Responding to MONEY LAUNDERING

INTERNATIONAL PERSPECTIVES

EDITED BY

ERNESTO U. SAVONA

Responding to Money Laundering

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International Perspectives

ISPAC

International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme

Edited by

Ernesto U.Savona
University of Trento, Italy

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The preparation of the conference was a unique opportunity for discussing the topics with the authors. The follow-up work of focusing the different contributions and finalising them for the book turned the collaboration with the authors into a long standing professional friendship. I am grateful to all the authors for their patience in responding promptly to my requests.

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My final and deepest gratitude goes to Adolfo Beria di Argentine, Secretary of the ISPAC Board, who has wanted, planned and made the conference and this volume possible. This book is dedicated to him and to his creative drive in bringing about the not always easy but most fruitful encounter between researchers and policy makers.

Introduction

This book collects some of the main papers presented at the conference on 'Money Trails: International Money Laundering Trends and Prevention/Control Policies' held in Courmayeur, Italy, in June 1994. This conference, organised by ISPAC, the International Scientific and Advisory Board of the United Nations in cooperation with the Crime and Justice Branch of the United Nations under the auspices of the Italian Government, convened approximately one hundred experts in the field. This combination of different experiences coming from governmental and research fields has ensured that this conference in Courmayeur should become a milestone in the debate on anti-money laundering policies. Some recent publications have extensively drawn from the material of this conference.[1]

The Courmayeur conference was substantially preparatory to the World Conference on Transnational Organised Crime that the United Nations held in Naples in November 1994, just five months later. In the Naples conference anti-money laundering policies played an essential role in combating organised crime, and the contribution coming from Courmayeur was officially and substantially recognised in the proceeding of this conference[2] and endorsed by the General Assembly of the United Nations.

Being one of the authors and the rapporteur of the Courmayeur conference and having prepared, in cooperation with an American colleague, the five background papers which, after some changes, were tabled as United Nations Secretariat papers at the Naples meeting, I have had the opportunity to compare notes before, during and after these conferences, with investigators, prosecutors, judges, regulators and researchers involved in anti-money laundering policies. Their cooperation enabled me to acquaint myself with the intricate labyrinth of anti-money laundering policies and to better understand the reasons for their successes and failures. This book is the result of this ongoing process of understanding, offering the reader an insight into the past and the future of the international anti-money laundering action.

This action begins with the United Nations Conference of 1988 and develops through the impulse of the forty recommendations of the Financial Action Task Force of 1990 and its continuing action in the field. During these last few years, international attention was made to focus on the money laundering problem.

Initially connected with drug trafficking, money laundering has emerged as the main problem connected with the development of large scale organised crime.

Continuing in the path of economic sanctions, considered as more effective and more efficient against organised crime groups than the mere incapacitation of their members, law enforcement agencies and governments have considered the criminalisation of laundering the proceeds of crime as a possible effective deterrent for contrasting the production and accumulation of illicit wealth, which is the rationale of the existence and development of criminal organisations. Money laundering being an additional crime to the predicate one of originating criminal proceeds, the action against money laundering has also been considered as one of the ways for tracing the criminals; through the trails their money follows.

The development of crime control policies proceeded in strict connection with regulatory policies directed to block the cooperation between financial institutions and criminals. The main goal of these policies is to make the financial markets transparent, minimising the circulation of criminal money and its influence upon legitimate industries.

The result of this combined crime control/regulatory action is that in the space of a few years, only the money laundering issue has created a constellation of international, regional and domestic regimes where 'soft laws' overlap and influence a growing number of 'hard laws'. Although these norms respond to the peculiar characteristics of the country or the region, they are moving fast in the process of the harmonisation of legislations against organised crime, an important condition for their effectiveness.

The original impulse of the drug trafficking problem is still present in a greater part of the anti-money laundering legislation, especially in South American countries. This impulse, formalised by the 1988 Vienna Convention, is still dominant today, but the trend is towards an extension of the crimes considered as predicate offence of money laundering. A great contribution in this direction was made simultaneously by the Financial Action Task Force and the Strasbourg Convention on 'Laundering, Search, Seizure and Confiscation of the Proceeds from Crime', both of 1990.

In terms of the relationship between crime control and regulatory policies, we are witnessing an intense development of the latter ones. Anti-money laundering policies are the lever for achieving a better transparency in the financial markets.

Have crime control and regulatory policies met the objective? The answer to this question is complex. What we need today is not so much an evaluation but rather a thorough understanding of the experience gained in these first years of anti-money laundering activity. And, among the many lessons we have learned, the most important one is that without a global participation of all countries and without clearly harmonised policies, the efforts against money laundering are in vain.

The explanation lies in a simple reasoning. Criminals organise themselves according to two main functions: maximising benefits and minimising costs. In doing so, when possible and when capable of doing it, they try to internationalise their operations, and by laundering the proceeds of their crime at international levels they minimise the risk of the money being traced and seized. Criminals manage this risk through different levels of expertise and information. One information they need to have is the discrepancy in regulations among countries, They go where they can turn these discrepancies to their advantage.

The philosophy of this 'global approach' is clearly explained in the conclusions of one of the papers presented at the conference, which was considered as the final message to the audience:

> "…it would be far preferable for all countries, both developing and developed, both those now suffering from the money laundering phenomenon and those which hope to attract investment capital by offering fiscal advantages, to adhere to a common global approach to money laundering. Step by step, regulation by regulation, and law by law, the international community should patiently but resolutely motivate and assist countries which do not have anti-money laundering policies and mechanisms to put them in place, thereby building together this protective net against the circulation and infiltration of illegal money".

Experience shows that it is becoming easy to pass anti-money laundering policies but it is much more difficult to implement them. Established norms and principles are short-lived if they are not applied everywhere and the big challenge the international community faces today and tomorrow is their world-wide implementation.

Having recognised that the approach needs to be as global as the problem, we understand that the strategy needs to be global too. This strategy we have in mind should, ideally, consist of four steps: international—regional—domestic—and international again; its goal is the implementation of the soft-laws introduced. The first step is the cooperation between international and regional mechanisms, old or to be created anew. The international community should help the regions to establish mechanisms for monitoring the domestic implementation of the minimum standards (the model is the E.C.Directive). Once these mechanisms have been determined the second step follows. The regions should act with the countries persuading them to include the minimum standards in their legislation and practice. With this second step it should be possible to move towards more uniformity among regions. Having achieved the minimum standards there the international community would evaluate further steps and directions. Thus, starting the circle once again (international-regional-domestic-international), a move could be made towards an improved transparency of the economic and financial systems in the world.

Regional mechanisms are an essential part of this process on which the outcome of the challenge depends. They can anticipate new difficulties and take into account the countries' geographical, political and legal peculiarities. Appropriate disincentives should be given to countries who still persist in attracting criminal money. All these regional mechanisms should be coordinated internationally. The level of coordination should combine the greatest participation with the highest efficiency in the two key areas (regulatory and criminal) where the solution of money laundering problems requires expertise and action. The aim of this volume is to contribute to the development of expertise and to make the action more effective. Divided into two parts, Trends and Implications' and 'Tuning the Instruments', the essays develop the analysis of the problems in different styles and attempt to tune the instruments for combating them.

Dini's contribution introduces the problem of money laundering, illustrating its international dimensions. The international and domestic prestige of the author and his long standing experience in the field of international economy, enable the reader to comprehend the international combination of crime and economy. The background to this chapter, and indeed to the whole book, is the Italian experience. It symbolically represents all the ingredients which characterise the money laundering phenomenon and its responses: high intensity of the organised crime/money laundering problem, prompt reaction in terms of legislation, difficulties and lack of organisation among the different bodies in charge of implementing the norms.

Problems and responses are strictly connected. Analysing the main trends in the money laundering activities and trends in responses, the chapter by myself and De Feo points out the main convergences and divergences among countries and regions. This analysis argues for the globalisation of the anti-money laundering policies either criminal or regulatory. The authors argument is that this process should go through a planned series of steps where the harmonisation of the policies at domestic and regional levels constitutes an essential condition for further action.

The chapter by Dini and my chapter with De Feo both introduce the problem of money laundering looking at the recent qualitative dimension of the phenomenon. The chapter by Hughes Hallett, on the contrary, presents an economic understanding assessing the quantitative dimensions of illegal activity. This approach, combined with the author's scholarship in the economy of development, could be considered as a framework for further analyses on the implications illegal activities have for developing countries.

Tanzi's chapter follows the same lines. The author analyses the macroeconomic aspects of money laundering for the transparency of the international financial markets. Tanzi's experience at the International Monetary Fund combined with academic scholarship in the area of international finance, puts the money laundering issue in the context of the process of globalisation of

the economy. Considering the costs provoked by money laundering, the chapter suggests a path for effective responses:

> "…the solution to eliminating the scope for money laundering must be found in a mechanism that reduces, if not eliminates, these regulatory and legal differences across countries".

The second part of the book deals with the problems of the instruments. The chapter by Bassiouni and Gualtieri outlines the international and national framework where responses to money laundering are taking place. The long standing experience of the authors in international criminal and regulatory law allows a detailed and comprehensive analysis of the international, regional and national anti-money laundering regimes. This chapter offers the reader a comprehensive picture of the 'puzzle' and how the different instruments are combined in different legal cultures.

An example of how different legal cultures, common and civil law, play a role in the investigation and prosecution of the proceeds of crime is outlined in the two chapters by Evans and Turone. Both high standing experts in the field, Evans and Turone view the problems in two different contexts, the North American experience for Evans and the Italian one for Turone. They analyse the changes in domestic and international legislation and the practical problems met by those investigators and prosecutors who need to follow the domestic and international trails which criminal money takes. Their analyses show the general difficulties met in the common and civil law contexts and the advantages obtained through international cooperation.

Among the many difficulties the most important one is represented by offshore banks. Bernasconi's chapter addresses the obstacles represented by the development of these criminal and fiscal havens in controlling money laundering crimes. Although not all the off-shore countries are the same, differences in regulation produce a potential threat to the transparency of the financial markets and quite often give a certificate of legitimacy to criminals and their operations. The off-shore banks and other mechanisms are a hole in the net of global regulation and, the theoretical and practical experience of the author helps the reader to understand how much control and how many regulations the international community needs to build the protective net of anti-money laundering policies.

Regulation is the topic of the last two papers. Levi discusses how a 'regulatory compliance culture' can be created, and how this could affect money-laundering. The author navigates through international, European and British regulations with special attention to the experience gained in the United Kingdom. Levi's chapter points out where the problems are and how they can be solved better in future. Among these problems the internal corporate control within financial institutions has priority. Fisse's paper deals with this issue and analysing the FATF recommendations relating to internal controls, explains the problems of

their implementation. Being a well known expert in the field, Fisse confronts general recommendations, domestic legislative 'disharmonies' such as the Australian ones, and outlines models that can render the internal corporate controls effective. These models, which can be adapted to different legal cultures and financial systems, could be a concrete contribution for shifting the attention from discussion about internal controls to their implementation.

This is also the message contained in the afterword by Giorgio Giacomelli, director general of the United Nations Vienna Office and executive director of the United Nations International Drug Control Programme, inviting us to make a serious commitment in the action against money laundering.

Presenting a wide range of different approaches and experiences, this volume has no conclusions. The thread which connects them, globalisation of the problems that calls for a globalisation of responses, comes out reinforced. The contributions are small seeds the Courmayeur Conference has sown. If in sand or in fertile soil is a question left open.

NOTES

1. To quote just two examples on the domestic and international level: D. Masciandaro, *Banche e riciclaggio—analisi economica e regolamentazione*, Milan, Edibank, 1994, and W.C. Gilmore, *Dirty Money—The Evolution of Money Laundering Counter-measures*, Council of Europe Press, Strasbourg, 1995.
2. Report and recommendations of the International Conference on Preventing and Controlling Money-Laundering and the Use of the Proceeds of Crime: A Global Approach (Courmayeur, Italy), in E/CONF, 88/7, 12 July, 1994.

Notes on Contributors

M.Cherif BASSIOUNI

J.D., Indiana University; LL.M., John Marshall School of Law; S.J.D., George Washington University; Dottore in Giurisprudenza *(Honoris Causa)*, Università di Torino, Docteur en Droit *(Honoris Causa)*, Université de Pau.

Professor of Law; President, International Human Rights Law Institute, DePaul University, Chicago, USA; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences; Former Chairman, Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia; Former Vice-Chairman, General Assembly's Ad Hoc Committee on the Establishment of an International Criminal Court.

Paolo BERNASCONI

Paolo Bernasconi is a lawyer and notary in Lugano, Switzerland, and from 1969 to 1985 he was State Attorney in Lugano. Since 1984 he has been a lecturer in economic penal law at the University of St. Gallen, from 1986 he has lectured at the University of Zurich and since 1990 he has been a full professor at the Centre for Bank Studies in Lugano.

Bernasconi is a member of the federal commissions of experts for legislational studies and projects (covering money laundering, confiscation of goods deriving from crime, federal law on international legal assistance in penal matters, federal law on the stock exchange and financial markets). He is a consultant to the United Nations and the Council of Europe and is a member of the editorial staff of the *Schweizerische Zeitschrift für Strafrecht* in Bern and of the Quarterly Journal on economic penal law in Padova, Italy.

Michael A. DE FEO

De Feo was a prosecutor in the Organized Crime and Racketeering Section of the U.S. Department of Justice (1963–1991), and went on to head the U.S. delegation drafting model forfeiture and anti-money laundering regulations with the Organization of American States (1991–1992), Since 1992 he has served as Senior Counsel for International Law Enforcement at the American

Embassy, Rome, Italy. He is the author of numerous articles and has published many reports. A lecturer at the U.N. Institutes in Japan and Latin America, he has represented his country in U.N. Crime Prevention and Criminal Justice programme matters since 1986.

Lamberto DINI

Lamberto Dini was President of the Council of Ministers and Minister of the Treasury of the Italian Government and is now Minister for Foreign Affairs. He is also governor for Italy in the International Monetary Fund, for the European investment bank, the European bank for reconstruction and development as well as the Inter American development bank and ex-minister of the Treasury. In the past he has been executive director of the International Monetary Fund, from 1979–1994 director general of the Bank of Italy, from 1981–1994 a member of the board of directors of the Italian Exchange Office and at the same time, chairman of the Deputies of the Group of Ten. He was also Vice-President of the bank for international settlements and a member of the Monetary Committee of the EEC.

John L.EVANS

John L.Evans is a senior associate at the International Centre for Criminal Law Reform and Criminal Justice Policy at the University of British Columbia in Canada. The Centre is affiliated with the United Nations Crime and Criminal Justice Programme.

For many years he was a senior executive in the Government of Canada, responsible for research and statistics in criminal justice. He has worked in policing, corrections and other criminal justice areas for twenty five years and has been involved in the development of policies, programmes and legislation at national and international levels. His research interests include organised and economic crime, sentencing and international criminal law. He is also an adjunct professor of law at the University of British Columbia.

Brent FISSE

Brent Fisse graduated in law from the University of Canterbury in 1964. He has since held various university positions in Australia and the USA, including the Deanship at Adelaide Law School in 1977–78, and a Bi-Centennial Fellowship at the University of Pennsylvania in 1968–69. He has been a Professor of Law at the University of Sydney since 1985, a position he now holds on a part-time basis after joining Gilbert & Tobin as a partner in 1995. Gilbert & Tobin is a leading Australian law firm which specialises in corporate regulatory issues.

Fisse's publications include: *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Law Book Co., 1992), co-edited with David Fraser and Graeme Coss; *Corporations, Crime and Accountability* (Cambridge University Press, 1993), coauthored with John Braithwaite; *Securities Regulation in Australia and New Zealand* (Oxford

University Press, 1994), co-edited with Gordon Walker; *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983), co-authored with John Braithwaite and *AIIA Software Legal Guide* (1993), prepared with others, as consultant to Gilbert & Tobin.

Giorgio GIACOMELLI

Giorgio Giacomelli is Director-General of the United Nations Office at Vienna and concurrently Executive Director of the United Nations International Drug Control Programme (UNDCP), a post he assumed in 1991 at the rank of Under-Secretary-General. Giacomelli served as Secretary-General of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which took place in Cairo from 29 April to 8 May 1995. A national of Italy, Giacomelli was Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) from 1985 to 1991. He served as the interim Director of the Ministry's Technical Cooperation Service to Developing Countries in 1972 and as Italy's Ambassador to Somalia from 1973 to 1976 and Ambassador to Syria from 1976 to 1980. In 1981, Giacomelli was appointed Director-General for Emigration and Social Affairs in Italy's Foreign Ministry and subsequently, Director-General of the Department of Cooperation and Development, in charge of all bilateral and multilateral assistance programmes of Italy to developing countries.

David S.GUALTIERI

Attorney at Law; former Attorney, Argonne National Laboratory; former Fellow, International Human Rights Law Institute, DePaul University, Chicago, USA.

Andrew HUGHES HALLETT

Andrew Hughes Hallett is Professor of Macroeconomics at the University of Strathclyde, Glasgow, and Research Fellow of the Centre for Economic Policy Research, London, as well as Consultant to the World Bank, IMF, UNDP, UNESCO, OECD, EC Commission, Federal Reserve System and various National Governments. He has published 160 papers in international journals on policy co-ordination, international economics and economic integration in Europe, with forthcoming papers in the American Economic Review and other journals. His most recent book was: *Optimal Control, Expectations and Uncertainty* (Cambridge University Press, 1989).

Michael LEVI

Michael Levi is Professor of Criminology at the University of Wales, Cardiff and is the author of *The Phantom Capitalists* (Gower, 1982), a study of the organisation and control of bankruptcy fraud; *Regulating Fraud: White-Collar Crime and the Criminal Process* (Routledge, 1988); *Customer Confidentiality, Money Laundering and Police-Bank Relationships* (London, Police Foundation, 1991); *The Investigation, Prosecution and Trial of Serious Fraud*

(Royal Commission on Criminal Justice Research Study No. 14, London: HMSO, 1993) and *Money Laundering in the UK: an Appraisal of Suspicion-Based Reporting* (London, Police Foundation, 1994) in collaboration with Michael Gold. In addition to many articles, the Home Office Crime Prevention Unit has published his general guide to fraud prevention (paper 17) and his guide to the prevention of cheque and credit card fraud (paper 26), and the Home Office Police Research Group has published his review (with Lisa Osofsky) on the investigation, freezing and confiscation of the proceeds of the proceeds of crime (paper 61). His next book, *Victims of Fraud: the Social and Media Construction of White-Collar Crime*, on the impact of fraud on individual and institutional victims, will be published in 1996 by Oxford University Press.

Ernesto U.SAVONA

Ernesto U.Savona is professor of Criminology and Director of TRANSCRIME, research group on transnational crime, at the Faculty of Law, Trento University (Italy). He is also President of the European Documentation and Research Network on cross-border crime, a Foundation promoted by the Commission of the European Union grouping sixteen European universities. He is consultant to the United Nations Crime Programme, Council of Europe and various National Goverments and scientific adviser to ISPAC. In June 1996 he was elected as a member of the Criminological Scientific Council of the Council of Europe, Strasbourg. For three years he has been visiting fellow and project director at the National Institute of Justice, Research Center of the U.S. Department of Justice, Washington D.C. He has published several papers and books focusing on the relationships between organisational crime and criminal justice systems. Most recent publications are: *European Drug Policies and Enforcement*, (MacMillan, 1996) edited with N.Dorn and J.Jepsen, and *The United Nations and Transnational Organized Crime*, edited with Phil Williams, Frank Cass (London, 1996).

Vito TANZI

Vito Tanzi is now Director of the Fiscal Affairs Department at the International Monetary Fund, Washington D.C. and previously he was Professor at the Department of Economics at the American University and George Washington University. He has worked as a consultant for the World Bank, the United Nations, the Organization of American States and the Stanford Research Institute. He has worked as a fiscal expert in many countries and his publications include: *The Individual Income Tax and Economic Growth* (John Hopkins University Press, 1969); *Inflation and the Personal Income Tax* (Cambridge University Press, 1980); *The Underground Economy in the United States and Abroad* (Lexington Press, 1982); *Taxation, Inflation and Interest Rates* (IFM, 1984); *Public Finance in Developing Countries* (Edward Elgar, 1991) and *Taxation in an Integrating World* (Brookings, 1994). He has also written a large number of articles in leading

journals. In the period 1990–94 he was President of the International Institute of Public Finance.

Giuliano TURONE

Giuliano Turone has been part of the Judiciary Bench since 1969. For many years he was examining magistrate in Milan and has carried out wide ranging investigations in the field of organised crime and economic crime. In 1993 he became a member of the staff of magistrates of the National Anti Mafia Prosecuting Office. At present he is consultant to the Parliamentary Anti Mafia Commission, the Council of Europe and the United Nations. He is the author of *Le associazioni di tipo mafioso* (Milano, 1984); *L'estradizione e l'assistenza giudiziaria nei rapporti fra Italia e Stati Uniti* (Milano, 1986); *Le indagini collegate nel nuovo codice di procedura penale* (Milano, 1992) and // *delitto di associazione mafiosa* (Milano, 1995).

Part I

Trends and Implications

1
The Problem and its Diverse Dimensions

Lamberto Dini

1.
INTRODUCTION

Money laundering is an increasingly ramified, complex phenomenon that must be tackled in an integrated and interdisciplinary fashion. We must not waste resources but concentrate them on identifying and neutralising the underlying causes.

Money laundering is an activity aimed at concealing the unlawful source of sums of money. To shed their identity, funds of illicit origin are first employed in financial transactions before entering the legal circuit in various forms of investment. We do not know, but should not underestimate, the amount of illegally procured capital accumulated and laundered in the past, whose origins are now virtually undiscoverable.

Typically, laundering is effected through legitimate markets, banks and other financial intermediaries, generally used as unwitting tools. In some cases, however, there are dangerous interconnections between the management of financial intermediaries and criminal interests.

The sophistication of the financial side of criminal activities increases with the size of the sums to be laundered and the extensiveness of the illegal activities that generate them. In some cases organised crime wields a power capable of challenging the state itself.

Through money laundering, organised crime diversifies its sources of income and enlarges its sphere of action. The social danger of money laundering consists in the consolidation of the economic power of criminal organisations, enabling them to penetrate the legitimate economy.

In advanced societies, crime is increasingly economic in character. Criminal associations now tend to be organised like business enterprises and to follow the same tendencies as legitimate firms: specialisation, growth, expansion in international markets and linkage with other enterprises.

The holders of capital of illegal origin are prepared to bear considerable costs in order to legalise its use. Criminals may well find it acceptable to purchase

control of loss-making businesses or low-yielding assets, as long as they provide an entry into the business community in respectable guise. This results in distortions of the market.

2.
THE ITALIAN EXPERIENCE

For years now, in the battle against organised crime, Italy has engaged the foe on the financial front. Disparities in economic development between different parts of the country facilitate the occupation of the territory by organised crime in the less developed areas, resulting in differences in the ability of civil society to respond to criminal violence.

Since the early eighties there has been full awareness of the importance of banking inspections as a tool for tracing the flows of illicit finance. Thanks to this method of inquiry courageous investigative magistrates, first and foremost Giovanni Falcone, made great strides in advancing our knowledge of the operating mechanisms of the Mafia.

Anti-laundering policy does not interfere with the orderly working of the market; it concentrates on watching over the access points through which "dirty" money can be funnelled into the system and on heightening awareness of the risks of criminal infiltration.

Action against money laundering does not consist solely in the repression of crime. The markets themselves have been improved in size, efficiency and transparency, in order to increase their professional competence and depth and hence their resistance to criminal infiltration. The regulations governing the various types of financial intermediation have been strengthened, developing synergy between the rules of prudential supervision and the anti-laundering provisions.

In this effort, the defence of several key points in bank operation is crucial: the control of ownership arrangements, the rules governing equity interests in banks, the quality of institutions' organisation and the effectiveness of their internal controls. The 1993 Banking Law directs supervisory action to ensuring the sound and prudent management of banks, emphasising standards of conduct and reliability.

The extension of supervisory controls to non-bank intermediaries and the institution of general rules governing financial companies, which are now required to be listed in a special register, have fully defined the perimeter of intermediaries and the scope of the rules, including those on money laundering. Within the payment system, a monitoring threshold of 20 million lire has been set, above which transfers of cash or bearer instruments outside authorised circuits is prohibited and special precautions and controls are required.

Like many other countries, Italy is working to win the banks' wholehearted support and active co-operation in the battle against money laundering. Computerisation of customer data analysis can help to create a protected

environment. In the short run the intermediaries will incur substantial costs to install the requisite information systems. But they should also consider the operational advantages that may accrue from co-ordinated action with the institutions and the other components of the financial and productive system.

The link between crime and professionals in the field of finance is producing ever more complex combinations. A highly symptomatic development is the new exploitation of the age-old practice of usury, which is proliferating both nationally and internationally, Usury is no longer just the work of the free-lance "loan shark". It is now one of the operational arms of organised crime to launder money, take over companies, strengthen its economic power and tighten its grip on the territory.

The spread of usury has been abetted by the economic difficulties of firms. Banks, even those with a strong local and mutualistic bent, will not service certain market segments. The causes also include the inefficiency of the government apparatus. The judicial process for the collection of debts often involves delays and cost that the creditor cannot afford. This favours the intervention of operators who find it preferable to take the law into their own hands through violence and intimidation.

Internationally, usury is proving to be a dangerously effective way of re-cycling illegal funds where the large-scale reallocation of small property holdings is under way, as in the countries of Eastern Europe. Here the spread of usury is facilitated by the laborious transition towards a radically reformed government, economy and society as well as by lack of familiarity with the classical operation of credit intermediation which is still underdeveloped.

3.
THE INTERNATIONAL CONTEXT

To set the discussion of money laundering in proper context, we must consider the principal tendencies unfolding in the international markets, both real and financial.

A first tendency consists in the growing internationalisation of production and of the structure of consumption and hence in the growing real integration between the various national economies. Between 1970 and 1992 the volume of world trade grew by more than 160 per cent and world income by around 90 per cent. Measured as the ratio of foreign trade to national income, the average degree of openness of national economies to the rest of the world stands at around 30 per cent today.

A second tendency is that of increasing financial integration. The stock of inter-national bank loans rose from 5 per cent of the industrial countries' GDP in 1973 to more than 20 per cent in 1992; the stock of Eurocurrency bonds and bonds issued outside the issuer's country rose from 3 per cent of the same aggregate in 1982 to 10 per cent in 1991. Direct investment expanded in the

seventies and eighties; in 1993 the total was more than $160 billion, compared with $20 billion in 1970. The growth in cross-border financial transactions is more pronounced in countries that have recently removed the barriers to the free circulation of capital. Daily turnover in the foreign exchange market rose to $880 billion in 1992, while the value of world trade amounts to around $3,600 billion a year.

A third tendency is the growing role played in international financial transactions by non-bank international investors, especially pension funds, insurance companies and investment funds. In the eighties international investors' assets grew as a percentage of households' total financial assets from around 20 to 30 per cent and more in North America and Germany, from 15 to 26 per cent in Japan, from 10 to 36 per cent in France and from 40 to 60 per cent in the United Kingdom. The 100 largest investment funds in Europe and their counterparts in the United States are currently estimated to manage savings totalling more than $8 trillion.

Information technology and innovative financial instruments such as derivatives allow even small, highly specialised traders to mobilise massive resources in the markets. For example, the so-called "hedge funds", some 800 funds with high minimum investment requirements, have a total capital of between $50 billion and $100 billion and are able to take on debts of up to ten times their capital base. Non-banks tend to operate under less stringent regulatory and supervisory regimes than banks. Hedge funds, for example, are usually established in offshore centres where controls are minimal.

The tendencies mentioned are bound to persist and intensify. Further advances will be made in information technology and financial innovation. The elimination of the barriers to the free circulation of goods and capital will proceed. The liberalisation of the economy in China, Russia and Central and Eastern Europe will increase the size of the world markets enormously. These tendencies bring unquestionable benefits on the economic plane. Yet there is no denying that they also greatly complicate the prevention and repression of money laundering.

The greater ease with which the proceeds from illegal activities can be transferred abroad is a problem not only for the countries of origin but also for those of destination. Once they are established in the latter's economic structures, funds of illicit provenance, particularly if they belong to organised crime, can contaminate the business environment and make the path of economic development more uncertain, since free enterprise can be threatened and subdued when it comes into conflict with the economic interests of criminals.

In general the countries of the Third World and Eastern Europe have a strong need to attract resources from abroad in order to finance growth and development programmes, while their systems and institutions for checking criminal activities are often limited and insufficient. Both of these factors are at odds with the need to prevent money laundering. The fight against crime is

therefore closely linked with the objective of promoting economic development and combating poverty.

4.
ELEMENTS OF A POLICY OF PREVENTION

The principal difficulty in the fight against money laundering lies in the existence of conflicting interests and calculations of expedience between agents, sectors, geographical areas and governments. Since criminal organisations operate at the international level, the fragmentation of legal arrangements represents a major impediment for the institutions in the face of the extreme flexibility of manoeuvre enjoyed by operators.

The economic cost of controls based on obligations and prohibitions is often underestimated, while the benefits they produce tend to be overrated. The latter error stems from the difficulty of envisaging the avoidance stratagems that those subject to control may adopt, that is to say the difficulty of picturing the context in dynamic terms. At times the costs are underestimated because they are not viewed comprehensively to include not only the direct compliance costs but also the indirect costs of an allocative nature that can distort the decisions of economic agents towards less efficient solutions.

One crucial issue is the economic interest of firms, intermediaries and institutions in co-operating to combat money laundering. The conditions for fruitful collaboration can be realised only if the collective gain is accompanied by individual benefits. To be sure, sanctions for non-compliance with obligations and prohibitions increase the individual's interest in co-operating, but rigid rules in themselves will rarely be effective. It would be better to institute rewards and penalties commensurate with the actual contribution made towards the objective on the one hand and the unwillingness to co-operate on the other. Such rewards and penalties can of course take a wide variety of forms and be consistent with the standards established by the various national business communities.

For this reason, together with the controls carried out by the authorities, the tendency is to encourage the development of self-discipline and self-regulation within individual markets. Rules of conduct based on professional ethics can serve as a useful connecting rod between intervention by the authorities and the forces of the market.

The advantages of such an arrangement are most evident where self-regulation is accompanied by self-monitoring, self-government and specific sanctions that can detect and isolate those who fail to comply with the code that the profession has instituted.

Still with a view to prevention, a particularly useful form of international co-operation could be the exchange of administrative information concerning not only financial flows but also the markets for products, corporate control and labour. The aim is automatic detection of anomalous situations on the basis of significant deviations from the norm Without prejudice to confidentiality, the

exchange of information could be a potent tool for tracing the routes taken by the proceeds of criminal activity. Here again international co-ordination displays significant network externalities; consequently, the greater the number of data flows exchanged and of countries taking part, the more advantageous it is.

In general, in the battle against organised crime information is a crucial weapon. Criminal organisations fear effective information systems in the hands of the authorities. In turn, they use information bases of their own to defend themselves and expand. The interest of organised crime in taking over banks and financial institutions stems in part from the enormous strategic criminal potential of the information that banks have about customers and markets. Defending banks' independence thus means, among other things, protecting the wealth of information they handle in order to maintain the special confidentiality of the bank-customer relationship.

The fight against money laundering is connected with the development of payment systems at national and international level. The steady decrease in the use of cash and the adoption of funds transfer methods that are more efficient, more transparent and channelled through reliable intermediaries can help to shrink the areas of opacity into which illegal operators can move.

There is an increasingly evident need for a comprehensive approach, founded on constructive, pragmatic action covering the various aspects of the problem and effectively set in an international framework. Co-operation among states and among authorities is the best response to the risk of regulatory competition that could lower the defences against organised crime.

The chief initiatives undertaken at international level have all moved in the direction of co-operation. They have hinged on shared commitment and the leading role of the more advanced countries in working toward a number of key objectives: uniform regulations, co-ordinated action by national authorities, effective judicial and police co-operation, assistance to the financially immature countries, and the adoption by the latter of banking supervisory systems in line with international standards.

Future measures must take account of past experience, the critical unresolved problems, the need for practical and timely action. On one point we cannot but all agree: combating money laundering becomes more difficult as the areas of the economy infiltrated by organised crime expand.

2.
International Money Laundering Trends and Prevention/Control Policies*

Ernesto U.Savona and Michael A.De Feo

1.
INTRODUCTION

"Money Trails" refer to the different routes used to conceal the criminal origin of assets earned in various illegal ways and to invest those assets in the legitimate economy. Conversely, these trails also refer to the investigative paths which authorities follow to track criminals and to seize their assets. This chapter examines the ways in which criminals launder proceeds of their illegal activities and analyzes prevention and control policies with which different countries combat this phenomenon.

"Money laundering" is a concept in expansion and a phrase of recent origin. In the past, complex manoeuvres to hide the criminal origin of capital or assets were rare because criminal accumulations were not so great as today nor were financial systems so transparent as to necessitate such stratagems. Although examples of intricate schemes to hide the criminal origin or nature of a transaction can be found since the founding of the banking system, often in connection with corruption of public officials, the public currency of the phrase "money laundering" emerged together with the profitable development of mass drug markets since the 1960s.

Money laundering, or "riciclaggio" in Italian, "blanqueo" in Spanish, "blanchiment" in French, and comparable terms in other languages, is widely understood to mean the process of concealing the criminal origin of assets and investments or the illegal nature of a financial transaction. The widespread acceptance of this unofficial, popular meaning often leads the public to assume that "money laundering" has an official, juridical definition, which is rarely the case. That term is a useful shorthand phrase for a complex process, which has even been

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dissected into its component elements of placement, layering and integration of illegal proceeds (see Section 2.5). However, when legal instruments are constructed to prevent and control the money laundering phenomenon, more precise juridical terminology is required, e.g.: "…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 offence…".1 What are commonly called "money laundering offenses" include a myriad of violations of regulatory and penal rules including reporting schemes for currency transactions and transfers, registration requirements for financial intermediaries, and prohibitions against knowingly possessing or conducting transactions with the proceeds or instrumentalities of crime.

Money laundering is examined in this chapter not only from its definitional or juridical aspect, but also from a criminological aspect. The notorious expansion of the phenomenon of money laundering, largely driven by drug trafficking, reflects the development of criminal behavior from individual or at least local criminality to more corporate, organizational crime, frequently practised on an international scale. This development was not an anomalous aberration, but simply the dark side of modern economic and social development, in which illegal as well as legal entrepreneurs have learned to exploit global markets, economies of scale and lack of harmonization among national preventive and control policies. Seen in this perspective, criminal organizational complexity is a mirror image of modern economic and social complexity. Similarly, the increased profitability of criminal enterprises and the destructive effects of massive criminal profits on economic, social and political structures, particularly in emerging or otherwise vulnerable nations, have generated a parallel development of progressively more sophisticated anti-money laundering mechanisms for prevention and control.

The following three parts of this chapter address these objectives.

Part 2 deals with the prevalence and type of criminal activity giving rise to money laundering (2.1), the type of organizations involved (2.2), and the typologies of methods, mechanisms and schemes (2.3). Utilizing public sources, the section traces recent trends in the nexus between laundering levels, methods and the criminal activities which produce the assets to be laundered (2.4) and the overall complexity of the schemes utilized (2.5).

In Part 3 particular attention is given to the effects of the 1988 Vienna Drug Convention of the United Nations and to the regional anti-money laundering policies and efforts of the Council of Europe, the European Union, the Caribbean Financial Action Task Force and CICAD, the Inter-American Drug Abuse Commission of the Organization of American States.

Part 4 contains preliminary observations on the dynamic interrelationship between trends in money laundering activity and in regulatory and criminal control responses. Using a framework of money laundering markets where criminals and governments interact, this section analyzes trends and interrelationships in money laundering activities and responses through their

convergencies and divergences around the world. The picture which emerges helps us to understand the globality of the money laundering problem and to address the key choices for a global commitment to this problem. After describing what can be done to improve the effectiveness of anti-money laundering responses, the chapter in the last two paragraphs outlines a possible global strategy.

2. TRENDS IN INTERNATIONAL MONEY LAUNDERING ACTIVITIES

2.1 Introduction

The short history of the money laundering concept originates in the context of the growth of the drug trafficking phenomenon. At domestic and international levels the anti-money laundering policies of the last few decades have frequently been considered in the framework of drug legislation. Even though the need to launder crime proceeds has always been connected with a wide range of crimes, many countries only penalize drug money laundering. This impedes understanding of the economic consequences of organized crime and limits the implementation of anti-money laundering policies.

This current expansion of the recognized predicates for penalization of criminal proceeds serves to introduce the concept of money laundering trends, intended to mean either trends in the organizations and types of criminal activities which produce the proceeds to be laundered or the typologies used to launder them.

2.2 Not only drugs?

A 1990 study by the Financial Action Task Force[2] estimated alone to be 85 billion dollars a year the quantity of money available for laundering and investment coming from the sales of cocaine, heroin and cannabis in the United States and Europe. We are not able to improve this estimate nor to say how much criminal money is circulating today in the economic and financial systems of the world. Assessing it through the analysis of cash-flow between countries appears to be extremely difficult, although that technique has been useful in identifying particular suspect situations.[3] Recommendation No.30 of the Financial Action Task Force provides that:

> *"National administrations should consider recording, at least in the aggregate, international flows of cash in whatever currency, so that*

> *estimates can be made of cash flows and reflows from various sources abroad, when this is combined with central bank information. Such information should be made available to the IMF and BIS to facilitate international studies"* [4]

Pursuant to that recommendation tentative national estimates have been made and are being refined,[5] but they appear to be of limited utility. In the United States, analysts estimated that "non-drug proceeds may account for a third or even as much as one-half of total illicit proceeds converted in or transmitted through US financial institutions".[6] The crimes giving rise to this money comprise a long list, including gambling, smuggling, pornography, loan sharking, fraud, corruption and criminal tax evasion.

According to the International Narcotics Control Strategy Report (INCSR) for 1994, approximately the same trend is found in Europe:

> *"Bankers, finance ministries and enforcement agencies report an apparent increase in non-drug money laundering and seem agreed that drug-related money laundering constitutes no more than three-fourths of illegal proceeds transferring through or being converted by West European financial institutions (exclusive of tax considerations), and may be at that level or slightly lower in Eastern Europe where large sums of crime syndicate funds are being invested. Drug money laundering may be no higher, and could be an even lower percentage of total illegal money laundering in other parts of the world, notably Southwest, Southeast and East Asia".*[7]

The perception of an expansion of non-drug related criminal proceeds can result from a combination of factors. The first could be the new attention governments and institutions are paying to non-drug criminal proceeds due to pressures from other governments and international and regional bodies such as the FATF and Council of Europe, and bureaucratic concerns that anti-drug programs may lose budgetary appeal. The second could be a relative increase in criminal proceeds from non-drug crimes, giving rise to the question whether drug-money accumulation is decreasing or other criminal money is increasing. The third factor could be the professionalization of money laundering activities discussed in section 2.4, which leads other criminal groups to exploit the same kinds of money laundering schemes used by drug money launderers.

2.3
Trends in Transnational Criminal Organizations

While there may be disagreement on what types of transnational criminal activity merit international attention, there is a consensus on the transnational criminal organizations which operate across national borders. With some differences in

perception of their relative importance, authorities of the major industrialized countries find that the groups which most deserve international attention are Chinese Triads, Colombian cartels, Jamaican posses, Japanese Yakuza, Sicilian Mafia, Russian criminal organizations and West African, e.g. Nigerian, criminal groups. Even if other groups could be added, the seven mentioned are the most widely recognized among practitioners and scholars.[8]

Some of these groups have long traditions, such as the Asian gangs and the Sicilian Mafia: others, such as the Columbian cartels, Russian criminal organizations and the Nigerian criminal groups, are relatively young or have come to global attention only in the last few years. The most documented activity and literature with respect to money laundering deal with the following four groups:

A)
Chinese Triads

Triads are well established in every major Chinese community across the world, including Amsterdam, London, Manchester, New York and San Francisco. Their pattern of operation and involvement in the Chinese community remains much the same as in Hong Kong and their cities of origin in China. Their local activities are: extortion, protection rackets, gambling, vice, and sideline businesses in Chinese videos, books, newspapers, and entertainment services.[9] International activities include heroin trafficking toward United States and Europe mixed with arms smuggling and other kinds of opportunistic activities, such as theft and the smuggling of luxury automobiles and yachts to wealthier markets, consumer goods to the People's Republic of China, and international credit card frauds. Particularly intense is alien smuggling to the United States.

All these activities have recently been estimated at a total amount of 210.2 billion dollars per year.[10] Law enforcement officials are concerned about the progressive shift of the Triads to the United States, Canada and Australia in anticipation of the transfer of Hong Kong to the Peoples' Republic of China in 1997.[11] Triad money handling practices are part of their original process of internationali-zation. Rather than engaging in elaborate concealment schemes they frequently make direct investments to generate more funds, exhibiting little concern about inquiries into their sources of finance. Recent testimony before the United States Congress has focused on large cash investments by organized crime groups in export facilities in mainland China.[12]

B)
Colombian Cartels

In a peculiar fashion, law enforcement agencies, banks and financial institutions owe a debt of knowledge to the Colombian cartels, because investigations of their schemes have provided an observatory on the state of the art in money laundering. Money laundering activities are part of the cartels' activities oriented

to drug trafficking. They have been represented by the United States Treasury Department's Financial Crimes Enforcement Network (FinCEN)[13] in the following ays:

> *"An important aspect of this cycle is the separation between the distribution and the payment sides. The individuals involved in distributing the narcotics, from the source to the ultimate consumer, generally do not launder the profits of narcotics sales (other than their own share in the profits). Likewise, those individuals responsible for 'processing' the profits from drug sales, from the point of collection to the accounts of the cartel bosses, generally do not have direct links to narcotics distribution. Moreover, the majority of personnel who do the actual laundering are not direct cartel employees. Their relationship to the cartel is primarily as contractor. The business analogy as stated earlier is most appropriate in describing this aspect. The money laundering operation serves the same purpose for the cartels as international financing operations do for legitimate multinational corporations.*
>
> *Cartel financial matters are managed by a number of financial specialists—the cartel accountants, the comisionista, the cambista, and the money launderer—operating in a series of layers. Working directly under the individual cartel bosses, the cartel's accountants handle financial matters through a money broker or financial advisor (comisionista). The comisionista despite his close association with the cartel, is independent of its control. He advises the cartel boss on the most effective use of his earnings based on investments, money movements, etc. Already established in the financial community, the comisionista has several mechanisms available to move money. Perhaps the most important of these is the foreign money exchange or cambio. The foreign exchange dealer or cambista may serve more than one comisionista. His role is important in the cartel related money laundering operation, as it is he who (1) arranges for money laundering, (2) provides hard to find dollars to legitimate businesses, and (3) ultimately provides "clean" "pesos for other cartel operations. Usually, the cambista does not launder drug derived proceeds; rather, he arranges for the laundering to take place through another individual or organization.*
>
> *The way the narcotic/money laundering cycle works is as follows: After obtaining coca paste from producers in the Andean Region, the cartel refines the substance into cocaine powder and places it into the distribution system. The narcotics are transported to a particular U.S. region where they are ultimately sold to the drug user. The cartel's operating cell at the location handles the distribution of the drug and the collection of the cash proceeds of the sale. After collection, the cell money handler passes the cash to the cambista representative. At this point, the proceeds have ceased to be directly under cartel control. The cambista*

> *then passes the funds to the money laundering organization, where the funds, once processed, are eventually passed back to the cambista representative in Colombia. Depending on the desires of the cartel boss, the comisionista will direct that the funds be sent to other foreign locations for investment or brought back to Colombia and converted to pesos, The funds may then be used to pay operational expenses or for investment in other cartel controlled enterprises."*

This can be considered as a model of the cartels' money laundering activities. The roles are interchangeable, but considering the functions being performed it is possible to discern a changing relationship between drug trafficking and money laundering. At the beginning of the 1980s the *money exchanger* (described as "cambista" in the preceding quotation) usually acted as a subcontractor providing financial services to the cartel and was directly involved in the laundering process. In the mid-1980s laundering became separated from the money exchangers working on behalf of the cartels. The *cambios* began contracting with Colombian and American money launderers to process illicit funds. By 1991 one of the main money laundering operations revealed a marked degree of independence from cartel management. The organization laundered proceeds not only of the Medellin cartel, but also for the Cali cartel and US organized crime families.[14] The same independence and economically rational division of labor was shown in the Green Ice operation involving a Colombian cartel and the Sicilian Mafia.[15] These events demonstrate a trend toward specialized money laundering operations which service but are not part of large scale narcotics organizations. This tendency requires expertise in business administration, accounting, finance and law, or in specialized commercial fields, such as precious metals, jewelry, import/export, and money exchange, and demands better educated people even at lower levels.[16]

A geographical trend has also characterized the cartels' drug laundering schemes. In the late 1970s Florida was the point of payment for drug importation to the United States from Latin America. At the beginning of the 1980s money laundering operations were transacted in Central America, with Panama and the Caribbean islands as the negotiation point and transhipment zone for many shipments. By the middle of the 1980s *casas de cambio* in Mexico were the focal point for processing the money coming from the United States and rerouted to European banks in Switzerland, Germany and Luxembourg. The operations routed to Europe were increasing by the end of the decade because of the increasing controls of US law enforcement agencies and the favorable market opening to cocaine in Europe[17] as revealed by the increased number and quantity of cocaine seizures after 1989.[18] Today, through the specialization and globalization of money laundering activities, cartels do not need to concentrate transactions or investments in a particular region. They move and market their money wherever they are able to avoid the control system and get the best interest rate or investment.

C)
Sicilian Mafia[19]

The total amount of money produced by Italian criminals has been estimated by the Italian Central Institute for Statistics at between approximately 27,000 and 30,000 billion lire per year (1990)[20], i.e. then approximately 21.5 to 24 billion dollars. Allowing for the high percentage of persons engaged in the most profitable forms of criminality who are associated with organized crime, at least half of this amount can be attributed to organized crime, that is approximately 10–12 billion dollars. Considering the relative profitability of the Mafia groups in comparison to other types of organizations, e.g. the Camorra and the 'Ndrangheta, the Sicilian Mafia's share can be estimated at between one third and one half of this amount, i.e. approximately 3.5–6 billion dollars per year. Data for 1991 and 1992 confirm this amount.[21]

A distinction can be drawn between the unsophisticated asset management practices of the traditional Mafia and the increasingly sophisticated schemes which are presently being undertaken, often with the assistance of specialized money laundering firms.

Mafia money management was traditionally rooted in the Sicilian culture. Mafia bosses avoided complicated investments requiring the payment of commissions or the loss of control. Instead they sought guaranteed returns on their investments by choosing sound investments and businesses with monopoly power through which they could control markets and whose profitability would be enhanced by their criminal reputations and connections. Choices seem to have been determined by the degree of control afforded, by the profit opportunities offered by the investment, and by the background information and personal contacts available, including the use of simple fronting arrangements through relatives or anonymous business entities. Mafia members preferred to acquire apartments, farms, shops, import-export firms, and firms receiving public contracts. Their choice of investments reflects the European investment strategy of acquiring real estate[22] or tangible business assets rather than intangible interests such as stocks and bonds. The selection of these investments, whether in Italy or abroad, often depended on the individuals entrusted to make and manage the investments. When investing abroad, the latter are usually Mafia members who have emigrated to a foreign country and have a good knowledge of the local investment situation.

The Sicilian Mafia has not made extensive use of the complex forms of laundering employed by Colombian cartels. However, there has been a transformation in the level of sophistication of their investment strategies—a change from "do it yourself" to the use of "money laundering firms"[23] which offer professional laundering-investment services also available to other national and inter-national criminal organizations.[24]

A priority of any laundering strategy is to establish or utilize an enterprise or activity to process criminal funds which is not apparently associated with the

criminal activity producing the illegal asset. It may be useful to use a metaphor to describe how things are changing. In the past all criminal organizations owned a washing-machine and set the washing cycle on a harsh or soft wash, according to how soiled the items were and the degree of cleanliness desired at the end of the washing cycle. The trend which is now becoming widespread is to utilize professionally operated 'launderettes' or 'laundries', which provide either preset or customized wash cycles, as requested by the client criminal organizations, centers of political and administrative corruption, tax evaders and whoever else wishes to avert the risk of identification of the source of the laundered money.[25] This can be done directly by the organized crime groups themselves or more likely through the same professional launderers who handle drug money. Capital being inherently fungible, once the preliminary process of changing bills—readily identifiable by serial number or the presence of drug residue—has been accomplished, usually by a separate professional exchanger, the professional investment launderer has no reason not to blend funds from various criminal activities in transactions which further dilute the possibility of direct association of those funds with a specific drug trafficking origin.

These operations are carried out at the international level, but are often linked with domestic-market operations. This can include the acquisition of bankrupt companies, or targeted Mafia activity to bring about the bankruptcy of a targeted company such as Manifattura Fidelma in Prato, after which the Mafia acquired it at reduced cost.[26]

Investigations by the customs police synthesize the recent trends of economic activities carried out by Italian organized groups in legitimate activities. These investment strategies, not very different from the objectives of other investors, reveal the increasing sophistication of the Mafia. They have been outlined as:[27]

- acquisition of the control of specific economic activities in particular areas of the country;
- intervention in those economic sectors affected by recession;
- intervention in those economic sectors with better prospects of development;
- investment of illicit money in foreign economic activities.

The Italian Anti-Mafia Investigative Agency (Direzione Investigativa Antimafia) has identified some main circuits of money laundering. They are: the banking system, the non-banking financial system, leasing and invoicing, commercial enterprises, the acquisition of casinos and other gambling systems.[28] Some "washing cycles" are short and require little time, e.g. when cash is deposited against the emission of a bank draft. Such action demonstrates the desirability of legislation to control cash deposits. In other cases, more time may be required to circulate the money until it is untraceable and reaches its destination (the "washing cycle" is long and involves soaking, washing and rinsing). The Pizza Connection case, in the early 1980s, is a good example of this time scale. Between April and September 1982, a money launderer for the Mafia deposited

13.5 million dollars in cash in E.F. Hutton brokerage accounts, which was transferred to another Hutton account for a supposed Swiss gem dealing firm. From this account the funds were used to purchase commodity future contracts in Switzerland, the proceeds of which underwent further transfers before reaching the ultimate recipients.

In conclusion, Sicilian Mafia money-laundering and re-investment activities are carried out in association with the narcotics trade and some other highly profitable offenses.[29] We might suggest that the "family washing-machine" system is preferred here. Recently there have been signs of money laundering operations being contracted out to the Sicilian Mafia by Camorra families. The Mafia's traditional attraction to casinos led to activities[30] in the South of France aimed at obtaining control over some of the biggest casinos on the Cote d' Azur, and entering construction enterprises as well as tourism there.[31] This project envisaged a continuous laundering/re-investment cycle. The casino owners were to offer mobsters from other "families" facilities for the laundering of "hot" money by simulating fake wins. Half of the returns due were to be paid through the purchase of local property, and the other half was to be paid in laundered currency. This pattern could be called the "condominium washing-machine" system, set on a complete washing cycle. It is not certain whether the case described above is unique or whether it should be considered as a sign of a growing trend for organized crime groups to develop laundering systems finalized at not only hiding their capital but also at producing an income. This system approaches the quasi-entrepreneurial "launderette", even if it is still far removed from the professional dry cleaning capabilities of the notorious Bank of Credit and Commerce International.

Current Mafia trends thus seem to be directed towards a major infiltration of legitimate activities at the local level and the development internationally of links with other groups, sometimes independent and sometimes subordinate to the Mafia, also offering them money laundering services made possible through activities previously infiltrated by the Mafia.

D)
Russian Organized Crime Groups

Russian mafia-type groups are attracting world wide attention. They are exotic, rapidly spreading and a sensational novelty. Except within their domestic boundaries, however, and certainly in the field of money laundering, the amount of attention devoted to them can be justified only because their international future is more dangerous than the present.

Even if the police of Russia and other concerned states know much more than several years ago about the structure of these groups, their members and activities, it is still difficult to make a serious assessment of the money laundering trends in the states of the former USSR. A general assumption is that because of weak control mechanisms and fragile economic systems: "Eastern

Europe offers attractive investment possibilities for organized crime because of the privatization process and the desperate need of many Eastern European Countries for hard currency".[32]

The most productive activities of Russian gangs have been described as: theft of antiques and smuggling to the West; prostitution; car thefts; arms trade; narcotics.[33] To this list can be added efforts to control former state assets or activities. Russian organized crime groups belong to the prototype of opportunistic mafias operating in domestic and international markets. Like the Sicilian Mafia they concentrate at the local level on keeping control of their territory, from which they exclude criminal rivals, and at the transnational level on using their capabilities in smuggling or otherwise illegally dealing in anything which presents a profit opportunity, from cars to arms, medicines or raw materials.

In terms of money laundering an apparent contradiction should be explained. States of the former U.S.S.R. offer opportunities to foreigners for money laundering for the same reason their domestic mafias do not need to launder their money. The Russian, Georgian, Chechen, etc., mafias can invest their capital without worry where there is no effective system which monitors money movement or investment. Money laundering opportunities which are attractive to foreigners as a means of escaping controls at home, may be taken advantage of directly by local mafias without any attempts to conceal or cover the investment with layers of insulation. Many operations of smuggling money across borders, which are perceived by outside observers as having a money laundering motive, may more properly be attempts at speculation on the ruble exchange rate. Such movements of funds are part of the capital flight from Russia estimated at 10–20 billion dollars a year.[34] Collusive relationships between organized crime groups in Russia and in other countries could become problematic in the future. There is evidence of relationships with Colombians and with Italian mafias.[35]

Privatization of the former centrally planned economies of the Eastern Bloc creates great concern that wealthy criminals with capital, either domestic (which may include persons who previously profited by economic crimes) or foreign, will buy privatization vouchers or directly purchase businesses and thereby exercise substantial economic power. Even though this is probably actually happening, it is a process difficult to arrest. Privatization is also a process which can introduce gangs composed of socially and economically disadvantaged persons into the legitimate world of business and thereby speed up the assimilation process which usually belongs to the second or third generation of ethnic organized crime groups. If criminal proceeds being invested in privatization are not identified and forfeited in the short term, there are those who would argue that in the long term this additional ladder of social opportunity could allow those who have accumulated criminal proceeds to become legitimate participants in society, and to over-come their criminal origins in the same way the public tends to forget that the original accumulation process of many great fortunes was, if not criminal, at least characterized by dubious practices.[36]

Of course, not all criminal proceeds are accumulated by the socially disadvantaged. Moreover, there is no reason to suppose that a wealthy entrepreneur, who by experience knows the cost effectiveness of intimidation and bribery, will spontaneously forsake those advantages. Only when the law enforcement risk is sufficiently immediate will a criminal entrepreneur seriously begin to calculate whether the easy money to be gained by criminal tactics is worth the possibility of loss of a legitimate business, social status and life style, and will seriously consider putting aside previous criminal habits.

Many efforts are underway in Eastern Europe to achieve a transparent process of privatization and to organize resistance to the growth of organized crime and money laundering. Nevertheless, the world community must be prepared to deal with the reality that some of these states will for years to come experience powerful influences from organized crime on all their institutions, given the weakness of competing social and economic forces. It will require a real concentration of scarce resources and great political motivation for such countries to assent a return to more authoritarian methods and to establish the same degree of regulatory and enforcement efficiency against laundering activities which can be found in members of the Financial Action Task Force.

A special obstacle to effective money laundering control in these countries is the control of or influence on banks by criminal groups. A number of banks in Russia is believed to be “mafia” controlled. Some banks in other Eastern Europe countries are also believed to be influenced or controlled by criminal elements. Control aside, many banks and financial institutions in these countries, exactly like many of their American and Western European counterparts, make little effort to differentiate between legitimate and illegitimate funds, Too often, both regulatory and penal authorities lack the legal mechanisms and enforcement competency to deal with sophisticated money laundering schemes.[37] This illustrates the increasing dependence of the anti-money laundering community on changes in laws, policies and procedures by the financial community, in ways which have not commonly been thought to be of concern to criminal justice authorities. In Russia, until the Central Bank raised capital requirements, US $100,000 would buy a bank license and Russia had licensed some 2,000 banks, some of potentially criminal ownership. Obviously, a banking system regulated by a central authority which actively cooperates with law enforcement authorities toward the common goal of preventing and controlling money laundering is essen tial if criminal practices are to be avoided by these new bankers, many of whom underwent little effective scrutiny before receiving their licenses.[38]

2.4 Trend toward Professionalism. From the Hand Wash to a Launderette System

Having examined the evolution of the money laundering activities of the main transnational groups, it is possible to say that we are observing a progressive professionalization of this activity, in at least the following ways:

a) progressive separation between criminal activities and money laundering activities;
b) more professional launderers such as accountants, lawyers, private bankers;
c) the provision of money laundering services to a wide range of criminals and to more than one criminal organization.

The tendency toward a separation between groups producing criminal profits and groups laundering those profits has already been noted in Section 2.3 in connection with Colombian drug cartels. Criminal organizations now frequently resort to independent experts for laundering and investment advice and services. The notorious Mafia-connected Italian bankers Sindona and Calvi exemplify the involvement of professional bankers of major institutions in the process of laundering money. As the need for their advice grows, these professionals become more and more essential to the criminal organizations. "And you have got people who are involved in dealing with the financial side of the industry, dealing with the money, dealing with the controllers and accountants. I might add that these cartels rely very heavily on professional accountants. Many of these people are credentialed and decreed and licensed in several countries. They travel frequently to check on the investments in the investment centers of the financial world."[39]

The metaphorical classification used for describing different levels of money laundering services, such as "hand-wash", "family washing machine", "condominium washing machine" and "launderette"[40] are intended to express the trend toward the professionalism of money laundering activities. There are different kinds of "launderettes" operating in money laundering markets. Some of them are regulated mechanisms such as banks and other financial institutions, some-times with informal subsidiaries devoted to laundering, such as the black network of the Bank of Credit and Commerce International (BCCI). Other alternative systems are those operating in Asia as *hawala* or *hundi.* These are alternative systems of informal banking widely used for both legal and illegal transactions. *Casas de cambio* in Latin America and import/export, commodities, etc., brokers are structures frequently used for laundering.

In an evolutionary process, criminals who begin as customers readily become the owners of these services. The combined result of law enforcement action, more effective regulation of banking systems, and demand for laundering services in corrupt business and official transactions and for tax evasion, as well as for

organized criminal activities, seem to be stimulating international alternatives to the use of traditional, well regulated, financial institutions. The increasing number of off-shore banks, especially close to drug-producer countries, seems relevant in this regard.

Drawing on records seized through Colombian National Police raids and their own investigations, U.S. government agents say that the Cali cartel, which once handled all money operations internally, now employs financial controllers, who seek bids from money brokers who may process money for more than one drug trafficking organization. One effect of massive document seizures has been that these controllers now minimize paper records, preferring to use more sophisticated electronic systems.

Money brokers are also buying cash in bulk, at a discount rate. The drug trafficker or other criminal entrepreneur sells his currency receipts in the point-of-sale countries and receives the balance (less the substantial commission) wherever he directs, without having the risk and burden of moving the currency himself.[41] This level of sophistication was not common several years ago and is still limited to the more developed practitioners of money laundering, such as the Colombian cartels, who have historically been trend-setters in money laundering.

2.5
Trend toward Complexity? Old and New Methods, Mechanisms and Schemes of Money Laundering

Some conceptual definitions are necessary to explain the money laundering system, which are best presented in a practical example. Criminals may desire to "smurf" (an American slang word meaning to use anonymous helpers to divide a transaction into small parts that will not arouse suspicion) the cash proceeds of crime in many banks in order to avoid controls before bringing the funds together to buy stock shares through a brokerage account. This is a money laundering *scheme* to structure a transaction (potentially punishable conduct), understood as a use of one *method* (smurfing) through some *mechanism* (the banks). The scheme is the plan to launder the proceeds and structure the transaction. The mechanisms are the banks and the brokerage houses. A scheme could be simple, as in the example, or more complex when more and different methods and mechanisms are involved, and an overall conception or practice of combining or selecting schemes according to organizational goals could properly be called a money laundering strategy.

The phases of money laundering can go through bank and non-bank financial institutions (e.g. brokerage houses) and through non-financial institutions (export broker), or all three in the same scheme. The main phases are commonly called placement, layering and integration. These can be seen in a continuum (from the placement to the integration) or alone—proceeds or instrumentalities of crime may be laundered only through one of these phases. For this reason it is

sometimes difficult to understand in which phase a single operation should be inserted.

A)
Placement

The following are principal methods used in this phase:

i) Physical Disposal of Bulk Cash Proceeds—because large volumes of cash may draw attention to their illegal source and carry a continuous risk of theft or seizure, criminals are motivated to exchange small denomination bills for larger bills, to deposit cash and buy financial instruments or other-wise dispose of bulk cash promptly. The disposal itself may draw unwelcome attention from law enforcement authorities or others. Thus, criminal organizations are driven to seek methods and mechanisms to process these proceeds discreetly so that they are more easily disguised or misrepresented. This placement of bulk cash proceeds by any number of means into (1) traditional financial institutions, such as banks or securities brokerages or (2) non-regulated financial businesses, such as exchange houses, precious metals dealers, (3) into the retail economy, or (4) out of the country, is only the initial step to legitimize illegal proceeds.

ii) Structuring/"Smurfing"—of cash transactions (deposits, monetary instrument purchases), to evade the common regulatory requirement that transactions which exceed a certain amount be recorded and sometimes reported. With increased adoption of improved regulatory and control policies recommended by the FATF, structuring and other money laundering practices may migrate to non-regulated financial businesses providing bank-like services (that is currency exchanges, precious metals dealers/brokers, export-import brokers, telegraphic services, postal services, and check cashing services).

iii) Bank Complicity—money laundering is facilitated when bank personnel are corrupted, intimidated or controlled. This complicity makes bulk cash placement (as well as subsequent layering and integration of illicit proceeds) much easier, particularly when customer identification, recording or transaction reporting requirements are discretionary rather than mandatory.

iv) Misuse of Exemptions—to reduce unnecessary reporting obligations, regulatory schemes often contain an exemption from reporting requirement for transactions by legitimate businesses which are well known to the financial institution and have a known reason to engage in transactions which would otherwise trigger reporting requirements. The unsupervised unilateral ability of a financial institution to exempt itself or its customer from a reporting or recording regimen can offer

money launderers a way in which to avoid an audit trail of their cash transactions. Abuse of the exemption procedure may involve the creation of front companies by criminals or the complicity of bank officials, and can be controlled by requiring approval and monitoring by the supervisory authority of such exemptions.

v) Commingling of Licit and Illicit Funds—there are numerous types of businesses for which the handling of large amounts of cash is both common and legitimate (i.e., supermarkets, restaurants, bars, hotels, vending machine companies, etc.). Commingling of funds and establishing front companies is a way to take advantage of these circumstances by obscuring illicit proceeds in a forest of licit transactions (commingling) or masking them with the appearance of legitimate receipts of a largely cash business activity (front companies).

vi) Asset Purchase with Cash—the purchase of tangible assets with cash is a significant money laundering method. Large scale purchases can support a luxurious life style; change the form of the proceeds from conspicuous, bulk cash to some equally valuable but less conspicuous form; or obtain major assets which will be used to further the criminal enterprise, e.g. aircraft or boats.

vii) Currency Smuggling—the cross-border smuggling of currency and monetary instruments by various methods (e.g. international air express companies, commercial air passengers, private aircraft, cargo shipments, and over land borders) accomplishes the desired physical transfer without leaving an audit trail.

The money launderer may utilize any combination of these and other methodologies in order to accomplish placement of funds. Beside traditional mechanisms, such as banks and regulated financial institutions, attention is being focused upon a progressive orientation of placement activities outside the regulated financial sectors, through cash intensive businesses, attorneys, accountants and others, such as:

i) Currency Exchanges—currency transaction departments of banks, large currency houses which deal in a multitude of currencies, and smaller currency houses near borders or in tourist localities can screen illicit currency movements. Currency can be exchanged in a foreign country and the exchanged currency subsequently returned to the country of origin. The worldwide currency exchange of Deak-Perera was described in a 1984 report of the United States President's Commission on Organized Crime as having failed to file over 1500 required currency reports on hundreds of millions of dollars in transactions by a money launderer known by Deak-Perera to be using a false name.

ii) Securities and Commodities Brokers—function in an industry characterized by high volume, high value transactions, in which

laundering usually requires the complicity of employees who structure cash deposits to disguise the source of the funds. The utilization of securities brokers/dealers depends largely upon the extent of regulation to which the industry is subject, and the degree to which the industry observes the "know your customer" principle and refuses to accept cash transactions.

iii) Precious Metals, Stones and Artwork Dealers and/or Brokers—are often cash oriented businesses, in which cash is exchanged for precious metals, stones or artwork, which can act as a medium of exchange and be more easily transported.

iv) Casinos/gambling establishments (eg. racetracks, sport betting establishments) are significant avenues for money launderers wherever gambling is legally tolerated. Gambling is a cash intensive business, offering in-come with few audit trails. Casinos particularly offer a full range of finan-cial transactions, e.g., extension of credit, safe deposit boxes, issuance of checks, and funds transmittal.

v) Automobile/airplane/boat/real estate dealers and/or brokers along with dealers in luxury goods, are often recipients of illegal funds. The purchase of hard assets with cash is an unsophisticated but significant money laundering method.

vi) Professionals such as attorneys, notaries, commercialists, accountants and trustees routinely handle large sums of money for their clients for many legitimate reasons, and some illegitimate ones. Attorneys may receive cash derived from illegal drug sales and deposit it into client trust accounts from which the attorney's fees can be withdrawn as they accrue. These accounts are maintained by the attorney and generally do not identify the clients, or commingle various clients' funds. For laundering, the attorney can return the money to the client through checks or other monetary instruments, through the purchase of real estate or other valuable property, by payment of the client's obligations or through other means. Due to confidentiality privileges it becomes difficult, if not impossible, to determine the legitimacy of the funds and, indeed, of the service the professional is performing.

vii) Money order issuers/check sellers (eg. cashier's and traveler's Checks) provide services which may mirror some of the functions of check cashers, *bureaux de change* and money transmitters, but usually do not provide a full range of bank-like services. The conversion of bulk cash into monetary instruments allows illegal proceeds to be more readily transported out of the country without detection, or to be deposited into financial accounts without the filing of a currency transaction report. A narcotics organization may supply currency to check cashers in exchange for checks cashed by the general public. The endorsed checks can be deposited into a front company controlled by the organization, and funds can be wire transferred anywhere in the world.

viii) Insurance companies in almost every developed country achieve tremendous concentrations of capital through a large volume of transactions in the normal course of business. The utilization of an insurance company to further a money laundering scheme requires the complicity of the employees to provide an opportunity to place illicit proceeds into the legitimate financial system.

B)
Layering

After the initial placement of bulk cash, the next step is layering. This meansseparating illicit proceeds (or criminally destined instrumentalities, e.g. an intended payment to buy drugs) from their source by creating one or more layersof financial transactions designed to interrupt any audit trail. If the placement ofthe bulk cash has been undetected, the money launderers' activities become increasingly difficult to reconstruct. The confusing and complicated ways in whichlayer after layer of activities and transactions can be piled on one another maketracing such proceeds extremely difficult.

What follows is an overview of some of the methods utilized in the layeringprocess:

i) Creation of a False Paper Trail—the intentional production of false documentary evidence to disguise the true source, ownership, location, purpose of or control over the funds.

ii) Cash Converted into Monetary Instruments—once illicit proceeds have been placed into a bank or a non-bank financial institution, they can then be converted into monetary instruments such as traveler's checks, letters of credit, money orders, cashiers checks, bonds or stocks. Conversion into monetary instruments allows the proceeds to be more readily transported out of the country without detection, to be deposited into other domestic financial institution accounts, pledged for loans, etc.

iii) Tangible Assets Purchased with Cash and Converted—when proceeds have been placed by the purchase of assets such as vehicles or gold, the asset can then be resold domestically or exported and resold overseas, and the proceeds taken in a non-cash form. Two benefits offset transac tion costs: the identity of the parties may be obscured by untraceable transactions, and the assets become more difficult to locate and seize.

iv) Electronic Funds (or Wire) Transfers—are probably the most cost effective layering method available to money launderers. They offer criminals speed, distance, minimal audit trail, and virtual anonymity amid the enormous daily volume of electronic fund transfers, all at minimal cost.

C)
Integration

The third phase is integration—the introduction of criminally derived wealthinto the legitimate economy without arousing suspicion and with an apparentlylegitimate source. Once layering has been accomplished, laundered funds needto be introduced into the legitimate economy in a discreet manner to effectuatethe investment or consumption goals of their owner. Integration schemes presentlaundered proceeds as normal investments, loans or reinvestment of earnings.Once placement and layering have been successfully accomplished, detectionand identification of laundered funds at the integration phase will normally bepossible only through undercover infiltration or assistance by a source knowledgeable about the suspect nature of the funds.

What follows are some methods utilized during the integration process:

i) Real Estate Transactions—real estate dealings can be utilized to integrate laundered money. Property can be bought by a shell corporation using illicit proceeds. The property can then be sold and the proceeds appear as legitimate sale proceeds. A reduced price can be declared and partial payment made in cash to the seller, guaranteeing a paper profit when the property is resold at the true market value. Inflated prices can be established by a series of trades, enabling the last seller to show a legitimate source for a substantial, although fictitious, profit, or providing justification for inflated loan transactions.

ii) Front Companies and Sham Loans—through front companies (usually incorporated in a country with corporate secrecy laws) laundered proceeds can be loaned to legitimate businesses, and to businesses belonging to the owner of the criminal proceeds, in transactions which cannot be traced beyond the front company. In this way the owner can pay his foreign laundering subsidiary interest on the loan and deduct it as a business expense, thereby reducing his tax liability.

iii) Foreign Bank Complicity—money laundering using accomplice foreign banks represents a higher order of criminal sophistication and presents a very difficult problem both at the technical and political levels. Such a bank can conceal many incriminating details relating to persons and transac tions and provide sham loans secured by criminal proceeds, while guaranteeing immunity from law enforcement scrutiny due to the protective banking laws and regulations of another sovereign government.

iv) False Import/Export Invoicing—the use of false invoices by import/ export companies is an effective way of integrating illicit proceeds. Fictitious transactions, overvaluation of entry documents and/or the over-valuation of exports serve to justify funds transfers involving criminal proceeds.

D)
Examples

The following examples from a compilation of actual cases submitted by Hong Kong, the United Kingdom, and the USA are illustrative examples of moneylaundering schemes, methods and mechanisms:[42]

i) Currency Exchanges—An investigation into a *casa de cambio* in California revealed that approximately US$ 40 million in drug proceeds were laundered over a ten-month period in 1990. The owner and employees accepted cash known to be drug proceeds, and transported it by courier to a Mexican bank where it was converted to cashier's checks payable to fictitious names. These checks were transported by courier back to the United States and delivered to the customer for a fee. In other instances, the Mexican bank transferred funds via wire, or through internal bank transactions, directly to the principals. The investigation culminated with the arrest of the *cambio* owner, the seizure of the business and of approximately US$ 2 million in currency.

ii) Money Transmitters—Her Majesty's Customs and Excise in London, reports an investigation which revealed payments of over 250,000 pounds sterling in cash to an international money transmitter in the U.K. The scheme appears to have been a part of a cycle of laundering proceeds of cannabis consignments to maintain a continuous flow of drugs, while enabling the overseas supply organization to siphon off part of the proceeds for investment purposes. A United States money laundering investigation targeted the owner of 15 money transmitting businesses, whose offices consisted of travel agencies, *casas de cambio* and a real estate office. In return for an 8% commission, the business structured large sums of currency into checks in non-reportable amounts, which were then deposited or wire transferred into 48 different business accounts at 26 various domestic and foreign banks. The business organization utilized facsimile machines to transmit directions to correspondents in South and Central America regarding the payment of money to individuals, totalling US$ 250 million over a five-year period.

iii) Parallel Exchange, or "Black" Money Markets—A United States prosecution revealed that one currency black market operation laundered over $10 million in Peru. Colombian narcotics traffickers flew into the Upper Huallaga River Valley to exchange U.S. dollars for coca. Lima-based currency exchangers also flew into the area to buy the dollars for the local currency (intis) which the Peruvian growers/traffickers needed to sustain their narcotics production. The U.S. dollars were then sold on the currency black market in Lima to Peruvians desiring a hedge against inflation or needing foreign exchange. For a fee these dollars were delivered by wire transferring the money to the currency exchange's

accounts overseas and then retransferring them into the buyers' overseas accounts.

iv) Precious Metal, Jewelry, Artwork Dealers/Brokers and Auction Houses—The Royal Hong Kong Police reports that a money launderer was employed to cleanse cash from heroin sales in Australia. The hired money launderer utilized the cash to purchase Krugerands and kilogram gold bars, which he then carried into Hong Kong and placed in safety deposit boxes. The gold was sold a few kilograms at a time over the counter in a Hong Kong bank. The proceeds from the sale of the gold were wire transferred to shell company accounts in the Channel Islands, Zurich, New York, and Vanuatu. The money launderer requested that the proceeds of one particular sale be paid in the form of a number of demand drafts, which were traced to Manila where they had been cashed by the bearer. A total of HK$ 13,812,000 in drug proceeds was remitted from Hong Kong.

The U.S. investigation entitled Operation Polar Cap revealed an elaborate scheme to disguise the origin of narcotics proceeds through the buying and selling of large quantities of gold. A Los Angeles whole-sale jewelry business was being used in an international narcotics conspiracy that laundered more than US$ 1 billion in two years. Drug sale proceeds were collected in U.S. cities and delivered to offices purporting to be gold and jewelry businesses. The cash was then boxed and shipped cross-country via armored car companies to the jewelry business in Los Angeles, where it was deposited into bank accounts, represented as proceeds from the sale of gold and jewelry. It was then transferred to the cartel's New York bank accounts, and some was wired through Panama to South America to pay for coca and operating expenses. The remaining profits were wired to accounts in European banks or sold through the parallel money exchange market in South America and then, in a typical layering manoeuvre, returned to the U.S.

Auction houses are a dominant force in art transactions and offer financial services in connection with their sales, including credit advances, individual "accounts", wire transfers via brokerage services, etc. In a case involving extradition to Australia, New Scotland Yard in London, reports that cash from the street sales of heroin in Australia was used to buy antique firearms and art from both auction houses and private individuals. The property was then exported under license to the U.K. through an antique firm owned by the offender and sold at reputable auctions. The proceeds paid into the offender's business bank account were then transferred to a Cayman Island bank account, and after this layering were returned to the U.K. for the purchase of a mansion.

v) Casinos/Gambling Businesses—Many casinos have offices overseas where patrons can book reservations and deposit money which can be

wired back to the casinos as part of an aggregate transfer between casino accounts, an effective and anonymous means to move funds. Large amounts of foreign currency or negotiable instruments being handled at a casino or placed on deposit may be an indication of large scale money laundering and smuggling.

The Royal Hong Kong Police reports that approximately US$ 8 million in drug proceeds from North America were taken to casinos in Atlantic City, New Jersey. The "gamblers" would buy an average of US$ 1 million of chips, gambling minimally. The chips were then turned in for casino checks, which were deposited into accounts in Hong Kong and later transferred to Australia to buy real estate.

vi) Automobile/Airplane/Boat/Real Estate Dealers or Brokers—A U.S. investigation revealed that five automobile dealerships and two insurance companies were aiding narcotics dealers by knowingly accepting drug proceeds in cash for the purchase of luxury automobiles and concealing the cash transaction and the identity of the purchasers. The automobile dealers would deposit sale receipts in installments under the reporting threshold into the dealership accounts. Two insurance companies were utilized to further disguise the true ownership of both the illegal funds and the new automobiles, by providing driver's licenses and vehicle registrations in fictitious names.

vii) Professionals—Attorneys, notaries and other service professionals in some countries are required to comply with recording and reporting requirements if they receive a cash payment over the threshold applicable to financial institutions. Some professionals, such as attorneys in the United States, have refused to file these reports or have withheld the identity of the client, arguing that such transactions would unfairly incriminate their clients and thus violate the attorney/client privileges. Despite this argument, a significant number of attorneys have been convicted for their involvement in money laundering schemes.

Her Majesty's Customs and Excise in London, report that approximately 500,000 UK pounds sterling from the sale of cannabis was deposited into a solicitor's client account using a company name as a cover. The bank was only aware of the solicitor's client account and not how many individual client accounts were represented. Part of the money from this client account was subsequently used to purchase real estate properties in further dealings between the solicitor and the traffickers.

viii) Security Brokers—The Providence, Rhode Island brokerage office of E.F.Hutton and Co. in the United States was involved in laundering organized crime funds. Over US$ 500,000 from the sale of pornographic films were converted from cash to cashier checks at banks (in amounts under the reporting threshold) by E.F.Hutton employees, then deposited into Hutton customer accounts bearing fictitious names and social security numbers. The funds in these accounts were used to purchase

certificates of deposit and governmental securities in the form of bearer bonds. The stock broker then directed intermediaries to redeem the coupons attached to the bonds at local banks, again using false names and addresses.

E)
Observations

By focusing upon money laundering, criminal enterprises can be demotivated through loss of their profits. Seized drugs can be replaced at a relatively low cost, but accumulated drug profits and subsequently acquired assets are not so easily replaced.

Criminal organizations do not respect national borders and have exploited the globalization of commerce. As improved regulations and enforcement procedures restrict money laundering in formal financial systems, money launderers will turn increasingly to non-traditional financial systems and transfer mechanisms, and to foreign financial systems where regulations are absent or weak, to disguise the source of their funds and to make them usable in legitimate economies.

The utility of the international payments system to money laundering networks has been demonstrated by investigations into the operations of the Bank of Credit and Commerce International and the previously described Operation Polar Cap. These investigations have assisted in heightening global awareness of the money laundering threat, and illustrating the necessity for governments to modify bank secrecy laws and develop coordinated responses to combat the money laundering threat.

The examples described do not demonstrate an evolutionary trend from simple money laundering methods toward more complex ones. Even today the simplest ways of laundering persist, such as physical smuggling across borders. There does, however, appear to be an evolution in the use of mechanisms, with more emphasis on non-bank financial institutions where only banks are regulated, and on non-financial businesses and mechanisms when both banks and non-bank financial institutions are regulated. This shift of laundering from regulated to non-regulated mechanisms is most characteristic and noticeable in the developed countries where anti-money laundering controls have been more effectively implemented.

It is also possible to detect an evolution toward more complexity in the schemes utilized. A movement toward internationalization is obvious and may result from the new transnational dimensions of criminal organizations doing business on a global market, selling cocaine in Europe as well as in North America, or buying heroin from Southeast rather than Southwest Asia if the price and purity promise better resale profits. Internationalization in money laundering schemes may also be a conscious strategy to minimize law enforcement risk, taking advantage of imperfect investigative and prosecutive cooperation between

countries, bank secrecy, absence of regulation, corruption or simply lack of law enforcement capabilities in countries which constitute weak links in the global anti-money laundering chain. A sophisticated criminal organization has the capacity to use complex schemes to protect and utilize its assets, with its choice of methods being a function of the various environments in which it operates and can find opportunities for placement, layering or integration.

3.
TRENDS IN PREVENTION AND CONTROL POLICIES

3.1
Introduction

In this section we consider the responses to the money laundering problem as part of an evolving system which acts at the international, regional and domestic levels. The first two levels are discussed below. Space limitations preclude discussion of conditions at the national or domestic level except for the charts appearing in Part 4.3, but a country by country description of money laundering activities and control and prevention responses can be found in the original paper presented at the International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: a Global Approach, held at Courmayeur, Italy, 18–20 June, 1994.

Internationally, the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Drug Convention) was the turning point for anti-money laundering policies. Previously limited to a few countries, such as Australia and the United States, after the Vienna Drug Convention many countries introduced in their internal system a complete or partial set of criminal and regulatory policies. As will be discussed in Part 4.2 below, these policies have two main goals: attacking criminal activities and defending the transparency of the economic/financial systems.

Criminal (control) and regulatory (preventive) policies are necessarily connected. To avoid confusion it may be well to note that it is possible to distinguish two targets of anti-money laundering legislation: criminals engaged in money laundering activities and those persons who should prevent such activities by virtue of their positions in institutions, businesses or professions. Both types of legislation can have civil and penal aspects. Laws penalizing drug trafficking and laundering of the proceeds of crime may provide either or both an independent civil forfeiture mechanism or forfeiture in connection with a criminal prosecution. Conversely, regulations addressed to banks and non-bank financial institutions, car dealers or attorneys, may create recording and reporting obligations, enforced by both civil and criminal penalties, for non-compliance. For ease of reference, the term money laundering legislation is used herein to refer to laws aimed at punishing the money launderer and forfeiting criminal

proceeds. The term regulatory legislation is used to mean laws designed to ensure the compliance of institutions and individuals in a regime of recording, reporting and otherwise conducting financial transactions in a way to guarantee transparency and deter money laundering, even though it may provide both civil and criminal penalties.

Policies related to the areas of prevention and control, as well as to the third important component of an anti-money laundering strategy, that is international cooperation, are outlined below:

PREVENTION POLICIES

Physical disincentives for cash transactions

- Non-convertibility of domestic currency
- Occasional recall and substitution of currency
- Elimination of large denomination bills
- Advance notice requirements for large cash transactions

Prohibition of large currency transaction

- Canalization through authorized financial intermediaries
- Conflict with E.U. free movement of capital policy

Recording requirements

- Cash threshold
- Other transactions, e.g. foreign exchange
- Aggregating mechanisms

Documentation requirements

- Customer identification
  - “Know your customer” rule
  - Traceable ID for significant transactions
  - Identification of real party in interest
  - Record maintenance schedules

Transaction reporting

- Mandatory reporting
- Suspicious transaction reporting and definitional problems

- Mechanisms of reporting
  - Macro vs. incident reporting
  - Timeliness
  - Regulatory or investigative reporting channel
  - Local or centralized reporting channel
  - Immunity (indemnity) for reporting
  - Anonymous reporting possibilities
  - Institutional and/or individual responsibility
- Utilization of reporting
  - Centralized data bank
  - Regulatory or law enforcement control or mixed
  - Spontaneous dissemination of pertinent information
    - With other regulatory authorities
    - With domestic law enforcement authorities
    - With foreign bank regulators
    - With foreign criminal justice authorities
  - Procedural formalities
  - Cost effectiveness measures
- Scope of application of regulation
  - Banking institutions
  - Non-bank financial institutions
  - Business and professional activity
- Sanctions
  - Investigation and enforcement mechanisms
  - Due diligence standard
  - Culpable negligence
  - Institutional liability for subordinates
  - Liability of juridical persons

Applicability of civil and penal penalties

CONTROL POLICIES

Forfeitability of criminal proceeds

Only narcotics

Organized criminality or specified offenses

All serious offenses

Tracing of proceeds

Definition of proceeds and instrumentalities

Personal penalty or in rem theory

Consequences for enforcement

Consequences for third party claims

Penalization of regulatory violations

Violations by recording/reporting community

Liability for causing non-recording or reporting

Penalization of dealing in proceeds

Applicability to perpetrator of crime

Degree of knowledge required

Specific type of crime

Recklessness or negligence

Provision for enforcement mechanisms

Rewards

Undercover operations-property represented to be proceeds

Effect of possession of unexplained wealth

Corporate Criminal Liability
Designation of coordinating or lead investigative agency
Central data bank

Access

Limitation to specified law enforcement uses

Procedural formalities

Destination of seized proceeds

Application to domestic law enforcement uses

Implications for budget process

Implications for enforcement priorities

Sharing with cooperating governments

Application to international organizations

INTERNATIONAL COOPERATION

International problems

Financial/tax haven fiscal paradises

Bank secrecy

Anonymous banking and investment procedures

Legal mechanisms to accomplish cooperation

Accumulation and availability of relevant data

Anecdotal

Statistical

Non-extraditability of citizens for money laundering offenses

Efforts to prevent and control international money laundering

Vienna Drug Convention implementation

FATF and regional efforts

Banking community efforts, e.g. Basle Statement of Principles

Training and technical assistance

Sanction possibilities

Implementation mechanisms

Mutual assistance agreements

Dual criminality and harmonization of laws

Reducing formal requirements for cooperation

Domestic implementation of international cooperation

Aut dedere aut punire if extradition refused

Information sharing mechanisms

Evidence collection mechanisms

Asset seizure and forfeiture mechanisms

Penalization of laundering of proceeds of foreign crime

Prosecution of foreign laundering if extradition refused

Many of these policies have been adopted in regional systems, such as the Council of Europe, the European Union, and the Organization of American States, according to the characteristics of the region and its main problems.

3.2
Trends in International Policies

3.2.1
The United Nations

The United Nations have played an important role in galvanizing the world in the suppression of illicit drug trafficking. Most importantly, on December 19, 1988, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was signed by more than one hundred countries. On November 1, 1990, the Convention took effect. This Convention is a law enforcement instrument and contains provisions requiring international criminal cooperation including extradition, asset forfeiture, mutual legal assistance, co-operation between law enforcement agencies, control of precursor and essential chemicals, and crop eradication. Most pertinently to our present discussion, after defining the offenses of drug trafficking, Article 3 obliges Parties to the Convention to penalize the offense of drug money laundering, as follows:

> *"(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"*

The U.N. Drug Convention requires rendering mutual legal assistance for any of the crimes within the Convention, including drug money laundering. It also provides that a requested country cannot refuse to render assistance on the basis of bank secrecy. Ninety-nine nations have now become party to the Convention, which represents an impressively rapid demonstration of consensus for an international instrument.

The following countries became party to the Convention in 1993: Burundi, Colombia, Guyana, Fiji, Antigua/Barbuda, Malaysia, El Salvador, Romania, Zambia, Slovakia, Argentina, Dominica, Croatia, Zimbabwe, Germany, Bosnia/Herzogovenia, The Netherlands, Armenia, the Dominican Republic, Azerbaijan, Brunei, Mauritania, Sudan and the former Yugoslav Republic of Macedonia. Three states moved towards compliance in 1994. Panama became a party to the Convention on January 13, 1994, and Finland and Latvia deposited their instruments of accession in February 1994.

The following governments had become parties to the Convention in prior years: Afghanistan, Australia, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Bhutan, Bolivia, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Costa Rica, Cote d'Ivoire, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, France, Ghana, Greece, Grenada, Guatemala, Guinea, Honduras, India, Iran, Italy, Japan, Jordan, Kenya, Luxembourg, Madagascar, Mexico, Monaco, Morocco, Myanmar, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Paraguay, Peru, Portugal, Qatar, the Russian Federation, Saudi Arabia, Senegal, Seychelles, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Syria, Togo, Tunisia, Uganda, Ukraine, the United Arab Emirates, the United Kingdom, the United States, Venezuela and Yugoslavia.

The twenty-six governments which are signatories to the Convention but had not moved to become a party as of 1994 include several important financial center countries, among others: Algeria, Austria, Belgium, Cuba, Gabon, the Holy See, Hungary, Indonesia, Ireland, Jamaica, Kuwait, Maldives, Mauritius, New Zealand, Norway, Philippines, Poland, Sierra Leone, Switzerland, Tanzania, Trinidad and Tobago, Turkey, Uruguay, Yemen and Zaire.

As of February 1, 1994, thirty-nine governments had neither signed the Convention nor become a party; 22 of the governments on this list, which contains relatively few key financial centers, are in Africa, which has received comparatively less attention from money launderers and/or groups attempting to counter it: Albania, Angola, Belize, Benin, Botswana, Cape Verde, Central African Republic, Chad, Comoro Islands, Congo, Cook Islands, Djibouti, Equatorial Guinea, Ethiopia, The Gambia, Guinea-Bissau, Haiti, Iceland, Iraq, Kampuchea, Kiribati, North Korea, South Korea, Laos, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Malawi, Mali, Malta, Mongolia, Mozambique, Namibia, Papua New Guinea, Rwanda, St. Kitts and Nevis and St. Lucia.[43]

3.2.2
Interpol

Interpol has assumed the task of assisting states to communicate with each other in the investigation of money laundering.

Interpol's Caribbean and Latin American working groups have initiated model legislation on money laundering. The General Assembly of Interpol approved that model legislation in 1985, which provides for the temporary freezing of property prior to the filing of criminal charges. Additionally, the legisla-tion authorizes the issuance of restraining orders, injunctions and other actions upon property which is deemed to be derived from criminal activity. It also provides for the forfeiture of property to the government of the country where it is located upon a conviction for the offense of possession of criminal proceeds. Interpol's Fonds Provenant d' Activites Criminelles (FOPAC) working group continues to review asset forfeiture and other economic crime issues, particularly as they relate to drug trafficking.

Interpol's adoption of a series of resolutions on combatting international money laundering and forfeiting crime proceeds illustrates its continuing efforts to forge a consensus among its members and with international organizations to cooperate against money laundering. After its General Assembly approved model legislation on money laundering and forfeiture of assets in 1985, it undertook an educational campaign to promote the model outside the Interpol community. United Nations representatives have agreed to distribute the Interpol model with the Vienna U.N. Drug Convention as an example of the legislation needed to permit international financial investigations and forfeiture of criminal assets. In March, 1994 Interpol held a Money Laundering Working Group at OECD head-quarters with the support of the FATF, which demonstrated unexpectedly strong interest by over 25 national central *bureaux* and international organizations in the work of Interpol's FOPAC group.

3.2.3
Financial Action Task Force

The FATF was created in July 1989 at the Economic Summit of Industrialized Countries in Paris in an effort to develop an international approach to controlling money laundering. The group of the seven most industrialized countries was joined by Sweden, Netherlands, Belgium, Luxembourg, Switzerland, Austria, Spain and Australia to produce a 1990 report with forty recommendations for reducing money laundering. The report is grouped broadly into three categories: criminal law, banking law, and international cooperation, after having made initial recommendations to adopt the Vienna Drug Convention, to limit bank secrecy, and to enhance international cooperation.

With respect to penal measures, the report recommended that nations criminalize money laundering, including corporate criminal liability, allow proof

of intent based on knowledge inferred from objective circumstances, and utilize the type of seizure and forfeiture measures contained in the Vienna Drug Convention.

Financial recommendations related to bank and non-bank financial institutions, and included elimination of anonymous accounts, identification of hidden beneficial owners, and record keeping permitting reconstruction of individual transactions. Also recommended were increased attention to suspicious transactions, authority to report such transactions with full protection for the reporting person and institution, non-disclosure of such reporting to customers, and formalized anti-money laundering programs fixing responsibility for compliance with the recommendations. Additional recommendations dealt with heightened scrutiny for transactions involving countries which did not comply with the recommendations, consideration of monitoring significant cross-border transactions and domestic cash flows, as well as encouragement of modern systems of money management rather than cash intensive practices.

To achieve international cooperation, monitoring of aggregate cash flows was suggested, as well as collection and spontaneous exchange of relevant information, harmonization of legal standards and definitions, availability of compulsory mutual assistance mechanisms, seizure and forfeiture authority on foreign request, and effective extradition for money laundering.

The FATF Members agreed in 1991 on a process of "mutual assessment" through examination of responses given to a lengthy questionnaire by the country being evaluated, verified by an on-site visit by a team of outside experts, whose evaluation is discussed and subject to approval by all the members of the Task Force. Each member of the FATF is to be evaluated according to a fixed cycle, and summaries of these evaluations are made public. During the year preceding its 1993 report, Denmark, the United States, Belgium, Canada, Italy, Austria, Luxembourg and Switzerland were evaluated. The results of these evaluations were capsulized as follows in the 1993 report:

> *"Most (evaluated countries) had already, or were proposing to enact, a money laundering offence which went wider than just the proceeds of drugs trafficking. All fully recognized the importance of enlisting the support of the financial community in the fight against money laundering and the banking sector was already well aware of the problem, although the position was more variable in the case of non-bank financial institutions. In all cases, the reports pointed to some areas where the anti-money laundering framework could be strengthened with a view to maximizing the effectiveness of the counter-measures and preventing the exploitation of any weak links in the system by money launderers."*

Now expanded to 26 Members, the FATF operates through a six-member steering committee. It includes the President, the past President, the next

President, and the chairmen of three working groups: Legal Issues, Financial Cooperation and External Relations.

FATF has not felt the need for more recommendations to counter new trends, but the Working Groups have recommended interpretative notes, e.g. the Legal Group has drafted notes on the use of shell corporations to obscure the identity of beneficial owners and concerning controlled deliveries in the money laundering context.

The objective of the External Relations Working Group (III) is to engage all governments significant from a money laundering perspective in the FATF consensus. This Group urges other countries to endorse and implement the 40 recommendations and to agree to be evaluated on their progress. FATF attempts to provide directly or in association with the U.N., the E.U. and other organizations, a sufficient level of training and technical assistance to reach all such governments, and conducts seminars to explain its policy approach to the specific problems of a given region and to provide guidance on implementation and evaluation. Its strategy includes a "futures paper" adopted in 1994 and projected to 1999 which broadens the group's mandate to include money laundering as coming from serious crime, i.e., not limited to the laundering of drug proceeds.[44]

3.2.4
The Basle Committee on Banking Regulations and Supervisory Practices

In December 1988, the Basle Committee on Banking Regulations and Supervisory Practices, adopted a Statement of Principles. The Committee is comprised of representatives of the central banks and supervisory authorities of the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, The Netherlands, Sweden, Switzerland, the United Kingdom, the United States, and Luxembourg). In its statement, the Basle Committee recognized that, although the main purpose of bank supervisory authorities is to maintain the financial stability of banks, and not to ensure the legitimacy of individual banking transactions, these authorities "cannot be indifferent to the use made of banks by criminals". Such indifference may cause banks to suffer losses through fraud or to erode public confidence and undermine the stability of the banking system.

To maintain the stability of financial institutions and prevent criminal use of the banking system internationally, the Basle Committee developed its principles in the belief that "the first and most important safeguard against money-laundering is the integrity of banks' own managements and their vigilant determination to prevent their institutions becoming associated with criminals or being used as a channel for money laundering". The Committee agreed that banks should make reasonable efforts to identify customers and ascertain actual ownership of accounts and safety deposit facilities. The Committee also agreed

that banks should not engage in transactions with customers who fail to provide evidence of their identity and in transactions in which the banks "have good reason to suppose they are associated with money laundering activities".

The Basle Committee stated that banks should cooperate to the greatest extent possible with national law enforcement authorities without violating regulations on customer confidentiality. Banks should not assist customers to deceive law enforcement authorities. If there is reason to presume that a deposit derives from criminal activity, or that a transaction is criminal in nature, banks should take appropriate legal measures. Banks should adopt formal policies consistent with these principles and develop internal control and training procedures to execute them. Furthermore, banks should develop specific procedures for customer identification and for the retention of transaction records.

3.3
Trends in Regional Policies and Bilateral Treaties

3.3.1
The Council of Europe

The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime was opened for signature in 1990**. The drafting participants and potential signatories include countries outside the Council of Europe. In addition to the experts from sixteen Council of Europe countries, the drafters consisted of experts from Australia, Canada, and the United States. The Convention contains important substantive developments, expanding the concept of money laundering to the proceeds of all serious crime, not just drug trafficking, and envisioning the penalization of culpably negligent money laundering. It is forfeiture and international cooperation. being widely adopted in Europe and promises to set a regional standard for asset

Parties are required to enact all measures necessary for the investigation and confiscation of proceeds of all serious criminal activity and to ensure that financial and credit institutions surrender records where money laundering is suspected. Bank secrecy is not a grounds to refuse cooperation, although domestic law must be observed when judicial authorization is required.

The Convention calls upon Parties to cooperate with each other "to the widest extent possible" and lists the grounds for refusing or postponing cooperation. The procedures the parties are to use when communicating with each other in handling and executing requests are specified. As in the case of the EC Directive discussed below, the Council of Europe Convention uses the type of definition of

**The Convention has four chapters: the first explains the use of terms; the second sets forth measures to be taken at a national level; the third defines the obligations and parameters of international co-operation; and the fourth contains final provisions.

money laundering contained in the Vienna Convention without restricting that definition to drug-related offenses.

3.3.2
The European Union

Prior to its renaming as the European Union the Council of the European Community issued EC Council Directive 91/308 of June 10, 1991 on prevention of the use of the financial system for the purpose of money laundering. The Directive is intended to preclude individual nations from adopting initiatives contrary to a liberal and integrated European financial market, while safeguarding the integrity of and public confidence in the financial system.

The Directive supplements the Vienna Drug Convention, the Council of Europe Convention on the Proceeds from Crime and the banking practices enunciated in the Basle Statement of Principles. It adopts the Vienna Convention definition of money laundering with the recommendation that penalization be expanded to the proceeds of crimes such as organized crime and terrorism. Operative articles define money laundering to include transactions in property derived from domestic or foreign crime: require that money laundering be prohibited; establish customer identification standards, a transaction threshold, and record keeping standards; require particular attention to suspicious transactions and cooperation with public authorities, including non-notification to a customer that a transaction is suspected or has been reported; immunity for good faith disclosure of a suspicious transaction; require formal anti-money laundering programs and extend the Directive provision to professions which are vulnerable to money laundering.

3.3.3
Caribbean Financial Action Task Force

On June 8–10, 1990, a Caribbean drug money laundering conference was held in Aruba. The governments of the region committed themselves to take action against drug money laundering and to consider the forty recommendations of the Financial Action Task Force plus additional recommendations appropriate to regional conditions.

Five FATF Members (US, UK, France, The Netherlands and Canada) support the Caribbean Financial Action Task Force, which has established a Secretariat in Trinidad and Tobago. Its major task is to implement the FATF 40 recommendations plus a number of other regulations indigenous to the region which ministers from Caribbean Basin governments endorsed in Jamaica in 1992. The resolutions include a commitment to evaluate their progress at one and three year intervals. Participating governments include Antigua and Barbuda, Aruba, the Bahamas, Brazil, British Virgin Islands, Canada, Cayman Islands, Colombia, Dominican Republic. France, Grenada, Jamaica, Mexico, The Netherlands,

Netherland Antilles, Panama, St. Vincent and the Grenadines, Turks and Caicos, Trinidad and Tobago, United Kingdom, United States and Venezuela.

3.3.4
Inter-American Drug Abuse Commission

In 1991 the Inter-American Drug Abuse Commission (CICAD), an autonomous, regional organization within the Organization of American States (OAS), created a group of experts who prepared model anti-money laundering laws, which sought to harmonize differences in the legal systems of the region. These proposed laws define as a crime all activities connected with the laundering of property and proceeds related to illicit drug trafficking, and enable the identification, tracing, seizing, and forfeiting of such property and proceeds. Financial institutions would be required to cooperate with domestic authorities to facilitate the tracing, seizure and forfeiture of illegal proceeds.

"Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses" were approved by CICAD in March 1992 and by the OAS in May 1992, which recommended their adoption by its members. The recommendations follow the Vienna Convention, and incorporate, whenever possible, the recommendations of the Financial Action Task Force.

The models address notification requirements for asset seizure, burden of proof, protection of *bona fide* third parties and the disposition of forfeited property. In regards to financial systems, the regulations cover a broad range of "financial institution and activities". These include non-banking financial institutions, such as brokers and dealers in securities, currency exchangers, check cashers and transmitters of funds, which must identify clients and maintain appropriate records on transactions in excess of a specific amount of cash to be determined by the competent national authority. Financial institutions are required to comply promptly with information requests from the competent authorities for use in criminal, civil, or administrative proceedings; or for use by competent foreign authorities in accordance with domestic law or international agreements.

The Model Regulations require financial institutions to report all complex, unusual or large transactions, or patterns of same, particularly those which have no apparent economic or other lawful purpose. They also contain provisions holding financial institutions liable for the actions of their representatives and requiring the institutions to adopt and implement procedures to ensure high standards of integrity, training and compliance.

The Model Regulations also establish the obligations of national authorities which regulate and supervise financial institutions to create and maintain anti-money laundering compliance programs and to cooperate with other national and foreign authorities engaged in anti-money laundering activities. Recognizing the critical role of international cooperation in the control of money laundering operations, the Regulations would permit the issuance of and compliance with requests for foreign assistance in tracing, seizing and forfeiting drug proceeds.

One of the Regulation's most important provisions would prohibit bank secrecy or confidentiality laws from impeding compliance with the regulations.

It is likely that the draft money laundering legislation will prove useful to CICAD member states, as CICAD's infrastructure and continuity equip it to play an important role in regime transformation in the Americas for anti-money laundering policy.

3.3.5
Bilateral Treaties

Bilateral mechanisms often enable treaty partners to seize and forfeit assets in connection with violations of the partner's laws. The primary mechanisms are mutual legal assistance and narcotics treaties, and to a limited extent, extradition agreements. Recent assistance treaties typically contain an article which states that a requesting party may notify the other when it has reason to believe that proceeds 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 immobilizing and forfeiting of the proceeds and instrumentalities of crime, and to restitution and collection of fines.

Older extradition treaties list the crimes within their coverage and do not cover the recently developed crime of money laundering. The long term solution to this problem is the use of a general treaty requirement of dual criminality, Le. that the alleged criminal conduct be punishable under the laws of both countries, coupled with widespread penalization of transactions laundering the proceeds or instrumentalities of all serious offenses. Bilateral provisions can be advantageous because they can establish a treaty regime tailored to the requirements and circumstances of the parties, whereas multilateral conventions must necessarily find a least common denominator. Bilateral agreements are also much easier to bring into force and to amend than multinational ones.

Domestic laws sometimes permit tracing, seizing, freezing, and forfeiture of assets as a means of assistance to another country without a treaty basis. Some countries only render assistance for drug-related crimes while other laws extend to a broader range of crimes. The procedural requirements vary. Unilateral assistance does not require a requesting state to have either a bilateral treaty or multilateral convention relationship, but the absence of such instruments can create uncertainty in application.

4.
INTERACTION AMONG MONEY LAUNDERING ACTIVITIES AND RESPONSES

4.1
Introduction

Rather than simply a factual recital and overview, this section is an initial attempt to understand a global problem through a global description and analysis. Such an approach looks to convergencies, divergencies and interdependencies among the different factors which influence money laundering activities by criminals and anti-money laundering policies, and their implementation, by governments and other domestic and international institutions.

4.2
Fragments of an Analytical Framework

Analysis of the factors which influence money laundering activities and the goals which characterize responses to them relies on a theoretical money laundering market model involving two main actors. One party is composed of criminals who want to maximize their economic benefits, and the other consists of governments and their institutions who want to increase the price of the criminal activities in order to diminish their extension. A necessary assumption of this framework is that criminals and governments have conflicting goals. When governments, law enforcement agencies, banks and other institutions are corrupted or follow a national policy of seeking deposit activity with no questions asked, their goals converge at least in part with those of criminals, and effective antimoney laundering strategies cannot be pursued.

For criminals the demand for money laundering activities is related to:

i) the degree of liquidity and the magnitude of accumulation resulting from criminal activities;
ii) the desire to infiltrate legitimate activities as a part of the continuum process, in which criminals desire the flexibility to invest crime proceeds in either illegal markets or legitimate investments, depending which offers the best combination of earnings and security;
iii) the need to reduce “apprehension risk” for individual members resulting from following the money trail;
iv) the need to reduce “seizure risk”, that is the seizure and confiscation of instrumentalities and proceeds of crime.

The first two factors relate to the structure, activities, income and duration of criminal organizations; the third and the fourth directly relate the demand for

money laundering to legislative and investigative activities aimed at the "money trail". As financial investigative and prosecutorial activity becomes more effective, criminal organizations tend to devote more resources to lowering the risk of being traced and apprehended through the money trail and the risk of losing the criminal proceeds. Thus, developments in money laundering methods correspond to the capabilities of the organization on the one hand, and to the reactions of law enforcement and regulatory authorities on the other. Increasingly sophisticated prevention and control methods tend to be matched by increasingly sophisticated money laundering activities, until one side or the other reaches the point of diminishing returns.

The three trends in money laundering activities outlined in Section 2 (in the source of the criminal proceeds, "Not only drugs"; and in the trends "toward professionalism" and "toward complexity" in laundering schemes and strategies) are related to this problem. Criminal activities, drug and non-drug, are producing immense riches which need to be laundered in order to be used and invested. This demand for money laundering, combined with increased risk from antimoney laundering action carried out by governments, is stimulating the development of a more professional supply of money laundering services. These professional services tend to increase the level of complexity of money laundering schemes and of overall money laundering strategies.

The market for money laundering services is thus demand driven. The combination of supply and demand factors influences the selection of the preferred laundering strategy, schemes, methods and mechanisms. These choices depend on the opportunities offered, the abilities of the organization producing the illicit wealth, the advice and counsel of experts, the complicity of bank and financial operators, costs and risk management factors.

For governments and their institutions anti-money laundering policies can be characterized according to their two main goals:

i) Attacking criminal activities—The first goal seeks to discourage criminal activities by increasing "law enforcement risk", a comprehensive term meaning both the risk of being arrested and convicted and the risk that the proceeds of crime will be forfeited. A criminal enterprise characterized by continuity and a hierarchical structure can control apprehension risk. Overstaffing or recruitment/replacement procedures, accompanied by layers of organizational insulation, and financial rewards and/or reputation for violence (to minimize the risk of an apprehended member jeopardizing the continuity of the group or its core management), allow organizations like the Mafia, the Triads and the Boryokudan to survive the incarceration of individual members without serious damage to organizational operations or profitability.

   Forfeiture risk represents a less easily managed threat to the ultimate organizational motivation, the criminal proceeds themselves. The above defense mechanisms are not sufficient to overcome the damage from

forfeiture of instrumentalities and proceeds, which tends to frustrate organizational and individual goals and profitability, pushing the organization to work harder and take more risk for less return. Money and other proceeds of crime increasingly are increasingly becoming the investigative trail used to trace criminal organizations, as well as furnishing forensic evidence usable for prosecution purposes. Making it more difficult for criminals to keep the proceeds of their crime, and making the enjoyment of those proceeds more dangerous, provide a classic economic disincentive to incurring the apprehension risk necessary to generate those proceeds.

ii) Defending the transparency of economic/financial systems—The second goal is defensive, the protection of the transparency and integrity of domestic and international economic/financial systems. Those who control criminal wealth have unfair competitive advantages over legitimate investors whose money has been earned at a lower profit margin than is possible in illegal enterprises and on which taxes must be paid. Criminal money also creates a risk to political as well as economic/financial systems because of the advantages to be derived from corrupting officials and influencing electoral systems and situations.

The goals of penal deterrence and protection of financial transparency/integrity are closely connected, even if the first is centered more in criminal legislation and enforcement and the second in the exercise of regulatory powers. Frequently there is a cross-over phenomenon, in which criminal penalties are applied to reinforce transparency/integrity of the financial system, and regulatory policies are used to identify or deter criminal conduct.[45] Thus, customer identification requirements are typically regulatory obligations which impose both administrative and penal penalties on a non-complying financial institution and/or its representative, as well as penal penalties for a customer intentionally causing a violation of those requirements by furnishing false identity documents. Conversely, these identification policies and large currency transaction reporting practices have historically been originated by law enforcement authorities seeking to enlist the assistance of banks and bank regulators in identifying and tracing an observed phenomenon of placement and transfer of criminal funds through regulated institutions.

4.3
Convergencies and Divergencies in Money Laundering Activities and Responses across the World.

4.3.1
Tentative Aggregation of Data

A serious limitation on analysis of trends in policies is that this overview is focused more on "law in the books", intended to include both "hard laws", such as legislation and regulations in force and so-called "soft laws", such as FATF Recommendations and the Basle Declaration, and less on the degree and effectiveness of their practical implementation in the field. This is one of the most delicate problems of anti-money laundering regulation and control. Enactment of legislation and issuance of regulations are obvious and important steps, but their implementation is more important and more difficult to assess objectively. Official data on implementation, such as that provided through the mutual evaluation reports of FATF, are essential. Even more emphasis on hard data of seizure and prosecution statistics, as well as objective measures of money flows, cash intensiveness, and incidence of money laundering schemes should be developed and the results integrated into policy review, evaluation and correction cycles.

The first problem is how to find a reasonable criteria for aggregation of money laundering data from different countries. It is always very difficult to analyze crosscultural and cross-country data because each country will display peculiarities in criminal behaviors, policies, implementation, recording and reporting that make any kind of meaningful aggregation difficult. One approach has been attempted by the U.S. Department of State pursuant to a legislative mandate, that its yearly International Narcotics Control Strategy Report (INCSR) identify the major money laundering countries and provide specific information about each. While these reports represent exclusively a United States perspective, they present the most comprehensive source of information on the global money laundering situation readily available today, and provide a good point of departure for trend analysis and for other aggregations.

The 1994 international situation is graphically illustrated in several charts which appear in the 1994 report and the criteria of which are explained as follows:[46]

> *"There is no uniformly reliable way of estimating the volume of currency or monetary instruments flowing through a given financial system, and there is no mathematical definition of "major money laundering country". However, there is enough information to identify them as high, medium or low rank in terms of the comparative significance on the world stage,*
>
> *…From such rankings, an inference can be made that a given nation or territory is a major concern to the USG (United States Government) if it is*

considered of high medium-to-high significance and thus of high or medium-to-high priority for bilateral and multilateral intervention. The designations for each nation or territory are shown as (H), (M) or (L) or (NP) for no priority [Chart 1]. Those which are (M-H) or (H) are shown in the compliance table (chart n. 2)…They show the relative degree of compliance with such critical criteria as criminalizing money laundering, or requiring the reporting of unusual or suspicious transactions.

…The higher priority grouping is that list of governments from which effective action is needed if the international community is to make any headway in the collective effort to stem and prevent the laundering and/or transit of the proceeds of serious crime.

A Medium priority county designation can indicate a country in transition, where the threat is real but hasn't fully materialized, or simply a country where a significant but not market-shaping volume of money laundering is believed to occur, or one which gives moderate but important assistance to anti-money laundering enforcement efforts.

A Low priority country is one in which there is only a moderate amount of money laundering, and one in which we do not expect the situation to worsen in the immediate future. By definition, we would not expend major resources, in such a country.

No Priority means that we either are not aware of any money laundering, or that it is too insignificant to be a factor in the international drug money market". 47

In Chart 2 countries have been described according to their anti-money laundering policies, which are denominated Ci to Cviii as a consequence of their being specified in Subsection (7)(C) of the legislative act establishing the yearly reporting requirement:

(i) criminalized narcotics money laundering;
(ii) required banks and other financial institutions to know and record the identity of customers engaging in significant transactions, including the recording of large currency transactions at thresholds appropriate to that country's economic situation;
(iii) required banks and other financial institutions to maintain, for an adequate time, records necessary to reconstruct significant transactions through financial institutions in order to be able to respond quickly to information requests from appropriate government authorities in narcotics-related money laundering cases;
(iv) required or allowed financial institutions to report suspicious transactions;
(v) established systems for identifying, tracing, freezing, seizing, and forfeiting narcotics-related assets;

(vi) enacted laws for the sharing of seized narcotics assets with other governments;
(vii) cooperated, when requested, with appropriate law enforcement agencies of other governments investigating financial crimes related to narcotics; and
(viii) addressed the problem of international transportation of illegal source currency and monetary instruments.

The report further explains that the entry in the column UN88 indicates whether or not a government has become a party to the 1988 Vienna Drug Convention. The entry under the column Goals refers to whether, in the judgment of the U.S. Government, the government described is meeting the goals of the Drug Convention.[48]

The INCSR reports present yearly snapshots. To perceive and analyze trends it is necessary to take into account more general historical data and to view the scene with a more panoramic lens, even though that may sacrifice clarity of detail. One can begin by examining convergencies and divergencies revealed at the regional/country level, according to the criteria used for the descriptions of the different countries, that is criminal organizations, money laundering activities, criminal legislation and policies, law enforcement operations, regulatory legislation and international cooperation.

4.3.2 Convergencies and Divergencies in Criminal Organizations and Activities

The geography of crime is becoming more and more complex. Western Europe produces, exports and imports organized crime. Groups like the Sicilian Mafia are spreading their activity into both Western and Eastern Europe, in addition to maintaining their traditional connections in the Americas. Organized crime from Africa (Nigerian criminal groups); from the East (mainly Chinese, Turkish and Russian mafias); and from the Western hemisphere (Colombians) import drugs into Europe, and may receive payment through European financial channels. Central and Eastern European countries are potentially large exporters of organised crime, and seem to be fields of investment for money laundering by European criminals. North America is a major producer of organized criminality and the largest import market for organized crime and its product lines of drugs, smuggled immigrants, etc. South America, Africa and Asia, with many local differences, are mainly producers and exporters of either organised crime products (cocaine, heroin, methamphetamine), services (Nigerian courier networks) and proceeds (Cali cartel bank accounts in Luxembourg), and/or organizations (Colombian cocaine cartel vertical distribution networks, Chinese Triads).

Actions by High and Medium-to-High Priority Governments

Goverment	Ci	Cii	Ciii	Civ	Cv	Cvi	Cvii	Cviii	UN88	Goals
Aruba	Y	Y	Y	N	N	N	Y	N	**	N
Bahamas	N	V	V	V	Y	N	Y	N	Y	N
Brazil	N	Y	Y	N	Y	N	Y	?	Y	N
Burma	N	N	N	N	N	N	N	N	Y	N
Canada	Y	N	Y	V	Y	N	Y	N	Y	Y
Cayman Islds	Y	Y	Y	Y	Y	N	Y	Y	**	Y
Colombia	N	Y	Y	Y	Y	Y	Y	N	Y	N
Equador	Y	Y	Y	N	Y	N*	Y	N	Y	N
Germany	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
Hong Kong	Y	N	Y	Y	Y	N	Y	N	**	Y
India	Y	Y	Y	?	Y	N	Y	Y	Y	N
Italy	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
Ivory Coast	Y	Y	Y	Y	Y	N	Y	Y	Y	N
Japan	Y	Y	Y	Y	Y	N	Y	N	Y	Y
Liechtenstein	Y	?	Y	?	Y	N	Y	?	N	N
Luxembourg	Y	Y	Y	Y	Y	N	Y	N	Y	Y
Mexico	Y	N	N	N	Y	N	Y	Y	Y	N
Netherlands	Y	Y	Y	Y	Y	N	Y	N	Y	Y
Nigeria	Y	Y	Y	N	N	N	Y	N	Y	N
Pakistan	N	N	N	N	N	N	Y	N	Y	N
Panama	Y	Y	Y	N	Y	N	Y	N	Y	N
Paraguay	N	Y	Y	N	?	N	Y	N	Y	N
Russia	N	N	N	N	N	N	Y	N	Y	N
Singapore	Y	Y	Y	Y	Y	N	Y	?	N	N
Spain	Y	Y	Y	Y	Y	N	Y	?	Y	Y
Switzerland	Y	Y	Y	Y	Y	N	Y	N	N	(1)
Thailand	N	N	N	N	Y	N	Y	N	N	N
Turkey	N	N	N	N	N	N	Y	N	N	N
UAE	N	?	N	?	?	N	Y	?	Y	N
UK	Y	N	Y	Y	Y	N	Y	Y	Y	Y
US	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Uruguay	N	Y	Y	N	N	N	Y	N	N	N
Venezuela	Y	Y	Y	Y	Y	N	Y	N	Y	N

Legend: Y=Yes N=No V=Voluntary
* US-Ecuador asset sharing agreement will be signed soon.
** UN Convention does Not apply
(1) Switzerland has Not ratified but substantially meets the goals and objectives of the 1988 UN Convention.
Source: US Dept. of State—International Narcotics Control Strategy Report, April 1994, p.496

Does this mean that "global crime" is becoming the norm, as the new label popularized by the news/entertainment media suggests? That would be an exaggerated description of the processes which for the foreseeable future seem likely to characterize organised crime and its activities in the world. While we are experiencing processes of globalization of economies and of economic sectors, even the most mature and extended criminal organizations, such as the

High Priority	Medium-Priority	Medium	Low-Medium	Low	No Priority	No Priority
Canada	Aruba	Argentina	Antigua	Afghanistan	Albania	Madagascar
Cayman Isl.	Bahamas	Australia	Egypt	Andorra	Algeria	Malawi
Colombia	Brazil	Austria	Portugal	Barbados	Anguilla	Maldives
Germany	Burma	Bahrain	Sri Lanka	Bermuda	Angola	Mali
Hong Kong	Ecuador	Belgium	St Vincent	BVI	Azerbaijan	Marshall Isl
Italy	India	Belize	Trinidad	Cuba	Bangladesh	Mauritania
Mexico	Ivory Coast	Bolivia		Czech Rep	Benin	Mauritius
Netherlands	Japan	Bulgaria		Dom Rep	Botswana	Micronesia
Nigeria	Liechtenstein	Channel Isl.		Estonia	Burkina Faso	Mozambique
Panama	Luxembourg	Chile		F W Indies	Burundi	N Marinas
Singapore	Pakistan	China		Finland	C African Rep	Nambia
Switzerland	Paraguay	Costa Rica		Ghana	Cambodia	Nauru
Thailand	Russia	Cyprus		Haiti	Cameroon	Nicaragua
UK	Spain	Denmark		Honduras	Cape Verde	Niger
USA	Turkey	France		Indonesia	Chad	Oman
Venezuela	Uruguay	Gibraltar		Ireland	Comoros	P N Guinea
	UAE	Greece		Jamaica	Congo	Quatar
		Guatemala		Kenya	Cook Isl	Romania
		Hungary		Laos	Croatia	Rwanda
		Israel		Latvia	Djibouti	Saudi Arabia
		Korea		Lithuania	Dominica	Senegal
		Kuwait		Malta	El Salvador	Seychelles
		Lebanon		Monaco	Eq Guinea	Slovakia
		Macau		N Zealand	Eritera	Solomon Isl
		Madeira/Azores		Norway	Ethiopia	Somalia
		Malaysia		Puerto R	Fiji	St Kitts
		Monsterrat		S Africa	Gabon	Sudan
		Morocco		Sierra Leone	Gambia	Swaziland
		N Antilles		South Africa	Grenada	Tajikistan
		Nepal		St Lucia	Guinea	Tanzania
		Peru		Suriname	Guinea-Bissau	Togo
		Philippines		Sweden	Guyana	Tunisia
		Poland		Syria	Iceland	Turkmenistan
		Taiwan		Ukraine	Iran	Turks &
				Vanuatu	Iraq	Caicos
				Vietnam	Jordan	Tuvalu
				Zambia	Kiribati	Uganda
					Lesotho	US Virgin Isl
					Liberia	W Sahara
					Lybia	W Samoa
						Yemen
						Zaire
						Zimbabwe

Source: U.S. Dept. of State—International Narcotics Control Strategy Report, April 1994, p.497

Mafia, the Triads and other organizations described in Chapter 2, typically act with identified organisational systems, leadership and infrastructures firmly rooted in their home countries. For this reason multinational criminal groups can still be disrupted by the criminal justice system of a country if it has the resources and the political will to do so.

One legitimate concern is that these organizations, more now than in the past, are internationalizing while maintaining their local strength. That means that they are increasingly using the facilities of the global economy and in the same time influencing, when not directly controlling, crime at the local level. This is the

tendency which characterizes the Sicilian Mafia and other powerful criminal organizations, including Colombian cartels and Chinese Triads. They act at the international level, often through collusive relations with other criminal groups, but they are firmly rooted in their home territory, where they dominate certain criminal activities, tolerate no rivals, and seek to neutralize criminal justice authorities by exchange of favors, bribery or intimidation, precisely in order to maintain a secure, even invulnerable base of operations. Entire areas of Italy, Colombia and certain Asian countries suffer from conditions that at times border on the existence of a parallel state.

However, it would be mistaken to assume that such organizations can become "global" in the sense that they can take flight, detach themselves from their base of operations, and become free-floating opportunists who could operate on the world market of criminal activities with no need for a fixed home basing arrangement. Criminal organizations do not allow themselves to be cut off from their roots. When threatened, as the Sicilian Mafia has been in recent years and the Medellin Cartel was previously, such organizations typically fight to the death for the control of their home territory, because otherwise they would be left to compete in strange environments, without an assured source of supply of labor or products, or official influence/protection, with very negative prospects if they sought to reestablish operations in unfavorable markets, that is where they had to confront a strong law enforcement environment or in competition with gangs which enjoyed home territory advantages.

Assuming that the major criminal organizations will engage in transnational criminality and money laundering when the combination of profit and risk seem appropriate, their options have been rapidly changing due to two interdependent factors: (1) increased opportunities offered in illegal markets, such as a growing demand for cocaine in Western Europe, the opportunities for economic crime and laundering in Eastern Europe and the ready availability of arms for trafficking; and (2) the introduction of recent laws and effective law enforcement policies against organized crime and money laundering, such as criminal enterprise and conspiracy laws, anti-money laundering criminal and regulatory provisions, asset forfeiture authorization and procedures, and evidentiary tools such as electronic surveillance, undercover techniques, and protection of collaborators with justice.

One can propose various hypotheses of mutual adjustment, as gangs try to take advantage of new opportunities while contending with greater law enforcement risk in some areas. Because of variations in types of criminal activity, law enforcement tactics and the level of competition in illegal markets, it seems likely that the reactions of different gangs to improved prevention and control are more likely to be divergent than convergent.

Considering these processes, it is interesting to speculate on future developments. Before the effectiveness of law enforcement responses was enhanced after the murders of prosecutors Falcone and Borsellino in the summer of 1992, the Italian Mafia, Camorra and 'Ndrangheta were beginning to take

advantage of the open international markets for illegal goods and services, both in expansion of drug activities to cocaine sales in new European markets and in new ventures, such as arms trafficking and the conduct of money laundering as a profit center, and not simply as an incidental means of protecting and using capital from other activities.[49]

To the extent that the Mafia seeks to enter the field of money laundering as a stand-alone criminal activity, this activity will require new internal skills. The Mafia has always used its electoral support to earn political profit. However, giving a money launderer investment authority and knowledge about organizational assets requires more confidence than giving a politician votes. If Mafia families enter the money laundering market as providers rather than consumers, the costs and risks of using outside consultants could encourage the emergence of a more white collar oriented element. Its members would have to be more sophisticated, better educated, with better accounting and business skills than the present Cosa Nostra leadership and membership, possibly less personally violent, although not necessarily opposed to the use of violence. However, this specialization in non-violent skills could only be achieved within an organization which maintained a reputation and capacity for violence sufficient to discourage hostile take-overs of money laundering profit centers.

4.3.3
Convergencies and Divergencies in Money Laundering Activities

The question was asked previously whether it was appropriate to talk of global crime as the new norm, and answered negatively. Is it appropriate to speak of "global money laundering activities"? In this case the answer should be affirmative. The growing professionalism and complexity of money laundering strategies require recognition of a deliberate globalization process. International laundering can achieve several goals which are beyond the capabilities of domestic strategies. One is the ability to escape from an unfavorable jurisdiction and avoid the impact of improved crime control policies in countries which are modernizing and reinforcing their criminal justice systems. Another would be to take advantage of the inherent communication and cooperation problems and delays among regulators and criminal justice systems with different languages and different legal and administrative cultures. The third would be to find and to exploit the weakest link in the global regulatory and enforcement chain, by shifting transactions, communications or assets to the country which has the weakest or most corruptible regulatory or police and prosecution authorities, the most restrictive bank and professional secrecy, or extradition, or asset seizure law, the most ineffective bank supervision, etc.

This increasing global money laundering activity involves old and new mechanisms and methods: banks and non-bank financial institutions of the developed and developing countries, old informal systems such as *hundi* or

hawala, the privatization processes of the transition economies, and the growing number of off-shore banks in developing countries close to areas of drug production such as Thailand. The trends toward more professionalism and more complexity in money laundering strategies and schemes coincide with a recent geographical trend which moves the money to be cleaned from north to south, from west to east, from developed to developing countries and economies in transition. Increasingly effective regulatory and criminal controls in the industrialized countries are pushing capital to be laundered toward countries where these controls do not exist or are weak. Some governments and banks turn a blind eye to the source of deposits or investments which they seek to attract, with more or less explicit policies of "no questions asked", e.g. tolerance for anonymous accounts. This is a dangerous form of competition with those countries which attempt to discourage, identify and take action against the introduction of illicit capital into their financial, economic and political systems, and to avoid becoming accomplices of international criminal activities. This alarming trend underlines the urgency of the need for a global approach to the global market of money laundering.

The case of the Bank of Credit and Commerce International is emblematic of how an organization with almost an industrial level of specialization in the laundering of money from the most diverse sources could survive the control of multiple regulators, including the Bank of England, for years.[50] The future will probably be marked by similar cases, and by increasingly frequent collusive agreements among criminal organizations, aimed at exploiting the opportunities afforded by the free circulation of capital.

While criminal organizations have limited geographical flexibility because of their need to maintain a secure base of operations, certain criminal activities are more mobile than others. Money laundering is inherently one of the most mobile crimes. Its placement stage is physically tied to a location to which bulk cash can be transported, but layering can and most effectively should take advantage on global financial markets. Integration is likely to occur in any investment environment considered to be profitable and with an acceptably low degree of law enforcement and, particularly, forfeiture risk. The internationalization of the production of illegal goods and services increases the demand for transnational money laundering services.

4.3.4
Convergencies and Divergencies in Criminal Policies

In terms of criminal policies, with slight variations, the geography seems clear. Western Europe, North America and Australia are converging towards the criminalization of money laundering activities and enlargement of the predicate offenses from drug offenses to virtually all serious crimes. In Central and South America and Asia, when money laundering is criminalized as a separate offense, its application is often limited to drug instrumentalities and proceeds.

Eastern European countries are beginning to address these issues in the context of an overall reexamination of the law of property, banking regulations and procedural law. Few African countries have ratified the Vienna Convention and criminalized money laundering.

There is a marked convergence of country policies on asset forfeiture and confiscation of the proceeds of crime, which appear to be more widely accepted than the criminalization of a money laundering offense *per se*. In addition to the Vienna Drug Convention, the Council of Europe Convention on the Proceeds from Crime and the E.C. Anti-Money Laundering Directive, one should also take note of the 1986 Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters. This early response to the money laundering/proceeds of crime issue did not depend on treaty negotiation, but relied on the domestic enactment of laws granting assistance to a requesting state in seizing and confiscating the proceeds of crime, not limited to drug offenses. In the numerous countries where there are no specific money laundering provisions forfeiture may also be possible under generic laws dealing with stolen property or the proceeds of a criminal act.

Western Europe and North America, together with Australia, are rapidly converging in creating one or more specialized agencies with the exclusive purpose of investigating or concentrating data on money laundering. In other countries these activities are carried out by the financial and economic sectors of the general police agency. Law enforcement tactics and permissive legislation for techniques such as controlled deliveries of drugs or crime proceeds are becoming more harmonized, particularly among countries which frequently and productively have occasion to cooperate in investigating money laundering. Undercover operations in the area of drugs and money laundering were originally relatively rarely allowed, but their demonstrated effectiveness in operations like Green Ice is resulting in more widespread acceptance.

4.3.5
Convergencies and Divergencies in Regulatory Policies

The earliest form of widespread regulation with relevance to money laundering may have been controls on the amount of cash or equivalents allowed to be transported across national borders, or requiring reporting or approval procedures for such transportation. The motive for such regulation was often the control of foreign exchange, but the mechanism was recognized as having immediate relevance when the transnational transportation of criminal proceeds began to be recognized as a phenomenon requiring attention. The primitive stages of money laundering typically involve bulk cash. For domestic laundering purposes, and as borders be came less porous for international laundering, banks became the next target of regulation. Conversion of cash to paper instruments or deposit credits offered convenience, security from theft and embezzlement, and at least a physical separation from the inherently suspicious possession of large quantities of cash. Banks being traditionally subject to supervision as deposit

taking institutions, it was predictable that governments concerned about criminal profits being recycled would turn to bank regulation to deter, identify and trace them, either alone or together with penalization of money laundering as a separate offense.

Discouraging money laundering by regulatory/preventive means has often been described as the enlistment of banks and bank regulatory institutions in the fight against drugs and other criminality, a description which has been met with the argument that banks are not equipped to be criminal investigators and that neither they nor bank regulatory agencies want to assume that role. Since neither private nor public institutions can be assumed to act altruistically, motivations serving the selfish interests of banks and banking regulators are necessary to win cooperation. In this regard it has been easier to provide a motivation to bank regulators than to bankers. Administrative regulators, to the extent that they are part of the executive, are subject to the policy choices of that government, and can be assigned responsibilities which they might not have voluntarily sought. For regulators, imposition of an anti-money laundering regulatory regime can have its bureaucratic rewards, in terms of increased budgets for increased responsibilities, greater visibility on a popular public issue, and a role in representing the financial community to the law enforcement community, a role which can confer advantages with both of those communities.

Bankers have been more difficult to motivate, as their imperatives are financial rather than bureaucratic. Effective money laundering regulation has internal costs (training time, record creation and maintenance costs) and external costs (lost customer patronage). Indeed, the protests of the banking community caused the United States Congress to require the Treasury to defend the cost-effectiveness of that country's regulatory system, which is based on mandatory reporting of cash transactions over $10,000.[51] The history of that comprehensive system was that until 1984 only several hundred thousand cash transaction reports were filed by U.S. banks annually. In 1984 a Presidential Commission focused public attention on bank money laundering.[52] At about the same time the Bank of Boston, one of the most respected banks in the country, was prosecuted for systematic violation of anti-money laundering regulations, and the news media focused on the association of organized criminality and unscrupulous bankers. The reporting escalated immediately, reaching over 3 million reports in 1986 and 7 million reports by 1990.

This example demonstrates that the disincentives of public disapproval and law enforcement risk can motivate compliance with regulatory requirements. Fortunately, experience has demonstrated that bankers are also capable of far-sighted acceptance of what they consider reasonable regulatory regimes in the interests of economic transparency and integrity and to avoid infiltration of criminal capital and influences in their national economies. The difficulties, not unexpectedly, relate to what regulatory schemes will be viewed as reasonable by the banking industry, and what level of enforced observance will be accepted by bankers.

A general consensus seems to have been reached among all concerned parties that customer identification, the "know your customer" principle of the Basle Statement of Principles, is a basic rule of good banking, not simply an antimoney laundering rule. Record maintenance requirements are now much less controversial than they once were, due to the increased computerization of bank operations and data storage. Divided views exist concerning the merits of mandatory reporting of all specified transactions to a central authority (e.g. Australia, U.S.A.), as opposed to reporting only transactions considered to be suspicious by the banker (Austria, U.K., Italy). The latter approach is complicated by the conflicting demands by bankers for an objective definition of "suspicious transaction", and by regulators that bankers use due diligence in applying their professional expertise and report any dubious transaction. Another obstacle to application of the suspicious transaction rule is that its discretionary nature is often left in conflict with banking secrecy obligations, without adequate immunity, indemnity or safe harbor provisions, meaning a law which protects a bank representative from legal action if he reports a suspicious transaction.

Surprisingly, a satisfactory consensus has not yet been achieved in the area of customer notification. In some countries bankers are still allowed to notify a customer of an official inquiry, and even of the fact that the bank has reported a suspicious transaction by that customer to a regulatory or police authority. This is an inexplicable schizophrenia of policies, which should in the opinion of the authors be resolved in favor of cooperation with governmental authorities rather than appearing to give that cooperation and then subverting its utility.

4.3.6
Convergencies and Divergencies in International Cooperation

The convergencies in international cooperation are encouraging. Ratification of the Vienna Drug Convention is becoming virtually an indicator of responsible membership in the anti-drug and anti-money laundering world community. Criminalization of money laundering as a separate offense is still in its early stages, but its extension is impeded more by indifference and the technical complexity of defining the offenses' constituent elements than by any substantial policy arguments against criminalization. Widespread definition of a money laundering offense is also important because various forms of international cooperation, particularly extradition, depend on the offending conduct being punishable in both the requesting and requested state. Similarly, inertia rather than policy reasons seems to be the principle impediment to expansion of the money laundering offense beyond its initial drug crime predicates to other serious crimes. The Council of Europe Convention on the Proceeds from Crime sets the standard on this issue, applying to the proceeds of all serious crime, and is gaining widespread acceptance throughout Europe.

Generalizations invite a certain margin of inaccuracy, but it is possible to say that those countries which have demonstrated a political will to act against

money laundering, particularly those with significant organized crime problems and advanced financial industries, are succeeding in achieving a desirable degree of prevention and control at the national level. Achieving that same degree of control at a regional and international level is a much more difficult proposition, as many countries are not yet motivated to control the phenomenon.

4.4
Policy Implications: A Global Problem which requires a Global Commitment

4.4.1
Substantial versus Formal International Cooperation

The introduction and updating of anti-money laundering regulation and legislation is proceeding favorably as more countries recognize the threat to their domestic interests and the obligations to the world community imposed by international conventions and bilateral agreements. These efforts are as yet only partial responses to the money laundering problem, but they clearly point the way to the ultimate solution of greater transparency in economic/financial systems, at least for the eyes of criminal justice authorities.

Not only domestic but also international prevention and control mechanisms are continuously being developed, as national borders encourage rather than impede money laundering. More and more gangs are dealing in global markets for illegal goods and services and are laundering their instrumentalities and proceeds both domestically and internationally. Broader markets, the economies of scale and the ability to reduce local law enforcement risk are positive inducements to criminals to operate internationally. To provide a logical and proportionate response sufficient to deter global money laundering activity, enhanced regulatory and law enforcement responses resulting in higher international risks and costs to the criminals are necessary. Unfortunately, several divergent influences undermine the possibilities of global harmonization and collective action against money laundering:

i) The continuing practice of “tax haven” or “fiscal paradise” countries, whether developed or developing, of offering not only financial services with commercial confidentiality, but virtual invitations to tax evasion and/or laundering of dirty money. A useful test in this area is the extent to which bank or professional secrecy can be applied to block a criminal investigation. Undeniably, the financial advantages of being a fiscal paradise are tempting, particularly for countries with few other resources. In every country the cost-benefit ratio of specific regulatory practices will be calculated differently. Even when a country is clearly creating a global problem by its vulnerability to money laundering,

respect for national sovereignty makes remedial actions by the countries negatively affected a delicate issue, but one which must be confronted.

ii) Structural conflicts and competition which can impede prevention and control even in countries with adequate legal and regulatory provisions and a desire to avoid involvement in money laundering exist. Legitimate banks are influenced by the competition of offshore banks, of less scrupulous banks, and of less closely regulated institutions and businesses. Law enforcement agencies, both nationally and internationally, may compete against each other for visibility in a way which detracts from information sharing. An investigative or regulatory agency, in possession of information which could furnish the basic preventive or penal action by a different entity, may not communicate that information as long as it has any possibility of itself taking action which would reflect favorably on its own reputation or program, rather than sharing it with the "competitor" agency. Dealings between the financial and regulatory communities, or between either of those and the law enforcement community, may be characterized more by mutual suspicion and paranoia than by mutually profitable trust and cooperation. Internationally, a lack of harmonization of legal and regulatory cultures may make cooperation virtually impossible.

iii) The transitions underway from centrally planned to market economies, with privatization processes, which may involve weak controls on the source of investment capital, unrestrained business practices, and a general weakening of state authority.

These obstacles must be overcome to increase the law enforcement risk sufficiently to effectively deter and repress international laundering activity. Professional, calculating criminals operate internationally, not only because they thereby maximize profit opportunities, but also because in the current state of incomplete cooperation they thereby can also reduce the risk of discovery of their activities and disclosure of the true nature of their financial transactions and assets. If only one country or banking system freely permits the recycling of criminal proceeds or fails to furnish meaningful investigative cooperation, crimi nals can continue to manoeuvre in the global financial system, paying for drugs with camouflaged letters of credit, moving crime proceeds out of the reach of investigators, and investing in vulnerable industries and economies.

Due to the mobility of criminal enterprises and of capital, particularly within economic zones such as the European Union, anti-money laundering objectives cannot be achieved solely on a domestic basis. Both developing and developed countries tempted by the short term advantages of attracting suspect capital by lenient regulatory policies, weak or nonexistent penal sanctions for money laundering, or inadequate international cooperation must be made aware that becoming a fiscal, or penal, paradise is increasingly likely to result in the long term disadvantages of a dubious international reputation.

Developed countries may be resistant to the purely economic disadvantages resulting from illegal money, but must calculate the potential loss in international prestige, not to mention the possibility of ostracism from international banking mechanisms if their practices too obviously encourage laundering. Developing societies must evaluate the corrupting potential of illegal capital through political contributions, bribery, and introduction of criminal attitudes and competitive techniques into crucial industries and markets. Welcoming such dirty capital by a policy of consciously avoiding serious inquiry into its origin can also deter assistance from nations with more carefully regulated financial industries. Dirty capital also may be quickly withdrawn from a society if efforts are made to impose reasonable regulatory policies, as the motivation for its placement are the advantages of secrecy and lax regulation rather than purely economic prospects.

4.4.2
Expanding Predicate Offenses Beyond Drugs

The history of penal money laundering legislation began with the criminalization of dealings in the instrumentalities or proceeds of drug related offenses. Not all countries have yet accepted the obligations or urging of the Vienna Drug Convention or the FATF to criminalize such dealings, while other countries have progressed to the next stage of evolution, which is extension of criminalization to the instrumentalities and proceeds of any serious crime. The Council of Europe Convention on the Proceeds from Crime sets the standard by generically defining serious crimes as those punishable by a certain period of imprisonment. Other countries have expanded the concept by listing specified crimes considered to be likely sources of laundering activity, such as organized crime offenses, extortion, etc. An expanded definition of predicate offense is necessary to avoid the ludicrous situation in which a banker cannot properly report an otherwise highly suspicious transaction because he cannot know whether the suitcase of cash in small bills being presented for deposit into a newly opened account comes from drug dealing or the exploitation of prostitution, or from extortion. Defining predicate offenses broadly is also an aid to international cooperation, given the typical requirement of dual criminality (that is that the criminal conduct be punishable both in the requesting and requested state).

4.4.3
Better Regulation to Supplement Criminal Law

A general theory of anti-money laundering prevention and control would explain that criminal control mechanisms alone are insufficient to overcome the professionalism of money launderers and the complexity of their schemes and that more regulation is needed.[53] More sophisticated laundering calls for more sophisticated and effective prevention by regulation, as criminal enforcement can

never reach more than an exemplary sample of widespread, complex criminality. Because it first came to attention in the drug context, which is both sensational and very much penally oriented, money laundering is embedded in the public imagination as a criminal justice rather than regulatory problem, and the Vienna Drug Convention emphasized that penal focus. As the countries participating in the Financial Action Task Force became more knowledgeable about laundering, they began to observe and analyze its separate functions and the mechanisms, methods and schemes being utilized. This more scientific approach has contributed to a recognition that criminal policies are not a panacea, even with the use of controlled delivery and undercover techniques. Instead penalization is a *sine qua non*, a basic minimum standard which must be accompanied by comprehensive and effectively implemented regulation of all the pertinent sectors of the economy, including professions. These regulatory provisions must be designed strategically to ensure cost-effective transparency, and tactically to prevent or reveal laundering practices. Achieving that goal at the national level is not impossible, as a number of FATF countries have demonstrated.

4.4.4
Six Points for Immediate Action

As the foregoing discussion has shown, both criminal and regulatory anti-money laundering policies are diverging on many points, according to the geopolitical position of the countries. This gap between widespread international acknowledgement of the basic principles necessary to effectively prevent and control money laundering and a very inconsistent application of those principles on the ground in far too many countries needs to be acknowledged and corrected. The following problem areas should be the focus of immediate action by all countries in the exercise of responsible membership in the international law enforcement and financial communities, without prejudice to other principles enunciated by the FATF recommendations and the Vienna Drug Convention.

i) The Criminalization of Money Laundering Offenses—Various international and regional definitions and model laws are readily available. An area of difficulty in application is the standard of intent required to make participation in money laundering punishable. Some countries require the transgressor to intentionally participate in the laundering, while some are beginning to penalize conduct that is negligent or careless under circumstances where greater care is required. While not all mutual assistance treaties contain a dual criminality requirement, such a requirement in one form or the other is almost universal in extradition treaties. Hence, the ability to assist or extradite may depend on whether both states have the same *mens rea* (guilty knowledge) standard.

ii) Limitation of Secrecy Privileges—A crucial element of emerging anti-money laundering policies is a limitation on secrecy privileges. Virtually all of the emerging regimes to combat money laundering recognize the need for reasonable limitation on financial and professional privacy. In the context of a criminal inquiry by a legal authority there seem to be few arguments against removing such secrecy for the purposes of the inquiry and subsequent judicial use. A regrettably large number of countries decline to implement the Vienna Drug Convention and FATF Recommendations on this point, which is one indicator of the sincerity of a country's anti-money laundering intentions.

iii) "Know Your Customer"—A fundamental FATF and Basle Statement of Principles requirement is to "know your customer". Anonymous accounts are the purest expression of a money laundering service, and functional equivalents through the use of nominees or *pro forma* identification are becoming rarer, and need to be universally recognized and rejected as the equivalent of an invitation to money launderers.

iv) Identification and Reporting of Suspicious Transactions—The obligation to report suspicious transactions, which can exist together with or in place of mandatory reporting of all large cash transactions, is very often law on the books but not law in practice. A bank, business or professional, asked to participate in a currency transaction which raises suspicion of money laundering, is under a number of regimes required to inform the appropriate authority. Other less effective regimes merely permit such reporting but do not require it, although it is difficult to under-stand why a government would not want its appropriate authorities to know of a transaction which causes a banker or other professional person to suspect criminal activity. Absence of protection for the reporting against legal action by a customer or third party is a serious impediment to effective implementation of suspicious transaction reporting. Such protection, variously called indemnity, immunity or safe harbor provisions, needs to be legally declared in unequivocal terms. A large number of countries also still permit a financial institution to promptly notify a customer that a suspicious transaction has been reported, a procedure which is difficult to reconcile with a serious intent to allow criminal justice authorities to react in any meaningful way and which betrays a marked ambivalence in policy goals.

v) Improving the Regulation of Businesses/Professionals Who Conduct Financial Operations—When regulatory anti-money laundering policies first began to take effect, non-bank financial institutions were perceived, both by criminals and governments, as readily available alternatives to banks for money laundering. It was relatively easy to expand regulation to such institutions because their deposit-taking activity and provision of financial services were so obviously comparable to banks that it was

difficult to argue that they should not comply with anti-money laundering policies.

Implementation of such policies, however, is more difficult to achieve against persons or institutions who do not provide financial services to the general public. When prevention and control schemes are extended beyond non-bank financial institutions to businesses and professionals who conduct currency transactions, the gap between law on the books and law in practice becomes obvious. In some countries important segments of professions, such as attorneys who conduct financial affairs for others through client trustee accounts, resist anti-money laundering policies, often invoking client privacy privileges originally designed to protect far different types of relationships. Substantial resources and political will have to be expended to limit such privileges and to avoid the transfer of money laundering from regulated financial institutions to non-regulated professions and businesses.

vi) Developing Asset Forfeiture—An asset forfeiture capability is a necessary complement to anti-money laundering regulation and penalization. Domestic money laundering laws contain substantive and procedural provisions for forfeiting goods, and a separate sub-regime of international asset forfeiture is undergoing parallel development because of the complexities of harmonizing forfeiture concepts between different legal cultures. Some laws which provide for asset forfeiture provide for forfeiture only in criminal proceedings, while other regimes include civil and administrative actions. Some countries cooperate with foreign asset forfeiture requests only when they are based on penal actions. Others apply these laws only to the direct proceeds and instrumentalities of crimes, while other countries have laws which are more comprehensive, i.e. per mitting a judgment against any of the assets of the criminal (Council of Europe Convention approach).

4.5 Conclusions

The recent past has seen the creation of a new social attention, of a new culture, of new laws and of new mechanisms for combatting money laundering. The future should bring their effective implementation. Recognizing that money laundering is a global problem that requires global solutions, one must also recognize that a global strategy is needed to implement that approach. The six challenges described above are starting points for this process of global implementation.

The strategy proposed for discussion resembles the process of building a protective net. We know which kind of anti-laundering laws, regulations, treaties and procedures are needed, how they should be tied together domestically and internationally, and how tight the mesh must be to be effective. The great

problem is that certain parts of the global net are characterized by a very loose, irregular or even non-existent mesh. The great effort expended by some countries to construct and keep in good condition a tight and strong net in their geographic area is obviously wasted to a greater or lesser degree depending on how easily the money laundering sharks and barracudas of the world can swim through a neighboring country's part of the net.

The key question is how to persuade reluctant countries to come to participate in this comprehensive network and make their part tight enough so that the efforts of their neighbors are not nullified. A distinction should be made between countries who do not want to participate because their interest is in attracting criminal money, and countries who are not able to participate because they have no capabilities to deal with this phenomenon. The first group, even giving due respect to national sovereignty, is inviting non-cooperation and ostracism by the responsible elements of the world financial and law enforcement community. The second group needs technical assistance, and deserves that assistance in the sense that helping such countries to close their part of the net is in the overall global interest and in the self-interest of countries with tighter anti-money laundering nets.

In both cases, which sometimes overlap, the international community should provide systems of incentives/disincentives which facilitate compliance with anti-money laundering standards. The process should be managed in terms of progressively achieving more responsible country/regional/international mechanisms. The basic unit of money laundering control is domestic legislation and regulation. However, not every country, for a number of reasons, will move spontaneously toward implementation of effective anti-money laundering policies. When a country does not, a three level response strategy may be implemented. On a bilateral level its neighbors and the other countries damaged by the country's lack of a sufficiently tight anti-money laundering mesh, and those most able to influence it culturally and economically, should use education and legitimate forms of persuasion to move the deficient country to assume legally binding commitments to create or repair its part of the net.

At the same time the regional organizations, broadly understood to include not only geographic groupings such as the O.A.S. or Council of Europe, but also political/cultural groupings such as the Commonwealth, should exert peer pressure and leadership to bring their fellow state up to that region's standard of antimoney laundering policies. Positive regional experiences such as the E.U. Directive and the O.A.S. Model Regulations should be extended to all regions and should become progressively more binding, that is their standards should be incorporated in bilateral and regional commitments. At the international level the relevant organizations can reinforce these bilateral and regional processes. A non-complying country which is damaging the international anti-money laundering effort should know that aid is available from friends and neighbors, from regional groupings, and from the international community if it wishes to weave its part of the anti-money laundering net, and that bilateral, regional, and international

disapproval and appropriately measured disincentives are inevitable if it chooses not to do so.

NOTES

1. 1988 United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.
2. Financial Action Task Force, *The 1989–1990 Report*, Paris, 1990.
3. The President's Commission on Organized Crime, *The Cash Connection*, U.S. Government Printing Office, Washington D.C., 1986.
4. Financial Action Task Force, *op. cit.*
5. I have seen notes and tables organized by P. van Duyne on the cash flow sent back to the Netherlands. The cash flow repatriated in 1990 from foreign banks was f 3, 691 million. This money includes criminal and legitimate sources such as savings from foreign workers, tax evasion/avoidance money and normal transfers of people having a second home in France, Spain or other countries. As Mr. van Duyne says, "anyhow the f 3,691 million seems the physical upper limit of the money-laundering cash flow following a cross-border circuit. The criminal money should be considerably lower".
6. Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy 1994 Report*, Washington D.C., 1994, p.467.
7. Bureau for International Narcotics and Law Enforcement Affairs, *op. cit.*, p.4.
8. Among others: P.Williams, "Transnational Criminal Organizations and Drug Trafficking", paper presented at the workshop on *International Implication of the Transnational Drug Phenomenon*, Philadelphia, April 18–19, 1994; E.U. Savona, "Le mafie, la mafia. Una prima lettura del rapporto tra forme organizzate di criminalità e strategie di contrasto" in G. Fiandaca e S. Costantino (eds.), *La mafia, le mafie*, Laterza, Bari, 1994, pp. 158–173.
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19. This paragraph has been drawn from E.U. Savona, "Mafia Money Laundering Versus Italian Legislation", *cit.*
20. G. Rey, "Analisi economica ed evidenza empirica dell'attività illegale in Italia" in S. Zamagni (ed.) *Mafie e mercati illegali*, Bologna, II Mulino, 1993.
21. G. Rey, Introductory Presentation, in *Economia e criminalità*, Camera dei Deputati, Rome, 1993.
22. These are also the main investments of the Mafia in Germany, as reported in a study of the Bundeskriminalamt, a summary of which appeared in the article "Letzte Warnung aus Wuppertal 1992", *Der Spiegel*, n. 35, 1992.
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39. Coleman, Testimony at the US Senate Committee on Foreign Affairs, Subcommittee on Terrorism, Narcotics and International Operations, Washington D.C., April 21, 1944, p. 15
40. E.U.Savona, "Mafia Money Laundering Versus Italian Legislation", *op. cit.*, pp. 35–36.
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42. This material has been kindly provided to the authors by the U.S. Dept. of Treasury, Office of Financial Enforcement and by the Financial Crimes Enforcement Network.
43. Bureau for International Narcotics and Law Enforcement Affairs, *op. cit.*, p. 491.
44. Bureau for International Narcotics and Law Enforcement Affairs, *op. cit.*, pp. 488–491.

45. For example, the requirement to report transactions over a determined amount of money is a regulatory measure to prevent criminals using banks for their laundering purposes. This measure could also help law enforcement agencies to trace a money laundering scheme.
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47. These rankings were developed in a series of meetings involving State, Justice, Treasury, Federal Reserve, Comptroller of the Currency and the Central Intelligence Agency, and included the Drug Enforcement Administration Customs, Federal Bureau of Investigation, Financial Crime Enforcement Network, Internal Revenue Service, and the Office of National Drug Control Policy.
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3
Money Laundering and Measuring Illegal Activity: an Economic Analysis

A.J.Hughes Hallett

1.
INTRODUCTION

The literature on the economics of crime has two main characteristics. It has focused on analysing the motivations and economic consequences of criminal activities, and it has attempted to show how we might go about measuring the economic value of illegal activities and the consequences for the rest of the economy of ignoring these activities.

To provide a framework for economic analysis, we need to start with three important distinctions. The first distinction is between informal or irregular economic activities on the one hand, and illegal activities on the other.

i) We can define *informal activities* as comprising incomes and expenditures which are not recorded in the national accounts. The classic example would be household production (housewives). Other examples from the developing and transition economies are subsistence farming, street selling, and small scale (and therefore unrecorded) self-employed work. None of these activities are illegal They merely go unrecorded because of the informal and unorganised nature of their markets, and because of their small scale. A more formal economic system, and (more significantly) a more systematic accounting and tax system, would have recorded the prices and transactions into the national accounts.

ii) In the *irregular* sector some illegality is involved; typically tax evasion, avoiding of regulations (e.g. minimum wages, paying social security dues, using nonregistered workers, avoiding safety standards, etc.), or direct social security fraud. The most common example is the non-payment of income or sales taxes—in which case the relevant incomes or

*I am grateful to my colleagues Rod Cross and Myrvin Anthony for their comments, but this acknowledgement is to be suitably laundered by the usual disclaimer.

transactions will again go unrecorded in the national accounts. But the vital distinction from criminal activities (definition to follow) is that the goods and services which form the output in this sector are not illegal, whereas the non-disclosure or falsification, underreporting or nonpayment of certain dues is illegal. Hence irregular activities may be a subset of the informal set, but they need not be. They are never a subset of the criminal sector, however. Indeed, since the output of the irregular sector is legal, the illegality lies only in the payments and distribution of those payments. Therefore the only interest of the authorities should be in a tighter enforcement of the tax, social security or safety codes—not in stopping that output being produced. On the contrary these activities should be encouraged as contributions to national income.

iii) In the *criminal* sector, *both* the output *and* the payments for those goods and services are illegal (as are any subsequent transactions involving the proceeds of those activities). Typical examples are theft, racketeering and extortion, drug production and trafficking, prostitution, etc.; and, by extension, money laundering and other ways of benefitting from the proceeds of crime while concealing their origin. Since criminals cannot afford to advertise their incomes or income sources, the last point means their activities have certain characteristics in common with the irregular sector.

Moreover much of the criminal activity will be in payments and transactions made *after* the original goods and services are produced. And in contrast to the two previous cases, the authorities will, for legal and moral reasons, be most interested in eliminating the production of these goods and services rather than collecting the taxes and enforcing the social security code. But this means that they should do this either by operating on the output side, with legal sanctions on the producers of criminal goods and services and/or measures which eliminate the incentives for such activities; or by operating on the payments side by raising the costs of spending, and the penalties on laundering, concealing and otherwise benefiting from the proceeds. Of course that may well involve foreign authorities since there is an obvious incentive to try to launder “hot” money by crossing national or jurisdictional frontiers. On the other hand, that provides the authorities with an additional opportunities for checks and interventions designed to control the laundering of money.

Our *second* distinction is needed to support the first We have to distinguish clearly between whether the illegal part of the activity is in the production of the goods and services, or in the non-declaration and non-payment of dues on the incomes/expenditures generated by that production. Criminal activities involve both, irregular activities only involve the second. This chapter focuses on the second issue and therefore encompasses both criminal and irregular activities as I have defined them, But that switches the focus to detecting and measuring the scale of illegal activities in terms of the incomes and expenditures generated, and

to the further consequences for the prosperity and correct policy stance in the economy as a whole. The emphasis is therefore less on the motivations for certain activities, or the legal and institutional sanctions to be placed on them, than on measuring those activities and their consequences. Economic analysis can deal with both aspects—principally by measuring the "hidden" or "underground" economy which should be added to the national income figures, and in trying to define and measure the irregular capital transfers which constitute money laundering and other irregular transfers.

That leads to our *third* distinction. Economists have analysed both the microeconomic and macroeconomic aspects of criminal and irregular activities. Broadly they can be categorised as the incentives for (and hence the production of, or markets for) such activities; and secondly their consequences (and hence the implications for further economic activities, for measuring the level of economic activity and for appropriate policy adjustments). Theoretical models have been constructed for both categories, and they allow certain conclusions to be drawn about the incentives and appropriate control measures. But it seems fair to say that the applied work has largely been on the macroeconomic (measurement and consequences) issues. Hence we may be able to say more about the size and consequences of the proceeds of crime, than we can about the economic motives for, and suppression of the production of illegal goods and services.

Reliable estimates of the actual size of the criminal economy are, understandably enough, very hard to come by. Thomas[1] reports a market of $13bn to $18bn for the narcotics trade in the US in the mid 1970s; that is roughly 1–1.5 per cent of GNP—a large industry which is equivalent to perhaps half of the current fiscal deficit. Estimates for pornography run at $1.5bn to $2bn; prostitution at $2bn to $14bn and other crime at $5bn-$10bn; to give an overall share of 2–4.5 per cent of GNP. More provocatively, Blades[2] argues that these figures represent some 6% of the operating surplus of the companies in the US national accounts. Thus we may suspect that criminal activity is of very considerable importance to economic performance, but the vagueness of the figures and the lack of estimates for other countries suggest (unsurprisingly) that measurement is perhaps the biggest difficulty faced by economic analysts.

2. AN ECONOMIC ANALYSIS OF THE DECISION TO LAUNDER MONEY

The decision to launder money obtained from some criminal or irregular activity is essentially the same as the decision to evade paying tax on "regular" incomes. Both involve decisions on how much income to conceal from the authorities, and how much to spend in the open or regular economy where the enforcement agencies could match expenditure patterns with declared incomes in their search for law breakers. Both involve payments to third parties on a portion of the

income in question, except that laundering criminal money requires the payment of a fee to the launderer on the concealed portion while tax evasion involves the payment of tax on the unconcealed (or declared) portion.

Hence, if we can regard X as the sum of money which our criminal chooses to launder, or the sum of money which our tax evader chooses to declare to the tax authorities, the criminal will be concerned about the probability of (and penalty on) his concealed money being detected in the laundering process; plus the possibility that either this discovery will trigger wider investigations which will reveal his unlaundered income W-X. By contrast, our tax evader will be concerned only with the probability and penalty on his residual (undeclared) income, W-X say, being discovered. In that sense our decision makers are interested in opposite sides of the problem; the selection of the amount to be concealed taking into account the possible losses upon detection vs. the selection of the amount to be declared taking into account the possible losses on the remainder if they are detected.

But in other respects the problems are essentially the same: a proportional "fee" is charged on the decision variable X, and the declaration or concealment decision is uncertain because the decision to conceal and/or launder part of one's income does not automatically provoke a penalty or even an investigation. A penalty follows only if one is caught, i.e. it depends on the possibility of an investigation and on the probability that that investigation will actually reveal any illegal or undeclared income. At this point the tax evasion and money laundering decisions begin to diverge. The tax evader may declare all his income, or less than that. He faces a certain probability of being investigated. If he is not investigated, he will be better off if he does not declare his income; but if he is investigated he will be worse off than if he had declared all. This decision is not a trivial one. He has to choose how much to declare so as to maximise his expected retained income, or more generally his expected welfare from that retained income. The criminal, on the other hand, would presumably never wish to declare any illegal income. Instead he has to decide how much money to launder, given the cost of getting it laundered through the legitimate or underground financial systems, and given the probability that the launderers may be investigated which would cost him the money being laundered and might trigger an investigation of his other affair and lead to the discovery of his unlaundered income and a criminal prosecution. The unlaundered income may also be discovered in the nominal course of criminal investigations too. So he still has to choose how much to launder so as to maximise his expected retained income, and the expected welfare from that income.

3.
WHY DO ECONOMISTS NEED TO ANALYSE CRIME?

Economists are not well equipped to make legal or moral judgements about crime and its control. However economic analysis can contribute by explaining

the economic motivations for committing crimes, and thus predicting how criminal activity would change in different circumstances—and in response to different anti-crime policies in particular. Becker[3] and the analysis of money laundering and tax evasion above are cases in point. Secondly, economists analyse crime in order to explain the workings of particular markets (examples exist for drugs, gambling, prostitution, etc.) and assess their consequences for aggregate economic activity; in particular the political economy of organised crime syndicates.

The third issue is measurement. By their nature irregular and criminal activities remain unreported in data on economic activity, yet they may generate large incomes and expenditures, large volumes of employment and, in cases such as the drugs trade, massive capital movements which may affect financial markets as well as expenditure and employment variables. It is important to have estimates of these effects if one wishes to predict where the economy is headed, what official revenues or the foreign trade gap will be, and hence what the correct policy responses by the government should be. In the absence of that information, policies could be conditioned on quite the wrong information and may have quite a different impact from that intended. An example of how that can affect the performance of the economy now follows.

A standard feature of central concern in any economy is the trade-off between output growth (or unemployment) vs, inflation. Typically, as is clear from casual observation, an economy can operate at a higher level of aggregate demand (higher levels of incomes, expenditures, higher growth, lower unemployment rates) and higher inflation rates; or at lower levels of income and output growth, but lower rates of inflation. This trade-off is captured by the Phillips curve relationship, and most theoretical analyses would now suggest that this relationship was vertical in the long run—that is, unemployment will be fixed at its "natural" rate determined by the structure of the economy and its full capacity output. That means policy cannot affect the level of unemployment in the very long run, unless it somehow affects the underlying productive capacity through productivity growth, the choice of production technology, or the level of training etc. All that policy interventions would do is increase or decrease the rate of inflation. If we abstract from long run changes in productivity growth, this vertical relationship is drawn in Figure 1.

Of course in the short run things can be quite different; policy can help reduce unemployment by reducing interest rates (expanding the money supply) or by increasing government expenditures. In that case unemployment will fall, although prices will also start to rise as the extra demand thus created meets a fixed supply. So in the shorter run, there is a downward sloping Phillips curve, as in Figure 2. What happens after the very short run is largely a matter of how fast wages adjust to the new higher prices. If they are slow to adjust then firms face higher real demand created by the government's expansionary policies and they will employ more workers. Hence the short run trade-off of falling unemployment but slowly rising prices. But the wage bargains will be adjusted to

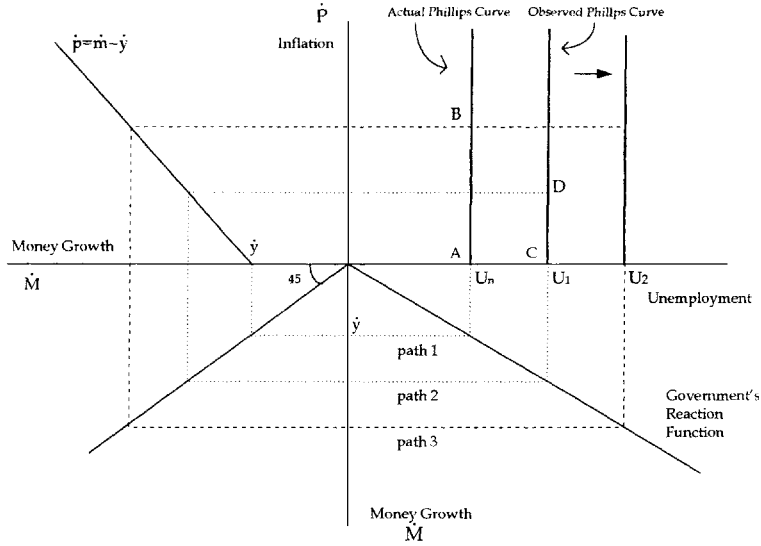

Figure 1

account for the fact that prices are now rising. That will make prices rise faster, and hence wages too, and so on. If in the long run wages fully compensate for all the price rises, real demand will be back to where it was before and unemployment will return to its natural rate—and we get the vertical curve. But in the inter-mediate stages, the government has adjusted its money supply growth in an attempt to reduce unemployment, and firms have adjusted their prices/ wages to maintain the level of real incomes. These two "reaction" mechanisms are generated by the downward sloping lines in the bottom right and top left quadrants of Figures 1 and 2: higher unemployment triggers an expansionary growth in the money supply to counter it; and, to the extent that extra demand created by extra money outstrips the expansion in supply, prices rise.

Now we can impose the irregular economy or criminal activity on this system. Take Figure 1. The left hand Philips curve, AB, is the true one—reflecting all economic activity inclusive of the incomes/employment generated by the unreported, irregular and criminal activities. But since those activities, and any dependent on them, are unreported, the actual recorded income and employment levels will be lower—and observed unemployment (which will reflect the apparent "underemployment" of those individuals involved in criminal or tax evasion activities) will be higher. Hence the right hand Philips curve CD.

Now the correct equilibrium position would be A, which sets the actual "natural" rate of unemployment (U_n, the lowest available here) with a money growth m which generates zero inflation since output growth y is exactly balanced by the demand created. This is ideal, since any attempt to grow faster (raising m to reduce U) will eventually create higher inflation but no permanent

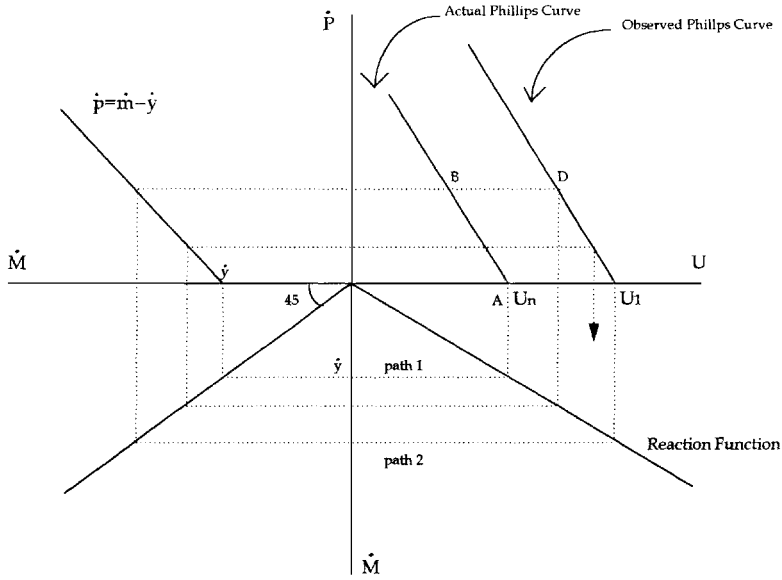

Figure 2

reduction in U. However this is not what the government or the public sees. Since part of national income is illegally generated and hence unrecorded, recorded incomes will appear to be lower, and unemployment higher to account for those lower incomes. The same would happen with social security fraud etc. The result is unemployment recorded as U1 at C. This will hold for any inflation rate. The observed Phillips curve therefore lies to the right of the true one. Given the desire for full employment, the government will now expand the money supply to reduce the higher unemployment That in turn will raise demand above the available supply and therefore trigger inflation: we move around path 2, to return to point D. That implies a permanently higher inflation rate (P1), and a higher unemployment rate (U1) will be maintained in a new equilibrium which is inferior to that which would have been achieved had policies and market reactions been based on the true Philips curve. We get apparent stagflation, in other words.

Of course *actual* unemployment is where it always was, at U_n but unreported. So in fact all that the illegal activity has done is permanently raise inflation above what it otherwise would have been, damaging the rest of society and the rest of the economy's performance. However, if illegal activities increase over time, then the observed Philips curve will shift further to the right. This will provoke the same chain of events as before but at higher money growth and inflation rates; see path 3. That means yet another permanent rise in actual inflation (and apparent unemployment) although actual unemployment remains

unchanged. Illegal activity has just served to worsen economic circumstances in the form of higher inflation, without any compensating benefits elsewhere.

In the short term we get a slightly different, and perhaps less unfavourable outcome. Figure 2 reproduces Figure 1 with a downward sloping Philips curve, and the corresponding observed curve displaced to the right. Repeating the same steps as before we find that illegal activity provokes an expansionary monetary policy reaction and additional inflation as before. But that no longer immediately establishes a new equilibrium with higher inflation at the higher observed unemployment level. Instead it leads to cycles around the diagram with alternating adjustments up and down in money supply growth, inflation and observed unemployment. Eventually the cycles converge on new inflation and observed unemployment rates which both lie below the long run levels in Figure 1, but whether that better performance is more in lower inflation or lower (observed) unemployment depends on the slope of the Phillips curve (the flatter it is the larger the gain in terms of lower unemployment). So that it is more favourable for inflation. Moreover, the actual unemployment will be lower than the natural rate too, unlike Figure 1. So in this case there is a gain to offset the inflation loss. On the other hand, for any inflation level, actual unemployment will be lower than that recorded. So the message is the same: being unable to correctly measure the main economic aggregates because of illegal activity can lead to a significant deterioration in economic performance.[4]

4.
MEASURING ILLEGAL ACTIVITY I: THE EARNINGS GENERATED

Having examined the motivations for, and consequences of, illegally generated and unreported income flows, we move to the more difficult question of how to measure those flows. How large are they? Are they an important problem, numerically? Unfortunately, by their very nature, illegal and irregular incomes are very hard to measure—even implicitly. We split the problem into two parts: trying first to measure the incomes themselves, and second to infer the size of unreported capital transfers.

4.1
Direct Inference

(1)
Indicators, Surveys and Samples

Individuals may be interviewed, or asked in survey form, whether they have participated in economic activities outside the reported sectors as either buyers or sellers. If the sample is representative, and the questions are phrased so as to get

around the obvious incentive to bias the answers against illegality, some estimates of the size of illegal/irregular incomes may be obtained.

One example is a two part survey, in which the first part simply separates those who work (legally) from those who say they do not. In a later survey, those who do not are asked if they contribute something to the family's upkeep (and how much). An alternative would be to match how many in a survey admit having paid for irregular labour services with those who admit having worked in that sector. If hours worked or average hours worked are also surveyed, we have our estimate. However as with all survey methods the results can give no more than indicators of illegal incomes. It is most unlikely that genuinely illegal incomes would be reported, or even that all irregular activities would be revealed—and income from illegally obtained capital would be missed. These estimates can be no more than a lower bound.

(2)
Auditing Methods

Tax auditing to uncover concealed earnings (whether irregular or illegal) should also give estimates of illegal incomes. Although this should not suffer false reporting by those audited, it still depends on good "sampling" to pick those groups most likely to conceal their earnings or capital returns. But having obtained estimates of unreported incomes in the sample, we can estimate their size in the tax population as a whole—which means those outside the tax net would not be included. On the other hand, auditing can be applied to firms as well as individuals and matching the results (with those from individuals) will allow us to refine our first estimates.

(3)
Expenditure vs. Incomes

Capital transactions apart, illegal incomes will be spent. The excess of expenditures over reported incomes gives an indication of those incomes. This may be done using national income accounting data, or on the basis of individual house-hold surveys (grossed up to an aggregate level). The former is fine in principle. But in practice expenditure data is more difficult to collect and is therefore more prone to errors and omissions. Similarly, we do not know if the gap between expenditures and incomes really represents illegal activities as opposed to informal activities or other transactions. Meanwhile household surveys are subject to all the same difficulties as other surveys and samples. Either way we get no more than lower bound estimates.

(4)
Inferences from Labour Market Participation Rates

Comparing the actual participation rate in a particular country with that in another country having a similar social structure, or with that in the same country in an earlier period, will give an idea of the size of the irregular labour force. However accurate estimates are not possible since the comparison participation rate will also reflect some irregular activities, not a "no irregular activities" level of participation. Moreover participation rates—even the "no irregular activities" ones—are not constant in the face of changing economic and social conditions. Finally it matters very much how part time work is measured—the incidence of double or shared jobs is likely to be much higher in the irregular and informal sectors, than in the regular economy. And even if all these measurement problems were overcome, we would still need to know labour productivity in the irregular sector. That is hard to gauge, since by definition we cannot measure it directly and it may be higher than in the regular sector because of the incentives and lack of official regulations, or lower because contracts are not enforceable and additional effort must be expended to ensure the activity remains concealed.

4.2
Monetary Measures

If examinations of the data and survey results are flawed as methods for measuring illegal incomes, we should employ indirect measures. Those involved in illegal activities have an incentive to undertake their transactions in cash in order not to reveal anything in bank statements, tax returns, or other written records. This means that the demand for money (in the form of cash) in aggregate will increase to the extent that there is illegal/hidden activity. Hence the difference between what one might take to be the "normal" demand for cash on the basis of the reported figures for economic activity, and the actual demand, will give a measure of illegal activity.

(1)
Fixed Ratios

A simple version of this approach uses the ratio of currency issued to demand deposits. If one can assume a period of no illegal activity then a comparison of the current ratio to that prevailing in that base period would show how much extra cash above "normal" was in circulation—cash which would by hypothesis be supporting illegal activities of one sort or another. This of course assumes the "normal" or legal currency-demand deposit ratio is constant; that the velocity of currency circulation is the same in the regular and irregular economies; that all irregular transactions are strictly cash; and the base year had no irregular activity. Any of these assumptions could (and perhaps should) be challenged. In

practice it appears that the numerical results are extremely sensitive to (at least) the choice of the base year, the assumption of constant velocity across sectors, and the assumption that a "normal" ratio is constant. In fact a great many other factors (legal ones!) can influence this type of ratio; e.g. variations in the opportunity cost of holding currency, taxation, income levels, financial innovations, and so on. So this does not look to be a satisfactory approach.

(2)
Transactions Data

Since transactions (including illegal ones) require data, the total stock of money will reflect the level of such transactions. If the quantity theory of money holds, MV=PT (V=velocity of money, P=aggregate price level, T=volume of transactions=total GNP). Inserting first the total volume of transactions (both regular and irregular) and then the reported level of GNP, this formula gives a measure of "illegal" GNP. To do this we again need a base year with no illegal activities. In that year a ratio of actual PT to "normal" GNP can be obtained. Then, in any other year, the ratio of MV to reported normal GNP to that in the normal year gives an estimate of how much illegal activities have boosted total GNP above that reported. This approach avoids all the assumptions about constant velocities and cash only transactions; but it retains those on the base year, the constancy of the "normal" ratios, and it requires direct estimates of V. As before all changes in the relevant ratio are attributed to the irregular economy, rather than alternatives such as financial innovations or the cost of holding money.

(3)
An Econometric Approach (Tanzi) [5]

Here we attempt to measure the determinants of a "normal" demand for money holdings. Any currency holdings above that would be due to irregular transactions and could, if the relation between money demand and incomes were stable, yield estimates of irregular GNP. This approach requires no assumptions of the type associated with the previous two approaches. Instead, if we can identify the determinants of the "normal" demand for money and those for the demand generated by illegal/irregular activities, and estimate the relationship between total money demand (normal and irregular) and both sets of determinants, then we can estimate the extent of irregular activity from the ratio of the impact of the normal components to the impact of all determinants. For example, if the burden of taxation creates tax evasion, we would include a tax variable with the other determinants of money demand in the estimation phase. Then calculating what the money demand would have been had the tax variable been set to zero shows the "normal" demand for money; and one minus the ratio

of that to actual money demand gives the proportion of irregular activity in the economy.

4.3 Empirical Estimates

Frey and Pommerehne (1984)[6] summarise a sample of the empirical evidence on the size of the irregular economy in different countries. Using the fixed ratio approach and a base year (with no irregular activities) between 1937–41, the irregular economy contributed around 10–14 per cent of US GNP in the late 1970s. However varying the base year to 1935–39 or 1925–29 increased that estimate by up to 60 per cent for only a .06 variation in the currency to demand deposit ratio. Similar estimates for the UK for 1974, with a base year of 1964, could be turned around to imply a negative sized irregular economy by changing the base year to 1963. Another study for Sweden produced estimates of the irregular economy which varied from 6–17 per cent of GNP depending on which of a plausible set of money velocity figures (from 5 to 11) were used. This method looks unreliable.

The transactions data approach with a base (no irregular activity) year of 1939, suggests that irregular activity added 22 per cent to US GNP in 1976 and 33% in 1979 (a 91 per cent increase compared to a 23 per cent growth in official GNP). Again the choice of base year is crucial, and other estimates of money velocity reduced the estimates given above.

The econometric approach has usually been applied to measuring the under-reporting of incomes as a result of high tax burdens. Thus “normal” money demand is said to be determined by income levels, prices and interest rates, and the irregular (unreported) element by a tax variable, then the contribution of the latter in 1976 implied a figure for US GNP which was 3.5–5 per cent higher than actually measured. For other countries this method yielded GNP estimates that were 13% higher in Sweden in 1978, 4–13 per cent in Germany in 1980 and 5–8 per cent in Canada in 1976. One of the problems with these estimates for the US at least, and perhaps Germany, is that national currencies may circulate widely out-side the issuing country—implying that relating actual money demand to domestic variables will overestimate the contribution of irregular activities. In addition, more than just taxation creates irregular, illegal, or unreported incomes.

Tax audits, surveys and expenditure discrepancies tend to produce similar or lower estimates, say 5–8 per cent of GNP for the US in the 1970s, although such methods are evidently less reliable in principle. For the UK in the 1970s we find 2–3 per cent which certainly appears too low. For Sweden the results are equally low at 1–6 per cent; for Germany they are higher at 5–12 per cent.

The consensus of the literature now seems to be that the econometric approach, based on money demand functions but extended to more than just the burden of taxation—that is including social security contributions, safety regulations,

Table 1 Estimates of Size of the Hidden Economy in Terms of GNP (5), 17 OECD Countries, 1978

Sweden	13.2	Germany	8.3
Denmark	11.8	United States	8.2
Belgium	11.5	United Kingdom	8.1
Italy	10.5	Finland	7.6
Netherlands	9.2	Ireland	7.0
Norway	9.2	Spain	6.0
France	8.7	Switzerland	4.5
Canada	8.6	Japan	3.9
Austria	8.6		

participation rates and various structural factors (restrictions)—yields the best estimates of the irregular economies size.

A sample of those estimates appear in the following table.

Estimates for other countries, principally developing countries and now the transition economies, are typically not available. I have seen recent estimates which suggest that including the irregular economy into Poland's national accounts over the past 2 years would reduce the reported output decline by one half.[7] There is undoubtedly some plausibility in such estimates—if only because the ownership of expensive items such as colour televisions or cars has increased during the recession. But it is very hard to judge the validity of these estimates statistically in an era of such rapid change and incomplete official data.

5.
MEASURESING ILLEGAL ACTIVITY II: CAPITAL TRANSFERS

5.1
The General Problem

The measurement of capital flight—that is capital transfers which are clearly excessive in relation to the capital base of the countries they are leaving, and which are in excess of the "normal" capital flows needed to make up a rationally chosen portfolio of holdings of different assets in different currencies—is a problem which gives economists a great deal of difficulty. It is usually thought of in relation to developing countries and economies in transition. For example, the huge build up of Latin American and African debt in the 1970s and 1980s—and now also in the transition economies—has been accompanied by large outflows of capital from those countries. At the same time as those societies were creating vast external obligations, their private citizens are acquiring foreign assets on a grand scale. That is a serious problem for such economies since it restricts investment and further development at a time when they were already restricted

by domestic debt and poor economic performance. A subsidiary concern is for the financial health of the banking system which lends money in a system with such large and apparently "irrational" flows between investment portfolios. But ultimately the concern must be for the economic health of those economies suffering such large outflows of capital when economic performance is weak—so that the recycling of capital cannot be expected to take place. In that case, even before asking what drives those transfers, one has to ask how they are financed in poor, low growth and underinvested economies. In some cases the answer may be from illegally diverted aid and foreign loans, but in many others it may be from irregular or illegal activities—tax evasion, drug trafficking, black market and smuggling operations where trade and/or price controls still function, are conducted to avoid other legal and administrative controls, and so on.

The first step in analysing these problems is to estimate the scale and persistence of these capital transfers; and then to pick out the degree of excess over what might be regarded as "normal" flows for investment purposes. Indeed, capital transfers of this kind are by definition a form of money laundering since the motivation is escape and the method is a change of jurisdiction and financial system. However this is a hard measurement to take since, by its nature, capital flight involves unrecorded and probably illegal financial transactions. Second, we need a clear definition of "normal" capital flows, so that we can distinguish the excessive and illegal elements. Third, capital transfers are often episodic rather than continuous; which suggests that in some years the transfers are associated with particular economic events—for example, poor economic management, monetary laxity and inflation, or fiscal austerity and rising tax rates, which would generate irregular rather than criminal activity—while in other years and other places criminal activities (e.g. the drugs trade) may be the main component. It will be difficult to separate those two aspects.

5.2
Different Definitions and Indirect Measures

Economists have used a number of different definitions and concepts for measuring unrecorded or excessive capital transfers. Not surprisingly they generate rather different results and implications. The big question then is, do these various estimates actually generate anything useful? Are the differences purely a matter of definition (so that we choose, and perhaps refine, the one which matches our particular problem best)? Or is it that they all capture different aspects of the problem (so none are complete, but none of them are empty)? Or is it that they are derived by deducing the unrecorded parts of the national financial accounts and therefore accumulate all the errors, omissions and definitional mismatches in that accounting framework (so that their information content is pretty low, or at least significantly obscured by random "noise")?

Anthony and Hughes Hallett[8] examine these questions by constructing "excess" capital transfer estimates for Argentina, Brazil, Mexico, the

Philippines, and Venezuela, using the three main approaches advocated by economists. These estimates are then examined for consistency and information content, as well as for their complementarities and disparities. While the information content is un-doubtedly the key issue for analysis (how much are genuine capital flows, and how much of that are potentially the proceeds of illegal activity rather than "normal" flows), the consistency and complementaries are the issue here because they show up how difficult the underlying measurement problem is. One approach is to define "excess" capital flows as the net errors and omissions figures in the balance of payments accounts, plus changes in certain categories of the non-bank private sectors holdings of foreign assets. That assumes errors and omissions are in fact unrecorded (and hence illegal) transfers; and that the other inflow and outflow figures in the balance of payments accounts are correctly measured. A second method takes these transfers to be the difference between recorded capital inflows and the sum of the current account trade deficit; that any surplus/deficit from that purpose must be a potentially illegal transfer or capital flight; and that the inflows and current account are correctly measured. The third method is to capitalise foreign investment incomes for the same year; add on foreign asset purchases thereafter, with the errors and omission figures and the cumulated differences between data on the stock of debt and the stock of external liabilities implied by the balance of payments statistics. Decumulating the result will give a series for unrecorded capital transfers. Once again we have to assume the components are correctly measured; and already some differences are appearing in the coverage of these different measures.

The main problem here is that the "errors and omissions" figures may be exactly what they say they are—a residual category reflecting the myriad imperfections in collecting national statistics. And there inevitably will be such errors even if there is also information on the unrecorded transfers too. The question is how much is "noise". Second, different definitions will imply different amounts of errors. Third, the first measure clearly is a short run concept —perhaps more appropriate to illegal capital transfers than investment flows, but we cannot be sure. Fourth, the first two measures cannot distinguish "normal" from other transfers which is a disadvantage, whereas the last depends on true reporting of investment income. Reported investment income is unlikely to be predominantly derived from illegally obtained and laundered investments.

Empirical investigations reinforce the notion that we are unable to measure unrecorded (illegal) capital transfers. Regressing the estimates obtained by each of these three methods on estimates by one of the other methods: fitting a., βi and in

$$E_{it} = \alpha_i + \beta_i E_{it} + e_{it} \qquad i \neq j$$

where is the figure obtained by method i in year t for a given country, produced very low degrees of fit ($R^2 \geq .1$) and implausible parameter values *(a.* $\neq 0, \beta i \neq 1$). This lack of consistency shows that we cannot capture the relevanttransfers by

each method—either they are capturing different aspects of thetransfers and are therefore incomplete, or they are dominated by "noise". The latter seems more likely because there was little evidence of systematic serialcorrelation or heteroskedasticity in the errors of the regressions, such as youwould expect if each had captured some systematic feature which was absent inthe other measures.

On the other hand, they are not completely without information as there are some systematic tendencies in the measures: the third measure is larger on average and more volatile, the first is always smallest and most stable; the a estimates display systematic sign patterns, but the βi estimates do not. In order to tease out what that information might be, we regressed each measure for each country on domestic inflation, domestic interest rates, the average ratio of return on foreign assets, the ratio of fiscal deficit (surplus) to GDP, and export prices. Few significant relationships were found, and even fewer of the expected signs. However the first measure showed some relation to foreign financial conditions (the return on foreign assets, export prices) and the third to domestic market conditions (inflation, the fiscal deficit), and all three were sensitive to relative rates of return. That suggests normal capital flows are still being captured here, and we need to turn to methods design to eliminate that before we can make further progress.

5.3
Direct Measures and the Hidden Economy Approach

In a more detailed study based on the techniques developed for measuring the hidden economy (Anthony and Hughes Hallett)[9] we use a proxy variable for capital transfers (the demand for foreign deposits by domestic residents) to estimate the determinants of capital transfers. The fact that this is only a proxy for all the capital transfers, including the unrecorded and illegal ones, is not a problem for estimation since all the measurement errors appear on the left hand side of our relationship. In fact the econometric theory of measurement errors says that there will be no impact on the estimated coefficient values provided that there is no systematic relationship between the measurement errors and the explanatory (or determinant) variables. We can test that theory with the usual battery of diagnostic test and forecasting error tests applied to the estimated equation's error structure. In that case, if there is no apparent effect on the estimates, figures for the total capital transfers derived from the estimated equation will be unbiased. Of course the way things are set up, we will have estimated the determinants of both "normal" or investment capital flows and for the unrecorded or illegal capital flight transfers but by partitioning the explanatory variables between those which drive "normal" capital flows and those which drive the capital flight elements, we can estimate the volume—or at least the proportion—of capital flight and unrecorded transfers.

$$y = \alpha_0 + \alpha_1 (r - r^*) + \alpha_2 E(e) + \alpha_3 W + \beta_1 T + \beta_2 \Pi + \beta_3 P + \beta_4 C + \varepsilon$$

To illustrate, suppose we specify on theoretical grounds

where y=capital flight, unrecorded transfers, or foreign deposits held
r—r*=interest rate differential vs. (say) US treasury bonds corrected for the expected rate of depreciation of the domestic currency
E(e)=expected rate of depreciation of the domestic currency
W=existing stock of domestically owned wealth
T=average tax rate
π=rate of domestic price inflation
P=discount on secondary market (domestic) debt prices
C=index of export prices

Here r—r*, E(e) and W are all variables which influence the demand for foreign vs. domestic assets which make up an investment portfolio. Therefore they drive "normal" capital flows. We would expect $\alpha_1<0$, $\alpha_2>0$ and $\alpha_3>0$ on theoretical grounds. But T, π, P and C are all variables which would drive capital flight because they signal problems within the domestic economy and would drive money to leave, unrecorded in many cases, rather than face those restrictions at home. Moreover $\alpha_1 < 0$ would imply normal investment flows, but $\alpha_1 > 0$ would imply capital flight triggered by the desire to avoid any contractions or adjustment difficulties expected in the domestic market. Obviously we cannot claim that this partitioning separates legitimate from illegal capital transfers, but it will show the proportion of any estimated or fitted transfer values which belong to the flight/unrecorded category.

This approach appears to work tolerably well in statistical terms, with good fits, the expected coefficient signs which are significant ($\alpha_1$is positive in many cases, suggesting unrecorded "flight" is probably important), and no systematic patterns in the error structure. However II, P, and C prove insignificant quite a lot of the time so it is not clear how well we have actually measured the "excess" capital transfer components, and of course we cannot separate out the potentially illegal from mere panic movements without such a detailed explanation. The computed capital transfer series also shows a good deal of volatility around fairly well established trends, which suggests periods of "panic" interspersed in longer periods of continuous transfers. That is certainly consistent with a transfer of illegal funds being tangled up with periods of straightforward capital flight—but we have no formal way to demonstrate that since we cannot reliably distinguish separate determinants for capital flight and the "normal" flows regimes.

To do the latter we also tried a latent variables technique borrowed from sociology, which breaks the explanatory equation for capital flight into two parts: a relationship linking the estimates of capital flight to its determinants (some of which will relate to illegal funds and would therefore allow us to pick out the criminal components we want), and relations linking capital flight to

various observable indicators (economic signals) of capital flight. Putting those two parts together, it is possible to eliminate the capital flight variable (it remains latent in the problem) and estimate the coefficients in the two parts together. Having done that, the implicit capital flight figures can be recovered. However, what matters here is that when we tried to do this in practice, we found (for all three countries studied) that we could get a good measure of the indicators of capital flight, but very poor measures of its determinants. That implies we can get quite a good measure of capital flight itself, but very little of what causes it. In other words, we can do little to pick out the illegal or criminal elements, and we are still faced with the underlying measurement problem.

5.4
Empirical Estimates

Estimates of unrecorded capital transfers using the hidden economy approach of section 5.3 yielded rather mixed results for Brazil, Venezuela and the Philippines. For Brazil, transfers were estimated at roughly $lbn per quarter, or around 50 cents on every dollar borrowed through the 1980s. However the transfers were uneven, with long periods of “average” values interspersed with short periods of considerably larger figures. That implies a steady level of perhaps irregular transfers, with short periods of panic transfers driven by bouts of poor economic performance.

The estimates for the Philippines suggest transfers of $500m per quarter, or 90 cents or more per borrowed dollar. In this case the panic periods produced smaller transfers around the trend values. In Venezuela the estimates are more extreme, at up to $5bn per quarter, but the short periods of larger “panic” transfers have vanished leaving only a steady flow of irregular transfers.

6.
CONCLUSIONS

The methods of economic analysis have shown that illegal and irregular earningsare important. However we have had considerably more success in analysing themotives for, and the consequences of, money laundering the proceeds of crime,than we have in actually measuring how large those effects might be. Even wherewe have managed to estimate “hidden” sources of incomes or capital transfers,we have not been able to make satisfactory estimates of how much was due tocriminal activity and how much to other unreported sources. That is the challenge for the future.

NOTES

1. J.Thomas, *Informal Economic Activity*, 1992, Harvester-Wheatsheaf Publishers, Hemel Hempstead.
2. D.Blades, "Crime: What Should be Recorded in the National Accounts and What Difference would it Make?" in W. Gaertner and A. Wenig, eds. *The Economics of the Shadow Economy*, 1985, Springer Verlag, Berlin.
3. G.Becker, "Crime and Punishment: An Economic Approach" *Journal of Political Economy*, 1968, 76, 169–217.
4. Not all economic analysis of crime has been concerned with the traditional performance and incentive issues just described. A new strand of "political economy" literature, i.e. concerned with the behaviour of special interest groups, has recently emerged. Most of this is concerned with the behaviour of organised crime, rather than with laundering and the proceeds and economic implications of crime. A typical example is Celentani *et al.* ("Regulating the Organised Crime Sector" [mimeo] University of Madrid and Naples, December 14, 1993), which looks at the strategic interactions of between organised crime syndicates and government or the regulating authorities. If the latter design punishment strategies to minimise the profits to be made from criminal activities they can increase the probability that the criminal organisation will be investigated and closed down. That in turn will force the organisation to diversify into legitimate businesses in order to ensure that it may continue to exist. The more it diversifies in this way, the smaller the high risk criminal activities become as a proportion of total output and the less the incentives (in terms of expected profits) to continue with the criminal activities which threaten a cut back (if not closure) of all activities when penalties are imposed. The diversification of the Mafia into legitimate Casinos is an example. However this strand of literature deals with the performance of crimes, rather than controlling laundering or the proceeds and implications of those crime.
5. V.Tanzi, "The Underground Economy in the United States: Estimates and Implications" *Banca Nazionale del Lavoro Quarterly Review*, 1980, 135, 427–53.
6. B.Frey and W. Pommerehne, "The Hidden Economy: State and Prospects for Measurement" *Review of Income and Wealth*, 1984, 30, 1–23.
7. J.Arvay, "The Impact of the National Accounting Systems (SNA or MPS) on Growth Rates" IIASA Conference on Output Decline in Eastern Europe, Laxenburg, Austria, November 1993.
8. M Anthony and A.J.Hughes Hallett, "How Successfully Do We Measure Capital Flight? The Empirical Evidence from Five Developing Countries" *Journal of Development Studies*, 1995, 28, 538–56.
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4
Macroeconomic Implications of Money Laundering *

Vito Tanzi

1.
GLOBALIZATION AND MONEY LAUNDERING

One of the most important economic developments of recent years has been the growing globalization of the world economy and, especially, of the world capital market. The globalization of the economy has led to an expansion of world trade twice as fast as that of the world economy. Most economies have become much more open than they had been in the past. The globalization of the world capital market, that allows individuals and firms to shift money from one country to another with little or no impediments, has made it possible for huge amounts of money to move freely and rapidly across frontiers in search of the most desirable economic habitat and the highest rate of return.

The latter development has many desirable consequences: (a) by allowing capital to move out of countries where its productivity is low and into countries where its productivity is high, the globalization of the capital market leads to a better allocation of world savings and, consequently, to a higher rate of growth of the world economy; (b) it has facilitated progress in overcoming the debt crisis by giving easy access to the international capital market to countries willing to pursue necessary adjustment policies; (c) it will help in the enormous task of integrating into the international economic system the economies under-going a transition from central planning to market; and, finally, (d) it facilitates the recycling of capital from countries with surpluses in their current accounts, such as Japan, to those in deficit, such as the United States.

While the potential benefits of greater economic integration and of freedom of capital movements are obvious and significant, there are inevitably some costs. For example, with the freer movement of goods and the increased volume of trade, it has been easier for drug dealers and weapons smugglers to move their

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*The views expressed in this chapter are strictly personal and not official views of the International Monetary Fund. Some assistance received on an earlier draft from David Nellor is much appreciated.

wares across countries.[1] As far as the globalization of the capital market is concerned, one such cost is the large, sudden, capital movements promoted 'by speculators in search of quick gains, or by legitimate investors who are influenced by herd instincts to take their money out of the country where they had invested it. The growth of hedge funds and the increasing importance of derivatives have contributed to these sudden capital movements that create great difficulties for the countries involved (see Mexico in 1994 and Italy in 1993).

Another cost of globalization is that it allows countries with structural fiscal deficits, that is with deficits not caused by the economic cycle, to postpone making the needed corrections to their tax revenue or their public spending because of their easier access to foreign borrowing. These countries may thus tend to accumulate more debt than is wise. Still another cost, and one of particular relevance for this chapter, is the greater facility that the integration of capital market has provided to criminal elements to launder the money that they acquire from their criminal activities. The international laundering of money has the potential to impose significant costs on the world economy by (a) harming the effective operations of the national economies and by promoting poorer economic policies, especially in some countries; (b) slowly corrupting the financial market and reducing the public's confidence in the international financial system, thus increasing risks and the instability of that system; and, (c) as a consequence of (a) and (b), reducing the rate of growth of the world economy.

2,
QUANTITATIVE ASPECTS OF MONEY LAUNDERING

Several studies, including the annual reports of the Financial Action Task Force (FATF), have documented the growing importance of the criminal activities that generate large monetary gains to those who engage in them. These are not the activities of the petty criminals who engage in minor or random crimes. Rather they are often the activities of groups. They include, first of all, the production and distribution of illegal drugs. This activity has acquired immense dimensions. It concerns many or most countries as consumers and few countries as producers and major distributors. The criminal activities extend to the smuggling and the illegal sale of weapons and, in a worrisome recent development, to the smuggling and sale of nuclear material. They also cover usury, fraud, embezzlement, high level corruption, kidnapping, extortion, prostitution, theft of artworks and other valuable assets, and large-scale tax evasion.

Some of these illegal activities attract large economic resources, as for example those that go into the production and the distribution of illicit drugs and, perhaps, weapons. These resources are subtracted from the regular economy thus reducing its output and its rate of growth. This reduction is an important macroeconomic aspect of these criminal activities but it is more related to the criminal activities *per se* than to the laundering of the proceeds from those

activities. These activities often generate far more "income" for those who engage in them than these individuals can reasonably or prudently spend in the short run. In order to be enjoyed over time, these "incomes" need to be stored in ways that will, to the extent possible, preserve their value and possibly convert them into assets that can later be claimed legitimately or without attracting the attention of the authorities.[2] This is, thus, what money laundering attempts to do: to maintain, as far as possible, the value of the acquired assets and to transform them (i.e., launder them) into more legitimate or more usable assets.[3] This process of storage of value and conversion into more accessible and usable forms has inevitable macroeconomic consequences when it involves large sums.

Because the activities that generate the money to be laundered are criminal or illegal activities which, by necessity, must take place far from the eyes of the authorities, it is obviously impossible to measure directly or exactly the size of the net financial gains that they bring to those who engage in them. In some cases, major costs may have to be met at the stage of production of the raw material or at the stage of distribution of the finished product, as with narcotics. These costs sustain the standard of living of the producers or the distributors so that they do not enter the circuit of money laundering and especially of international money laundering.[4] Those who manage and control the whole process, the "drug lords", end up with the very large profits. Anecdotal reports as well as the estimates of well informed observers, including some of the official agencies with jurisdiction in these areas such as the US Customs Office, suggest that the total earnings from these activities are likely to be very large.

Some guesstimates, and they cannot be more than guesstimates, have pointed to total annual gains from these criminal activities that, for the whole world, may reach U.S. $500 billion a year. How much of these gains needs to be laundered is difficult to say. It is even more difficult to assess the value of the stock of all assets acquired with laundered money. This stock would, of course, include this year's as well as past years' laundered money (in its present value) less the money that has been spent. Changes in exchange rates and in the rates of return to the previously "invested" profits would influence the total present value. It is well known that the laundering of money may be very expensive. Sometimes, fees of 30 percent (or even higher) of the amount to be laundered have to be paid or loss-making activities have to be bought. With all these qualifications, a reasonable conclusion must still be that the value of the total stock of laundered money must be much larger than the yearly figure.[5] The value of this stock is likely to exceed the gross domestic product of many countries.

The proceeds from criminal and illegal activities to be laundered are not evenly distributed among countries. In some countries, the proceeds from crime tend to be small and atomized among many petty criminals who spend them as soon as they receive them. In others, and especially in those engaged in the management of the drug trade, or where crime is organized or corruption is on a large scale, the proceeds of crime tend to be large and to be concentrated into a few hands. In the latter case, the money needs to be laundered especially when it

is received in countries other than the ones where the managers of these activities reside.

Because of the volume of money to be laundered, because of the concentration of this money in a few countries and in relatively few hands, and because the countries' authorities are more likely to uncover the domestic laundering of illegally obtained money, there have been progressively more sophisticated attempts to launder these assets internationally. Recent developments—such as (a) the large-scale privatization of public enterprises in many countries, (b) the growth of stock markets in developing countries, (c) the growing diversification of financial instruments in the international financial market, (d) the growing share of international capital controlled through entities which report tax haven countries as their place of residence, and (e) the great need for foreign capital on the part of the former, centrally planned economies, and many developing countries—have created both a strong demand for foreign financial capital and the conditions that facilitate the anonymous investment of this capital.

The globalization of the capital market and its increasing technical sophistication have oiled the process. The much larger volume of legitimate capital moving at any one time in the world has made possible for money of questionable origin to enter this huge stream of capital without attracting much attention. It is often impossible to distinguish between capital flight encouraged or induced by poor economic policies and capital flight that reflects attempts at laundering money. Currently available statistics and controls do not allow this distinction to be made. Furthermore, the fact that many countries welcome the inflow of foreign capital implies that the authorities of the capital importing countries are not likely to look too closely at the origin of the incoming capital. Some corruption of the private institutions that manage capital flows (such as the banks and the exchange houses) has also contributed.

3. THE ALLOCATION OF LAUNDERED MONEY

Available information suggests that while the activities that generate the money to be laundered tend to be country-specific and somewhat fragmented, the laundering of the money tends to be more international. The international laundering of money often is not done by the same individuals who engage in the criminal and illegal activities but by experts who are familiar with the workings of the international capital market and who are thus able to determine risks of detection and to exploit differences in controls and regulations among countries.[6] They can thus channel the funds towards financial instruments and other assets such as real estate and towards countries in which the money can more easily be invested without too many questions asked about its origin. Often, the money is first channelled, perhaps in cash, towards tax haven countries from which it is subsequently invested in other countries.[7] The economies of the tax haven countries are not large enough to absorb the volume of money searching for

places where it can be invested. Therefore, they are often used only as conduit for investments done elsewhere.

There have been reports that some of these highly trained and skilled professionals have carried out, or have commissioned others to carry out, sensitivity analyses for those who wished to launder money. These analyses attempt to assess the probability that the origin of the laundered money will be uncovered or they attempt to spread the risk among many investments and/or countries. As long as major differences exist among countries in controls and in regulation, there will be scope for well informed professional money launderers to exploit them. There are still enormous differences in controls and regulations among countries with respect to the activities that lend themselves to money laundering. In this area, the international playing field remains highly uneven.[8] Some of the tax haven countries and many other capital-starved countries, and especially the economies in transition, have almost no controls. They welcome any capital inflow regardless of its origin.[9] Therefore, money can be exported to these countries and, if necessary, it can be reinvested in third countries. By the time it is re-exported, the original provenience of the capital invested is no longer an issue.

4.
EFFECTS ON ECONOMIC POLICY

The globalization of the capital market has allowed the professional money launderers to exploit differences in controls and regulations far more efficiently and easily than it was possible when capital movements were controlled and restricted. In a way, freedom of movement of capital without the necessary step of levelling controls and regulation has led to a second best optimum. Capital movements induced by attempts at laundering money are not promoted by differences in economic fundamentals, such as differences in real rates of return in interest rates or in exchange rates, or even by tax-induced differences in *after-tax* rates of return. Rather, they are induced by differences in controls and in regulations.

Those who wish to launder money are not looking for the highest rate of return on the money they launder but for the place or the investment that most easily allows the recycling of the criminally or illegally obtained money even if this requires accepting a lower rate of return. Therefore, these movements may well be in directions contrary to those that would be predicted on the basis of economic logic. Money may move from countries with good economic policies and higher rates of return to countries with poorer economic policies and lower rates of return, thus seeming to defy the laws of economics. This implies that the world capital is invested less optimally than would occur in the absence of money laundering activities. The world rate of growth is reduced not only because of the effects of the criminal activities on the allocation of resources but also because of the allocation of the proceeds from crime. As a consequence of

these counter intuitive capital movements, the policymakers may get confused as to the policies to be pursued. The policymakers of a country that, in the face of high inflation, overvalued exchange rate, and a large fiscal deficit experienced capital inflow might be less inclined to change their current policies.

If the reported estimates of the proceeds of crime are broadly of the right order of magnitude, the value of all the assets controlled by criminal organizations must be very large.[10] A sizeable share of this value may be invested in countries other than those where those who own and control these organizations reside.[11] Some of these assets may be held in the form of deposits in foreign banks and especially in those that respect bank secrecy; some in shares in foreign enterprises;[12] some in real estates; others may be held in public bonds; others still may be held in foreign currency or in actual dollar bills. Those who own and control these assets, on the basis of the advice they receive from their financial advisers, make the decisions on whether to leave them where they are or to move them to other habitats. These decisions are made more to escape controls and to avoid detection than to search for the highest rate of return. Therefore, as already mentioned, there may be a large misallocation of resources associated with the investment of laundered money.

Apart from the issue of the optimal or at least the efficient allocation of resources, a large volume of laundered money may bring some inherent instability to the world economy. The total assets controlled by criminal organizations or by their agents are so large that the transfer of a small fraction of them from one country to another could have important and possibly systemic economic consequences. If the annual total flow of laundered money is in the hundreds of billions of dollars, and if the stock of all laundered money is even larger, it is not too farfetched to imagine that billions of these dollars could be moved around at particular times. These movements could create macroeconomic difficulties for the countries that receive or lose this money and could have a potentially profound impact on the world economy.

At the national level, large inflows or outflows of capital could significantly influence variables, such as the exchange rates and the interest rates, or even the prices of particular assets toward which the money is invested, such as land and houses. For example, when the exchange rate is free to fluctuate, the inflow of large amounts of capital into a country would lead to its appreciation and to an expansion of the country's monetary base because the capital inflow would increase the demand for domestic money which would be satisfied by the monetary authorities. The appreciation of the exchange rate would reduce the competitive-ness of traditional exports and would encourage more imports. The expansion of the monetary base might also put some upward pressure on domestic prices. Faced with this version of the so-called "Dutch disease", the policymakers of the country would be forced to tighten its fiscal policy in order to try to create a budgetary surplus to use to sterilize the monetary effects of the capital inflows. A country experiencing a capital outflow would have opposite effects.

These capital movements, especially when they are considered to be of temporary nature, could have internationally destabilizing effects because of the integrated nature of global financial markets. This integration implies that financial difficulties originating in one center can easily spread to other financial centers thus becoming systemic problems. The destabilizing effects could arise because these capital movements would not be seen to reflect differences in economic fundamentals across countries. Thus, they send confusing signals to the world economic community. International coordination of economic policy cannot be completely successful without addressing the causes of these perverse capital flows. These causes are, of course, the criminal or illegal activities and, perhaps, more important for the international policy coordination, the differences in controls and regulations.

An interesting aspect of international money laundering worth mentioning is the role that American dollar bills play in it. Being by far the largest market for narcotics, the United States generates a large share of the "income" produced by this activity. The sale of illegal drugs alone has been estimated to generate as much as US$100 billion a year in the United States. When drugs are sold in the streets of the American cities, they are bought with American currency, i.e., with actual dollar bills. These dollars, normally collected in small amounts reflecting the purchases by individual drug users, are used by the local distributors to buy their merchandize from the wholesalers. These in turn use them to pay the distributors who represent the drug lords. This money is generally smuggled out of the country.[13] As far back as 1984, the President's Commission on Organized Crime had estimated that US$5 billion a year in the form of currency was being taken out of the United States through the illegal drug trade. Recent estimates indicate much larger amounts.

Other indirect evidence points to a large stock of US dollars held abroad For example, there is a great disparity between the total amount of dollar bills issued by the American authorities, and thus known to be in circulation (about US$350 billion), and the amounts reported by periodic surveys made by the Federal Reserve System to be in the hands of Americans. On the basis of the known quantity of dollar bills issued by the American authorities, each American should be carrying about $1,500 in cash in his/her pocket. Obviously, this is not the case. Richard Porter of the US Federal Reserve System has estimated that the amount held abroad is at least US$200 billion out of a total of about US$350 billion.[14] How much of what is abroad because of money laundering activities is unknown.

Important macroeconomic implications follow from this. First, there is a kind of implicit seigniorage that accrues to the American government. The production of dollar bills is almost costless in terms of resources used to produce them. At the same time, the US Government, by issuing these dollars, can acquire purchasing power equal to these dollars issued. Second, the holding of these dollars by foreigners implies that an interest-free loan has been given to the US government because no interest is paid to those who hold them. Given the level

of interest rates, the holding of US$200 billion outside the United States implies an equivalent interest-free loan to the US Government by those who hold these dollars. In a way, the US Government is getting a kind of rent out of this money and, by implication, out of some of the laundered money. Third, by reducing the demand for *domestic* money in the countries where the US dollars are held (that is, through the phenomenon of currency substitution), the holding of dollars abroad raises the rate of inflation in those countries or at least it reduces the seigniorage that the governments of those countries receive from issuing their own money. Finally, it creates a potential instability for the world financial system because of the possibility that at some point (if, say, the value of the dollar were predicted to fall significantly) these dollars could be unloaded in exchange for foreign currency,

The development of an efficient world capital market requires that those who participate in this market in various ways such as lending internationally have full confidence in it. If this market comes to be contaminated to some significant extent by money controlled by criminal elements, it will inevitably be affected. The trust that normal individuals will have in it will be reduced, less legitimate capital would flow and the world welfare would be reduced. The market will then react more dramatically to rumors and to false statistics. These reactions can generate much more instability than is good for the world economy.

The transparency and soundness of financial markets are key elements in the effective operation of economies and both are threatened by money laundering. Criminally obtained money can corrupt some of the officials who make decisions concerning the financial market of countries. If some damage should occur to the financial markets, it could be long lasting because the credibility of markets can be depreciated instantaneously but it takes time to regain it.[15]

It is not farfetched to imagine that, through the use of proxies, criminal elements could intentionally seek to subvert financial markets by corrupting some of the designers and administrators of the laws governing banking, currency, and financial markets in particular countries and the administrators of the financial market. In a worst case and unlikely but not impossible scenario, a cartel of criminal organizations with control over large financial resources could attempt to destabilize a national economy by intentionally coordinating a transfer of funds (which they control through proxies) out of that country. They might do this, say, for punishing the authorities of that country for being extra vigilant or for introducing stricter controls. These shifts could create serious difficulties for some of the countries involved. Of course, these criminal elements may also corrupt the political process of particular countries by financing candidates who may be more likely to let these elements have their way. When the money involved is so large and the pay off to the criminal elements is so important, it seems realistic to expect that attempts will be made to install more friendly administrations.

5. ON POLICY COORDINATION AND MONEY LAUNDERING

While domestic money laundering can often be fought at the national level by each country acting with determination and good policies, an effective solution to the *international* money laundering problem can be found only at the international level. The reason is that the scope for such money laundering activity is provided by differences in controls and regulations within countries and concerning financial transactions across jurisdictions. Thus, the more effective controls are introduced in some countries, the more attempts will be made to exploit the less stringent environment of other countries. The international coordination of economic policy cannot be fully effective as long as the controls and the regulations imposed by individual countries differ and as long as there is a large pool of unstable money in search of the habitat that is most attractive from a regulatory point of view.

It would be helpful to build on the work of the Financial Action Task Force, established by the G-7 in 1989, *by seeking a comprehensive international agreement on a set of binding minimum worldwide standards of statistical, banking, prudential and financial rules that should govern domestic capital markets and international financial transactions.*

The solution to the international money laundering problem must be sought via international mechanisms: it is an international problem which requires an international solution. International money laundering is based on the exploitation, by sophisticated financial operators, of differences in financial and banking regulations of countries across the globe. Therefore, the solution to eliminating the scope for money laundering must be found in a mechanism that reduces, if not eliminates, these regulatory and legal differences across countries.

When they met in Paris in 1989, the G-7 established the Financial Action Task Force (FATF). The Task Force was mandated to examine measures that could be adopted *by each country* to combat money laundering. In April 1990, FATF issued a well-balanced set of 40 recommendations which its members should seek to implement in order to control money laundering. The FATF comprises 28 jurisdictions and regional organizations; the 24 members of the OECD, Hong Kong, Singapore, and representatives of the European Commission and the Gulf Cooperation Council.

Many members of the FATF have made significant progress in implementing the 40 FATF recommendations. The FATF has also monitored developments in money laundering methods and examined refinements to the counter-measures that it suggested in its recommendations. In addition, it has pursued external relations activities to promote widespread international action against money laundering. The main focus of the FATF has been to counter the laundering of money related to illegal drug activities but more recently, it has also been considering the laundering of the proceeds of other serious criminal activities or

other offenses which generate large funds. Proceeds from non-drug related criminal activities are now estimated to be a significant proportion of total money laundered.

Initiatives have also been undertaken in the United Nations System particularly in the area of illegal drug trafficking. Most notable is the UN Convention on this matter agreed on in Vienna in 1988. The Council of Europe and the European Communities have issued a number of statements on this question including recommendations on banking practices. The Basle Statement of Principles in 1988 also recognized that public confidence in the banking system could be undermined through association with criminals and made recommendations intended to reduce this possibility. The Commonwealth has pursued the matter by seeking to facilitate programs of mutual assistance.

Despite the substantial progress achieved by the FATF, and in other international fora, there remain significant drawbacks to the current arrangements. In particular, as long as the membership of the organization is not comprehensive, there will be free-riders who will seek to benefit from the fact that other countries have adopted rules that discourage the inflow of illegal capital. The development of the various offshore tax havens and, more recently, the growth of illegal activities and organized crime in the previously centrally planned economies, together with weak controls on their banking system, suggest that the present measures to counter money laundering need to be strengthened. Moreover, the guidelines of the FATF and other groups are in any case only recommendations. The issue is whether the framework established by the FATF can be applied internationally. The time may have come to take the next step—to build on the experience of the FATF and to make more effective the work already done.

The international financial system is an international public good which can provide its full benefits to the world community only if all its participants ensure that it remains transparent and credible: activities by any one participant to seek short-term gains can impose high costs on all. Unfortunately, the incentives for some countries or territories to gain economic advantages by attracting, through lax controls and regulations, criminal money to be invested in other countries are very high. As long as these possibilities continue to exist, international money laundering will remain a problem. It is now easy for criminals to invest their money through convenient conduits provided by offshore countries or by countries with inadequate controls.

The G-7, or possibly a group representing more countries, could take the initiative by issuing a strong statement that financial practices, by any country, that facilitate international money laundering will not be tolerated. This group could announce the intention that it would reflect this view in its dealings with other countries that follow practices that facilitate money laundering. The objective would be to raise the cost of participating in the intenational capital market to countries following those practices.

However, the international community needs to go beyond that. It should consider the establishment of *a set of rules which will form the basis for full participation by any country in the international financial market.* This market should become an exclusive club with benefits and obligations for those who wish to belong to it. An international conference, in which *all* countries or economic entities would be invited to participate, should, building on the work of the FATF, establish *minimum* worldwide standards of statistical, banking, prudential and financial rules that would be binding *on all countries.* These rules would eliminate, or at least drastically reduce, the differences in domestic regulations that encourage and to some extent make possible international money laundering. The support of the international organizations should be enlisted to effectively establish these minimum standards and, subsequently, to monitor and enforce these rules.

This leaves unanswered a fundamental question—how can countries be encouraged to participate in the conference and to enforce the set of minimum standards of financial behavior which would limit the scope of money laundering. All countries can participate in the economic gains that flow from the free movement of capital but this alone will not be enough because some countries may feel that they can gain more by attracting to them capital of doubtful origin. Consideration should be given to denying international legal recognition of financial operations transacted and rights acquired within a country that does not agree or adhere to the terms of the international agreement. Moreover, part of the agreement could involve the imposition of substantial or punitive withholding taxes on capital flows to or from countries not participating in or not adhering to the rules of the international agreement. For example, an offshore country that attracted criminal money and served as a conduit to channel it to the main international financial centers would have all its capital flows in and out of the financial centers, taxed at significant punitive rates.[16] This kind of quarantine for those not willing to play by the internationally agreed rules of the game could come into effect after, say, a period of five years during which the countries would be given the time to make the required changes.

For its part, the IMF (International Monetary Fund) views the issue of international money laundering as a significant risk to its task of maintaining an effectively operating international monetary system. There is a risk that international money laundering operations may either de-stabilize the international financial system or that countries, frustrated by the behavior of those countries offering shelter to the proceeds of criminal behavior, may eventually introduce controls on the free flow of capital. Both of these outcomes would impose serious costs on the global economy that should and could be avoided by international agreement. In Article VIII of its Articles of Agreement, the IMF requires that its members furnish information necessary for the discharge of its mandate. If its members requested it, the IMF could, in its surveillance activities, monitor in more detail the rules governing capital flows and the capital operations in the balance of payments to facilitate the monitoring

of an internationally agreed upon set of rules for capital transactions. However, many offshore centers are not IMF members so that other channels must be used to control them.

6. CONCLUDING REMARKS

This chapter has discussed briefly some of the macroeconomic implications of international money laundering activities. It has pointed out that the allocation of the world resources is distorted not only when labor and capital resources are used in criminal activities and in the production of illicit products and services but also when the proceeds of these crimes are invested in ways that defy the laws of economics. The chapter has also speculated on other macroeconomic consequences of these activities showing the potential dangers to individual economies and to the international financial system. The chapter has made a proposal that, if followed, might substantially reduce international money laundering. It has not discussed the political, legal, administrative, and financial implications of the proposal made. It is clear, however, that detailed analyses, reflecting different angles—legal, political, etc.—would need to be made before that proposal were seriously considered. It would be easy to anticipate many objections to it. However, we live in a world of second best so that it would be impossible to find a solution that passed all the objections.

Finally, the chapter has relied on published estimates or, better, guesstimates of the size of the money laundering phenomenon. The issues discussed become more important, the larger is the volume of money that is being laundered each year internationally. It is, therefore, essential to generate firmer estimates than we have so far.

NOTES

1. During the deliberations leading to the North American Free Trade Association (NAFTA) among Canada, Mexico and the United States, some opponents to the agreement called attention to this factor especially in relation to the drug trade. Recent newspaper articles have attributed to NAFTA the growing importance of Mexicans in the drug trade.
2. There is thus a kind of life-cycle character to these “incomes”. Their earning is more concentrated in time than the consumption based on them.
3. The golden rule of investing, that it is better not to put all of one’s eggs into one basket, applies also to money laundering.
4. The peasants who produce the coca leaves used to produce cocaine generally spend the money they receive. They have no need to launder their earnings. This may apply also to the “foot soldiers” who distribute the drugs in the streets.

5. The measurement problems extend beyond the lack of statistics. They cover also conceptual questions such as when money that has been laundered in the past stops being considered "laundered".
6. International money laundering requires a technical preparation and a sophistication that relatively few individuals have.
7. With increasing frequency, cases have been discovered in which employees of legitimate institutions such as banks, foreign exchange offices, investment houses and real estate agents lend their services to money launderers in compensation for large payments.
8. As of now, most countries are still not members of the Financial Action Task Force. Furthermore, not all the countries that are members have equally effective controls, For example, many countries still do not require the reporting of large cash transactions.
9. It has been reported that some banks in these countries are in the hands of criminal groups; thus, they facilitate the process of money laundering.
10. In some estimates, the value of these assets is reported to exceed two percent of the world GDP.
11. For example, a large proportion of the assets controlled by the Colombian drug lords is likely to be invested outside of Colombia.
12. Some reports have indicated that the privatization of public enterprises has attracted some of the money to be laundered.
13. As a report by the United States General Accounting Office has put it: "Smuggling currency out of the country is relatively easy" in *Money Laundering, US Efforts to Fight It Are Threatened by Currency Smuggling* March, 1994, p. 3. This report outlines the efforts by the U.S, government to control currency smuggling. However, these efforts are unlikely to be very succesful.
14. See R.Porter, "Foreign Holdings of US Currency," in *International Economic Insights,* Nov/Dec. 1993. See also V.Tanzi, "A Second (and More Skeptical) Look at the Underground Economy in the United States" in *The Underground Economy in the United States and Abroad,* V.Tanzi, ed., Lexington Books, Lexington, Massachusetts, 1982, pp. 103–118.
15. The experience with the Bank of Credit and Commerce International (BCCI) raised some questions about the effectiveness of the supervisory role of some central banks.
16. For similar ideas related to the tax area, see V. Tanzi, *Taxation In An Integrating World,* The Brookings Institution, Washington, D.C., 1995.

Part II

Tuning the Instruments

5
International and National Responses to the Globalization of Money Laundering

M.Cherif Bassiouni and David S.Gualtieri

1. INTRODUCTION

Drug trafficking, organized crime, corruption and other economic crimes that generate large financial gains have made the suppression of money laundering[1] one of the primary law enforcement issues of the past several years[2]. The international response to this situation has resulted in an unprecedented level of international cooperation in criminal matters as the nations of the world seek to combat serious crime and the money laundering that inevitably follows.[3] The initiatives that have resulted from these international efforts are the focus of this chapter.

Discussions of efforts to curb money laundering often focus on drug trafficking and its enormous proceeds.[4] The cultivation, distribution and use of drugs have increased and engulfed the world in a tidal wave that seems impossible to stem, with an estimated US$500 billion annual business.[5] It should be no surprise that thirteen international instruments have been created in response to the illicit drug traffic.[6] For the most part, however, efforts to control production and consumption have failed, as evidenced by the increase in supply and demand.[7] Irrespective of what the exact figures are, there is no doubt that the markets for drugs are expanding, the utilization is increasing, the supply base is growing, and the proceeds are multiplying. These facts are recorded in the consistently increased seizures of drugs and assets by law enforcement agencies all over the world, without any apparent reason to believe that the supply is in shortage, or that the proceeds and profits are diminished. The only visible result is the increased in-come to law enforcement agencies from the seizure of such proceeds. Another obvious consequence of the increased profits available to those engaged in such criminal activities is their utilization of these funds for investment in so-called legitimate business and financial enterprises and activities. But these funds are also used to corrupt legitimate business and public officials, and to buy political favors, This is where the real dangers lie to organized societies.

It is axiomatic that money has no color or smell, and that all money, whether derived from legal or illegal sources, uses the same financial channels. As a result, once money, from drug traffic, corruption or other offenses is in the world's financial pipelines, it is very difficult to detect it.[8] The points of entry and exit are the ones that offer the greatest opportunities for control and eventual seizure.[9] But because of international financial interests in keeping the entry and exit channels of the world's financial pipelines open, it is difficult to have effective control at these most crucial points. For reasons stated above, governments too have an interest in keeping the world's financial pipelines relatively free, open, and confidential. Thus these competing interests make the task of controlling money laundering, only for some activities and not for others, more arduous to achieve. As a consequence, the detection of illegal proceeds is selective and sporadic and, thus, of little impact on the drug business.

Recent asset control efforts consist of two fundamental parts: 1) the immobilization and forfeiture of assets[10] and 2) efforts to criminalize, discover and curb money laundering under both international and domestic law. The immobilization and seizure of assets and the criminalization of money laundering have been employed throughout the world as powerful new weapons against many forms of criminal activity.[11] Undergirding this entire approach is a primary need for effective inter-state cooperation in penal matters to guarantee the proper implementation of these innovative international law enforcement measures.[12] The requirement to freeze and seize assets, contained in mutual legal assistance treaties (MLATs) or mutual legal assistance provisions in multilateral agreements, has become central to the prevention, investigation, and ultimate prosecution of money laundering.

This chapter focuses on the many international initiatives designed to control the flow of proceeds generated by criminal activity. Initiatives will be discussed at levels ranging from the global approach of the 1988 United Nations Drug Convention to the strictly regional activities of the Organization of American States.[13]

This chapter begins by considering the context within which money laundering has been addressed. Through a web of bilateral, regional, and nearly global initiatives, the principles of international criminal law have been applied to solve this ever-expanding threat of corruption in the international financial sector. To implement the most recent initiatives, those who would tackle this dilemma must fully comprehend the rubric of international criminal law—particularly inter-national criminal law's tendency to operate at many levels or tiers.

In this connection, it must be understood that a global approach to money laundering will hinge on effective inter-state cooperation in penal matters. The mechanisms of mutual legal assistance must be implemented effectively and fairly. Because criminal organizations practise in an international sphere, so too must law enforcement authorities. The second section of this chapter presents an overview of the principles of inter-state cooperation in penal matters. The

effectiveness of these principles can be seen, at least on a bilateral level, by analyzing the experience of the United States government in using mutual legal assistance treaties (MLATs) to control the flow of illicit assets into and from many money laundering havens.

Two major multilateral instruments, the 1988 United Nations Convention and the 1990 Council of Europe Laundering Convention, employ the freezing and seizing of illicit proceeds to suppress drug trafficking, organized crime, and other offenses which generate large sums of money. These two agreements provide a framework which is implemented through other subregional, and regional initiatives on inter-state cooperation. The discussion of these instruments focusses on three topics: 1) provisions relating to the freezing and seizing of assets; 2) the manner in which inter-state cooperation is handled; and 3) obligations to make money laundering a crime under national law.

The paramount example of this international approach, and the first initiative discussed, is the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("UN Drug Convention").[14] Its strong provisions requiring states to cooperate with each other to accomplish the freezing and forfeiture of illicit proceeds and the requirement to criminalize money laundering indicate a commitment on the part of the United Nations to strike at the economic foundations of the illicit drug trade.[15] The cooperation contemplated by this treaty will require both bilateral participation and domestic legislation to effectuate any bilateral agreements. Any discussion of international efforts to control the economic gains from illicit activity must begin with this major development in international law enforcement. Significantly, however, the UN Drug Convention is limited to proceeds from drug offenses.

The second major initiative considered is the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("European Laundering Convention").[16] This multilateral instrument, which is open to accession by like-minded states which are not members of the Council of Europe, is an excellent example of the integrated approach to interstate penal cooperation. The European Laundering Convention also makes significant achievements in recognizing the need to harmonize domestic legislation with international norms. The Convention was formulated with reference, in principle, to all kinds of offenses and is not directed particularly at drug trafficking or organized crime.[17] In fact, the broad scope of this treaty is a reminder that organized crime and narco-trafficking are not the only criminal enterprises that launder and recycle funds. Indeed, a multitude of criminal endeavors generate huge amounts of currency that must be made to appear legitimate.

Four other international initiatives are significant and worthy of discussion. First, the European Community has issued a directive on the role of financial institutions in combatting money laundering.[18] Another example of a large scale under-taking to thwart international money laundering is the work of the Financial Action Task Force (FATF), a group begun by the Group of Seven

industrialized nations (G-7) which has since expanded to include a number of other nations.[19] Many of the 40 recommendations made by this body have been implemented, in one manner or another, in many national legal systems.[20] Third, the Organization of American States (OAS) has adopted model regulations related to laundering offenses and illicit drug trafficking.[21] Finally, the Basle Committee on Banking Regulations and Supervisory Practices ("Basle Committee") has developed a set of principles urging banks to take measures to curb money laundering.[22]

The international initiatives to curb money laundering create potent new law enforcement mechanisms. The final section of this chapter discusses how these new mechanisms, while important to effective international law enforcement, will inevitably affect the individual rights of criminal suspects as well as innocent third parties whose assets have become intermingled with laundered proceeds.

I.
THE STRUCTURE OF INTERNATIONAL CRIMINAL LAW AND THE ROLE OF INTER-STATE COOPERATION IN PENAL MATTERS

Initiatives designed to curb money laundering are a product of the current status of international criminal law. As such, they will have to operate within the context of enforcement mechanisms employed in inter-state cooperation in penal matters. This context is important to understanding domestic and international implications of efforts to combat money laundering.

International criminal law has always been a challenging subject, if for no other reason than its pluri-disciplinary nature. It is the convergence of the penal aspects of international law and regional law, and national criminal laws and procedures, with the addition of their respective related legal subjects. Perhaps the most important peculiarities of international criminal law are the different international, regional and domestic legal processes through which these multiple areas of the law interact.

International criminal law, and, by implication, international efforts to control illicit proceeds, are based on a three-tiered system. The first tier consists of substantive multilateral treaties that proscribe certain types of activities or conduct. These treaties may also contain provisions pertaining to inter-state cooperation in penal matters.

So far, the twenty-four categories of international and transnational crimes identified below are essentially the product of conventional international law; only piracy and the laws and customs of war are the product of customary international law. But few of these conventions contain any more than general provisions for enforcement. Furthermore, all of them rely on the "indirect enforcement system," namely, reliance on national criminal justice systems for substantive and procedural enforcement. In addition, multilateral and bilateral conventions provide the framework and specifics of certain mechanisms for

inter-state cooperation in penal matters. Thus, substantive and procedural inter-national criminal law are not integrated, but juxtaposed. Lastly, national legislation makes applicable and enforceable both the substantive and procedural aspects of international criminal law.

There are 315 international instruments, elaborated mostly on an *ad hoc* basis between 1815–1988, which cover 24 categories of offenses.[23] Typically, any one of ten penal provisions characterize substantive international criminal law instruments:

1. Explicit recognition of proscribed conduct as constituting an international crime, or a crime under international law.
2. Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like.
3. Criminalization of the proscribed conduct.
4. Duty or right to prosecute.
5. Duty or right to punish the proscribed conduct.
6. Duty or right to extradite.
7. Duty or right to cooperate in prosecution and punishment (including a duty to provide mutual legal assistance).
8. Establishment of a criminal jurisdictional basis.
9. Reference to the establishment of an international criminal court or international tribunal with penal characteristics.
10. No defense of obedience to superior orders.[24]

Of the above, several arise from recognition of the fact that states must cooperate with each other to enforce the substantive norms contained in a particular instrument.

The second tier of the system is made up of regional and bilateral treaties on inter-state cooperation in penal matters that facilitate the exchange of information and other enforcement functions between states. These treaties sometimes complement, or work in conjunction with, inter-state cooperation obligations contained in substantive multilateral treaties.

The third tier required to enforce international criminal law is national implementing legislation. This legislation also provides the domestic legal basis for the provision of inter-state cooperation.

A.
Inter-state Cooperation in Penal Matters

The manner in which states cooperate with one another in the enforcement of both domestic and international criminal law is called inter-state cooperation in penal matters.[25] Inter-state cooperation in penal matters consists of six modalities or techniques: recognition of foreign penal judgments, extradition, mutual legal assistance in penal matters, transfer of penal proceedings, transfer of prisoners

and, most recently, the seizure and forfeiture of the illicit proceeds of crime. The law enforcement objectives of this final modality are of special importance in controlling all forms of money laundering. The tracing, seizing and confiscation of illicit proceeds are expressly provided for in the UN Drug Convention and the European Laundering Convention, and also play a prominent role in "soft law" proposals such as the recommendations of the Financial Action Task Force.

The essence of international criminal law enforcement is the "indirect enforcement scheme",[26] where by substantive provisions contained in international criminal law conventions are enforced through national legal systems and by the cooperation of member-states. Consequently, the specificity of these modalities of international cooperation is critical to their effectiveness. These modalities are, to a great extent, accomplished in the UN Drug Convention and the European Laundering Convention (discussed *infra),* both of which contain detailed provisions delineating a state's enforcement obligations and the role of inter-state cooperation in penal matters.

1.
Mutual Legal Assistance

Law enforcement officials in the United States and many other nations have long recognized that organized crime and drug trafficking are international endeavors and that a key to the success of these organizations is their ability to keep their illicit proceeds beyond the reach of law enforcement agencies. In the United States, for example, law enforcement officials have struggled in their efforts to investigate money laundering activities in foreign jurisdictions, even though United States courts have subpoena authority to demand the production of evidence located abroad.[27] That technique can be effective only if there exist mutual legal assistance treaties with the country where the subpoena is to have effect. Otherwise, subpoena powers in the US can be enforced only through the court's civil contempt powers, and that can apply only when the court in question has *in personam* jurisdiction. Moreover, obtaining legal assistance through letters rogatory,[28] whereby a court in one jurisdiction formally seeks the assistance of a court in another jurisdiction, lacked the force of law and was inefficient, costly, and time-consuming.[29] To counter these obstacles in carrying out investigations and obtaining evidence admissible in court, the United States and many other countries have entered into mutual legal assistance treaties (MLATs) aimed at discovering, freezing and eventually forfeiting assets in other countries, including many of the world's most notorious laundering havens.[30]

Most bilateral MLATs contain fifteen to twenty articles. While the precise terms may differ, MLATs (and mutual legal assistance provisions in multilateral treaties) generally provide for the following forms of assistance: 1) executing requests related to criminal matters; 2) taking of testimony or statements; 3) production of documents, records, or articles of evidence; 4) serving of judicial documents such as writs, summonses and records of judgments; 5) effecting the

appearance of witnesses before the court of the requesting state; 6) locating persons; and 7) providing judicial records, evidence and information.[31] In addition to these provisions, many recent MLATs provide for the immobilization and forfeiture of assets (discussed in detail *infra*). [32] The law of the requested state will apply to the execution of all forms of assistance.

MLATs have several advantages over letters rogatory. First, MLATs represent obligations between states, while letters rogatory function merely as a matter of comity. Second, MLATs are more effective in securing evidence in a form that is admissible in United States courts. Third, MLATs are more efficient because requests travel through "central authorities"; letters rogatory must pass through courts in both countries, their respective foreign and justice ministries, and embassies.[33] Fourth, MLATs avoid the costs of employing foreign attorneys to pursue the assistance sought by a letter rogatory.[34] Fifth, letters rogatory create a situation whereby evidence may be taken in civil law jurisdictions in a manner that is not admissible in the common law of the country requesting the assistance.[35] Finally, MLATs are substantially more effective in overcoming bank secrecy laws that have impeded efforts to thwart organized crime and money laundering. (However, an MLAT will only supersede domestic bank secrecy laws where this is a term of the MLAT; otherwise a requesting party is as restricted as the law enforcement authorities of the requested state).

Based on the foregoing, an effective MLAT must contain these provisions that do the following: 1) expressly permit the use of the requested party's government process to obtain evidence for the entire investigation and prosecution process, including grand jury proceedings; 2) to avoid conflicts with the doctrine of "dual criminality,"[36] expressly permit the use of the requested party's process to obtain evidence for non-familiar or non-universal forms of crime (e.g., money laundering, racketeering, continuing criminal enterprise, structuring, or mail fraud) in addition to traditional crimes; 3) expressly permit the waiver of the requested state's bank secrecy laws under specified conditions; and 4) expressly provide for an expedited means of securing evidence which will be admissible in the courts of the requesting state.[37] The requirements of a mutual legal assistance agreement are considered in greater detail with respect to the UN Drug Convention and the European Laundering Convention.

2.
The Newest Modality: The Obligation to Trace, Immobilize and Confiscate Criminal Proceeds

The requirement to trace, immobilize, and confiscate criminal proceeds has emerged as a powerful new modality of inter-state cooperation. Interestingly, this new modality is most often executed within the context of mutual legal assistance treaties. This arrangement is illustrated by the adoption by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders of a Model Treaty on Mutual Assistance in Criminal Matters that

includes an Optional Protocol related to "proceeds of crime."[38] Although not concerned explicitly with money laundering, the Optional Protocol deals with assistance related to the enforcement of orders authorizing the tracing, seizing and confiscating of proceeds of crime.[39] Forms of assistance to be provided by a requested state include location of proceeds of crime within its jurisdiction, tracing of assets, investigations of financial dealings, and the securing of evidence which will assist in the recovery of the proceeds of crime.[40]

Where suspected proceeds of crime are located, the requested state must take measures to prevent the dealing in, transfer, or disposal of the assets pending a final, judicial determination in relation to those proceeds.[41] These procedures will be conducted in accordance with the law of the requested state.[42] Similarly, a requested state must, to the extent allowed by its law, give effect to a final order of confiscation made by a court of the requesting state.[43] Any measure taken under the Protocol must protect the rights of *bonafide* third parties.[44]

The drafters of the Protocol recognized that, although related in many ways, immobilizing proceeds of crime is conceptually different than confiscating assets.[45] Confiscation of proceeds, as discussed *infra*, is a matter that falls under the rubric of the enforcement of penal judgments. The immobilization of assets, on the other hand, is generally accepted as a matter that falls within the modality of mutual legal assistance.[46] However, in the context of this model treaty, "proceeds of crime" and immobilization measures conducted thereon were included only as an Optional Protocol. This result reflects the notion that immobilization and legal assistance, the subject of the model treaty, are conceptually and substantively different.

The Optional Protocol, the UN Drug Convention, and the European Laundering Convention contemplate that a requested state will enforce the forfeiture portion of a penal sentence handed down by a court of the requesting state. In bridging the gap between different legal systems, both Conventions allow the direct execution of an order made by a foreign court or, alternatively, the institution of confiscation proceedings in the state where the proceeds are located if so requested.[47]

For example, when confiscation is sought under the European Laundering Convention, a requested state is obligated to "enforce a confiscation order made by a court of a requesting Party."[48] To effect cooperation, the requesting Party must submit a certified copy of the confiscation order and a statement of the grounds which served as the basis for the order. The requesting Party must also certify that the confiscation order is enforceable and not subject to appeal.[49]

3.
The Recognition of Foreign Penal Judgements

When included in an MLAT or in a multilateral agreement, the requirement to freeze and eventually forfeit proceeds derived from illicit activities will require a state, at some point, to recognize the penal judgement of another state.[50] This

process is quite similar to the enforcement of a confiscation order under a treaty governing the recognition of foreign penal judgments—a modality distinct from mutual legal assistance which engenders both similar and distinct difficulties. As the European Laundering Convention illustrates, under legal assistance treaties and other instruments which contemplate the enforcement of confiscation orders, the modality of mutual legal assistance overlaps with the modality of the recognition of foreign penal judgments.

A treaty governing the recognition of foreign penal judgements rests on several guiding principles.[51] Under such a treaty, a state may be asked to enforce any of several types of penal sanctions, including prison sentences, fines, confiscations or disqualifications (e.g., the suspension of a right, such as to practise law or medicine). The principles of dual criminality and *ne bis in idem* (double jeopardy) will be applied to, and act as a restriction upon, any request to enforce a penal judgement. In order for a requested state to enforce the sentencing state's penal sanction, the sentenced person must have had the opportunity to present a sufficient defense in a proceeding which recognizes basic principles of justice and human rights. Any decision must be final and enforceable. A further limitation is that the offense which resulted in a sanction or confiscation must not be of a political, military or fiscal nature.

Generally, in making a request, a state must submit the following: 1) a certified copy of the decision or order; 2) a description of the offense which gave rise to the sanction; 3) a copy of the provision under which the act or omission is considered an offense; 4) a description of the sanction (e.g., confiscation of assets); 5) an indication of any portion of the sanction which has already been enforced; 6) a statement of the identity and location of the person sought; and, 7) in the case of confiscation, information relating to the property sought.[52]

Many of these provisions and general requirements parallel those of the UN Drug Convention and the European Laundering Convention, evidencing an overlap of these modalities in the various instruments. This overlap is problematic and suggests that, in the area of the seizure and forfeiture of assets, a separate convention should be concluded which governs the recognition of that particular form of penal judgement.

B.
Approaches to Inter-state Cooperation in Penal Matters

1.
The "Bilateral Approach"

While inter-state cooperation in penal matters can surely be a subject of multilateral arrangements, it has most often been the subject of bilateral efforts covering only one of the six modalities of inter-state cooperation. The "bilateral approach" to inter-state cooperation in penal matters, which forces states to rely

on a web of agreements, has been criticized for its piecemeal results and the quirks of historical, political and diplomatic factors which eventually influence and undermine these agreements.[53] In addition, these enforcement modalities arise under diverse international, regional, and national law-making processes,[54] and their application differs in scope and legal technique.

States are generally more comfortable with the "bilateral approach "despite its inadequacies. Governments prefer to deal bilaterally with their closest allies, partners, friends, and those they can pressure into accepting bilateral terms, as opposed to dealing with the complex and competing interests of many governments in the context of multilateral treaty negotiations. But their reliance on bilateralism (and regionalism to a lesser extent) has resulted in agreements which generally contain only one or a few of the methods of international penal cooperation, thereby failing to integrate several modalities into a single, enforceable instrument. The result of this approach is that a state must rely on one of several instruments depending on the type of cooperation required, and this fragmentation creates a number of gaps and loopholes which often make these bilateral agreements ineffective,[55]

2. The "Bilateral Approach" In Practice: US Experience with Mutual Legal Assistance Treaties

The United States has consistently adhered to the principles of the bilateral approach, erecting a comprehensive framework of MLATs in the war on drugs and money laundering. The United States concluded the first of these treaties with Switzerland in 1973.[56] Since then, the United States has concluded and ratified MLATs with the following countries: Argentina,[57]the Bahamas,[58] Belgium,[59] Canada,[60] the Cayman Islands,[61] Colombia,[62] Italy,[63] Jamaica,[64] Mexico,[65] Morocco,[66] the Netherlands,[67] Spain,[68] Thailand,[69] Turkey[70] and Uruguay.[71] MLATs with Nigeria,[72] Panama,[73] the Republic of Korea,[74] and the United Kingdom and Northern Ireland[75] have been signed but not ratified.

The United States has also entered into several interim executive agreements which cover only drug offenses with the Turks and Caicos Islands,[76] Montserrat,[77] Anguilla[78] and the British Virgin Islands.[79] In addition, the United States has entered into interim executive agreements providing formal liaison procedures for exchange of evidence (while also calling for the negotiation of a complete MLAT) with Haiti,[80] Great Britain[81], and Nigeria.[82] Finally, the United States has entered into negotiations with West Germany, Australia, Sweden, and Israel in the hope of concluding MLATs.

In concluding MLATs, the United States has focused its efforts on nations that have traditionally been havens for laundered funds or sources of narcotics and illicit drugs.[83] With this purpose in mind, one of the primary forms of assistance is the procurement of financial bank or corporate records.[84] Therefore, it is

crucial that any MLAT concluded by the United States contain a provision which allows the United States to pierce the other nation's bank secrecy laws.[85]

To a great extent, the terms of an MLAT must be tailored to the specific needs of the two states. For instance, the MLAT with Canada provides for wide assistance and cooperation due to the shared border and the large volume of cases.[86] Briefly, other examples include 1) the focus on bank secrecy in the Swiss MLAT; 2) the conclusion of an MLAT with Belgium based on that nation's financial status and legal system; and 3) the focus on inbound investment found in MLATs concluded with offshore banking centers (the Bahamas, the Cayman Islands, the Dutch Antilles, etc.).[87]

MLATs are not only beneficial to the United States, and the treaties are not merely efforts to protect United States interests at the expense of a smaller state's banking industry.[88] First, all nations have an interest in suppressing the effects of drug trafficking (e.g., related crime and local drug addiction). Second, a state may need to obtain evidence from the United States in order to effectuate local law enforcement, Third, states generally prefer to maintain friendly relations with the United States and seek to avoid United States legislation which is adverse to their interests. Fourth, states seek to discourage unilateral law enforcement measures (e.g., subpoenas *duces tecum* and other "self-help" methods) which infringe on foreign sovereignty and foreign interests.[89]

a.
The Swiss Treaty

An appropriate starting point in analyzing United States experience with bilateral MLATs is the Swiss Treaty (signed in 1973 and in force since 1977).[90] Since the treaty has been in force, the United States has made approximately three times more requests for judicial assistance than the Swiss have made.[91] The use of the treaty has generally been very successful and has led to scores of federal and state convictions.[92] A recent use of the treaty resulted in the seizure from Zurich bank accounts of $150 million in drug money sought by United States officials.[93]

However, the Swiss Treaty has been plagued by one basic problem. Swiss law allows requests to be challenged and litigated, with objections considered seriatim rather than jointly.[94] The obvious result is that delays in obtaining evidence may be particularly severe when the legitimacy of the request is challenged.[95] Another result of Article 36(a)[96] of the treaty has been to warn suspects of government investigations earlier than required by the Federal Rules of Criminal Procedure.[97]

Another provision also operates to slow United States investigations and provides suspects with an opportunity to cover their tracks. Article 29(1)(a) requires that all requests include "the subject matter of the nature of the investigation or proceeding" and a description of the "essential acts alleged or sought to be ascertained."[98] This provision can tip off suspects to the government's case and affords them an opportunity to prepare their defense

much earlier than they would be able to in the United States." Moreover, this early disclosure may result in "sticking" the prosecution with a theory of the case which is not yet certain and which, under Article 36(a), will be open to challenge in the Swiss courts.[100]

One of the primary United States objectives in negotiating the Swiss Treaty was to pierce the Swiss bank secrecy laws. [101] Article 47 of the Swiss Banking Code[102] and Article 273 of the Swiss Penal Code[103] had, for years, blocked United States efforts to obtain bank and business records. In the MLAT, the Swiss sought to protect the identities of innocent third parties whose names appear on requested documents and to prevent the United States from using the information obtained for the prosecution of fiscal (e.g., tax) offenses.[104]

In respect to the first concern, the United States sought to eradicate the Swiss practice of excising the names of third parties from requested documents (a practice which made the documents inadmissible in United States courts and disrupted the "paper trail"). Article 10 of the treaty respects this Swiss concern by allowing the requested party to balance the interest of an innocent party with the importance of the criminal proceeding in the requesting state.[105] This provision may be construed to mean that the Swiss will allow the piercing of bank secrecy only if the United States demonstrates a compelling interest. [106]

This article generally sets forth conditions where testimony or production of documents will not be compelled (e.g., attorney/client privilege), However, Article 10 does not comprehend bank secrecy laws as providing any source of a right to remain silent.[107] Moreover, execution of a request which would mean the dis closure of information normally protected by bank secrecy does not implicate Article 3(1)(a) as a request "likely to prejudice its sovereignty, security or similar essential interest."[108]

A primary motivation for the conclusion of this treaty was the mutual concern that organized crime had, for years, used Swiss bank secrecy laws to secrete illicit proceeds. The result of this concern was a special section, Articles 6–8, governing organized crime. Generally, when an investigation concerns organized crime, the Swiss must render assistance even when the alleged offenses do not meet the dual criminality test or do not appear on the Schedule,[109]

However, if the request concerns an investigation for income tax violations, requests will be honored only when the suspect is an "upper echelon" figure.[110] Even if the suspect is such a figure, the United States must demonstrate that assistance 1) is essential to the case; 2) will facilitate the successful prosecution; 3) will result in imprisonment for a significant period of time; and 4) that such imprisonment will have a significant adverse effect on the criminal organization.[111] This Article also overrides Article 5's requirement of "specialty of use," a provision designed to prevent the use of requested information for the purpose of prosecuting tax offenses.

While the Swiss Treaty has generally been effective in the prosecution of organized crime (through the use of other provisions), the organized crime provisions have rarely been utilized.[112] The treaty has been seen as successful, in

part, because publicity surrounding it and the possibility of piercing bank secrecy laws have encouraged organized crime to seek out alternative tax and banking havens, primarily Caribbean, offshore banks.[113] This result has been viewed as generally beneficial because depositors (criminals) have less confidence in the banking systems of Caribbean nations with bank secrecy laws.[114]

Because the Swiss Treaty was the first MLAT negotiated by the United States, subsequent treaties have been negotiated with the benefit of the protracted negotiations that produced the Swiss Treaty. Several lessons were learned from the conclusion of that MLAT: 1) the avoidance of drawn-out and complex negotiations; 2) avoidance of long and complex clauses; and 3) limitation of the number of clauses.[115] Theseobjectives, as shall be seen, have largely been met, considering the brevity (15–20 articles) and relative simplicity of the subsequent MLATs negotiated by the United States.

b.
The Netherlands Treaty

The Netherlands Treaty has been functioning well and is used to obtain evidence and information approximately 25 times per year (the Dutch make about half as many requests per year).[116] About half of these requests concern the Dutch Antilles—an offshore banking and tax haven.[117] The United States was particularly interested in concluding this agreement because it would provide a model for MLATs with other European states; moreover, the Dutch have a liberal view on international cooperation in penal matters and are interested in innovative methods of assistance.[118] The treaty calls for double criminality (offenses punishable in both states for more than one year) in order to execute searches and seizures or to compel the production of documents. An annex requires assistance for various tax offenses which carry a maximum of one year imprisonment,[119]

Tax matters are a significant part of the Netherlands Treaty because the United States was renegotiating its tax treaty with the Dutch at the same time as the MLAT negotiations.[120] Desiring (to some extent) to protect their tax haven status, the Dutch reserved the right to refuse assistance for fiscal offenses until the Tax Treaty had been renegotiated.[121]

c.
The Turkish and Italian Treaties

The Turkish Treaty has been used 98 times by the Turks while the United States has made only one request.[122] Similarly, the Italian Treaty has been used approximately twice as often by Italy as by the United States during the first two years that the treaty has been in force.[123] These statistics are likely attributable to two factors: 1) neither Turkey nor Italy is a bank secrecy jurisdiction; and 2)

many Turks and Italians (and their relatives) reside in and travel to the United States.[124]

Two particular points of interest in the Italian Treaty are the forfeiture provisions of Article 18 and the international subpoena provision of Article 15. Article 18 provides for the immobilization and forfeiture of assets.[125] The forfeiture provisions are contingent on irnplementing legislation; however, it was agreed that ratification would not be delayed by the enactment of legislation. The United States inactivity in this regard had been a point of contention.[126] Similar provisions appear in most of the MLATs concluded after the Italian Treaty. Article 15's provisions for the taking of testimony in the Requesting State represents the first instance where the barrier of witness consent was removed.[127]

d.
The Cayman Islands Treaty

Of the MLATs most recently concluded, the Cayman Islands Treaty has been especially effective.[128] Since it entered into force in 1987, nearly one hundred requests have been made to the Cayman Islands and the evidence thus obtained has contributed to the conviction of 95 drug traffickers.[129] This assistance has been particularly helpful in asset forfeiture proceedings pursuant to Article 16.[130]

C.
The "Integrated Approach"

The clearest way to overcome the problems inherent in the "bilateral approach" is to conclude, instead, multilateral or regional agreements which are more comprehensive and integrate several modalities of international cooperation.[131] The various modalities of inter-state cooperation should be integrated in a comprehensive codification that would permit the cumulative and alternative use of these modalities, enhance their effectiveness, and streamline cooperation efforts.[132] The integration of several modalities of cooperation could be adopted at the domestic level (in national legislation) and the bilateral, sub-regional, regional, and multi-lateral levels (in treaties on inter-state cooperation and substantive international criminal law). With a comprehensive instrument at their disposal, law enforcement authorities will be able to easily shift from one modality to another and utilize a uniform set of procedures, no longer having to resort to a separate instrument with a separate set of procedures for each type of cooperation sought.

The Council of Europe has been considering this type of integrated approach since 1987 on the basis of a project developed by an *ad hoc* Committee of Experts, which convened twice at the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy. There, the Committee of Experts determined that the Council of Europe should integrate all of the European Conventions into a single, integrated code of inter-state penal cooperation. This

conclusion was supported by a Resolution of the Council of Ministers of Justice in 1987 and the development of a Draft Comprehensive Convention.[133]

Whether on the global, regional, bilateral or domestic level, an integrated approach to inter-state cooperation is an eminently desirable course of conduct. Regrettably, however, it has not gained much governmental support on the international, regional and domestic levels. This result is somewhat surprising in light of the fact that Austria, Germany and Switzerland have successfully implemented legislation that integrates several forms of inter-state cooperation in a single act.[134] In addition, both the UN Drug Convention and the European Laundering Convention, discussed *infra*, employ an integrated approach to inter-state cooperation, albeit in a limited fashion.

Much of the work of the United Nations has acknowledged the need to harmonize and make consistent inter-state cooperation efforts. The United Nations General Assembly has adopted a series of model treaties on inter-state penal cooperation approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, August-September, 1990). The United Nations has developed the following model treaties on legal assistance: *Model Treaty on Extradition,*[135] *Model Treaty on Mutual Assistance in Criminal Matters* and its Optional Protocol on the freezing and seizing of illicit proceeds,[136] and *Model Treaty on the Transfer of Proceedings in Criminal Matters.*[137] The General Assembly also adopted measures for international cooperation for crime prevention and criminal justice.

These model treaties are expected to provide a useful framework for states interested in negotiating bilateral arrangements in these areas. They provide excellent examples of widely applicable provisions for each modality because they reflect differences in legal systems and contain only widely agreed-upon provisions. Because the legal and administrative systems of states vary widely, these model treaties contain few mandatory rules. Instead, they contain optional rules that states can adopt in bilateral and multilateral conventions. These treaties are also expected to enhance the ability of states to harmonize their national legal schemes with international obligations to provide cooperation in penal matters. To enhance the usefulness of these model agreements, the Crime Prevention and Criminal Justice Branch of the United Nations is preparing two manuals to assist states in the implementation of the model treaties on mutual assistance and extradition.

A shortcoming of these model treaties, however, is that each treaty concerns only a single modality of inter-state cooperation and, thus, does not represent an integrated approach.[138] By following the lead of the Council of Europe's Draft Comprehensive Convention, the United Nations could significantly contribute to the adoption of the integrated approach by elaborating a model treaty that effectively integrates the modalities of inter-state penal cooperation.

II.
MULTILATERAL CONVENTIONS AIMED AT MONEY LAUNDERING

A.
The 1988 United Nations Drug Convention

Perhaps the most telling indication of the perceived threat of illegal drug trafficking on a global level is the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("UN Drug Convention").[139] This Convention reflects the desire of states to utilize the immobilization and forfeiture of assets as a means to combat drug trafficking and the accompanying money laundering. The Convention's provision for legal assistance also indicates a recognition of the importance of inter-state cooperation in fighting drug trafficking on an international level.

Before analyzing the provisions of the UN Drug Convention, bear in mind that any infirmities which are indicated are likely necessary in an agreement of such scope (106 states took part in drafting this convention)[140], considering the compromises necessary to maximize the number of signatures and take account of disparate legal systems. Second, this Convention is the first step towards recognizing, and codifying, an international commitment to the suppression of the illegal drug trade.[141] Finally, this Convention contemplated subsequent bilateral and regional agreements. While the Convention empowers states to cooperation based on the convention alone, the drafters likely contemplated subsequent agreements as the true enforcement mechanism and not the convention itself.[142]

The UN Drug Convention is also noteworthy in that it makes great use of the integrated approach to inter-state cooperation. In a single text, the treaty utilizes four of the six modalities of inter-state cooperation: recognition of foreign penal judgments (e.g., the recognition of orders of forfeiture); the freezing and seizing of assets; extradition; and mutual legal assistance.

The UN Drug Convention requires the parties to enact implementing legislation consistent with their domestic legislative systems.[143] States must carry out their obligations consistent with the principles of sovereign equality and territorial integrity.[144] The parties also agree not to exercise jurisdiction or perform functions that are reserved for the authorities of the other state.[145] These provisions seem intended to prevent larger, consuming nations from interfering with the internal affairs of smaller, producing nations.[146]

Article 3 defines the offenses and sanctions covered by the UN Drug Convention.[147] First, as the title indicates, the UN Drug Convention applies only to the various crimes associated with drug trafficking and, tangentially, money laundering. More specifically, the convention obligates states to criminalize nearly every conceivable facet of the production, cultivation, distribution, sale or possession of illicit drugs. While the convention thoroughly exhausts the

possible offenses associated with illicit drug traffic, it falls short of other initiatives that cover violent crimes, terrorist acts, organized crime and other non-drug-related offenses that generate large profits.[148]

1.
Seizure and Forfeiture

Consistent with the increased use of criminal forfeiture in bilateral agreements and domestic legislation, the UN Drug Convention contains a powerful confiscation provision that requires signing parties to implement legislation enabling them to confiscate the proceeds or instrumentalities used in or intended for use in drug offenses.[149] Furthermore, parties are required to adopt measures to enable their competent authorities to identify, trace and freeze or seize proceeds, property or instrumentalities for eventual confiscation.[150] In order to effectuate these procedures and reach more assets, each state must empower its judicial or other authorities to order the seizure of bank, financial or commercial records; no state can deny compliance based on bank secrecy laws.[151]

Bank secrecy laws shield the tremendous profits of drug trafficking from law enforcement efforts and facilitate the techniques of money laundering.[152] The UN Drug Convention may provide the tool to obviate bank secrecy laws and, as a result, amend existing bilateral treaties to aid in the discovery of substantial assets.[153]

States are obligated, upon the request of another state, to submit any request to their competent authorities in order to gain an order of confiscation or to give effect to an order of confiscation issued by the requesting party.[154] Similarly, states agree to take measures to identify, trace, freeze or seize proceeds, property and instrumentalities for the purpose of eventual confiscation ordered by the requesting or requested party.[155] Pursuant to paragraphs 6–19 of Article 7 on mutual legal assistance, the requesting state must provide a description of the property to be confiscated and sufficient facts to enable the requested state to seek confiscation under domestic law or, in the event the confiscation is sought pursuant to an order issued by the requesting state, a legally admissible copy of the order and a statement of the facts upon which the order was secured.[156] If freezing of the assets is sought, a statement of facts must accompany the request.[157] Forfeiture, on the other hand, will require an order of forfeiture issued, after conviction, by an appropriate court.

Article 5 also requires parties to try to conclude bilateral and multilateral treaties to enhance the effectiveness of confiscation, tracing and freezing of assets.[158] Where a state's domestic law requires such treaties to give effect to the provisions of Article 5, a state must consider this Convention as the necessary and sufficient treaty basis.[159] This provision may be seen as amending existing treaties on mutual assistance in penal matters to provide for confiscation if those treaties lack confiscation procedures. As a result, the Convention may extend the reach of restraint and forfeiture orders to nations that have not included such

provisions in their mutual assistance agreements but who are party to the UN Drug Convention. Whether this will prove true, in practice, remains to be seen as states may be reluctant to take such steps in the absence of a specific agreement.

Once assets are confiscated, they will be disposed of according to the domestic law of the requested state, but states may conclude agreements with other states to 1) contribute the proceeds of confiscation to intergovernmental law enforcement bodies, or 2) share the proceeds with other parties on a case-by-case basis. [160] If assets have been converted or transformed into other property, any converted property will be subject to restraint or confiscation.[161] If the proceeds have been inter-mingled with legitimate assets, only an amount equal to the intermingled assets may be confiscated.[162] Also, states may reverse the burden of proof regarding the lawful origin of the assets, subject to a party's principles of domestic law—a clear indication of the prosecutorial perspective of this instrument.[163]

Finally, Article 5 provides that the provisions of this article shall not interfere with the rights of *bonafide* third parties.[164]

2.
Mutual Legal Assistance

Article 7 of the Convention requires parties to provide the "widest measure of mutual legal assistance" in investigations, prosecutions and judicial proceedings related to Article 3(1) violations, including money laundering. The Drug Convention provides a non-exhaustive list of the types of mutual legal assistance to be provided: taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information and evidentiary items; providing records and documents, including bank, financial, corporate or business records; and identifying or tracing proceeds, instrumentalities or other things for evidentiary purposes.[165] Moreover, parties may provide any other type of assistance allowed by the domestic law of the requested party.[166] This article does not encompass mutual legal assistance in regard to restraint and confiscation of assets because Article 5 contains its own provisions.

Article 7 reiterates the mandate that parties may not decline assistance based on bank secrecy laws.[167] As stated with respect to confiscation, this provision will help to overcome the hindrance of business and bank confidentiality which has undermined mutual legal assistance and efforts to suppress money laundering.[168] This provision may bolster existing and future legal assistance treaties, especially in light of paragraphs 6 and 7, which provide that the obligations of states under existing treaties are not affected by this Convention.[169] Also, if states are not party to a bilateral or multilateral legal assistance treaty, the mutual legal assistance provisions (as detailed in paragraphs 8–19) will apply; even if the states are party to such a treaty, they may agree to apply the provisions of the Convention.[170]

The confiscation and mutual legal assistance provisions, especially the bank secrecy provisions, of the UN Drug Convention will enable authorities to gain access to more assets either for the purpose of pre-trial seizure or to give effect to adjudicated orders of forfeiture. In either event, instruments such as these will significantly deprive drug traffickers and organized criminal organizations engaged in drug trafficking or money laundering of the use of their ill-gotten assets.

3.
Money Laundering

In addition to criminalizing nearly every violation associated with drug trafficking, the UN Drug Convention also contains several provisions specifically designed to thwart the effects of money laundering associated with illicit drug trafficking. As previously discussed, the Convention requires the signatory states to adopt legislation to facilitate the freezing, seizing and forfeiture of assets.[171]

Article 3 of the Convention defines the offenses and sanctions. Signatory parties are obligated to take the appropriate measures necessary to criminalize these offenses.[172] Several provisions of Article 3(1) govern drug-related money laundering.[173] The knowing conversion or transfer of property derived from a predicate offense with the purpose of concealing its illegal origin is an offense under the Convention.[174] Moreover, assisting any person committing such an offense to evade the legal consequences of his acts is also an offense.[175]

Signatory parties must criminalize the concealment or disguise of the true source of property knowing that such property is derived from one of the offenses of Article 3(1)(a).[176]The Convention also requires a signatory state to criminalize, subject to its constitutional principles and the basic concepts of its legal system, the knowing acquisition, possession or use of property derived from a predicate offense.[177] Finally, the convention also criminalizes the participation in or conspiracy to commit, and any aiding, abetting and counseling the commission of any of the above offenses.[178]

The Convention also obliges each party to make all of the above offenses punishable by sanctions which take into account the gravity of drug-related offenses.[179] Such sanctions may include imprisonment, other deprivations of liberty, pecuniary sanctions and confiscation.[180] In a significant step, the Convention provides that the listed offenses shall not be considered fiscal offenses or political offenses or regarded as politically motivated for the purposes of mutual legal assistance as provided by the Convention.[181]

A few critical points about the UN Drug Convention's mutual legal assistance provisions and money laundering provisions merit reiteration. First, recall that Article 5 generally provides for the freezing, seizing and eventual confiscation of assets derived from predicate offenses.[182] Pursuant to this goal, the Convention also provides that each party must adopt measures to identify, trace and freeze or

seize illicit proceeds, property or instrumentalities.[183] However, the most important and innovative provision of Article 5 will be of tremendous assistance in detecting and thwarting drug-related money laundering. Article 5(3) requires that signatory states empower their courts and competent authorities to order that bank, financial or commercial records be made available or be seized.[184] Parties cannot invoke domestic bank secrecy laws as a grounds for refusing a request under this article.[185]

Second, a similar provision appears in Article 7 of the Convention. In addition to its general requirements that parties shall provide each other with the widest measure of mutual legal assistance,[186] Article 7 also prohibits a party from declining to render mutual legal assistance on the basis of domestic bank secrecy laws. This prohibition also extends to other bilateral conventions affected by the Convention.[187]

B.
The Council of Europe's 1990 Laundering Convention

As discussed above, the UN Drug Convention represents a significant step towards an integration of several forms of inter-state cooperation in penal matters by incorporating provisions for the following: extradition (Article 6); transfer of proceedings (Article 8); mutual legal assistance (taking of statements, service of process, provision of evidentiary items, executing searches and seizures, etc.) (Article 7); and the newest modality of assistance in penal matters —the seizure and confiscation of assets (Article 5). The UN Drug Convention is also significant from a norm-building standpoint in that, due to its global scope, its prohibitions and mechanisms are more likely to become integral parts of international penal law. However, as discussed above, that instrument is also limited by its global scope. Thus, additional bilateral and multilateral agreements like the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime are necessary to make the international control scheme more effective.

The European Laundering Convention offers a partially integrated approach to mutual legal assistance. It incorporates the mechanisms of mutual legal assistance, provisional measures, and confiscation of assets, and is also intended to work in concert with other Council of Europe conventions on judicial assistance.[188] Therefore, while the European Laundering Convention is not exactly a paradigm of the integrated approach to inter-state cooperation in penal matters, it represents a significant step toward this aim by at least integrating a few modalities of international cooperation to work in connection with existing instruments covering other modalities.[189] In so doing, the Convention accomplished its goal of establishing a complete set of rules that cover all stages of criminal procedure from the initial investigation to the final imposition and recognition of the confiscation sentence.[190] This approach provides an effective but flexible means of international cooperation.[191]

Two other objectives motivated the negotiation of the European Laundering Convention. A primary purpose of the Convention was to complement existing Council of Europe instruments related to inter-state cooperation, such as the European Convention on Mutual Assistance in Criminal Matters,[192] the European Convention on the International Validity of Criminal Judgments,[193] and the European Convention on the Transfer of Proceedings in Criminal Matters.[194] However, the European Laundering Convention does not use the word *European* in its title, indicating that it is open for signature to non-member, like-minded states.[195] The treaty is also noteworthy because, rather than reflecting the commonality of the many civil law systems in Europe (as has been the case with many other Council of Europe instruments), the European Laundering Convention was elaborated with differing legal systems in mind. For example, Australia, Canada and the United States were represented on the expert committee that drafted the Convention.[196] The treaty "emphasizes the objectives to be achieved," but leaves the methodology for implementation to respective laws of the member states.[197]

Another important objective of the European Laundering Convention was to obligate states to adopt efficient measures in their domestic laws to combat serious offenses and deprive criminals of their profits.[198] Specifically, the European Laundering Convention will require states to align their legislation and adopt efficient legislation to investigate offenses, implement provisional measures and confiscate instrumentalities and profits of illegal activities.[199] This is not a requirement to harmonize legislation, but rather a means to enable states to cooperate effectively.[200] In pursuit of these objectives, the European Laundering Convention seeks to demonstrate how the integrated approach can bolster the effectiveness of the immobilization and seizure of assets in combatting serious offenses and the concomitant money laundering.

1. Seizure and Forfeiture and Mutual Legal Assistance

In regard to the seizure and eventual forfeiture of assets, the European Laundering Convention is perhaps the most forceful international instrument yet contemplated. Owing to its intention to undercut the effectiveness of money laundering in sustaining the economic bases of criminal organizations, the Convention's focus is naturally twofold: 1) requiring states to criminalize the offense of money laundering and 2) providing states the means to confiscate illicit proceeds, including provisional measures to immobilize those assets for eventual forfeiture. The preamble to the Convention notes the Council's belief that the fight against serious crime is an international concern requiring modern and effective methods of an international character and that depriving criminals of proceeds from crime is one of those methods. In light of this concern, the Council intended that this Convention combat all forms of serious crimes, especially drug offenses, arms dealing, terrorist offenses or any offenses which

generate large profits.[201] The European Laundering Convention draws much of its strength from its broad scope and its adoption of the trend to extend the definition of money laundering beyond drug-related offenses.[202] Therefore, the Convention overcomes the UN Drug Convention's biggest infirmity: its restriction to drug-related offenses.

Chapter II (dealing with measures to be taken at the national level) and Chapter III (concerning international cooperation) require parties to enact legislation and other measures necessary to accomplish the following: 1) confiscate instrumentalities and proceeds of crime;[203] 2) identify and trace property liable to confiscation (investigative measures);[204] 3) prevent the transfer or disposal of such property (provisional measures);[205] 4) empower its courts or authorities to order the availability of bank, commercial or financial records and require that no party may deny a request on grounds of bank secrecy;[206] and 5) ensure that interested parties affected by confiscation or provisional measures have effective legal remedies in order to preserve their rights.[207] The Convention then enumerates each party's duties as to international cooperation.

The Convention's strength emanates from the format of these provisions. Each section concerns a form of assistance (investigative assistance, provisional measures, or confiscation) and each section begins with an obligation to assist, followed by the method of execution (as governed by the law of the requested state). With this format, the Convention integrates the mutual legal assistance requirements with the procedure itself so that there can be no confusion as to what type of assistance a party is to render once it receives a confiscation request. Article 7 embodies these general goals of international cooperation by requiring that parties provide the widest extent of cooperation in investigations and proceedings aimed at confiscation. [208] Furthermore, each party is required to adopt legislation to enable it to comply with requests for investigation, preliminary measures and confiscation.[209]

Upon request, parties must afford each other the widest possible measure of assistance in identifying and tracing proceeds and instrumentalities liable to confiscation, and any assistance must be carried out in accordance with the domestic law of the requested state.[210] Parties are also allowed, without a prior request, to transmit information about instrumentalities and proceeds when a party believes that information might assist another party in carrying out its own investigations or proceedings.[211]

Parties are also obligated, upon request of a party which has instituted criminal proceedings or proceedings aimed at confiscation, to take necessary provisional measures such as freezing or seizing property which may be subject to confiscation.[212] Provisional measures must also be conducted in accordance with domestic law and, before any measures may be lifted, the requesting party must be given an opportunity to give its reasons for continuing the measures.[213]

The Convention adopts the two types of confiscation commonly used in Council of Europe States: property confiscation and value confiscation. All states have systems of property confiscation whereby the ownership rights in the

property are transferred to the state. Under this method, specific property can be confiscated, and such property may include items or substances whose possession is itself illegal, instrumentalities used in the offense, indirect or direct proceeds from the offense, and substituted property.[214] When presented with a request for confiscation of property located within its territory a party must 1) enforce a confiscation order made by a court of a requesting party or 2) submit a request for confiscation to its competent authorities for the purpose of securing an order for confiscation and, if such an order is granted, the party must enforce it.[215]

A second method of confiscation adopted by the Convention, and already used by some Council of Europe member states, is value confiscation. Under this method, the state can exert a requirement to pay a sum of money corresponding to the value of the proceeds. If payment is not obtained, the requested party may realize the claim on any property available (whether legally or illegally obtained) for that purpose.[216]

Execution of a confiscation request must be carried out pursuant to the domestic law of the requested state.[217] Moreover, the requested party is bound by the findings of fact stated in a conviction or judicial decision of the requesting party or any facts implicit in such decisions.[218] Any confiscated property will be disposed of in accordance with the domestic law of the requested state.[219]

The Convention provides some grounds for refusal to fulfill a request: requests based on political or fiscal offenses; lack of dual criminality; or any request which is contrary to the *ordre public* of the requested state or is otherwise contrary to the fundamental principles of justice of the requested state.[220] A party may not invoke bank secrecy as a grounds for refusal; however, where a request would require the lifting of bank secrecy, the requested party may require that this be authorized by a judge or another judicial authority.[221]

2.
Money Laundering

While the UN Drug Convention treated money laundering as tangential to illicit drug trafficking, the European Laundering Convention tackles money laundering as a major offense in and of itself. Moreover, the European Laundering Convention will reach laundered proceeds from a wider array of offenses than the UN Drug Convention.[222] A major aim of the European Laundering Convention is to undercut the effectiveness of money laundering in sustaining the economic bases of criminal organizations.[223] Hence, the Convention's focus is naturally on the discovery, immobilization and eventual forfeiture of proceeds of criminal activity. In support of this objective, the preamble to the Convention states the Council's belief that the fight against serious crime is an international concern requiring modern and effective methods of an international character and that depriving criminals of proceeds from crime is one of those methods.[224]

Article 6 of the European Laundering Convention governs laundering offenses and, like many other provisions of the Convention, Article 6 is largely based on the UN Drug Convention.[225] First, signatory parties are required to criminalize money laundering under their domestic laws.[226] This requirement is nearly identical to Article 3 (b)(i), (b)(ii), (c)(i), and (c)(iv) of the UN Drug Convention. The knowing conversion or transfer of illicit proceeds for the purpose of disguising or concealing the illicit origin of the property is an offense under the European Laundering Convention.[227] Like the UN Drug Convention, the European Laundering Convention also criminalizes assisting any person who has committed a predicate offense to evade the legal consequences of his actions.[228] The knowing concealment or disguise of the true nature or source of illicit proceeds is also an offense under the act.[229]

Subject to a party's constitutional principles and the basic concepts of its legal system, a signatory party must criminalize 1) the acquisition, use or possession of property known, at the time of receipt to be illicit proceeds;[230] and 2) participation in, association or conspiracy to commit, attempts to commit and aiding and abetting and counseling the commission of any of the above offenses.[231]

The most significant difference between the UN Drug Convention and the European Laundering Convention, regarding offenses which a party must criminalize, is that the European Laundering Convention is not limited to drugrelated offenses.[232] The European Laundering Convention is not limited to drug offenses because the drafters believed that it was not necessary to prevent states from limiting the scope of application *vis-a-vis* the UN Drug Convention.[233] Consequently, Article 6(4) echoes Article 2(2) and provides that states may, by declaration at the time of signature or ratification, enumerate the predicate offenses to which Article 6 (and likewise the confiscation measures of Article 2) will apply.[234] A similar result is that the Convention does not include "participation" as an element of Article 6(1)(a)-(b) and (c).[235]

Paragraphs 2 and 3 of Article 6 are, for the most part, not contained in the UN Drug Convention and are intended to assist states in implementing the provisions of paragraph 1. First, it is immaterial whether the predicate offense was subject to the criminal jurisdiction of the Party.[236] The Committee wanted to make clear that the Convention was intended to cover extraterritorial offenses. As a result, the universality principle of jurisdiction will apply to predicate offenses.[237]

Second, states may provide that the laundering offenses do not apply to the person who committed the predicate offense.[238] This provision recognizes that the penal systems of some states provide that if a person has committed a predicate offense he may not be tried for an additional offense of laundering the proceeds of that offense.[239] Finally, knowledge, intent or purpose as an element of the laundering offense may be inferred from the facts.[240]

Paragraph 3 provides for additional offenses which are not covered by the UN Drug Convention. States are not obligated to adopt such offenses, but they may adopt these measures if they consider such adoption necessary.[241] Briefly, this

article imposes a negligence standard for those who **should have** assumed that the property was proceeds.[242] In addition, the European Laundering Convention seeks to reach those who transact business with criminals knowing that payment is being made with the proceeds from crime.[243] This paragraph also seeks to criminalize the promotion of further criminal activity.[244]

III.
OTHER INTERNATIONAL EFFORTS RELATED TO MONEY LAUNDERING

In addition to the broadly negotiated international conventions already discussed, an array of other initiatives have been propounded by inter-governmental organizations, international task forces and committees, and national governments. While some of these efforts have a global scope, many of them have focused on how money laundering concerns can be addressed in a regional context or what measures can be taken domestically to prevent money laundering. Taken as a whole, however, these initiatives suggest a consistent approach to the money laundering problem that could, eventually, be integrated into a global regime designed to suppress money laundering.

A.
The EC Directive

On June 10, 1991, the Council Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering ("Directive"),[245] was passed by the European Community Council of Economic Finance Ministers (ECOFIN). With the Directive, EC member states took a common stance in efforts to thwart money laundering.[246] The Directive's two primary aims are 1) to require member states to introduce laws prohibiting money laundering by January 1, 1993,[247] and 2) to increase cooperation among member states in investigating and prosecuting money laundering. The Directive imposes significant obligations and duties upon a wide range of financial institutions, including the insurance industry. It also applies sanctions to credit and financial institutions which refuse to comply with the Directive's reporting requirements.[248]

Credit and financial institutions will be required to demand the identity of customers and must confirm the identity of the client[249] if the amount of the transaction exceeds 15,000 European Credit Units (ECUs) (equivalent to approximately US$18,500).[250] The Directive also requires the lifting of bank secrecy laws in the applicable jurisdictions.[251] Many states have implemented the Directive's requirements with new or amended national legislation.[252]

The Member States of the European Community are also planning a supranational European police force to regulate anticipated problems with currency movement once Europe is integrated in 1992,[253] while many Caribbean

nations are discussing the benefits of a regional criminal court and a multinational narcotics strike force.[254]

B.
The Financial Action Task Force and the Caribbean Financial Action Task Force

The Financial Action Task Force (FATF), initiated in July 1989 by the G-7 nations and presently consisting of 28 members,[255] prepared a report on money laundering ("Task Force Report")[256] which hasbeen called "the single most comprehensive, significant and forceful international declaration on money laundering to date."[257] These nations represent 80% of the world's 500 largest banks. At the time of the Task Force Report, only a few of these nations had criminalized money laundering. [258]

While the FATF's smaller membership eases implementation and is conducive to developing consistent policies, there are some drawbacks to its Eurocentric composition. FATF members are mainly states with sophisticated, highly developed economies where financial regulation is commonplace. These states also have a high number of drug users and are major importers, rather than producers, of illicit substances. Though the FATF conducts international outreach programs, its current makeup does not adequately represent states that are traditional laundering havens, drug producing states, and states with uneven or emerging economies.[259]

The Task Force Report consists of forty recommendations and, while it has no legal effect, it is a useful tool in formulating a unified policy to combat money laundering.[260] This section discusses that ground-breaking report and digests the progress of the FATF in its first five years of operation. In its most recent report, FATF-V decided to continue its work for an additional five years (until 1998–99).

The topics covered by the Task Force Report are comprehensive and include definition of the offense of money laundering,[261] provisional measures and confiscation,[262] customer identification and record-keeping requirements,[263] the increased diligence of financial institutions,[264] measures to cope with nations that have insufficient or no anti-money-laundering measures,[265] administrative cooperation,[266] and mutual legal assistance in extradition and confiscation.[267] The overarching recommendations of the Task Force Report strongly encourage implementation of the UN Drug Convention, the limitation of bank secrecy so as not to impede the detection and suppression of money laundering, and increased mutual legal assistance in money laundering investigations.[268]

The delegations to the FATF agreed to continue its work for a period of five years. This five-year period will be marked by continuous review of the FATF's effectiveness and the need to continue its mission. In a report prepared after its first full year of implementation,[269] the Task Force identified several areas where the 1990 recommendations had been effective and other areas which needed

further attention. The FATF's observations and commentary upon review can be divided into three categories: 1) an assessment of the implementation of the forty 1990 recommendations; 2) a need to extend the geographical reach of the FATF recommendations; and 3) a projection of the FATF's role in the future of combatting money laundering. Only the first of these categories merits detailed discussion here.

As of May 1991, most FATF countries and participating countries had substantially implemented the legal measures recommended by the 1990 FATF.[270] Very few nations indicated that implementation of a particular measure was not foreseeable.[271] However, of the nations participating in the follow-up survey, several indicated obstacles to improving domestic legislation (recommendations 4–8) that is designed to facilitate mutual legal assistance and other forms of cooperation (recommendations 32–40).[272] Particular obstacles included defining predicate offenses and the apparent inability of some states to establish corporate criminal liability.[273] These difficulties, in turn, impede or preclude effective mutual legal assistance because many states will be unable to fulfill the requirement of dual criminality.[274] The FATF believes that these obstacles may be over-come by flexible relations and the harmonization of domestic legislation.[275]

Several other obstacles were identified through the survey process, including the increasingly large role played by non-traditional financial institutions and businesses and professions which deal in large sums of currency.[276] To cope with this growing dilemma, the FATF classified these professions under four broad headings in order to facilitate the implementation of recommendation 11 relating to such organizations.[277] Another enforcement problem identified by the survey related to a lack of cooperation between law enforcement authorities. Often, technical and legal difficulties, such as rights of privacy and confidentiality, hinder effective legal assistance. These difficulties may be attributed to the inability to satisfy dual criminality, which leads to a refusal to provide information.[278]

In its third year, FATF-III began to look more closely at the level of compliance with FATF recommendations of its members. It is expected that all of the member countries will be evaluated in the next two years (i.e., by the end of 1994). Another task of the FATF is to keep abreast of "evolving money laundering techniques." This function is made easier by the fact that the FATF is the world's only body which is concerned solely with the dilemma of money laundering. Endeavors have also been made, in the third year, to coordinate efforts with non-member countries and relevant international bodies. Particular attention has been paid to nations in the Caribbean region, the Asia-Pacific region, Central Europe, Eastern Europe and Africa.[279]

The FATF's fourth annual report, released in June 1993, indicated that nearly all of the twenty-six member countries had made further progress in implementing the FATF's forty recommendations. For example, ten members had enacted measures to criminalize money laundering and an additional eight members were in the process of doing the same. In its fourth year, the FATF

focused on three primary areas: 1) evaluating the progress of its members in implementing the FATF's recommendations; 2) monitoring developments in money laundering techniques and considering their implications on possible counter measures; and 3) implementing an external relations program to promote efforts to combat money laundering.[280]

The report indicated that the FATF continued its task of conducting in-depth evaluations of the money laundering efforts of its members. Evaluations consisted of on-site visits by money laundering and financial experts and an analytical report of the findings. The report contained summaries of evaluations for eight member countries: Austria, Belgium, Canada, Denmark, Italy, Luxembourg, Switzerland, and the United States.[281]

The FATF did not discern any genuinely new laundering techniques. But one of the gravest concerns identified by the FATF during 1992–93 was that non-bank financial institutions (such as currency exchanges, check cashers and casinos) continued to be significant centers of money-laundering activities.

Though no new recommendations were adopted during FATF-V (1993–1994), the FATF's report on its fifth year of operation revealed significant developments in the implementation of the original 40 recommendations and suggested new possibilities for bringing money laundering under control.[282] Nearly all FATF members have criminalized money laundering, and all members either permit or require their banks to report "suspicious" transactions. Many members have also had some success in amending their bank secrecy laws, which will assist those members that have constructed a legal framework for mutual assistance in criminal matters. Providing assistance in the freezing, seizing and confiscation of assets is a priority for many FATF members; many members have ratified the European Laundering Convention.

Several trends continue to emerge in money laundering. As nations move toward closer regulation of the traditional financial sector, FATF-V revealed that money launderers continue to identify alternative routes such as shell companies, electronic funds transfers, non-bank financial institutions (e.g., currency exchanges), and non-financial institutions (e.g., travel agents and auto dealers). Areas of the globe identified as particularly conducive to laundering include Central and Eastern Europe, Asia, and South America.

Perhaps the most significant development of FATF-V is the decision to continue the FATF for an additional five years, during which time the FATF will 1) continue to monitor the progress of members in implementing recommendations;[283] 2) re-view money laundering techniques and countermeasures; and 3) carry out external relations to promote world-wide action against money laundering.

Some members have encountered difficulties in implementing the FATF recommendations. For instance, some members have constitutional or other legal impediments to establishing corporate criminal liability for laundering offenses. In addition, only about half of the FATF members have ratified the UN Drug Convention.

A significant development closely related to the FATF is the formation of the Caribbean Financial Action Task Force (CFATF) in June of 1990.[284] In November 1992, at a Ministerial meeting in Kingston, Jamaica, the CFATF agreed to follow the forty recommendations of the FATF, as well as twenty-one additional recommendations.[285] The CFATF also agreed to establish procedures to monitor the implementation of the recommendations. In December 1994, implementing the CFATF recommendations was one of many action items relating to money laundering in the "Plan of Action" that emerged from the Summit of the Americas in Miami, Florida.[286]

C.
OAS Initiatives to Combat Money Laundering

In recent years, the Organization of American States (OAS) has taken steps to suppress the flow of narcotics and illicit proceeds throughout its territory. Two instruments, in particular, deserve mention: the Draft Inter-American Convention on Mutual Assistance in Criminal Matters ("Draft Convention")[287] and the *Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses* ("Regulations").[288]

Although it appears to be a typical mutual legal assistance treaty in many regards, the Draft Convention utilizes several procedures related to the freezing and seizing of assets that have characterized the mutual legal assistance treaties recently concluded between the United States and several laundering hubs. First, a requested state must execute requests for the search, seizure, attachment and surrender of any items, documents, records or effects.[289] The law of the requested state will apply to any such procedure.[290] Second, the central authority of any party may convey, to the central authority of any other party, any information related to the existence of any proceeds, fruits or instrumentalities of a crime within its territory.[291] Finally, if proceeds are found, the parties must assist each other in taking precautionary measures to secure the proceeds, fruits and instrumentalities of the crime.[292] The extent of assistance permitted will be determined by the laws of each state.[293] These provisions represent recognition, on the part of the OAS member states, of the importance of inter-state cooperation in controlling the proceeds of crime and presaged more detailed efforts like the Regulations discussed *infra.*

In 1990, the OAS adopted the mandates of the *Declaration and Program of Action of Ixtapa* and embarked upon a course dedicated to halting money laundering and controlling the proceeds from crime.[294] Several of the measures recommended by the declaration related to money laundering and judicial assistance, including *inter alia:* emphasizing the need for legislation that criminalizes money laundering and makes it possible to trace, seize and confiscate illicit proceeds; recommending to member states that they develop mechanisms of bilateral and multilateral cooperation to prevent the laundering of proceeds and facilitate the tracing, seizing and forfeiture of assets; and, finally,

proposing to the OAS General Assembly that it direct the Inter-American Drug Abuse Control Commission (CICAD) to draft model regulations in conformity with the 1988 UN Drug Convention.[295]

In response to this command, CICAD drafted, and the General Assembly adopted, *Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses* ("Regulations").[296] TheGeneralAssembly of the OAS recommends that these measures be adopted by the member states, pursuant to their respective legal systems; the Regulations have no independent legal force.[297] The Regulations are extensive—comprising nineteen lengthy and detailed articles that broadly define laundering offenses.[298] They include, *inter alia,* the freezing[299] and eventual confiscation of proceeds of crime;[300] the freezing of proceeds connected to illicit traffic committed against the laws of another country;[301] various measures related to inter-state cooperation[302] (traditional mutual legal assistance and provisional measures[303] and the recognition of foreign orders of forfeiture);[304] and a prohibition against the use of bank secrecy as an impediment to enforcement.[305] In addition, significant protections are accorded to the property rights of *bonafide* third parties.[306] Special note should be taken that, like the UN Drug Convention, the Regulations suffer from the limitation that offenses criminalized under them only include drug-related money laundering.[307]

The bulk of the Regulations, however, pertain to significant requirements and restraints which will apply to a broad array of financial institutions.[308] Under the Regulations, financial institutions may not keep anonymous accounts or accounts under fictitious names and they are further required to record and verify the identity of clients.[309] Any records must be turned over promptly to the competent authorities, who may then share that information with other domestic and foreign competent authorities in cases concerning drug-related violations.[310]

The Regulations employ a system of currency transaction reporting similar to that mandated by many domestic statutes (most notably CTRs that must be filed in the United States) whereby financial institutions will be subject to extensive reporting requirements for transactions which exceed a specified amount.[311] Records must be kept for five years and must be made available to the courts or competent authorities for use in civil, criminal, and administrative proceedings related to illicit traffic or illicit offenses.[312] Special provisions apply to suspicious transactions; any such transaction must be promptly reported to the competent authorities.[313] Any such report, if made in good faith, will not subject the institution or any individual to civil or criminal liability related to the making of an unauthorized disclosure.[314] One shortcoming of the Regulations is that no provision is made for the regulation of electronic wire transfers, although to the extent that any such transactions are "suspicious," they must be reported.

Stiff penalties apply to financial institutions or employees thereof found to be in violation of the regulations. The institution itself will be held criminally liable for the actions of its employees, staff, directors, owners, or authorized representatives and may be subjected to fines and suspension of an operating

license or operating charter.[315] Liability must be premised on a willful failure to comply with the Regulations or the willful filing of a false report.[316] These Regulations, drafted in such detail, will likely prove indispensable to the development of the type of domestic legislation necessary to the effective implementation of multilateral instruments related to narco-trafficking and money laundering.

D.
Basle Committee's Statement of Principles on Money Laundering

In a statement issued in December 1988, the Basle Committee on Banking Regulations and Supervisory Practices ("Basle Committee") declared that it would direct its attention toward halting international money laundering. The Committee, comprised of representatives of the Group of 10 industrialized nations (G-10),[317] issued a statement of principles urging banks to take several measures to curb money laundering.[318] The statement is not legally binding, but is, instead, an example of the "soft law" approach that recommends measures to be adopted. Banks were urged to take these measures: obtaining identification information about customers, taking steps to ascertain the true ownership of accounts and assets, refusing to conduct business with customers that refuse to provide identification information, refusing to carry out suspicious transactions, and taking appropriate legal actions in response to suspicious transactions.[319] To implement these measures, banks were requested to adopt formal procedures and develop specific policies for the identification of customers and the maintenance of financial records.

IV.
NATIONAL STRATEGIES TO CONTROL MONEY LAUNDERING

Though money laundering is a complex problem, with global dimensions and potentially very damaging effects on national societies, the substantive elements of a domestic strategy to control it are not difficult. But they require political will by governments, and administration, resources, and technical personnel to make them effective. Several of the initiatives discussed above contain the same basic elements and they are all somewhat consistent in their approach to better regulation of financial institutions and establishment of money laundering as a serious criminal offense. The actions taken at the domestic level are encompassed in the following strategies:[320]

A.
Criminalize Money Laundering

Countries may create the substantive offense of money laundering as a matter of domestic policy or they may do so under the auspices of an international treaty. For instance, Recommendation 4 of the FATF suggests that countries take measures to criminalize the offense of money laundering in accord with the UN Drug Convention, which requires member states to criminalize drug-related money laundering. In addition, the European Laundering Convention requires member states to make all money laundering a criminal offense.

National strategies to criminalize money laundering differ in two primary ways. First, the predicate offenses that generate the illicit proceeds vary from country to country. Some states have criminalized money laundering only with respect to drug-related offenses, but FATF Recommendation 5 urges states to consider criminalizing money laundering based on all serious offenses. This approach has been adopted by many countries and is illustrated by the European Laundering Convention. National strategies also vary with respect to the scienter or *mens rea* required before a charge of money laundering can be made. Most countries require that the defendant know that the funds were derived from criminal activity; other countries allow intent to be inferred from the circumstances or even criminalize conduct that is reckless or negligent.

B.
Enable Authorities to Trace, Freeze and Confiscate Illicit Proceeds

As has been discussed with regard to the UN Drug Convention and the European Laundering Convention, enabling national authorities to trace, freeze, and confiscate the proceeds of crime has emerged as a significant weapon in the war on money laundering. Countries should be able to take these measures as a matter of domestic law enforcement and in response to an appropriate request from another country. A request will most likely be appropriate if both the requesting and requested states are parties to the UN Drug Convention, the European Laundering Convention, or one of the growing number of mutual legal assistance treaties that contain such a provision. The importance of implementing these procedures at the national level is embodied by FATF Recommendation 8.

Of course, national schemes to implement these measures will vary. Some states will compel forfeiture of assets only as part of a criminal conviction; other states allow assets to be frozen and confiscated during civil and administrative actions as well. Similarly, some states will provide assistance in the freezing and confiscating of assets only under the principle of dual criminality (i.e., the offense giving rise to the proceeds and the charge of money laundering itself must be a criminal offense in both the requesting and requested states). Finally,

some countries limit the application of these measures to drug-related offenses, including money laundering.

C.
Require Financial Institutions to Obtain Customer Identification Information and Prohibit Anonymous Accounts

One of the primary techniques employed by national regulations is the requirement that financial institutions gather additional information about their customers and keep other types of records that could eventually aid law enforcement activities. Governments have taken steps to obtain more information about financial transactions by creating regulations for banks and financial institutions that require them to 1) obtain information about the true identity of customers; 2) abolish anonymous accounts and accounts handled through intermediaries like attorneys and accountants; 3) keep more extensive records and retain those records for a period of at least five years; and 4) establish internal procedures designed to detect money laundering. The importance of customer identification and achievement of some level of transparency in banking is reflected by the prominence of such initiatives in the FATF Recommendations, the EC Directive, and the Basle Committee Statement. Implementing these record-keeping requirements, combined with the reporting requirements discussed below, necessarily involves a limitation on the application of bank secrecy laws and the right to financial privacy.

D.
Require Financial Institutions to Report Large Cash Transactions and All "Suspicious" Transactions

By using an instrument known as the currency transaction report (CTR), many countries require both traditional and non-traditional financial institutions to report large or "suspicious" cash transactions to the government. In countries that have enacted such requirements, all cash transactions that exceed a threshold amount must be reported to the government.[321] This requirement does not apply only to banks; businesses such as casinos, securities dealers, automobile dealerships, currency exchange houses and other cash intensive businesses are also required to report large cash transactions. Some national laws also require banks to report all "suspicious transactions."[322] This requirement raises some thorny legal issues. For instance, some countries impose criminal liability on bank officials that fail to report such transactions. Additional penalties apply to bank officials that warn customers of current or pending investigations. Another complication concerns the possibility of an erroneous report of illegal activity, subjecting banks to potential civil liability from lawsuits filed by customers erroneously accused of wrongdoing. Customers may also sue banks for disclosure of private financial information that violates a contractual obligation or

national bank secrecy laws. Many countries resolve this dilemma by granting banks immunity for reports of suspicious transactions made in "good faith".

E.
Place More Forceful Controls on Professionals

National mechanisms to control money laundering are beginning to focus on the role that professionals such as lawyers, accountants, and securities dealers play in the process of money laundering. Some national laws place strict record-keeping and reporting requirements on all professionals involved in the financial sector. This is the least effective area of national control. The difficulties associated with means of professional self-controls, and other means of prevention and control of independently regulated professions, are discussed below.

F.
Provide for Inter-state Cooperation in Criminal Matters

In order to implement the requirements of international conventions, states will invariably be required to enact legislation permitting them to provide a variety of inter-state cooperation in penal matters, including recognition of foreign penal judgments (e.g., the recognition of orders of forfeiture); extradition; mutual legal assistance; the freezing and seizing of assets; and transfer of proceedings. Accordingly, many countries already have legislation covering these topics, and that legislation may simply need to be amended to include these anti-money laundering conventions. Issues of note in this area include 1) resolution of questions of *mens rea;* 2) creation of mechanisms to deal with dual criminality; 3) harmonization of domestic implementation with international requirements; and 4) establishment of efficient means of gathering and transmitting information.

The various initiatives designed to fight money laundering, including the "hard law" of treaties and the "soft law" of international directives, will require states to implement novel law enforcement techniques. States will need assistance in developing these domestic initiatives. Even though the obligation to provide legal assistance stems from treaties—either bilateral, regional or multi-lateral—any such request must be executed according to domestic law.[323] Therefore, as states formulate and implement domestic measures in order to comply with multilateral agreements which require a degree of inter-state cooperation, such as the UN Drug Convention and the European Laundering Convention, they will require guidance as to how domestic measures can be drafted in a manner that complies with the multilateral instrument.[324]

Toward this end, it has been suggested that the United Nations should assist member states in developing laws which are sufficiently compatible and harmonious to render international cooperation effective.[325] A model of such a law has already been propounded in the Model Regulations developed by the

OAS and discussed fully *infra*. In addition, as noted above, Austria, Germany and Switzerland have each adopted the integrated approach in their domestic legislation.

V.
INDIVIDUAL RIGHTS ISSUES RAISED BY EFFORTS TO COMBAT MONEY LAUNDERING

Recent international developments demonstrate a commitment on the part of the world's nations to devise and apply powerful new weapons in the fight against money laundering. They also demonstrate the modern trend to include direct and intrusive enforcement measures in international instruments.[326] The measures contemplated by the international initiatives discussed above may come into conflict with the domestic and international obligations of many states to respect the rights of their citizens. In exercising these potentially powerful new law enforcement tools, both requesting and requested states will be subject to two major limitations: 1) those contained in the treaties themselves (which incorpo-rate the limits of domestic law), and 2) those imposed by international human rights norms and standards.

Both of the initiatives of primary concern here, the UN Drug Convention and the European Laundering Convention, contain important safeguards to protect the rights of suspects and defendants. Both treaties also strive to protect the property interests of *bona fide* third parties. States must comply with these procedures when making and granting requests. However, despite these built-in protections, several potential problems inhere whenever law enforcement measures are drafted from a purely prosecutorial perspective and, unfortunately, neither treaty makes significant advances in solving these problems.

Both treaties employ a similar approach to protect the rights of interested persons. First, both treaties require that in providing legal assistance or other forms of cooperation, including the enforcement of confiscation orders, the law of the requested state will apply.[327] Therefore, suspects and defendants will be entitled to any procedural protections afforded by the constitutions, domestic statutory or judge-made law of the requested state. Second, both treaties require a requesting party to supply at least some explanation and documentation to support the request for cooperation; insufficient requests can justifiably be refused by the requested party.[328] For instance, under the European Laundering Convention, requests for any form of cooperation must specify the authority making the request, the object and reason for the request, relevant facts and circumstances related to the investigations or proceedings, and texts of relevant statutes and laws (including an indication that the measure or cooperation sought could be taken in the requesting party under its own law).[329]

Third, both the United Nations and the Council of Europe treaties provide states the discretion to refuse to grant a request if it violates certain well-established principles of legality.[330] Article 18 of the European Laundering

Convention provides states with several grounds for legitimately refusing to grant a request—most of which are concerned with protecting the rights of the accused and defending important principles of national legal systems.[331] A request can be refused if the action sought would be contrary to the fundamental principles of the legal system of the requested state, the request is based on a political or fiscal offense, it violates the principles of dual criminality or *ne bis in idem*, or it is contrary to the *ordre public* or other essential interests of the requested state.[332] Bank secrecy is not an accepted ground for refusal, but the requested party may require that the request be authorized by a judge or another judicial authority.[333] It is essential to note that all grounds for refusal are discretionary or optional. A state is not obligated to refuse a request for assistance, even if a violation of legal protections is imminent.[334]

In effectuating these new modalities, states and their law enforcement bodies are also governed by human rights norms and standards which arise from treaty obligations, regional obligations, customary international law, and general principles of international law. National governments are bound to respect human rights under a framework of international human rights instruments consisting of, *inter alia*, the European Convention for the Protection of Human Rights and Fundamental Freedoms[335] the American Convention of Human Rights,[336] the American Declaration of the Rights and Duties of Man,[337] and the African Charter on Human and Peoples' Rights.[338] There also exist United Nations instruments, such as the Universal Declaration on Human Rights[339] and the International Covenant on Civil and Political Rights.[340]

Parties to these human rights instruments have evinced their intent to recognize the rights of individuals. Criminal suspects and defendants will have the clear right to invoke the provisions of these treaties to the extent that a party seeking or providing legal assistance is a signatory to a relevant human rights instrument. For example, requests for inter-state cooperation or confiscation under the European Laundering Convention will, in the case of most states, be subject to the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, the European Laundering Convention is also open to signature by like-minded non-European states that are not necessarily party to the European Convention for Human Rights; thus, these states will not be subject to the limitations of the E.H.R.C. Defendants may, however, be entitled to protections to the extent that such treaties and the subsequent practice of states have brought the protection of human rights into the ambit of customary international law.

The protection of human rights is enormously important to a discussion of international law enforcement and the control of illicit assets. Although a complete discussion of these issues is beyond the scope of this chapter, a brief discussion of several potential individual rights issues is warranted. The following issues are of primary concern:

- Right to Privacy Considerations, to wit, increased access to financial information during the tracing of assets and requirements for searches and seizures in order to freeze assets;
- Due Process Considerations, to wit, the possibility that assets can be seized in the absence of a hearing, inadequate procedural protections for *bona fide* third parties and a lack of procedures to challenge seizures and forfeitures;
- Presumption of Innocence Considerations, to wit, shifting of the burden of proof during confiscation proceedings based on "indicia" of wrongdoing;
- Fair Trial and Equality of Arms Considerations, to wit, the unavailability of these mechanisms to criminal defendants for the purposes of putting on a defense; and
- Right to Counsel Considerations, to wit, the inability of attorneys to accept *bona fide* fees and the possibility of criminal liability for attorneys and other professionals

Differences in national legal traditions and the ambiguities of international human rights law mean that the possible rights issues raised herein will be dealt with in a manner that is appropriate for each country attempting to implement these anti-money-laundering measures. Therefore, this section does not presume the application of any particular legal standard, apart from acknowledging universally accepted human rights, nor does it seek to undermine international efforts to control illicit proceeds by erecting legal barriers to their effective implementation.

A.
Right to Privacy Considerations

As states implement many of these recent initiatives, they will be required to take investigative measures in order to identify and trace assets for the purpose of eventual confiscation. States will also be required to provide certain forms of mutual legal assistance, including executing searches and seizures. These law enforcement activities will, necessarily, entail additional infringement on individual privacy rights,[341] particularly in light of the ability of government agencies to search massive databases and financial records by means of computers.[342]

Apart from the procedures discussed above (such as the limitations of domestic law), these initiatives do little to preserve privacy rights or restrict the activities of law enforcement officers. For instance, neither the UN Drug Convention nor the European Laundering Convention requires a showing that a warrant, writ, or other indication of reasonable suspicion, has been obtained by authorities in the requesting state before a search or asset tracing can be conducted. The information required for a valid request for assistance will not necessarily enable the authorities of the requested state to establish reasonable suspicion or to assess whether the assistance sought would be permissible if it

were carried out in the requesting state. The lack of some type of reasonable suspicion standard in the treaties themselves creates the possibility that law enforcement officials in states with strict prohibitions against unreasonable searches and seizures might be tempted to try to execute searches in other states based on less than the probable cause or reasonable suspicion that would be required for a domestic search.[343]

Another possible rights issue concerns the infringement of these initiatives upon financial privacy rights. When providing legal assistance or executing provisional measures under the UN Drug Convention and the European Laundering Convention, states must lift their bank secrecy requirements and provide access to financial information. The FATF, the EC Directive and other initiatives also emphasize the need to lift bank secrecy laws. Financial privacy concerns are also heightened by requirements that financial institutions "get to know" their customers, report large transactions, and make inquiries into suspicious transactions. Although sound in a law enforcement sense, the proliferation of new requirements suggests a tendency to place the interests of law enforcement above the legitimate and once undisputed right to financial privacy.[344]

B.
Due Process Considerations

Due process of law is protected by domestic law in most countries and must be provided under international human rights instruments.[345] Several aspects of these initiatives could threaten the due process rights of criminal defendants and innocent third parties. Each of these issues falls under the broad heading of due process: 1) insufficient procedural protections before assets can be frozen, including an insufficient burden of proof and a lack of procedures allowing defendants to challenge a seizure or forfeiture; and 2) vague descriptions of the assets to be frozen.

1.
Insufficient Procedural Protections

Although both the UN Drug Convention and the European Laundering Convention require that the law of the requested state applies to requests and both grant states the discretion to refuse insufficient or improper requests, neither treaty specifies a minimum burden of proof before assets can be restrained; requires proof of a restraining order issued by a court of the requested country; nor specifies a minimum of procedural protections that must be accorded to the accused or *bona fide* third parties.

For instance, the execution of provisional measures under the European Laundering Convention requires very little from a requesting state before assets can be frozen or seized. The requirement of a criminal proceeding or

investigation is easily met and is quite vague. As a result, assets may be frozen and placed beyond the defendant's reach without the benefit of a hearing (either before or after the seizure) in the requested state if the law of the requested state does not require a hearing or other procedural safeguards. Under these terms, a state party could probably request seizure of assets based solely upon the investigation of a suspect.

Under the European Laundering Convention, as with many bilateral mutual assistance agreements and the UN Drug Convention, a suspect or defendant's only protection will be the law of the requested state. Law enforcement officers may be tempted to take advantage of a requested state's standards and try to freeze assets they would not be able to freeze under their own law. While the legislative history indicates that seizure or freezing may be most appropriate where the offense concerned is serious or where the defendant or suspect has substantial property located in the requested state, there is no guarantee that requests for seizure or freezing of assets will not be granted based on sparse facts or the mere existence of a criminal investigation.[346]

The confiscation provisions are less objectionable because any confiscation requires some form of adjudication of guilt in the requesting state, including a record of the conviction and an order of confiscation issued by a court in the requesting state. More importantly, not allowing criminals or their organizations to prosper from their illegal activities is logical and easily reconciled. Confiscation is only objectionable when it interferes with a defendant's right to secure legal counsel or if his assets are confiscated without due process. Society's interest in depriving criminals of their ill-gotten gains is not so great as to deprive defendants of the ability to defend themselves.

In contrast to the UN Drug Convention, the European Laundering Convention more explicitly recognizes the property rights of *bona fide* third parties by requiring the requested party to recognize any judicial decision with respect to property rights claimed by third parties; moreover, a requested state party can refuse to grant a request for confiscation if third parties were not given adequate opportunity to assert their interests in the property to be confiscated.[347] In addition, parties must offer mutual assistance in serving judicial documents to persons affected by provisional measures and confiscation, including the accused.[348] Parties to the Convention must adopt legislation to provide effective legal remedies in order to protect the rights of interested parties, including the accused.[349] The accused is entitled to such remedies only as long as an order of confiscation has not been made against him, while *bonafide* third parties can defend their interests at any time.[350]

That neither Convention provides (or even mandates) a system whereby a defendant may challenge a seizure or forfeiture proceeding against him suggests a final procedural inadequacy. The defendant will be entitled only to the procedural protections afforded by the law of the requested state, which frequently amount to less than trial rights where the proceeding concerns inter-state cooperation, such as procedures for the freezing of the accused's assets.

2.
Vague Definition of Assets Subject to Seizure

Neither Convention limits the amount of assets that are subject to restraint or seizure, while both require that confiscation be limited to the amount of the confiscation order. Both instruments merely require that the assets may, at some time in the future, be subject to forfeiture.[351] Obviously, this minimal requirement can be ap plied quite broadly where states are not required to meet a strict burden of proof when asserting what assets may eventually be subject to forfeiture; the absence of a burden of proof (such as probable cause or reasonable suspicion) creates the possibility that all of the defendant's assets may be frozen or seized. As a result,the defendant may be left without means to hire an attorney.

C.
Presumption of Innocence Considerations

A closely held tenet of international human rights law and the domestic law of most nations is that a defendant is presumed innocent until proved guilty in criminal proceedings.[352] However, the sometimes quasi-criminal nature of confiscation proceedings, and the focus on the *res* rather than the defendant, creates an ambiguity that undermines the presumption of innocence. Under civil forfeiture laws, the property is presumed guilty; but under criminal forfeiture, as is contemplated by the initiatives herein, the property ought to be presumed innocent. This has not proven to be the case.[353]

Most of the seizure and confiscation proceedings pursuant to these initiatives require the defendant and persons claiming to be innocent owners to establish that there is no nexus between the property concerned and the criminal acts alleged. Thus, once the government proves that there is reason to believe that property could be subject to forfeiture, the burden of proof is shifted from the government to the criminal defendant to prove that the assets are not tied to wrongdoing. Indeed, Article 5, paragraph 7 of the UN Drug Convention explicitly permits states, consistent with domestic law, to "ensur[e] that the onus of proof be reversed regarding the lawful origin of alleged proceeds."

This shifted burden is complicated by the fact that the owner is required to prove a negative (i.e., the lack of a nexus). Once currency enters the stream of commerce, and is commingled with other proceeds, it is exceedingly difficult, if not impossible, to prove that a specific portion of the proceeds has not been tainted by illegality. The initiatives considered above do not provide defendants with a sufficient opportunity to show that proceeds are not tainted. While the rights of *bona fide* third parties are recognized, these innocent owners may also be placed at the disadvantage of having to prove a negative.

D.
Fair Trial and Equality of Arms Considerations

Neither the UN Drug Convention nor the European Laundering Convention makes its powerful information-gathering capabilities available to the accused for the purposes of gathering exculpatory evidence. Instead, defendants must rely on the inefficient process of letters rogatory. As a result, other state parties will not be required to provide legal assistance and they will only do so on a voluntary basis. This hindrance in the preparation of a defense may diminish a defendant's right to a fair trial[354] and, at the very least, create an imbalance in the equality of arms. Akin to bilateral and regional mutual assistance treaties, it is obvious that these two new Conventions are drafted entirely for the benefit of law enforcement officials, possibly to the point of derogating the individual rights of the accused if these information-gathering powers remain unavailable to them.

E.
Right to Counsel Considerations and Criminal Liability of Defense Attorneys

Concern over the application of immobilization and confiscation provisions to attorneys' fees has raised a significant degree of controversy. The greater controversy has surrounded the UN Drug Convention. While the UN Drug Convention protects *bonafide* third parties,[355] the Convention's s confiscation provisions could possibly be interpreted to reach legitimate attorneys' fees.[356]

The money laundering provisions of Article 3 are particularly troublesome where attorney fees and advice are considered. A broad construction of Article 3 (b)(i) could make it a crime for an attorney to accept laundered funds in order to prepare a legal defense or, by giving advice, to assist his client to "evade the legal consequences of his actions"[357] In light of the difficulties observed regarding attorney fees and attorneys as *bonafide* purchasers for value, the Convention heightens attorneys' worries about accepting fees from clients charged with drug-related offenses.

The provision could also be construed to mean that a third party who transfers assets to an attorney for the means of a criminal defense would be converting funds to help the defendant/money launderer evade the legal consequences of his acts.[358] Combined with the criminal forfeiture provisions, and the forfeiture of substitute assets should tainted assets be unavailable, these money-laundering provisions, strictly construed, could make it difficult for drug offenders to secure counsel.[359]

Article 3(c)(i) and (iv) of the UN Drug Convention also pose a potential threat to criminal defense attorneys. Under these provisions, a criminal defense attorney would be subject to prosecution if he knowingly accepted tainted assets.[360] Fear of accepting fees from defendants in drug-related cases could chill the defense bar in many state parties. Moreover, under Article 3(c)(iv),

an attorney may be subject to prosecution to the extent national implementing measures consider the advice or actions of an attorney as "aiding, abetting, facilitating, and counselling" the commission of a drug or money-laundering offense. It is unlikely, however, that national legal systems will construe this provision so broadly as to criminalize the legitimate counselling of drug offenders.[361]

Because the European Laundering Convention is so similar to the UN Drug Convention, the same concerns over attorney fees exist. However, the commentary to the Convention acknowledges the challenges made to the UN Drug Con vention on these grounds and declares that the European Laundering Convention cannot be misinterpreted to mean that it is illegal to hire a lawyer or for a lawyer to accept a fee.[362] Possible objections over right to counsel considerations may be complicated by the European Laundering Convention's broad, although optional, provisions regarding *mens rea.* Under Article 6, parties can criminalize situations where the offender "ought to have assumed that the property was proceeds." This equivalent of a "negligence standard" could expose attorneys to potential liability for accepting fees that have been laundered.

However they may be interpreted by parties implementing them, the initiatives considered herein include broad provisions that grant, or at least contemplate, powerful enforcement authority. The development and inclusion of these mechanisms indicate the prosecutorial perspective that motivates the conclusion of these initiatives. These initiatives will undoubtedly be forceful tools in the war on serious crime and money laundering and should be models for future instruments. The combination of forceful obligations and effective methods of enforcement will make future agreements less ambiguous, more binding and, overall, more effective. However, drafters of future instruments must carry out their mandate in a manner that recognizes fundamental human rights in a way that incorporates procedural protections for criminal suspects and defendants. Confiscation is a rational and logical means of undermining organized criminals and narcotics traffickers, yet criminal sanctions must not be imposed on defendants in the absence of fair enforcement techniques and before a finding of guilt. These instruments are incomplete until they provide, within the instruments themselves, minimal procedural protection for suspects and defendants.

VI.
CONCLUSIONS

The international legal community has responded to money laundering with action at various levels—internationally, regionally, and domestically—though with differing commitments and widely different means. The various mechanisms outlined above have, at least in the area of drug money laundering, wrought profound changes in international penal law enforcement. According to William Gilmore, "it is no exaggeration to say that in the area of drug-related money

laundering the landscape of international cooperation has been radically and positively transformed."[363] It can only be presumed that, in due time, these efforts to seriously hamper money laundering will be applied to other crimes that generate significant profits, as can be seen in the 1990 European Laundering Convention, the EC Directive, and the work of the FATF. The extension of these modalities to all forms of criminality, in some way, repudiates the narrow approach that seeks to regulate only drug-related money laundering.

The policies and modalities of enforcement which have been instituted so far, as discussed above, are broad-based and far-reaching, though they still hardly scratch the surface of the problem. Domestic and international law enforcement authorities now recognize that the financial aspects of criminal activity should be a primary focus of law enforcement strategies, though governments must yet provide the resources to render such efforts effective. Either through the implementation of international agreements or measures taken on their own initiative, national governments are starting to use powerful new tools to battle money laundering and the criminal activities that give rise to money laundering. In the main, these new tools have two basic purposes: 1) they seek to make money laundering a crime and provide penalties for activities in support of money laundering, and 2) they seek to apply the traditional modalities of inter-state cooperation in penal matters to the detection, suppression and punishment of money laundering, including the implementation of a new modality to trace, freeze and seize the proceeds of crime. Aside from this two-part strategy, the initiatives discussed above, which range in scope from global to domestic, all rely upon the same basic national mechanisms which are still inadequately supported by governments.

The current international strategy to address the problem of money laundering, and especially drug-related money laundering, is powerful and well reasoned. The components of this strategy to detect, suppress and punish money laundering are well defined, but the likelihood of their successful implementation among the world's nations is, so far, unclear. It will be difficult to assess whether these initiatives are likely to succeed until states enact and implement domestic legislation and, in turn, attempt to cooperate with each other in their implementation. Suffice it to say that, at this stage, recently adopted theories of enforcement depend on a number of assumptions, some of which may eventually prove erroneous. Thus, the basic premises of these new regimes should be scrutinized in order to 1) avoid the development of unrealistic expectations, 2) identify potential pitfalls, and 3) make the first step toward devising workable solutions.

Assumption #1: Because money laundering is a global concern, multilateralism is the most effective means of controlling it.

This rapidly developing regime assumes that new principles of multilateralism in international criminal law will operate successfully. Because crime is a global

concern, inter-state cooperation in penal matters has moved well beyond the bilateral and regional scope; instruments like the UN Drug Convention and the European Laundering Convention demonstrate an assumption that the suppression of serious offenses such as money laundering should proceed in a nearly global context. Nevertheless, many of the international instruments required for a truly effective global enforcement strategy are non-existent.

International controls against money laundering and the illicit proceeds of crime require that states provide each other with an unprecedented level of mutual assistance. States will be expected to share information, execute searches, and seize assets at the investigatory or pre-trial stage; exchange information and documentation at the adjudicatory stage; and, finally, recognize and give effect to foreign judgements at the enforcement stage. While it is relatively simple for states to enact domestic measures as required by these treaties, it remains to be seen whether they can live up to the sweeping and loosely defined obligations in regard to inter-state cooperation.

In addition, while the conclusion of international treaties suggests that states have accepted a more multilateral approach to international criminal law by agreeing to provide each other the various forms of inter-state cooperation, the traditional barrier of national sovereignty still exists and may interfere with efforts to implement international controls. Several realities of the current status of international criminal law will also present obstacles for a global strategy to control money laundering. There is, for example, no single international treaty covering the range of activities that need to be controlled; no international enforcement mechanisms to which all (or substantially all) countries adhere; no legal obligations binding all (or substantially all) countries to enact the same or similar measures in their national legislation; and, finally, there are no arrangements for inter-state cooperation in penal matters binding on all (or substantially all) countries. Thus, states are forced to rely upon a flawed, limited, and inconsistent system of enforcement and inter-state cooperation.

Assumption #2: National controls on financial institutions are (or can be) sufficient to support international efforts to combat money laundering.

Criminal organizations are attracted to laundering hubs—those countries with few or no domestic regulations on their financial industry. Thus, in this new era of multilateral regulation, the most crucial component is domestic legislation which supports international efforts to curb money laundering. While most states can enact the necessary legislation with relative ease, effectively mobilizing the administrative structures and resources required by domestic banking and financial controls is a different issue altogether. Potential difficulties associated with domestic implementation could include overburdened systems of criminal justice, lack of administrative resources, lack of skilled personnel, inexperience

in the area of financial controls, and, perhaps most importantly, an ineffective national apparatus for providing or seeking inter-state cooperation.

Problems can plague even those governments that have developed ostensibly comprehensive financial controls designed to operate in an integrated international financial system. Because money is fungible, it is impossible to identify the source of funds once they enter the international financial pipeline. Therefore, practice has demonstrated that the most effective point of control is when funds enter the financial stream. In most cases, that point will be a domestic financial institution that is subject to domestic, but not international, financial regulations.

The most widely used national control scheme is what some national legislations refer to as the "currency transaction report" or CTR. These regulations, which can serve both banking and tax purposes, require financial institutions to report all cash transactions over a threshold amount to government authorities and to keep records of all financial transactions for a period of years. These controls are clearly contemplated by the EC Directive, the FATF, the Basle Committee, and the OAS initiatives.

These schemes typically require a governmental authority to oversee all CTR requirements.[364] Three problems exist with this framework. First, in many countries, the administrative bodies required to exercise control are frequently non-existent, inadequately funded and staffed, overburdened or insufficiently prepared technically to carry out effective internal controls. The costs and difficulties associated with exercising or implementing international controls can be even greater. Even in countries with seemingly sufficient resources, the financial and bureaucratic costs of contending with thousands of daily transactions are o verwhelming.[365]

Second, to obviate the enormous burdens on the private banking industry (which is reluctant to assume the cost burdens of such control) and the burdens on public institutions like central banks, national regulations authorize financial institutions to grant exceptions from CTR requirements to "legitimate" cashintensive businesses. In the future, industry resistance to additional regulations is likely to be placated by the creation of broad exemptions from reporting requirements—allowing businesses such as restaurants, casinos, currency exchanges, etc., to slip through the regulatory cracks. Money launderers and criminal organizations will naturally gravitate to industries with non-existent or less intrusive reporting requirements for the purposes of recycling.

This shortcoming in the CTR scheme also highlights the indispensability of developing an international regime that does not focus solely on banking and other traditional financial industries. In its 1993 report, the FATF indicated that non-financial institutions (such as currency exchanges, check cashers and casinos) continued to be significant centers of money-laundering activities.

Third, by their very nature, and owing greatly to administrative difficulties in handling so many of them, CTRs necessarily lag behind the criminal conduct they are meant to expose. The large volume of CTR reports are such that even

the central banks or control agencies with the most resources are unable to catch-up with the backlog, creating long delays between the time of reporting and the time when control can be effectuated. The result is that many transactions are discovered long after the fact, reducing the effectiveness of control strategies. Thus, the assumption that national controls on financial institutions are effective is questionable, even in those countries with advanced control strategies. Inefficiencies at the domestic level could weaken international controls that may subsequently apply.

Assumption #3: The international financial industry will cooperate with national and international controls, including restrictions on wire transfers.

A third major assumption is that the international financial industry can and will cooperate with efforts to secure more information about financial transactions. Due to domestic efforts to comply with treaties and initiatives like the EC Directive and Basle Committee statement, institutions will be faced with a battery of new regulations and commensurate burdens. They will be required to gather more information about customers, inquire into the source of funds, and report thousands of transactions to the government—costly requirements that will diminish profitability. While greater accountability for large cash transactions from the banking community is a long overdue virtue of these initiatives, the idea is likely to face resistance from the industry in the implementation phase. For instance, the banking community might argue that these additional requirements are not banking functions at all but are, instead, enforcement methods that are more appropriately the responsibility of the central bank or law enforcement authorities. It is one thing to develop a set of recommendations, but it is quite another to convince a powerful industry to endorse additional regulations. Co-opting the international financial industry—both traditional and non-traditional—will be critical to the effectiveness of the controls contained in multilateral instruments like the UN Drug Convention. One means of co-opting the financial sector is to stress how important it is that a bank, or even an entire national banking system, be perceived as a "clean place to do business."[366] If the financial integrity of a bank is impugned, legitimate business will be driven out and profits ultimately lost The work of the EC, the FATF, the Basle Committee, and others has stressed the importance of financial integrity and has deftly moved toward greater accountability for financial institutions. However, financial institutions are the focus of money laundering, and more can and should be done.

For instance, though this chapter has chronicled several control mechanisms to be applied to financial institutions, woefully little is being done in regard to the international regulation of electronic wire transfers. These electronic transactions, nearly untraceable because customers are only required to provide minimal amounts of identification information, facilitate the international movement of

huge sums of money in just seconds. A single such transfer is routinely in the range of millions of dollars and it is estimated that trillions of dollars in funds and securities are exchanged in this manner daily.[367]

The volume of these transactions, both in daily numbers and with respect to the value of each transaction, make electronic transfers very difficult to control. Any additional controls will result in significant additional regulations for the financial institutions and clearing-houses involved in these transactions—many of whom contend that the vast majority of their transactions are made with long-time, respected clients. At present, there are no effective international controls on electronic transfers, particularly international ones.

Among the reasons why the international controls of electronic transfers are lacking is that governments have an interest in preserving the confidentiality of a variety of types of financial transactions and greater transparency in financial dealings would be inimical to many government interests. For example, governments insist on confidentiality when the central bank intervenes to control the fluctuation of their national currencies. Should these transactions become known they would defeat the purposes of intervention and become a prime source of information for currency speculators who could then play havoc with the stability of national currencies and financial markets. A variety of other governmental commercial transactions rely on confidentiality, including arms transactions, major oil transactions, and other transactions that may be marginally legal (e.g., complicated transactions designed to circumvent an embargo).

A system to regulate international electronic transfers would tend to make these transactions discoverable and could prejudice the governments engaging in them. As a result, controls have not been put in place and confidentiality is maintained—allowing criminal organizations to benefit from the same confidentiality that governments enjoy with respect to their monetary transactions. A method must be devised, at national, regional and international levels, whereby legitimate government claims to confidentiality can be respected while, at the same time, control is exerted over other transactions involving criminally-derived funds. Despite the difficulties inherent in a such a discriminatory system, including opportunities for corruption and abuses of power, devising such a method will be an important step in solidifying the political will of governments to implement financial controls.

Assumption #4: Professionals (such as lawyers, accountants, and brokers) can be relied upon to act ethically and can be effectively regulated by ethical standards and self-policing.

Because money-laundering activities are often shaped by the advice of professionals (such as lawyers, accountants, and tax specialists), international finan cial controls and resultant government initiatives rely on the ethical integrity of several professions that handle large sums of cash. The trade in

tainted assets has been quick to recognize the benefit of employing a category of professionals who enjoy the privilege of confidentiality. These "commercialists"—lawyers, accountants, tax advisers, securities dealers, etc.—have used their legal privileges to erect another wall of confidentiality between their laundering clients and the inquiries of law enforcement bodies.[368] In many countries, the primary means of control applied to these professionals are self-imposed ethical standards and ethics boards that review the conduct of practising professionals and discipline violators of established standards.

Unfortunately, codes of conduct are often inadequately enforced or are non-existent. Moreover, without anything but the strictest of reporting requirements and more forceful controls on "commercialists", national enforcement efforts will be premised on the hope that these professionals adhere to general standards of ethical conduct.

Assumption #5: The international protection of human rights can be subjugated to meet compelling law enforcement objectives.

A fifth, and final, consideration is that the drafters of these instruments have assumed that applying intrusive investigative measures and freezing and confiscating "suspicious" assets can be done in a manner consonant with the fundamental human rights of defendants, suspeets, and innocent property owners. While this assumption will probably prove true at some time in the future, significant legal questions already surround the authority of governments to implement these strong new measures. Even in the United States, whose system of asset tracing, freezing and forfeiture has been a paradigm for many years, recent judicial decisions have undercut the government's authority to control allegedly illicit proceeds. The possible impact of these initiatives on individual rights warrants further study.

Money laundering is a global problem that can be addressed only by the use of global measures. This means that a new system for the international control of financial transactions must be established. But the effectiveness of such a system depends essentially on global participation by governments and national financial institutions. So far, the political will of states is lacking, and no such global system yet exists. To a large extent, this may be due to the economic interest that some states have in keeping their financial institution free from the controls that are indispensable if international money laundering is to be controlled. But governments also have an interest in preserving the secrecy of their financial transactions. These transactions use the same channels and methods employed by individuals who launder their illegal gains. Thus the dilemma of having some controls over some transactions, and not over others, is apparent. But because the world's financial pipelines are the same for all money, it is very difficult to see how effective controls of illicit money laundering in certain categories of criminal activities can be verified while others cannot.

NOTES

1. Money laundering is generally defined as the "process by which one conceals the existence, illegal source or illegal application of income, and the disguises that income to make it appear legitimate". "President's Commission on Organized Crime, interim Report to the President and the Attorney General, The Cash Connection: Organized Crime, Financial Institutions and Money Laundering", p. 7, (1984. In recent years, the international community has recognized that criminal activity generates tremendous profits and that, as a result, organizations seek to hide the actual source of these profits. Money laundering often involves the use of foreign banks, usually located in countries with strict bank secrecy laws and lax financial regulations, which transfer the laundered cash back to its country of origin as seemingly clean, legitimate funds.
2. The pressing nature of the money laundering situation is indicated by the degree to which national governments have responded to the issue. By the end of 1993, it was estimated that 47 nations had adopted laws or other measures to combat money laundering. Many states have gone so far as to create anti-money laundering units as part of their national law enforcement initiatives. "United Nations General Assembly to hold Special Meetings on International Cooperation against Illicit Drugs", in *PR Newswire*, October 25, 1993, available in Lexis/Nexis Library, Wires File. See also "More countries enact, strengthen Laundering Laws", in *Money Laundering Alert*, September 1993, p. 7. For a detailed description and analysis of national laws in this area, see generally E.Savona and M. De Feo, "Money Trails: International Money Laundering Trends and Prevention/Control Policies", 1994 (draft report presented at the International Conference on Preventing and Controlling Money Laundering and the Use of Proceeds of Crime: A Global Approach, Courmayeur Mont Blane, Italy, June 18–20, 1994).
3. See F.Soh, "Cleaning Up Dirty Money", in *The Straits Times* (Singapore), January 8, 1995; "UN gathers 49 Nations to prompt Action against Money Laundering", in *Money Laundering Alert*, September 1994, p. 7 (summarizing the conclusions of conference on money laundering held in Courmayeur Mont Blane, Italy in June 1994).
4. Despite this almost inevitable focus on drug trafficking and organized crime, it must be remembered that many of the initiatives discussed in this paper are critical to the suppression of all serious offences that generate large profits. All too frequently, however, governments ignore large-scale corruption and other forms of abuse of power by government officials that lead to enormous financial losses to their countries. The selective approach of most governments, particularly those of major developed countries, ignores the use of money laundering techniques to conceal drug transactions and other financial transactions carried out by intelligence agencies. Lastly, there are a whole host of economic crimes, whether in developed or developing countries, that use the same techniques of money laundering that are used by drug traffickers and other offenders. To understand that the same channels and techniques are used by money launderers is indispensable to understanding why efforts to control and curb money laundering are so far only partially and selectively successful. For example, it is estimated that as much as US $300 billion is "laundered" through the world's banking system each year. "Report

submitted by the Subcomm. of Narcotics, Terrorism, and International Operations to the Senate Foreign Relations Comm.", 101st Cong., 2d Sess. Other estimates claim that US$85 billion enters the international financial stream from the sale of drugs in the United States and Europe alone. European Committee on Crime Problems, "Recommendations by the Financial Action Task Force on Money Laundering" (done at Strasbourg, 7 February 1990), p. 6. For other economic crimes potentially involving money laundering, see "International Criminal Law: a Guide to US Practice and Procedure" (V.P.Nanda and M.C.Bassiouni, eds., 1987).

5. See M.C.Bassiouni, "Critical Reflections on International and National Control of Drugs", in *Denv.J. Int'l, L & Pol'y*, pp. 18, 311, 321 (1990) (citing "Drug Trafficking and the World Economy", UN Dept. of Public Information, UN Doc. DPI/ 1040b-40076 (January 1990)).
6. M.C.Bassiouni, "The International Narcotics Control Scheme" in *International Criminal Law*, vol. 1, p. 505 (M.C. Bassiouni ed., 1986). See also "United Nations, Division of Narcotic Drugs, Extradition for Drug-Related Offenses: a Study of Existing Extradition Practices and Suggested Guidelines for Use in Concluding Extradition Treaties", ST/Nar/5 (1985).
7. Illegal drug sales in the United States alone may be as high as $200 billion. See Dr. I.V.Tragen, "Drugs in America. A World View", Address to the Drug/Alcohol Education Training Seminar (July 5–9, 1989), reprinted in *135 Cong. Rec. 20,219* (1989).
8. One such technological breakthrough, electronic wire transfers, has benefitted drug traffickers, organized criminals and money launderers. International financial institutions electronically transfer approximately US$500 billion daily, and it is estimated that each year, US$100–500 billion of those transfer involve illicit proceeds. See generally G.Wyrsch, "Treasury Regulation of International Wire Transfer and Money Laundering: a Case for a Permanent Moratorium", in *Denv.J. Int'l L. & Pol'y*, vol. 20, p. 515 (1992).
9. See M.C.Bassiouni, "Effective National and International Action against Organized Crime and Terrorist Criminal Activities", in *Emory Int'l L Rev.*, vol. 9, p. 21 (1990). See also D.P.Stewart, "Internationalizing the War on Drugs: the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", in *Denv. J. Int'l L & Pol'y*, pp. 387, 389–391 (1990).
10. Each of the instruments to be discussed provides two types of procedures. First, assets are either seized, frozen or restrained in anticipation of eventual forfeiture or confiscation. Then, following an adjudication of guilt by a court, assets that are deemed to be the instrumentalities or proceeds of illicit activity are ordered forfeited to or confiscated by the government and are appropriately disposed of by the government. The terms forfeiture and confiscation are commonly used interchangeably, although, in fact, their meanings are not identical. The fundamental distinction between the two procedures is clear: immobilizing of assets is based on suspicion while forfeiture or confiscation is based on an adjudication of guilt and represents a criminal penalty. Criminal suspects often transfer or harbor their assets from the reach of government authorities and the immobilization of assets, by freezing bank accounts or seizing houses, cars and businesses, ensures that these assets will be available for forfeiture.
11. See generally S.Carlson and B.Zagaris, "International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime", in *Nova*

L Rev., vol. 15, p. 551 (1991) (discussing the approaches of various nations implementing asset seizure and forfeiture by means of inter-state cooperation in penal matters).

12. See generally B.Zagaris, "Developments in International Judicial Assistance and Related Matters", in *Denv.J. Int'l L. & Pol'y*, vol. 18, p. 339 (1990). See also, B.Zagaris, "Protecting the Rule of Law from Assault in the War against Drugs and Narco-Terrorism", in *Nova L Rev.*, vol. 15, pp. 703, 712 (1991) (arguing that the absence of effective extradition and mutual assistance allow organized criminal organizations to circumvent international law). See also generally, *International Criminal Law: Procedure*, vol. 2 (M.C. Bassiouni ed., 1987).
13. Domestic initiatives will also be considered to the extent that they reflect the progress achieved by international efforts to thwart money laundering and to control the flow of ill-gotten gains.
14. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature December 20, 1988, UN Doc. E/Conf.82/15 Corr. 1 and Corr. 2, 28 I.L.M. 493 (1989) (entered into force November 1990) [hereinafter "UN Drug Convention"]. See also P.Bernasconi, *New Judicial Instruments against International Business Crimes* (1995); W.C.Gilmore, *Dirty Money: the Evolution of Money Laundering Counter-Measures* (1995).
15. For a summary of the recent efforts of the United Nations in the area of inter-state cooperation in penal matters, including reproductions of relevant documents and United Nations model agreements in the field see E. Vetere, "The Role of the United Nations: Working for More Effective International Co-operation", in A.Eser and O.Lagodny eds., *Principles and Procedures for a New Transnational Criminal Law*, vol. 713 (1992).
16. "Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime", November 8, 1990, in *Europ. T.S.*, No. 141, 30 I.L.M. 148 (entered into force March 1, 1991) (hereinafter "European Laundering Convention"), reprinted in "European Inter-State Co-Operation in Criminal Matters: the Council of Europe's Legal Instruments", vol. 2, p. 1405 (E. Müller-Rappard and C.Bassiouni eds., rev'd 2d ed. 1993). See also Bernasconi, *Op. cit.*, note 14; Gilmore, *Op. cit.* note 14.
17. The European Laundering Convention, unlike the UN Drug Convention, is not limited to drug-related offences. Rather, Article 1 (e) of the European Laundering Convention defines a "predicate offence" as "any criminal offence as a result which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention." The European Laundering Convention is intended to combat all forms of serious crimes, especially drug offences, arms dealing, terrorism or other offences which generate large profits. See Council of Europe, "Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime" (1991), No. 8, reprinted in "European Inter-State Co-operation in Criminal Matters: the Council of Europe's Legal Instruments", vol. 2, p. 1419 (E. Müller-Rappard and M.C. Bassiouni eds., rev'd 2d ed. 1993).
18. Council Directive No. 91/308, 1991 O.J. (L 166) p. 77.
19. See European Committee on Crime Problems, "Recommendations by the Financial Action Task Force on Money Laundering" (done at Strasbourg, February 7, 1990). See also Bernasconi, *Op.* cit., note 14; Gilmore, *Op. cit.*, note 14.

20. See H.G.Nilsson, "The Council of Europe Laundering Convention: a Recent Example of a Developing International Criminal Law", in *Crim. L.F.*, vol. 2, pp. 419, 420, n.4 (1991). See Note, 'The International Attack on Money Laundering: European Initiatives", in *Duke J.Comp. and Int'l* L., p. 213 (1991).
21. OEA/Ser. L/XIV.2, CICAD/INF.58/92 (July 9, 1992). See also Gilmore, *Op. cit.*, note 14.
22. Basle Committee on Banking Regulations and Supervisory Practices, December 1988 "Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering" [hereinafter "Basle Committee Statement"], reprinted in "International Efforts to combat Money Laundering" pp. 273–77 (W.C. Gilmore ed., 1992) (nearly every major anti-money-laundering initiative of the past several years is reproduced in this reference text). See generally Hogarth, "Beyond the Vienna Convention: International Efforts to suppress Money Laundering" (1994) (presented at the International Conference on Preventing and Controlling Money Laundering and the Use of Proceeds of Crime: a Global Approach, Courmayeur Mont Blane, Italy, June 18–20, 1994). See also Bernasconi, *Op. cit.*, note 14; Gilmore, *Op. cit.*, note 14.
23. The categories of offences are aggression; war crimes; crimes against humanity; unlawful use of weapons; genocide; apartheid; slavery and slave-related practices; torture; unlawful human experimentation; piracy; aircraft hijacking; offences against international maritime navigation; threat and use of force against diplomats and other international protected persons; taking of civilian hostages; drug offences; international traffic in obscene materials; destruction or theft of national treasures; environmental violations; theft of nuclear materials; unlawful use of the mails; interference with sub-marine cables; falsification and counterfeiting; bribery of foreign public officials; and mercanerism. See M.C. Bassiouni, "Draft Statute International Criminal Tribunal", in *Nouvelles Études Pénales*, vol. *9bis*, Annex 1 (1993). See also "International Crimes: Digest/Index of International Instruments 1815–1985" (M.C.Bassiouni ed., 1986), which digests 312 international instruments up to 1985. The three post-1985 instruments are "Protocol for the Suppression of Unlawful Acts of Violence at Airports Servicing Civil Aviation", adopted by the International Civil Aviation Organization, at Montreal, February 24, 1988, 27 ILM 627 (1988); "Convention and Protocol from the International Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation", adopted by the International Maritime Organization (IMO), at Rome, March 10, 1988, IMO Doc. SVA/CON/15; UN Drug Convention, *Op.* cit., note 14. See also "United Nations, Division of Narcotic Drugs, Extradition for Drug-Related Offenses: a Study of Existing Extradition Practices and Suggested Guidelines for Use in Concluding Extradition Treaties", ST/Nar/5 (1985).
24. M.C. Bassiouni, "Characteristics of International Criminal Law Conventions", in *International Criminal Law: Crimes*, vol. 1 p. 7 (M.C.Bassiouni ed., 1986). Some of these penal characteristics are based on the duty to prosecute or extradite. See M.C.Bassiouni and E.H.Wise, *"Aut Dedere Aut Judicare: the Duty to prosecute or extradite in International Law"* (1995).
25. This is a broad term that typically involves an obligation of the judicial, law enforcement and administrative arms of a national government to provide assistance in both criminal and administrative penal matters. The forms of cooperation that states can provide to one another are defined by both domestic and

international law. Typically, the various forms of inter-state cooperation are provided through bilateral and multilateral agreements, although inter-state cooperation can be provided as a matter of comity. Most countries require that cooperation can only be provided pursuant to national implementing legislation. In real terms, treaty obligations can only be fulfilled to the extent permitted by a state's national criminal justice system and to the extent that system is capable of executing a request. Therefore, the effectiveness of the modalities of inter-state cooperation varies among countries. This diversity of implementation allows launderers to seek out jurisdictions where they can exploit loopholes and weaknesses of national implementation measures in order to evade the controls prescribed by international criminal law treaties and other initiatives.

26. The "indirect enforcement scheme" derives from the notion that states obligate themselves, through various regional and international instruments, to enforce international criminal law. The "direct enforcement scheme," on the other hand, presupposes the existence of an international criminal code, an international criminal court, and the existence of international enforcement machinery. For a thorough discussion of both schemes and the Draft International Criminal Code and the Draft Statute for an International Criminal Tribunal, see generally M.C.Bassiouni, "Draft Statute International Criminal Tribunal", in *Nouvelles Études Pénales*, vol. *9bis* (1993); M.C.Bassiouni, "A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal" (1987).
27. See 28 USC § 1783. See also "Restatement (Third) of the Foreign Relations Law of the United States", § 473.
28. *Op. cit.*, § 1782.
29. According to one commentator, letters rogatory "have proven ill-suited to the increasingly complex and voluminous needs of modern international law enforce ment methods." "Most Effective Forms of International Cooperation for the Prevention and Control of Organized Transnational Crime at the Investigative, Prosecutorial and Judicial Levels", UN Doc. E/CONF.88/4 (Sept. 1, 1994) (background document to the World Ministerial Conference on Organized Transnational Crime), 66 (citing E.A.Nadelmann, "Cops across Borders", p. 319 (1993)). See A.Ellis and R.L.Pisani, "The United States Treaties on Mutual Assistance in Criminal Matters", *International Criminal Law: Procedure*, vol. 2, p. 151 (M.C. Bassiouni ed., 1986). See also B. Zagaris, "Protecting the Rule of Law from Assault in the War against Drugs and Narco-Terrorism", in *Nova L. Rev.*, vol. 15, pp. 703, 728–30 (discussing the benefits of ongoing cooperation in judicial assistance, such as the use of memoranda of understanding while MLATs are being negotiated; specifically, the author points out the value of model extradition and mutual legal assistance treaties, such as those prepared by the United Nations Crime Prevention Committee, in helping states to adopt a comprehensive treaty negotiation program).
31. See Ellis and Pisani, *Op. cit.*, note 30, pp. 158–9.
32. See Morocco (art. 12), Italy (art. 18), Bahamas (art. 14), Cayman Islands (art. 16), Canada (art. 17), Thailand (art. 15).
33. See B. Zagaris, "Developments in International Judicial Assistance and Related Matters", in *Den. J. Int'l L & Pol'y*, vol. 18, pp. 339, 351–52 (1990).
34. See B.Zagaris, *Op. cit.*, pp. 339, 352–353.

35. Evans, "The Proceeds of Crime: Problems of Investigation and Prosecution" (1994) (paper presented at the International Conference on Preventing and Controlling Money Laundering and the Use of Proceeds of Crime: a Global Approach, Courmayeur Mont Blane, Italy, June 18–20, 1994).
36. Under this doctrine, the offences in question must be punishable under the laws of both parties in order for assistance to be provided.
37. See J.I.K.Knapp, "Mutual Legal Assistance Treaties as a Way to pierce Bank Secrecy", in *Case W. Res. J. Int'l L.*, vol. 20, pp. 405, 410 (1988). Moreover, many states must enact legislation to implement these treaties because many MLATs are non-self-executing. See *ibidem*, p. 410, n. 15.
38. G.A.Res. 45/117 (1990), reprinted in "Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders" (Havana, Cuba, August-September 1990), A/Conf.l44/28/Rev. 1, at 77–89 [hereinafter "Model Treaty"]. "Proceeds of crime" is defined as "any property suspected, or found by a court, to be property directly or indirectly derived or realized as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence." *Ibidem.,* Optional Protocol, 1.
39. See Commission on Crime Prevention and Criminal Justice, "Money Laundering and Associated Issues: the Need for International Cooperation", UN Doc. No. E/CN.15/1992/4/Add.5 [hereinafter "UN Money Laundering Report"], 72, for a discussion of how this initiative is related to other international efforts to control the proceeds of crime.
40. Model Treaty, *Op.* cit., note 38, Optional Protocol, 2–3.
41. *Ibidem.*, 4.
42. *Ibidem.*
43. *Ibidem.*, 5.
44. *Ibidem.*, § 6.
45. *Ibidem,*, n. 91.
46. *Ibidem.*
47. See "UN Money Laundering Report", Op. *cit.*, note 39, 79. For a full discussion of these seizure and confiscation procedures, see the textual discussion of the UN Drug Convention and the European Laundering Convention *infra.* part III.A-B.
48. European Laundering Convention, *Op. cit.*, note 16, art. 13(1)(a).
49. *Ibidem.*, art. 27(3).
50. Confiscation may be treated as a penal measure at the administrative level in some states and at the criminal level in other states. In either case, these measures will be considered to the extent that they are penal or punitive in nature.
51. See "European Convention on the International Validity of Criminal Judgements", May 28, 1970, Europ. TS No. 70. For a more thorough discussion of the transfer or recognition of foreign penal judgments, see D. Oehler, "The European System", in *International Criminal Law: Procedure,* vol. 2, p. 199 (M.C.Bassiouni ed., 1986); E.Müller-Rappard, "The European System", in *International Criminal Law: Procedure,* vol. 2, p. 95 (M.C. Bassiouni ed., 1986).
52. These provisions and requirements are primarily derived from the Draft Model Treaty on the Transfer of Enforcement of Penal Sanctions prepared by a Committee of Experts which convened December 3–8, 1991, at the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy. The conference was sponsored by the Institute, the United Nations Crime Prevention and Criminal

Justice Branch and the International Association of Penal Law. The document is contemplated as a United Nations Model Treaty to be added to the package of United Nations Model Treaties in the area of international criminal cooperation, which presently includes the Model Agreement on the Transfer of Foreign Prisoners, Model Treaty on Extradition, Model Treaty on Mutual Assistance in Criminal Matters, Model Treaty on the Transfer of Proceedings in Criminal Matters, Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released and Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property. For a discussion of these model agreements, see generally R.S.Clark, "Crime: the UN Agenda on International Cooperation in the Criminal Process", in *Nova L Rev.*, vol. 15, p. 475 (1991).

53. See generally M.C.Bassiouni, "Policy Considerations on Inter-State Cooperation in Criminal Matters", in *Principles and Procedures for a New Transnational Criminal Law*, p. 807 (A.Eser and Otto Lagodny eds., 1992).
54. See generally articles by E.Müller-Rappard, L.Gardocki, A.Ellis and R.L.Pisani, D.Oehler, H.Epp, J.J.E.Schutte, D.D.Spinelli, and D.Poncet and Paul Gully-Hart in "International Criminal Law: Procedure", vol. 2 (M.C.Bassiouni ed., 1986). See also G.O.W.Mueller, "Enforcement Models of International Criminal Law", in *New Horizons in International Criminal Law* p. 85 (1985); J.Schutte, "Expanding the Scope of Extradition and Judicial Assistance and Cooperation in Penal Matters", in *Ibidem*, p. 79 (1985).
55. See M.C.Bassiouni, "Effective National and International Action against Organized Crime and Terrorist Criminal Activities", *Emory Int'l L. Rev.*, vol. 4, pp. 9, 37–40 (1990). See also B.Zagaris, "Developments in International Judicial Assistance and Related Matters", in *Denv. J. Int'l L & Pol'y*, pp. 339, 355–357 (1990).
56. "Treaty on Mutual Assistance in Criminal Matters", May 25, 1973, US-Switz., 27 UST 2019, 12 ILM 916 (entered into force January 23, 1977) [hereinafter "Swiss Treaty"].
57. "Treaty on Mutual Legal Assistance in Criminal Matters", December 4, 1990, US-Arg., S. Treaty Doc. No. 18, 102d Cong., 1st Sess (1991) (entered into force February 9, 1993).
58. "Treaty on Mutual Legal Assistance in Criminal Matters", August 18, 1987, US-Bah., S. Treaty Doc. No. 16, 100th Cong., 2d Sess. (1988) (entered into force July 18, 1990).
59. "Treaty on Mutual Legal Assistance in Criminal Matters", January 28, 1988, US-Belg., S. Treaty Doc. No. 16, 100th Cong., 2d Sess. (1988) (advice and consent of the US Senate October 24, 1989).
60. *"Treaty on Mutual Legal Assistance"*, December 9, 1987, US-Can., S. Treaty Doc. No. 13, 100th Cong., 2d Sess (1988), 24 ILM 109 (entered into force January 24, 1990).
61. "Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters", July 3, 1986, S. Treaty Doc. No. 8, 100th Cong., 2d Sess. (1987), 26 ILM 536 (entered into force March 19, 1990) [hereinafter "Cayman Islands Treaty"].
62. "Treaty on Mutual Legal Assistance", August 20, 1980, US-Colom., S. Treaty Doc. No. 11, 97th Cong., 1st Sess. (1981) (advice and consent of the US Senate

December 2, 1981). This treaty is not likely to come into force due to Columbia's failure to ratify the instrument based on that nation's political climate. See Knapp, *Op. cit.*, note 37, p. 413, n. 31.

63. "Treaty on Mutual Assistance in Criminal Matters", November 9, 1982, US-Italy, S. Treaty Doc. No. 25, 98th Cong., 2d Sess. (1984), 24 ILM 1536 (entered into force November 13, 1985) [hereinafter "Italian Treaty"].
64. "Treaty on Mutual Legd Assistance in Criminal Matters", July 7, 1989, US-Jamaica, S. Treaty Doc. No. 16, 102d Cong., 1st Sess. (1991) (advice and consent of the US Senate July 2, 1992).
65. "Treaty on Mutual Legal Assistance in Criminal Matters", December 9, 1987, US-Mex., S. Treaty Doc. No. 13, 100th Cong., 2d Sess. (1988) (entered into force May 3, 1991).
66. "Convention on Mutual Assistance in Criminal Matters", October 17, 1983, US-Morocco, S. Treaty Doc. No. 24, 98th Cong., 2d Sess. (1984) (advice and consent of the US Senate June 29, 1984).
67. "Treaty on Mutual Legd Assistance in Criminal Matters", June 12, 1981, US-Neth., TIAS No. 10734, 21 ILM 48 (entered into force September 15, 1983) [hereinafter "Netherlands Treaty"].
68. "Treaty on Mutual Legal Assistance", November 20, 1990, US-Spain, S. Treaty Doc. No. 21, 102d Cong., 2d Sess. (1992) (entered into force June 30, 1993).
69. "Treaty on Mutual Assistance in Criminal Matters", March 19, 1987, US-Thail., S. Treaty Doc. No. 18, 100th Cong., 2d Sess. (1988) (entered into force June 10, 1993).
70. "Treaty on Extradition and Mutual Assistance in Criminal Matters", June 7, 1979, US-Turk., 32 UST 3111 (entered into force June 1, 1981).
71. "Treaty on Mutual Legal Assistance in Criminal Matters", May 6, 1991, US-Uru., S. Treaty Doc. No. 19, 102d Cong., 1st Sess. (1991) (advice and consent of the US Senate July 2, 1992).
72. "Treaty on Mutual Assistance in Criminal Matters", September 13, 1989, U.S.-Nig., S. Treaty Doc. No. 26, 102d Cong., 2d Sess (1992).
73. "Treaty on Mutual Assistance in Criminal Matters", April 11, 1991, US-Pan, S. Treaty Doc. No. 15, 102d Cong., 1st Sess (1991).
74. "Treaty on Mutual Legal Assistance in Criminal Matters", US-Korea, S. Treaty Doc. No. 104–1 (transmitted to the Senate January 12, 1995).
75. July 6, 1994.
76. See "Exchange of Letters concerning the Turks and Caicos Islands and any Matter Related to any Activity referred to in the Single Convention on Narcotic Drugs" (1961), as amended September 6, 1986, US-UK, cited in *Dep't St.Bull.*, June 1987.
77. See "Exchange of Letters concerning Montserrat and Matters Related to any Activity referred to in the Single Convention on Narcotic Drugs" (1961), as amended May 14, 1987, US-UK, cited in *Dep't St.Bull.*, August 1987.
78. See "Exchange of Letters concerning Anguilla and Matters Related to any Activity referred to in the Single Convention on Narcotic Drugs" (1961), as amended March 11, 1987, US-UK, cited in *Dep't St.Bull.*, June 1987.
79. See "Exchange of Letters concerning the British Virgin Islands and any Matter Related to any Activity referred to in the Single Convention on Narcotic Drugs" (1961), as amended April 14, 1987, US-UK, cited in *Dep't St.Bull.*, September 1987.

80. See "Agreement on Procedures for Mutual Assistance in Law Enforcement Matters", August 15, 1987, US-Haiti, TIAS No. 11389.
81. See "Interim Executive Agreement Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking", February 9, 1988, US-Gr Brit.
82. See "Agreement on Procedures for Mutual Assistance in Law Enforcement Matters", November 2, 1987, US-Nig.
83. See S.Rep. on Bahamas MLAT, S. Treaty Doc. No. 16, Exec. Rept. 100–27, 100th Cong., 2d Sess. 1988: The committee believes that [MLATs] are a key element in the US strategy to improve international cooperation against crime, particularly narcotics-related offences such as RICO, CCE and money laundering. The Bahamas are a major transit point for narcotics trafficking and an important international banking center. The MLAT with the Bahamas will assist US efforts to obtain bank records and other evidence of narcotics related money laundering. *Ibidem.*, pp. *3–4.*
84. See B.Zagaris, "Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—A United States Perspective", in *Geo.Wash. J.Int'l. L & Econ.*, vol. 22, pp. 465, 498 (1989), and sources cited therein.
85. *Ibidem.*
86. See Ibidem, pp. 465, 489, and sources cited therein.
87. *Ibidem,* pp. 498–499 and sources cited therein.
88. See Knapp, *Op. cit.*, note 37, p. 411.
89. *Ibidem.* Consider this statement by Swiss Justice Minister Elisabeth Kopp: Increased economic interdependence has led to increased numbers of requests regarding new forms of criminality. **International mutual assistance is, contrary to the popular perception in Switzerland, not a one side process.** Although US authorities have made three times as many requests as the Swiss, **our authorities have been able to obtain search and seizure or freeze orders in the** US **too** in *Wall St.* /., October 28, 1987, p. 33 (emphasis added). See also H.Schultz, "Banking Secrecy and Mutual Assistance in Criminal Matters" (Swiss Bank Corp., 1983).
90. Swiss Treaty, *Op. cit.*, note 56. The discussion of the Swiss Treaty will be the most thorough for several reasons: 1) being the first treaty, the lessons learned from use of the Swiss treaty often apply to the other MLATs; and 2) the purpose of the Swiss Treaty was to pierce bank secrecy and there is extensive documentation of the way the Swiss MLAT has helped to pierce Swiss bank secrecy laws.
91. This figure applies to the first eight years that the treaty has been in force (1977–85). See in *Exec. Rep.* pp. 100–30, 100th Cong., 2d Sess., September 26, 1988, Bahamas MLAT Report, p. 1. See also Knapp, *Op. cit.*, note 37, p. 414 (for the first six years the US made 202 requests to Switzerland's 65 requests).
92. During the first six years that the treaty was in force, the evidence obtained contributed to over 145 convictions. Notably, mutual assistance from Switzerland contributed to the fraudulent transactions and money-laundering convictions of Michele Sindona (United States v. Sindona, 636 F.2d 792 (2d Cir. 1980), cert. denied, 451 US 912 (1981)) and mobster Anthony Giacalone (United States v. Giacalone, No. S 80 Cr. 123 SDNY, indictment filed February 6, 1980). These convictions were facilitated by access to Swiss bank and business records. See Knapp, *Op. cit.*, note 37, p. 415.

93. "Most Effective Forms of International Cooperation for the Prevention and Control of Organized Transnational Crime at the Investigative, Prosecutorial and Judicial Levels", UN Doc. E/CONF.88/4 (September 1, 1994) (background document to the World Ministerial Conference on Organized Transnational Crime), 68 (citing "US-Swiss MLAT Yields $150 Million Seizure in Swiss Bank", in *Money Laundering Alert*, May 1994, p. 3).
94. See "Swiss Treaty", *Op. cit.*, note 56, art. 37, § 2 which provides that Swiss law and procedure will govern the validity of a treaty request to Switzerland.
95. See Knapp, *Op. cit.*, note 37, pp. 415–416.
96. Art. 36(a) provides in pertinent part that "upon receipt of a request for assistance, the requested state shall notify…any person from whom a statement or testimony or documents, records, or articles of evidence are sought." Swiss Treaty, *Op. cit.*, note 56, art. 36(a).
97. This early warning also gives suspects an opportunity to move the assets before they can be detected and thus destroy the paper trail. See E.A. Nadelmann, "Negotiations in Criminal Law Assistance Treaties", 33 in *Am.J.Comp. L.*, vol. 33, pp. 467, 479 (1985).
98. See Swiss Treaty, *Op. cit.*, note 56, art. 29(1)(a).
99. See Nadelmann, *Op. cit.*, note 97, p. 479. In United States courts, defendants usually do not learn of the theory of the government's case until the indictment is returned.
100. *Ibidem.*
101. See Nadelmann, *Op.* cit., note 97, pp. 472–474. Much of Nadelmann's research included interviews with the United States negotiators of the Swiss Treaty.
102. Swiss Banking Code Article 47 provides that any officer or employee of a bank who violates his duty of secrecy or anyone who induces or attempts to so induce a person to violate that duty may face six months imprisonment or a fine of 50,000 francs.
103. Swiss Penal Code Article 273 makes it a crime to "elicit a manufacturing or business secret in order to make it available to any foreign official agency or to a foreign organization or private enterprise" either directly or through an agent, and to make such secrets available to such foreign authorities or organizations.
104. See Nadelmann, *Op. cit.*, note 97, pp. 476–477.
105. *Ibidem*, p. 477. See also "Swiss Treaty", *Op. cit.*, note 56, art. 10(2). However, even if an innocent third party is implicated, Switzerland is required to furnish the information if these conditions are met: 1) the request concerns the investigation or prosecution of a serious offence; 2) the disclosure is of importance for obtaining or proving facts which are of substantial significance for the investigation of proceeding; 3) reasonable but unsuccessful efforts have been made in the United States to obtain the information in other ways. *Ibidem.* See "Technical Analysis of the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters" [hereinafter "Technical Analysis"], p. 48.
106. *Op. cit.*, note 105.
107. *Op. cit.* This provision is not substantially different from Swiss jurisprudence which allows the piercing of bank secrecy where the government interest is compelling. See in *Exec. Rept.*, pp. 94–29, 94th Cong., 2d Session, at 5.
108. *Op. cit.*
109. See Nadelmann, *Op. cit.*, note 97, p. 478.

110. *Ibidem.*
111. *Ibidem,* See also "Swiss Treaty", *Op. cit.,* note 56, art. 7(a-c).
112. This lack of use can probably be attributed to a lack of Swiss cooperation and a paucity of United States requests due to the stringent criteria. See Nadelmann, *Op. cit.,* note 97, pp. 478–479.
113. *Ibidem, p.* 479.
114. *Ibidem,* pp. 478–479.
115. *Ibidem,* pp. 482–483.
116. See Knapp, *Op. cit.,* note 37, p. 416.
117. *Ibidem.*
118. See Nadelmann, *Op.* cit., note 97, p. 488.
119. *Ibidem,* p. 489. See also 26 USC § 7203.
120. Nadelmann, *Op. cit.,* note 97, pp. 489–491. As a result the IRS played a key role in the negotiation of the Netherlands MLAT. The IRS sought to repeal the Dutch Antilles status as a tax haven (as granted by the 1963 US-Neth. Tax Treaty) as the Antilles had become "one of the four countries having the most 'iron clad secrecy'." Statement of Asst. Sec'y of the Treasury in Charge of Enforcement, Hearings Before the Commerce, Consumer and Monetary Affairs Committee, 98th Cong., 1st Sess., p. 569.
121. Nadelmann, *Op. cit.,* note 97, p. 491. See also "Netherlands Treaty", *Op. cit.,* note 67, art. 20.
122. See Knapp, *Op.* cit., note 37, p. 416 (as of 1988). See also Nadelmann, *Op. cit.,* note 97, pp. 483–484, for an interesting discussion of the impact of the film *Midnight Express* on the MLAT negotiation process (a package which resulted in prisoner transfer, extradition and legal assistance provisions).
123. *Ibidem.*
124. The Italian Treaty was used extensively in the "Pizza Connection" prosecution, allowing several Italian police officers to travel to New York in order to testify. See "United States v. Badalamenti", in *F. Supp.,* vol. 626, p. 658 (SDNY 1986). The Italians also made extensive use of the MLAT during the "Maxi-Trial" in Sicily where over 400 defendants were prosecuted (including two money launderers). See Giovanni Abate and 467 People, No. 2289–92 (Palermo).
125. Article 18 of the Italian Treaty provides as follows: Immobilization and Forfeiture of Assets 1. In emergency situation, the Requested State shall have authority to immobilize asset found in that state which are subject to forfeiture. 2. Following such judicial proceedings as would be required under the laws of the Requested State, that state shall have the authority to order the forfeiture to the Requesting State of assets immobilized pursuant to paragraph 1 of this Article. "Italian Treaty", *Op. cit.,* note 63. The effect of paragraph 2 is that the proceeds forfeited profit the requesting state. This arrangement provides incentive for a requested party to provide assistance. *Ibidem.*
126. See Nadelmann, *Op. cit.,* note 97, p. 494. A provision in the Anti-Drug Abuse Act of 1986 has eradicated this problem. 18 USC § 981 provides statutory authority 1) to forfeit the proceeds of a foreign drug trafficking offence and 2) when authorized by a treaty, to sell the property and transfer the proceeds to a foreign country (at least where there has been joint participation in the investigation leading to the proceeds). See Knapp, *Op. cit.,* note 37, p. 423 for a discussion of how proceeds should be disposed of once confiscated by the requested state.

127. Article 15 of the Italian Treaty provides as follows: Taking Testimony in the Requesting State 1. The Requested State upon request that a person in that State appear and testify in connection with a criminal investigation or proceeding in the Requesting State, **shall compel that person to appear and testify** in the Requesting State by means of the procedures for compelling the appearance and testimony of witnesses in the Requested State if: a. the Requested State has no reasonable basis to deny the request b. the person could be compelled to appear and testify similar circumstances in the Requested State; and c. the Central Authority of the Requesting State certifies that the person's testimony is relevant and material. 2. A person who fails to appear as directed shall be subject to sanctions under the laws of the Requested State as if that person had failed to appear in similar circumstances in that State. Such sanctions shall not include removal of the person to the Requesting State. "Italian Treaty", *Op. cit.*, note 63. Article 17(1)(b) provides protection for a witness compelled to testify by granting immunity from prosecution based on truthful testimony. *Ibidem.*
128. These figures refer to the Cayman Islands Agreement (see "Exchange of Letters Concerning the Cayman Islands and Matters Connected with any Narcotics Activity referred to in the Single Convention Narcotic Drugs" 1961, as amended July 26, 1984, US-UK, 14 ILM 1110), which was utilized since 1984 and until the ratification of the Cayman Islands Treaty.
129. See Knapp, *Op. cit.*, note 37, p. 417, and sources cited therein. Of those 95 convictions, one-third were convicted of CCE (18 USC § 848) violations. This is a much higher percentage than the total number of defendants charged in the overall enforcement task force program. *Ibidem.*
130. This provision is important because it is similar to the provisions in the five other treaties concluded at the same time. Article 16 of the Cayman Islands Treaty provides as follows: Proceeds of Crime 1. The Central Authority of one Party may notify the Central Authority of the Other Party when it has reason to believe that proceeds of a criminal offense are located in the territory of the other Party. 2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings related to: (a) the forfeiture of the proceeds of criminal offenses; (b) restitution to the victims of criminal offenses; and (c) the collection of fines imposed as a sentence for a criminal offense. "Cayman Islands Treaty", *Op. cit.*, note 61.
131. See generally M.C.Bassiouni, "Critical Reflections on International and National Control of Drugs", in *Denv.J. Int'l.L & Pol'y*, vol. 18, pp. 311, 331–334 (1990). This recommendation must not be seen, however, as a suggestion that bilateral treaties are per se limited to a single modality while multilateral treaties necessarily represent the integration of a number of modalities. Certainly, bilateral legal assistance treaties may contain a number of modalities while multilateral treaties may, in some instances, concern only a single modality.
132. An important issue to consider in adopting an integrated approach is which modalities of inter-state penal cooperation are sufficiently accepted as to be included in a comprehensive instrument. Legal assistance provisions contained in broadly-negotiated multilateral conventions provide excellent examples of widely accepted norms. Also, model treaties on various forms of inter-state cooperation provide excellent examples of widely applicable provisions for each modality

because they reflect differences in legal systems and contain only widely agreedupon provisions.

133. See Council of Europe, Rec. No. R/87/1 of the Committee of Ministers of Justice to the Member States on Inter-State Cooperation in Penal Matters among Member States (adopted January 19, 1987). The "Draft (European) Comprehensive Convention on Inter-State Cooperation in the Penal Field" contains provisions applicable to most forms of legal assistance and individual sections relating to the individual types of inter-state cooperation. That instrument suggests four types of cooperation: extradition, mutual legal assistance, prosecution (e.g., transfer of proceedings), and enforcement and supervision (e.g., recognition of foreign penal judgments and transfer of proceedings). The original text of this instrument is con tained in "European Inter-State Co-operation in Criminal Matters: the Council of Europe's Legal Instruments 1661", vol. 2 (E.Müller-Rappard and M.C.Bassiouni eds., rev'd 2d ed. 1993). The revised version of that text is contained in "Draft European Comprehensive Convention on International Co-operation in Criminal Matters", reprinted in, Council of Europe, European Committee in Crime Problems, "Committee of Experts on the Operation of European Conventions in the Penal Field: Interim Activity Report", PC-OC (94) 5 (Strasbourg, April 21, 1994).
134. National laws in Austria, Germany, and Switzerland utilize more than one modality in a single law. See Austrian Law on Mutual Assistance in Criminal Matters, *Bundesgesetz* vom 4. December 1979, über die Auslieferung und die Rechtshilfe in Strafsachen (AHRG), BGBI. No. 529/1979; (Germany) Act Concerning International Mutual Assistance in Criminal Matters, "Gesetz über die internationale Rechtshilfe in Strafsachen" (December 31, 1982, entered into force January 7, 1983), BGBI, Teil I, S. 2071 (Federal Official Gazette); and Swiss Federal Law on International Mutual Assistance in Criminal Matters, S.R. 353.1 (January 1, 1983), Entraide internationale en matière pénale of 20 March 1981. See also Vogler, "The Expanding Scope of International Judicial Assistance and Cooperation in Legal Matters", in *Die Friedens-Warte,* vol. 66, p. 287 (1986).
135. G.A. Res. 45/116 (14 December 1990).
136. G.A. Res. 45/117 (14 December 1990).
137. G.A. Res. 45/118 (14 December 1990). Other model agreements include: Model Agreement on the Transfer of Foreign Prisoners, Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released and Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property. For a discussion of all of the above model agreements see generally R.S. Clark, "Crime: the UN Agenda on International Cooperation in the Criminal Process", in *Nova L. Rev.*, vol. 15, p. 475 (1991).
138. Despite these institutional differences, and in recognition of the fact that the United Nations has not adopted an integrated approach, one of the writers has propounded such an approach in a report submitted to a Committee of Experts Meeting at ISISC (Siracusa) June 1990 and presented to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders (Havana, Cuba, August-September 1990), A/Conf.l44/NGO (31 July 1990), reprinted in M.C. Bassiouni, "A Comprehensive Strategic Approach on International Cooperation for the

Prevention, Control and Suppression of International and Transnational Criminality", in *Nova L Rev.*, vol. 15, p. 354 (1991).

139. "UN Drug Convention", *Op. cit.*, note 14. As of February 1994, 99 states have become Parties to the Convention. Another 26 states have signed the Convention but have not yet become Parties. For the history of the UN Drug Convention see United Nations Economic and Social Counsel, Final Act of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, Austria, November 25-December 20, 1988. See Bernasconi, *Op. cit.*, note 14; Gilmore, *Op. cit.*, note 14.
140. See B.Zagaris, "Developments in International Judicial Assistance and Related Matters", in *Denv. J. Int'l L. & Pol'y*, vol. 18, pp. 339, 340 (1990).
141. The UN Drug Convention improves upon two previous multilateral agreements (the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances) that sought to limit the trade in illicit drugs. However, these treaties focussed on the supply of narcotic drugs and tried to limit their supply in a way that hindered diversion to illicit traffic. These treaties did not provide for the prosecution of drug traffickers and approached the issue from a regulatory, and not criminal law enforcement, standpoint. See "Single Convention on Narcotic Drugs", March 30, 1961, 18 UST 1409, 520 UNTS 204 (amended March 25, 1972, 26 UST 1441, 976 UNTS 3); "Convention on Psychotropic Substances" of 1971, February 21, 1971, 32 UST 543, 1019 UNTS 175.
142. Provisions for immobilization and forfeiture of assets become more vague and less effective as the community for which they are intended expands. Because of the number of states involved in it negotiation, the UN Drug Convention may lack sufficient specificity to make its use effective absent some sort of bilateral or regional agreement.
143. "UN Drug Convention", *Op. cit.*, note 14, Art. 2(1). For a discussion of the implementation tasks posed by the treaty, as well as models for implementing legislation see generally "United States Dept. of Justice, Criminal Division, Narcotics and Dangerous Drugs Section, Manual for Compliance with the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (October 1992).
144. "UN Drug Convention", *Op.* cit., note 14, art. 2(2).
145. *Ibidem*, art. 2(3). See B.Zagaris, "Developments in International Judicial Assistance and Related Matters", in *Denv. J. Int'l L & Pol'y*, vol. 18, pp. 339, 342 (1990).
147. See "UN Drug Convention", *Op. cit.*, note 14, art. 3.
148. One such initiative is the European Laundering Convention, *Op. cit.*, note 16. In addition, many bilateral mutual legal assistance agreements, such as those concluded between the United States and a number of laundering havens, apply to all serious offences and not just drug-related offences. See M.C. Bassiouni, "Effective National and International Action against Organized Crime and Terrorist Criminal Activities", in *Emory Int'l L Rev.*, vol. 4, pp. 9, 37 (1990).
149. "UN Drug Convention", *Op. cit.*, note 14, art. 5(1)(a)-(b).
150. *Ibidem*, art. 5(2).
151. *Ibidem*, art. 5(3).
152. Governments have a legitimate interest in maintaining the secrecy of transactions. On a macro level, for instance, the confidentiality of transactions is important in the

shoring up of a nation's currency. But the public sector and legitimate industries seek the same type of financial secrecy as money launderers. This is particularly true of the arms industry, whose financial dealings have recently been shown to utilize the same channels as drug dealers and money launderers. For a complete discussion of the manner in which bank secrecy can be abused to facilitate money laundering see Commission on Crime Prevention and Criminal Justice, "Money Laundering and Associated Issues: the Need for International Co-operation", UN Doc. No. E/CN.15/1992/4/Add.5 (21–30 April 1992), 25–60.

153. See Stewart, *Op. cit.*, note 9, at 399. However, with this increased access, privacy violations are more likely as officials go fishing through private bank records for potentially forfeitable assets.
154. "UN Drug Convention", *Op. cit.*, note 14, art. 5(4)(a)(i)-(ii).
155. *Ibidem*, art. 5(4)(b).
156. *Ibidem*, art. 5(4)(d)(i)-(ii). See also *Ibidem*, art. 7(6)-(19).
157. *Ibidem*, art. 5(4)(d)(iii).
158. *Ibidem*, art. 5(6)(g).
159. *Ibidem*, art. 5(6)(f).
160. *Ibidem*, art. 5(5). An interesting consequence of this provision, and similar provisions in other treaties regarding the allocation of confiscated assets, is that law enforcement activities may become driven by the profit motive. The purpose of this type of provision is to give incentive to the agencies responsible for seizing and freezing assets. However, such a profit motive may create a de facto policy of giving priority in international cooperation and enforcement to those crimes involving the greatest sums of money susceptible to seizure. Consequently, serious crimes that do not involve the potential for confiscation of assets *(e.g.*, hijacking, taking of hostages, and terrorism) may become secondary in certain international cooperation and enforcement efforts.
161. *Ibidem*, art. 5(6)(a).
162. *Ibidem*, art. 5(6)(b)
163. *Ibidem*, art. 5(7).
164. *Ibidem*, art. 5(8). This provision could possibly be used to allow the exemption of attorney fees from restraint or confiscation. See B. Zagaris, "Developments in International Judicial Assistance and Related Matters", in *Denv.J. Int'l L. & Pol'y*, vol. 18, pp. 339, 345 (1990).
165. "UN Drug Convention", *Op. cit.*, note 14, art. 7(2)(a)-(g).
166. *Ibidem*, art. 7(3). The obligations under Article 7, and some of the confiscation provisions of Article 5, create a "miniature mutual legal assistance treaty." Because methods of acquiring admissible evidence vary from country to country, it was impossible to negotiate legal assistance provisions as detailed and comprehensive as those in bilateral or regional agreements. Thus, while the UN Drug Convention contains many of the "key elements of mutual legal assistance relations," it does not, and could not, contain more detailed procedures. See "Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", in *S. Exec. Rep.*, vol. 15, 101st Cong., 1st Sess., reprinted in "International Efforts to Combat Money Laundering" pp. 98, 127 (W.C. Gilmore ed., 1992). This lack of specificity, however, will inevitably result in countries interpreting their legal assistance obligations differently according to national law. This limitation in the UN Drug

Convention contrasts with the greater comprehensiveness and detail of regionally motivated multilateral instruments like the European Laundering Convention and the Draft Inter-American Convention on Mutual Assistance in Criminal Matters discussed *infra.* Issues of interpretation will be diminished under these instruments.An interesting example of a legal assistance obligation in a widely negotiated multilateral instrument is Article VII, paragraph 2 of the 1993 Chemical Weapons Convention (CWC) which provides as follows: Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of obligations…While the CWC's application of principles of inter-state penal cooperation to arms control is historic, the treaty gives no further indication of the types of assistance to be provided under the treaty. As a result, the legal assistance obligation will be defined, in great part, by the domestic legislation adopted to implement the CWC. For a discussion of how this broad, undefined obligation to provide legal assistance could be interpreted by States Parties see B.Kellman, D.Gualtieri, E.Tanzman, and S.W.Grimes, "Manual for National Implementation of the Chemical Weapons Convention" pp. 106–128 (1993).

167. "UN Drug Convention", *Op. cit.,* note 14, art. 7(5).
168. See B.Zagaris, "Developments in International Judicial Assistance and Related Matters", in *Denv.J. Int'l L & Pol'y,* vol. 18, pp. 339, 346 (1990).
169. "UN Drug Convention", *Op, cit.,* note 14, art. 7(6).
170. *Ibidem,* art. 7(7).
171. *Ibidem,* art. 5(2),(4)(g).
172. *Ibidem,* art. 3(1).
173. See *Ibidem,* art. 3(1)(b)(i)-(ii), -(c)(i), -(c)(iv).
174. *Ibidem,* art. 3(1)(b)(i).
175. Art. 3(1)(b)(i) provides that each Party shall establish as an offence: The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, 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 offence or offences to evade the legal consequences of his actions. *Ibidem.*
176. Art. 3(1)(b)(ii) provides that each Party shall establish as an offence: 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 offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences. *Ibidem.*
177. Art. 3(1)(c)(i) provides that each Party shall establish as an offence: (c) Subject to its constitutional principles and the basic concepts of its legal system: (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences. *Ibidem.*
178. Art. 3(1)(c)(iv) provides that each Party shall establish as an offence: Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in

accordance with this article. *Ibidem.* Article 7 of the Convention amends existing mutual legal assistance treaties to include the offences listed in article 3. Therefore, via the Convention, money laundering will fall within the reach of existing mutual legal assistance treaties. See Stewart, *Op. cit.*, note 9, p. 398. See B. Zagaris, "Develop ments in International Judicial Assistance and Related Matters", in *Denv.J. Int'l L & Pol'y*, vol. 18, pp. 339, 346–47 (1990).

179. See "UN Drug Convention", *Op. cit.*, note 14, art. 3(4)(a).
180. *Ibidem.*
181. See *Ibidem*, art. 3(10). This provision will be a significant aid for the purposes of mutual legal assistance and extradition. See Stewart, *Op. cit.*, note 9, p. 394 n. 23.
182. See "UN Drug Convention", *Op. cit.*, note 14, art. 5(1), -(4).
183. See *Ibidem*, art. 5(2). Thus, national legislation must provide for eventual confiscation and all other measures necessary to confiscate proceeds—including provisional measures.
184. Article 5(3) provides as follows: In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph or on the ground of bank secrecy. *Ibidem.*
185. *Ibidem*, Bank secrecy is a common barrier to discovery in forfeiture proceedings. See generally, Newcomb, "United States Litigation and Foreign Bank Secrecy: the Origins of Conflict", in *NYL Sch.J. Int'l. and Comp.L*, vol. 9, p. 47 (1988). See also Knapp, *Op. cit.*, note 37. This provision, however imposes an affirmative obligation on signatory parties to not shield from discovery bank and financial records for the purposes of seizure, freezing and forfeiture proceedings. See Stewart, *Op. cit.*, note 9, p. 395,
186. Article 7(1) provides as follows: The parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1. "UN Drug Convention", *Op. cit.*, note 14.
187. Article 7(5) provides that "A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy "*Ibidem.* See also Stewart, *Op.* cit., note 9, p. 399.
188. Nilsson, *Op. cit.*, note 20, p. 419. See also, *e.g.*, Müller-Rappard, "The European Response to International Terrorism", in *Legal Responses to International Terrorism*, pp. 388–391 (M.C.Bassiouni ed., 1987); E.Müller-Rappard, "The European System", in *International Criminal Law: Procedure*, vol. 2, p. 95 (M.C.Bassiouni ed., 1986). See also M.Pisani and F.Mosconi, "Codice delle convenzioni di estradizione e di assistenza giudiziaria in materia penale" (2d ed. 1993). See also Bernasconi, *Op.* cit., note 14; W.Gilmore, *Op. cit.*, note 14.
189. The European Laundering Convention focuses on the recognition of foreign confiscation or forfeiture judgements and contains the provisional and investigative measures of freezing and seizing of assets along with the necessary judicial assistance. Thus, although it utilizes several modalities of inter-state cooperation, it does so only in order to facilitate the freezing and seizing of assets. This focus on one modality arises because the Council of Europe has concluded 18 other conventions relating to inter-state penal cooperation and the European Laundering Convention is expected to operate in concert with those agreements. These

instruments are of a better technical legal quality than many other international instruments, including the 1988 UN Drug Convention, for three primary reasons. First, the 23 nations that comprise the Council of Europe are more cohesive than the 100-plus nations that participated in the elaboration of the UN Drug Convention. As a result, the Council of Europe is not as concerned with maximizing the number of signatures as is the United Nations. Second, the Council of Europe, as with most regional law-making bodies, does not face as great a problem of conflicting legal and criminal justice systems as does the United Nations. The legal systems of the 24 nations that made up the Council of Europe until 1990 contain many similarities. With the admission of Eastern and Central European countries, this situation differs. But the Council of Europe has the ability to spend more time, exert more effort and expend greater resources in the conclusion of a treaty than does a body like the United Nations. The Council of Europe is also consulted by more governments than the United Nations and has the benefit of additional expertise and input. See M.C. Bassiouni, "Policy Considerations on Inter-State Cooperation in Criminal Matters", in *Principles and Procedures for a New Transnational Criminal Law*, vol. 807, pp. 810–811 (A.Eser and O.Lagodny eds., 1992). See also "La Convenzione Europea di assistenza giudiziaria in materia penale" (P.Laszloczky ed., 1984); T.Vogler and P.Wilkitzki, "Gesetz über die internationale Rechtshilfe in Strafsachen", (IRG) in *Kommentar* (1992); Carlson and Zagaris, *Op. cit.*, note 11; C.Van den Wyngaert, "Criminal Law and the European Communities: defining Issues", in *Transnational Aspects of Criminal Procedure* (1983).

190. Nilsson, *Op. cit.*, note 20, p. 425.
191. *Ibidem.*
192. April 20, 1959, Europ. TS No. 30.
193. May 28, 1979, Europ. TS No. 70.
194. May 15, 1972, Europ. TS No. 73. See Nilsson, *Op. cit.*, note 20, p. 424, for a more complete discussion of how the relevant instruments are intended to interact.
195. *Ibidem,* p. 5.
196. Nilsson, *Op. cit.*, note 20, p. 424. As of December 1995, eight states have ratified the Convention (Bulgaria, the United Kingdom, the Netherlands, Switzerland, Italy, Lithuania, Finland, and Norway). France, Spain, Sweden, and Germany are expected to ratify soon. Ratifications may number as many as 20 within the next two years. See "Bulgarian says Embezzled Money from East flowing into Western Banks", in *BNA's Banking Report*, December 5, 1994, p. 851. States that have signed but not ratified include Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Iceland, Liechtenstein, Luxembourg, Portugal, San Marino, Slovenia, Spain, Sweden, and Australia. See "Czech Republic becomes 25th Nation to sign Convention on Money Laundering", in *BNA Banking Daily*, December 19, 1995; M.R. Marchetti, "Commento L. 9/8/1993 n. 328—Ratifica e esecuzione della convenzione sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato, fatta a Strasburgo 1'8 novembre 1990," in *La legislazione penale*, vol. 4, No. 3/94 (1994). See also, L. Magistro, "Riciclaggio dei capitali illeciti" (1991). The United States has yet to ratify this agreement, but United States involvement in an instrument such as this is almost certain. Agreements of this nature highlight the differences between hard power (the unilateral action of seizing criminals abroad and bringing them to the United States) and soft power (the use of

international agreements and judicial assistance). Advocates of both sides represent the powers that be in the United States Department of Justice. Carlson and Zagaris, *Op,* cit., note 11, p. 557, and sources cited therein (arguing that the hard power approach is untenable in Western Europe and that United States policy makers must conform to the European regime).

197. Woltring, "Money Laundering: Impediments to Effective International Cooperation", *UNICRI,* vol. 199, p. 5 (conference paper presented to the International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: a Global Approach, Courmayeur Mont Blane, Italy, 18–20 June 1994).
198. See Nilsson, *Op. cit.,* note 20, p. 424.
199. There can be no doubt that implementing a number of these elements of international co-operation, and particularly the immobilizing and confiscation of assets, will require the enactment of innovative legislation. Recognizing the differences in legal systems and the likelihood of disputes, the Committee of Experts provided the equally innovative solution of an arbitral tribunal as an option for the settlement of disputes. "European Laundering Convention", *Op.* cit., note 16, art. 42. See also "Arbitral Tribunals under the Laundering Convention", Recommendation No. R (91) 12, 11.
200. *Ibidem,* p. 425. Nevertheless, states desiring to become bound by the Convention may find it necessary to substantially amend existing legislation. *Ibidem.* Particular attention was paid to the fact that, in relation to measures to be taken at the national level, the national law of states differs significantly. As a result, the harmonization of national implementation measures was not sought—except in regard to the criminalizing of money laundering. This flexibility recognizes the varied characteristics of national law and will, hopefully, ensure "a minimum common degree of effectively (sic)." Polimeni, "The Council of Europe Convention on Laundering Search, Seizure and Confiscation of the Proceeds of Crime", Conference Paper: The Money Laundering Conference, M.L 92(15) (Strasbourg, September 28–30, 1992). An important actor in this area has been the Pompidou Group. Formed in 1971 and operating under the auspices of the Council of Europe (since 1980), the Pompidou Group has endeavored to coordinate international responses to drug trafficking. The Group encourages the development of international agreements and was an active advocate in the conclusion of the European Laundering Convention. See Carlson and Zagaris, *Op. cit.,* note 11, pp. 565–67.
201. European Laundering Convention, *Op. cit.,* note 16, art. 1(e) (defining a "predicate offence" as "any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention"). See also "Council of Europe, Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds From Crime" (1991), 8 [here-inafter "Explanatory Report"], reprinted in, "European Inter-State Co-operation in Criminal Matters: the Council of Europe's Legal Instruments", vol. 2, p. 1419 (E.Müller-Rappard and M.C.Bassiouni eds., rev'd 2d ed. 1993) .
202. See Gilmore, "International Responses to Money Laundering: a General Overview", Conference Paper: The Money Laundering Conference, M.L 92(10) (Strasbourg, September 28–30, 1992). See also Gilmore, *Op. cit.,* note 14.
203. "European Laundering Convention", *Op. cit.,* note 16, art. 2(1).

204. *Ibidem,* art. 3.
205. *Ibidem.*
206. *Ibidem,* art. 4(1).
207. *Ibidem,* art. 5.
208. *Ibidem,* art. 7(1).
209. *Ibidem,* art. 7(2)
210. *Ibidem,* arts. 8 and 9.
211. *Ibidem,* art. 10. No such discretion is granted by the UN Drug Convention. See "UN Money Laundering Report", *Op. cit.,* note 39, 82.
212. *Ibidem,* "European Laundering Convention", *Op. cit.,* note 16, art. 11(1).
213. *Ibidem,* art. 12.
214. Nilsson, *Op. cit.,* note 20, p. 426.
215. "European Laundering Convention", *Op. cit.,* note 16, art. 13.
216. *Ibidem,* art. 13(3). See also Nilsson, *Op. cit.,* note 20, p. 427.
217. "European Laundering Convention", *Op. cit.,* note 16, art. 14(1).
218. *Ibidem,* art. 14(2).
219. *Ibidem,* art. 15.
220. See *ibidem,* art. 18.
221. *Ibidem,* art. 18(7).
222. See "European Laundering Convention", *Op. cit.,* note 16, art. 1(e) (defining a "predicate offence" as "any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention"). See also "Explanatory Report", *Op. cit.,* note 201, 8.
223. See "Preamble to the European Laundering Convention". See also "Explanatory Report", *Op, cit.,* note 201, 8.
224. See "European Laundering Convention", *Op. cit.,* note 16, Preamble.
225. See Explanatory Report, *Op, cit.,* note 201, 32.
226. "European Laundering Convention", *Op. cit.,* note 16, art. 6(1).
227. *Ibidem,* art. 6(1)(a).
228. *Ibidem.*
229. See *ibidem,* art. 6(1)(b).
230. See *ibidem,* art. 6(1)(c).
231. See *ibidem,* art. 6(1)(d). To the extent that criminalization does not conflict with these principles, the state is obligated to criminalize the above acts. See also Explanatory Report, *Op. cit.,* note 201, 32.
232. See "European Laundering Convention", *Op. cit.,* note 16, art. 1(e). *Cf.* UN Drug Convention, *Op. cit.,* note 14, art. 3(1)(a)(i)-(iv) (generally defining predicate offences as any activity related to the manufacture, possession and trafficking of illicit drugs).
233. See Explanatory Report, Op. cif., note 201, 32.
234. See "European Laundering Convention", *Op. cit.,* note 16, arts. 2(2), 6(4). As a result, the offences referred to in respect to confiscation are not necessarily the same offences referred to with respect to a predicate offence for the purposes of the laundering provisions. See "Explanatory Report", *Op. cit.,* note 201, 34.
235. The UN Drug Convention includes participation as an element of every laundering offence under art. 3(1)(b)(i)-(ii), -(c)(i), -(c)(iv). The committee did not feel that it was necessary to include participation due to the approach taken (i.e., because the

Convention is not limited to drug offences). See "Explanatory Report", *Op. cit.,* note 201, 32.

236. See "European Laundering Convention", *Op. cit.,* note 201, art. 6(2)(a).
237. Nilsson, *Op. cit.,* note 20, p. 431. The author explains, by way of illustration, that under this principle if the offence of trading in endangered species was committed in Country A and the proceeds were laundered in Country B, it would not matter if trade in endangered species was illegal in Country B. *Ibidem.*
238. "European Laundering Convention", *Op. cit.,* note 16, art. 6(2)(b).
239. The committee also recognized that several states have laws providing the contrary. See "Explanatory Report", *Op, cit.,* note 201, 32.
240. "European Laundering Convention", *Op. cit.,* note 16, art. 6(2)(c). This provision mirrors Art. 3(4) of the UN Drug Convention, *Op. cit.,* note14.
241. See "European Laundering Convention", *Op. cit.,* note 16, Art. 6(3), which provides as follows: Each Party may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the acts referred to in paragraph 1 of this Article, in any or all of the following cases where the offender: a. ought to have assumed that the property was proceeds; b. acted for the purposes of making a profit; c. acted for the purpose of promoting the carrying on of further criminal activity.
242. See *ibidem,* art. 6(3)(a).
243. See *ibidem,* art. 6(3)(b). See also Explanatory Report, *Op. cit.,* note 201, 32.
244. "European Laundering Convention", *Op. cit.,* note 16, art. 6(3)(c).
245. "Council Directive" No. 91/308, 1991 O.J. (L 166) 77 (June 10, 1991) [hereinafter "EC Directive"]. For a discussion of how the EC Directive may influence the European Laundering Convention and a comparison of their provisions see Nilsson, *Op. cit.,* note 20, pp. 429–431. Under the terms of the Treaty of Rome, the EC can only "prohibit" an offense as it is not within its competence to "criminalize" activity. See "Treaty Establishing the European Economic Community", March 25, 1957, 298 UNTS 11. See also Bernasconi, *Op. cit.,* note 14; Gilmore, *Op. cit.,* note 14.
246. "EC Ministers to adopt Formally Money Laundering Law", in *Reuter Library Report,* June 7, 1991, available in LEXIS, NEXIS Library, Wires File. See also Carlson and Zagaris, *Op. cit.,* note 11, p. 572. The EC Directive adopted the definition of money laundering in the UN Drug Convention. "EC Directive", *Op. cit.,* note 245, art. 1. However, the Directive does not limit its scope to drug-related offences ("since money laundering occurs not only in relation to the proceeds of drug-related offences but also in relation to the proceeds of other criminal offences…, the Member States should, within the meaning of their legislation, extend the effects of the Directive to include the proceeds of such activities…"). *Ibidem.* Preamble.
247. "EC Directive", *Op. cit.,* note 245, art 16(1). The requirements extend to the branches of foreign-owned subsidiaries. *Ibidem,* art. 1.
248. Carlson and Zagaris, *Op. cit.,* note 11, p. 573. Sanctions are to be developed by the member states. "EC Directive", *Op.* cit., note 245, art. 14.
249. "EC Directive", *Op. cit.,* note 245, art. 3.
250. *Ibidem,* art. 3. For transactions below the threshold amount, financial institutions must obtain identification information if there is a suspicion of money laundering. *Ibidem.* These records must be maintained for a minimum of five years after the

relationship with the customer ends. *Ibidem*, art. 4. See also "Reuter Library Report", June 7, 1991, *Op. cit.*, note 246.

251. "EC Directive", *Op. cit.*, note 245, art. 9. For a more detailed discussion of the Directive, see "International Efforts to Combat Money Laundering xvi-xviii" (W.C.Gilmore ed., 1992). See also D.E.Alford, "Anti-Money Laundering Regulations: a Burden on Financial Institutions", in *NCJ Int'l L. & Com. Reg.*, vol. 19, p. 437 (1994).
252. For example, on December 30, 1993, Spain's law implementing the Directive (Law 19/1993) went into effect. "Implementation of Money Laundering Directive", in *Financial Regulation Report*, January 1994 available in LEXIS, NEXIS Library, Curnws File. As of April 1, 1994, financial institutions in the UK will face additional requirements as a result of the new law implementing the EC Directive (as part of the 1993 Criminal Justice Act). "UK Gears up to Enforce Tough New AntiLaundering Law", in *Money Laundering Alert*, March 1994, available in LEXIS, NEXIS Library, Curnws File.
253. For a discussion of other EC initiatives directed at drug trafficking and money laundering, see "Address by Mr. Padraig Flynn to the United Nations General Assembly—Special Session on Drugs—New York, 26 October 1993", in *RAPID*, October 27, 1993, available in LEXIS, NEXIS Library, Wires File.
254. See F.Strasser, "Crime has no Borders so Countries close Ranks: Drugs Spur Efforts", in *Nat'l L.*J., October 30, 1989, p. 1 (summarizing current international efforts to thwart drug trafficking and money laundering).
255. See Gilmore, *Op.* cit., note 202, p. 9. As of December 1992, the FATF consisted of 26 member countries as well as the Commission of the European Communities and the Gulf Corporation Council. The member states include: Australia, Austria, Belgium, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, Denmark, Norway, Greece, Ireland, Portugal, Turkey, Finland, New Zealand, the United States, the United Kingdom, Hong Kong, Singapore, Italy, Germany, Canada, Japan, and France. See Polimeni, "Presentation on behalf of the Presidency, Financial Action Task Force", Conference Paper: The Mafia Challenge: What to do now?, International Conference, Palermo, Italy (December 10–12, 1992).
256. European Committee on Crime Problems, Recommendations by the Financial Action Task Force on Money Laundering (done at Strasbourg February 7, 1990) [hereinafter Task Force Report]. It must be noted that the FATF is not a G-7 structure, although it was created, at first, under the aegis of the G-7.
257. Statement of Deputy Treasury Secretary John E.Robson, "Group of 7 asks Money-Laundering Curbs", in *N.Y.Times*, April 20, 1990, § D, p. 1, cited in Note, "The International Attack on Money Laundering: European Initiatives", in *Duke J.Comp. and Int'l L.* pp. .213, 218. For additional, detailed discussion of the measures contained in the FATF report, see "UN Money Laundering Report", *Op. cit.*, note 39, 43–55.
258. See "G-7 Nations launch Global Laundering Assault", in *Money Laundering Alert*, May 1990, p. 1, available in LEXIS, NEXIS Library, Arcnws File. At the time of the FATF's inception, money laundering was an offence in Australia, Canada, France, Italy, Luxembourg, the United Kingdom and the United States. As of February 1990, legislation creating an offence was pending in four Task Force countries: Belgium, Germany, Sweden, and Switzerland. There is no money

laundering offence in the remaining four countries: Netherlands, Spain, Austria, and Japan. "Task Force", *Op. cit.*, note 256, p. 11.

259. See Hogarth, *Op. cit.*, note 22.
260. These recommendations have been referred to as the "action steps". See Gilmore, *Op. cit.*, note 202, p. 9.
261. "Task Force Report", *Op. cit.*, note 256. Recs. 4–7 encourage the implementation of legislation criminalizing drug money laundering. Liability could be based on laundering funds derived from any serious offence and criminal liability should extend to corporations. *Ibidem.*
262. Measures similar to those of the UN Drug Convention should be adopted to facilitate investigation, seizure and confiscation of laundered funds, proceeds from crime or instrumentalities used in crime. *Ibidem,* Rec. 8.
263. Anonymous accounts or accounts in fictitious names should be prohibited and institutions should be required to take reasonable steps to ascertain the "true identity of clients." *Ibidem,* Recs. 12–13. Records of transactions or customer identification should be maintained for five years and should be sufficient to reconstruct individual transactions. *Ibidem* Rec. 14. Institutions should pay special attention to suspicious transactions and should be permitted to report suspicious transactions without fear of civil or criminal liability for breach of any bank secrecy regulation or contract. This is essentially a good faith, "safe harbor" provision. *Ibidem,* Rec 15.
264. Institutions should develop internal procedures against money laundering and should not warn customers of reported suspicions. *Ibidem,* Recs. 17–20.
265. Special attention should be paid to transactions originating from institutions or companies located in countries with insufficient or no anti-money laundering measures. *Ibidem,* Rec. 21. These recommendations should apply to offshore subsidiaries—especially when located in countries with insufficient money laundering controls. *Ibidem,* Rec. 22. A reporting requirement for all transactions over a certain fixed amount should be considered and alternatives to cash (e.g.; checks, direct deposit, payment cards) should be encouraged. *Ibidem,* Recs. 23 & 24. Regulatory authorities should guard against the control or acquisition of financial institution by criminals or their confederates (case in point, BCCI). *Ibidem,* Rec. 29.
266. A record of international currency flows should be maintained and disseminated as should a compilation of the latest developments in money laundering and money laundering techniques. *Ibidem,* Recs. 30–31. Information regarding suspicious transactions should be available "upon request" and should be disseminated in a manner that protects privacy and data. *Ibidem,* Rec. 32.
267. *Ibidem,* Recs. 33–40. Bilateral and multilateral agreements should be concluded to give the broadest possible mutual legal assistance (such as the European Laundering Convention). The seizure of persons and evidence should be aided by mutual assistance as should the identification, freezing, seizing and confiscation of assets. Procedures should be developed to provide for the sharing of confiscated assets. There should be a mechanism for selecting the best venue for criminal prosecutions and money laundering should be recognized as an extraditable offence. Finally, extradition should be expedited by inter-ministry communications, extradition based solely on arrest warrants, extradition of nationals and a simplified procedure where the relator has consented to extradition.

268. "Task Force Report", *Op. cit.*, note 256, Recs. 1–3.
269. "Financial Action Task Force on Money Laundering", Report (May 13, 1991).
270. *Ibidem*, p. 6.
271. *Ibidem.*
272. *Ibidem.*
273. *Ibidem*, p. 7.
274. *Ibidem*, p. 8.
275. *Ibidem.*
276. *Ibidem*, pp. 11–12.
277. *Ibidem*, p. 12. These categories are 1) organizations whose main function is to provide a financial service; 2) gambling organizations (e.g., lotteries, casinos, etc.); 3) organizations which buy and sell high value items; and 4) professionals who offer clients account facilities.
278. *Ibidem*, p. 14.
279. For a comprehensive review of the activities of FATF-III, see "European Committee on Crime Problems, Financial Action Task Force on Money Laundering: Annual Report 1991–1992", M.L 92(8) (Strasbourg, 28–30 September 1992). See also "European Committee on Crime Problems, Annexes to the Annual Report—Financial Action Task Force", M.L 92(9) (Strasbourg, 28–30 September 1992). These reports were prepared as a result of the Money Laundering Conference of the European Committee on Crime Problems at Strasbourg, France September 28–30, 1992 under the auspices of the Council of Europe. For a commentary on the work of FATF-III and its relation to the current state of money laundering see generally Polimeni, "Presentation on behalf of the Presidency, Financial Action Task Force", Conference Paper: The Mafia Challenge: what to do now?, International Conference, Palermo, Italy (December 10–12, 1992).
280. Council of Europe, European Committee on Crime Problems, "Information on the Activities of the Financial Action Task Force on Money Laundering in 1992–93", CDPC (93) p. 6 (Strasbourg 16 April 1993).
281. FATF's fourth report and the evaluations of the eight member countries are summarized in "FATF Pinpoints Non-Bank Entities as Laundering Meccas", in *Money Laundering Alert*, July 1993; "Annual FATF Report puts Eight Countries under Microscope", in *Money Laundering Alert*, August 1993.
282. OECD, "Financial Action Task Force on Money Laundering: 1993–1994" (June 1994).
283. FATF-V evaluated nine members in 1993–1994 (Netherlands, Germany, Norway, Japan, Greece, Spain, Finland, Hong Kong and Ireland). In all, 21 members have been evaluated; the remainder will be evaluated in FATF-VI.
284. The CFATF was formed during the June 1990 Caribbean Drug Money Laundering Conference. See B.E. Hernandez, "RIP to IRP—Money Laundering and Drug Trafficking Controls score a Knockout Victory over Bank Secrecy", in *NCJ Int'l L. and Com. Reg.*, vol, 18, pp. 235, 289 (1993). For a description of developments in the Caribbean leading up to the adoption of the FATF's recommendations see Gilmore, "International Responses to Money Laundering: a General Overview", Conference Paper: The Money Laundering Conference, M.L 92(10) pp. 13–14 (Strasbourg, September 28–30, 1992).
285. "Money Launderers Turning to New Institutions, Task Force Reports", in *BNA's Banking Report*, July 5, 1993, p. 34.

286. "Summit of the Americas, 'Plan of Action'", in Notis*ur—Lat*in *American Political Affairs*, December 16, 1994, available in LEXIS, NEXIS Library, Curnws File. Other items included ratifying the UN Drug Convention; enacting legislation for the freezing, seizing and confiscation of assets; and encouraging better reporting by financial institutions.
287. "Report of the Chairman of the Working Group to Study the Draft Inter-American Convention on Mutual Assistance in Criminal Matters", OEA/Ser.G/CP/CAJP.860/92 [hereinafter "Working Group Report"] pp. 17–35.
288. OEA/Ser.L/XIV.2/CICAD/INF58/92 (July 9, 1992) [hereinafter "Regulations"].
289. "Working Group Report", *Op. cit.*, note 287, art. 13, p. 23.
290. *Ibidem.*
291. *Ibidem,* art. 14.
292. *Ibidem,* art. 15, p, 24. Articles 14 and 15 were patterned after Article 11 of the mutual legal assistance treaty between the United States and Mexico. *Ibidem,* p. 10.
293. *Ibidem.*
294. The Declaration was adopted at the 20th regular session of the General Assembly of the Organization of American States, June 4–9, 1990. See Inter-American Drug Abuse Control Commission, "Final Report of the Group of Experts to prepare Model Regulations concerning Laundering Offenses connected to Illicit Drug Trafficking and Related Offenses" [hereinafter "OAS Laundering Report"], OEA/Ser.L/ XIV.2.11/CICAD/doc.391/92 (March 9, 1992) p. 1.
295. *Ibidem,* at p. 2. The measures thought necessary under the UN Drug Convention were 1) criminalizing money laundering; 2) preventing the use of financial institutions for the purposes of money laundering; 3) enabling authorities to trace, freeze and confiscate proceeds; 4) changing regulatory regimes to ensure that bank secrecy laws do not impede law enforcement efforts related to illicit proceeds; and 5) studying the feasibility of reporting large currency transactions and permitting the interstate communication of such information.
296. "Regulations", *Op. cit.*, note 288. The General Assembly of the OAS adopted these regulations at its twentieth second regular session, held in the Bahamas, from May 18–23, 1992. *Ibidem,* at iii.
297. *Ibidem.* Introduction.
298. *Ibidem,* art. 2. Laundering is committed by anyone who converts, transfers, acquires, possesses, uses, conceals, disguises or impedes the establishment of the true nature of property which he knows, should have known or is intentionally ignorant that such property is proceeds from illicit traffic or related proceeds. The definition also includes traditional conspiracy and aiding and abetting criminal liability. The knowledge required as an element of the offence can be inferred from objective factual circumstances.
299. *Ibidem,* art. 4. In accordance with law, and without prior notice or a hearing, the court may order any provisional or preventive measure necessary to preserve the availability of proceeds of crime. Such measures may include a freezing or seizure order.
300. *Ibidem,* art. 5. Once convicted of an illicit traffic or related offence, the court must order that any property or proceeds related to the offence be forfeited. The Regulations also impose the theory of value confiscation found in the European Laundering Convention such that, where the proceeds cannot be forfeited, the court must order the forfeiture of any other property of the person of an equivalent value

to the forfeiture order. In the alternative, the court may order the person to pay a fine in the amount of the forfeiture

301. *Ibidem,* art. 8. The doctrine of dual criminality will apply to this provision.
302. *Ibidem,* art. 18.
303. *Ibidem,* (1)-(2), (4).
304. *Ibidem,* (3).
305. *Ibidem,* art. 19.
306. *Ibidem,* art. 6. Notice must be given to all those claiming a legitimate interest in the property. Upon a showing of good faith and lack of culpability, property will be returned to a *bona fide* third party.
307. *Ibidem,* art. 2.
308. *Ibidem* arts. 9–16. The category of financial institutions includes traditional financial institutions (e.g., banks, trust companies, savings and loan associations, credit unions, etc.), securities brokers, currency exchanges, and any institution performing any of a number of financial activities (cashing of checks, sale of traveler's checks and money orders, substantial transmitting of funds, and any other activity subject to supervision by government banking authorities). *Ibidem* art. 9. Special provision has also been made whereby the Regulations will apply to establishments which carry out transactions in excess of the specified amounts, such as real estate, weapons sales, jewelry, automobiles, travel services, casinos and professional services (e.g., accountants and lawyers). *Ibidem* art. 16.
309. *Ibidem,* art. 10. Records must be kept for at least five years.
310. *Ibidem,* art. 11. Financial institutions cannot warn customers of investigations as they are barred from notifying any person, other than those authorized by law, that a request for information has been made.
311. *Ibidem,* art. 12(1).
312. *Ibidem,* (3), (6).
313. *Ibidem,* art. 13(1)-(2).
314. *Ibidem,* (4).
315. *Ibidem,* art. 14(1)-(2).
316. *Ibidem,* (3).
317. The G-10 consists of Belgium, Canada, France, Germany, Great Britain, Italy, Japan, Luxembourg, the Netherlands, Sweden, and the United States. The European Community also participates in the G-10.
318. "Basle Committee Statement", *Op. cit.,* note 22.
319. See Hernandez, *Op. cit.* note 284, p. 286.
320. For a more thorough description of national strategies to control money laundering, including the analysis of many examples of national legislation, see generally Zagaris and Castilla, "Constructing an International Financial Enforcement Subregime: the Implementation of Anti-Money-Laundering Policy", in *Brooklyn J. Int'l L,* vol. 19, p. 872 (1993); Savona and DeFeo, *Op. cit.,* note 2; Note, "Putting Starch in European Efforts to Combat Money Laundering", in *Fordham L Rev.,* vol. 60, pp. 429, 441–457 (1992) (summary of domestic initiatives in many European states); "The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering" (President's Commission on Organized Crime, 1984).
321. FATF Recommendation 24 urges countries to develop a system "where banks and other financial institutions and intermediaries would report all domestic and

international currency transactions above a fixed amount, to a national central agency with a computerized database…"

322. See FATF Recommendation 16.
323. That national law will govern a state's capacity and mode of executing a request is usually a provision of the agreement on inter-state cooperation. Commission on Crime Prevention and Criminal Justice, "Money Laundering and Associated Issues: the Need for International Cooperation", UN Doc. No. E/CN. 15/1992/4/ Add.5 [hereinafter "UN Money Laundering Report"], 63.
324. Many countries have made tremendous progress in enacting domestic measures to thwart money laundering. See "Putting Starch in European Efforts to combat Money Laundering", *Op. cit.*, note 320, pp. 441–457; E. Savona, "Mafia Money Laundering Versus Italian Legislation", in *Eur. J. Crim. Pol'y and Res.* (June 1993) (discussion of Italian response to money laundering). For a description of United States legislation related to money laundering and the regulation of financial institutions, arguably the most complex set of controls in the world, see J.J. Duffy and J.A. Hedges, "United States Money Laundering Statutes: the Business Executive's Conundrum", in *International Trade: Avoiding Criminal Risks* pp. 14–1 (1991); C.M. Carberry and S.E. Abrams, "The Money Laundering Laws—Civil and Criminal Ramifications", in *Corporate Counsel's Quarterly*, April 1990, at p. 88 (1990); J.K. Villa, "A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes", in *Cath. U.L.Rev.*, vol. 37, pp. 489, 492 (1988); J.D. Harmon, "United States Money Laundering Laws: International Implications",in N.Y.L. *Sch.J.Int'l and Comp. L.*, vol. 9, pp. 1, 25 (1988); Note, "Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers is Not the Answer", in *Notre Dame L Rev.* vol, 66, p. 863 (1990).
325. "UN Money Laundering Report", *Op.* cit., note 39, 63.
326. An excellent example of this trend is the intrusive and elaborate verification regime of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons, signed in Paris on January 13, 1993. The verification provisions of this treaty will require the inspection of private property, possibly even private homes. In addition, states are required to enact "penal" legislation to enforce the treaty's prohibitions. As a result, this arms control instrument will directly impact the lives of private citizens.
327. See "UN Drug Convention", *Op. cit.*, note 14, art. 5(4)(c) (execution of confiscation); *Ibidem*, art. 7(3) (execution of legal assistance); European Laundering Convention, *Op, cit.*, note 16, art. 9 (execution of investigative assistance); *Ibidem*, art. 12 (execution of provisional measures); *Ibidem*, art. 14(1) (execution of confiscation).
328. See "UN Drug Convention", *Op.* cit., note 14, arts. 5(4)(d), 7(10); European Laundering Convention, *Op. cit.*, note 16, arts. 27–28.
329. "European Laundering Convention", *Op. cit.*, note 16, art. 27. Additional, specific requirements apply to requests for provisional measures (such as the freezing of assets) and the confiscation of assets.
330. See C.Van den Wyngaert, "Rethinking the Law of International Cooperation: the Restrictive Function of International Human Rights Through Individual-Oriented Bars", in *Principles and Procedures for a New Transnational Criminal Law*, p. 489 (A.Eser and O.Lagodny eds., 1992) (discussing the distinction, and differences in

effectiveness, between bars to assistance contained in inter-state cooperation agreements and reliance on fundamental human rights as codified in international agreements).

331. See Polimeni, *Op.* cit., note 200, p. 7.
332. See European Laundering Convention, *Op. cit.*, note 16, art. 18. Additional, specific grounds for refusal can be applied to certain forms of cooperation under the treaty. For example, investigative cooperation can be refused if the requested action would not be permitted under the law of the requested party or the requesting party.
333. *Ibidem,* art. 18(7).
334. "It goes without saying that the requested state is not obliged to invoke a ground for refusal even if it has the power to do so." "Explanatory Report", *Op. cit.,* note 201, 58. States may, however, make some grounds for refusal mandatory in their domestic implementing measures. *Ibidem.*
335. November 4, 1950, 218 UNTS 221, Europ. TS No. 5 and its Eight Protocols.
336. OAS Off. Rec. OEA/Ser. L/V/II. 23 Doc. 21 Rev. 6, opened for signature November 20, 1969, entered into force July 18, 1978.
337. Adopted by the Ninth International Conference of American States (March 30-May 2, 1948), OAS Off. Rec. OEA/Ser.L/V/I.4 Rev. (1965).
338. Done at Banjul, June 26, 1981, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, reproduced in 21 I.L.M. 59 (1982).
339. December 10, 1948, UNGA Res. 217A (III), 3 UN GAOR 71, UN Doc., A/810.
340. December 16, 1966, UNGA Res. 2200 (XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc. A/6316.
341. The right to privacy is an international human right. Most countries recognize this right under constitutional, statutory or judge-made law. The right to privacy is also enshrined in many international human rights agreements. See, *e.g.,* "The Universal Declaration of Human Rights", art. 12 ("no one shall be subject to arbitrary interference in his privacy, family, home, or correspondence…"); "International Covenant on Civil and Political Rights", art. 17 ("no one shall be subjected to arbitrary or unlawful interference with his privacy…"); "European Convention for the Protection of Human Rights and Fundamental Freedoms", art. 8 ("Everyone has the right to respect for his private and family life, his home and correspondence").
342. See generally Comment, "The Right to Financial Privacy Versus Computerized Law Enforcement: a New Fight in an Old Battle", in *Nw. UL Rev.*, vol, 86, p. 1169 (1992).
343. For a discussion of how searches executed on less than probable cause pursuant to a legal assistance treaty could violate a defendant's privacy rights see A.Ellis and R.L.Pisani, "The United States Treaties on Mutual Legal Assistance in Criminal Matters", in *International Criminal Law: Procedure,* vol. 2 (M.C.Bassiouni ed., 1986), pp. 162–164.
344. Indeed, no one would advocate that drug traffickers and money launderers have the right to conduct their illicit dealings in utter privacy. But legitimate rationales support the traditions of bank secrecy and financial privacy, and these interests must be weighed fairly against the government's crime fighting objectives. According to one commentator: "Secrecy laws have served to shield persons from financial loss in countries plagued by instability, weak currency and run-away

inflation rates. Secrecy laws have also served to protect wealthy individuals or those who promote unpopular political causes by allowing them to hide their assets to avoid the threat of kidnapping or persecution." Hernandez, *Op. cit.*, note 284, at 235. See also P.W.Schroth, "Bank Confidentiality and the War on Money Laundering in the United States", (Supp.) in *Am.J.Comp.L*, vol. 42, pp. 369, 369 (1994) (arguing that the war on drugs and money laundering has eroded universally accepted rights to financial privacy and bank confidentiality: "Since 1970, the steadily escalating indirect war on drug traffickers has been conducted almost without regard to privacy, property rights, the costs to financial institutions and government…").

345. See, *e.g.*, "European Convention for the Protection of Human Rights and Fundamental Freedoms", arts. 5 and 6; "American Declaration of the Rights and Duties of Man", art. XXVI ("every person accused of an offense has the right to be given an impartial and public hearing…").
346. See "Explanatory Report", *Op. cit.*, note 201, 41.
347. "European Laundering Convention", *Op. cit.*, note 16, art. 22.
348. See *Ibidem*, art 21(1).
349. See "European Laundering Convention", *Op. cit.*, note 16, art. 5 ("Each Party shall adopt such legislative and other measures as may be necessary to ensure that interested parties affected by measures under Articles 2 and 3 shall have effective legal remedies in order to preserve their rights").
350. This provision implies that there should be a system whereby interested parties are informed of their right to challenge an action against them, that (in the case of third parties) a challenge can be raised even if a confiscation order has become enforceable, that interested parties have a right to a court hearing, and that the party has a right to legal representation. See "Explanatory Report", *Op. cit.*, note 201, 31. Compare this provision with Art. 5(8) of the UN Drug Convention, *Op. cit.*, note 14, protecting only the rights of *bona fide* third parties.
351. See, *e.g.*, "European Laundering Convention", *Op. cit.*, note 16, art. 11(1) ("a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal or property which, at a later stage, may be the subject of a request for confiscation…"); *Ibidem*, art. 27(2) ("A request for provisional measures…in relation to seizure of property on which a confiscation order consisting in the requirement to pay a sum of money may be realized shall also indicate a maximum amount for which recovery is sought in that property").
352. See, *e.g.*, "American Convention on Human Rights", art. 8(2) ("Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law."); "African Charter on Human and Peoples' Rights", art. 7(1)(b) ("Every individual shall have the right to have his cause heard. This comprises…b) the right to be presumed innocent until proved guilty by a competent court or tribunal;"); "Universal Declaration of Human Rights", art. 11(1) ("Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law…").
353. One commentator has noted that an international standard is emerging whereby assets can be subjected to forfeiture based on "indicia" of wrongdoing: "This notion of indicia—that which is or might be wrong, not under fact-finding standards, but under skewed presumptions—is paramount in dealing with international drug trafficking and money laundering problems. In this context, the

scienter standard of the United States forfeiture laws, now being incorporated in the international arena, will not protect any legitimate business person from persecution." Hernandez, *Op. cit.*, note 284, p. 302.

354. See, *e.g.*, "Universal Declaration of Human Rights", art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."); *Ibidem*, art. 11 ("Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence."); "European Convention for the Protection of Human Rights and Fundamental Freedoms", art. 6 (1) ("everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."); "American Convention on Human Rights", art. 8.
355. See "UN Drug Convention", *Op.* cit., note 14, art. 5(8).
356. But see Zagaris, *Op. cit.*, note 12 (arguing that Art. 5(8) may protect attorney fees).
357. See *Ibidem*, art. 3(b)(i); see also "UN Treaty on Drugs worries the Defense Bar", in *Nat'l L. /.*, September 25, 1990, p. 5.
358. See Zagaris, *Op. cit.*, note 12, p. 342.
359. See *Nat'l L* J., *Op. cit.*, note 357. It should be noted that this perceived fear is based, to some degree, on the effects of the UN Drug Convention in light of United States jurisprudence. Different legal systems with different definitions of "conspiracy" or "association" and varying levels of prosecutorial discretion may encounter significantly different obstacles. See Stewart, *Op. cit.*, note 9, p. 393.
360. Under the forfeiture provisions of some domestic statutes, attorneys are uniquely unable to qualify as *bonafide* purchasers for value. Any attorney who exercises due diligence (as ethically required) will likely be aware of the tainted/laundered source of the funds.
361. Of course, in most legal systems, legal advice given for the purpose of furthering a criminal scheme will not be entitled to legal professional privilege and, provided all elements are proved, an attorney giving advice of this nature would rightfully be subject to prosecution.
362. See "Explanatory Report", *Op. cit.*, note 201, 33.
363. "International Efforts to Combat Money Laundering" vol. xix (W.C. Gilmore ed., 1992).
364. This role may be assumed by a central or national bank in many countries.
365. For example, forced to deal with millions of CTRs annually, reporting requirements have placed a tremendous burden on the United States Department of the Treasury. See generally Note, "Recordkeeping and reporting in an attempt to stop the Money Laundering Cycle: why Blanket recording and reporting of Wire and Electronic Funds Transfers is not the Answer", in *Notre Dame L. Rev.*, vol. 66, p. 863 (1991).
366. Statement of Dilwyn Griffiths, Secretary of the FATF, in R.Bruce, "Offshore Financial Centers move to shake the Stigma of Shadiness", in *Int'l Herald Trib.*, February 11, 1995.
367. See B.Zagaris and S.B.MacDonald, "Money Laundering, Financial Fraud, and Technology: the Perils of an Instantaneous Economy", in *Geo. Wash.J. Int'l L. and Econ.*, vol. 26, pp. 62, 72 (1992). There may be as many as one trillion electronic financial transactions a day. See O'Brien, "Moving Money by Stealth: Electronic

Transactions give Fugitives an Edge", in *Clev. Plain Dealer*, October 30, 1994, at 1H.

368. In many instances, however, claims to confidentiality may be well founded. Law enforcement efforts to obtain more information about financial dealings will inevitably intrude upon the professional/client relationship and come into conflict with legitimate claims of professional privilege.

6
Investigating and Prosecuting the Proceeds of Crime: A Common Law Experience*

John L.Evans

1.
INTRODUCTION

Criminals engage in money laundering to thwart investigation and make prosecution impossible. Their goal is to protect themselves and the proceeds of their criminal operations from the reach of courts and tax authorities. In this pursuit criminals have had the advantage. They have learned to manipulate and use financial systems and standard business practices to disguise the origin of capital. They have learned to use professional advisers and develop complex structures that make detection unlikely and the collection of evidence particularly onerous. They have learned to operate internationally to compound the difficulty of tracing proceeds of crime.

The international community and countries around the world have responded with new international conventions[1] and domestic laws to take the profit out of crime, to make it possible to get at the proceeds of criminal activity.

This chapter reviews money laundering techniques and the problems of investigation and prosecution commonly encountered as criminal justice systems seek to take the profit out of crime and makes a number of recommendations and concludes with observations on the role of the criminal law and other policy areas.

Examples are drawn from several jurisdictions but Canada is the primary point of reference. Because of Canada's federal structure, the Canadian proceeds of crime legislation has some unique features.[2] It does not, for example, include civil forfeiture procedures. Nonetheless, the Canadian experience is instructive in an international context since such a high percentage of Canadian cases have cross-border components.

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2.
MONEY LAUNDERING PROCESSES AND PRACTICES

The more popular processes and practices involved in money laundering and the problems of investigation and prosecution related to them are reviewed here. There are many excellent sources for those wanting a more comprehensive catalogue.[3]

2.1
Cash, cash economies, currency exchange and deposit

For many small-time criminals no elaborate "washing" is required. They deal in cash and avoid financial institutions as much as possible. Their criminal associates and suppliers expect cash and they pay cash for most living expenses. If they do have bank accounts, they make small deposits so that larger expenses can be handled without arousing suspicion. Much criminal activity, whether drug related or not, is of this type. The criminals engaged in such low-level ventures provide most of the cases processed by criminal justice systems around the world.

In some countries larger-scale ventures use cash, with little risk of inviting official scrutiny. Many countries of Eastern Europe function largely in cash as do countries that are experiencing high inflation. In economies of this type, where average citizens deal in cash, so too do dishonest citizens. To do other-wise would invite suspicion.

When the focus shifts from small-scale criminal ventures to more organized criminal enterprises, the nature of the law enforcement problems shifts as well. From the standpoint of investigation and prosecution, the problem has long been that the major figures in criminal ventures could insulate themselves from the crimes committed by subordinates. If convictions were obtained, it was the "soldiers" who suffered the consequences, the "generals" were far from the scene. They tend, however, to be closer to the money. Cash Reporting, and Proceeds of Crime legislation are designed to allow governments to get at the financiers and the finance. For many crimes, and particularly for crimes which result in cumbersome amounts of cash, criminals are most vulnerable when they deal with cash. That is at the placement stage when bulk cash is combined with legitimate income, smuggled out of the country, or converted into deposits in financial institutions.

While cash transactions are very common in many jurisdictions[4], the amounts of money generated by drug operations are so large that small denominations, which are usually used for drug purchases, must be converted into larger denominations. Frequently the conversion will be into American dollars, the preferred currency of drug traffic. Nearly every jurisdiction has its share of cases to illustrate the point. In the United States, for example, one Anthony Castelbuono arrived at a casino with 280 pounds of currency, a value of

US$1,180,450.[5] With similar brazenness, a drug trafficker deposited US$810,000 in a Canadian bank in Vancouver. The deposit included 25,700 twenty-dollar bills and filled three substantial cardboard boxes.[6]

More sophisticated operations abound. Many of these were discovered by accident. This has provided additional impetus for many countries to enact legislation making it compulsory to report cash deposits over a certain threshold amount and transfers of currency into or out of the country. Cases such as "Polar Cap", in which the Medellin drug cartel, in a single operation, laundered US$1.2 billion over a three-year period, have also stimulated and justified new legislation. The American and Australian regimes are the most fully developed.[7] The United States now has laws requiring that currency transactions over US$10,000 be reported, that make it illegal to structure deposits and other transactions to avoid the reporting requirements, and that make money laundering a crime. Australia has similar robust statutes and, following the Vienna Convention[8], many other states have passed or are considering similar legislation.[9]

Not all countries are convinced of the merits of cash reporting systems. There is some controversy in the United States about the efficacy of the American system since it is voluminous, largely manual, and slow. The Australian system, by contrast, receives over 90% of its data electronically and has developed computerized means of flagging suspicious transactions. The Australian legislation tar-gets both tax evasion and money laundering. Its currency reporting system and suspicious transaction reporting systems have brought to light numerous cases that would not likely have been detected previously. For example, over 8,000 suspect transactions were identified in the first 18 months of the requirement for reports. Of these

> "… the majority involve low to medium tax cheats under $50,000.00, 1, 881 cases involved money laundering. There are more than 20 cases which appear to involve high level corporate tax cheating and fraud worth more than $30 million and also 30 to 40 transactions at the organized crime end of the scale indicating major tax evasion and significant drug money laundering."[10]

Although it is too early to judge the effectiveness of the Australian system, it has clearly provided law enforcement with a set of powerful new investigative tools. Since the system is so comprehensive it is picking up cases, not just of money laundering and tax evasion, but also frauds both complex and simple. While the Australian example appears to be worth emulating, few countries have the combination of circumstances necessary for such a scheme to succeed. Australia is a country with a relatively small population and a highly centralized and efficient banking system. There are a small number of banks and they are extensively computerized, allowing filing electronically on a daily basis.

Other countries, Canada for example, have chosen to rely on a system of regulation and voluntary co-operation of financial institutions. The banks and other financial institutions have been responsive. The Canadian Bankers' Association and its member banks have instituted policies and practices to allow suspicious transactions to be reported to the authorities. The most important policies are those that stipulate what should be done to "know the customer". In addition, the measures include having policies and procedures regarding the detection and reporting of suspicious transactions in each branch, including foreign branches and correspondent banks; having forms and procedures for reporting and keeping records of suspicious transactions; and conducting ongoing training for staff. The initiatives of the banker's association and the five largest banks are beginning to be followed by smaller banks and trust companies.

In addition to these voluntary measures being adopted by financial institutions, "The Proceeds of Crime (Money Laundering) Act"[11] and associated regulations provide record-keeping requirements to facilitate investigation and prosecution.

The effectiveness of the voluntary measures and the regulations is difficult to assess at this stage. The policies seem to be in place but major police forces report that the information supplied frequently provides an inadequate basis to know whether to investigate further.[12] On occasion, however, good cases have resulted from suspicious transaction reports from financial institutions. Although police are critical of the information they are receiving, they confess that they do not have the resources to handle the number of cases that would result from more complete reports. Nonetheless, better reports would allow better targeting and some redeployment of resources.

One interesting consequence of the training given to bank employees is that, once they learn what to watch for and appreciate the significance of money laundering, they have more than one reporting option. If they sense that senior management in their financial institution is not keen on reporting suspicious transactions, or that the process is too slow, they can report directly to law enforcement personnel. Just this kind of information led to a recent case in Vancouver in which the Royal Canadian Mounted Police executed a search warrant on a trust company and seized an extensive array of evidence. This included records and documents from the foreign exchange department, business records, company documents, banking documents, and computer programs and documentation. The case has yet to go to trial but it is alleged that some officers of the trust company accepted Canadian currency, literally through the back door, and exchanged it for US currency. This was then wire-transferred to financial institutions in other countries, deposited in various accounts, or simply converted to US funds. Several million dollars were handled in this way. For example, it is alleged that in twenty days in 1991, US$1,562,600 was purchased with Canadian currency and that a company, which seems to have been completely fictitious, brought in sufficient Canadian dollars over four months to purchase US$4,940,000.[13] Whatever the outcome of the case, news of the police operation

spread quickly in financial circles in Canada and beyond, and will likely have a salutary effect on internal vigilance and reporting behaviour. Thirty-five police officers entered the premises before the start of business one day and seized thousands of documents and copies of computer systems and records. This is an object lesson even slow learners will appreciate.

Another example that reinforces the need for vigilance is provided by a recent case in the United States. In December 1993, the Banque Lew (Luxembourg) S.A. pleaded guilty in California to one count of money laundering and agreed to the forfeiture of $2.3 million. An employee of the bank, now facing charges in Luxembourg, had enabled the deposit of more than four hundred US cashiers' cheques. The money was from drug sales in the US. The cheques were purchased with cash in the United States, sent to Columbia, and then on to Luxembourg for deposit.

The plea arrangement had several unique features:

> "In addition to the forfeiture, the bank agreed to pay a $60,000 fine, to relinquish any right it might have and accede to the forfeiture of $1,038,587.34 that has been frozen by the Luxembourg authorities; to engage an auditing firm to prepare three Special Purpose Reports (one for each of the 3 years following the sentence) which will assess the bank's accounting systems and internal accounting controls relevant to money laundering (and to take corrective action within 60 days if necessary); to publish, at its own expense, within 8 months of sentencing (and to update 1 and 2 years after it is published) a monograph about money laundering laws and methods to prevent money laundering, which will be distributed to its employees, its correspondent banks and other financial institutions; and to post a Letter of Credit in the amount of $250,000, which will become payable to the United States if the bank fails to satisfactorily comply with either of the two previous terms of the agreement."[14]

Although, as these cases illustrate, there is room for improvement, many financial institutions are being more vigilant and suspicious transactions are being reported. But, as with hydraulic systems, if the pressure is capped in one place it builds up elsewhere. Thus, other cash dealers that are essentially unregulated are now handling more illicit funds. These include currency exchange houses that offer cash-for-cash currency exchange, electronic wire transfers, and the issuance of negotiable instruments such as traveller's cheques, bank drafts, cashier's cheques and precious metals. The point is nicely illustrated by a recent Canadian case. On June 22, 1994 the Royal Canadian Mounted Police laid charges against currencyexchange operations across Canada. The *Vancouver Sun* (June 22, 1994) reported that "Dozens of foreign-currency exchanges…face money-laundering charges after a sting operation by the RCMP. The charges were laid after officers posing as drug dealers went into currency-exchange houses across the country, exchanging up to CDN$70,000 for

US currency. In all more than $3 million was exchanged… About 190 criminal charges involving 36 corporations and 65 people are expected."

Besides deposit-taking institutions and currency-exchange companies, most countries have a variety of other financial institutions that can accept and transform cash. Many countries have credit unions, *casas de cambios*, remittance corporations, *bureaux de change*, and wire-transfer companies. As the laws are tightened and enforced, new, or variations on the old, techniques arise. For example, Colombian drug cartels have a system of "currency swapping" by which US currency located in the United States is sold for Colombian pesos located in Columbia. The practice is similar to the ancient underground banking systems used extensively by Asian organized crime groups.

Asian-crime groups resident in North America appear to make extensive use of underground banking. The case of Johny Kyong provides an interesting illustration. Mr. Kyong was convicted of supplying heroin to the New York mafia in 1990. He repatriated his profits through bulk shipments of cash to Hong Kong or through a Venezuelan company to bank accounts in Hong Kong. Money was then sent through underground banking systems to Burma and Thailand to purchase additional drugs. Kyong used small denomination, consecutively numbered Thai currency that, when presented in Burma, would be redeemed for vastly greater sums. Fax machines and verbal telephone instructions were also used to move money through the underground banking systems. More generally, American and Canadian law enforcement agencies have noted North American Asian organized crime groups using Indian and Pakistani underground banking systems located in Vancouver, Canada, to move money to Hong Kong and other jurisdictions.[15]

Before examining more sophisticated schemes, it is worth noting that bulk smuggling of cash across borders remains common, and is perhaps even more frequent, following the introduction of money-laundering legislation. It is of interest that the United States' embargo on high-technology exports to the Soviet Union caused the customs service to examine more cargo leaving the United States. Because of the importation of drugs, most customs attention had been directed to cargo entering the country. When the customs service stepped up scrutiny of exports, little illegally-exported technology was intercepted. Instead, cartons of US $100 notes were frequently discovered.[16]

Bulk movement of cash may be unsophisticated but it is frequently easy, inexpensive, and relatively low risk. The vast increases in world trade make it impossible to examine more than a fraction of the cargo crossing frontiers. Spot checks, and developing intelligence allowing special attention to particular targets, are the best that most jurisdictions can do. Customs services have too few resources to deal with increased trade and the relaxation of border controls in many regions. This means that smuggling will continue and likely increase.

2.2
Layering and Integration

While cash is freely used in many economies, most large criminal operations eventually must devise money-laundering schemes that give an appearance of legitimacy to the proceeds of crime. Unfortunately for those seeking to detect money laundering, nearly any legitimate business or financial arrangement can be adapted and used for laundering money. The range of possibilities is very wide. An attractive vehicle for money laundering is the stock exchange. Cash or other tainted assets can be transformed into alternate financial instruments, ownership of stocks and bonds. Brokerage firms can function as deposit-taking institutions. Cash or other securities can be deposited to a trading account and then used to buy stocks or other financial instruments. Cash deposits are, however, rare in the securities industry, most criminals seeking to launder funds through a brokerage house will find a way to place the cash in a more usual deposit-taking institution.

In most countries it is unlikely that new customers of brokerage houses will undergo much scrutiny concerning their identity or the source of their funds. If asked, there will be little or no attempt at verification. Even where there is an attempt to know the customer, this can be relatively easily circumvented. Where there is a requirement that beneficial owners be registered, a "respectable" front can be so declared. Or the "owners" of the tainted asset can simply pose as legitimate investors. Further insulation can be achieved by using legitimate or shell companies. If suspicious activity is then avoided and accounts are not overdrawn, there will be little reason to investigate further.

It should be noted that the proceeds of any crime, not just drug offenses can be laundered through stock exchanges. Indeed, profits from insider trading and other stock market manipulations are frequently invested in other, presumably more secure vehicles. A Canadian case with international overtones provides a useful illustration:

> "During the mid-1980s Edward Carter and David Ward manipulated, through 100 trading accounts distributed among 15 brokerage firms in Canada, the US and the Cayman Islands, the shares of 19 public companies listed on the Vancouver Stock Exchange. In addition, Carter and Ward paid secret commissions to the portfolio manager of an American-based mutual fund in return for his purchase of large volumes of stock in the target companies.
>
> Many of the trading accounts were registered in the name of beneficial owners and numbered companies incorporated in the Cayman Islands. One of the accounts Carter utilized to sell stock to the Mutual Fund was located at the Cayman Island branch of the Canadian brokerage firm Richardson Greenshields Ltd. This account was in the name of the Cayman Island

> branch office of the Royal Bank of Canada, and it was used for more than just the manipulation of the target companies' securities.
>
> Through this account such investments as silver and gold bullion, Government of Canada Bonds, US Treasury bills, and a number of blue chip securities were purchased. In short, by funnelling the illicit proceeds of Carter and Ward's market manipulation into commodities and other securities, this trading account was utilized as a central laundering conduit. It is estimated that over CDN$15 million in illicit profit was generated through the manipulation of these shares and mutual funds which in turn was laundered through securities and other vehicles."[17]

Cases of laundering through the stock exchange are not rare and many that have come to the attention of law enforcement were investigated, based on information from individuals rather than from securities firms or securities regulators. Very few police forces have developed the expertise to detect and investigate stock market violations. Although securities commissions in many countries have powers that exceed those of the police, the dominant view is to keep cases in-house and not refer them to law enforcement unless there is no alternative. Typically this occurs when the case has become public and the immediate victims of the fraud are clamouring for action. The result is that the securities industry continues to be extensively used as a means both of generating and concealing the proceeds of crime. The case cited above is one example of many financial frauds and laundering operations. The wild excesses of the junk bond and takeover craze of the late 1970s and 1980s may be over[18] but routine stock-market fraud continues apace.

Moreover, given the increasing internationalization of the financial services sector and the ease of buying stocks in any market in the world, the opportunities to move the proceeds of crime across borders have expanded. Thus, to take a simple example, once a trading account is established with a firm having offices in other countries, the account can be transferred and used, or closed out, in another jurisdiction. Unless the individual involved was already a target of law-enforcement attention or was in some other way behaving very suspiciously it is unlikely that any problems would arise.

Another popular method of laundering money is to buy or establish private companies. The time-honoured technique is to operate a cash-intensive business. Laundromats in some US cities were one-favourite and inspired the first use of the term "money laundering". More usual now are restaurants, bars, travel agen cies, construction companies, jewellery stores, and so on. Any business that routinely deals in cash can have its receipts inflated by running tainted cash through the till. When large volumes of cash are laundered in this way, however, the web of deception becomes complex and thus more open to detection by law enforcement or tax authorities. False invoicing, ghost employees, inflated expenses and inflated revenues all leave a paper trail and require accountants and others to be involved. Not only are there more people to betray the deception but

there is more paper required and, potentially at least, more investigators from law enforcement and tax departments who will have an interest in the business.

The cost of such laundering is therefore more expensive and carries a higher risk of detection than alternate methods. Nonetheless, it is popular, since, if successful, it allows criminals to have a "legitimate" business as a cover and a source of status in the community. Moreover, the legitimate business may flourish since its competitive advantage can be so great. Having tax-free capital and "loans" that do not have to be repaid provides advantages that in themselves should ensure a business is successful. Many such businesses also have accountants and other professionals who are already used to breaking the law and are further employed to evade tax, thereby providing additional competitive advantage. In other cases, lawyers and accountants will be hired to carry out professional duties on one end of a transaction without having actual knowledge of the laundering operation.

If circumstances also provide lax law enforcement and corrupt officials criminal enterprises can flourish. Consider, for example, the western Sicilian Salvos cousins described by Santino and Giovanni La Fiura (1990). Vitiello summarizes as follows:

> "…the Salvos [were] tax collectors 'serving the Public' during the 1970s and 1980s. Using citizens' tax dollars and Mafia linkages to build a virtual empire, these cousins came to own twenty-four agricultural 'cooperatives' (mostly of the shadow variety designed to sell drugs), an insurance company and a bank (to launder money), four tax offices, four finance companies (for Mafia enterprises), a computer firm…six brokerage firms, nine construction (i.e., building speculation) companies and three tourist enterprises ,…"[19]

In recent years real estate investment has been a popular money laundering vehicle in many jurisdictions. Real estate offers a variety of advantages, not the least of which is its tendency to appreciate. It is relatively liquid and can be held in a variety of ways that obscure the sources of funds and the beneficial owners. The range of techniques is very broad and includes simple purchases of residential or business properties with no particular attempt to hide ownership; complex schemes where real estate investment is part of a much larger operation involving shell companies in tax haven countries; and the use of nominees and the involvement of both shell and legitimate companies to handle investment, development, rentals and sales. Many intermediaries may be legitimate business persons or professionals who do not know that they are aiding and abetting laundering. Others will knowingly be so employed. In other cases lawyers have been extensively, and knowingly involved in real estate laundering schemes. They have the technical and legal knowledge to assist in the creation of companies and in the purchase, development and sale of real estate. They have the option of conducting business transactions in their own names. Beneficial

ownership is thereby hidden and with reasonable care no suspicion will be aroused. Solicitor-client privilege provides a further shield, or at least a delaying tactic.

Moreover, real estate can frequently be developed using government subsidy and tax advantages such as the deduction of interest payments and depreciation from income tax. This is a considerable advantage if "loans" are a way of repatriating proceeds of crime already lodged in another company, frequently registered abroad. Investigating such companies is labour intensive and requires knowledge of corporate structures and strategies, bookkeeping, accounting, computer science, and tax law. The expertise of forensic accountants and lawyers is frequently required to assist police investigators. This is expensive with the result that police forces in most jurisdictions have more leads than they can properly investigate. Developing informants and intelligence to support more efficient targeting of scarce resources should therefore be a priority everywhere. Accountants and other professionals employed by organized crime, or operating their own criminal venture, are unlikely to leave a trail that can be easily detected. Fraud and money laundering are after all carried out by people who know more about the accounting systems and other practices than auditors or police investigators. It is striking how many cases of fraud[20] and money laundering have survived a series of audits and were discovered only through informants' leads, accidents, or simple blunders.[21]

3. INTERNATIONAL LAUNDERING

Several recent trends, taken together, have greatly increased the scope of international crime. In addition to the international drug trade, these include the continued growth in world travel and immigration, the growth in world trade in goods and services, the communications revolution, and the relaxation of border controls in many countries. Whereas only a few years ago international crimes were novel, they are now commonplace.

In Canada a recent study of police cases involving money laundering found that 80% of them had an international component.[22] The percentage of cases with an international element may be higher in Canada than elsewhere because of Canada's proximity to the United States, its openness, and the fact that it has a very efficient and international banking system. Canada may not, however, be that unusual. In 1991, 80 per cent of the serious securities fraud investigated by the Metropolitan Police in London (UK) had some cross-border aspects. The estimates in the United States are smaller;[23] in 1984, a Presidential Commission report speculated that 10–15 per cent of the drug money moved into the international arena. At the same time, cocaine, heroin, and many other drugs come from other countries and, therefore, are international. Whatever the actual percentage, clearly crime, like much else, is increasingly international.

It has been noted that money is moved offshore by smuggling cash, by various money transfer mechanisms of financial institutions, via the securities markets, and through the purchase of assets elsewhere. Add to these the use of courier services, the post, currency exchanges and underground banking. There is no shortage of methods and the volume of legitimate international financial transactions makes it difficult to distinguish between legitimate finance and proceeds of crime.

There is no methodologically clear procedure for estimating the extent of the illegitimate proceeds of crime but it is clearly very high and growing. Fortunately there is no particularly compelling reason to spend much time on estimates. Clearly the proceeds of crime have reached unacceptable levels[24] and action must be taken to contain criminal profits. The sums involved finance, domestically and internationally, extensive criminal operations in drugs, arms, exploitation of women and children, manipulation of markets, infiltration of business, commercial frauds, corruption of officials and politicians and destabilization of nations.

We list a variety of crimes along with drug crimes to make several points. First, few large criminal organizations restrict their activities to drugs. Drugs may provide the bulk of the initial funds but, through money laundering, many become involved in other crimes, either through investing the proceeds of crime in legitimate markets or to finance additional criminal operations. Second, there is compelling evidence that the traditional organized crime groups are deeply involved in large-scale commercial fraud. For example, organized crime was found to have been involved in 35 per cent of more than 1,000 cases referred to the Common-wealth Commercial Crime Unit since 1981. The involvement of organized crime was suspected in a further 25 per cent of cases.[25] Third, so-called white-collar criminals are quickly involved in other types of crime, frequently by engaging others to ensure successful operations. This can range from using collectors, enforcers and money laundering specialists, to contracting to have evidence, or worse, even witnesses, disappear. Also, for example, when a modest embezzlement from a trust account goes awry, a little drug smuggling, or selling, may be seen as the remedy. Fourth, to reiterate a point made earlier, most big cases involving both economic and drug crimes will have international components. In some cases international connections will be necessary to secure the supply of illicit goods, drugs and arms. In other cases, illicit or counterfeit goods or services are sold offshore, for example, supplying fake pharmaceuticals or customers for off-shore centres for the exploitation of women and children. And, in most large cases, offshore laundering facilities will be used, frequently involving tax-haven countries with bank secrecy laws and efficient money transfer facilities. Most of these countries will have regulations that allow for the easy establishment of shell companies and the use of nominees. Many allow the issuance of bearer shares.

The use of multiple jurisdictions greatly exacerbates problems of investigation and prosecution. But, in most jurisdictions, serious problems of investigation begin

long before money is moved offshore. Many police forces are poorly equipped to investigate sophisticated criminal operations. Their training, funding and rewards are tied to operations against violent crime, street-level drug dealing, and the ubiquitous property offenses. With some notable exceptions they do not have the resources to either employ, or buy, the forensic accounting, financial analysis, computer skills, and ongoing legal advice to unravel sophisticated criminal networks. The result is that if the operation hasn't been detected, and a successful counter strike made before the proceeds of crime are moved around even within the domestic sphere, there will be little chance of a successful prosecution resulting in convictions, much less of the forfeiture of proceeds. It should be noted that this is not to disparage what police forces can do. As was pointed out above, many significant cases detected by the police through developing good intelligence or though following leads and exploiting lucky breaks have exposed operations that had successfully survived repeated audits by professional auditors. It should be stressed that sophisticated criminal operations are frequently run by practitioners who are themselves very skilled, or who hire skilled help.

Once the proceeds of crime are successfully deposited in the financial system many laundering operators take the precaution of moving money, not just offshore, but through more than one tax haven and through a maze of shell companies and respectable nominees. Investigators run into obstacles that are nearly impossible to penetrate, even if they get co-operation from their opposite numbers in the jurisdictions in question. Fortunately, not all laundering operations go to such lengths. The more steps in the operation, the more expensive it is and the more opportunities criminal colleagues have to take a portion for themselves.

Although the most sophisticated operations may effectively be immune from prosecution, there is room for optimism. Laws have been strengthened and several countries have had notable success in convicting those higher up in criminal networks. The United States and Italy are the leading examples. Much of their success is due to the resolve and dedication that an epidemic of crime has created. More importantly, the recent string of successful cases mounted against major crime figures is due to appropriate resourcing of investigations and prosecutions and the specialization necessary to carry out the full range of investigations, and evidence gathering, called for by proceeds of crime legislation.

Successful operations against criminal networks require specialization by both the police and the prosecutor's office. Moreover, they need to work together from the outset so that investigators can get continuing legal advice regarding evidence. Further, usually parallel files should be created from the start: one aimed at obtaining criminal convictions on the specific criminal offenses; another at the proceeds, which, depending on the particular legislation, may be handled either criminally or civilly. Unfortunately, very few police and prosecutors proceed this way. It is not just a question of resources, although there

is no denying that resource levels are frequently the determining factor in decisions to pursue or abandon cases. Tradition, and the endemic tensions between segments of the criminal justice system frequently create other difficulties.

In many jurisdictions, the police assigned to work drug money laundering cases are those officers who have handled drug cases on the street. There is no question that such experience is valuable but unless they can work effectively with forensic accountants, lawyers, computer experts, and other specialists there is little chance that effective forfeiture cases will proceed. Police forces and prosecutors frequently complain that the legislation is too cumbersome and unwork-able. Perhaps, but some police forces and prosecution offices are making it work despite the difficulties. Too often police investigators do not want what they call "paper cases". They have, as a result, to be content with small operations that net a few street dealers and low-level suppliers, but do not attack the proceeds and do not make use of the more powerful features of proceeds of crime legislation.

The prosecution also needs specialists to handle forfeiture and complex money laundering cases. In cases where forfeiture of the proceeds is possible, prosecution specialists should be involved from the outset of the investigation. Some jurisdictions will have more options than others[26] but success comes to those who integrate forfeiture considerations early and think through the issues carefully. Practical questions of exactly what is to be seized and when[27] cannot be neglected and should not conflict with other aspects of the game plan. Similarly other aspects of the case[28] should be alive to developing evidence in support of seizing, freezing and eventual forfeiture.

There is no question that proceeds of crime cases can be complex and difficult to prepare. In jurisdictions that do not have procedures for civil forfeiture a convic-tion must be obtained for a predicate offence prior to triggering a proceeds case. The criminal profits must have been traced and frozen or at least found. And all legal and logistical hurdles for a seizure and forfeiture must have been cleared. When investigations are well handled and the cases are properly presented, the courts have no great difficulty with the various proceeds of crime statutes. This has certainly been the case in the United States, Australia, Italy and Canada. In these jurisdictions, and likely in others with which we are less familiar, the courts have seen fit to order the forfeiture of the proceeds of crime when well-prepared cases are presented. Courts have, for the most part, had little difficulty with the lower standard of proof that generally applies to forfeiture.

Consider, for example, the following Canadian case. Following a conviction on a charge of forgery of Pharmacare[29] claim forms and Pharmacare Prescription Invoices, the Crown prosecutor applied for forfeiture of the proceeds of crime. In brief, the Crown alleged that at least $635,000 was illegally obtained; that these funds were moved through 36 bank accounts in Canada and then transferred off-shore, some to England, some to the Isle of Man and some to the Channel Islands; and that the illegal funds were co-mingled with legitimate funds, making

it impossible to determine exactly what was legitimate and what was not. The defense responded by an application that, among other things, challenged the appropriateness of using civil standards of proof in criminal court.

In refusing the defense application Judge W.J.Kitchen addressed the standard of proof:

> "The objective of the lower standard of proof is to resolve the difficulty of proving matters of which only the criminal likely has knowledge. The Crown must prove beyond a reasonable doubt the fact of the crime and the quantum of proceeds. But proof of the identification of the proceeds of crime is a different matter. The disposition of the proceeds by the accused will have been a manipulation of the property when it was likely well beyond the control and observation of others. Such surreptitious activity is becoming easier with the increasing sophistication of commercial transactions and the capability to make computer and electronic dispositions of property on a national and international level."[30]

Further, Judge Kitchen observes at page 23 that:

> "The accused has a correlative burden—to prove on the balance of probabilities that the subject property is not the proceeds of crime. If such is not done, the facts are 'presumed'. Placing a burden on the accused to prove this furthers the objective of not putting a burden on the Crown which is virtually impossible to meet."

There will no doubt be further constitutional challenges to the use of a lesser burden of proof in criminal proceedings but thus far Canadian courts have not had difficulty in accepting a lower standard as provided for by the Proceeds of Crime legislation. The Supreme Court of Canada has not yet considered a case on the issue.[31]

4.
MUTUAL LEGAL ASSISTANCE

An additional order of complexity is introduced when jurisdictional considerations enter the picture. Consider, for example, a drug-trafficking operation con ceived of by citizens of two or more countries, with financing and direction coming from players in a third jurisdiction, and the execution of the crime using associates in supplying countries, with couriers to transport the drugs to one or more additional countries. Add to this the distribution and money laundering operations, which will almost certainly involve additional jurisdictions. If the organized crime group is at all skilful, associates at each stage of the operation will know just enough to do their part, but not enough to betray other parts of the operation.

Leaving aside for the moment questions of cost, and assuming a solid basis for suspecting a particular group, investigators are going to face problems of cooperation with police and regulatory bodies, and bank secrecy laws. They will have to cope with delays, language barriers, and perhaps corrupt police or other officials. If they manage to overcome these difficulties and collect evidence they may face even more serious problems. In most common-law jurisdictions, for example, only evidence that can be tested through cross examination before the court is admissible. Many expensive, and time consuming, investigations have foundered on this offshore rock.

There has been progress, however. Informal cooperation among police forces and regulatory bodies continues and is being strengthened. This kind of cooperation depends, however, on personal contacts, which can be effective, but are frequently short-term due to personnel changes. As invaluable as the informal arrangements are, they can also lead to procedures being short-circuited, resulting in, for example, evidence being collected that is inadmissible. Beyond informal co-operation, letters rogatory and commission evidence provide modest and slow assistance in many jurisdictions.

Given the growth in international crime and the many difficulties of international investigations, many bilateral and multilateral mutual legal assistance treaties have been negotiated and ratified in recent years. The United Nations has developed model treaties that can be used by Member States in negotiating such arrangements. The Model Treaty on Mutual Assistance in Criminal Matters contains provisions that deal with, among other things: the scope of application; the designation of competent authorities, the contents of requests; refusal of assistance; the protection of confidentiality; service of documents; obtaining of evidence; availability of persons in and out of custody to give evidence; safe conduct; search and seizure; certification and authentication; and costs. Treaties based on this model will contribute to improvements in international investigations.[32]

For example, Canada has eight bilateral treaties in force, two more are awaiting ratification and ten are being negotiated. In addition, Canada has ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psycho-tropic Substances and nearly 100 countries are party to the convention in force. The convention includes provisions related to mutual legal assistance. Canada has also contributed to the development of the Organization of American States Convention on Mutual Legal Assistance. With respect to the proceeds of crime, the Canadian policy allows for execution of orders related to the proceeds of crime. The treaty with the United States includes the provision that:

1. The Central Authority of either Party shall notify the Central authority of the other party of proceeds of crime believed to be located in the territory of the other party.

2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in a criminal prosecution.[33]

Consequently, the proceeds of crime can be pursued regardless of whether a conviction was obtained in Canada or in the United States.[34]

Mutual Legal Assistance Treaties can also be negotiated to deal with special difficulties. As noted above, letters rogatory can provide modest assistance in some circumstances but they can also frustrate investigations. For example, several recent Canadian cases have involved Canadian authorities taking commission evidence in civil-law countries and having to work with the civil-law procedure for taking evidence. This can have the unfortunate consequence that the evidence is then inadmissible in a common-law jurisdiction.

It is possible, however, to fashion an agreement to overcome this serious obstacle. The Mutual Legal Assistance Treaty between Canada and the Netherlands, which came into force on May 1, 1992, provides that:

Whether or not the testimony of a person is requested to be taken under oath or affirmation:

a. the requesting State may specify any particular questions to be put to that person;
b. the requested State may permit the presence of the accused, counsel for the accused and any competent authority of the requesting State, as specified in the request, at the execution of the request;
c. the competent authority of the requested State shall permit questions to be put to the person called to testify by any persons allowed to be present at the execution of the request.[35]

It is worth emphasizing the importance of this kind of provision.[36] If letters rogatory and informal arrangements lend themselves to processes that frequently cannot be concluded and result in cases that must be abandoned, those authorities responsible for assigning resources will not support what they will increasingly see as international adventures and a waste of scarce resources. This is precisely the opposite reaction to that required to deal with the increasing internationalization of criminal enterprises.

More treaties are being negotiated which will provide additional incentive to pursue difficult international crime cases that are not now considered or have to be abandoned after significant expenditure of time and money. This, in turn, corroborates the tacit decision to avoid investing resources in international cases unless there is significant national self-interest and a set of circumstances that produce the following elusive combination: good intelligence, likely involving an inside informant; cooperation from all the relevant authorities; the right personal contacts; the appropriate Mutual Legal Assistance Treaty; extradition

agreements; appropriate budgets; and management willing to authorize international investigations and travel.

Given all this it is not surprising to find that so few international cases are pursued. Moreover, without sustained and meaningful international pursuit, we should not be surprised to find criminal enterprises becoming increasingly international. If the growth in international crime is to be contained, more cases must be investigated and prosecuted, even if the odds are long. This is fundamental to preserving trust in the international financial and economic structures.

5.
ENTERPRISE CRIME

The trade in illegal drugs has provided the primary incentive for the enactment of proceeds of crime legislation and many countries have essentially limited the application of proceeds statues to drug cases. Other countries have stipulated a broader range of crimes that can trigger a proceeds of crime action leading to forfeiture of criminal profits. In Canada, for example, the provisions of the proceeds legislation apply to designated drug offenses and to enterprise crime offenses. An enterprise crime offence is defined as an offence against twenty-four Criminal Code offenses. The list is reasonably comprehensive, covering most economically motivated crimes. Thus, murder fraud, robbery, theft, fraudulent manipulation of stock exchange transactions, procuring, keeping a common bawdy-house, forgery, laundering the proceeds of crime, and so on are included.[37]

As argued above, many career criminals, and most organized crime groups, are no longer narrow specialists. Some groups may limit their criminal operations to drugs but when they become at all successful the range of offenses widens, including for a start, money laundering. Traffic in drugs provides funds for other crimes and yields the capital for infiltration of legitimate business and the corruption of officials and politicians. The ills of the drug trade are well known and have motivated the extraordinary international effort to curtail drug trafficking witnessed in the last few years.

Drugs offenses are not, however, the only significant domestic and international crime problem worthy of intensive investigation and the application of proceeds of crime legislation. Enterprise crimes of various kinds are equally threatening to many states and threaten the international financial and economic system.

In addition to the drug trade, the threat is concentrated in three areas, each requiring intensive investigation. First, enterprise crimes of all sorts benefit from, and frequently depend upon, the corruption of officials and politicians. A second area requiring increased attention is the corrosive effect of enterprise crime infiltration of legitimate business, whether funded by drug traffic or other enterprise crimes. A third broad area is the continued operation of organized

crime in traditional areas in addition to drugs. Many crimes simply require that groups be organized internationally. Smuggling of all kinds is flourishing and includes traffic in drugs, arms, illegal immigrants, human and animal body parts, tobacco, pharmaceutical products, art and archeological treasures, and so on. Other traditional crimes also require organized enterprises: protection rackets; disposing of stolen goods; gambling; the production and distribution of pornography; the procurement of women and children for the sex trade.

If, along with drugs, these three broad areas present the best opportunities for organized criminal activity, it is fair to ask if we have structured our search for criminal events appropriately. In many countries it seems fair to say that the fight against drug trafficking has received the bulk of public attention and government resources. Moreover, traditional targets have received the bulk of investigative attention. Thus, mafia groups and their rivals have been the focus of law enforcement efforts on organized crime. This has frequently meant that low-level criminals were convicted but those directing the ventures were seldom caught.

More recently law enforcement in some countries has been much more success-ful in penetrating criminal enterprises. The Federal Bureau of Investigation in the United States has, in the last decade or so, had unprecedented success in convicting the bosses of crime families in major American cities. The investigative strategy that has guided FBI work against organized crime is called the enterprise theory of investigation.[38] In this approach the focus is on identifying the hierarchy. Investigative techniques that seem routine to North Americans are essential, including the use of co-operating witnesses, sometimes requiring the use of a witness protection program; informants; undercover agents; and, particularly important, court approved electronic surveillance. These techniques, coupled with the power of the United States Racketeer Influenced and Corrupt Organizations Statute,[39] have led to significant success in prosecuting crime bosses.

Although the investigative techniques listed above are common in some jurisdictions, their use is forbidden in others. Most civil law countries do not allow such investigative techniques. A notable exception is Italy,[40] which has passed legislation providing greater investigative powers. These new powers, with the strong sense of public outrage against crime and corrupt politicians, have led to dramatic improvements in the anti-mafia, anti-corruption, crusade.

The general point here is that success against the leaders of criminal enterprises requires the skilful use of intrusive investigative techniques. Many countries cannot use them, and others do so with little skill and against a backdrop of corruption, which nullifies their effect in any case. As a consequence, there is no doubt very much more enterprise crime than is commonly believed.

Moreover, we know very little about the magnitude of newer crimes committed by corporations and professionals. The kinds of offenses included under terms such as “economic”, “corporate”, or “white collar crime”, have

received too little attention. This holds for most countries, even for those that are attending to traditional organized crime. It is partly a question of resources, partly one of ideology. Many people, particularly the rich and powerful, do not see that the behaviour of the rich and powerful is sometimes profoundly criminal, not just sharp practice or the necessities of business, and deserves the same treatment as other serious crime. Some even believe that the economic system could not sustain a profound scrutiny of business since so much "legitimate" business is questionable, depending for example on corrupt regulators and such practices as having loans guaranteed by stolen assets or by assets, (i.e., real estate holdings), which are knowingly overvalued.

Recent cases underscore the need to look more carefully for violations of the law by professional and business interests, and not just when they are in active collaboration with, for example, drug traffickers to launder money. The Bank of Credit and Commerce International and the Savings and Loan cases[41] in the United States illustrate that the potential damage from such criminal abuse to national economies, individual victims, and international commerce often exceeds the harm most organized crime groups can inflict.

Although, as noted above, proceeds of crime statues were primarily designed with drug profits in mind, in many states they can be triggered by a wide range of other enterprise crimes as well. In Canada, and in other countries, as police and prosecutors gain more experience with the proceeds legislation more nondrug cases are attracting efforts to seize and forfeit criminal proceeds. In Canada the proceeds of crime legislation is being used more frequently in drug cases. Applications for forfeiture have also been made in enterprise crime cases including commercial fraud, forgery, and keeping a common bawdy-house.

This is a trend that should be continued. The criminal law is likely more effective against enterprise crimes when the general deterrence effect is not overwhelmed by a lucrative drug trade. Ironically, as many have observed, the very vigour of the "war on drugs" has driven the price up and provided, in effect, an incentive to traffic and a continuing subsidy once established in the trade.

6.
SUMMARY AND CONCLUSIONS

The nature and extent of organized crime, and particularly international organized crime, fuelled largely by the traffic in illicit drugs, have prompted an unprecedented response from nation states and the international community. The list of international conventions and other mechanisms of cooperation is impressive and is complemented by changes in domestic legislation in countries around the world. This wealth of international and domestic action has provided new tools for the investigation and prosecution of drug offenses and other enterprise crimes. It has also imposed new requirements on investigators and prosecutors.

Enterprise crime has become international and sophisticated, making use of improvements in computers, telecommunications, international financial services and taking advantage of increased openness in trade and the mass movement of people. Moreover, many enterprise crime groups hire specialists for various aspects of each operation. These specialists have come to include money-laundering experts who knowingly provide such services and others, such as lawyers and accountants, who may not know that they are part of a larger laundering operation.

Money laundering operations have developed a variety of methods of moving money around the world. Smuggling cash, wire transfers, the use of underground banking, and so on, are common. In addition, money laundering operations routinely use tax-haven countries with bank secrecy laws and regulations allowing the easy establishment of shell companies, the use of nominee shareholders, and the issue of bearer shares.

Faced with a nearly inexhaustible list of money laundering techniques and specialists, investigators and prosecutors similarly need to specialize and form teams of investigators who, together, can provide the necessary mix of skills. Often experienced police investigators need to have the ongoing assistance of lawyers, forensic accountants, computer experts, and specialists in corporate practices, banking, and international money-transfer procedures. Depending on the case, other specialized expertise must be available as well.

Typically it will be necessary to run parallel files: one aimed at a conviction for a crime predicate to a proceeds case; the other to identify and trace the assets of the criminal enterprise leading to an application to seize and forfeit. There will be variations on this in states that allow for civil forfeiture or *in rem* proceedings, but even where this is the case, parallel files may be advisable. Often the decision to proceed civilly will be made only after it is clear that evidence for a criminal prosecution is lacking.

None of this is simple, nor is it inexpensive.[42] Specialists cost money. Running parallel files costs money. International investigations cost money. As always, it is a question of priorities and political will. Politicians and international public servants have been persuaded that the threat posed by organized crime is greater now than it has ever been. In response, international co-operation has been improved and domestic legislation enacted to enable criminal justice to take the profit out of crime. What is required now is to negotiate the priority that confiscating the proceeds of crime will have where it counts: in the resourcing provided to investigate and prosecute money laundering cases domestically and internationally.

There is no question that international investigations can be difficult and complex. But there is promise in the new mechanisms of co-operation that have been developed, and are being improved upon, since the Vienna Convention. Of particular importance are Mutual Legal Assistance Treaties. Such treaties need to be negotiated and refined but they can assist in surmounting difficulties that have

too often meant abandoning important cases because of technical problems such as the procedures to be followed in collecting evidence.

Although many police investigators and prosecutors are, perhaps justifiably, sceptical about the utility of such treaties, they can be made to work. They should be seen not as substitutes for good informal contacts and international working relationships which investigators so value, but as mechanisms that can be used when there is a problem and a need for a formal, clear procedure.

Proceeds of crime legislation is new in most jurisdictions and there is not yet an established body of jurisprudence to provide complete guidance. Nonetheless, there has been sufficient experience across many jurisdictions to show that well-prepared cases can succeed. Proceeds of crime legislation is robust and can sometimes take the profit out of drug trafficking and other enterprise crime.

Note that this conclusion does not depend on the view that the criminal law can carry the burden of containing, much less reducing, international organized crime. Even with greatly increased resources law enforcement is not going to be able to investigate a significant proportion of international commerce. Certainty, or even a significant probability of punishment, will continue to be absent. Moreover, the effectiveness of deterrence, overestimated at the best of times, is likely least effective when applied to organized crime. But, if general deterrence is never as effective as we would like, neither is it completely ineffective. At the same time we should acknowledge specific deterrence and the symbolic importance of convictions for organized crime and particularly international organized crime. Criminal law, for all its weakness, is nonetheless an essential feature of the larger international effort.

The criminal law cannot by itself carry the burden of reducing, or even containing, money laundering. A broad range of measures is required. They are beyond the scope of this paper, which has focused on problems of investigation and prosecution. Nevertheless, it is important to mention in closing some of the other supporting pillars of a sensible anti-money laundering policy.

First, there must be greater involvement from industry and professional associations in self-regulation and in participating in industry-wide efforts to prevent the abuse of financial systems, stock markets, real-estate markets and other business sectors. Although complaints that “we are not the police” are heard less frequently, there is still insufficient appreciation of the stakes involved. If, as argued, trust in key structures and financial systems is threatened, then industry and professional associations have everything to lose by not actively participating to reduce money laundering.

Second, there needs to be greater attention paid to prevention generally. Improved intelligence and greater sharing of information on specific techniques and organized crime groups are essential. The gathering and appropriate sharing of criminal intelligence are delicate tasks, requiring a balanced judgement about the quality of the information, the legitimate privacy interests of individuals and the trustworthiness of those with whom intelligence is to be shared. Organizations

such as Interpol and the Commercial Fraud Unit of the Commonwealth Secretariat are examples of how this balance can be struck.

Third, given the nature of international commerce, national regulation and law enforcement are not sufficient. There is a role for regional and international regulation in various sectors to reduce, not just organized crime's participation in legitimate business, but also the corporate criminality of companies that manipulate the legal and regulatory regimes of national systems and, for example, do safety testing in countries with relaxed regulatory structures or shift profits around the world to evade tax.[43]

Sound public policy designed to contain organized crime depends upon, at least, these pillars in addition to the criminal law. We should be cautious then, when we evaluate the effectiveness of the new criminal-law powers provided by proceeds of crime legislation. Proceeds of crime legislation can take some profit out of crime. Prudence suggests that we learn to use the new tools the legislative regimes have provided and work on strengthening other pillars of public policy simultaneously.

NOTES

1. The list includes: The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations, Vienna, 1989, the Financial Action Task Force, the Basle Committee on Banking Regulations and Supervisory Practices, the Council or Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, the European Community Council Directive on prevention of the use of the financial system for the purpose of money laundering, the Organization of American States Model Regulations and Draft Mutual Legal Assistance Treaty. In addition, Interpol has become a significant player in providing model legislation to facilitate the obtaining of evidence for forfeiture proceedings. Interpol continues to facilitate co-operation in investigations and in tracing and arresting international offenders. All these agreements and mechanisms (and others not listed here) are conven iently available in Baldwin Jr., N.Fletcher and R.J.Munro, *Asset Forfeiture and International Financial Crimes,* Oceana Publications, New York, 1993.
2. S.C. 1988, c. 51. The act was brought into force by proclamation on January 1, 1989.
3. An excellent overview is provided by the United Nations. See United Nations, *Control of the Proceeds of Crime,* Report of the Secretary-General, United Nations Document E/ CN. 15/1993/4. The reports of the Financial Action Task Force are also a good place to start. The recommendations and the subsequent activities of the group are published in three annual reports. See Organization for Economic Co-operation and Development, Directorate for Financial, Fiscal and Enterprise Affairs. Financial Action Task Force on Money Laundering, *Annual Reports and Annexes,* 1991, 1992, 1993. Recommended as well is a Canadian report done by two researchers at the Department of the Solicitor General. M.E.Beare and S.Schneider,

Tracing of Illicit Funds: Money Laundering in Canada, Department of the Solicitor General, Ottawa, 1990.

4. Even in countries with well developed financial services the use of cheques and credit cards may be declining. In some jurisdictions there is a growing return to cash as tax levels stimulate underground economies, tax avoidance and evasion. In such circumstances governments stand to loose significant tax revenue but even more important is the erosion of traditions of honest reporting of income. When low-level laundering becomes common it is more difficult to detect and prosecute more serious cases. In-formation from, and the continuing cooperation of, the citizenry is essential to most law enforcement. When this erodes, the efficiency and effectiveness of the entire structure is threatened. The result may be to exacerbate traditional difficulties of detecting and prosecuting money laundering.
5. See United States Senate, Committee on the Judiciary Money Laundering Legislation Hearing, 1985, 99th Congress, 1st Session, p. 104.
6. Royal Canadian Mounted Police case files.
7. For an excellent review and commentary see B.Fisse, D.Fraser and G.Coss eds. *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting,* The Law Book Company Ltd., Sydney, 1992.
8. Formally, The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
9. Baldwin and Munro, *op. cit.*, contains proceeds of crime legislation from around the world together with the relevant international agreements.
10. Pinner G. "Cash Transaction Reporting and Money Laundering Legislation in the Money Trail" edited by Fisse, Fraser and Coss, *op. cit.*, p. 42.
11. Bill C-9—passed by the House of Commons of Canada June 19, 1991. The regulations pursuant to the act entered into force on March 26, 1993. See S.C. 1991, c. 26.
12. Personal interviews with officers in charge of economic crime units and anti-drug profiteering units.
13. See "Information to Obtain A Search Warrant" sworn in Vancouver, B.C., December 5, 1993 relating to Citizens Trust Company, Intercontinental Currency and Bullion.
14. United States, Department of Justice. *The Money Laundering Monitor,* October-December 1993. Washington, D.C., US Department of Justice, p. 4.
15. From notes of a meeting organized by the Co-ordinated Law Enforcement Unit, Ministry of the Attorney General of British Columbia, November, 1993.
16. Personal interviews with US customs personnel.
17. RCMP case files as summarized by Beare and Schneider, *op. cit.*
18. For an excellent history of just how excessive see J.B. Stewart *Den of Thieves,* Touch-stone Books, New York, 1991.
19. J.Vitiello in G.La Fiura and U.Santino, *L'impresa mafiosa,* Franco Angeli, Milan, 1992.
20. For an excellent brief review see J.T.Wells "Accountancy and White-Collar Crime", *Annals of the American Association of Political and Social Science,* 1993, p. 525.
21. See Beare and Schneider, *op. cit.*
22. M.Levi "White-Collar Crime: The British Scene", *Annals of the American Academy of Political and Social Science,* 1993, Vol. 525, p. 80.

23. See the United States President's Commission on Organized Crime, *Cash Connection: Organized Crime, Financial Institutions and Money Laundering*, Government Printer, Washington, D.C., 1984.
24. For those who cannot resist estimates, however problematic: An estimate from the Financial Action Task Force has it that illicit drug sales in Europe and North America amount to $122 billion (US) annually, Lascelles, "Money Laundering Under Siege", *Financial Times*, April 20, 1990, at 39, col. 5. This is approximately equal to the projected total annual expenditure of the Government of Canada for 1993/1994.
25. A.M.Shipman and B.A.K.Rider, *Organized Crime International:Fraud in the Securities Markets*, Crown Agents Training Services and the Commonwealth Secretariat Commercial Crime Unit, Toronto, 1988.
26. In the United States most assets can be forfeited either civilly, or criminally, or both. Moreover, anything used to facilitate the commission of a crime and any asset which is the proceeds of crime, may be forfeited.
27. What is it? What is it worth? Who is going to manage it while the case is pending? (One prosecutor's shorthand for this was "If it eats, don't seize it"). Are there storage problems? What third party rights are there likely to be?
28. For example, during undercover operations or when debriefing informants.
29. A provincial government plan subsidizing prescription drugs.
30. Regina v. Nayanchandra Shah, Provincial Court of British Columbia, November 30, 1992. Vancouver Registry No. 40437T3, p. 22.
31. R. vs. Tortone, 1993 23 C.R. (4th) does not call into question the proceeds of crime legislation. Rather, the case turned on the question of whether or not the trial judge should have ordered a mistrial because of comments he had made about the difficulty in appreciating the evidence in the case.
32. The Government of Canada is preparing an implementation manual to assist Member States of the United Nations in negotiations based on the United Nations Model Treaty on Mutual Assistance in Criminal Matters. The Government of Australia is preparing an implementation manual on the United Nations Treaty on Extradition.
33. *Canada Gazette*, 1990, Part 1, p. 953. See also Mutual Legal Assistance in Criminal Matters Act (R.S. 1985, c. 30 (4th Supp.) and Statutes 1988, c. 37, assented to 28th July, 1988).
34. Some refinement and interpretation will be required. For example, Canadian Judges cannot order the forfeiture of assets ordered forfeited by a court of criminal jurisdic tion in the foreign state. They have the power, however, to enforce the payment of fines to represent the value of any property, benefit, or advantage. See S.C. 1988, c. 37, s. 9.
35. Mutual Legal Assistance Treaty between Canada and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters. Treaty Series 1992/9, Queens Printer for Canada, Ottawa.
36. Some additional refinement will be required here. One of the first investigations seeking to use the new treaty floundered when defense counsel asked to see police note-books, a practice common in Canada, but not in the Netherlands. Treaty negotiators do not think of everything the first time.
37. For the complete list see section 462.3, Criminal Code of Canada. See also P.J.Donald, "Money Laundering—A Legislative Response", unpublished paper prepared for the International Investigational Techniques Course on Money

Laundering (sponsored by the United Nations), Malta, March 1–12, 1993. Patricia J. Donald points out (p. 18) that "The list of predicate offenses is fairly comprehensive but has some surprising omissions, considering the philosophy behind the legislation which is to confiscate the proceeds of crime. Not included are such Criminal Code offenses as charging a criminal rate of interest (s. 347), break and enter (s. 348), mail fraud (s. 381), and publishing a false prospectus (s. 400)".

38. See U.S. Department of Justice, "Wanted by the FBI: The Mob" *FBI Organized Crime Report—25 years after Valachi,* Department of Justice, Washington D.C., 1988.
39. Title IX of the Organized Crime Control Act, 18 U.S.C. ss. 1961.
40. M.Papa, "La nouvelle legislation italienne en matière de criminalité organisée", *Revue de Sciences Criminelles et de Droit Pénal Compare,* 4, Oct.-Déc. 1993, p. 725.
41. For two excellent accounts of the Savings and Loan Case: W.L.Seidman, *The Great S & L Debacle and Other Washington Sagas,* Times Book/Random House, New York, 1993, and K.Day, *The People and Politics Behind the $1 Trillion Savings and Loan Scandal,* W.W.Norton & Co., New York, 1993.
42. Some jurisdictions, including Canada and the United States, have procedures so that some of the forfeited profits are directed to law enforcement and do not simply disappear into the general revenue account. Even proponents of these policies acknowledge that the amounts forfeited (as distinct from the amount seized) are insufficient to make much of a difference to law enforcement budgets. Nonetheless, there is something satisfying about using criminal proceeds to combat crime.
43. See J.Braithewaite, *Corporate Crime in the Pharmaceutical Industry,* Routhledge & Kegan Paul, London, 1984, and *Transnational Regulation of the Pharmaceutical Industry,* Routhledge & Kegan Paul, London, 1993, for an analysis of corporate crime in the international pharmaceutical industry.

Investigating and Prosecuting the Proceeds of Crime: A Civil Law Experience

Giuliano Turone

l.
INTRODUCTION: MONEY LAUNDERING AS A STAGE IN CRIMINAL ENTREPRENEURIAL ACTIVITY

Over the last fifteen years, the Italian legislator has become more and more aware of the need for decisive action against the illicit economic activities of major criminal organizations. From the norm incriminating involvement in a mafia-type association (introduced in 1982 in the Penal Code) to the recent norms on money laundering; from the norms on the transparency of transactions and proprietary assets to the Law No. 501 of 8th August 1994 on the confiscation of illicitly derived assets, there has been a massive accumulation of norms, which have had little coordination, and which are difficult to sort out on a coherent basis. Nevertheless, the intensive legislative attention paid to the links between organized crime and money laundering makes the Italian experience one which merits particular study.

This chapter will endeavor to provide an organic, comprehensive and up-to-date view of such heterogenous norms, and at the same time will seek to trace guidelines for their rational application, primarily by members of the Public Prosecutor's Offices, whose task in the Italian system, where organized crime is concerned, is to *manage* the investigations. It will also address itself to the "international reader", adopting an approach which, while skimming over a number of problems of purely "national" interest, will focus strongly on the transnational dimension of the criminal phenomena and the need for coordinated counter-strategies at an international level.[1]

In broad terms, money laundering is any act aimed at hiding or masking the illicit origins of valuable assets. In point of fact, "laundering", in the widest sense of the word, may also be applied to the proceeds of an impromptu robbery committed by persons not belonging to any criminal organization.

In practical terms, however, attention must concentrate on a more specific category of laundering, representing the necessary and permanent route adopted by *crime-based business*, which by now has assumed alarming dimensions and is characterised by a sophisticated *organizational structure.*

In this perspective, the search for more suitable techniques to combat money laundering should commence with a non-sectorial approach, adopting, in other words, an overall view of the phenomenon—transcending individual acts of "divorcing" of an asset from its illicit origins—as the necessary moment of the criminal economy, and thus of the essence of the major criminal organizations. In such a perspective, the techniques to combat laundering cannot afford to act in isolation—as we will explore below—from the techniques employed to combat organized crime.

It should also be stated at the outset that when this paper speaks of "money laundering" it does not refer simply to either one of the two specific crimes covered by Arts.648-*bis* and 648-*ter* of the Italian Penal Code (which, by express legislative provision, are never chargeable against those who have committed the presumed original offence) but also—in the more general criminological aspect—to any transformation undergone by the illicit proceeds of organized crime, including those by the same authors of the presumed crimes from which such funds derive.

2.
THE ENTREPRENEURIAL DIMENSION OF ORGANIZED CRIME; CRIMINAL ENTREPRENEURIAL ASSOCIATIONS. GUIDELINES FOR A REVIEW OF COUNTER-STRATEGIES

The expression *organized crime* belongs more to the vocabulary of criminology than to that of Criminal Law. In its broader sense it may refer to any organization devoted to criminal activity; more narrowly—and more consistently with a correct perception of criminal phenomena—it tends to be used today only for the most current and disturbing forms of association crime, characterized by their pursuit of gain and possession of particularly complex and sophisticated organizational structures.

Thus, in speaking of organized crime, one's focus must go beyond any group of persons, however well organized, who are dedicated to penally prohibited activities. It is not enough that the organizational structure has the capability to commit the crimes planned by the group: it must also reflect the further aim to dominate areas of power—primarily *economic* power—far beyond the scope of the crimes themselves. The modern concept of *organized crime*, therefore, does not denote a group of people engaging in criminal activities where the sole aim is to enjoy, successively, the spoils they achieve; nor does it denote a group of persons who, for instance, regularly sell small quantities of drugs simply for their own subsistence. Rather does it denote a group permanently engaged in crimes against property (or crimes with some sort of economic connotation) which possesses a structure comparable to that of a business undertaking, in which costs, profits, resources and investments are planned *lato sensu* in a managerial dimension, so as to enable the group to

achieve a favored position within an illegal market. That is not to say that organized crime must also possess refined managerial characteristics or highly developed economic strategies: on the contrary, the strategies themselves may be relatively simple; although this does not prevent an organization of men and resources systematically devoted to the production and investment of crime-sourced assets being considered in the context of an entrepreneurial entity in its broadest sense.

Thus defined, the concept of organized crime serves to denote only those criminal phenomena whose common feature is the business logic of self-enrichment, profits and exploitation of illegal markets, deriving from a high degree of organization. These may be termed business organizations in the widest sense of the word, constituting their essential common denominator. This limited concept covers the field of what has been termed as "the criminal economy"; from the moment that it moves a vast resource of wealth, it drives towards the illegal conquest of areas of economic power and thereby pollutes the economic texture—and more generally the institutional structure—of the countries in which it operates.

The devastating dimensions reached in recent decades—in Italy and many other countries—by this variegated and wide-spread criminal phenomenon, their growing destabilizing potentialities, the areas of real power which they occupy ever more menacingly through the management of continuously expanding sectors of the criminal economy—all these show, beyond any reasonable doubt, that the corresponding counter-measures taken by states have been woe-fully inadequate. Therefore it is imperative to establish as a matter of urgency new strategies which might radically enhance the quality of counter-measures, both nationally and internationally.

In this context, one specific fact must be recognized at the outset: there are no short-cuts for defeating organized crime or frustrating its development and economic growth, without following the arduous route of *investigation aimed at penal repression.* Whatever normative "obstacle" may be devised, however ingenious it may be (see Part 7 below) it can only, at best, make criminal activity less easy without seriously impeding its progress. Thus, to raise the level of action to combat organized crime and its entrepreneurial activities necessitates raising the level of the investigation and penal repression of the association groups within which the phenomenon is centered. In other words, the new strategies of attack must be established *in the shape of criminal investigations concentrating directly on organized criminal groups*, with particular emphasis on the entrepreneurial aspect of such criminal phenomena.

In this perspective—tying in with our more restrictive sense of "organized crime"—we may go on to state that criminal investigations into association groups dedicated to the commission of crimes can be considered *investigations into organized crime* when they aim to throw light on the activities and association structures based on the logic of gain (*profit-oriented*) and possessing

an organizational structure classified in quasi-business terms in the sense mentioned above.

From an Italian point of view, these last associations—which we will term *criminal-entrepreneurial associations*—may be identified in three classes, according to the particular association crime which is committed under the provisions of Italian Criminal Law. Italian law, in fact, specifies three distinct categories of association crime which are designed according to the particular phenomena of organized crime and calculated to strike at their entrepreneurial dimension: the association to commit every-day types of crime, the association specifically to engage in drugs-trafficking and the mafia-type association.

3. OVERVIEW OF CRIMES OF ASSOCIATION AS LAID DOWN IN ITALIAN LAW. IN PARTICULAR THE CRIME OF MAFIA-TYPE ASSOCIATION AND RELATED PROBLEMS OF DOUBLE CRIMINALITY

The first association crime provided by Italian law, the most general and simple, is the *common type* criminal association, which occurs when at least three persons join together with the aim of committing a general program of crimes and with an internal organization suitably adapted for that purpose (Art.416, Italian Penal Code). This association can have an entrepreneurial dimension when the organizational level is rather sophisticated. Let us imagine, for instance, a group of white-collar criminals pursuing a program of strictly economic crimes, or a group of people who deal professionally with weapons smuggling or money laundering, or trafficking in stolen cars.

The existence of this association crime is established when we can prove that at least three persons joined together in an association suitably and permanently organized for the agreed purpose of committing an open program of crimes; a program of crimes which is not previously defined as far as the *number* of crimes to be committed is concerned. On the other hand, the evidence for any single membership can be reached by proving that the single person gave a *contribution* —even slight, but not meaningless—to the existence of the criminal group. For instance, within a criminal group trafficking in stolen cars, the owner of the garage where the cars are supposed to be kept gives a contribution to the life of the group and can be accused of being a member of it, provided he is acting together with at least two other people, aware of the illegal origin of the cars, and aware of the illegal economic business being dealt in.

When this evidence is reached, a punishment is provided *for the association crime itself*, theoretically even if none of the specific programmed crimes has yet been committed. Specific crimes being committed within the association are to be proved separately with regard to every single person being accused; and for each one of the specific crimes being proved a separate punishment—or an increase of punishment—is provided.

This general discipline is also widely valid for the other two kinds of association crime, which are more specific and which provide heavier punishments: the drug-trafficking association and the mafia-type association.

There is not much to say about the special kind of criminal association acting in drug-trafficking, which occurs when the program of delinquency concerns drug-trafficking crimes (Art.74 of Law No.309 of 1990 on narcotics). This association usually has an entrepreneurial dimension, provided the organization level is high enough and the aim of the members is something more than securing their means of subsistence.

Then we have the mafia-type association, which has a more complex definition and is precisely described in Art.416-bis of the Italian Penal Code.[2] The association is mafia-type when the members use the force of intimidation, spreading from the association bond, from *the association tie itself*, and use the condition of subjection deriving from the intimidation, in order either to commit crimes or to acquire the control of economic activities or to realize other unlawful advantages. This kind of association always has an entrepreneurial dimension. Again, each one of the specific crimes being committed within the association is punishable separately. Furthermore, a mafia-type association may also be, at the same time, a drug-trafficking association; and in this case, according to Italian law, the two norms punishing criminal association may apply together; and an increased punishment will be imposed.

The mafia-type association crime has been defined by the Italian legislator after observing the typical way of acting of the traditional Sicilian Mafia. But the result has been a general legal definition, which applies to any criminal group *acting in the same way*, no matter in what part of the country the group may be active, and no matter how the group may be named. Entering into details, the law outlines the mafia way of acting, i.e. the *mafia method*, saying that a criminal association is mafia-type when the members pursue their goals using three particular instruments.

The first instrument—the main one—is the force of intimidation proceeding from the association bond itself, which means an autonomous force of intimidation, deriving from the history of the group and from its consolidated reputation for violence. In other words, the operating group must have an autonomous and persistent burden of fear, without any need (usually) for specific threats: we can say that around a mafia-type association there is a broad persisting "halo" of intimidation, which belongs to the patrimony of the group and is the ***main*** permanent working instrument of the group.

The other two instruments which complete the mafia method are consequences of this force of intimidation:

— first, a condition of general subjection, due to the fear produced by the group;
— second, a condition of more specific subjection that produces a wide-spread attitude which will deny—inside and outside the mafia group—the possibility of co-operating with investigating state authorities.

In short, a mafia-type association is a criminal association acting through a wrongful use of *fear* and a wrongful use of *subjection* of other people. And thereby it pursues unlawful advantages, either by committing crimes or—even without committing specific crimes—through an unlawful control of legal economic activities or, in a more general way, through the realization of "wrongful advantages" (*vantaggi ingiusti*). That means, of course, that a mafia group always has a strong entrepreneurial dimension.

The evidence of the general structure of this association crime is usually reached by proving specific conditions of fear being exploited by the group, and not necessarily by proving conducts of specific violence or threat (which might even occur in a common type of criminal association). An example taken from real experience may be useful: it became relevant in a court trial, as a proof of the mafia method, that the sale of a piece of real estate was made at a price far below the actual value, due to the fact that it was proved that the seller was in a condition of fear and subjection.

Since the mafia-type criminal groups generally operate on an international scale, it is worth trying to identify possible solutions to the problem of *double international criminality,* which a very individual norm, such as the Italian law on mafia-type association, inevitably raises. The problem is more intractable in those countries whose legal systems have neither the model of association crime nor the Anglo-Saxon model of *conspiracy.* In such a case, any request for inter-national judicial assistance, occurring in relation to Italian proceedings in a mafia context, needs to be founded on specific common crimes, if the procedural elements so allow, and not on the mafia-type association crime (although it is possible that certain specific instances of exploitation of an "autonomous intimidatory position" may be penally relevant even in the foreign system).

But the position is different in those countries which acknowledge the association crime (however elementarily) and in those which, to some extent, recognize the Anglo-Saxon model of *conspiracy.* Of course, even in those countries, the Italian authorities should base their request for judicial assistance wherever possible on an evidential basis related to *demonstrably* specific ordinary criminal offences. What counts, however, in relation to those countries, is that it is often possible to identify facets of double criminality where it is easy to demonstrate some of the *formally* "non-criminal" goals only (such as the control of economic activities or the general theme of "wrongful advantage", where "wrongful" is not necessarily criminal) and not the most manifest criminal aims (i.e. specifically "to commit crimes"). This is obviously the case which creates the greatest difficulties, and the one which we will examine in further detail.

Before tackling this theme, and considering some of the countries with whom Italy has the most active tradition of judicial co-operation, we should underline that the most general aim among those envisaged by the norm (that of realizing "wrongful advantages") has a breadth of meaning sufficient to embrace all the other aims that may be pursued by a mafia-type association. It should further be

stressed that the systematic exploitation, by the active criminal group, of its "autonomous intimidatory position" automatically implies a program of criminal activity involving, as a minimum, threats and coercion: this program of "minimal" criminal activity will tend to remain "potential" the greater the power of the autonomous intimidatory position, which correspondingly tends to make specific intimidatory acts superfluous. But this does not prevent such a program of "minimal" criminal activity from being always inherent in the systematic exploitation of the "autonomous intimidatory position".

This is the overall reference framework which—through solutions that can be variously modulated according to the foreign juridical system in question—may provide the key for an opportune identification of aspects of double criminality.

If we commence our specific analysis with Switzerland, we see that its Penal Code has recently introduced the crime of "criminal organization" (Art.260-ter), which to some extent resembles the Italian crime of mafia-type association and which punishes "any person who participates in an organization that maintains its organization and members secret and has the aim of committing violent criminal acts or *enriching itself by criminal means"*. For the purposes of our problem of double criminality, we consider that this norm should be read in conjunction with the norm in Art.181 of the same Penal Code, which sets out the crime of "coercion" and punishes "any person, who, by using violence or threats of serious harm to any other person, or otherwise impedes his freedom of action, or compels him to commit, refrain from, or suffer an act". On this basis, in fact, the Italian mafia-type association, taking account of its program of "minimal" criminal activity, may be recognized by the Swiss Law as a criminal association aiming, at least, to enrich itself by criminal means, notably through a program of "coercion".

In Germany, Sec.129 of the StGB defines the association to commit crimes (*kriminelle Vereinigung*) as "an association whose aims or activities are directed towards committing crimes".[3] Successively, Secs.240 and 241 of the StGB establish respectively the offences of "coercion" (*Nötigung*) and "menaces" (*Bedrohung*) which substantially correspond to Italian Law's crimes of personal violence and threats. Consequently, the program of *minimal* criminal activity of the Italian mafia-type association, has its counterpart in German Criminal Law.

In the new French Penal Code, the crime of *association de malfaiteurs* is laid down in Arts.450–1, in such a way as not to admit a satisfactory solution to our problem of double criminality. A possible solution might be sought on the basis of a most specific aggravating circumstance, applicable to a rather limited number of offences, provided by the fact that the crime may be committed "in an organized gang". It should be emphasized that the existence of an "organized gang" *(bande organisée)* does not constitute an autonomous crime in itself, but only an element aggravating a specific offence, even if the norm defining it (Art. 132–71 of the new French Penal Code) employs a formulation identical to that of the *association de malfaiteurs*, perceiving such a circumstance when a number of persons combine or make an agreement "with a view to preparing, by one or

more material steps, the commission of one or more infractions".[4] Thus the norm which defines the offence of extortion, and provides a term of seven years *emprisonnement* for the simple offence (Art.312–1, French Penal Code), stipulates up to twenty years *réclusion criminelle* when the offence is committed "in an organized gang" (Art.312–6, French Penal Code). Now, precisely the case of extortion committed "in an organized gang" may in some cases serve to solve the problem of double criminality, with which we are concerned, thanks to the fact that the expression used by Art.312–1 of the French Penal Code to define the mode of extortion—"by means of violence, threats of violence, or coercion (*contrainte*)"[5]—is wider than that used in the Italian norm ("by means of violence or threats"). Consequently, with regard to an Italian mafia-type association in which it is only possible to demonstrate the aim of economic control or wrongful advantage, the search for a possible outline of double criminality may lie in the possibility of extrapolating from the activities of the association some episode which may be constructed—according to the new French normative provisions—as an episode of extortion prepared and carried out "in an organized gang".

There is a similar situation to the German one in Spain, whose Penal Code (Art. 173.1) deals, among illicit associations *(asociaciones illicitas)*, with those whose aim it is to commit *algún delito* ("any offence"), or which, after being formed, proceed to its commission:[6] the disjunctive "or" implies that the illicit association is punishable *per se* quite apart from the effective fulfillment of its criminal program. Successively, the crimes of threats, personal violence and extortion are considered together by the Spanish Penal Code under the rubric *"De las amenazas y coacciones"*, that is Threats and Coercion; in particular, Art.493 punishes any person who threatens to cause unlawful harm to another "by demanding a sum of money or imposing some other condition", thereby introducing a rather broad example of extortion and personal violence to be strictly supervised, while Art.496 introduces an example of *coacción* which is only applicable to situations which do not fall within the preceding definition of "conditioned threats". Consequently, the program of *minimal* delinquency of an Italian mafia-type association has its counterpart in Spanish legislation, in identifying a virtually established *asociación ilícita* established to commit, as a minimum, offences of *amenazas y coacciones*, that is Threats and Coercion.

Analogous solutions exist in the juridical systems of some of the larger Latin American states.[7]

We now come to the *common law* juridical systems, which have the crime of *conspiracy*, which not only exists in common Criminal Law but also appears in legislation of the various systems. *Conspiracy* is usually defined as "an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means".[8] In some systems (especially in North America), for the agreement to be punishable there has to be (at least) the commission of some act in preparation for the agreed activity.

In the Federal system of the USA, the general definition of *conspiracy* is laid down in Section 371, Chapter 18 of the US Code.[9] *Conspiracy* occurs when at least two people reach a specific agreement to commit *one or more* given offences, provided that there has occurred—on the part of one of the participants, even unbeknown to the others—some "overt act" aimed at achieving the purposes of the agreement (in other words, at least a preparatory act, if not an executive act, of the particular offence agreed upon or one of the number of offences agreed upon). This is the general example of *conspiracy*, insofar as there are other special instances of *conspiracy*, such as conspiracy specific to organized crime and defined in the Racketeer Influenced and Corrupt Organizations Statute, although it is beyond our present purview to examine these in detail, since the extremely specific nature of the necessary elements would tend to cloud rather than assist the search for a solution in terms of double criminality.[10]

So, an Italian authority requesting assistance from a *common law* country (and notably from the USA) in the context of proceedings concerning a mafia-type association (in which only the aim of economic control or wrongful advantage is demonstrable) would need to provide an evidentiary framework capable of evaluation on the grounds that the elements constitute a general case of recognizable *conspiracy* (according to the law of the country approached)—at least a "specific agreement" or a "manifest act" related to episodes of threats, coercion or extortion. In the last of these cases, under US Criminal Law (Section 1951.b.2., Chapter 18, US Code),[11] extortion occurs either when the wrongful gain is realized through threats (openly or covertly, but in either case so as to determine the conduct of the person threatened) or when it is realized more generally through *"the wrongful use of…fear"*\ this facilitates the solution of the specific problem of double criminality, provided that the US authorities are given evidence which may qualify as "wrongful use of fear". Consequently, the program of *minimal* delinquency by the Italian mafia-type association—in any circumstances that may be interpreted as an *overt act* by the American jurist—may be seen in Federal US Law as a *conspiracy to commit extortion.*

In the British penal system, *conspiracy* is regulated under Sec.l of the Criminal Law Act, 1977, which repealed all former common law rules in this field and which basically defines *conspiracy* as an agreement between two or more persons aimed at the commission of one or more offences.[12] The essential point here, so far as the question of double criminality is concerned, is that a prosecution for *conspiracy* may take place even if the intended offence is not consummated. In particular, it could be maintained that the *minimal* criminal activity of the Italian mafia-type association has its counterpart in the UK system in a conspiracy to commit blackmail, insofar as Sec.21 of the *Theft Act, 1968,* provides that "a person is guilty of blackmail if, with a view to gain for himself or another, or with intent to cause loss to another, he makes an unwarranted demand with menaces".

We conclude this *excursus* into comparative legislative provisions, which is inevitably incomplete, by underlining that the problems of double criminality encountered in connection with the Italian mafia-type association would be easier to solve if one could achieve, at an international level, a common definition of "organized crime", capable of including the surrounding aspects of intimidation which tend to generate distinctions between the relative phenomena in whatever geographical setting they appear. This point, moreover, has been supported by the United Nations Organization in the final Resolution of its *World Ministerial Conference on Organized Transnational Crime,* which was held at Naples in November 1994, and at which it was expressly stated that "in order to effectively combat organized crime, states must overcome their code of silence and intimidation".[13]

4.
THE NEED FOR A NEW CULTURAL ATTITUDE TOWARDS ASSET INVESTIGATIONS IN RELATION TO CRIMINAL ENTREPRENEURIAL ACTIVITIES

Following the long parenthesis set out in the preceding section—which was necessitated by the opportunity to offer a panoramic view of association crimes set out in Italian Law aimed at combatting organized crime in its entrepreneurial dimension—we may now turn to the perspective outlined in the first two parts, which perceives organized crime and the criminal economy as two sides of the same coin.

It is clear that, in this viewpoint, money laundering assumes an enormous importance, not so much as a criminal activity in itself which may be distinguished from the general context of the criminal economy, but as a feature which is deeply rooted in the latter. Consequently, as it is illusory to imagine that it is possible to fight money laundering without a drastic campaign against the criminal economy. It is equally illusory to think that it is possible to fight the criminal economy without—as we have already said—decisively raising the level of investigatory action against organized crime, which is the direct progenitor of the criminal economy.

In particular, money laundering and the criminal economy are to be tackled in the knowledge that the members of a criminal entrepreneurial association are inevitably obliged to institute maneuvers which will conceal the illegal origins of their funds. Thus, they themselves (or at least those who have the greatest responsibilities within the group) are the first *necessary launderers* for the illegal wealth. It follows from this that, in order to fight money laundering and the criminal economy, a central importance must be given to the *investigation of assets* within any investigation into organized crime, thus overcoming the cultural attitude which lacks consistency in relation to this type of enquiry.

In fact, until now, asset investigation in matters of organized crime has been the least employed method—when not altogether neglected—in the course of

judicial investigations, being adopted only when it has appeared strictly indispensable for acquiring evidence in this or that enquiry, whether of the association crime or some other specific offences. Once evidence sufficient to support the charge against the accused has been acquired, the asset investigation (which in any case is very arduous due to the limited resources of the current Italian investigatory organs and the time limits imposed for preliminary investigations under the Italian Code of Criminal Procedure) are too often set aside. Thus it often happens that in the major judicial investigations based on the statements of collaborating accused persons, the Italian Public Prosecutor confines himself to the few details of asset enquiries which are absolutely necessary for corroboration, despite the theoretical possibility of substantially broader enquiries into the economic implications of the criminal association under investigation, and thus the sector of the criminal economy for which it is responsible. It is quite probable that something similar also occurs in other countries.

Thus, it is important to confirm quite clearly that the necessary increase in resources of the investigating organs and appropriate amendments to the normative framework should be accompanied by the development of a new cultural attitude towards asset investigations. When we say *overturn* the hitherto prevailing cultural attitude, we refer, in investigations into criminal entrepreneurial associations, to the duty of the investigating authorities to adopt a mental approach which considers "under investigation" not only the *persons* (for the purposes of some future punishment that may be imposed on them) but also their related *wealth* (for the purposes of some future order of confiscation). They should there-fore accustom themselves to using asset investigations *as a matter of course in every area,* not only to the extent that it may be useful in confirming and consolidating the particular evidence against the accused *persons,* but also, further, until they have acquired all the incriminating evidence concerning the *wealth* deriving from their illicit activities.

Moreover, experience teaches us that organized crime has a ready capacity to replace its members who are neutralized by the repressive system of the state, but finds it less easy to replace its confiscated resources. On the other hand—in view of the well known advantages enjoyed by criminal businesses relative to lawful ones—only a counter-action *which gives priority attention to the violence of the criminal economy* can prevent the latter from expanding to irreversible and irreparable dimensions.

5.
"INTER-CONNECTED" ASSET INVESTIGATIONS: THEIR PREREQUISITES, THEIR INFLUENCE ON THE LEVEL OF MONEY LAUNDERING AND THEIR CENTRAL IMPORTANCE IN INVESTIGATIONS INTO CRIMINAL ENTREPRENEURIAL ASSOCIATIONS

It is perhaps opportune to confirm and emphasize that the best route for establishing asset investigations in relation to organized crime is the extremely difficult but ultimately worthwhile one of *penal investigation of individual criminal entrepreneurial associations.*

In the context of such investigations, moreover, one avoids the construction of ill-defined maxi-asset-enquiries, while patiently building up inter-related specific asset investigations, so as to reconstruct the acquisitions, transformations and applications of the illicit wealth in the hands of the criminal group under enquiry. In other words, the faint-hearted temptation to pass over the first links and intermediate stages of the investigation, in the mistaken belief of being able to reach directly the economic heart of major crime, is avoided: the temptation not to start at the ground roots, with individual criminal episodes, but to pursue enquiries which pretend to operate at the peak by tackling the moving sands of an encyclopedic *screening* of all the wealth which for whatever reason appears to be suspect, of all the financial bodies which appear legally unconvincing, or of all the contracts which at first sight do not appear entirely transparent, etc.

When we speak of asset investigations, which are *specific and inter-connected inter se,* we mean to say that they must be clearly oriented towards gradual progressive targets, which are decided upon step-by-step and comprehensively focused on the final aim of reconstructing the illegal sources of wealth. This is because the asset investigation may reach the economic heart of the criminal organizations only by patiently tracing every single step of the pyramid. In other words, the asset investigation must be firmly and fundamentally anchored on one or more specific criminal events and on an evidentiary framework which clearly establish the existence of a criminal entrepreneurial association. It must then develop like a chain, in which every single revelation is a link supported by the preceding link and providing support for the successive links of discovery.

None of this means, so far as the method of the investigation is concerned, that the first link of the chain of asset investigation must necessarily be founded at the *base of the evidentiary pyramid,* where various types of enquiry should be founded, mostly of a non-economic nature, seeking to establish the specific criminal activities (including those, which by their very nature, are likely to *produce* wealth) and progress to the point of demonstrating their participation in the association crime (or in the *conspiracy).* In fact, to say that the asset investigation should begin *at the base* simply means that it must commence *at a level of economic transformations which is still relatively close and easily linked with the evidentiary basis,* that is: from sources of wealth attributable—even,

perhaps, through an intervening person—to a given criminal entrepreneurial association which is already recognizable as such by virtue of a basic evidentiary structure.

With regard to such sources of wealth, the chain of economic revelations may be further developed in two directions: towards the base of the probatory pyramid, in which the original source can be fully ascertained, and towards the apex, from which to identify the successive transformations and successive applications to which these give rise.

So, a careful combination of the two types of economic enquiry (those directed towards "the base" and those directed towards "the apex") may permit—for every source as indicated above—the most remote origins and the most recent evolutions to be ascertained. Enquiries "towards the base" may help to show the progression from illegal sources to criminal events producing wealth, thus tracing back the most recent money laundering activities to their origins. Enquiries "towards the apex" may help to highlight the money laundering acts and subsequent applications of funds and, thereby, the areas of the criminal economy attributable to the group in question. It will thus be possible to identify fully—as the requisite evidentiary support—the illegal resources which may be considered liable to confiscation.

A simple but significant example of how an asset investigation of this type may be undertaken "from the base", may be in order. Let us imagine a criminal association permanently devoted to trafficking in arms and drugs and to other crimes, whose operating center is located in the premises of a garage whose owner is one of the leading members of the association. So, in the approach on which we are now focusing, the garage should be considered, *per se*, as the source of the wealth to be subjected to a close and accurate asset investigation, even when the overall probatory framework on the criminal association may be more than sufficient to support the prosecution of all the members of the operative criminal group. Enquiries "towards the base"—through the most meticulous analysis of licence movements, notarial documents, preliminary contracts of sale, invoices for participation in immovable property, modes of payment, banking transactions traceable to the top point of the negotiations—all these will help to reconstruct the ultimate origin of the monies used to acquire ownership of the garage. Thus it will also be possible to trace other wealth-generating offences committed in the past by the same criminal group, which otherwise would have been destined to remain unpunished. Enquiries "towards the apex", in their turn, with an analysis of the documentation involved in running the garage and moving about its profits, will also be able to identify further acts of money laundering, illuminating the degree of intermingling between criminal profits and profits attributable to formally lawful activities.

This investigative approach is the most opportune instrument for tackling scientifically the major phenomenon of money laundering and thereby of the criminal economy. If applied consistently, constantly and *with due totality* in all investigations concerning the criminal entrepreneurial associations which are

identified from time to time, the degree of discovery achievable with the inter-connected asset investigation—and thus the amount of the criminal economy liable to confiscation—will be of a high order.

As we have seen, the starting point for this type of enquiry is always a source of wealth (a current bank account, a piece of realty, a business, etc.) which is traceable because of its obvious connection to the criminal group, and as a result "rendered suspect" for illegal origins or intermingling between criminal and formally lawful sources. This implies that where no "point of departure" of this sort can be identified within the ambit of an investigation into a criminal entrepreneurial association, it is advisable to seek one (or more than one) through identifying the banking relationships, the ownerships of realty and the entrepreneurial activities leading (directly or indirectly) to the members of that association.

The content of individual linked economic discoveries may be most varied, according to the techniques of laundering and re-investment favored by the individual criminal group and the particular inter-connections identified in the investigations, by aligning the initial transformations to the crimes generating the wealth and tracing progressively the subsequent transformations (and the co-related asset investigation will be even more complex the higher the entrepreneurial level of the association).

Inevitably, there will be a question of tracing and impounding various forms of documentary materials, containing the basic data which may form part of the asset investigation; of developing such data (including personal interviews or other complementary acts of investigation) with a view to tracing further documentation that may be preliminary for successive phases of the asset investigation, and so on. Almost always, indeed, it has been a case of patiently wading through interminably involved banking transactions, where cheques, bearer bonds, state securities and similar operations will succeed each other in vicious circles calculated to frustrate any reconstruction of the monetary movements.

Accurate reconstruction of monetary movements and exact analysis of the documentation progressively impounded permits tracing the existence of situations inevitably leading to further confiscations, further analysis of documents, and uncovered and connected data. Obscure financing activities may lend themselves to loan-sharing operations. Economic connections may exist with the world of gaming dens, or there may be investments in the stocks and bonds markets (with the possible participation of middle men in the corporate sector), or purchases of real estate, or the acquisition of public contracts or commercial structures, The lastmentioned types of transaction may result in over-invoicing so as to present as law-ful profits the gains derived from criminal activities. Forays into the world of old masters and valuable artifacts are suspect. Purchases of formally lawful entrepreneurial operations permit incursions into the world of public contracts and building operations, as do relationships with insurance companies, financial companies, etc.

The connected economic discoveries will inevitably extend to various parts of the national territory. Just as often, the long sequence of linked economic enquiries should extend to the international scene through the presentation of timely requests for judicial assistance, while, on the other hand, new connected economic enquiries will receive their initial *input* in the international field in the case of requests from other countries for judicial assistance.

This trend will intensify as a result of the Convention "On laundering, search, seizure and confiscation of the proceeds of crime", held in Strasbourg on 8th November 1990. This is Convention No. 141 of the Council of Europe, so far signed by twenty-two countries (some of which are outside the Council of Europe) and already ratified by eight of the signatories (Bulgaria, Finland, Great Britain, Italy, Lithuania, Norway, Netherlands and Switzerland). The Convention, *inter alia,* commits its adherents to adopt the necessary measures to permit—in the context of a transnational judicial environment—the confiscation of the proceeds of crime, the identification and tracing of such proceeds, and, for such purpose, the use of opportune investigative techniques and the "gathering of evidence related thereto" (Arts.l, 2, 3 and 4). In this way it gives authoritative direction to the campaign by individual states, by way of favoring the techniques of "linked" asset investigations. We will examine these international aspects in further detail below.

6.
INVESTIGATIONS COMPLEMENTARY TO CONNECTED ECONOMIC ENQUIRIES AND THE ROLE OF SPECIFIC PENAL PROVISIONS AGAINST MONEY LAUNDERING. THE "MONEY LAUNDERING ENTERPRISES"

Within the scope of the type of investigative activity which we have been describing, the individual economic enquiries obviously cannot be detached from the necessary complementary investigations. Apart from impounding documentation, which will be the basis for asset investigation into the data they reveal, this area will embrace all the investigatory acts envisaged by the Code of Criminal Procedure: questioning of people under investigation, hearing of testimony, confrontation of witnesses, technical enquiries into accounts and valuations, etc.

In this context, and because the members of the criminal association undertaking their various acts of laundering and reinvestment enter into contact with foreign persons, a special importance will attach to the hearing of evidence from everybody who—even acting in good faith—played any part in any section of the process of money laundering and reinvestment: people who have disposed of realty or permits of public undertakings, as well as bank officials, notaries, intermediaries, financial operators, agents, trustees, officials responsible for public contracts and for firms competing for given contracts, public officers, etc.

In the same context, one sees the application of specific norms incriminating money laundering, which, for Italy, are contained in the Penal Code, Arts.648*bis* ("Money Laundering") and *648-ter* ("employment of money, goods or assets of illegal origins"). These two norms are applicable to persons extraneous to the alleged offences only when they have *knowingly* participated in the acts of laundering crime-based profits or reinvestment of the same.

In particular, the two norms may be applied to the people mentioned above—if they have played some part in the *iter* of the economic transformations brought to light by the asset investigation—to the extent that, while not being guilty of offences in question, or part of the criminal body under investigation, their good faith is not beyond suspicion.

These two norms were amended in 1993 by the same law which ratified and implemented in Italy the above mentioned Convention of laundering, search, seizure and confiscation of the proceeds of crime, made at Strasburg on 8th November 1990. The first of them punishes any person who, while not participating in the offence, "replaces or transfers money, goods or other assets resulting from offences committed with malicious intent *(delitto non colposo)* or carries out other operations in relation to them, so as to impede the identification of their illegal origins". The second extends the liability to any person "who utilizes in economic or financial activities money, goods or other assets resulting from the offence". Both norms, moreover, provide for an aggravated offence

where the deed is "committed in the course of a professional activity". In evaluating the two norms in question, one should always recognize that the acts which they incriminate are not the *primary* money laundering activities—i.e. those carried out by persons who committed the crimes giving rise to the funds—but only those acts *complementary and secondary* to them, committed by persons not involved in the alleged primary offences. And it is clear that the possibility of discovering and prosecuting such *secondary* conduct (even if anything but secondary in practical terms) will be almost inevitably subordinate to the eventual disclosure—through the investigative process already examined—of the *primary* actions.

It is therefore necessary that the investigations into these *secondary* activities of money laundering (using "money laundering" in a broad sense so as to include acts which should technically be termed "reinvestment") will never be distinguishable from the relative investigations into the criminal associations producing the illicit wealth under enquiry, nor from enquiries into the *primary* acts of money laundering carried out by those associations. In other words, investigation into the acts punishable under the two norms will always proceed in conjunction with linked economic enquiries, which in turn—in the sense already explained—are tied in with the "evidentiary base" of the particular criminal entrepreneurial association which produced the illegal wealth the subject of the money laundering activity.[14]

At this point, the investigation into the money laundering activities under *Arts. 648-bis* and *648-ter* will pursue a virtually autonomous development and—

through further links with asset investigations—will ultimately be able to reveal the existence of a genuine "money laundering enterprise" in which the money laundering is professionally conducted. In some cases, it may be an "individual" enterprise, where the "secondary" laundering activities are established by a "professional" acting in isolation. In other cases there will be a free-standing criminal entrepreneurial association, able to make insidious use of the many instruments offered by the legal economy (trust companies, banks, insurance companies, etc.) which in most cases will be classified under Italian Law as an association to commit crimes (Art.416, Penal Code) aimed at the systematic commission of the offences laid down in Arts.648-bis and 648-ter, Penal Code.

It may sometimes happen that a lawful business, endeavoring to evade tax, will establish relationships conniving with a criminal undertaking, in such a way as to assume the features of a "money laundering enterprise" (although not participating in the primary criminal activity). One of the commonest mechanisms of this sort of connivance is the invoicing, by the criminal undertaking, of services supposedly but not in fact rendered to the legal business, so as to enable the criminal undertaking to show a legitimate source for its income (even if thereby it may incur significant liabilities by way of tax) and so as to permit the lawful business to secure tax deductions for costs incurred: the lawful business pays the criminal undertaking the price for the fictitious services; the criminal undertaking, thanks to the receipt of illicit funds, credits the equivalent to the lawful business (usually abroad), subject to an appropriate deduction (generally 30%) which goes towards compensating the high costs of the exercise, leaving the lawful business able to recoup itself, partially, from taxes saved and the deduction of fictitious costs.[15] Obviously such type of activity is always punishable as fiscal fraud. But it is also punishable under Arts.648-bis and 648-ter of the Penal Code, where the legal business is aware of the money laundering aims of the other party. And if the inter-connected asset investigation reveals that this represents money laundering systematically within the ambit of the lawful business, the latter—but only those aware of the situation—may be categorized as an autonomous criminal entrepreneurial association, coming within the provisions of Art.416 of the Italian Penal Code.

7.
THE SUPPORT ROLE PLAYED BY "OBSTACLE" NORMS, AIMED AT FIGHTING THE USE OF INSTRUMENTS OF THE LEGAL ECONOMY FOR LAUNDERING PURPOSES

All the economic enquiries of which we have spoken so far could to a large extent be activated by the anti-laundering norms aimed at securing greater transparency in financial transactions and in proprietary dealings.

As regards the Italian system in this connection, attention must be paid first of all to the Law of 5th July 1991, No.197, which limits the use of cash and bearer

securities in business transactions, permitting them only through authorized intermediaries when the sum involved exceeds twenty million lire (and the subsequently regulation, which, given the way the Law is to be applied, prescribes that the norm extends also to subdivided operations which, although individually below the limit, seem to form part of a unitary operation). The Law also lays down certain obligations for financial intermediaries and authorized banks, in this way covering financial companies and extending the obligations to all related activities: identification of clientele, registration of financial movements, reporting suspicious operations to the police.

In particular, Art.3 of the Law lays down that the reporting of operations to the police is mandatory whenever it should be considered in a variety of given circumstances (characteristics, type and nature of the operation, economic capacity and activities carried on by the subject in question, etc.) "that the money, assets or utilities the object of the operation might derive from any of the offences indicated in Art.648-bis of the Penal Code".

This regulation is extremely useful, not only as an autonomous instrument with which to combat money laundering—given the undoubted value of compelling the money launderers to resort to increasingly difficult and risky stratagems—but also as a support instrument assisting the main thrust of the fight against the criminal economy, namely the systematic undertaking of inter-connected asset investigations within the context of penal enquiries into criminal associations. In particular, the reporting of a suspicious operation, usefully developed by the financial police, may tie in with one of the links of a chain of economic enquiries of the type already amply illustrated, so as to create the groundwork for a valuable "pincer movement" against the target.

Other parts of Law No. 197 are very innovative and allow a high degree of synergic combination between prevention and control policies. According to this law every financial institution has to set up its own computerized data base for a homogeneous compliance to all recording requirements. No automatic and general reporting requirement to a central agency is yet provided in Italy, but financial institutions are required to pass "aggregate" information, on a monthly basis, on the overall flows of funds, to a central authority (the Italian Exchange Office), which is entitled to accede to the computerized data base of anyone of the reporting financial institutions and is responsible for processing the information into usable statistics, so as to detect anomalities and identify regions or towns with suspicious financial flows. Special attention is paid to the aggregate data concerning electronic transfers of funds, especially if they affect "high-risk" countries, for which the concerned towns (inland and abroad) and the profession of the concerned persons must also be reported. Well, within the scope of an investigation into an organized crime group, the investigating authorities might have found evidence of some financial flows between the criminal group and some individuals operating in some given domestic or foreign town: in such a case the investigating authorities can get to know through the Exchange Office which financial flows were overall reported in a given time

between the interested areas, identify the specific electronic transfers of funds which deserve to be further examined, and request further information by the concerned financial institutions in order to discover the transfers which may really concern the investigated criminal group.

Other "obstacle" norms intended to impede the use of the lawful economy for illegal ends are contained in the Law of 12th August 1993, No.310, which, by amending certain Articles of the Italian Civil Code and introducing some supplementary provisions, regulates the issue of shares and structure of the membership base of limited companies, as well as the sale of land and grant of management rights.

The Law provides that the transfer of limited liability company shares be formalized by entry—against an authorized and notarized signature—in an appropriate "companies register". Similar formalities—also against an authorized and notarized signature—must accompany any transfer of commercial businesses, which can only be effected in the presence of a public official. Finally, for all limited liability companies and all joint-stock companies not quoted on authorized exchanges, analyzed lists of members and those holding rights over shares or other company securities must be deposited annually at the same time as the annual accounts.

This Law compels the authenticating notary to pass to the police authorities the essential data on the transfer of commercial businesses or land holdings: the contracting parties, the sources of funds, the contractually agreed price: and the police authority may request from the notary copies of the transfer documentation whenever it deems it necessary to establish the possible fictitious nature of the transfer. A similar obligation—solely in relation to the transfer of commercial businesses—is imposed on town clerks, who must advise the police of the terms of the authorizations granted for the exercise of commercial activities and their relative registrations.

However, the "obstacle" norms introduced by Law No.310 of 1993 can be considered effective. Experience shows, in fact, that the transfer of commercial businesses (perhaps just prior to bankruptcy or weakened by extortion rackets) and the transfer of land holdings are often prompted by aims of money laundering or reinvestment of crime-sourced funds. As regards limited liability companies, it is well known that criminal bodies often set them up to carry out formally lawful activities; while, on the other hand, participation in joint-stock companies—through a shield of nominee holdings—may provide a convenient means of reinvesting illicit capital. Consequently, a greater transparency of proprietary assets will undoubtedly assist investigations.

Law No.310, therefore, is certain to prove useful, not only as an autonomous instrument in the fight against money laundering, but also as a new instrument to tie in with the most important one of inter-connected asset investigations within the ambit of penal enquiries. In fact, if the police perceive in the notifications provided to them a transfer of land or commercial business which appears "suspicious", the only suitable mode of clarifying the nature, circumstances and

practical importance of the transfer—given that it is in effect a "wedge" of the criminal economy—is the penal investigation into *the criminal group which controls the part of the criminal economy in which the wedge is inserted.* Furthermore, it is in this area that further asset investigations may be launched, especially into the proprietary assets of the companies under consideration, their true substance, their real activities and their recent and distant history. Also, the notifications to the police from notaries under Law No.310 of 1993, similar to those from bankers under Law No.197 of 1991, are theoretically capable of providing the basis for interconnected asset investigations of the "wedge" of criminal investment being inserted into the lawful economy.

8. THE CONFISCATION OF CRIME-SOURCED FUNDS AND CRIMINAL INSTRUMENTS. THE PROBLEM OF THE CONFISCABILITY OF PREVIOUSLY CONSOLIDATED SECTIONS OF THE CRIMINAL ECONOMY, THE DISTANT BACKGROUND OF WHICH CAN NO LONGER BE RECONSTRUCTED

The ultimate aim of the "inter-connected" asset investigation, as we have already observed, is not only to obtain evidence of the commission of crimes by members of a given criminal entrepreneurial association, but also (and especially) to identify and reconstruct the respective "wedges" of the criminal economy—revealing the acts of money laundering and reinvestment and obtaining evidence on the criminal origins of the sources of wealth—with a view to their subsequent confiscation.

In this context and as a preliminary instrument for subsequent confiscation, the precautionary measure of preventive sequestration, which is governed by Art.321 of the Italian Code of Criminal Procedure, assumes importance. This norm provides that, on the request of the Public Prosecutor, the judge may issue an order (containing the relevant reasons) for "the sequestration of items which may be liable to confiscation". In case of urgency, the Public Prosecutor himself can make the order subject to later confirmation by the judge. At the end of the proceedings, the outcome will be the confiscation of those portions of the criminal economy whose illegal origins it has been possible to reconstruct—with sufficient evidentiary support and in the overall context of unmasking the relevant criminal association.

It should be added that the penal confiscation may concern not only the sources of wealth constituting illicit profits, but also those used or planned to be used in *committing crimes*—obviously including the association crimes (the "criminal instrumentalities" according to the terminology of the Strasburg Convention). Consequently, *any* sources of wealth will be subject to confiscation, including businesses which provide material elements in the organizational structure of the

operating association, even if it may not yet be possible to reconstruct its criminal origin.

All this is contained in the Italian system in the provisions of the seventh paragraph of *Art.416-bis* and in the first paragraph of Art.240 of the Penal Code. The former stipulates *obligatorily* in the sentencing for mafia-type association "the confiscation of the items used or planned to be used to commit the crime (clearly the mafia-type association crime) and the items which represent the cost, product or profit of it or its utilization". The second norm, more generally applicable, *permits* similar confiscation in relation to any type of crime.

Moreover, the limit of the penal confiscation provided in the seventh paragraph of *Art.416-bis* and the first paragraph of Art.240 of the Penal Code, lies in its effective inability to reach and strike at those sections of the criminal economy which have been well established for a long period, with the resulting inability to reconstruct documentarily their more remote, and hence, ultimate origins.

This is the area which has now been effectively tackled by a new normative mechanism introduced by the Italian legislator with the Law of 8th August 1994, No.501 ("Urgent provisions in relation to the confiscation of unexplained and unjustifiable assets") which provides a *further* instance for compulsory penal confiscation, which, with regard to the necessary guarantees, is suitable for striking at sections of the consolidated criminal economy. In fact, the Law in question lays down precise parameters whereby a given source of wealth may be considered as a portion of the consolidated criminal economy (and thus a source liable to confiscation), but strictly limits the incidence of those parameters to a *finding of criminal guilt* of the party in question for specified crimes which are particularly susceptible to criminal entrepreneurial activity.[16]

The essential condition for a "confiscation of unexplained and unjustifiable assets", is that the subject has incurred a *finding of criminal guilt* (whether as a result of a court hearing or an "application of penalty on the request of the parties", which constitutes a sort of "plea bargaining") *for one of the crimes specifically indicated by the norm itself.* Subject to this condition, the norm stipulates the obligatory confiscation of the so-called "unexplained and unjustifiable assets", in the following terms: "Confiscation will always be made of money, assets or other utilities for which the accused cannot provide a satisfactory statement of origin, and of which, even with the interposition of a physical or juridical person, he is the owner or over which he has the power of disposal in any way disproportionate to his own income, as declared on his tax return, or to his own economic activity". The presumed offences are mafia-type association and offences committed within it, criminal association aimed at drug-trafficking and specific drugs-related offences, the crimes of money laundering and reinvestment of the proceeds of crime, and certain other offences typical of organized crime, such as kidnapping and loan-sharking.

The confiscability of "unexplained/non-justified assets", as shown above, in the context of a prosecution, causes the same sources of wealth automatically to

become liable to preventive sequestration under Art.321 of the Code of Criminal Procedure in the course of preliminary investigations into the alleged crimes.

9. EXTENSION INTO THE INTERNATIONAL FIELD OF INTER-CONNECTED ASSET INVESTIGATIONS: JUDICIAL COLLABORATION BETWEEN COUNTRIES CONCERNED WITH "TRAFFICKING" AND THOSE CONCERNED WITH "LAUNDERING", THE NEW STRASBURG CONVENTION AND INTERNATIONAL CONFISCATION

As is well known, the techniques adopted by organized crime to launder, conceal and reinvest its illicit profits frequently operate beyond national boundaries. Consequently, even the inter-connected economic enquiries are obliged to operate on an international plane, through the instruments of judicial assistance, having identified the initial transformations and the exportation of illicit proceeds. Better still if—in the context of a well-developed international cooperation—the economic enquiries pursued in the country where the operating criminal association is based and where the crimes generating the funds are identified (the "countries concerned with trafficking") tie in with a corresponding asset investigation activity in liaison with the authorities of the "countries concerned with laundering", into which the funds have been transferred or have undergone other transformations. In this way the inter-connected asset investigation will assume a genuine transnational dimension, permitting illicit wealth to be traced from its source to its ultimate transformation and permitting its sequestration and confiscation wherever it is situated.

Let us leave aside for the moment the not inconsiderable problem created by the existence of states to which this type of collaboration is entirely alien. We will say later what measures may be adopted—by other countries in the civil context—in regard to fiscal refugees, who have translated themselves into "penal asylums".

Instead let us see how the collaboration may be developed between the countries to which it is acceptable, a collaboration made possible by the numerous judicial assistance Conventions in force, and particularly the most recent 1990 Strasburg Convention, which obliges the states adhering to it to provide reciprocal assistance and to adapt their domestic norms in such a way as to enhance the efficiency and incisiveness of investigations into criminal wealth, whether in order to *facilitate* "the identification and tracing of it" or to *facilitate* "the gathering of evidence" (Art.4), so as to assist the sequestration and confiscation of such wealth wherever it is situated The principle which emerges from the Convention is an obligation on the part of the states to favor asset investigations into illicit wealth *in the context of penal enquiries*, since Art.l of

the Convention gives a definition of the term "confiscation", which only covers confiscation directly linked with criminal proceedings.

It should be remembered that the distinction between countries concerned with trafficking and those concerned with money laundering is not an absolute one, but one which is employed from time to time in individual cases of judicial assistance. For instance, in this type of international co-operation, Italy will be a "country concerned with trafficking" whenever the Italian authorities ask another state for help in tracing and confiscating illicit assets which have been exported there. But it will be a "country concerned with money laundering" where a foreign state requests similar assistance from it,

In this context, the problem to be tackled is primarily one of the strategy of international investigation (it is not fortuitous that the Strasburg Convention requires adherent states to provide reciprocal assistance *in investigations* aimed at tracing and revealing illicit assets). In fact, the first target is to achieve a good working for this sort of transnational juridical operation opened up by the Convention, so that the inter-connected asset investigation may usefully be integrated with it, with the minimum hindrance and a capability of developing "without frontiers".

So, in order to achieve this preliminary result, the country concerned with trafficking must give the country concerned with money laundering all the necessary information and evidence so as to be able to establish that the assets to be traced in the later territory represent the proceeds of crime; or so that it will be possible to demonstrate the necessity and relevance, for criminal proceedings, of the economic enquiries to be pursued in the foreign territory: this will occur when the latter are asked to be the last links in a chain of asset investigations which is already significant in itself as being "linked to the evidentiary base" of a criminal activity in the sense already stated.

Thus when the requesting authority from the country concerned with trafficking assumes that a certain sum of crime-derived funds has reached a foreign bank and is merged in a current bank account belonging to a company operating in the country concerned with money laundering, it will be necessary to provide the authorities in the latter country with the results of the chain of economic enquiries aimed at the apex and on the basis of which it is demonstrable; or on the basis of which the necessity is shown for specific further enquiries in the country concerned with money laundering, so as to trace the funds through their successive stages, through transit accounts, sub-accounts, registration of companies of convenience, and so on.

Similar processes apply when the country concerned with trafficking discovers laundering maneuvers which pass through the mechanisms of international payment (savings accounts in the country concerned with trafficking, to which are credited sums to be illegally exported; payment of the equivalent in securities in a foreign account, often topped up by emigrants who wish the equivalent amount to be paid to families in their homeland). In fact it will be necessary to provide the country concerned with the money laundering the results of a chain of

enquiries towards the apex, on the basis of which to demonstrate that the maneuvers concern criminal proceeds and so represent something more than the simple exportation of securities; or on the basis of which to show the need for detailed on-the-spot investigations (especially if it is wished to maintain that the foreign account is supported, at least in part, by crime-sourced funds).

The same thing applies when one assumes that given transfers of money from one country to another under the guise of *import-export* relate in fact to fictitious invoicing and serve to conceal movements of illicit funds. In this case too the requesting authorities of the two interested countries which intend to collaborate with each other must co-ordinate their investigations and provide each other with all the information in the case relating to the fictitious nature of the operations and the criminal activities so revealed, in order to enable a genuine inter-connected international asset investigation (often in cases of this sort both the interested parties will be "countries concerned with trafficking", but also to some extent "countries concerned with money laundering" in relation to the criminal activities whose proceeds have been translated from one country to the other).

Once the judicial collaboration between the two countries has operated effectively and has served to complete the chain of inter-connected asset investigation in either territory, the next stage is to lay hands on the illicit assets that have been traced, either through sequestration—as soon as they are identified—or subsequently through confiscation.

The route of international sequestration and confiscation—already entered upon tentatively in some bilateral Conventions, such as that between Italy and the USA in force since 1985—has been made significantly more practicable by the frequently cited Strasburg Convention of 8th November 1990, which obliges each adherent state, on the request of one of the others (and within the limits laid down in the Convention) to sequestrate assets which represent, or could represent, the object of a request for confiscation, and also to permit the confiscation in its own territory of illicit assets or of a sum of money equal to the value of the criminal assets or of an asset representing the "instrument" of the crime (Arts.7, 11 and 13).

Each of the Convention States may elect to conform to the obligation to give direct executive effect to confiscation orders issued by the judicial authorities of the requesting State (Art.13.1.a), or to submit requests to their own competent authorities so as to obtain a domestic order of confiscation (Art.l3.1.b).

According to the means of execution of international confiscation chosen by the state receiving the request, the documentation required from the requesting state will vary: in the first case, there must be provided, *inter alia*, an authentic copy of the confiscation order issued by the judicial authority of the requesting state, as well as a declaration of the reasons underlying the order (if not already manifest in the order document); in the second case there must be attached an exposition of the facts upon which the requesting party relies, so as to permit the party receiving the request to ask for the order in accordance with its own domestic law (Art.27.3).

Art.14.2 then lays down that "the requested Party shall be bound by the findings as to the facts in so far as they are stated in a conviction or judicial decision of the requesting Party or in so far as such conviction or judicial decision is implicitly based on them". And Art.14.3 adds that each adherent state may, by declaration, subordinate the foregoing "to its constitutional principles and the basic concepts of its legal system".

When Italy is asked to execute a confiscation order of a foreign authority, the request may be satisfied in the terms provided by Art.731 of the Italian Code of Criminal Procedure. Thus it emerges that Italy has chosen the means envisaged by Art.13.1.a of the Convention, i.e. by giving executive effect to the confiscation order of the foreign judicial authority, either contained in a penal judgment or in some other official act (such as the order of confiscation *in rem* of Anglo-Saxon law, which is made by the Criminal Court but is not strictly speaking a judgment). For the sequestration of the asset which is the subject of a confiscation request, Art.737 of the Italian Code of Criminal Procedure stipulates the application of the provisions on preventive sequestration applicable in a domestic prosecution. *Art.735-bis* contemplates the possibility of executing a foreign confiscation order imposing the payment of a sum of money. Art.737-bis, finally, gives the possibility of carrying out in Italy, if requested from abroad and in the forms set out in the foreign rogatory, "enquiries into assets which may become the object of a later request for the execution of a confiscation order".

Having thus concluded the examination of the instruments and techniques of international judicial assistance in matters of confiscation of illicit assets (and "instrumentalities"), we must acknowledge that there is still a long way to go, both by reinforcing the "philosophy" of Strasburg and extending it to as many states as possible (including those from the former Socialist bloc, who are particularly vulnerable to the phenomena of organized crime) and by prompting, at last, steps towards the unification of European Criminal Law and the free circulation of the criminal judge within the European juridical area, whether by over-coming certain preconceptions that are slow to die (such as the tolerance of corruption of foreign public officials by national undertakings) or by finally neutralizing those states which function as "penal paradises".

On this last subject, it has been correctly suggested that they should be subject to genuine international economic sanctions by other states, who could well agree to prevent juridical persons based in the "penal paradises" using the international banking system, the monetary and stock exchange *clearing* system, or the international payments system[17] (and it would be timely that similar economic sanctions be applied to those States which obstinately consent to appear fictitiously as consignees of regular arms shipments, which may then be diverted to countries subject to arms embargo).

10.
PRACTICAL PROSPECTS OF TWO TYPES OF SITUATION: INVESTIGATIVE OPTIONS AND PROCEDURAL ASPECTS OF INTERNATIONAL CO-OPERATION

At this point in our paper it seems opportune to analyze specifically two types of situations which may present themselves to a national investigating authority, in order to endeavor to establish, for each one of them, the sort of investigative processes which might usefully strike at the high level of money laundering and the criminal economy.

Situation type no.1

The first type of situation is the most frequent one, occurring most often when an investigatory authority is looking into a group of organized crime. To illustrate the case more clearly, let us suppose that the enquiry concerns a particular type of criminal group (say one engaged in trafficking drugs or arms), implicating various subjects, including party Y, whose organization and criminal activities have been discovered by the investigatory authority thanks to the assistance of certain collaborators among the accused parties, but without there being evidence of any specially promising *piste* to follow with regard to money laundering and the financial aspects of the association (even though the presence thereof is strongly apprehended).

How should the investigatory *piste* of an economic nature be opened up in this situation?

The route to follow is to apply from *the base* the inter-related asset investigation according to the criteria already illustrated, plugging into the economic enquiries “towards the apex” on the *evidentiary base* which has already been obtained with regard to the criminal group, and also into the economic enquiries “towards the base” with regard to the sources of suspect wealth which have been progressively identified.

In particular, the task will be to identify, among those accused of being members of a group of organized crime, those who, through possession of immoveables, company investments, specific entrepreneurial activities, banking relationships, etc.—seem to be particularly “lively” on the economic plane, and then to join with the inter-connected asset investigations into those subjects and parties who could be their front-men.

The sources of wealth possibly liable to future confiscation, whose criminal origins are identified, and the instruments used by the associations for their criminal purposes, will be subjected to preventive sequestration. If the assets are located in a foreign state adhering to the Strasburg Convention, it will be possible to obtain an order for preventive sequestration by means of an international rogatory.

As it develops, the inter-connected asset investigation may discover, first, *primary money laundering activities*, which will have been carried out by the members of the criminal association themselves. The *primary* activities will generally be punishable under the penal norms covering the phenomena of organized crime (association crime or *conspiracy).*

At the point where the inter-connected asset investigations also come across *secondary* money laundering activities, and thus some "money laundering enterprise" outside the group of organized crime which is the principal object of the investigation, the enquiries will also extend to the related subjects. But the fact of having pursued the investigation "from the base", in the way we have illustrated, will bring the undoubted advantage of being already in possession of the type of proof whose acquisition normally presents the greatest difficulty in this type of investigation: i.e. the proof of the link between the illegal activities of the criminal group and the assets which are the object of the *secondary* money laundering activities, proof which arises from concrete money laundering activities and not just from suspect movements of money.

The *secondary* money laundering activities will then fully qualify, as we know, to be dealt with under the "specific" norms punishing money laundering acts.

In short, the route described—through a study which starts "from the base" and which ties in with certain subjects accused of being involved in a group of organized crime—enables the level of professional money launderers to be reached. At this point the investigation will most probably extend to money laundering activities undertaken abroad, but—given the evidentiary process which we have described—the enquiring authority of the "country concerned with trafficking" will be able to provide the "country concerned with money laundering" with the information needed to obtain the assistance requested. And the result, in the spirit of the Strasburg Convention can be a co-ordinated investigation conducted in *équipe* by the investigatory authorities of the two countries, moving towards the confiscation of the illicit wealth of a criminal group which operates on an international scale.

We might mention a concrete case of the first type of situation, where there was an effective co-ordination between the investigatory authorities of Palermo and Milan and the investigatory authorities of the Ticino Canton in Switzerland. The enquiry concerned party Y who had been sentenced in Palermo for massive trafficking in drugs. Focusing on the economic position of Y, a real property company of Y's was discovered, which undertook high-yield investments. As a result of the inter-connected asset investigation, it was found that the company received enormous loans, apparently without good cause, from an Italian bank; next it was found that the Italian bank received, equally inexplicably, huge guarantees (in support of the company) from a Swiss bank; finally, through the Swiss investigation, it was possible to establish that the Swiss bank was receiving the funds generated by the trafficking in drugs carried on by the criminal group involving party Y.

Situation type no.2

The second type of situation occurs when the starting point of the national investigation lies in court proceedings which, at least in the initial stage, have no clear or precise connection with a specific group of organized crime, but concern an intricate mass of financial operations which *are suspected* of being money laundering activities, even though no valid evidence exists to substantiate this.

To illustrate this, let us assume that discovery has been made of an excessive mass of bankers transfers from various centers and on the authority of various persons, which are credited to the current account of an apparently inoffensive individual and from here moved to one or more foreign bank accounts of financial companies. Let us also assume that the criminal standing of the various persons who have effected the monetary movements is merely *suspect*, but not sufficiently substantiated: this seems to be the classic case of the man of straw, or, in the most significant cases, of the adventurer of fortune who cannot be precisely classified. Let us assume, however, that two of the persons involved (say A and B) are connected, even if the connection may be very indistinct and indirect, with mafia-type circles. Let us assume, finally, that the situation suffices to consider—at least as a working hypothesis—that all the subjects identified are part of a "money laundering enterprise", possessing a stable organization capable of providing "services" to mafia-type associations, a hypothesis borne out by the links, however tenuous, leading to parties A and B.

The problem we meet in this type of situation is the exact opposite of that in the first type of situation which we have examined. There it was a question of opening an investigative route towards the financial level, starting with an evidentiary situation belonging only to the "military" and organizational level of a criminal group. Here, the starting point is a series of circumstances intuitively located at the financial heart of organized crime, but concerning a range of asset transformations (presumably of crime-sourced profits) which is in no way *proximate* to the evidentiary base concerning the original group of organized crime. Therefore the task is to establish an investigatory strategy capable of opening up the route in the opposite direction: towards the source of the wealth, and so towards identifying the original criminal association.

Until this route can be opened up, it will probably not be a great deal of use to trace the sums of money from their deposit in the individual's account to their foreign destination, because the foreign authorities—probably with the best intentions—will find difficulty in giving judicial assistance in the absence of elements demonstrating the illicit source of the funds. This is particularly the case when, as usually happens, those called upon to provide explanations to the enquiring authorities give explanations not involving money laundering (e.g. speculation in currencies or financial speculations, which may be adventurous but not necessarily criminal) which the enquiring authorities may disbelieve but which can only be judicially refuted with concrete evidence.

It is clear that to open up this route it is necessary, especially at the beginning, to proceed step-by-step. But in the situation which we are illustrating, the first step should be a broadly based investigation into parties A and B who, in the given situation, appear as the *closest* to the level of the hypothetical offence of money laundering. For their case, not only will the well known instrument of inter-connected asset investigations "towards the base" (which will be applied anyway to the respective sources of significant riches) prove useful, but also other types of investigatory instruments capable of focusing on their relationships with other *mafiosi* who, from the start of the enquiry, may be sensed in the under-layers, and who may now, in the light of the discoveries, be identified with the involvement of party Y, as in the concrete case illustrated in the preceding type of situation considered above.

Thus in this search to open up an investigative route "towards the base", it will be useful to liaise with the judicial collaborators who have uncovered the criminal association around the Y mafia family, so as to establish whether they know of parties A and B and whether, and how, it will be possible to construct, to some extent at least, their ultimate connexions with that mafia-type association. It will be just as useful to employ the instrument of telephone-tapping and, especially, the construction of personal relationships which may emerge from these and from the study of the print-outs of cellular telephone calls.

It may thus occur that two distinct procedures, originally totally unconnected, respectively belonging to type 1 and type 2 situations, will at a certain point join up with each other. It is even more likely that this will occur in subsequent developments in court proceedings related to the first situation—the technique of inter-connected asset investigations—and in proceedings relative to the second situation—the technique of opening up a route *towards the base* commencing with the "zone" hypothetically closest to the trafficking level.

It is obvious that, in the context of the second type of situation, the investigating authority will demand explanations from the accused of their financial operations, but it will be able to evaluate the veracity of the responses only if it has proceeded previously in the manner we have indicated. Moreover, if, having done so, it has managed to open up the "evidentiary route" towards the underlying criminal group and the activities generating the wealth, it will be better placed to pursue the requisite international rogatories to trace the funds in their subsequent translations abroad. It often happens, however, that situations of this sort actually emerge in the context of requests for judicial assistance and assistance by the police at an international level, which are made by authorities in the "country concerned with money laundering". And the investigation aimed at opening up or broadening the "evidentiary route" towards the underlying criminal association (which is assumed to be operating in the "country concerned with trafficking" to which the request is addressed) may be, once more, a co-ordinated investigation conducted in *équipe* by the investigating authorities of both countries.

The second type of situation may also be connected with another concrete case in which there has been an effective co-ordination of investigations between the investigating authorities of different European countries, and which may give an idea of the possible prospects of the Strasburg "philosophy" in enquiries into money laundering.

A party accused of money laundering (let us say party A in the present type of situation) is investigated in depth, as a result of which significant links are uncovered with a criminal group active in the drugs and arms traffic (let us say the group to which party Y belongs in the preceding type of situation).

Party A's home is searched under a search warrant, and numerous faxes and other documents relating to a Slovene commercial company are impounded. These documents show that the Slovene company has presented numerous securities for discounting to a Swiss bank, through a fiduciary company in Liechtenstein.

Now, as a result of an inter-connected investigation, laboriously co-ordinated at an international level, it is possible to establish:

a) that the Swiss bank agreed to discount the securities and to credit the relevant funds to the Slovene company, because in its turn it received corresponding letters of credit from a guarantee company in London;
b) that the London guarantee company issued the letters of credit because in its turn it received corresponding letters of credit from an Austrian bank;
c) that the Austrian bank received illicit funds traceable to the criminal group involving party Y;
d) that as a result of this circulation the illicit funds were laundered and moved to the Slovene company, the direct emanation of party A linked with party Y.

All the foregoing will have been laboriously ascertained, as a direct result of collaboration, which will not have been easy, and may sometimes have been acerbic, between as many as six different countries. But it is clear that, if the Strasburg "philosophy" is not widely diffused, it will be so much harder for the legitimate authorities to fight together against the criminal economy.

NOTES

1. For further detail on these subjects see Fondazione Rosselli: *Secondo rapporto sulle priorità nazionali. La criminalità organizzata,* Second Report on National Priorities, Organized Crime, Milan, 1995.
2. "The association is a mafia-type association when those who participate in it utilise the force of intimidation of the association bond and the condition of subjection and *omertà* resulting from it, to commit crimes, in order to acquire directly or indirectly the management or whatever control of economic activities, concessions, authorizations, public and building contracts, or to realize profits or wrongful

advantages for themselves or others, or to prevent or impede the free exercise of votes or to procure votes for themselves or others in elections".

3. *"Eine Vereinigung […], deren Zwecke oder deren Tätigkeit darauf gerichtet sind, Straftaten zu begehen"* ("An association […] whose aims or activities are directed at committing punishable acts").
4. "An organized gang exists in the eyes of law in any grouping formed or voluntarily established with a view to preparing, as demonstrated by one or more material facts, one or more infractions". Art. 132–71 of the new French Penal Code is included—within the chapter dealing with penalties—in the section which defines "certain circumstances incurring aggravated penalties".
5. "Extortion is obtaining by violence, threat of violence or coercion, a signature, a commitment or a renunciation, or the disclosure of a secret, or the remittance of funds, valuables or any other asset".
6. *"Las que tuvieren por objecto cometer algún delito o, después de constituidas, promuevan su comisión"* (Those, whose object it is to commit any crime or which, after their establishment, proceed to its commission).
7. Thus, Art.210 of the Argentinian Penal Code provides the offence of *asociación ilicita,* and punishes anyone who takes part in an association of three or more persons *"dedicated to the commission of crimes"*. In turn, Arts. *149-bis* and *149-ter* of the Argentinian Penal Code provide the crime of threats *(amenaza)* as well as an example of personal violence and protection *(amenaza coactiva).* Consequently, the Italian mafia-type association may be seen by Argentinian Law as an illicit association potentially dedicated, as a minimum, to committing the offences of threats, either to induce fear *("para amedrentar")* or to compel others to do, permit or forego some action (*"con el propósito de obligar a otro a hacer, no hacer o tolerar algo").* Similarly, Art. 186 of the Columbian Penal Code describes the association to commit crimes *(concierto para delinquir)* as occurring when *"varias personas se concierten con el fin de cometer delitos).* The crime of menaces *(amenazas personales o familiares)* is laid down by Art.26 of the integrative decree-law of the Penal Code, promulgated in 1991, whilst the crime of personal violence is set out, in terms similar to those in Italy, by Art.276 of the Columbian Penal Code *(costreñimiento ilegal).* But it goes further: under Columbian Law, the crime of extortion *(extorsión)* is drafted as a protection crime, and it punishes *"el que constriña a otro a hacer, tolerar y omitir alguna cosa, con el propósita de obtener provecho ilicio"*. Thus the Italian mafia-type association may be considered by Columbian Law as a *concierto* potentially dedicated, as a minimum, to committing offences of menaces, illegal force or extortion.
8. This is the definition coined in the first half of the last century by Lord Denman, in *Rex* v. *Jones,* 110 *English Reports,* 1832, 485, 487.
9. "If two or more persons conspire […] to commit any offense […] and one or more of such persons does any act to effect the object of the conspiracy […]"
10. In particular, the conspiracy of the R.I.C.O. Statute is notoriously complex and difficult to prove, and to be established it requires proof, which is far from easy, of a particular "pattern of racketeering activity" which passes through the commission —in a period of ten years—of at least two of the list of serious offences set out in Sec. 1961, Chapter 18 of the US Code. Moreover, it does not cover all the possible range of profits and advantages which may be wrongfully pursued by an Italian mafia-type association through the use of terror and the subjection of others.

Conversely, the basic case of conspiracy lends itself better to a solution of the problem of double criminally (one recalls that in the common law systems, it is also conspiracy when there is agreement to pursue a formally legal objective by unlawful means).

11. "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right".
12. "If a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question".
13. U.N. Economic and Social Council, "Naples Political Declaration and Global Action Plan against Organized Transnational Crime", Draft Resolution of the "World Ministerial Conference on Organized Transnational Crime" (Naples, 21–23 November 1994), Doc. E/Conf.88/L.4, p. 7. We recall that in one of the base documents of this World Conference, Art *416-bis* of the Italian Penal Code and the US R.I.C.O. were presented as models for an effective strategy to fight organized crime: "The numerous indictments in the United States on the basis of the R.I.C.O. legislation and the positive results of the implementation of article *416-bis* of the Italian criminal legislation suggest that the extension of those categories to other national legislations may have definite advantages" (U.N. Economic and Social Council, National legislation and its adequacy to deal with the various forms of organized transnational crime; appropriate guidelines for legislative and other measures to be taken at the national level, Doc.E/ Conf.88/3, Naples, 25 August 1994, p. 7).
14. This particular relationship between primary and secondary forms of money laundering reflects the juridical relationship developing along the same lines, especially with regard to the crime of mafia-type association. In fact, the "launderers" within the mafia-type association, including those whose regular and exclusive role is devoted to "laundering" the mafia-generated profits, will not be liable under Art.648-bis, Penal Code, since this norm is only applicable to cases considered not to be involved in the presumed initial offence. That the "presumed crime" should apply also to the crime of mafia-type association (and not solely to the crimes directly giving rise to the illegal wealth) is shown, moreover, by the seventh paragraph of Art.416-bis, Penal Code, which stipulates, specifically in relation to the offence of mafia-type association, the mandatory confiscation of "things representing the cost, product or profit of the crime (clearly the association crime) or which represent the employment of such proceeds". On the other hand, the profits of the mafia-type association—capable of laundering and reinvestment—include equally those deriving from the commission of specific offences and those resulting from the actions connected with the formally "lawful" aims of the association (control of economic activities, etc.), in such a way that it is often very difficult to distinguish between the two. Hence there is the new requirement to investigate secondary laundering activities and somehow include these—through interconnected asset investigating—in the enquiries into the basic association

offence, preferably commencing with the relevant evidentiary base and proceeding by way of investigating the primary laundering activitied. In this way the whole gamut of the investigation "from the base" will have been dealt with, with the advantage of already being in possession of evidence of the link between the criminal activities of the association and the assets subject to the secondary laundering activities, at the moment when the investigative operation reaches that level.

15. On this subject, C.Nunziata, "Frode fiscale e riciclaggio nell' esperienza legislativa e giudiziaria ("Fiscal fraud and money laundering in legislative and judicial experience"), in *Rassegna tributaria* (Tax Review), 1992, No. 10, pages 124–5, in which additional possible similar mechanisms of commission between money laundering and tax evasion, such as recourse to accommodation companies, or corporate shell companies are examined.
16. More precisely, the new *particular instances of confiscation* are regulated by Art.2 of this law, which formally introduces as *Art.12-sexies* into the early Law No. 356 of 7th August 1992.
17. P.Bernasconi, "Mafia e zona grigia. La giustizia è ancora bendata?" ("Mafia and the grey area. Is justice still blindfolded?"), a paper presented at the Forum of the Antimafia Commission of the Italian Parliament on "Economy and Crime", Rome, 14–15 May 1993.

8
Obstacles in Controlling Money Laundering Crimes

Paolo Bernasconi

1.
INTRODUCTION

At the end of their debate, on November 23, 1994, the World Ministerial Conference on Organised Transnational Crime passed the draft of a resolution of the UN General Assembly[1], a political declaration as well as a world programme against this form of criminality. This world programme includes several preventive measures against money laundering, one of them, mentioned in particular, being the reinforcement of the administrative and jurisdictional mechanisms in order to obtain a better transparency in commerce. This reinforcement aims to collect precise information on property, purchase, take-over and resale of companies available.

This aim seems obvious to me: in fact, what does a money launderer dread and try to avoid? Transparency. What is he looking for? Mechanisms of disguise and sealing off.

Under these points of view organised criminality prefers those legal entities which have their registered office in an off-shore country. Consequently, this field has also to be examined more closely and more thoroughly by criminologists and criminalists and that is the subject-matter of this analysis.

2.
TAX AND CRIMINAL HAVENS

In the course of the last ten years, many countries have reinforced their roles as shelters and revolving platforms in favour of the flight of capital from other countries for fiscal reasons. We are dealing with a colossal flux of money which is not declared to the national fiscal authorities and is hidden from the eyes of the latter thanks to the utilization of off-shore countries. To some extent, capital is effectively transferred through banking and financial institutions of these countries to then become invested in countries having strong tax regulations without, however, revealing the identity of the actual owner. Other capital can be disguised without the money even passing through the off-shore country by

utilizing companies which have their registered offices in off-shore countries and carry out their activities in other countries, for example, by using bank accounts. A typical case is represented by the thousands of off-shore companies which have bank accounts in Swiss banks, opened in the name, for example, of a limited liability company with a registered office in Panama, a foundation or an establishment with a registered office in Liechtenstein or trusts with registered offices in the Channel Islands.

The appeal of off-shore countries is due essentially to two reasons: extremely favourable tax regulations in comparison with industrialised countries and a juridical system which assures the utmost discretion and secrecy for the flight of capital for fiscal purposes.

The fiscal authorities in countries having strong tax regulations use, officially and unofficially, black lists of off-shore countries.[2] For the purpose of our analysis, it is enough to mention some of the more well-known off-shore countries:

— in Europe: Channel Islands (Jersey, Guernsey), Isle of Man, Luxembourg, Switzerland, Liechtenstein, Monaco, Gibraltar, Ireland, Malta, etc.,
— in America: Panama and other Caribbean islands (Bahamas, Bermuda, Virgin Islands, Cayman Islands, Aruba, Curaçao, etc.),
— in Asia: Hong Kong and Singapore,
— in Africa: Liberia.

Since many of these countries do not have important economic sectors, their political authorities have fully favoured the creation and amplification of a financial sector that is based exclusively on the capacity to assure secrecy for the flight of capital in order to overcome economic and national weakness. As a consequence, the entire financial, banking and corporate systems of these countries have developed and refined in the course of the last twenty years in such a sophisticated manner as to not only include the flight of capital but also to represent products of common criminal acts.[3] The following crimes are brought to attention:

(i) products of forbidden traffic such as drugs, prostitution of women and children, unauthorised arms dealing, the traffic of forbidden substances and toxic waste;
(ii) white collar crimes, for example, bankruptcy, fraud, misappropriation and mismanagement;
(iii) kidnapping as an object of extortion and the proceeds of the activities resulting from organised crime;
(iv) proceeds of crimes committed by public officials, for example, corruption and bribery.

As a consequence, many countries which are classified as tax havens should also be considered in the category of countries which assure clandestinity where, as a result, the offenders of the above-mentioned crimes remain unpunished and retain the assets which represent the proceeds of the crimes. In order to better understand this group of countries, we can define them as criminal havens.

3 ADVANTAGES OFFERED BY OFF-SHORE COMPANIES:SECRECY AND AVOIDANCE OF RESPONSIBILITIES

The financial system of off-shore countries offers foreign investors an important series of facilities which are utilized even for criminal reasons. These facilities essentially guarantee foreign investors two objectives: secrecy regarding eventual investigation by foreign authorities, and the complete avoidance of responsibility regarding the activities which are carried out using off-shore companies. These two objectives are achieved, thanks to an almost total laxity on behalf of the legislation and authorities of these countries, in a manner allowing the utmost freedom of financial, banking and corporate transactions. These advantages fall into two large categories: that of the rules concerning companies and their commercial activities and that regarding criminal offences and mutual assistance. In order to establish whether or not a country may be considered as a criminal haven, we must not only consider the existence of legal standards but also the existence of authorities which may exercise effective control in applying the law. It is, in fact, evident that for some years many countries which enter into the category of tax havens have adopted certain laws in order to demonstrate their willingness to participate with the international efforts made to fight crime. Very often, it is easy to establish that these laws exist on paper, whilst the authorities of tax havens still exercise an insufficient control in respect of the national laws which govern these matters. The main sectors which have insufficient national legislation are the following:

(i) banking, commercial and corporate sector:

(a) Conditions regarding the formation of companies, in particular, the releasing of capital in order to form a company allowing the same to carry out its activity. It is, in fact, well-known that in numerous off-shore countries, the law allows the incorporation of a company by paying a small tax. When the law requires the transfer of a share capital which corresponds to the needs of the company, no forms of control exist to verify that the capital is indeed for the use of the company.[4]

(b) Tools which allow creditors and shareholders to make claims intended to obtain compensation for damages in the case of liability on behalf of the effective directors of the companies.

(c) The obligation to record in the public registries the names of the directors and the active managers of the company.[5] It is well-known that, even in the advertising for off-shore companies, the possible avoidance of registration of the names of the people effectively managing the company in public registers is underlined in countries in which the company has its registered office. Directors of the same are mainly lawyers or professional businessmen who limit themselves to guarantee payment of the off-shore company taxes and to maintain a relationship with the authorities without having any information or control survey regarding the actual activity carried out by the company.[6]
(d) The obligation to prepare a balance sheet and to submit the same to the national and fiscal authorities.
(e) The obligation to verify the accounting and approval of the balance sheet by an external auditor being independent from the directors and those who actually control the company.
(f) A system of rules and surveillance regarding the companies that exercise banking or other financial rights as well as publicly obtaining capital.

(ii) The absence or insufficiency of regulations governing criminal matters and mutual assistance.

(a) Regulations regarding the criminal liability of the directors of companies concerning any violation committed by means of the activities of the companies, regardless of whether or not they are carried out within the off-shore territory or in another country.
(b) Punishability of money laundering even if the predicate offence is committed on foreign ground.
(c) Punishability of the participation in organized crime.
(d) Punishability of insider trading.
(e) Punishability of fiscal fraud.
(f) Punishability of the corruption of foreign officials.
(g) The possibility of confiscation of the proceeds of the crime, even if committed on foreign ground and, in particular, of the proceeds of all the above-mentioned crimes even if the assets to be confiscated are deposited with banks or other financial institutions.
(h) Punishability of the violation on behalf of the directors of banks and financial institutions of the conditions foreseen in the 40 FATF Recommendations.

(iii) The absence or insufficiency of regulations governing criminal procedures.

(a) The possibility for the criminal authorities to decide on the basis of advisable criteria whether or not to initiate criminal proceedings for

serious offences. It is well-known that an important guarantee concerning the pursuit of more serious crimes lies in respecting the principles of legality, on the grounds of which the law foresees the right on behalf of the criminal authorities to initiate criminal proceedings as soon as the suspect of a crime is established.

(b) The power of the criminal authorities to obtain information or documents regarding any operations made by the client from banks and other financial institutions, even if they have been made in cash or by using a nominee.

(c) The possibility for the national criminal authorities to order provisional measures, in particular, the seizure of bank assets also arising from crimes committed abroad, even before a request for extradition or judicial assistance is made through the channels foreseen by the law.

(d) The obligation on behalf of the national judicial authorities to supply information or documents to foreign judicial authorities regarding the economic activities of third persons who have not yet been accused in foreign criminal proceedings and also if these activities are protected by national regulations regarding banking secrecy or professional secrecy.

(e) The obligation on behalf of the national criminal authorities to spontaneously inform the foreign criminal authorities regarding proof related to offences committed abroad (Art. 10 of the Convention of the European Council regarding the seizure and the laundering of the criminal proceeds).

4.
A TYPICAL EXAMPLE: THE FORMATION ABROAD OF UNDECLARED AND UNACCOUNTED ASSETS

Many investigations carried out by criminal judicial authorities of different countries have proved, during recent years, how much the formation of off-shore co mpanies with undeclared and unaccounted capital is still very much diffused. We are dealing with undeclared and unaccounted funds which are made up partially by higher officials belonging to a group of multinational businesses outside of the territory in which the latter have their head office and, therefore, legal on the territory of an off-shore country. The fact that these undeclared assets and the relative activities are not accounted means that the consolidated balance sheet of the business group does not reflect reality. As a consequence, the judicial authorities of certain countries consider that this default of accounting is legally punishable as falsification of documents or falsifying financial or corporate information (i.e. Art. 2621 of the Italian Civil Code or Art. 152 of the Swiss Criminal Code).

Usually, these unaccounted funds are formed and supplied throughout the years using proceeds derived from term investments in foreign currencies or in assets abroad even using the differences arising from the operations as

under-invoicing or over-invoicing. The available capital by unaccounted funds is usually used for:

(a) payments of amounts of money used for the corruption of foreign public officials in order to assure certain offices and markets of business groups.
(b) payment to directors and other officials of the business group a part of their salary which is neither declared to the national nor foreign fiscal authorities.
(c) satisfying the needs of the shareholders of the business group, for example, to make investments, acquisitions, etc.

The criminal judicial authorities of certain countries have considered the activities of formation and utilization of unaccounted funds abroad as being punish-able as misappropriation or mismanagement and, in any case, when the business group is declared insolvent, with fraudulent bankruptcy.

The criminal judicial authorities of certain countries have even proceeded legally against the issuance of false invoices by the off-shore company designated to allow for the formation of unaccounted funds abroad or to create an accounting document which allows justification, at least formally, of the use of funds taken from unaccounted capital.[7] Hundreds of off-shore companies issue thousands of false invoices annually which serve these objects.

In consideration of the progressive infiltration of the legal economy by organized crime, it is to be expected that the commercial and fiduciary companies which, in many countries world-wide, supply their services in order to assure the operation of unaccounted funds, become constantly more frequently required by criminal organizations, as in the case of organizations which have enormous proceeds from criminal activities (for example, the Colombian cocaine ring or mafia organisations in the ex-Republic of the Soviet Union).

5. THE INTERNATIONAL INEFFICIENCY IN CONTROLLING CRIMES COMMITTED BY THE USE OF OFF-SHORE COMPANIES

The political authorities of off-shore countries are confronted today with numerous initiatives adopted in an international context, as, for example, the 40 FATF Recommendations of February 1990, the anti-money laundering Convention no. 141 of the European Council of November 1990 and the anti-corruption Recommendations of the OECD of April 1994.

As a consequence, many off-shore countries have changed their legislation regarding corporate, banking and criminal matters in an attempt to adapt to the above-mentioned international instruments.

These legislative changes are, however, absolutely useless in terms of off-shore companies which carry out their activities outside the off-shore country,

as is true for the majority of cases. In fact, it is well-known that, for example, limited liability companies of Panama do not carry out their activities in Panama. The same is the case with establishments and foundations of Liechtenstein as well as with trusts of the Channel Islands who operate, for example, in Switzerland or Luxembourg or other countries. As a consequence, the above-mentioned legislative changes have no effect because the authorities of the off-shore countries do not receive any information regarding the activities which are carried out abroad by the off-shore companies, against which the sanctions foreseen by the new laws will never be applied.

6. IN FAVOUR OF NEW INTERNATIONAL INSTRUMENTS AGAINST THE ABUSE OF OFF-SHORE COMPANIES

During my 25-year career as a state attorney and, now, as a private-practising lawyer, I have verified many times that off- shore companies are used by numerous criminal organizations, either to commit crimes or to hide proceeds resulting from crimes. This is due to the fact that the off-shore companies have their registered offices in countries which are not able, and often have no minimum intention, of subjecting even a small control of the activities that such off-shore companies carry on outside the off-shore country. In comparison with the large diffusion of useful and efficient instruments at the disposal of international criminal activities, there are only two strategies to adopt in favour of an effective full crime control policy:

(i) to get the off-shore countries to radically change their national legislation eliminating all the present laws in such a way as to neutralize and paralyze activities carried out abroad by off-shore companies.
(ii) The international community must prohibit any activity carried out by off-shore companies and subjecting them also to an extra-severe control over funds which are objects of transactions effected by off-shore companies.[8]

The above-mentioned strategy may be adopted by means of a new chapter in the FATF Recommendations[9] which will be issued by countries being members of the OECD as well as by other countries which are members of other, international organisations like the CICAD.[10] The recent initiative of the IOSCO[11] could be an interesting example.[12]

NOTES

1. In the meantime the resolution was approved in December 1994 by the UNO General Assembly.
2. See such a list of countries in "Office of the Controllers of the Currency, Money Laundering", A Bankers Guide to Avoiding Problems, Washington DC, December 1987, p. 8.
3. "There is increased concern with the misuse of many types of legal entities established solely for concealment purposes", see Financial Action Task Force on Money Laundering, Annual Report 1993–1994, Enclosure 1, Interpretative note to recommendations 3.12, 13, 16 through 19.
4. At the occasion of a work meeting of Interpol on October 25, 1994, it was stated that recently an establishment with a registered office in Liechtenstein had founded a bank in Zagreb (Slovenia) with a capital of Sw.Frs. 2 millions, despite the fact that the establishment merely has a share capital of Sw.Frs. 50,000-.
5. "A Belize registered Office and registered agent together with a minimum of one director are the only requirements" in Belize—an Attractive Location for Setting up an Off-Shore Company, *Off-Shore Investment* 48/1994, p. 9.
6. "Exemption from filing of audited accounts, exemption from disclosure of beneficial ownership", in Mauritius a sophisticated Off-Shore Financial Centre, in *Off-Shore Investment* 48/1994, p. 14.
7. See Decision by the Swiss Federal Court 114 III page 6 as well as Decision by the Swiss Federal Court in 117 II 494 ff. ("Unter der Herrschaft des schweizerischen internationalen Privatrechtgesetzes bleibt kein Raum für den Vorbehalt des fiktiven, zum Zweck der Gesetzesumgehung gewählten Sitzes"—Under the rule of the Swiss legislation concerning the International Private Law there remains no room for the reserve of the fictive registered office chosen for the purpose of law evasion.)
8. See the Convention against Money Laundering and Abuse of Off-Shore-Centers with money-laundering intentions proposed by the Columbian Government in November 1994. (Nieto Samuel Salazar, Proponen bloqueo a los paraisos fiscales, *El Tiempo* 4.11.1994, p. 15; Freno a multinacionales del delito, *El Tiempo* 8.11.94, p. 3).
9. Reference is made to the FATF Recommendations Nr. 21–22.
10. Inter-American Drug Crime Control Commission.
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9.
Money Laundering and Regulatory Policies
Michael Levi

> "The only laws that are permanent are the laws of nature. Everything else is flexible. We can always work in and around the laws. The laws change."
>
> Agha Hasan Abedi, founder of BCCI.

1.
INTRODUCTION

What is meant by money laundering? One of the fundamental difficulties faced by those trying to criminalise the behaviour is that as *behaviour*, it may be perceptually indistinguishable from normal commercial activity of law-abiding persons depositing, transferring, and using funds for lawful purposes. Its distinguishing characteristic is that the *purposes* for which these transactions take place are unlawful because the activities that give rise to the funds are criminal. The *Realpolitik* is that money laundering is a term of opprobrium to describe the movement of money to or from undesirable persons, organisations, or countries. When the CIA move money via BCCI, the Americans call it facilitating the national interest; when the Mafia do the same thing, we call it money laundering (though there may be ambivalences when they may be acting for the intended—though not effective—purpose of assisting the Catholic Church, as with Banco Ambrosiano during the 1970s). The label may be used *contemporaneously*, as when a bank under surveillance knowingly launders "drugs money" (viz. BCCI); but the judgment may also be applied *retrospectively*, as we can see in the succession of UK Serious Fraud Office cases such as Barlow Clowes, Polly Peck 259 International and Maxwell, which were never spotted as money laundering at the time. (Indeed, given the acquittal of the Maxwell sons on fraud charges, we may now redefine them back to 'money movement'!) We note immediately one crucial difference: drugs trafficking proceeds are criminal *ipso facto;* indeed, under US law they are the property of the government. However, what are in fact fraudulent transactions are labelled laundering only if and when the fraud is discovered and recorded as crime. (Though sometimes civil cases involving constructive trust are really laundering cases.) Fraudsters also have the terrific

advantage over most drugs traffickers that they already have corporate structures to utilise for "layering" and "integration" purposes—making suspicion less likely—and that they probably have legitimate financial instruments (such as cheques and bankers' drafts) rather than large quantities of cash to process through their accounts.

1.1 The role of regulation

Nearly all Financial Action Task Force (hereafter, FATF), Council of Europe and European Union countries have now passed legislation implementing the Conventions and Directives. There may be important variations in the extent to which the legislation and implementing regulations cover non-drugs crimes, but my purpose here is to argue that the legislation is little more than an important symbolic step. The real issues are how the legislation is implemented and how observance is monitored and enforced. Money laundering regulation within the EU is rather like the French building the Maginot line to keep the Germans away: once breached, the sector can be invaded at will. Hence, the central importance of the supervision of the implementation of the regulations, a fact made clear in a different sphere by the controversies over nuclear inspections in North Korea. We can start from two positions: one is the diplomatic route, where we start from where we all are now and see how we can best reach a consensus position; the second is to imagine what sort of regulations for financial deposits and transfers we would have in a (relatively) ideal world. Would we, for example, allow anonymous "bearer bonds"? Total confidentiality of the beneficial ownership of corporations and bank accounts? For it is absolutely clear that criminals organise their activities in the interstices of the legitimate society, and will exploit—*if they have the necessary skills and connections*—any opportunities they are given. The trick of regulation is to minimise the illegitimate exploitation without wrecking the economic dynamism.

The political reality is that at different stages of economic and social development, different countries have different views about the desirability of controlling money laundering. However, arguments presented elsewhere indicate that some of these reservations about the desirability of control are unfounded. My object here is to discuss how a "regulatory compliance culture" can be created, and how this would be likely to affect money laundering itself.

1.2 The issues for regulators

Money laundering arises from the proceeds of unlawful activities (corruption, drugs, extortion, fraud, terrorism, vice) and from activities that are not *per se* unlawful (tax evasion, violation of exchange controls on lawful commerce). The core issues are:

Do regulators in different countries communicate adequately with each other?

Do regulators deal adequately with the full range of potential launderers in their own country?

Do compliance officers within financial institutions communicate effectively with, and affect behaviour of, staff in their own institutions?

Do "front line" staff in financial institutions take adequate steps to identify money laundering by customers of their institutions, and either prevent it or communicate it up the line?

In some absolute sense, of course, the answer to all these questions has to be "no". If this were not so, then there would be little domestic laundering in the "best regulated" countries, and we know that there is, though its extent may be debatable. However, in the light of the recent efforts of the UN, FATF, the European Union, and the Council of Europe, we might re-evaluate our views about likely future effectiveness, for we must appreciate that even within the original G7, there are considerable divergences in practice: we are only a little way down the road of controlling money laundering.

All regulation has been moving gradually in the direction of targeting resources to where they are most needed and/or where they can be most productively employed. In the light of BCCI, we should not need reminding that the highest risk for laundering is posed by a loosely regulated international financial institution which has no desire to regulate its own staff. Clearly, part of the problem was the ambivalent interest of the intelligence agencies, but unfocussed responsibility was a key feature: although the post-BCCI procedures for "lead regulation" will reduce the risk of another BCCI occurring, we would be foolhardy to believe that this is certain.

What is the nature of "the problem" that regulators are supposed to combat? Is it truly to eliminate the chance of a criminal being able to dispose of the proceeds of crime through a financial institution, or simply to reduce that chance to a more or less equal level in all the countries within the economic/legal block(s) to which the country belongs? Is it proactive prevention of crime or merely of the laundering of the proceeds of crime, or is it mainly aimed at providing an audit trail so that investigators can follow the money trail if they should decide to do so for any particular crime? Depending on which of these objectives is the most salient will be our judgment of the effectiveness of the regulatory system, but typically, there are few clear intermediate system performance indicators below the general platitudes that constitute the preambles to international legal instruments.

The problem of evaluating performance is compounded by the looseness in the activities which attract the label of money laundering. Although technically, it is a "money laundering" offence to dispose of one's own proceeds of crime, this can be a way of artificially boosting the apparent performance of detection systems, since much *detected* "money laundering" is nothing more than simple

depositing of funds for use, much as one keeps a bank account. It is dramatic in the extreme to describe that as "money laundering": unless deposited with BCCI, it is merely a safer way of keeping cash. This does not mean that we should not seek to control such conduct and use it as a means of investigating offenders: but it is misleading to bring such banal activity as cash deposits within a label that conjures up images

of the international repatriation after disguise of origins of source funds. There is no simple answer to the question of how much money is laundered, not least because it is unclear whether we wish to include our laundering of the proceeds of overseas crime—e.g. amphetamine and ecstasy production from the Netherlands; funds from Noriega and Marcos (only putatively criminal, since Imelda Marcos was acquitted in New York). Except for the major international syndicates and the most high-ranking criminals, relatively little narcotics sales money may end up being laundered (even in the simple sense of being deposited in financial institutions): it is simply spent in criminal "running expenses". Likewise the proceeds of terrorism (such as extortion), many of which are not laundered but simply used to pay "staff costs" in cash: this applies whether we are discussing Northern Ireland or many of the warring factions in Africa, Asia, and even Latin America. It is a mistake to assume that all proceeds of crime enter the official or unofficial banking systems directly (though they may do eventually, depending on what offenders spend their money on, and what those persons do with their cash income, which may be to spend it with other persons, by-passing the surveillance of the tax authorities).

This brings me to the topic of the role of the regulatory authorities in relation to money laundering. Some may think that this concern would have been triggered by BCCI, but to the best of my knowledge, that is not so. BCCI was important prudentially as an issue in regulatory co-ordination, and money laundering for the wrong people may have triggered its demise, but was not really a core issue. Laundering that is not combined with large-scale fraud and/or lending incompetence raises no serious prudential issues for regulators. In this sense, one may argue that morality is divisible, just as people who may happily invest on the basis of "tips" from "people in the know" (i.e. insider dealing) may balk at the idea of committing "real" fraud. Nevertheless, both the Criminal Justice Act 1993 and the Money Laundering Regulations 1993 give a significant apparent role to regulators which they are understandably puzzling over. (This raises further intriguing issues, e.g. will detected failure to report suspicions lead to disciplinary action or even deauthorisation of individuals from directing banks or of the banks themselves? It has not done so hitherto, illustrating the difficulties in finding penalties short of drastic ones as part of the disciplinary process.)

1.3
BCCI and money laundering

The best method of both stealing and laundering money is to own a bank. An illustration of the difficulties in separating out the varied aspects of criminality is the BCCL Whether the numbers are accurate or not is irrelevant for present purposes, but the Kerry Report[1] quotes one investigator:

> "It had 3,000 criminal customers and every one of those 3,000 criminal customers is a page 1 story. So if you pick up any one of [BCCI's] accounts you could find financing from nuclear weapons, gun running, narcotics dealing, and you will find all manner and means of crime around the world in the records of this bank."

For bankers caught up as intermediaries in a scandal, one important dimension is whether they are labelled (in court or in the media) as blameworthy for their role in laundering money: this fear strengthens the hand of regulators at governmental level and also at the level of organisational headquarters staff. Commercial consequences here vary enormously, At one extreme are those bankers who are under investigation for active complicity at least in regulatory breaches, which the Americans have exploited to fine the major banks large amounts of money. At the other are banks who are in receipt of negative headlines, even though no charges ensue against them: for example, the role of Goldman Sachs in allegedly "laundering" money for Robert Maxwell for what they must have assumed were legitimate business purposes. (The image consequences may be independent of whether it was actually reasonable for the bank to behave as it did, given what it knew.) We may be interested in the *effects* of such headlines on the financial institutions and, perhaps separately, upon the individuals caught up in the scandal: how many people actually withdraw their accounts from, or do not trade with, bankers who receive negative publicity? Unless the action for laundering were very severe (or the capital base of the bank were particularly vulnerable), I personally would feel more insecure if my banker had been a victim of a huge fraud than if he had been warned by the regulators for laundering money (thereby improving the bank's profits). But individuals who are dealt with formally or informally by the regulators may lose hoped-for promotions or titles, and that is salient to them personally. My basic point is that the difference between "money movement facilities" and "money laundering" is often a fine one, particularly when viewed from the perspective of the banker who wants to "do the deal" because ultimately, performing services for paying customers is the source of banking profitability.

There is also a secondary effect on banking regulators, who may be impelled by negative publicity to carry out money laundering compliance reviews, lest they be criticised for inactivity: such reviews (and media publicity) impose considerable compliance costs and divert senior management time to damage

limitation. A good example is the role of the *Banque Francaise de l'Orient* in assisting the flight of capital—both lawful and, allegedly, unlawful—from Africa: this is discussed in detail later in this chapter.

Before the Criminal Justice Act 1993, in the UK, there was no general legal obligation on the part of a bank to satisfy itself as to the identity of its customers. Prior to the Guidance Notes (1990), simple deposit account-holders were seldom checked up on: banks were pleased to have the custom. My experimental survey of several building societies in 1989 revealed that all they required was some item of identification with my signature on it. Whether they would have checked further after opening the account remains unknown—though it seems unlikely—but by then I could have laundered my funds. This relative laxity—which has now changed due to the effects of video and training programmes for building society staff—may be why in some recent completed and pending narcotics trafficking cases, funds were found in building society rather than in bank accounts.

Whether or not crimes were committed, major Serious Fraud Office cases—such as the Barlow Clowes, Maxwell and Polly Peck cases—demonstrate the ease with which large corporate fronts can transfer vast funds overseas without arousing any suspicion or, if there was suspicion, any reports to the National Criminal Intelligence Service (NCIS). Recent research[2] reveals that in the UK, the area of reporting **inter-company** transactions has been an almost complete black hole in the system of money laundering detection, though emerging responses to the Criminal Justice Act 1993 and the Money Laundering Regulations 1993 suggest that this will be less so in the future: many banks are taking their responsibilities extremely seriously.

Shady business operations may be involved in drugs or in terrorism, rather than fraud, or there may well be some intermingling of crimes by "crime entrepreneurs": for example, launderers (like physical smugglers) can apply many of the same techniques to any type of crime, though the amount of *cash money* required to be laundered make a considerable difference to the "business problem" for the launderer. Many legal regimes have politically understandable variations in reporting regulations, and these can present prosecution and regulatory difficulties if the prosecutors cannot prove that the bankers knew or suspected that the funds came from the particular crime in question. There are also problems about what to do if one subsequently learns to suspect former customers: the safe policy is for the banker to disclose to NCIS even where the account has been closed. Thus, to cope with the provision, banks have to establish regular reviews of bank transactions, applying agreed criteria to decide whether or not there is "reasonable cause" to suspect the source of the moneys to be terrorism. It is very difficult to do this on a *systematic* basis. Drugs funds may be expected to be laundered more evenly throughout the country than terrorist funds, but the objective reasonableness test clearly places greater burdens on bank staff who can no longer plead the "thought-less idiot" line of defence.

However, proof that a banker did suspect fraud may be very difficult without clear circumstantial inferences or notes.

Not too much should be expected from money laundering controls unless they can have some regulatory impact upon the Hawala banking "sector" and on the sort of moral neutrality evinced by those who participated in the "movement" of moneys for Robert Maxwell. Under the new legislation, would those banks that acted for Maxwell have been expected to look more closely at the beneficial ownership of the payees? And what would their liabilities have been if they had failed to do so?

2.
THE CRIMINAL JUSTICE ACT 1993

The Act makes it a crime for financial institutions to fail to report matters that they "know or suspect" constitute drugs money laundering, though how it can be proven that they suspected that the laundering was *drugs* money remains unclear. It remains voluntary to report suspicions of other crimes, such as fraud, so theoretically, it could constitute a defence to argue that the banker suspected tax evasion but thought that the trafficker was "not the sort of person who would be connected with drugs". (Provided that the state of knowledge and assistance was not such as to constitute conspiring with the account-holder to commit crime. As noted earlier, this differential crime-based liability also constitutes a significant problem in relation to terrorist finance.) The way in which staff are trained to recognise "suspicious behaviour" therefore constitutes a vital feature of the regulation of money laundering.

But how can we identify suspicious transactions? How, for example, are bankers to treat market traders and other substantial cash depositors from the Indian sub-continent? This, after all, is a major drug exporting as well as arms trafficking region. Market traders are often viewed as being unlikely to declare all their income to the revenue, and it is very difficult to verify the genuineness of the levels of trade that correspond to their currency deposits. They often send money back home to support their families in India and Pakistan or any other country which exports migrant workers. On the other hand, voluntarily or under blackmail, they may be merging criminal funds in with their legitimate income, knowing that cash deposits are common among people doing their kind of business. At one pragmatic level, this is unimportant: non-offenders are unlikely to know that their civil liberties have been invaded, and they suffer no direct harm. But as an illustration of the problems involved in differentiating legitimate from illegitimate *sources* of income, the example is a good one, and the interpretation placed by a criminal investigator may differ considerably from that of people in the trading culture.

2.1 Some evidence about suspicious transaction reporting in the UK

One of the major differences in the regulation of money laundering arises out of whether reporting systems are *suspicion-based* or *"objective" transaction-based.* In the former, institutions subjected to regulation need only report conduct that arouses their suspicions; in the latter, they may have to report, for example, all transactions over a particular sum, irrespective of whether or not they are suspicious about them. Increasingly, countries such as the US and Australia have a mixed system, but much of the rest of the world follows the suspicion-based approach, though as electronic banking develops, the Australian/US approach may gain favour.

The sort of reports that suspicion-based systems generate depend not only on legal regimes but also on cultural conditions and the training that people receive (which is mandated by the EC Directive of 1991). To illuminate some features of what suspicious transaction reports mean in practice, I have included below some data from our research, which pre-dates the implementation of the Money Laundering Regulations 1993. The latter fact is important, because there has been a broadening of the base of transaction reporting, as wholesale markets, lawyers, and accountants have been required to report and have undergone training: at least in the short term, this has made the latter risk-averse (in relation to the risk of imprisonment for failing to report).

1) 72% of the disclosures were made by the "Big Four" clearing banks. Other deposit taking banks accounted for 6 per cent. Building societies accounted for about 9 per cent. Other disclosers included travel agents, securities firms, and insurance companies. In view of the high profile given to compliance issues and the publication of separate guidance notes for the securities and insurance sectors, it may be of passing interest that these two sectors each accounted for just over 1 per cent of the disclosures made in 1991!
2) Although almost all disclosures were made under the Drug Trafficking Offences Act 1986 (hereafter, DTOA), except for some "advance fee" type frauds, it was very rare for the banker to have any idea of what sort of crime the customer may have been involved in: "drugs" was simply the convenient peg, partly because bankers felt less uncomfortable informing against drug traffickers.
3) Just over 70 per cent of the disclosures involved a simple personal account, and few were remotely classifiable as international or major domestic crime cases.
4) Only 14 per cent of disclosures involved "one-off' transactions with strangers; in 21 per cent, the relationship had lasted between a month and year; the bulk—31 per cent—involved relationships lasting 1 to 5 years;

and about 20 per cent involved relationships longer than five years. This might appear surprising at first glance, insofar as one might expect that suspect transactions are more likely to be associated with recent accounts opened up for the purpose of disposing of crime proceeds. However, a long standing account will have an established pattern of use, against which it is easier to spot an apparently "out of character transaction".

5) 40 per cent of the disclosures involved one transaction only. About 23 per cent involved a series of related transactions. About 35 per cent involved "suspicious activity" over a period. There may have been occasional difficulties in determining which of the last two categories applied in some of the cases.
6) 60 per cent of the reports involved purely UK sterling activities. The remaining were roughly divided between cross border currency movements and foreign currency exchange.
7) Over half of the suspicions were triggered by cash deposits.

A major difference in policy between financial institutions was the degree of "filtering" (now officially recognised as being the task of an "appropriate person" designated under the Money Laundering Regulations 1993). One large institution claimed that its compliance department rejected almost two thirds of internally raised suspicions after their own investigations revealed that in their (experienced and well trained) view, there was no basis for sustaining the suspicion. We will refer to this institution as X. Another institution rejected about twenty percent, and we will refer to this as Y. Yet another avoided playing internal detective and passed on virtually all suspicions without filtering: we shall refer to this institution as Z.

The results do show a higher hit rate for X than Y or Z as expected, but perhaps not as dramatically higher as one might have anticipated. Certainly we noted that Bank X tended to disclose a relatively high proportion of higher valued transactions, whereas since Z was disclosing across the board, there could have been a greater tendency for Z to pick up "tiddlers" (who may have been more easily investigated by the police or Customs). Not surprisingly, bankers are more likely to disclose an "unusual" or "unexplained" large transaction than a small one. Thus a compliance department which filters heavily is much more likely to disclose the big ones defensively, even though it is highly probable that the smaller "border-line" suspicions are a little more likely to yield a result. On the basis of the size of sample investigated and the result, our view would be that there is no evidence to suggest that those who are filtering are not doing so sensibly. On the other hand it is highly probable that heavy filtering leads to the occasional missed positive.

It was clear from our analysis that the overwhelming number of disclosures centred around personal accounts, and that even when business accounts were involved, there was usually some personal account also involved in the transactions reported. In other words, the "visibly" suspicious tended to be

relatively unsophisticated transactions involving known individuals. A fair summary is that the typical disclosure involves a large total of cash deposited within a short period which is then usually transferred rapidly. The suspicion is usually aroused by the sheer size of the transaction(s) in relation to the known (or believed) financial circumstances of the customer. It would be a mistake to impute to counter staff or senior management a substantial amount of actual knowledge of their customers' affairs: unless the customer has volunteered a reason for the "unusual transaction" or has been specifically questioned about it, suspicions are triggered by the way that the transaction looks on paper or by the perceived demeanour of the customer. Although there are many variations and departures from this simple model, there is little evidence to suggest that financial institutions are very successful at spotting the misuse of "front" companies for the intermingling of crime proceeds with legitimate takings. After all, if an offender is sufficiently sophisticated to be using this type of vehicle, then he will usually know how to use the disguise successfully, and even if the detection of money laundering were part of their corporate "mission statements" (which it is not), cutbacks in bank staffing mean that surveillance of business accounts which are not giving loanbook problems is very modest. In short, money laundering suspicions tend to follow the normal proactive policing mode: conduct that is, or seems to be, "out of place" and/or meets the criteria for "methodic suspicion" for which the banker has been taught to look (latterly by the Joint Money Laundering Committee guidelines and associated training films and talks), is picked up and reported upwards as suspected proceeds of crime.

In this connection, I would recommend the adoption of the distinction favoured by Interpol (1993) between unusual and suspicious transactions, though for reasons given elsewhere, I prefer "suspected" to "suspicious", the latter being too objective a term A **suspicious** transaction or series of them is conduct which "because of the circumstances, have reached a level of suspicion sufficient to identify a criminal offence (e.g. "subject is suspected of money laundering and drug trafficking or other stated offence"). An **unusual** transaction on the other hand is "one of several financial transactions of an unusual nature but where a criminal offence has yet to be determined." By this criterion, most disclosures are of unusual rather than suspicious transactions.

In addition to bankers, other financial institutions such as *bureaux de change* have been included among those obliged/permitted to report suspicions of money laundering. Here, the problems are far greater, for such organisations—even where regulated at all—generally deal in transactional rather than relationship banking. They may be obliged to "know their customers" in a technical sense of identifying them—an important advance for audit trail purposes—but they will have little context of trade within which to identify "suspicious" conduct.

Different problems are posed by the extension of the legislation to professionals such as accountants. The auditors of small to medium companies—those (Serious Fraud Office cases notwithstanding) which presumably are most likely to be used as laundering vehicles—tend to be general practitioners and

therefore unfamiliar with the trading circumstances applicable to individual areas of commerce. Some retail sectors (such as art & antiques, used cars, jewellery, and clothing) have enormous possible gross profit ranges: even a specialist firm would have difficulty in determining whether the accounts presented for such trades are realistic. When reviewing restaurants, arcades, casinos, and "adult entertainment", the accountant enters a realm which must surely lend itself to financial magicianship of the highest order. What is the expected turnover and gross profit of a "hostess" bar where drinks may be sold at ten times their wholesale value? One investigation I examined involved the suspected operation of a major drug trafficker in a mid-sized town. The suspect controlled a large number of slum properties. These were largely occupied by low paid and "down and outs" who would claim that they were paying high rents (i.e. most of their social security benefits), when it was fairly clear that such rents were unrealistic. The owner of the slum properties was believed to be declaring excessive returns but it was impossible—at least without expensive surveillance—to disprove his accounts, as his tenants were an ever shifting but loyal group. The net result is that someone who is in fact a drug trafficker appears to be a model citizen who is promptly paying his mortgage loans and building up an exemplary reputation with financial institutions as a property developer with accumulating assets. This would be an example of "depositing" by intermingling, followed by immediate "integration" without the need for "layering": in my view, this is probably a common illustration of the use of the property sector for money laundering.

One of the greatest strengths of the current operation of the disclosure system is the nature of the working relationship between law enforcement and financial institutions. This special relationship has been developed particularly early in the United Kingdom and all parties are anxious that this relationship is maintained, indeed improved: suspicious transaction reports have escalated to 15,000 in 1994, and it is anticipated that there will be more in future. Thus, with a few exceptions, police and Customs officers are just as anxious as bankers for the legislature not to impose further requirements upon financial institutions, which might alienate the latter and lead either to fewer reports or to less co-operation in filtering suspicions. In practice, bankers who fall short of active conspiracy are very seldom charged, Though there is no official breakdown by occupation, interviews with informed sources indicate that there are few bankers among them. Indeed, there were only 65 prosecutions and 27 convictions of anyone for s.24 Drugs Trafficking Act 1986 money laundering offences between 1986 and the end of 1992—so the threat of prosecution and long jail sentences is more symbolic than real, (though bankers are understandably less sanguine about this than are politicians). I have only been given the details of one prosecution of a non-conspiring banker: by contrast, I came across several instances of very question-able banking conduct which has never resulted in a report, even to the Bank of England, let alone a prosecution for failing to report suspicion.

Let us take as an example one case where internal regulation might be described as poor. Subsequent to the issue of the first set of guidelines by the

Joint Money Laundering Committee in 1990, a man turned up at a branch of a minor bank and opened up a new account depositing several thousands of pounds sterling in cash. The money holdall also held an apparently loaded revolver which accidentally dropped out of it. The cashier unsurprisingly formed a suspicion and reported this event to the manager. For whatever reason, despite what one presumes to have been his own training about money laundering, he did not disclose it to his head office or to the National Criminal Intelligence Service (NCIS). The customer was subsequently arrested for drug trafficking. When the bank was approached about the customer's financial arrangements, the manager was very open in admitting the circumstances described above. The investigating officers were convinced that as there was no attempt to conceal the facts, the lack of disclosure had to be put down to naïvety, ignorance, etc. This interpretation was a generous one: was there not a possibility that he needed that deposit to improve his branch figures? When I asked whether this occurrence had been reported to the Bank of England, the response indicated that there was no desire to disturb the cosy relationship between the police and that retail bank, or indeed the banks in general, which is perceived to be "at risk" from "aggressive policing". Whether the prosecution of such negligence would really alienate the banking community or rather would satisfy those bankers who believe that the guidelines should be enforced is moot: some question the point of (costly) virtue if vice or negligence go unpunished. Suffice it to observe that the obligations imposed under the Criminal Justice Act 1993 ought to clarify managers' minds under such circumstances in the future. Though especially if there was no drugs trafficking—as there was not in this case—what liability is there if someone other than a designated "appropriate person" has suspicion transferred to him but then discounts it (or says that he has discounted it)?

Let us mention a further example, to illustrate the weaknesses in the current approach to money laundering viewed as an *international* system. No-one is lawfully permitted to take out of Nigeria more than $5,000 in cash without a very good reason. Yet during 1992 and 1993, Nigerian money-changers were permitted to import and deposit £20–30 million a month *in cash* at the London branch of a small private bank, the *Banque Francaise de l'Orient* (which is now part of the *Banque Indosuez* group), for exchange into whatever currency they wished and for onward transmission to whatever bank they wished, without arousing any significant UK crime investigation or banking regulatory interest. The Bank of England took the view that the bank was regulated by the Bank of France; the Bank of France considered that this was legitimate money-changing business; and the *Banque Francaise de l'Orient* itself (and its parent) were delighted that they had found a lucrative source of business which turned around a poor-performing bank with expensive overheads into a serious money-maker. As regards the "know your customer" principle, they knew their customer—which was a Nigerian money-changer with considerable trade financing business—and (whether or not they *ought* to have suspected) they claimed that they did not suspect that *any* of the money was drugs money. The

Bank of England did not keep a tally of how much cash the French bank (or, indeed, any bank) took in: the returns to the Bank of England were of "foreign currency bought and sold", so for practical purposes, what was happening was foreign currency arbitrage, etc. One courier was stopped at Heathrow with $2.5 million in cash, *en route* from Switzerland to Lagos, and was let go when the money-changing firm asserted that he was just transporting money for them as part of their normal business. Because of their concern about money laundering regulations (and reputational risks), NatWest and the Republic National Bank (of the US) refused to take the Nigerian money, but the French bank apparently saw nothing wrong with it. (It is not known whether the French bank was aware that the others had refused the business). Despite the fact that "UK plc" did not appear to gain any thing from enhancing the profits of the French bank, the Bank of England did not intervene. It was only when the haemorrhaging of 5 billion French francs a year from the Nigerian Central Bank impelled them to stop the trade in African francs that the system stopped. Yet it is hard to believe that these transactions were not benefitting the international narcotics trade. It is this kind of example that leads many to conclude that the system of suspicious transaction reporting is only scratching at the surface of money laundering.

Similarly, although most of the transactions took place in The Netherlands, a large recent case involving the wholesale supply of Ecstasy tablets from Holland to the UK netted the leaders some 70 million guilders (£23 million) profit, some 33 million guilders having been spent on production, personnel, transport, and communications. The organisation employed someone to exchange the funds, mainly sterling. Using a false name and false identity papers, he would periodically visit an affiliate of a prominent Dutch bank to negotiate about the exchange rate. The bank accepted this man as a very respectable businessman who worked a lot with large amounts of cash. The organisation used a foreign expert in corporate legal entities in tax havens and, with the help of auditors and lawyers, he set up limited companies in England, Jersey, the Isle of Man, Gibraltar, Ireland, Hong Kong, Panama, and Delaware, USA, few of which were registered with their local Chamber of Commerce or tax office. The local registrants acted as nominee owners. Although the shell companies were not allowed to do business in the countries where they were incorporated—at least not without paying administration fees and taxes—they could open bank accounts, and much of the money was distributed around in this way. The investigation indicated that the local representatives were not aware of the source of this money. Much property was purchased in The Netherlands and then rebuilt for cash to luxurious standards. Indeed, some of the cash was sent from the overseas companies to Dutch public notaries who were involved in the purchasing of the real estate. A Dutch administration and tax consultancy office looked after the businesses as a whole, and administered the artificial schemes. Monthly, a Dutch firm delivered batches of goods to her foreign enterprise subsidiary for exorbitant prices, resulting in a rising business debt and enormous stocks at the subsidiary. The manager of the subsidiary was induced to take a

loan from a foreign investment company (established by the traffickers) for repayment of the business debt. In this way, the drugs money was channelled back and used as trading capital in legal activities. The Dutch administrators apparently never appreciated that the capital deficiency and vast loans which were not underwritten or covered by any official loan agreement was either unusual or suspicious. When arrested, the organisers had begun to set up artificial trading firms to exchange the money. As far as I am aware, no suspicious transaction reports were filed in the UK or The Netherlands.

The deterrent implications of identification requirements are probably over-stated: there is a flourishing black market in false and stolen passports, and documentary fraud in relation to fiduciary instruments also has been a recent growth area for organised criminals[3] in the UK and throughout the world. Though there may be an impact on the opportunist, casual cheque thief and the user of stolen or burgled cheques and credit cards—important categories in themselves—the need to obtain false identification will not deter the serious fraudster, though it will impose extra costs and inconvenience, and will help any subsequent jury realise that there were criminal motives right from the start.

Even assuming a genuine desire to comply, and complete integrity through-out the bank, it is hard to develop a realistic set of instructions that will guide the civic conscience of bank employees at all levels from director to assistant cashier without paralysing the banking activities or the handling capacity of the police. This is a different problem from that we see in responding to requests for information from the police, for in the latter, except where the information is requested without a court order, no judgment of suspiciousness on the part of "the banker" is called for. (Though problems can arise where there is localised misconduct of which Head Office is unaware: this, after all, was the claim of BCCI prior to its exposure.) It is where we are asking bankers to use initiative that real organisational communication problems arise. This depends not only on the ethics but also on the nature of the normal banking activities of the branch: unlike mainland High Street branches, where bank staff generally know customers personally, offshore branches in the Channel Islands, for instance, will normally have scanty information about clients unless they wish to borrow money. Inter-bank international electronic payments transfers, perhaps involving currency swaps by the (presumed) corporate clients of third-party banks that are common as hedges, would not be expected to excite the sort of interest that would lead to a report to the National Criminal Intelligence Service. (Even if it did, it might be hard to find the resources to follow the trail.)

Offshore branches are beyond the jurisdiction of the current legislation (with-out formal mutual assistance procedures), but transactions that are normal in some contexts are abnormal in others. Sometimes, as in the case of the Mafia front car-cleaning firm in the US that registered 200 cars going through one outlet on a day when a blizzard had stopped all traffic, trading claims are test-able in principle. But how, for example, are bankers to treat market traders and other substantial cash depositors from the Indian sub-continent? This, after all, is

a major drug exporting as well as arms trafficking region. Market traders are not best known for their book-keeping (or for their high level of declarations to the revenue), and it is very difficult to verify the genuineness of the levels of trade that correspond to their currency deposits. They often send money back home to support their families in India and Pakistan. Are bankers expected—like VAT investigators—to mount surveillance operations to check the level of trading of people who are, after all, good customers and (as far as the banker is aware) good citizens? The situation can easily degenerate into methodic suspicion of particular ethnic or national groups simply on the basis of their area of personal (or even antecedent) origin. This becomes more acute still where there is a potential terrorist connection: when do patterns of suspicion become racist?

3. THE FUTURE OF MONEY LAUNDERING REGULATION IN EUROPE

The Guidance Notes for banks and building societies (1990, revised 1994) required proof of identification for the opening of corporate, as well as personal, accounts, and noted (p. 12) that in the case of transactions undertaken for non-account holders of that institution, "special care and vigilance is required… Identification documents should be treated as part of the transaction records and should be retained and retrievable…". Nevertheless, it is arguable that reporting requirements in UK legislation seem best geared to persons opening up individual accounts and putting large wedges of money into them in cash: inter-company and particularly international banking transfers by electronic means are much harder to regulate, except where there is prior suspicion and surveillance by the authorities. Despite wide circulation of the provisions of the Drug Trafficking Offences Act 1986, warning circulars from the Bank of England and the Building Societies' Association about the dangers of money laundering, and the Guidance Notes for banks and building societies, as well as specialist Guidance Notes for insurance and for the wholesale banking sector, the "know your customer" rules for investment advisers under the Financial Services Act 1986 cue stockbrokers and merchant bankers, as well as clearing bankers, far more into the sophistication and financial means of their clients than into the origins of their (personal or corporate) money. To this extent, one may argue that the Draconian legislation has more symbolic than practical value against major crime syndicates, if they exist in the UK.

The legal framework and enforcement policy can affect the level of awareness: however unfair in terms of imputing bad faith where none may have existed, the prosecution in 1985 of the Bank of Boston and others for failing to make full currency transaction reports probably increased the general perception of the importance of these reports among bankers at all levels. Where banks or their local employees are greedy or where, as in the US Crocker Bank case and many US savings and loan institutions, as well as BCCI, they (personally or

institutionally) are under serious financial pressure, the temptation to cover up cash transactions will remain. That is why general regulation of the stability of financial institutions cannot be separated fully from checks on their probity, whether for fraud or money laundering purposes. My interviews with major UK financial institutions make it very clear that a desire to have a good reputation, combined with fear of imprisonment, have generated a strong willingness to comply with the spirit as well as the words of the legislation. This may not be so everywhere in Europe or in all FATF countries, let alone those outside.

3.1
The scope of predicate offences which must, if suspected, give rise to reporting

What crimes must be reported? The three-tiered system for reporting which differentiates in legal obligations to report between terrorist offences, drug trafficking, and other offences covered by the Criminal Justice Act 1988 fails to reflect the reality that the vast majority of suspicion-based reporting since the coming into force of the DTOA 1986 has not been based upon any knowledge or suspicion of any *particular* predicate offence.

4.
THE DETECTION OF MONEY LAUNDERING

Legislation prohibiting the transfer of funds on actual or constructive suspicion that they are the proceeds of crime—either within the jurisdiction or elsewhere—is premised upon individuals working in financial institutions realising that the funds are tainted. How might bankers become aware of the tainted nature of the funds in which they are being asked to deal (whether or not they actually do become aware)?

The Joint Money Laundering Guidelines offer broad insights, reflecting the inherent uncertainty from a banker's viewpoint in all but clearly disproportionate cases. They essentially involve the same sort of judgment made by police on the streets: that a person seems "out of place". The type of transactions which should alert financial services employees to the possibility of their firm becoming involved in a money laundering scheme will include:

1. large cash deposits made by an individual or company whose ostensible business activities are not of a kind which normally generate substantial amounts of cash;
2. substantial increases in cash deposits by an individual or company in business without apparent cause, especially if such deposits are transferred out within a short period to a destination not normally associated with the individual or company;

3 substantial increases in deposits of cash or negotiable instruments by a professional firm or company using client accounts or in-house company or trust accounts, especially if such deposits are promptly transferred between other client company and trust accounts;
4 large cash deposits and withdrawals by an individual or company which appear to have no obvious purpose or relationship to the account-holder as regards a business, or the customary banking activity of the individual or company;
5 deposits and withdrawals dominated by cash that are made by an individual or company in a type of business whose deposits and withdrawals would normally be dominated by cheques and other such instruments.

There are also customers whose patterns of behaviour might lead a prudent banker to suspect that they might be involved in money laundering. Examples include:

1 customers who, when applying to open an account, provide minimal or fictitious information or information which it is difficult or expensive for the bank to verify;
2 customers who decline to provide information which, in the case of a normal customer, would make them eligible for credit or other banking services which a normal customer would regard as valuable;
3 customers who open a substantial number of accounts and pay in amounts of cash to each of them which when totalled would amount to a very large sum;
4 customers who pay in cash by means of multiple credit slips so that the total of each deposit is unremarkable but the total of all the deposits is very large. (In the US, where particularly prior to the Anti-Drug Abuse Act 1988, the banks' reporting thresholds were known in advance, this is called "smurfing");
5 customers who appear to have accounts with several banks within the locality, especially when the bank is aware of a regular consolidation process from such accounts prior to a request for onward transmission to another country, whether or not such a transfer is associated with a foreign exchange transaction;
6 customers who pay by cash for bankers' drafts, certificates of deposit, and other negotiable and readily marketable money instruments, especially when such instruments (particularly bankers' drafts) are payable to bearer;
7 customers who seek to exchange low denomination notes for those of a higher denomination;
8 customers whose deposits of cash contain a significant number of forged notes;

9 customers who make regular and large payments to or receive regular and large payments from countries which are associated with the production, processing, or marketing of narcotics, or from countries which have been identified as being involved in the laundering of the proceeds of drug trafficking. (This category is quite large, and can be circumvented by re-routeing funds. One might extend these suspicion triggers to countries involved with terrorism, though as in the case of countries known to be conduits for narcotics trading or laundering, this casts a wide net, for there is much legitimate trade.)

Potential launderers include the clients of accountants, lawyers, trust companies, company administrators, and a whole range of brokers and agents for property and for financial instruments and contracts, though this category is so large that it is hard to argue plausibly what proportion of clients in general, or of a particular bank/firm's clients are likely to be launderers. It is likely that bankers will know little of the detail here, but they may know some, and the professionals acting for clients will have the requisite knowledge of their dealings. Examples include:

1 clients introduced by firms that tend to be "accident prone" in their selection of clients and business activities;
2 clients who are reluctant to provide sufficient information to establish their existence and identity, or who provide information that is difficult or expensive to verify or corroborate;
3 clients who establish and finance their companies with large amounts of cash or cash instruments rather than the more normal form of payment associated with commercial money transfers;
4 clients who seek fiduciary or cash management facilities for large sums of cash;
5 clients who request the firm to act as their agent in obtaining high sum bankers' drafts, cashiers' cheques, and other cash-equivalent or near cash monetary instruments or in making wire transfers to and from other banks and financial institutions;
6 clients who establish companies which have no apparent connection with themselves and no normal business-related activities, but which receive and disburse large sums of money for no obvious purpose;
7 clients whose companies are not natural cash-generators yet who require large volumes of cash to be banked and accounted for;
8 clients who decline to provide sufficient information to establish the position of their company for audit or tax purposes;
9 clients whose royalties, commissions, fees, asset sales, etc., cannot be independently verified.

Some of these criteria for putting bankers on notice of laundering require banker knowledge of customer activities—which varies in practice between and within countries, and is particularly low in offshore jurisdictions which are used mainly for "booking" transactions—but others require less knowledge. It should be a knowledged, however, that in practice, almost anyone being questioned with an eye to potential civil or criminal liability will tend—consciously or not—to understate their degree of knowledge which reasonably or actually might have given rise to suspicion of money laundering. Moreover, these may be triggers to further enquiries by bankers, rather than for immediate onward transmission to policing agencies.

It must be appreciated, however, that since laundering the proceeds of crime is a very widespread activity, there is an inexorable pressure towards ratcheting up the demands made of financial institutions and professionals such as lawyers and accountants to detect the previously undetected. Thus, for example, one would anticipate the development of computer-based intelligence systems to pick up unsuspected "suspicious transactions". Ultimately, it will be a question of political compromise between competing state and private sector interests.

5. CONCLUDING ANALYSIS

The trend in legislation has been to impose potential criminal liability on individuals within financial institutions who have been designated by those institutions as responsible persons to ensure that the regulations are being complied with "adequately". This is a form of enforced self-regulation, with the criminal law being used as a (very remote, in reality) stick with which to beat the individual and—via the requirement that all banks be "fit and proper"—the institution should they misbehave. However, there has been no real attempt to specify what counts as "adequate" regulation by the financial institution, while there is an even looser form of national" supervision" conducted under the aegis of FATF, to try to ensure that countries are not too far out of line with each other. There is a wholly laudable principle that competitive under-enforcement does not undermine the effectiveness of controls generally, making those countries who take regulation seriously suffer a capital outflow as a consequence of their integrity. But the very Draconian nature of the sanctions available—de-authorisation of a financial institution, or expulsion from FATF—make it very hard to push the unco-operative into line.

But at a more fundamental level, what is all this extra policing of banking transactions likely to achieve? One cynical approach is to argue that in sensitising and reforming the many, all we do is to impose barriers to entry into the money laundering market which (via bank-unauthorised personal or bank-authorised institutional "counting fees") drives up the price of corruption for the remaining few. The sophisticated offenders generate business fronts that can be used to launder funds in a way that is unlikely to be detected by even the most

conscientious pro-active monitoring on the part of the banks. (Though targeted surveillance, from the inside or outside, can succeed against particular syndicates, and this may benefit greatly from bank co-operation. It is, however, greater for drugs trafficking and terrorism than for fraud, which has a lower governmental and police priority in many countries.) In the meantime, there may be some overall diminution of criminal activity as the barriers to entry into the international or national laundering game prove too burdensome for some potential players, and there may be some national displacement of crime, as mobile criminals operate in areas they perceive as more lightly regulated.

Unlike drugs trafficking or terrorism, fraud operates in an arena which is not fuelled by demand-side pressures: there are no people who (consciously, at least) *want* to be defrauded in the way that there people who want to get "stoned" or want to start a revolution. Fraud is about simulating the sort of transactions from which the intended victim can plausibly believe he will get a profit. Clearly, if bankers were to be more liable for damages to defrauded persons in constructive trust for the conduct of accounts, they would have to institute greater surveillance of "accounts in difficulty" than they do for their own prudential purposes at present. (For example, they would be expected to consider the *business rationale* of international and local transactions, and to review whether the transfer overseas of large sums, or the persistent withdrawal from partnership accounts of substantial sums in cash, were really consistent with the kind of business that the firm were known to do.) Bankers have enough problems ensuring that they are making loans to "the right people" and getting repaid for them, without seeing that investors and trade creditors are being looked after also. It is unrealistic to expect bankers to be able to pick up all but the most "out-of-character" transactions by authorised signatories. Though some serious questions should and will be asked of those who dealt with major fraudsters, it is appropriate to observe that bankers themselves lost vast amounts of money which, presumably, they did not want to do. If they could not detect or prevent the laundering of their own or fellow bankers' money, it is optimistic to expect them to detect the laundering of pension money unless there are some special characteristics of those pension-laundering schemes.

Finally, let us put the policing of money laundering in its broad commercial context. Citibank alone handles $100 trillion per day in transactions world-wide. In 1992, there were 20,756,000 non-interest bearing, 35,020,000 interestbearing, and 9,804,000 deposit accounts held by members of the British Banking Association in the UK. 1.6 *billion* transactions on those accounts were effected by 408,700 staff (including foreign banks, merchant banks, and retail banks) at 12,623 branches (plus 21,211 for Girobank). On top of this, there were, in 1992, 89 building societies with 5,765 branches, employing 62,191 full-time and 17,212 parttime staff. (The number of their accounts and transactions is not collected.) This is an enormous spread of activities to police with the modest resources available, or indeed with any conceivable set of resources. The whole idea of a suspicion-based system is old-fashioned, since unlike burglaries and

robberies, most cross-border transactions are conducted purely electronically, without anyone physically seeing them: because of the legislation (and sometimes to guarantee that the transaction will be paid for) customers must be identified, but how are bankers to know whether there is a legitimate "business case" for the myriad of transactions they undertake, and why should it be their business to "shadow" their customers? Legislation does not require them to do those things, but they (and the "informal banking" sector) would have to do so if they were to smoke out all the laundering and fraud. For that reason, I prefer the term "suspected transactions" to the term "suspicious transactions": the former refers to a state of mind in evaluating what we see; the latter to some objective characteristics of transactions which may never be revealed or which, if "revealed", may turn out to be mistaken.

Apart from the macro-level objectives of reducing crimes of various kinds, the intermediate-level general objective is to fine-tune the system so that the law enforcement system is not overwhelmed by false suspicions, while maximising the number of correct suspicions that it obtains. To do this, the maximum transparency of financial transfers is required—which causes particular problems in relationships between those countries that practice exchange control and those that do not—in order that the lawful and unlawful are not mixed up too much. At a conceptual level, we could ask ourselves whether international bearer instruments are really appropriate in the world, and customer confidentiality (or banking secrecy, if one prefers!) is a further obstacle to the detection of money laundering. However, there is no substitute for the co-operation of financial institutions in the struggle against money laundering: the chances of penal authorities discovering all such malpractice on their own are too low. The key problem is to develop a set of rewards and sanctions that will maximise adequate feedback between banking regulators, police, and bankers themselves. At an international level, there must also be methods of assuring that each country regulates its financial communities with broadly similar effectiveness (up to a minimum standard), and significant sanctions to those financial institutions and countries that either fail or refuse to meet those minimum standards, *provided that it can be demonstrated that some actual or plausibly potential harm is caused thereby*. It is this that generates great controversy in financial institutions. For it can be-come so much of a challenge to detect violations of the system *by* financial institutions and so profitable to prosecute and fine them for these violations that one may lose sight of the final objective of crime reduction, whose resistance to financial counter-measures may be deduced from the inexorable rise of the US prison population to five million in 1994 and from the simultaneous difficulties experienced in reducing drugs *consumption* and crime levels to pay both for drugs and for lawful commodities that are desired by the American public. I would be surprised if these parallels of fining institutions occurred within Europe, partly because the sanctions are a product of the cash transaction reporting system but partly also because of the desire for a working partnership and cultural reluctance among Europeans to see bankers as allies of

criminals and enemies of good government. If the latter attitude changed, there would be much scope within the EC Directive for prosecuting those who failed to implement "adequate" training and money laundering systems, as well as keeping proper records. But meanwhile, at least in most of Europe, the remarkable social phenomenon of the co-operative altering of banking culture—backed up by statute—so as to transform elements of banking into an occasional surveillance arm of the fight against crime, seems set to continue.

NOTES

1. Kerry Report, 1992, vol. 1, p. 65.
2. M.Gold and M.Levi, *Money-Laundering in the UK: an Appraisal of Suspicion-Based Reporting*, 1994, London, Police Foundation. Available from 1 Glyn St., London SE11 5RA.
3. M.Levi, P.Bissell and T.Richardson, *The Prevention of Cheque and Credit Card Fraud*, Crime Prevention Unit paper 26, 1991, London, Home Office.

10
Regulatory Strategy and International Corporate Controls

Brent Fisse

1.
INTRODUCTION

The theme of this chapter is that internal corporate controls are essential to the implementation of any legislative or regulatory program aimed at money laundering and should not be neglected at the level of international initiatives to stem the tide of money laundering. The challenge is to devise flexible and efficient legal or administrative methods of inducing effective internal controls, especially within financial institutions, and to provide useful models which can be adapted to suit the legal culture and financial system of each member country of the United Nations.

The 44 recommendations on money laundering agreed to by the member countries of the Financial Action Task Force (FATF) may be taken as a convenient starting point. These recommendations are not confined to broader issues of policy and international co-operation, they also address the need for internal corporate controls against money laundering.

1.1
FATF recommendations on internal corporate controls

The main FATF recommendations relating to internal controls are as follows:

Recommendation 12

Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self-regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering

into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions).

Recommendation 13

Financial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or a transaction is conducted if there are any doubts as to whether these clients or customers are not acting on their own behalf, in particular, in the case of domiciliary companies (i.e. institutions, corporations, foundations, trusts, etc., that do not conduct any commercial or manufacturing business or any other form of commercial operations in the country where their registered office is located).

Recommendation 14

Financial 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 the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal behaviour.

Financial institutions should keep records on customer identification (e.g. copies or records of official identification documents like passwords, identity cards, driving licences or similar documents), account files and business correspondence for at least five years after the account is closed.

These documents should be available to domestic competent authorities in the context of relevant criminal prosecutions and investigations.

Recommendation 15

Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Recommendation 16

If financial institutions suspect that funds stem from a criminal activity, they should be permitted or required to report promptly their suspicions to the competent authorities. Accordingly, there should be legal provisions to protect financial institutions and their employees from criminal or civil liability for breach of any restrictions on disclosure of information imposed by contract or by

any legislative, regulatory or ad ministrative provision, if they report in good faith, in disclosing suspected criminal activity to the competent authorities even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

Recommendation 17

Financial institutions, their directors and employees, should not, or, where appropriate, should not be allowed to, warn their customers when information relating to them is being reported to the competent authorities.

Recommendation 18

In the case of a mandatory reporting system, or in the case of a voluntary reporting system where appropriate, financial institutions reporting their suspicions should comply with instructions from the competent authorities.

Recommendation 19

When a financial institution develops suspicions about operations of a customer, and, when no obligation of reporting these suspicions exist, makes no report to the competent authorities, it should deny assistance to this customer, sever relations with him and close his accounts.

Recommendation 20

Financial institutions should develop programs against money laundering. These programs should include, as a minimum:

(a) the development of internal policies, procedures and controls, including the designation of compliance officers at management level, and adequate screening procedures to ensure high standards when hiring employees;
(b) an ongoing employee training program;
(c) an audit function to test the system.

Recommendation 21

Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Recommendation 22

Financial institutions should ensure that the principles mentioned above are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply these recommendations, to the extent that local applicable laws and regulations permit. When local applicable laws and regulations prohibit this implementation, competent authorities in the country of the mother institution should be informed by the financial institutions that they cannot apply these recommendations.

Recommendation 24

Countries should consider the feasibility and utility of a system where banks and other financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount, to a national central agency with a computerized data base, available to competent authorities for use in money laundering cases, subject to strict safeguards to ensure proper use of the information.

Recommendation 26

The competent authorities supervising banks or other financial institutions or intermediaries, or other competent authorities, should ensure that the supervised institutions have adequate programs to guard against money-laundering. These authoritiesshould cooperate and lend expertise spontaneously or on requests with other domesticjudicial or law enforcement authorities in money laundering investigations andprosecutions.

1.2
Unresolved issues of implementation for discussion

These FATF recommendations focus attention on the need for internal controlsagainst money laundering. However, they raise rather than resolve several important and difficult issues of implementation. There are at least three fundamental issues which seem to warrant discussion at this conference:

- what design criteria are relevant when assessing the adequacy of internal compliance controls and what steps should be taken to help ensure that the relevant factors are legally recognized and applied in practice?
- to what extent should control measures aimed directly at particular money laundering practices be specified in legislation or left to self-regulatory internal controls?
- who is to be held responsible for non-compliance with control standards and what mechanisms should be used to help ensure accountability?

2. CORPORATE COMPLIANCE SYSTEMS

The extent to which corporations comply or do not comply with legal standardsor prohibitions is largely a function of the adequacy of their internal control systems. In *Where the Law Ends: The Social Control of Corporate Behavior* (1975) Christopher Stone made the important point that preventing corporate wrong-doing depended on internal corporate controls and that effective legal measuresneeded to relate specifically to those controls rather than treating the corporationmerely as a "black box". Numerous commentators have since explored that basicidea and today there is a rich and diverse literature on issues of corporate compliance. However, there are relatively few commentaries on corporate compliance inthe context of money laundering. As a result, there is some danger of neglectinglessons which have emerged from other areas of corporate regulation. The aim ofthis section is to set out a framework for the development of corporate compliancesystems and then to mention some of the steps that could usefully be taken to helpensure that the key factors are recognized in law and applied in practice.

2.1 A design framework for compliance systems

Much more is involved in designing corporate compliance programs than merely having a compliance policy, "know your client" (KYC) procedures, training routines or auditing controls. This can be seen by viewing compliance controls from the perspective of corporate risk management or liability control.

Key elements of compliance from a corporate risk management perspective

The following framework is suggested by reported experience and empirical studies of corporate compliance in a variety of regulatory contexts:[1]

- Clearly-stated compliance policies which are backed and reinforced by top management
- Systematic identification and management of risks created by the company's operations
- Clear allocation of responsibility for compliance functions to specified personnel
- Readable compliance manuals setting out relevant standards (legal, corporate, and industry-self-regulating [e.g. the Basle Statement of Principles on Money Laundering]) and enforcement agency guidelines, together with operating procedures for particular units in the organisation

- Routine controls for monitoring and enforcing compliance together with safeguards for ensuring command of compliance problems by senior management
- Review of loan and other contractual documentation in order to optimise the degree of self-protection
- Control of documentation, including standard contractual terms for protection where secured assets are subject to confiscation, and procedures for avoiding the creation or retention of unnecessarily damaging or incriminating documentation
- Investigative and reporting procedures structured so as to maximise the protection possible from legal professional privilege (where that privilege is available)
- Action plans in the event of discovery of illegality and for resolution of complaints received from employees, clients, members of the public, or enforcement agencies
- Education and training of personnel
- Regular interaction with the enforcement agencies responsible for administering the relevant statutes[2]
- Liaison with insurers and promotion of favourable insurance track record

The exact mix and emphasis depends on various factors, most notably organisational structure, the particular nature of the firms' financial operations and usual client base, quality and number of personnel, the ability of top management to instil a culture of compliance without laying down detailed rules, and the extent to which achieving compliance and liability control is seen as a line rather than a staff function.

The framework above reflects a liability control, or risk management, perspective. The old-fashioned view of compliance systems revolved around the provision of legal services, whether by way of advice on particular transactions, education of personnel as to legal requirements, or periodic review of contractual and other documentation. A different approach has emerged over the past two decades. According to this approach, the basis on which compliance programmes should be built is not only provision of legal services but management of risk of exposure to liability and related losses. This approach transcends legal advice and legal auditing:

- Liability control systems justify their existence not on the quality or intensity of legal or other input by staff experts but on the contribution made to the company's profitability and reputation
- Management attitudes tend to carry more weight than the views of discrete compliance staff or outside professional advisers
- Compliance depends greatly on the day-to-day accountability of line managers and supervisors for operations under their span of command

- Legal auditing requires that compliance be monitored and the monitoring function is best undertaken as a line as well as a staff responsibility
- Suspected non-compliance is more likely to be reported upwards in an organization through managers and supervisors than via specialised legal staff
- Self-protective documentation programmes require not only legal auditing but also procedures which are ingrained down the line
- Responding to complaints from consumers, employees, or enforcement agencies is not only a defensive legal function but a feedback mechanism for managerial learning
- Education and training are more obviously achievable through routine operational procedures than by reliance merely on periodic lectures and seminars conducted by compliance staff or solicitors from law firms

2.2 Harmonising state crime-control strategies and corporate risk management

The framework set out above relates to the position of organizations subject tomoney laundering controls by the state. By contrast, the approach taken in theFATF recommendations views corporate compliance from the angle of statecrime-control strategies. If the FATF recommendations or others to like effectare to take hold in practice, then state-oriented visions of social control needto be complemented by corporate-oriented assessments of the interests andmotivations of the financial and other institutions whose support is sought in thefight against money laundering. Unless this is done, conflicts and disharmoniescan and will arise between state-oriented control measures and corporate measures of liability control.

Disharmony between state crime-control and corporate risk managementsurfaces where financial institutions are put at risk of committing moneylaundering offences if, as a result of trying to comply with money launderingcontrol obligations, they are also likely to engage in conduct which amounts tolaw to an offence. The Australian *Financial Transaction Reports Act* and relatedmoney laundering statutes illustrate this problem.

Illustrative Australian legislative disharmonies

- The “no-knowledge” provision under s 17 of the *Financial Transaction Reports Act* immunises the information contained in a suspect transaction report and not other incriminating evidence of which the defendant may quite reasonably be aware. Under s 17, a cash dealer, or an officer, employee or agent of a cash dealer, who provides information in a suspect transaction report or otherwise under s 16 is deemed not to have been in possession of that information for the purposes of the money laundering offences under ss 81

and 82 of the *Proceeds of Crime Act* 1987 (Cth). The wording of this immunity is too narrow. The information communicated under s 16 is a restatement, usually in summary form, of the information in the possession of the cash dealer or one or more of its representatives. The information that must be reported under s 16 by no means exhausts all the details that may be known to a cash dealer or its employees. The immunity under s 17 extends only to "that information", i.e. the particular information communicated under s 16(1) or (4). It does not cover other information which is not communicated under s 16 but which, independently of the details communicated in compliance with s 16, may amount to knowledge or reason to know or suspect the tainted nature of a transaction required for the mental element of the offence of money laundering. If so, the cash dealer or employee has acted with the mental element required for the offence of money laundering under either s 81 of the *Proceeds of Crime Act* (which requires knowledge or reason to know) or s 82 (which requires a reason to suspect), and could be held criminally liable under those provisions. In other words, cash dealers or their employees who act in good faith and who taken all necessary steps to comply with s 16 are not adequately protected against liability for money laundering contrary to s 81 or s 82. The undue narrowness of the immunity under s 17 could and should be overcome by amending the section. The amendment should expressly provide that there is no liability under s 81 or s 82 where the communication of information under s 16 is sufficient to convey, in summary or detailed form, the centrally material facts which suggested or indicated to the cash dealer or its representative that the money or other property involved in the particular transaction reported was derived or realised, directly or indirectly, from some form of unlawful activity.

- The structured transaction or "smurfing" offence under s 31 of the *Financial Transaction Reports Act* does not contain a safe harbour provision for financial institutions or their employees in cases where cash transactions are entered into in order to discover the identity of those engaged in the unlawful structuring of transactions. The thrust of the *Financial Transaction Reports Act* is to encourage financial institutions to assist the detection of money launderers and indeed their assistance in the difficult task of un-covering smurfing operations and the ringleaders behind them is vital. Detection is unlikely to be possible unless deposits are accepted and then checked. However, by accepting a deposit a finance company or bank then becomes a party to a transaction which may expose it to criminal liability under s 31. Immunity against liability under s 31 cannot be achieved by making a suspect transaction report under s 16. Action taken pursuant to s 16 (making a suspect transaction report or giving further information required under s 16(4)) is immunised under s 16(5). However, being a party to a structured transaction as defined in s 31 is not action taken pursuant to s 16. Nor is there any protection under the "no knowledge" rule in s 17: the immunity under s 17 is confined to money laundering offences under s 81 and s 82 of the *Proceeds of Crime Act*

(Cth). A cash dealer and its employees are thereby placed in an invidious and unacceptable position. To make a suspect transaction report is to provide incriminating evidence of one's involvement in a structured transaction and thereby to run the risk of liability under s 31. Not to make a suspect transaction report is to violate s 16 and, quite possibly, to spark a prosecution for money laundering under s 81 or s 82 of the *Proceeds of Crime Act* (Cth). The solution required is a safe harbour provision which exempts parties from liability under s 31 if a suspect transaction report is filed in relation to the transaction in accordance with s 16.

- Where a suspect transaction report is made under s 16 in relation to a transaction it will be virtually impossible later in the context of forfeiture proceedings to exclude an interest of the bank or finance company created by the transaction. By hypothesis, the bank or finance company will have had a reason to suspect the transaction and if the bank or finance company proceeds with the transaction that it has reported as suspect it runs the risk that an interest created by the transaction will be subject to a restraining order and eventually to forfeiture as well. The immunity provisions under s 16(5) and s 17 of the *Financial Transaction Reports Act* do not apply to this situation. This is highly unsatisfactory, and s 16(5) requires amendment to provide a safe harbour for financial institutions in such a position.

Legal exemptions or administrative "assurances"?

It is sometimes claimed that financial institutions and their employees have nothing to fear in situations of the kind discussed above because they will never be prosecuted if they acted in good faith. Such a posture hardly confers a legally effective immunity. One danger is that the facts of the case where a financial institution happens to be prosecuted may differ from those contemplated by the representative of the enforcement agency when attempting to give that "assurance". Another danger is that the enforcement agency may change its policy or practice from time to time. Why not give stable and legally effective guarantees of non-exposure to criminal liability through a clear and adequate statutory definition of the conduct prohibited?

Excessively limited focus of FATF Recommendation 16

FATF Recommendation 16 provides that those who, in good faith, report their suspicions about money laundering to the authorities should be protected against criminal or civil liability "for breach of any restrictions on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision".

The safe harbour proposed in Recommendation 16 is commendable but does not go far enough to avoid the conflict and disharmony discussed above. The problem is broader than that posed by laws relating to privacy or

confidentiality and exists in any situation where state control measures require action to be taken by a financial institution but where compliance with that obligation is likely to expose the institution to criminal liability, liability to civil penalties or forfeiture of a legitimate interest in tainted property.

2.3 Embedding compliance precepts

If it is agreed that compliance with international money laundering control standards does depend heavily on whether those standards can be translated into effective compliance controls within financial institutions and other organizations, then what can be done at the international level to assist that process?

Several initiatives within member countries of the UN could be encouraged and the lessons flowing from the pursuit of compliance within organizations could be collected and made available for ready distribution:

- National money laundering control statutes could spell out both the need for financial institutions to have responsive internal control systems in place and the importance attached to that objective.
- A design framework for compliance systems could be set out in regulations or in an explanatory memorandum accompanying the relevant local money laundering legislation.
- Details of the content of compliance systems adopted by a representative range of financial institutions, together with case studies of compliance initiatives in a variety of firms, could be compiled by enforcement agencies together with recommendations about the features considered to be the most conducive to effective compliance. Comparative descriptions and analyses of compliance systems used by financial institutions in different countries could also be developed under the auspices of e.g. ISPAC.
- Enforcement agencies could be expressly encouraged to stress compliance systems in their surveillance and negotiations with financial institutions and to include specific compliance-related provisions in the terms of settlements entered into with those institutions as a result of enforcement action. Details of such settlements could be filed with and distributed through an international clearing-house.
- The legal framework for dealing with institutions found to have been implicated in unlawful money laundering activities could be geared so as to focus more on internal controls and the need to assess the need for revision and/or supervision. Corporate probation is one mechanism suitable for this purpose; the statutory injunction is another. The empowering provisions could expressly authorise the use of probation and injunctions as a means of spurring better internal controls and achieving their implementation.

- Self-regulatory initiatives in relation to the design of effective compliance programs could be further encouraged within the banking and finance industry and fostered by means of a compliance clearing-house so that the fruits of such activity in one country can readily be shared with enforcement agencies and financial institutions in other member countries of the UN.

In short, the policies expressed in the FATF Recommendations raise practical questions of implementation at the micro-level of the organizations where money laundering activities take place around the world. At that level, the concerns and the experience are specific and localised but, just as an international and comparative analysis of the behaviour of firms is widely thought to be essential in the context of economics, an international and comparative analysis of the conduct and compliance methods of firms seems essential in the context of money-laundering.

3. CONTROLS AIMED DIRECTLY AT MONEY LAUNDERING PRACTICES—ENFORCED SELF-REGULATION AND TECHNOLOGICAL CHANGE

As evidenced by the FATF recommendations, money laundering control measures require that financial institutions take steps (e.g. reporting suspect transactions) to block money laundering. An important question of regulatory design is the extent to which the standards imposed under such control measures should be prescribed in detail in the scheme of regulation or left more to the institution to work out as a matter of self-regulation. The FATF recommendations understandably give each member country considerable leeway to devise an approach consistent with its own regulatory culture. The discussion below outlines some of the directions which are open and which seem worth further consideration in an international forum.

3.1 Enforced self-regulation

The enforced self-regulation model advanced by John Braithwaite[3] is one interesting possible direction to be considered. This model, which is of general potential application, has recently been extended by Braithwaite to the field of money laundering.[4]

The first postulate of the model is that financial institutions differ widely, so widely that universalistic command and control prescriptions are bound to be inefficient for many organizations:[5]

> All banks are different They deal with different sorts of clients. They have different histories of how they have successfully solved their problems and

> what has failed to work for them in the past. In addition, they have disparate corporate cultures. Consequently, a strategy for detecting money launderers that works well in Bank A may fail in Bank B; a strategy that has a low cost for A may have a high cost for B. The problem with government command and control regulation is its commitment to the public law principle of consistency; it would be unjust to regulate A more aggressively than *B* unless A has engaged in conduct that makes it deserving of extra intervention. Therefore, the same regulatory requirements are imposed on Banks A and B, irrespective of their likely effectiveness and costs in the context of those organizations.

A second postulate is that it is possible to avoid going to the opposite extreme of self-regulation. Financial institutions can be given the same performance objectives and required to have their own particularistic plan for achieving those objectives efficiently:[6]

> Once the bank has come up with a money laundering control plan that satisfies the government that it is likely to meet its objectives or standards, the state motivates the bank to enforce its plan through the threat of enforcement action against the bank for failure to do so. The idea, therefore, is privately written and publicly ratified rules. These rules are then primarily privately enforced, with secondary public enforcement where private enforcement fails. It is thus an attempt to improve on the inflexibilities and costs of command and control regulation while responding to the naivety of trusting business to regulate itself.

The enforced self-regulation model holds much appeal in the abstract but in practice it can be difficult to work out exactly how far it should be taken or indeed whether it is a practical option. Some of the more difficult issues posed by the model in the context of money laundering are canvassed below.

3.2
Suspect transaction reporting

The model of enforced self-regulation envisaged by Braithwaite for suspect transaction reporting envisages that financial institutions would be required to spell out the particular way in which they would go about detecting suspect transactions and ensuring that staff acted according to that plan:[7]

> This enables the bank to design rules that are in tune with what works within their corporate culture and that will impose minimum costs given the way they are set up to do business. Trust-based corporate cultures may rely more on work groups meeting together to share “know your customer” suspicions and leads that might detect the laundering of proceeds of crime.

> Conversely, rule-based corporate cultures with a strong educative emphasis may rely on very detailed rules for reporting specified types of transactions where those rules are the subject of elaborate corporate training programs. Rule-based corporate cultures with a strong disciplinary emphasis may rely less on in-service training than on a corporate track record for immediately firing employees who have failed to teach themselves the rules and to implement them.

This approach is seen as more conducive to the protection of privacy as well as more efficient in terms of corporate impact:[8]

> Tailor-made money laundering detection plans might not only be less costly and more effective in terms of the detection of money launderers, but also more effective in preventing unnecessary invasions of privacy. Instead of reporting all suspicious transactions to the state so that huge numbers of citizens have their affairs listed on criminal intelligence data bases for quite insufficient reasons, banks can design their own procedures for internal investigations of suspicious transactions in their money laundering prevention plans. These procedures would be approved by the state, thereby limiting the number of reportable cases to those which continue to be suspicious after the agreed upon in-house tests have been applied. More citizens could have knowledge of their financial affairs confined within the walls of the banks to which they entrusted that knowledge.

Enforced self-regulation would not preclude small institutions from developing their own tailor-made systems: a "money laundering control systems consulting industry" could be expected to emerge. Consultants would supply "a variety of off-the-shelf control systems, the choice from competing systems being guided by the size, history, customer base, and corporate culture of the particular bank.[9]

Braithwaite contends that there would be innovation, not only in the software of detection diagnostics and in "know your customer" information processing, but in performance evaluation as well:[10]

> Banks could be required to undertake triennial reviews of how many true and false money launderers they had detected as part of their approved control plan. Moreover, the reviews could diagnose the aspects of their plans that were responsible for the true positives versus the false positives as well as the characteristics of false negatives—customers who were detected to be money launderers by some means other than the money laundering control plan. Performance indicators for such evaluations could relate not only to detection, but also to cost and privacy-protection indicators. Indeed, true-positive/false-positive ratios might be designed to incorporate all three of these performance criteria.

The approach suggested is a welcome contrast to the orthodox and rarely tested assumption that suspect transaction reporting is in fact effective and worth the cost it imposes on financial institutions and the law enforcement agencies who subsequently follow up on the reports. However, it is doubtful whether enforced self-regulation should extend that far.

One feature of Braithwaite's suggestion is that the onus and expense of the research and development is cast on to organizations without any apparent prospect of recoupment apart from the possible savings made by reduced exposure to loss through money laundering. Not all will agree with that position. It is unclear why the social cost of improving suspect transaction controls against money laundering should be imposed mainly on financial institutions rather than spread more through general taxes in the same way as many countries spread the costs of improving stolen vehicle tracking systems or enhancing surveillance technology for detecting terrorists or plane hijackers.

A more fundamental question, and one suggested by Braithwaite's plea for empirical testing, is whether suspect transaction reporting should be given the major role it is supposed to play in jurisdictions where this control measure has been adopted. First, it is difficult to distinguish between objectively suspect transactions and those which, short of the threshold, are merely suspected. Secondly, the suspect transaction test is narrower than that of "unusual" transactions and may easily exclude highly useful intelligence. Unusual transactions may provide critical investigative linkages, which partly explains why FATF Recommendation 15 envisages that financial institutions will keep a watch out for "unusual" patterns of transactions. Thirdly, the recent UK study by Michael Levi[11] indicated a very low strike-rate—around one *arrest* of a suspected drug trafficker per 200 suspect transaction reports. Fourthly, the sheer number of transactions handled by most financial institutions means that any checking of particular transactions is likely to be cursory and quite possibly unreliable.

These concerns have led Levi to suggest that the emphasis should not be on suspect transaction reporting but on the use of knowledge based systems, neural networks and artificial intelligence means of detecting potential cases of money laundering. If that direction be taken, then one implication is that finan-cial institutions will not be required to devise their own detection and selfevaluative programs but will instead be obliged to provide data in standard formats so that the intelligence can readily be captured and analysed by a central enforcement agency. This move away from suspect transaction reporting and towards cyberwatch systems is perhaps inevitable—the more automated the banking and financial system becomes, the less face-to-face contact between clients and employees and the greater the holes in the detection net unless client information is electronically scanned for abnormal patterns and connections. This growing reality has been recognized in Australia in the context of significant cash transactions reports and details of all wire transfers—the data is automatically

sent by the banks to AUSTRAC for checking and the checking process involves a variety of pattern matching and other computer-based detection routines.[12]

3.3 Anti-smurfing deposit aggregation requirements

Internal controls by financial institutions against structured transactions (smurfing) work on the basis of checks for cash deposits by a customer which in aggregate exceed the threshold amount at which a single cash transaction must be reported. One major difficulty is to indicate to financial institutions the time-frame within which they are obliged to aggregate cash deposits without also letting smurfs know what adjustments they need to make to avoid getting caught by the aggregation tests. This problem, which haunts any cash transaction reporting system, is illustrated by the Australian anti-smurfing provisions. The smurfing offences under s 31 of the *Financial Transaction Reports Act* 1988 (Cth) are defined essentially in terms of the test whether, given the nature of the transactions, it is "reasonable to conclude" that a dominant purpose of the transactions was to evade the reporting obligations under the Act. The test under s 31 is not related to any given period during which financial institutions are expected to aggregate transactions involving a particular customer. There is no specific obligation under the Act to aggregate deposits or other cash transactions, Instead, "the aggregated value of transactions" is one of the indicia (see s 31(1)(b)(i)(B)) which the trier of fact is to consider when applying the "reasonable to conclude" test.

The *ex post facto* nature of the test of liability under s 31 puts banks and other financial institutions in a precarious or impossible position. The "reasonable to conclude" test implies that financial institutions are under an obligation to aggregate cash transactions yet they are not in a position to know what that obligation requires of them at the time when the transactions take place. Worse, the test is not applied until the matter is determined by the trier of fact. Financial institutions thus remain under an obligation to aggregate until such time as the matter is decided in a prosecution or civil proceeding. So open-ended an obligation to aggregate is not merely vaguely defined but quite impractical. To comply with it, conceivably a bank would need to aggregate deposits on a perpetually rolling basis, perhaps for years after an initial transaction took place. If the legislation does not require banks to go to such extreme lengths, where is the line to be drawn?

It is also unclear whether the required standard of compliance is the same across the wide variety of organizations and bodies subject to s 31, or whether it varies depending on the technology available to the particular organization. What exactly are banks and other cash dealers supposed to do to keep track of deposits or other transactions at their various branches? A major interstate or international bank may have a sophisticated computer network which makes the task of aggregation a relatively simple one, whereas a small finance

company may lack any corresponding facility. If, for example, a bank has a computer-based tracking capability that enables it instantaneously to aggregate all deposits made at any branch within, say a 24-hour period, then it may well be "reason-able to conclude" on the basis of the information available to that bank that the sole or dominant purpose of the customer was to evade the reporting requirements. On the other hand, if a bank does not have such a computer-based capacity, perhaps it is unreasonable to arrive at the same conclusion. Section 31 does not resolve the most critical question here, which is whether or not banks are expected to install systems that will enable aggregation of deposits made at all branches, instantaneously or within say a daily or other period. Many financial institutions in Australia as elsewhere do not presently have the capacity to aggregate deposits at all branches even on a daily basis. If they are expected to acquire some greater capacity, it seems harsh to make them run the gauntlet of an ill-defined penal provision. Moreover, installing adequate systems takes time and systems cannot sensibly be installed until it is known what exactly the expected standards of aggregation are.

One possible solution would be a system, developed in conjunction with the banking and finance industry, under which different aggregation periods are used by different financial institutions at different periods arranged on a secret roster basis[13]. Financial institutions would then know exactly where they stand, yet smurfs would not be presented with aggregation rules which could easily be circumvented. Such a system supposes that banks and other financial institutions have the technical capability to alter the time settings of their aggregation programs periodically at low cost. It also assumes that the roster arrangements could in fact be kept secret from the smurfing underworld.

Another possible approach is via enforced self-regulation, with each bank determining its own aggregation rules—smurfs would not be faced with a standard aggregation period which could easily be circumvented but with many unknown and different aggregation periods.[14] This approach assumes that the aggregation period selected by a given bank could in fact be kept secret from smurfs. It does not necessarily assume a technological capacity to change the aggregation periods periodically at low cost. However, such a capacity might well be essential to reduce the risk of disclosure.

The only approach capable of avoiding the otherwise high risk of the aggregation periods being leaked to smurfs is a centrally controlled system under which aggregation periods for each and every financial institution are selected randomly by a computer program in such away that no human agent has access to the random sequence. As in the case of suspect transaction reporting, the solution which may ultimately be arrived at could well be driven much more by technology and software innovation than by the regulation v self-regulation debate.

4. ACCOUNTABILITY FOR NON-COMPLIANCE WITH MONEY LAUNDERING CONTROLS

As international initiatives against money laundering increasingly move beyond the macro-level and focus more on the operational or micro-level of securing compliance by financial institutions and the commercial sector generally, an important question is how accountability is to be imposed in the event of non-compliance. FATF Recommendation 7 exhorts member countries to rely on corporate criminal responsibility as well as individual criminal responsibility and Recommendation 8 urges that consideration be given to using a variety of sanctions including civil penalties. Even with such tools available, however, it is often difficult to impose accountability for non-compliance, especially in a context like money laundering where the main participants are often large organizations. This problem invites further consideration because, unless it is resolved in a practical way, efforts to control money laundering may easily break down. Two major problems of accountability for corporate crime are typical in modern societies:[15]

- There is an undermining of individual accountability at the level of public enforcement measures, with corporations rather than individual personnel frequently being made the prime target of prosecution. Given the practical difficulties of unravelling individual accountability within organizations, enforcement agencies and prosecutors are inclined to take the short-cut of proceeding against corporations rather than against their more elusive personnel. Individual accountability thus tends to be displaced by corporate liability, which serves as a rough-and-ready catch-all device.
- Where corporations are sanctioned for offences, in theory they are supposed to react by using their internal disciplinary systems to sheet home individual accountability, but little or no attempt is made to ensure that such a reaction occurs. The impact of enforcement can easily stop with a corporate pay-out of a fine or monetary penalty, not because of any socially justified departure from the value of individual accountability, but rather because that is the cheapest or most self-protective course for a corporate defendant to adopt.

These problems are far from trivial. Individual accountability has long been regarded as indispensable to social control, at least in Western societies. The danger of "headlessness" has often been stressed, as by John Stuart Mill in *Considerations on Representative Government:*[16]

> As a general rule, every executive function, whether superior or subordinate, should be the appointed duty of some given individual. It should be apparent to all the world who did everything, and through

> whose default anything was left undone. Responsibility is null when nobody knows who is responsible…

Introducing corporate criminal responsibility, as envisaged by FATF Recommendation 7, hardly goes far enough. The prime issue is not whether corporations can be held responsible but whether it is possible to secure an effective mix of individual and corporate responsibility.

Likewise, civil penalties do not resolve the basic issue of accountability. Useful as it may be to have this option available as well as criminal prosecutions and civil remedies, difficulties still stand in the way of upholding individual accountability and achieving a workable and effective balance between individual and corporate liability for penalties.

Nor is forfeiture well-suited to the challenge of securing accountability. The sanction of forfeiture is largely monetary in effect and, where imposed on financial institutions, the impact is likely to be borne by shareholders rather than by the managers responsible.

4.1 Extending accountability via corporate discipline and disclosure

If accountability for money laundering is to be taken seriously, one starting point is the following rule of action:

> *seek to publicly identify all who are responsible and hold them responsible, whether the responsible actors are individuals, corporations, corporate subunits, gatekeepers, industry associations or regulatory agencies.*

This rule of action could conceivably be implemented under an enforcement strategy which, in addition to relying on criminal or other public enforcement actions against individual suspects, harnesses the private justice and internal control capacities of organizations. The central idea is that corporate liability be used as a lever for achieving individual accountability at the level of internal corporate discipline or disclosure. As the Law Reform Commission of Canada has pointed out, corporate liability is potentially an efficient dispenser of individual accountability:[17]

> In a society moving increasingly toward group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialize through the conduct of people within the organization. Rather than having the state monitor the activities of each person within the corporation, which is costly and raises practical enforcement

difficulties, it may be more effi cient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level.

The aim is thus to find a way of imposing individual accountability across a far broader range of cases than is feasible given the limited resources of state enforcement agencies. The sanctions available through private justice systems (e.g. dismissals, demotions, shame, exposure) may be less potent than jail or community service, but there is nonetheless a case for imposing weaker sanctions on many personnel rather than resorting to stronger sanctions against very few as is now common.

There are various possible ways in which such an approach could be implemented. For example, where the conduct elements of an offence are proven to have been committed by or on behalf of a corporation, the court, if equipped with a suitable statutory injunctive power, could require the company (1) to conduct an enquiry as to who was responsible within the organization and outside it, (2) to pin-point those responsible and to take disciplinary action against all responsible parties over whom the organization had such power, and (3) to return a report detailing the lines of responsibility and the action taken. If the corporate defendant returned a report demonstrating compliance with the above requirements then corporate criminal liability would not be imposed. If the company inexcusably failed to comply then both the company and its top managers[18] would be criminally liable for their failure to comply with the order of the court; the range of sentences for corporate defendants might well include probation, court-ordered adverse publicity, and community service. The same approach could also be implemented by means of undertakings or consent agreements entered into as a result of enforcement negotiations and settlements.

More concretely, it is instructive to consider what might have been done in the case of BCCI to achieve accountability under such an approach.

4.2
BCCI and accountability[19]

The systematic culture of money laundering at the highest levels within BCCI and the consequential issue of accountability has not been addressed adequately by the few prosecutions which have occurred.

A more effective approach at the time of the first prosecutions would have been to hold BCCI civilly liable for having engaged in money laundering and to proceed on that platform to uncover the responsibility of those implicated in the web of illegality. Top management of BCCI would have then been brought in and required by the court to complete a full internal investigation of money laundering in all the bank's international operations, not just those in the country of the detected offence. Preferably, this would have been conducted with the assistance of an *independent* outside accounting firm.[20] More critically, the court would have required specified top management officials to certify (under threat

of imprisonment for contempt) that the bank had disclosed all of its international money laundering activities. Perhaps the top management team might then have refused to cooperate:[21] the extent and seriousness of BCCI's money laundering was so breathtaking that no top management officer might have been prepared to put their neck in this disclosure noose; alternatively, a tactical decision might have been made to resist disclosure on the basis that the court lacked jurisdiction to obtain details relating to the bank's operations abroad. Such a response would have sounded alarm bells.

A full-scale investigation would have then swung into action. This inevitably would have turned up insiders who were willing to reveal the complex story of the illegal bank within a bank (as they subsequently did when the Bank of England and the US Congress finally conducted a wider-ranging investigation in 1991). As soon as the wider investigation showed that the reason for the refusal to cooperate with a self-investigation report was the enormity of the top management fraud, one of the governments concerned could then have gone over top management's head to the shareholders—the ruler and government of Abu Dhabi. This would have been followed by inexorable political pressure for government to government demands for cooperation, with full disclosure of the malfeasance of the bank.

Whether by voluntary disclosure, by government investigation or by intergovernmentally-forced disclosure, the court would have produced a document revealing that there was a secret bank within a bank at BCCI that engaged in massive fraud itself and that moved money for other major international fraudsters, for the very biggest drug empires, for terrorist groups, for Manuel Noriega and Suddam Hussein, for covert nuclear programmes, and for illegal arms sales to Iran.[22] The court would have learned that by 1988 the then CIA director's nickname for the bank—the "Bank of Crooks and Criminals International"—had wide currency. It would have become clear to the court that a possible reason for this extraordinary nest of international criminality was that the bank was set up in such a way that it had no home regulator. It was effectively offshore in every country in which it operated. In response, the court could have opened up a more searching enquiry, conducted by honest elements within the bank working with outside consultants, to reveal to the public the full story of the regulatory failures that had occurred. What were the loopholes in the 1983 Basle Concordat on shared international regulation of banks that allowed BCCI to be effectively offshore everywhere?[23] Why did BCCI provide free travel to the Secretary-General of the United Nations, to Jimmy Carter, and more extravagant benefits to many other prominent international political figures?[24] How should the international banking system and the international banking regulatory system be reformed to prevent latter-day BCCIs from springing up?

If responsibility for corporate money laundering is to be imposed at all effectively, the courts need to impel the publication of accountability reports which document the responsibility of all who are responsible and which examine or at least draw attention to the institutional responses likely to be

necessary to thwart repetition of offences. In a case like that of BCCI, where the Governor of the Bank of England was among those partly responsible,[25] the court would have a role that can stand independently above the failings of the international club of regulators. Some regulators have claimed that they had to hold back in order to prevent a run that would harm depositors. Critics have responded that their inaction brought more innocent victims into the web and that "the Bank [of England] might have been more concerned about Middle East relations than protecting depositors".[26] Stronger critics allege that the key players in the central banks or finance ministries of a dozen nations took bribes from BCCI.[27]

Faced with cases of the enormity of BCCI, the criminological tradition has been to evince a policy analysis of despair. Nikos Passas has provided an incisive analysis of the reasons for pessimism about controlling such corporate crime.[28] Passas identified four particularly intransigent difficulties in the BCCI case:

1. *Inter-Agency Conflicts, Miscommunications and Inertia.* The most critical failure here was that the CIA's 1986 report on the criminality of BCCI was distributed to some but not all federal enforcement agencies (critically, not to the FBI and the DEA). Investigations were compartmentalised in a way that missed the big picture of systemic criminality. So the Bank of England was naively allowed to believe that BCCI had a few rotten apples that were being removed from the barrel.
2. *Inadequate Resources.* An integrated investigation would have been impossibly costly for most enforcement agencies in most countries.
3. *BCCI's Power.* Partly this was the power of cultivating some of the most influential political figures in the world. But it was also the power of harbouring the secrets of the CIA, British, French, and Swiss intelligence and other such clients who had used the services of the bank. There was also the power of the major shareholders, the Sheik of Abu-Dhabi and his government. Ultimately, the most persuasive power was the fear of disrupting Western-Arab relations and even of touching the White House through opening up the bank's role in the Iran-contra affair.
4. *Legal Restraints.* Secrecy provisions in many national banking and tax laws and the difficulties of extraterritorial enforcement were an effective last line of defence for the bank.

There is no simple panacea to these massive difficulties, but they can and should be tackled.

- Points 1 and 2 above can be tackled by motivating the defendant corporation to pay for independent counsel to pull together all the threads of the entire tapestry of responsibility. In the BCCI case, the desire to prevent a sudden collapse of all the bank's operations or withdrawal of all the bank's operating

licences as a result of court-ordered publicity might have been a potent motivation.

- Point 3 can be tackled by separating the powers of courts from those of the state in a functioning democracy: an independent judge has less reason to worry about what the White House, John Major, the CIA or the Bank of England thinks than does the head of a US government agency.
- Point 4 can be tackled by not relying directly on national laws to empower investigators; it is possible to rely on the self-investigative and internal disciplinary capacities of the defendant corporation. These capacities are no more limited by the sovereignty of national law than is the corporation's capacity to commit transnational crime. If the corporation has the will to find out what happened through its international transactions, it generally has the capacity to do so.

A core problem apparent from the BCCI case is that accountability for corporate crime has yet to be conceived and structured in such a way as to encourage courts to pursue the issue of allocation of responsibility in complex cases and to achieve the wide measure of disclosure and accountability that is often required. Unless efforts towards reconceiving and restructuring the role of courts in this area are made, it is difficult to see how, as a practical matter, the international control strategies which are being developed against money laundering can be enforced in the worst corporate cases of non-compliance where effective enforcement is most needed.

Upholding accountability is hardly the only major problem which arises in controlling international money laundering where financial institutions are implicated. The limited point raised here is that it is one major issue which has yet to be resolved.

5. CONCLUSION: CONTROLLING CORPORATE MONEY LAUNDERING

Internal corporate controls are essential to the implementation of any legislative or regulatory program aimed at money laundering and warrant further consideration at the level of international initiatives against money laundering. Although it is tempting to focus on more overarching issues of international enforcement, the view expressed in this paper is that effective strategies for controlling money laundering require attention to all major problems of implementation including the difficulties of achieving compliance within financial institutions.

This chapter has set out the following items for further consideration and debate:

a framework for assessing the adequacy of internal corporate compliance controls and suggestions for promoting the legal recognition and application of key compliance precepts;
a perspective on the regulation v self-regulation debate through the prisms of enforced self-regulation and technological change, with particular reference to suspect transaction reporting, and aggregation of deposits for the purpose of countering smurfing;
a review of the importance of accountability for corporate non-compliance with money laundering control standards, together with suggestions as to how accountability for corporate money laundering could conceivably be achieved, even in such daunting cases as BCCI.

NOTES

1. See American Bankers Association, *Currency Transaction Reporting*, 1988, Bank of Boston Corporation, *Bank Secrecy Act: Overview*, J.Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety'*, J.Braithwaite, "Taking Responsibillty Seriously: Corporate Compliance Systems" in B.Fisse and P.French, eds. *Corrigible Corporations and Unruly Law*, ch. 3; B.Fisse and J.Braithwaite, *The Impact of Publicity on Corporate Offenders*, 1983; W.Adams, "The Practical Impact of Criminal Money Laundering Laws on Financial Institutions" American Bar Association, 1990, *White Collar Crime National Institute* 599; B.Fisse, D.Fraser and G.Coss, eds. *The Money Trail*, chs. 16–19; J. Drage, "Countering Money Laundering: The Response of the Financial Sector", 1993, 1(2) Hume Papers on Public Policy 60.
2. See generally J.A.Sigler and J.E.Murphy, *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion*, 1988.
3. J.Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control", 1982, *80 Michigan Law Review*, p. 1466.
4. J.Braithwaite, "Following the Money Trail to What Destination?", 1933, *44 Alabama Law Review*, p. 657.
5. Ibid, p. 664.
6. Ibid, p. 664.
7. Ibid, p. 665.
8. Ibid, p. 666.
9. Ibid, p. 666.
10. Ibid, p. 667.
11. *The Reporting of Suspicious Money-Laundering Transactions*, 1994.
12. See AUSTAC, *AUSTRAC Papers 1992*. AUSTRAC operations are reviewed in Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Checking the Cash*, 1933.
13. B.Fisse, D.Fraser and G.Coss, eds. *The Money Trail*, p. 186.
14. J.Braithwaite, "Following the Money Trail to What Destination?", 1993, *44 Alabama Law Review*, pp. 657 at 665.
15. See further B.Fisse and J.Braithwaite, *Corporations, Crime and Accountability*, 1993.

16. J.Gray, ed., *John Stuart Mill: On Liberty and Other Essays*, p. 393.
17. Canada, Law Reform Commission, *Working Paper 16, Criminal Responsibility for Group Action*, p. 31.
18. As a condition of an injunction or a compliance agreement, particular managers (including senior managers) could well be assigned primary responsibility for ensuring compliance; see J.Geraghty, "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing", 1979, 89 *Yale Law Journal* pp. 353 at 372; Canada, Law Reform Commission, *Working Paper 16, Criminal Responsibility for Group Action*, p. 35.
19. This account is adapted from Fisse and Braithwaite, *Corporations, Crime and Accountability*, pp. *222–1*.
20. In fact, The Bank of England subsequently did require Price Waterhouse to conduct an "independent" investigation. But Price Waterhouse was far from independent. It was BCCI's sole auditor since 1987: *Australian Financial Review*, 17 Sept. 1991, p. 14; see also *Financial Times*, 15 May, 1992, p. 8.
21. In fact, however, what BCCI top management did was to cooperate with the investigations that did occur, while using a variety of stalling tactics.
22. In 1986, the CIA advised several other US government agencies that BCCI was a criminal organization *(Financial Times*, 2, August, 1991, p. 6). When Benazia Bhutto became Prime Minister of Pakistan in 1988, she was so advised by "friends in America" *(Wall St. Journal, 5* August, 1991, All).
23. *Financial Times, 22* July, 1991, p. 12. The Basle Concordat was amended with a view to having large international banks regulated on a worldwide basis by a single bank regulator *(Financial Times, 1* July, 1992, p. 3).
24. *Financial Times*, 27–28 July, 1991, p. 4; Kerry Report, *The BCCI Affair*, p. 11.
25. See "Senate Accuses Bank and Government over BCCI" *Guardian Weekly*, Oct. 11, 1992, p, 18.
26. *Financial Times*, 12, March, 1992, p. 8.
27. P.Truell and L. Gurwin, *False Profits*, p. 168.
28. N.Passas, *Regulatory Anaesthesia or the Limits of the Criminal Law? The Prosecution of BCCI for Money Laundering in Tampa, Floride*, 1993.

Afterword
Giorgio Giacomelli

1.
PURPOSE OF THE CONFERENCE

The purpose of the Conference at Courmayeur was a question far more complex than one would at first believe. There was the need to develop more effective, ideally global, strategies to prevent and control money laundering and the use of the proceeds of crime. But the task before the conference was even greater, because what was necessary was not only to develop better solutions but to reassess the very nature of the problem. Indeed, the conference represented a stepping stone in the way we respond to the problem and in the new way we view what has hitherto been seen as unisectoral issue. Money laundering and the use of the proceeds of crime are activities deeply entrenched in the major political, economic and social concerns of a new era The event was an opportunity to reinforce the core of expertise needed to carry this message to the rest of the world.

2.
MONEY LAUNDERING IN PERSPECTIVE

The problem is not by any means new, but it has undergone a significant change. At a time of historical transition, economic ties are reinforcing the worldwide network of communication and exchange. The merits of economic interdependence have been recognized for years but the dangers inherent in the ongoing process of change are only now coming to light. The financial activities which serve as the focus of our discussions constitute one of the most endemic manifestations of post cold war economic integration.

In addition to newfound interdependence, there is, of course, a second factor which has altered the context in which we must view the money laundering issue. In a substantial turnaround from the inward-looking policies of earlier decades, governments, particularly in the developing world, are liberalizing financial markets, dismantling trade barriers, privatizing state-owned industries, lifting restrictions on foreign investments and shifting to full currency convertibility.

The economies in transition have also, by definition, taken up the cause of economic reform This welcome yet turbulent process of global change has inadvertently left the international system vulnerable, more so than ever before, to criminal manipulation.

And not only that The process has also given rise to a heightened need for financing at all levels of international society. Indeed, it should be emphasized that while in the field of crime prevention and criminal justice, qualifiers like "dirty", "illicit" and "illegal" often precede the word "money", in the end, mere words cannot hide a simple fact: money is money. The target manipulation; our efforts to control the problem must focus on the actors responsible for the crime. But doing so is complicated by several factors. Take secretive banking laws, for example, or better yet, safe-money havens. On the other hand, witness some of the riskiest steps taken by government in response to today's heated competition for international finance when financial controls are relaxed and safe-money havens established. Clearly, in this context, we are not confronted with a purely criminal issue in the traditional sense, but rather, one which spans the horizon of concerns for public welfare. The risks taken by governments in this regard could be at least understood if the potential benefits were not so utterly overshadowed by the costs to financial stability, as it is here where the economic reform process in the international system runs head-on into the threat of criminal manipulation.

3.
THE EFFECTS OF THE PROCEEDS OF CRIME

Crime syndicates are active participants in what constitutes a second-hand sale of global proportions. Whether through the public sale of assets by government or the private sale in emerging capital markets, criminal forces are freer than ever before to establish roots in the legitimate economy.

The polluting effect of illegal revenues on national economies comes into play when we consider that, once established in legitimate enterprise, criminal entities can expand their activities in many ways. Among other options, they can transport illicit goods—like illegal arms—under the guise of legal merchandise. They can create new markets for wholesale or retail distribution of illicit drugs. They can recycle an even greater volume of illicit revenues through their expanding mimetized networks.

Aside from the direct infiltration of crime into national economies, the money laundering problem can also affect governments' ability to pursue fiscal and monetary policy. There is some degree of similarity between the money-laundering issue and the recent debate about the merits of financial derivatives—that is, swaps, options, and futures. One concern raised has been whether these financial instruments dilute the intended impact of monetary policy. The validity of the arguments raised are not of relevance today; what is important is the concern for the effectiveness of economic policy at a time when there are many

contending financial forces—increasingly difficult to anticipate and control—at play in the world economy.

When significant portions of financial assets are controlled by crime, some observers may rightly question the accuracy and utility of broad economic indicators which have been traditionally relied on to shape economic policy. After all, factors which affect the financial decisions of criminal organizations may be different from those which influence decision-making in the legitimate economy; rather than acting according to expected inflation rates and long-term bond yields, for example, the movement of criminal capital may on some occasions be influenced more by expected regulatory changes and other legal considerations. In Russia, it is in this light significant, that crime syndicates appear to have already infiltrated the country's incipient financial system. According to the Russian Center for Strategic and Global Studies, more than US $12 billion disappeared from the Russian banking system in 1993 alone into the pockets of criminal organizations.

One consequence of diluted monetary control is tarnished financial credibility. For countries in transition, for developing and industrialized countries alike, monetary credibility is at stake when crime can have its way in the financial sector. At a time when private sector investment decisions, international lending policies, and official assistance levels can be influenced by the credit-worthiness and perceived credibility of recipients, criminal capital can once again have a poisoning influence on public welfare. Attracting the proceeds of crime may appear harmless, even beneficial in the short run, but eventually decreased financial control will inevitably undercut financial credibility and those benefits will be more than offset by reduced access to legitimate sources of finance. One increasingly prominent criterion for international development assistance is sound macroeconomic management; in this regard, developing countries—as well as the economies in transition—must not fail to take a long-term view of their development priorities and strive to deflect the infusion of criminal proceeds away from their economies.

4.
ACTION AGAINST MONEY LAUNDERING

Final success in the fight against money laundering requires a greater emphasis on preventive measures. On the other hand, without a holistic perspective, preventive efforts and priorities will be limited to circles of legal and financial interest whereas they should be framed in the context of economic, social and political development. The practice of identifying a crime and then implementing the necessary legal measures is insufficient in the case of financial crime. The cat and mouse approach may work for easily identifiable offenses—but the one before us is nothing of the sort.

The process of rethinking the problem is already in motion. Not too long ago, money laundering and the use of the proceeds of crime were handled at a much more theoretical level, with empirically-based strategies a rare thing. The conceptual evolution of the problem gave rise to a second phase which continues to the present. This phase has been characterized by legislative consolidation, with international norms developed and agreed. Some of the milestones of this phase include the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime concluded in 1990, and the Global Programme of Action adopted by the General Assembly also in 1990. Also of relevance is the work of the Commission on Crime Prevention and Criminal Justice in its three sessions, and last, but surely not least, the forty recommendations in the report of the Financial Action Task Force of February 1990.

What is required, is a third phase which involves the development of collective safeguards against money laundering and related crimes. With regard to economies in transition and developing markets, we must embark on a revitalized advocacy campaign emphasizing prevention of—not only reaction to—money laundering and related crimes and on a substantial programme of technical assistance and support. Earlier phases of conceptual consolidation have made great headway in developing shields against such crimes, and the governments of new and aspiring entrants to the world financial system should be firmly encouraged and helped to utilize them, as there is, in fact, a lingering uncertainty about the precise impact of regulatory controls on the ability to attract foreign capital. Experience should be widely exchanged so that hesitant governments are convinced that the proceeds of crime impact adversely on economic welfare.

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