup>251</sup> and requires verification of identity in the opening of accounts.<sup>252</sup> The act further requires the following: reports by cash dealers on "significant cash transaction[s]" of \$10,000 or more,<sup>253</sup> reports by members of the public on cash transfers into and out of Australia of \$5,000 or more (sometimes referred to as international currency transfer

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245. *Id.* § 43(1)(a) & (b).

246. *Id.* § 81(3)(b).

247. Cash Transactions Reports Act (1988) (Austl.) [hereinafter CTRA].

248. *See id.* § 6.

249. *Id.* § 16. This agency is also commonly known as Austrac.

250. *Id.* § 4(3).

251. *Id.* § 24.

252. *Id.* §§ 18, 20.

253. *Id.* §§ 3, 7.

reports),<sup>254</sup> and reports on suspicious financial activity from cash dealers.<sup>255</sup>

Under the CTRA, cash dealers include cash carriers, financial institutions, banks, building societies, credit unions, financial corporations, insurance companies, insurance intermediaries, securities dealers, futures brokers, managers, trustees of unit trusts, firms that deal in travelers checks and money orders, currency and bullion dealers, and casinos and gambling houses.<sup>256</sup> The Australian Cash Transaction Reports Agency has issued guidelines to the above institutions to help them determine what a suspicious transaction is, and when and how it should be reported.<sup>257</sup> All of the requisite reported data are compiled and held by the Cash Transaction Reports Agency. Computerized access to these data is available to Australia's relevant taxation and law enforcement officers to aid them in investigating criminal activity.<sup>258</sup>

In 1992 Australia passed a Mutual Assistance and Business Regulations Act, which allows it to make agreements with other countries for the exchange of information.<sup>259</sup> Also in 1992 Australia signed a mutual assistance treaty with South Korea which signifies their willingness to cooperate in the investigating and prosecuting of crimes.<sup>260</sup>

Australia has taken the greatest initiative of all the nations in the Pacific Basin in enacting anti-money-laundering legislation. Its laws serve as comprehensive models for the region and the rest of the world. International law enforcement authorities hope that Australia's legislation will inspire other countries in the Pacific to enact tougher laws to fight money laundering.

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254. *Id.* § 15.

255. *Id.* § 16.

256. *Id.* § 3(1).

257. *Id.* §§ 3, 7.

258. *Id.* § 27.

259. See *Australia's New Australian Securities Chief Sees Better Inter-Agency Cooperation*, INT'L SEC. REG. REP., Jan. 25, 1993, available in LEXIS, Nexis Library, Intl File.

260. See *Australia, South Korea Sign Treaty in Combatting Crime*, XINHUA GEN'L NEWS SERVICE, Aug. 25, 1992, available in LEXIS, Nexis Library, Intl File.

## 2. Japan

Prior to enacting its "Narcotics and Psychotropic Control Law and Other Laws to Suppress Acts Promoting Illegal Drug Trafficking under International Cooperation" (Drug-Trafficking Law)<sup>261</sup> on October 2, 1991, Japan was bereft of any financial control laws authorizing narcotic enforcement officers to seize or confiscate funds acquired through drug trafficking. Passage of this law enables Japan to combat money laundering and exploitation of its financial system by Japan's organized crime syndicates, the "boryokudan."<sup>262</sup>

At present, Japan has no specific bank secrecy statutes. Rather, tradition and tacit agreement within the banking community keep records confidential making it nearly impossible for law enforcement officials to examine the financial records of drug traffickers. The new law somewhat displaces tradition by criminalizing money laundering and requiring financial institutions to report suspicious accounts and transactions to central authorities.

In addition to enacting this legislation, Japan has also signed the Vienna UN Drug Convention, and is a member of the FATF, the CECD, and the Basle Committee. Although Japan has not signed any MLATs with other nations, it has enacted a statute, International Assistance in Investigation,<sup>263</sup> which is intended "to provide a foreign country, at its request, with evidence necessary for the country to investigate a criminal case."<sup>264</sup> The following analysis will summarize the salient features of the anti-money-laundering law enacted in 1991 and discuss its impact on Japanese bank secrecy and criminal law enforcement.

Japan's new Drug-Trafficking Law defines "illicit proceeds" as property obtained by means of a criminal act constituting a drug offense or obtained as reward for such an act, or money offered or transported in the commission of an offense prescribed in item 7.<sup>265</sup> The anti-money-laundering provisions of

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261. KEIHO, Narcotics and Psychotropics Control Law and Other Laws to Suppress Acts Promoting Illegal Drug Trafficking, Oct. 1991 [hereinafter Drug-Trafficking Law] (translated photocopy of document on file with authors).

262. 1992 NARCOTICS REPORT, *supra* note 191, at 438.

263. Keiji Soshoho (Code of Criminal Procedure), Law No. 69 of 1980.

264. *Id.* at art. 1(1).

265. The offenses proscribed in item 7 include intentional offering or transport-

the law stipulate that a person who derives property from illicit proceeds, including "property obtained as fruit of, or in exchange for, illicit proceeds, or property obtained in exchange for such property,"<sup>266</sup> contravenes the law and that "[a]ny person who knowingly receives property related to illicit proceeds shall be punished with imprisonment at forced labor for not more than 3 years, or a fine of not more than one million yen, or both."<sup>267</sup> The enactment of this law demonstrates that Japan is committed to deterring use of its financial system for money laundering. However, bank secrecy will have to be fully overcome before this occurs.

Japan has no statute which preserves banking secrecy. Nevertheless, legal scholars and courts have held that a bank or financial institution has the legal duty not to disclose information regarding the banking transactions of its clients without proper reasons. This is based both on the contract between the bank and its clients and on customary practice in Japan. The bank's duty to maintain secrecy extends to information relating to all business and personal affairs of which it becomes aware through transactions involving the client. The Drug-Trafficking Law breaks with tradition by ordering banks to report "suspicious transactions" to authorities and report foreign currency conversion of five million yen (U.S. \$40,000) and 30 million yen (U.S. \$234,000) for domestic currency transactions to the Ministry of Finance through the Bank of Japan.

International cooperation by Japan is important because it is the Pacific region's wealthiest and most politically prominent nation. Its International Assistance in Investigation law is extensive and provides specifically for cooperation with international criminal police organizations.<sup>268</sup> Japan's international stature compels it to take a leading role in developing an anti-money-laundering regime.

Japan's Drug-Trafficking Law brings it closer to conformity with the provisions of the Vienna UN Drug Convention. Supporting legislation is being developed in Japan further to

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ing money, land, building, ship, aircraft, machine, equipment, or material for illegal importation, exportation or production of controlled drugs. Drug-Trafficking Law, *supra* note 261, art. 2.3.

266. Drug-Trafficking Law, *supra* note 261, art. 2(4).

267. Drug-Trafficking Law, *supra* note 261, art. 10.

268. Keiji Soshoho (Code of Criminal Procedure), Law No. 69 of 1980, art. 17.

combat money laundering, and international authorities expect that Japan will soon have complete and comprehensive laws in place to deter criminal activity through its financial system.

### 3. Hong Kong

Hong Kong is strategically located in the Pacific Rim and is one of the four major financial centers of the world. Therefore, it attracts money-laundering activity. Despite measures designed to curb drug money laundering, extensive laundering activity still occurs in Hong Kong, often through gold shops, trading companies, and money changers as well as the traditional banking and financial institutions.<sup>269</sup> This section reviews the laws and initiatives Hong Kong has taken to combat money laundering.

The Drug Trafficking Recovery of Proceeds Ordinance (the Ordinance) effectively criminalizes drug-related money laundering by providing that persons may be arrested for assisting another to retain or control drug proceeds.<sup>270</sup> This law allows law enforcement officials to confiscate proceeds "in relation to benefits derived from" drug trafficking.<sup>271</sup> To further its drug-related asset seizure and confiscation provisions, Hong Kong signed a drug designation agreement with the United States in January 1991, which establishes a reciprocal basis for the enforcement of confiscation orders against drug assets. The sharing of confiscated assets is being discussed by the two nations, but the Hong Kong government is reluctant to agree to share the \$45 million it has seized thus far.<sup>272</sup>

Bank secrecy continues to be a barrier to effective anti-money-laundering law enforcement, but enactment of the Ordinance is a first step toward overcoming Hong Kong's bank secrecy. The legislation makes those who assist persons in retaining the proceeds or benefits of drug trafficking criminally liable. Section 25 of the Ordinance provides, *inter alia*, for

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269. 1992 NARCOTICS REPORT, *supra* note 191, at 437.

270. See Graham C. Grant, Money Laundering: Legislative and Enforcement Developments in Hong Kong (undated) (on file with authors) for an explanation of Hong Kong statute, The Drug Trafficking Recovery of Proceeds Ordinance, 1989, (H.K.); *id.* at 2 (explaining that § 25(1) of the DTOA defines those persons who may be tried under the statute).

271. *Id.* at 12.

272. See 1992 NARCOTICS REPORT, *supra* note 191, at 437.

criminal sanctions for bank staff who fail to make required reports to the authorities related to drug trafficking.<sup>273</sup> The statute says:

Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement whereby—

(a) the retention or control by or on behalf of another ("the relevant person") of the relevant person's proceeds of drug trafficking is facilitated (whether [by] concealment, removal from the jurisdiction, transfer to nominees or otherwise) [is subject to punishment];<sup>274</sup>

A person unable to give a legitimate excuse for his failure to make disclosure of a suspicious transaction<sup>275</sup> is liable upon conviction for a fine of H.K. \$5,000,000 and may be imprisoned for fourteen years.<sup>276</sup> Summary conviction makes one liable for a fine of H.K. \$500,000 and imprisonment for three years.<sup>277</sup>

The Ordinance provides that when "a person discloses to a constable a suspicion or belief that any funds or investments are derived from or used in connection with drug-trafficking . . . the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract [statute or otherwise] . . . ,"<sup>278</sup> neither banks nor their staffs will be in breach of their duty of confidentiality. The Hong Kong Association of Banks, together with the Commissioner for Narcotics, the Royal Hong Kong Police, and the Customs & Excise Departments, established guidelines to assist bank staff in identifying suspicious transactions.<sup>279</sup>

Financial institutions are not required to maintain records of large currency transactions, and there have been no currency control regulations in Hong Kong since 1973. Without exchange controls, investment income and capital may be

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273. See GRANT, *supra* note 270, at 7.

274. See GRANT, *supra* note 270, at 4 (§ 25).

275. See GRANT, *supra* note 270, at 4 (excerpting § 25.4 which provides for defenses to charges of aiding and abetting).

276. See GRANT, *supra* note 270, at 4 (§ 25.5(a) reprinted in text).

277. See GRANT, *supra* note 270, at 4 (§ 25.5(b) reprinted in text).

278. See GRANT, *supra* note 270, at 4 (§§ 25.6-25.7 reprinted in text).

279. See Letter from Commissioner of Banking, Hong Kong to Chief Executive Officers of All Banks (on file with authors); see also Letter from the Hong Kong Association of Banks to Chief Executive Officers of All Banks (on file with authors).

transferred and repatriated without restriction, thereby providing a convenient means to launder money. Hong Kong's Banking Ordinance, enacted in 1990, does allow investigations on behalf of the Financial Secretary

[i]f it appears to the Commissioner [of Banking] that it is in the interest of depositors of an authorized institution or a former authorized institution or in the public interest that an inquiry should be made into the affairs of that institution . . . .<sup>280</sup>

In sum, although financial institutions maintain a high level of secrecy, they are required to cooperate with and provide information to authorized investigators.

In June 1991 the United Kingdom ratified the Vienna UN Drug Convention. Ratification will extend to Hong Kong as soon as the territory has enacted the complying legislation. Hong Kong has initiated compliance by proposing an organized crime bill—similar to the United States' Racketeer Influenced and Corrupt Organizations (RICO) statute<sup>281</sup>—which will make the laundering of all, not just drug-related, proceeds of organized crime an offense.

The Ordinance of 1989 and the introduction of a bill to criminalize the laundering of the proceeds of organized crime indicate that the Hong Kong Government is taking stronger enforcement measures against drug trafficking and money laundering. Tension continues between the banking community, which wishes to maintain bank secrecy, and law enforcement officials, who wish to enact stronger legislation. It is expected that the international call for legislative measures to combat money laundering will overcome resistance in Hong Kong's financial community and that stricter statutes will soon be enacted.

### *C. Europe*

#### 1. United Kingdom

The United Kingdom is the largest financial center in Europe and, therefore, highly susceptible to money-laundering

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280. Banking Ordinance, ch. 155, § 117.1 (1990) (H.K.).

281. 18 U.S.C. §§ 1961, 1956, 1957 (1988).



activity. England has led Europe in enacting anti-money-laundering legislation and to date has the most comprehensive and extensive regulations in place for combatting money laundering. The United Kingdom's commitment is demonstrated by its ratification of the Vienna UN Drug Convention, its drafting and signing the European Laundering Convention, and its membership in the FATF, the OECD, the EC (therefore subject to community policy on money laundering), the CFATF, and the Basle Committee. The United Kingdom has also signed an MLAT with the United States concerning the Cayman Islands.<sup>282</sup> This section reviews the extent to which the United Kingdom has been active in developing and promoting anti-money-laundering and asset-forfeiture regimes.

The most significant legislation developed in the United Kingdom, thus far, to address the problems associated with money laundering is the Drug Trafficking Offenses Act of 1986 (DTOA).<sup>283</sup> This act came into force in January 1987 and contains provisions for the investigation of suspected drug-derived assets prior to arrest,<sup>284</sup> the freezing of assets,<sup>285</sup> and the issuance of confiscation orders following conviction.<sup>286</sup> Under the statute it is an offense to assist a drug trafficker in retaining proceeds of drug trafficking. This conduct is punishable by a maximum of fourteen years' imprisonment, or a fine, or both.<sup>287</sup> The relevant section of the statute states:

(1) Subject to subsection (3) below, if a person enters into or is otherwise concerned in an arrangement whereby—

(a) the retention or control by or on behalf of another (call him "A") of A's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise), or

(b) A's proceeds of drug trafficking—

(i) are used to secure that funds are placed at A's disposal, or

(ii) are used for A's benefit to acquire property by way of investment, knowing or suspecting that A is a person who carries on or has carried on drug traf-

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282. U.S.-U.K.-Cayman Islands Treaty, *supra* note 159.

283. Drug Trafficking Offenses Act (DTOA), 1986, ch. 32 (Eng.).

284. *Id.* § 409.

285. *Id.* §§ 8(6) & 8(7).

286. *Id.* § 409.

287. *Id.* § 1305.

ficking or has benefited from drug trafficking, he is guilty of an offence.<sup>288</sup>

The statute provides that it is a defense if the alleged launderer did not know or suspect that the proceeds were the fruits of drug trafficking.<sup>289</sup> The DTOA provides courts with the power to seize and confiscate assets representing proceeds of drug trafficking. This power is exercised upon conviction of a person of a drug-trafficking offense.<sup>290</sup> The court makes an order requiring the defendant to pay an amount equal to the court's assessment of his proceeds from drug trafficking at any time (not just in connection with the offense for which he has just been convicted).

The DTOA stipulates that reporting suspicious transactions to authorities will not be treated as a breach of confidential duty between the financial institution or its employee and the person suspected of laundering money. Financial institutions are immune from suits arising from the reporting of suspicious activity. Voluntary disclosure of suspicious activity is made to the National Drugs Intelligence Unit. Mandatory disclosure of suspicious transactions, identification of account holders, and the exercise of due diligence in dealing with suspicious transactions are being proposed as amendments to the act.<sup>291</sup> These improvements should be implemented by 1993<sup>292</sup> and would follow the EC Money-laundering Directive.

The United Kingdom is unique in that once a financial institution reports a suspicious transaction, the authorities report back to the institution on the progress made in the investigation. Follow-up is complete and has resulted in a refined awareness within the financial community of the extent of money laundering and prosecutions resulting from suspicious transactions reporting. Such close cooperation between the authorities and financial institutions serves as a model for other countries that require reporting of suspicious transactions, but do not keep the financial institution updated on the progress the investigating authorities have made.

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288. *Id.* § 24.

289. *Id.* § 24(4).

290. *Id.* § 38.

291. European Laundering Convention, *supra* note 15.

292. 1992 NARCOTICS REPORT, *supra* note 191, at 459.

To combat money laundering further, the United Kingdom enacted legislation that extended the scope of the DTOA. The Criminal Justice (International Co-operation) Act of 1990 makes it an offense to conceal, disguise, convert, transfer, or remove from the jurisdiction of the courts property derived from the proceeds of drug trafficking for the purpose of assisting any person to avoid either prosecution for a drug-trafficking offense or the issuance or enforcement of a confiscation order.<sup>293</sup>

Additional anti-money-laundering legislation has recently been passed in the United Kingdom.<sup>294</sup> Implementation of the EC Money-laundering Directive is underway, which would require authorities to apply basic customer identification and record keeping requirements to currency exchange houses. These businesses are being used increasingly for money-laundering purposes, but are not currently subject to regulation. The United Kingdom is also considering extending the scope of the money-laundering offense to cover the proceeds of all serious crimes, not just drug trafficking.

Besides enacting drug and terrorist anti-money-laundering legislation,<sup>295</sup> the United Kingdom has adopted several regulatory requirements for financial institutions to deter money launderers and improve law enforcement. It has adopted the Principles which apply to "knowing the customer." The Principles require customer identification upon establishing a transaction relationship, cooperation with law enforcement authorities to the extent permitted without breaching customer confidentiality, keeping internal records of any transaction, and training staff about money laundering. Widespread dissemination of information and training about money-laundering activity are key objectives within the United Kingdom, and this is demonstrated by the publication of money-laundering guidance notes for various financial sectors, drawn up jointly by the

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293. The Criminal Justice (International Co-operation) Act, 1990, ch. 5, § 14(1) & (2) (Eng.).

294. According to a recent *Financial Regulation Report* article, two pieces of legislation were recently enacted: The Criminal Justice Act of 1993 and the Money Laundering Regulation of 1993. In addition, "guidance notes" will be published to outline reporting procedures and explain training programs for employees of banks and financial institutions. *Money Laundering Legislation*, FIN. REG. REP., Sept. 1993, available in LEXIS, Nexis Library, Intl File.

295. Prevention of Terrorism Act, 1989, § 11 (Eng.).

relevant trade associations, the Central Bank, and law enforcement authorities.<sup>296</sup>

The extensive legislation and regulations currently in place reflect the United Kingdom's unwavering dedication to the fight against money laundering. Recently, the FATF concluded that the United Kingdom continues to demonstrate a strong commitment to developing and maintaining an effective and comprehensive system to combat money laundering.<sup>297</sup>

## 2. France

The French government has been extremely attentive to the problem of money laundering and has enacted comprehensive legislation and approved numerous regulations to deter money launderers from abusing its financial system. The laundering of proceeds derived from drug trafficking is a distinct criminal offense in France, and the legislation provides for asset seizure upon indictment and forfeiture upon conviction.<sup>298</sup>

The French financial system has historically served as a transit point for drug funds moving through Europe and between Europe and South America.<sup>299</sup> To discourage this, France established TRACFIN,<sup>300</sup> a special office which targets suspected narcotics-related money-laundering operations. TRACFIN gathers information from the banking community and shares it with police and customs intelligence so that they may track money-laundering activity. Banks are required by law to report suspicious transactions to TRACFIN. In addition to the steps taken domestically to deter money laundering, TRACFIN exchanges information with foreign counterparts

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296. See *Financial Action Task Force on Money Laundering 1991/1992 Report* 14 OECD Press Release (OECD Press Division, Paris, France) (June 22, 1992) [hereinafter *FATF Report* 2]. Examples of such guidelines are the *Money Laundering, Guidance Notes for Insurance Business and Money Laundering, Guidance Notes for Banks and Building Societies*.

297. *Id.*

298. See *infra* notes 300 and accompanying text.

299. 1992 NARCOTICS REPORT, *supra* note 191, at 447.

300. TRACFIN is short for *Cellule de coordination chargée du traitement du renseignement et de l'action contre le circuits financiers clandestins*. See Fady M. Zeidan, *Drug Trafficking in France*, in BUTTERWORTH'S J. INT'L BANKING & FIN. 168 (1991). See *Money Laundering Law Passed*, Sept. 1990, FIN. REG. REP., available in LEXIS, World Library, Allwld File [hereinafter *TRACFIN Law*].

under conditions of reciprocity and confidentiality (e.g., with the United Kingdom's National Drug Intelligence Unit and the Australian Cash Transaction Reports Agency). French and United States Customs also have a bilateral agreement which allows a free flow of information on money-laundering investigations.

As a demonstration of its commitment to controlling money-laundering activities, France ratified the Vienna UN Drug Convention, which became fully effective as of March 31, 1991. France is also a member of the FATF, the OECD, the CFATF, and the EC, and, therefore, is subject to community policy on money laundering. France also participated in the drafting of the European Laundering Convention. No MLATs are in force between France and other nations, and French law currently limits the ability of law enforcement officials to conduct undercover operations. For example, its law hinders enforcement efforts by preventing United States undercover agents from making pickups of drug proceeds from French sources or making deposits in French banks as requested by drug dealers.<sup>301</sup> However, legislation is pending which, if approved, would authorize customs agents and police to do undercover operations.

The remainder of this section will delineate the salient features of the anti-money-laundering legislation in effect in France, take a closer look at the operations of TRACFIN, and give an update of the measures taken by France's private industry to deter money-laundering activity.

Law No. 87-1157, *Loi Chaladon*,<sup>302</sup> dated December 31, 1987 made money laundering a criminal offense. The penalties provided by article L 627, paragraph 3, of the Code of Public Health, punish those "who, in full knowledge, contributed to laundering of proceeds resulting from drug law violation."<sup>303</sup> This provision thus provides for legal action against those who, while not traffickers, play a part in financial or investment operations involving their proceeds.<sup>304</sup> Penalties include imprisonment from two to ten years and fines ranging from 5,000

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301. 1992 NARCOTICS REPORT, *supra* note 191, at 448.

302. See U.S. DEPT. OF TREASURY, MONEY LAUNDERING REVIEW OF THE EXISTING RULES IN FRANCE 2 (May 1989) (photocopy of document on file with authors).

303. *Id.* at 2.

304. *Id.*

to 500,000 francs.<sup>305</sup> Other sections of this law provide for the seizure and confiscation of property of traffickers.<sup>306</sup>

The 1989 law on finance, No. 88-1149, creates a new customs law which criminalizes financial operations between French and foreign entities which involve funds derived from drug-law violations.<sup>307</sup> The sanctions also include from two to ten years' imprisonment, confiscation of money involved, and a fine ranging from one to five times the sums involved in the violation.<sup>308</sup>

France's most recent law to combat money laundering, Law No. 90-614,<sup>309</sup> relates to the participation of financial institutions in the laundering of drug-trafficking proceeds. The main provisions of this law impose a duty of disclosure on "Professionals" and "Financial Institutions."<sup>310</sup> If professionals, including notaries, auditors, and legal advisors, are aware of transactions involving funds derived from illegal drug activities, they are required to disclose the information to the Public Attorney. Financial institutions disclose whether funds held by them or transactions with which they are involved derive from or are connected with illegal drug activities. The disclosure must be made to TRACFIN.<sup>311</sup>

TRACFIN may request and gather information from financial institutions and professionals regarding the source of the funds or the nature of transactions disclosed and may, if appropriate, alert the General Prosecutor. TRACFIN is obligated, subject to certain exceptions, to keep all information it receives confidential. When financial institutions make a disclosure, TRACFIN delivers an "acknowledgement of receipt" which can be accompanied by an order to freeze the funds or delay the transaction concerned for a twelve-hour period. TRACFIN or the Public Attorney may request in court that this period be extended or that the funds, accounts, or securities which are

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305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. Zeidan, *supra* note 300, at 168.

310. Zeidan, *supra* note 300. Financial institutions include banks and other institutions governed by the Banking Law of 1984, such as the Treasury, insurance companies, companies known as "mutuelles" (mutual insurance companies), stockbroking companies, and currency exchange dealers. Zeidan, *supra* note 300.

311. See Zeidan, *supra* note 300; see also *TRACFIN Law*, *supra* note 300.

the subject of the disclosure be temporarily sequestered. If no order accompanies the "acknowledgement of receipt" from TRACFIN, or if no court order has been issued, the financial institution may proceed with the transaction. Disclosure must also be made and an acknowledgement of receipt delivered in cases where 1) the transaction has already been executed because it was impossible to delay; or 2) it appears, after its execution, that the funds involved derived from drug-related activities. The new law eliminates any liability for breach of client confidentiality and makes it an offense for financial institutions or professionals to reveal to the owner of the funds that disclosure to TRACFIN or to the Public Attorney has been made.<sup>312</sup>

Financial institutions must also "know their customer" by requiring proof-of-identity documents upon account opening. They must also check the identity of an "occasional" client who requests a transaction exceeding 50,000 francs or who wishes to use safe custody services. The law further provides that financial institutions must scrutinize transactions exceeding one million francs. In such cases the financial institution must keep a record for five years of the characteristics of the transactions—including the origin and destination of funds—and report them to TRACFIN.<sup>313</sup>

After France succeeded to the presidency of the FATF in 1990, it adopted measures which are often more stringent than those contained in the FATF recommendations. Included among the French initiatives is the compulsory reporting of suspicious transactions for all financial and nonfinancial professionals. In addition, the French government has worked actively with banking and insurance trade associations to assist them in issuing recommendations for their members and instituting training programs for employees to ensure the effectiveness of the recommendations.<sup>314</sup> International law enforcement officials hope that France will extend its anti-money-laundering legislation to cover all serious criminal offenses in addition to offenses connected with drug trafficking. Overall, France has recognized money laundering as a serious problem

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312. Zeidan, *supra* note 300, at 169.

313. See description of TRACFIN in *TRACFIN Law*, *supra* note 300; see also Zeidan, *supra* note 300.

314. *FATF Report 2*, *supra* note 296, at 10.

and has taken admirable steps to combat it. Its wide-ranging initiatives will possibly serve as an example to other nations in continental Europe which have yet to implement anti-money-laundering legislation.

### 3. Austria

Prior to 1991, Austria's banking and commercial systems were popular havens for illicit funds derived from criminal narcotic and other illegal activities.<sup>315</sup> Financial experts and foreign government officials attribute the exponential increase in laundering activity to Austria's strict bank and tax secrecy laws,<sup>316</sup> stable government, and convenient geographic location. In addition, because Austria is not a member of the EC, it is not subject to the treaties and laws regarding disclosure of financial information, such as the European Laundering Directive, that regulate the anti-money-laundering regime of the members of the EC.

Austria's bank and tax secrecy laws serve as powerful magnets to attract illegal funds and money-laundering activity away from other traditional havens such as Switzerland. The result is that Austria has become one of Europe's key financial centers for hiding cash and securities derived from the proceeds of criminal activity.

Austria's bank secrecy law, set out in the Kreditwesengesetz (KWG) of November 1986, section 23, mandates strict confidentiality for individual and business client accounts.<sup>317</sup> The law states that banks, their organization members, employees, and persons otherwise connected with the bank's business activity, and persons exclusively bound by a confidential business relationship with the bank's clients, are expressly forbidden to disclose or use financial information derived from their business relationship with those clients.<sup>318</sup> Any Austrian federal agency, such as the Austrian central bank (Österreichischen Nationalbank), which is privy to confidential information through the course of its official duties, is

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315. 1992 NARCOTICS REPORT, *supra* note 191, at 445.

316. Dr. Geiserich Tichy, *Österreich-Nationalberichterstatte*, in LXXV1b C.D. FISC. INT'L 181-90 (1991).

317. Bankgeheimnisgesetz § 23, 1986 KREDITWESENGESETZ Abs. [Paragraphs] 1 and 2 (Aus.).

318. *Id.*



also bound to the same level of secrecy.<sup>319</sup>

The exceptions to the bank secrecy law are few and stipulate that the Austrian Finance Minister will only distribute confidential information collected from Austrian federal agencies to foreign banking regulatory authorities when to do so would not threaten public order, when Austria shares the same interest in the investigation as the inquiring country, and when there are common objectives between the Ministry of Finance and Austria's federal laws.<sup>320</sup> Austria has a vested economic interest in maintaining the strictest bank secrecy laws possible without losing respect internationally or incurring disapproval or sanctions from foreign nations which are active in combatting drug-related activity.

Austria's popularity as a haven for money-laundering activity can be attributed partly to Austria's nonmembership in the EC, which means that it is not subject to the EC's treaties, laws, and regulations. The flow of capital to Austria can be linked to a rise in investment in Austrian corporations and other Austrian securities instruments.

Foreign investors who wish to purchase bearer shares in Austrian companies through the Vienna Stock Exchange may do so without restriction.<sup>321</sup> Other major investment instruments which are issued in bearer form are medium- and long-term domestic bonds, mortgage and local-authority bonds, and cash deposit certificates.<sup>322</sup> Securities issued in bearer form provide anonymity for the purchaser of the instrument, thereby facilitating investment in legitimate instruments with illicit funds. Once the securities are purchased they are often kept in custody with Austrian banks which administer the client portfolio without ascertaining the final beneficiary of the bearer certificates. This makes investment in Austrian shares very attractive to money launderers.

Austria has come under increasing fire because of its strict bank and tax secrecy laws and its resulting vulnerability to money launderers. In an effort to counter criticism, the Austrian Central Bank, together with the Austrian Bankers Association, issued a "Declaration of Principles of Special Care of the

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319. *Id.*

320. *Id.* § 23a.

321. *DOING BUSINESS IN AUSTRIA* 32 (Price Waterhouse, Vienna, Austria 1989).

322. *BUSINESS IN AUSTRIA* 62-63 (Creditanstalt, Vienna, Austria 1990).

Austrian Banking Industry" (Declaration).<sup>323</sup> The Declaration stipulates that Austrian banks "will neither aid nor abet any transactions which they have reason to suspect serve money-laundering activities,"<sup>324</sup> and they will "cooperate fully with the authorities within the limits established by the governing law."<sup>325</sup>

If banks suspect that funds have been obtained counter to the intentions of the Declaration, they are required to break off relations with the relevant customer.<sup>326</sup> The Declaration further provides that prior to conducting business with a customer, the banks will make an appropriate review depending on the size and type of account or deposit to be opened.<sup>327</sup>

The Declaration also provides:

1) If U.S. dollar notes in sums of \$50,000 or more are deposited for any purpose whatsoever with an Austrian bank, the bank shall in every case establish beyond a reasonable doubt and record the identity and address of the depositor.

2) Banks shall send notes which they have reason to suspect originate from criminal offenses to the United States for deposit and credit. The depositor of the United States notes shall be informed that according to American regulations the bank is required to give information about the conversion of bank notes in excess of \$10,000 into account balances and that the Austrian banks will therefore have to disclose the identity of the depositor in case of an inquiry by the American bank.

3) The Austrian bank shall report the volume of such bank notes and the name of the American bank to which they are being sent to the Austrian central bank prior to dispatching the bank notes to the United States.

4) United States dollar notes in amounts of U.S. \$50,000 or more will not be traded on the Vienna Exchange.<sup>328</sup>

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323. DECLARATION OF PRINCIPLES OF SPECIAL CARE OF THE AUSTRIAN BANKING INDUSTRY (1992) (photocopy on file with authors).

324. *Id.* at 2, ¶ 2.

325. *Id.* at 2, ¶ 3.

326. *Id.*; see also *id.* at 2-3, ¶ 6.

327. *Id.* at 2, ¶ 1.

328. *Id.* at 5.

It should be noted that the records of transactions and finances and personal client data are for bank internal use and are reported only in the situations specifically enumerated.

The Declaration also describes the criminal liability for those who engage in money-laundering activity.<sup>329</sup> The Declaration notes that sections 12 and 15 of the Austrian Penal Code provide for recovery of any profits and confiscation and forfeiture for complicity in any criminal offense, including drug-related offenses.<sup>330</sup> A new agreement between the Austrian Nationalbank and the banking industry reached in January 1992 requires Austrian banks to determine the identity of customers who conduct foreign currency transactions involving more than 200,000 schillings (U.S. \$20,000). The prior limit was U.S. \$100,000 and applied only to United States dollars, not to other foreign currencies.<sup>331</sup> Authorities expect that this will decrease the use of Austria's financial system for money laundering. However, other experts maintain that money launderers have many means to circumvent the requirement. For instance, they can simply bypass the identity requirements by not conducting foreign currency transactions in excess of 200,000 schillings. Furthermore, anyone may convert foreign currency into schillings abroad and legally import them to Austria and deposit them with a bank.

The Declaration and other recent regulations are gestures made by the Austrian banking industry which indicate that it is interested in combatting money laundering. However, this Declaration is not binding and provides no penalties for non-compliance, nor does it override the Bank Secrecy Law<sup>332</sup> which governs the industry.

Some experts have criticized Austria's banking system for its secrecy and poor financial reporting. A recent study conducted by accountants KPMG Peat Marwick and Lafferty Business Research rates Austrian banks among the worst in the world for the provision of financial information such as state-

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329. *Id.* at 3, ¶¶ 6-7; *id.* at 4, ¶¶ 1-2.

330. *Id.* at 3, ¶¶ 6-7; *id.* at 4, ¶ 1.

331. Report by "Sy," *Banks to Take Measures Against "Drug Money"*, FOREIGN BROADCAST INFORMATION SERVICE—WESTERN EUROPE (FBIS—WEUR), 14 Jan. 1992, at 7.

332. Bankgeheimnisgesetz § 23, 1986 KREDITWESENGESETZ Abs. [paragraphs] 1 and 2 (Aus.).

ments on accounting policies, nonperforming loans, and strategy statements. The report concludes that "Australian and Canadian banks provide the best quality information in their annual accounts while their German and Austrian competitors [provide] the worst . . . ." <sup>333</sup>

While the Austrian national bank has taken steps to monitor the movement of money, such as those outlined in the Declaration, international pressure on Austria to enact tougher money-laundering countermeasures has also continued. On March 2, 1992, United States authorities arrested a prominent Austrian banker, Michael Margules, on suspicion of money laundering. The charges against Mr. Margules were based on an alleged conversation with a United States government official in which Margules praised Austria's advantages as a site for depositing drug money. The arrest prompted the Austrian Chancellor, the Finance Minister, and the president of the Austrian national bank to defend Austria's strict bank secrecy laws. In interviews conducted in March 1992, Chancellor Vranitzky stated, "I do not see any reason at all to question the principle of banking anonymity." <sup>334</sup> He also said,

As far as the kind and the extent of the Austrian regulations on anonymity, an agreement was concluded a long time ago between the commercial banks and Austria's Nationalbank. In addition, Austria's Foreign Minister has signed the Vienna UN Drug Convention. Thus, Austria is one of the countries that has undertaken to adopt efficient and useful measures against money laundering. <sup>335</sup>

Although Austria has signed the Vienna UN Drug Convention, it has not ratified it. Ratification would mean that Austria would be compelled to render mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to criminal money-laundering offenses and would not be able to decline assistance on the basis of bank secrecy. <sup>336</sup>

The president of the Austrian national bank, Maria

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333. Andrew Jack, *Financial Reporting of Banks Criticized*, FIN. TIMES, June 15, 1992, at 17.

334. Ernst Hauer & Margit Czoeppan, *Vranitzky Comments on Banking Anonymity*, FBIS—WEUR, Mar. 11, 1992, at 8 (interview).

335. Gisela Hopfmüller & Herbert Hutar, *Vranitzky, Lacina Remark on Banking Anonymity*, FBIS—WEUR, Mar. 9, 1992, at 9 (interview).

336. Vienna UN Drug Convention, *supra* note 40, art. 7, § 5.

Schaumayer, defended Austria's banking anonymity. She argued that there is no link between an offense committed by an individual person and a country's saving system. Ms. Schaumayer reiterated her position in a public statement: "I am not willing to change the whole system because of the offense by an individual person. There is no need to do that."<sup>337</sup> Further defense of Austria's anonymous banking system came from Austria's Finance Minister, Ferdinand Lacina. In accord with a report by the Vindobona Bank, for which Mr. Margules worked, Mr. Lacina stated that "the anonymity in the Austrian banking system could be maintained even after Austria has become a member of the EC."<sup>338</sup>

Austria's bank and tax secrecy laws are strictly adhered to by the banking community, and Austrian authorities carefully enforce the statutes (the exact penalties for noncompliance are uncertain due to lack of information). Recent EC directives and pressure on traditional financial centers have raised international interest in Austria as a haven for laundering funds. At present, Austria is believed to be attracting funds derived from criminal activities at an increased rate, and indications are that Austria's popularity among launderers will increase as long as its laws guaranteeing secrecy remain in force.

Austria's membership in three important international organizations and conventions currently provides the best assurance of its compliance with international money-laundering laws. In addition to having signed the Vienna UN Drug Convention, Austria is a member of the OECD and the FATF, which will eventually conduct an independent audit of Austria's international money-laundering compliance program. Austria is also a member of the Council of Europe and a signatory to the European Laundering Convention. International law enforcement officials hope these organizations will be successful in persuading Austria to adopt tougher anti-money-laundering laws.

The Financial Markets Adaptation Law will come into effect on January 1, 1994.<sup>339</sup> Among its provisions are that

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337. Hopfmüller & Hutar, *supra* note 335, at 9.

338. Lacina: *Banking Anonymity to Remain, Even in EC*, FBIS—WEUR, Mar. 27, 1992, at 12.

339. See Charles Pretzlik, *European Business: Austria Gets in Line with EC Banking Law*, DAILY TELEGRAPH, Sept. 13, 1993, available in LEXIS, Nexis Li-

depositors will have to identify themselves when they open accounts and will have to show proof of identity when depositing more than 11,000 shillings into another person's account. In addition, banks will be required to report suspicious clients to the police.<sup>340</sup> This legislation follows statements made earlier in the year by Justice Minister Nikolaus Michalek, initiator of the investigations into the activities of those controlling the accounts.<sup>341</sup>

#### V. AN EVALUATION OF THE INTERNATIONAL ANTI-MONEY-LAUNDERING REGIME

Multilateral conventions, such as the Vienna UN Drug Convention and the EC Money-laundering Convention, have indisputably helped develop an international anti-money-laundering regime. The conventions have focused the attention of world leaders on the extent of the laundering problem and the need to combat it. Agreements to override bank and business confidentiality laws, to police banking and other financial networks through "know-your-customer" and "suspicious transactions" requirements, and to enact laws to regulate professionals who operate offshore financial institutions in key jurisdictions can be reached, but only when professionals and top politicians decide that the benefits of an anti-money-laundering regime outweigh the costs of enacting new laws and embarking on new policies.

Multilateral operations, such as Operation Green Ice,<sup>342</sup> that for sustained periods have used new enforcement methods such as "controlled delivery"<sup>343</sup> to penetrate the financial op-

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340. *See id.*

341. *Austrian Bank Anonymity Must Go*, REUTER EUR. COMMUNITY REP., Mar. 25, 1993, available in LEXIS, Nexis Library, Intl File.

342. Operation Green Ice was a sting that occurred over a two-year period involving six countries. It culminated in the arrest of more than 200 persons, the seizure of nearly \$42 million in illegal drug profits, and the penetration of major drug organizations. For background, see *Six Countries Strike Major Sting Against Organized Crime Cocaine Ring*, 8 INT'L ENFORCEMENT L. REP. 399 (1992); Sharon La Franiere, *150 Arrested in 6-Nation Drug Sting, Money Laundering Disrupted*, DEA Says, WASH. POST, Sept. 29, 1992, at A3.

343. "Controlled delivery" is a technique whereby national governments allow the trafficking of drugs to occur in order to observe and gain intelligence on the traffickers, so that law enforcement agencies may penetrate the organizations at a higher level. Article 11 of the 1988 Vienna UN Drug Convention obligates signato-

erations of kingpins in the Cali Cartel, indicate some of the success of international anti-money-laundering enforcement. For several years, authorities have also frozen Cali Cartel assets in Luxembourg, the United States, and Panama simultaneously, although the cases are still in litigation in Luxembourg.<sup>344</sup>

Yet another example of the success of anti-money-laundering enforcement has been the enactment in Colombia of a new money-laundering law based on the Organization of American States (OAS) regulations.<sup>345</sup>

The EC Money-laundering Directive has resulted in the enactment of anti-money-laundering laws by EC members.<sup>346</sup> The directive requires these laws to apply extraterritorially. Banks and financial institutions that want to reach the major markets of the EC and the United States, even if these institutions are in jurisdictions without strong anti-money-laundering laws, will be forced to comply with the laws of the United States or the EC. For instance, in the author's own practice, he became aware of a Latin American bank which has a mutual fund in the Caribbean. Because this mutual fund uses a custodian in Luxembourg, it must comply with the "know your customer" requirement and other rules of the EC Money-Laundering Directive,<sup>347</sup> however, the Latin American customers expect the usual guarantee of anonymity.

Another example of the penetration of the international anti-money-laundering regime is that the regional FATFs do not hesitate to criticize any country they believe are not complying fully with anti-money-laundering principles, even principles that are not "hard law." For instance, this year the West

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ry countries to engage in this technique, "if permitted by the basic principles of their respective legal systems . . ." Vienna UN Drug Convention, *supra* note 40, at art. 11.

344. For a discussion of the case, see *Luxembourg Court Returns Drug Money to Cartel*, 9 INT'L ENFORCEMENT L. REP. 43 (1993) (discussing the victory by the cartel in the court of appeals in Luxembourg). The case is now before the Supreme Court.

345. See *supra* part II.D.2.d.

346. See, e.g., Heidi Gramckow, *Germany Enacts New Money Laundering Law*, 8 INT'L ENFORCEMENT L. REP. 432 (1992); Bruce Zagaris, *Spain Adopts Money Laundering Legislation*, 9 INT'L ENFORCEMENT L. REP. 136 (1993); Bruce Zagaris, *Portugal Enacts Anti-Money Laundering Regulations*, 9 INT'L ENFORCEMENT L. REP. 257 (1993).

347. EC Money Laundering Directive, *supra* note 113.

European FATF has criticized Austria for not acting more quickly to abolish laws that permit bearer shares and enable financial institutions and their customers to avoid the "know your customer" requirement.<sup>348</sup>

Communication between nations is key to developing the anti-money-laundering regime. At present, organized crime exploits communication gaps to conduct money laundering and financial fraud in sophisticated ways that involve moving money and balance sheets among countries. Because a national regulator focuses only on the business that occurs during a yearly or other time-cycle in its country, a bank such as BCCI or an organized crime group masquerading as a financial institution or import-export business can move money or assets to another country at certain times before an audit, so that the regulator will not spot fraud or money laundering.<sup>349</sup> Such offenses can be discovered only when there is communication between national governments.

Inter-governmental communication may occur when a regulator is auditing a company and in the context of such an audit requests assistance. Such communication may also occur spontaneously when a national regulatory agency in the conduct of an audit, believes that the conduct of a business is suspicious or may violate the law of another country.<sup>350</sup> In addition, bank regulatory agencies may conduct simultaneous audits of problem banks and financial institutions that have large business operations in tax-haven secrecy jurisdictions or have their home offices in countries not known for strong financial regulation; one such institution is BCCI, whose home office is in Luxembourg.

Other substantive areas, such as international taxation, provide for sophisticated, formal mechanisms for international

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348. See *West European Financial Action Task Force Calls for Austria to Tighten "Know Your Customer" Laws*, 9 INT'L ENFORCEMENT L. REP. 295 (1993).

349. See, e.g., *House of Commons Report on BCCI Urges Regulatory Reforms While Liquidator Issues Accusations against 1986 Auditors*, 8 INT'L ENFORCEMENT L. REP. 84 (1992) (discussing a recommendation that "on a global level the Bank for International Settlements (BIS) should supervise the supervisors of banks like BCCI that have multi-jurisdictional structures.").

350. For a discussion of closer cooperation and coordination with regulatory authorities in supervisory multi-jurisdictional banks, see *Bank of England Recommends Legislative Changes to Avoid International Bank Frauds*, 8 INT'L ENFORCEMENT L. REP. 255 (1992).



enforcement cooperation. Tax authorities have mini exchange-of-information agreements both multilateral<sup>351</sup> and bilateral<sup>352</sup> as well as TIEAs within income tax treaties.<sup>353</sup> As a result, tax authorities exchange information spontaneously,<sup>354</sup> on request,<sup>355</sup> regularly,<sup>356</sup> and in the conduct of simultaneous examinations. Also useful to national bank regulatory agencies would be the compilation of statistical information that would be helpful in spotting potential general problems or special problem institutions. These and other types of formal agreements can help regularize international enforcement communication and other types of cooperation among bank regulatory agencies.

Goodwill and understanding are important because trust and patience are required to develop successful relations in international anti-money-laundering enforcement. In the past, states have allowed criminals and their counsel to exploit bank secrecy laws by refusing cooperation with investigators. For instance, in the celebrated Bank of Nova Scotia cases, persons with accounts in the Cayman Islands branches of the Bank of Nova Scotia tried to use bank secrecy laws to avoid compulsory requests for information from a United States federal court.<sup>357</sup> Eventually, contempt orders and fines imposed by

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351. See, e.g., Council of Europe-OECD Mutual Administrative Assistance Treaty, in RUFUS V. RHOADES & MARSHALL J. LANGER, 5 INCOME TAXATION OF FOREIGN RELATED TRANSACTIONS § 85.00 (1993).

352. For background on bilateral exchange of tax information agreements, see *id.* at § 81; see also Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2701 (Supp. 1993) (authorizing the United States to negotiate duty-free treatment of eligible articles to beneficiary countries); I.R.C. § 274(h)(6)(A) (West Supp. 1993) (providing for North American treatment for Americans attending conventions in the countries that conclude TIEAs).

353. See Tax Implementation Agreement Between the United States of America and the Virgin Islands, RHOADES & LANGER, *supra* note 351, § 82.01; see also Tax Implementation Agreement Between the United States of America and American Samoa, RHOADES & LANGER, *supra* note 351, § 82.02.

354. For a discussion of spontaneous exchanges of information, see RHOADES & LANGER, *supra* note 351, at § 85.07.

355. RHOADES & LANGER, *supra* note 351, § 85.05.

356. Regular exchanges are also referred to as automatic exchanges. RHOADES & LANGER, *supra* note 351, § 85.08.

357. *In re Grand Jury Proceedings: United States v. The Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) (known as *Bank of Nova Scotia I*); *In re Grand Jury Proceedings: United States v. The Bank of Nova Scotia*, 722 F.2d 657 (11th Cir. 1983), *cert. denied*, 469 U.S. 1106 (1985) (known as *Bank of Nova Scotia II*); *In re Grand Jury Proceedings: United States v. The Bank of Nova Scotia*, 740 F.2d 817 (11th Cir.), *cert. denied*, 469 U.S. 1106

the Eleventh Circuit courts overcame the bank secrecy laws, but they also resulted in the development of bad-will between the Canadian and Cayman governments and the United States government. Eventually, the conclusion of MLATs for criminal matters<sup>358</sup> improved the goodwill.

The design of a proper international enforcement regime to combat money laundering and financial fraud will require cooperation among and input by experts in international organization theory, international law (especially international criminal law, the law of international organizations, and economic integration law), criminal justice, financial and banking law, trade law, and economics. The North America Free Trade Agreement (NAFTA) provides a good example of the need for international cooperation. Currently, much money laundering occurs on the southwest border in *casas de cambio* (exchange houses) and in Mexican banks inland. Liberalization of the movement of goods, capital, and people will enhance the ability to move not only legitimate money, but also illegitimate money. Without a central authority to compensate for the enhanced opportunities to move illegitimate money, criminals will be able to defraud more easily, using existing and new financial vehicles to recycle the profits and proceeds of their crimes. However, by recognizing problems such as these, governments will be able to develop mechanisms and institutions to fill the lucanae left by the gaps. For instance, as a precursor to and in the wake of the discussions of NAFTA, the United States and Mexico have concluded a TIEA<sup>359</sup> and proposed an income tax treaty.<sup>360</sup> In areas such as intellectual property<sup>361</sup> and

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(1983) (also known as *Bank of Nova Scotia III*).

358. U.S.-U.K.-Cayman Islands Treaty, *supra* note 159.

359. For an annotated text of the U.S.-Mexico TIEA, see Agreement Between the United States of America and the United Mexican States for the Exchange of Information with Respect to Taxes, RHOADES & LANGER, *supra* note 351, § 81.11.

360. A proposed treaty between the United States and Mexico and a contemporaneous protocol were signed in September 1992. They require ratification by both countries before taking effect and have been sent to the U.S. Senate for its advice and consent to ratification. They are likely to take effect in 1993. For the text of the proposed treaty and protocol, see RHOADES & LANGER, *supra* note 351, § 80.00.

361. For the intellectual property provisions of the North American Free Trade Agreement (NAFTA), see *Intellectual Property Provisions of North American Free Trade Agreement*, 6 WORLD INTELL. PROP. REV. 284 (1992) (NAFTA, pt. 6, ch. 17). NAFTA provides for criminal sanctions and provisional injunctive relief for viola-

environmental enforcement<sup>362</sup> the two governments have likewise arranged for mechanisms to strengthen enforcement cooperation. The EC, although initially without legal authority to impose criminal legislation, has begun enacting anti-money-laundering regulations<sup>363</sup> and has taken steps to form its own police force<sup>364</sup> and to combat terrorism,<sup>365</sup> organized crime,<sup>366</sup> illegal migration<sup>367</sup> and narcotics.<sup>368</sup>

Communication and goodwill between nations are the keys to developing the anti-money-laundering regime. Such a regime requires cooperation among and input by experts in international organization theory, international law (especially international criminal law, the law of international organizations, and economic integration law), criminal justice, financial and banking law, trade law, and economics.

Assessments that go beyond the scope of this article of the substance, procedure, and politics of the existing organizations and conventions are also necessary for the proper development of a regime. With a proper synchronization of international approaches, the law enforcement community can achieve the highest levels of enforcement consistent with respect for due

tions of its intellectual property protections. *Id.* at 290, 292 (NAFTA arts. 1715, 1717).

362. For a discussion of environmental enforcement between the United States and Mexico in the context of NAFTA, see Bruce Zagaris, *The Transformation of Environmental Enforcement Cooperation between Mexico and the United States in the Wake of NAFTA*, 18 N.C. J. INT'L L. & COM. REG. 61 (1992); Bruce Zagaris, *NAFTA Side Agreements Strengthen Enforcement, But Miss Opportunity to Provide Meaningful Enforcement Cooperation Mechanisms*, 9 INT'L ENFORCEMENT L. REP. 325 (1993). For background and a summary of the environmental side agreements, see *Agreement Reached on NAFTA Side Deals, Kantor Announces*, DAILY REP. FOR EXECUTIVES, Aug. 16, 1993, available in, LEXIS, Nexis Library, Allnws File, at \*1.

363. See, e.g., *EC Commission Imposes Wider Exchange of Confidential Supervisory Information and Other Supervisory Requirements*, 9 INT'L ENFORCEMENT L. REP. 339 (1993).

364. See *European Community Moves Towards Establishment of European Police Force (EUROPOL)*, 9 INT'L ENFORCEMENT L. REP. 52 (1993).

365. *Id.*

366. See, e.g., *European Cooperation Against Organized Crime Is Considered*, 9 INT'L ENFORCEMENT L. REP. 160 (1993).

367. For background on European action against illegal migration, see *European Ministers Agree on Enforcement and Criminal Action on Illegal Migration*, 9 INT'L ENFORCEMENT L. REP. 71 (1993).

368. For background on EC anti-narcotics action, see Berthold Baer, *The European Community's Anti-Drug Efforts: An Analysis of the Legal Framework of EC Anti-Drug Strategies After the Treaty of Maastricht*, 9 INT'L ENFORCEMENT L. REP. 359 (1993).

process, international human rights, and the need to minimize disruption of normal international commerce.

## VI. MECHANISMS TO COUNTER MONEY-LAUNDERING DEVELOPMENTS

To combat existing and new forms of international money laundering, multidisciplinary approaches are needed including the use of international organization science theory, international public law, and criminal law. Other mechanisms to combat organized crime can also be used against money launderers. These mechanisms should be long-term and uniform to be most effective.

### *A. Long-Term*

#### 1. Establishment of a Regime for International Criminal Law

Some global interactions are initiated and sustained entirely, or almost entirely, by nations. Other interactions, such as narcotics transactions, laundering criminal proceeds, and traffic in guns, involve private persons—money launderers and especially organized criminal groups. If nations are to succeed in the battle against organized crime, they must become more sensitive to a world politics paradigm in which other organizations are accorded power. A successful effort will entail a more innovative use of existing and new bilateral and multilateral legal mechanisms, as well as more uniformity in national actions, so that law enforcement officials can be as mobile and efficient as new organized criminal groups.

Remodeling world politics in this fashion would permit national governments as well as IGOs, INGOs, and NGOs to make more effective use of limited resources. In this way, long-term alliances and elite networks among the various law enforcement organizations could be established and developed.

Interested members of the world community, especially law enforcement officials, should study the interactions of the above-mentioned organizations to determine the best ways to design and implement a regime for international anti-money-laundering law. To the knowledge of these authors, such a study has yet to occur.

For instance, within the context of anti-money-laundering, a country in the Caribbean or Andean region might consider

its national enforcement policy and other alternatives to construct an international subregime of international financial enforcement cooperation. In the broader context of international criminal cooperation a national government might also compare strictly national enforcement mechanisms to those necessary to participate in an international criminal cooperation regime.

Within the regime of international criminal cooperation, many subregimes can and should be established to combat organized crime. For instance, subregimes in the area of enforcement include, *inter alia*, transportation, customs, immigration, and fiscal cooperation. Law enforcement officials and all other persons concerned with organized crime, should be included in the development of future subregimes. The task is effectively to design new principles, norms, rules, and decision-making procedures which will combat organized crime without detracting significantly from normal business operations, human rights, and constitutional protections.

## 2. Establishment of Subregimes

The international community's alarm about narcotics has become so acute that it has agreed to surrender some sovereignty in order to achieve new forms of cooperation. It has done this partly by agreeing to new types of cooperation, such as extradition and mutual assistance. It has also agreed to allow UN bodies, such as the Commission for Narcotic Drugs, to monitor member countries' compliance with the Vienna UN Drug Convention.<sup>369</sup> In the event that new types of crime become significant,<sup>370</sup> the international community will need to develop other subregimes. These subregimes should be monitored regularly and evaluated in accordance with international policies and international organization theory, so that the subregimes can effectively counter new forms of organized crime.

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369. See Vienna UN Drug Convention, *supra* note 40, art. 21(a).

370. An example of this is stolen art, which is often the domain of organized groups; INTERPOL has developed international modalities to combat art theft.

### 3. Specific Mechanisms

Within the context of regimes and subregimes, the international community can develop specific mechanisms to combat new forms of organized crime.

One model to combat crime which has been suggested is an International Criminal Court.<sup>371</sup> The International Criminal Court would have its own charter. Initially, such a court would be able to handle only specialized types of crimes, such as illicit narcotics transactions and related money laundering. In addition, it would be useful to create an International Indictment (or accusation) Chamber as an attachment to the court to hear the prosecution's evidence *ex parte* and determine whether evidence is sufficient to indict. A variation of an international criminal court would be a permanent Regional International Criminal Court. It would work, perhaps with the International Criminal Court, in exercising appellate jurisdiction over the decisions of the regional courts. Another potential model is a modification of the current International Court of Justice. That court's charter could be expanded to handle selected cases of international criminal law, especially cases dealing with certain organized criminal groups. This could be done by creating a special chamber.

Another possible means of enforcement would be the establishment of a mechanism for complaints and reports. Interested or affected persons could lodge complaints to determine whether states are fulfilling their obligations in combatting international organized crime. A periodic reporting system could also be established whereby each UN member state must report annually on the extent of implementation of UN agreements, guidelines, standards, and other rules concerning certain international crimes of organized groups, such as trafficking in arms and illicit narcotics. Interested persons and organizations should have access to these reports which should be widely disseminated. The world community should consider conditioning the allocation of credits and eligibility for benefits of IGOs, such as the World Bank Group and UN organizations,

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371. See M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 158 (1992).

on states' compliance with the above-mentioned UN agreements concerning international crimes.

With the above introduction on general enforcement modalities for international criminal law, the remainder of the article discusses more specific modalities directed at countering money-laundering activity.

*a. Create Universality of Jurisdiction for Organized Crime and Subspecies of Crimes Therein*

Due to the complexity of transnational criminality in the modern world, the traditional concept of territorial jurisdiction requires revision. Support should be given to international criminal courts, so that prosecutions of money launderers will not be impossible or ineffective due to territorial limitations.

*b. Strengthen Enforcement Modalities*

To ensure compliance with current enforcement modalities, the following mechanisms, organizations, and committees are proposed:

1. An international organization to supervise adoption of the Vienna UN Convention should be established. This organization would make suggestions and general recommendations based on the examination of information received from the members and would bring questionable matters to the attention of the International Narcotics Control Board.
2. The UN interregional and regional institutes and concerned IGOs and NGOs should give increased attention to the issue of organized crime.
3. The UN Development Programme and other funding agencies of the UN system, as well as member states, should be urged to strengthen their support for regional, national, and international programs for the prevention and control of organized crime.
4. The International Monetary Fund and the World Bank should integrate their loan programs to ensure that borrowing countries have adequate anti-money-laundering procedures in place.

5. Simultaneous tax examinations of individuals and organized criminal groups involved in narco-terrorism should occur.

6. Researchers and law enforcement officials should pay systematic attention to the property holdings of persons involved in narco-terrorism, or to the property holdings of the groups in which they participate.

Information among law enforcement agencies should be shared whenever possible to further law enforcement operations. Internally, IGOs, INGOs, and NGOs should hold workshops and training programs on techniques to study organized crime. States with MLATs should have a working group on organized crime where their resources and the level of organized crime activity warrant such a working group.<sup>372</sup> The commissions that implement bilateral MLATs can also include working groups that, *inter alia*, exchange information on cases and techniques of studying property holdings of organized criminals. In view of the complexity and volume of the financial operations of organized crime, it is essential to take an interdisciplinary approach that involves the combined expertise of lawyers, police, accountants, financial analysts, computer specialists, and investigators of corporate affairs.

## B. Uniform Legislation

### 1. International Central Data Bank

An international central data bank should keep track of and disseminate to interested governments the variety of laws and regulations on various types of measures taken against organized crime, such as sanctions against racketeering and continuing criminal enterprises, illicit drug trafficking, money laundering, theft of cultural property, use of mail and various types of fraud.

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372. Bruce Zagaris & David Simonetti, *Judicial Assistance under U.S. Bilateral Treaties*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM, U.S. PROCEDURAL ASPECTS 219, 228 (M. Cherif Bassiouni ed., 1988).



## 2. Dissemination

States and international actors should begin to design, monitor, disseminate manuals about, and hold programs on the importance of the following laws and procedures:

1. The right to financial privacy, currency transactions reporting, criminalization of money laundering, remedial measures, and blocking laws should be topics of discussion.

2. Legislation should be enacted that places on the person holding the assets the onus of demonstrating that the assets had been lawfully acquired. This is a revolution in legal practice and theory and, as such, should include the necessary safeguards to protect the human rights of the suspect.

3. Information pertaining to the adoption of new laws and methods on investigation and techniques to combat organized crime and the establishment of special anti-corruption measures should be disseminated.

4. Physical protection, relocation, monetary support, and identity-changing are increasingly important in the criminal investigation and trial process and in enforcement efforts against organized crime.

5. Special legislation aimed at narco-terrorist groups should be passed in which the Government can impose draconian penalties upon conviction of defendants and which provide procedural advantages to the law enforcement officials and prosecutors (*i.e.* ability to wire-tap and conduct undercover operations). Examples of these are RICO and Continuing Criminal Enterprises (CCE).

6. Legislation should provide rights and remedies to citizens groups that are directly affected by organized crime. For instance, in some civil law countries, victims have a right to participate in the criminal proceedings and in decisions to charge the defendant, and make their views known to the court on evidence and appropriate sentences after conviction.

7. Uniform tax laws should be enacted around the world, specifically targeting narco-terrorists. Organized criminals earn a greater deal of money through their illicit activities.

They do not report and pay taxes on this income. Hence, many countries have found that laws are useful in successfully tracing and prosecuting organized criminals.<sup>373</sup>

### *C. Financial and Technical Assistance*

The following are ways in which financial and technical assistance could be better utilized to combat money laundering: 1) Nations and existing IGOs and INGOs should establish technical assistance groups to provide technical services to requesting states. 2) Assets seized and forfeited should be shared with IGOs, INGOs, NGOs, and national governments which participate in combatting the narco-terrorist crimes. 3) A fund to provide technical assistance in narco-terrorism cases should be established. This fund should be maintained by an appropriate UN organ. 4) Technical assistance should be a part of the agenda at regional conferences which bring together law enforcement, prosecution, and judicial authorities. A network to facilitate communication between meetings should be developed.

### *D. The Model Extradition Treaty Adopted at the 8th UN Crime Congress and the UN Model MLAT Should be Widely Disseminated*

Most experts agree that the provisions of future model international criminal cooperation treaties should complement rather than replace existing cooperative arrangements. The view of many experts is that the drafts could actually serve as models for new national legislation, thereby contributing to the harmonization and increasing uniformity of domestic legislation.

When concluding an MLAT, governments should apply as many of the instruments of judicial assistance as possible. As the Australian government has noted, the establishment of effective international mutual assistance arrangements requires enormous political will. For a country to permit expo-

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373. See generally *Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings on S. 98-151 Before the Permanent Subcommittee on Investigations, U.S. Senate Committee on Governmental Affairs 99th Cong., 1st Sess. 1, at 2 (1985).*

sure of its citizens to compulsory measures such as search and seizure and the tracing, freezing, and confiscating of proceeds of crime at the request of another country requires a political decision. The political aspect of that decision cuts through every aspect of mutual assistance, for domestic legislation must be revised so that mutual assistance can be given and received, appropriate bilateral and multilateral treaties and arrangements can be established, and decisions about whether to grant or to refuse a request in specific cases can be made. Model extradition and mutual assistance treaties that the UN Crime Prevention Committee is preparing should be helpful to harmonize these efforts.

To ensure the efficient operation of international mutual assistance against new forms of organized crime, states must establish a Central Office. A Central Office is especially important because the new forms of mutual assistance, such as an anti-money-laundering subregime, require the use of coercive investigatory or enforcement measures against citizens of one country and their property at the request and for the benefit of another country. This has a direct impact on the sovereignty of the requested country and produces divergent diplomatic, political policy, and operational interests in both countries.

#### *E. Transfer of Proceedings, Transfer of Prisoners*

Pursuant to the Vienna UN Drug Convention and other international conventions, states should provide for the transfer of prisoners and judicial proceedings at the criminal pre-trial, trial, and post-trial stages.

#### *F. Education and Promotional Programs to Raise the Consciousness of the Public*

Information should be widely disseminated to the general public to inform it about money laundering. This can be done very effectively through financial institutions. For example, many financial institutions are now required to ascertain the identity of new clients through proper documentation and photographs.

*G. Assistance to Journalists and the Media*

One of the best modalities to identify and expose narco-terrorists is media exposure. It removes the anonymity from narco-terrorist groups and the resulting comfort they enjoy. The following efforts are suggested:

1. Stories by the media have resulted in concerted violence against the media, including the murder of journalists, and the burning and bombing of their businesses and homes. Therefore, a fund should be established to assist media/journalist victims of organized crime.
2. Better communication between local and international media/journalists should be facilitated.
3. IGOs, NGOs, INGOs, and nations should educate the public on the important role of the media/journalists in combatting narco-terrorism, so that the general public will support the media/journalists.

*H. Support for Comparative Research and Data Collection*

Comparative research and data collection related to issues of transnational narco-terrorism, its causes, its links to domestic instability and other forms of criminality, its prevention and control should be supported so that better law enforcement techniques can be developed.

*I. Links Between Different Organized Criminal Groups*

Particular attention and action should be directed at the links between different organized criminal groups, such as drug and arms trafficking organizations, particularly with regard to the acquisition of sophisticated weapons.<sup>374</sup> National legislation for the effective control of weapons, ammunition, and explosives and international regulations on the import, export, and storage of such articles should be developed in

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374. For a good discussion of an integrated and more active approach in combating international organized crime, see ROY GODSON & WILLIAM OLSON, *INTERNATIONAL ORGANIZED CRIME: EMERGING THREAT TO U.S. SECURITY* (1993); *See also Report Warns of the New Threat of International Organized Crime to U.S. National Security*, 9 INT'L ENFORCEMENT L. REP. 299 (1993).

order to prevent those weapons from being used by terrorist or organized crime syndicates. International cooperation in securing evidence with respect to the prosecution or extradition of terrorists is especially important.

*J. Strengthening Controls of Movement Through Official Points of Entry*

By strengthening the security of airports and sea and land border crossings, entry points will be less vulnerable to movement by international criminal organizations. Universal and regional IGOs and bilateral programs should assist countries in equipping the law enforcement authorities at points of entry with mechanisms to detect contraband, such as drug sensing mechanisms, sniffing dogs, drug identification kits, and other means of detection. Legislatures should exchange information on laws which apply penalties to transportation entities that are aware of narco-terrorism and do not take prompt and adequate steps to correct and report on it.

*K. Improving Cooperation with Economic Integration Groups*

Economic integration groups should exchange law enforcement intelligence and form special anti-narco-terrorism groups. They should permit member law enforcement officials to operate within their borders,<sup>375</sup> and, on request, they should provide mutual assistance. The more advanced economic integration groups,<sup>376</sup> working with IGOs (e.g., UN) and INGOs (e.g., International Association of Chiefs of Police), should provide technical assistance on request to other economic integration groups.

VII. SUMMARY AND CONCLUSION

Despite persistent efforts to develop an anti-money-laundering regime, the power and resources of established and newer organized criminal groups have continued to grow and to infect financial systems worldwide. These groups are successful in moving their money and wealth because they can

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375. See Accord, *supra* note 124.

376. Examples are the Council of Europe, the European Committee on Crime Problems, and the Trevi and Pompidou groups.

readily access and exploit the newest forms of technology and the best human resources. In the context of this new power threat, the need to effectively allocate the international community's limited resources to combat money laundering becomes more urgent.

Given limitations on resources, it is critical to assess accurately the degree to which various international actors criminally manipulate the movement of money. It is also necessary to evaluate the various steps and mechanisms involved with the transfer of funds, and to chart the potential scenarios for funds transfers.

Once all scenarios are considered and frameworks and institutions have been devised, international organizations and governments can devote attention to strengthening old, and devising new, techniques to combat money laundering. In the short-term, the FATF, the Basle Committee, the UN, and INTERPOL will remain the key universal international organizations. Hence, their framework and external relations should be strengthened to provide effective enforcement of anti-money-laundering principles and legislation. The World Bank group and regional banks could play a role in strengthening the international financial regulatory frameworks, if such new roles were conferred on them.

On a regional level, the CFATF and regional counterparts to the FATF will require support. In addition, regional organizations such as CICAD are in dire need of increased support and strength. Urgent attention and resources should be devoted to devising and supporting enforcement mechanisms with existing (*i.e.*, the Caribbean Common Market and Community and Organization of East Caribbean States) and proposed regional integration groups.

The world is still in the initial phases of the establishment and implementation of the anti-money-laundering regime. Most of the world is just now issuing regulations or is only beginning to evaluate the results of recently enacted anti-money-laundering laws. An important aid to understanding and evaluating the operation of these laws are the audits performed by the FATF of each of its members. The results of these audits are summarized in annual reports. Regional FATFs will begin to undertake evaluation of their mem-

bers,<sup>377</sup> thereby helping to inculcate the main principles of the anti-money-laundering enforcement regime.

Even the United States, which has required "know your customer" reports since 1979 and criminalized money laundering in 1986, is undergoing a major reevaluation of its entire money-laundering regime, so that it is more effective, less burdensome and costly for businesses, and can broaden its scope to embrace non-bank financial institutions and other persons suspected of engaging in laundering.<sup>378</sup>

Thorough assessments of the substance, procedure, and politics of existing organizations and conventions are beyond the scope of this Article, but are necessary for the proper development of a regime. With a proper synchronization of international approaches, the law enforcement community can achieve the highest levels of enforcement consistent with respect for due process and the need to minimize the disruption of normal commerce.

The potential for law enforcement and national governments to obtain revenue from asset forfeiture has made such officials more innovative and aggressive in bringing cases and trying to obtain assistance from their foreign counterparts. The success of these laws undoubtedly will continue to spark a rise in international assistance requests and litigation in which governments, defendants, and third-party counsel will participate.

The pervasiveness of the anti-money-laundering enforcement regime, as reflected above in the example of the Latin American bank with the mutual fund in the Caribbean and the Luxembourg custodian that needs to establish "know your customer" principles to meet EC requirements, has now made business counsel aware of and responsible for following the new principles. Similarly, international business counsel engaged in asset protection and estate planning can no longer advise so easily on anonymity and secrecy provisions. A few

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377. See, e.g., *Caribbean Financial Action Task Force Reaches Agreement to Implement International Standards and Establish a Secretariat*, 8 INT'L ENFORCEMENT L. REP. 425 (1992).

378. See, e.g., *Bank Advisory Group to Have Input Soon on Leaner Anti-Money Laundering System*, DAILY REP. FOR EXECUTIVES, Oct. 19, 1993, A-13 (explaining that the U.S. Department of Treasury is forming a Bank Secrecy Act Advisory Group to try to reduce burdensome reporting and other obligations established in connection with the reporting obligations under the Bank Secrecy Act).

years ago such counsel could more easily advise his or her client to go to Switzerland or the Bahamas. The abolition of formula B accounts in Switzerland and the conclusion by the Bahamas of MLATs and guidelines make advice on anonymity and secrecy more difficult. Business counsel also find themselves receiving phone calls from Swiss and Luxembourg counsel, stating that the fiduciary accounts established years ago must now be altered. Swiss and Luxembourg fiduciaries or their counsel must either reveal the beneficiary owners or close the accounts. Hence, the penetration of the anti-money-laundering enforcement regime is so deep that even business counsel are concerned with and must deal with it. As time passes, the anti-money-laundering enforcement regime will experience more harmonization of law and more of the details of the legal components of the regime will be established.

Several additional mechanisms to combat money laundering have been discussed in the preceding section. To effectively implement these measures, the international enforcement authorities in existence need the power and resources to match those of organized criminal groups with their ability to exploit new technology, liberalized trade, and existing gaps in the international legal system.



