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Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions

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UNLAUNDERING DIRTY MONEY ABROAD: U.S. FOREIGN POLICY AND FINANCIAL SECRECY JURISDICTIONS*

ETHAN A. NADELMANN**

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I. INTRODUCTION¹

Virtually every law enforcement agency in the United States has accepted the view that "going after the money" is the most effective way to catch and hurt organized crime. Numerous rationales underlie this now common wisdom. The most basic of these is that insofar as criminals, and particularly organized criminals, act as they do for the money, the best deterrent and punishment is to confiscate their incentive. A second rationale is that, while the higher-level and more powerful criminals rarely come into contact with the illicit goods, such as drugs, from which they derive their profits, they do come into contact with the proceeds from the sale of those goods. That contact often provides a "paper trail," or other evidence, which constitutes the only connection with a violation of the law. A third rationale is that confiscating the proceeds of criminal activities is a good way to make law enforcement pay for itself.

The significance of connecting a criminal with the proceeds of his illicit activities is thus twofold: it establishes a violation of the law for which he can be prosecuted and imprisoned; and it identifies his assets so that they can be forfeited to the government. The criminal's challenge is to "launder" his "dirty money" so that it appears clean and is thereby useful to him. The law enforcer's challenge is to "unlaunder" that money and thereby expose its connection with a criminal activity.

Much has been written during the last few years about the techniques used to launder money and the variety of institutions that engage in such chicanery. A prominent aspect of the money

1. In preparing this paper, the author benefitted from interviews conducted between October 1984 and April 1985 with fifty individuals. These included officials in the Departments of State, Justice and the Treasury, the FBI, the Drug Enforcement Administration, the IRS, U.S. Customs, the U.S. National Central Bureau of INTERPOL, and Congress. A few interviews were also conducted with foreign government officials, bankers and private attorneys with extensive knowledge in this area. All of the interviews were on a not-for-attribution basis. The author wishes to express his gratitude for their cooperation, in particular to those who offered comments on earlier drafts of this article.

The initial draft of this article was a report for the Assistant Secretary of State for International Narcotics Matters. This article constitutes a revised and updated version of that report. In preparing the report, the author had access to classified materials, although the report itself relied entirely on unclassified materials. At the request of officials in the State Department's Legal Adviser's Office, approximately six or seven sentences contained in the initial report were omitted from subsequent drafts. None of these concerned substantive issues discussed in this article. Some were subsequently replaced when public sources of the same information became available.

laundering business has been the use of offshore financial secrecy jurisdictions (FSJ's) to obscure the "paper trail" upon which law enforcement agents rely to unlaunde dirty money. This article describes what has been done, and by whom, to make that paper trail more visible. It also sets the questions of international laundering of drug money, and of government efforts to control it, in their broader context. The essence of that context is the desire of all FSJ's to preserve, at a very minimum, their status as secure havens for the billions of dollars which are not derived from drug trafficking and other criminal activities.

II. THE BANK SECRECY ACT AND U.S. LAW ENFORCEMENT AGENCIES

One of the basic operating assumptions in this area is that cash—or its equivalent in negotiable instruments of one sort or another—is the standard medium of exchange in illicit transactions such as drug sales. Disposing of this cash is typically the first step in the laundering process. In order to make this disposal more difficult, Congress passed the Bank Secrecy Act in 1970.² This legislation imposed two requirements which have become of primary importance in financial investigations.³ The first requires banks (and most other financial institutions) to submit Currency Transaction Reports (known as CTR's or 4789's) to the IRS for any transaction involving more than \$10,000 in cash (or other bearer negotiable instruments). The second requires individuals to submit Currency and Monetary Instruments Reports (known as CMIR's or 4790's) to U.S. Customs whenever transporting more than \$5,000 across the border.⁴

The purposes of this legislation were twofold: to provide a

2. The Bank Records and Foreign Transaction Act, Pub. L. No. 91-508, was signed into law on October 26, 1970 by President Nixon. Title I of that Act, which is codified in sections 1951-1959 of title 12 of the United States Code, requires banks and most other financial institutions to retain certain financial records for up to five years. Title II of the Act, which is presently codified at sections 5311-5323 of title 31 of the Code, was entitled the "Currency and Foreign Transactions Reporting Act." Its requirements are discussed in the above text.

3. A third requirement is that any person with a foreign financial account must disclose that fact on his income tax form and fill out a Foreign Bank Account Report (FBAR). Although there have been successful prosecutions for failure to comply with this law, this form has not proved as useful as the other two in identifying money laundering operations. One reason is that the notice of the disclosure requirement on the income tax form has not been consistent from year to year.

4. The amount was recently raised to \$10,000.

source of information on people, corporations, and banks engaged in large-scale cash transactions, and to create criminal penalties and forfeiture provisions for non-compliance. Since 1982, the information collected has been compiled into a computerized data base known as the Treasury Enforcement Communications System (TECS), which is supervised by the Treasury Financial Law Enforcement Center (TFLEC). Theoretically, the effect of the Bank Secrecy Act was to oblige criminals to either report their financial transactions or violate a criminal statute.

Enforcement of the Bank Secrecy Act, and drug-related financial investigations in general, proceeded at a very slow pace throughout the 1970's. A combination of legal challenges and a variety of bureaucratic lags accounted for this.⁵ The legal challenges involved not only the constitutionality of the Act but also disputes regarding the definitions of "financial institutions" and "monetary instruments," levels of proof, attempts to evade the law, timing of filing, who was required to file, and so on. The reasons for bureaucratic lag were even more diverse. Confusion and disagreement over many of the issues addressed by the courts were partially responsible. So too were the customary bureaucratic tensions and turf struggles. But most significant were the uncertainties concerning how the Act should be implemented, what should be done with the information collected, and how that information should be distributed. Finally, the ignorance and indifference of financial institutions to the requirements of the Bank Secrecy Act, caused in part by the government's failure to publicize them, contributed substantially to the failure in fulfilling the potential of the Act.⁶

Not until the very end of the 1970's did the Act begin to receive greater attention; but even then, law enforcement efforts lagged substantially behind the rhetoric stressing the importance of financial investigations to prosecuting drug trafficking organizations. The growing concern was generated in part by the dramatic increase in cocaine use, and in the proceeds derived from trafficking. The proliferation of offshore FSJ's, and increasing indications

5. The principal legal case was *California Bankers Assoc. v. Schultz*, 416 U.S. 21 (1974), in which the Supreme Court held that the recordkeeping requirements of the Bank Secrecy Act were constitutional. NARCOTIC AND DANGEROUS DRUG SECTION, CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE, INVESTIGATION AND PROSECUTION OF ILLEGAL MONEY LAUNDERING (1983)(case law and guide relating to the Bank Secrecy Act).

6. See *U.S. Failing to Catch Dirty Cash*, Boston Globe, September 25, 1985, at 1 (fourth in an excellent seven-part series on money laundering which appeared in the Boston newspaper the week of September 22-28, 1985).

that criminals were taking advantage of their services, also contributed to the heightened interest in implementing the Bank Secrecy Act more effectively. These developments led to greater attentions by the General Accounting Office, Congressional committees, and internal agency auditors, all of which pointed out inadequacies in the law enforcement effort as well as problems with the Act itself.⁷

In 1984, the President's Commission on Organized Crime picked this issue as its first subject of inquiry.⁸ Its report, entitled *The Cash Connection*, discussed the various problems which had been encountered in the enforcement of the Bank Secrecy Act, and proposed a "Financial Institutions Protection Act" to rectify them.⁹ Many of its suggestions, such as increased penalties, rewards for information, including currency violations as a basis for RICO prosecutions, and clarifying certain inconsistencies in the case law, had already been included as Title IX of the Comprehensive Crime Control Act enacted that year.¹⁰ Many of the remaining proposals, including one which specifically makes money laundering a federal (Title 18) crime, were debated throughout the course of the 99th Congress by a variety of congressional committees.¹¹

7. See GAO REPORT TO THE CONGRESS, BANK SECRECY ACT REPORTING REQUIREMENTS HAVE NOT YET MET EXPECTATIONS, SUGGESTING NEED FOR AMENDMENT (1981). The most significant of the Congressional hearings was conducted by the Senate's Permanent Subcommittee on Investigations. See *Senate Permanent Subcomm. on Investigations, Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, 98th Cong., 1st Sess. (1983)* [hereinafter *Crime and Secrecy, Hearings*]. For even more important sources of information see the PERM. SUBCOMM. ON INVESTIGATION'S INITIAL STAFF STUDY, CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES, S. Rep. No. 21, 98th Cong. (February 1983) [hereinafter *CRIME AND SECRECY, STAFF STUDY*] and PERM. SUBCOMM. ON INVESTIGATION'S FINAL REPORT, CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES, S. Rep. No. 130, 99th Cong. (1985). The Staff Study was later expanded and published by a consultant to the subcommittee. See R. BLUM, OFFSHORE HAVEN BANKS, TRUSTS, AND COMPANIES: THE BUSINESS OF CRIME IN THE EUROMARKET (1984) (perhaps the best study in this area). The Permanent Subcommittee on Investigation's hearings had been preceded since the mid-1970's by about two dozen other hearings held by other committees on money laundering, the Bank Secrecy Act, offshore havens, tax evasion and similar topics. A listing of these hearings can be found in Weiland, *Congress and the Transnational Crime Problem*, 20 INT'L LAW. 1025, 1029-30 (1986).

8. See PRESIDENT'S COMMISSION ON ORGANIZED CRIME, ORGANIZED CRIME AND MONEY LAUNDERING (1984) (Record of Hearing II, March 14, 1984). The first hearing did not focus on any specific theme, its purpose being to set the context for future hearings.

9. See 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 (1984) [hereinafter *THE CASH CONNECTION*].

10. See U.S. DEP'T OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 (1984).

11. For an excellent overview of recent Congressional efforts with respect to money

Despite broad support for cracking down on the financial dimensions of drug trafficking, opposition to the broad sweep of the proposed statutes was heard from many factions.¹² Lawyers argued that the proposed legislation would greatly curtail their ability to represent criminal defendants and would infringe on the attorney-client privilege. Bankers resisted the proliferation of regulations with which they would have to comply. Foreign governments were angered by the explicitly extraterritorial applications of the proposed legislation. On October 17, 1986, the House and Senate reached agreement on the anti-drug bill and sent it to the White House for the President's signature. The legislation's provisions regarding money laundering reportedly extend the powers of law enforcement authorities in investigating violations of the Bank Secrecy Act and other money laundering crimes. No doubt many of

laundering and other transnational crime, see the article by the former chief counsel to the Permanent Subcommittee on Investigations, Weiland, *supra* note 7. The Congressional hearings on money laundering included:

Tax Evasion Through Use of False Foreign Addresses: Hearing Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations, 98th Cong., 2d Sess. (1984);

Use of Casinos to Launder Proceeds of Drug Trafficking and Organized Crime: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. (1984);

Currency and Foreign Transaction Reporting Act: Hearing on Title IX of S. 1762 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. (1984);

Money Laundering Operations and the Role of the Department of the Treasury: Hearing Before the House Comm. on Ways and Means, 99th Cong., 1st Sess. (1985);

Domestic Money Laundering: The First National Bank of Boston: Hearing Before the Perm. Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 99th Cong., 1st Sess. (1985)[hereinafter *Hearing: Domestic Money Laundering: The First National Bank of Boston*];

Drug Money Laundering: Hearing on S. 571 Before the Senate Comm. on Banking, Housing & Urban Affairs, 99th Cong., 1st Sess. (1985);

Money Laundering in Puerto Rico: Hearing Before the Perm. Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 99th Cong., 1st Sess. (1985);

Money Laundering Legislation: Hearing on S. 572, S. 1335, and S. 1385 of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985);

The Drug Money Seizure Act and the Bank Secrecy Act Amendments: Hearing on S. 571 and S. 2306 Before the Senate Comm. on Banking, Housing, and Urban Affairs, 99th Cong., 2d Sess. (1986)[hereinafter *Hearings: The Drug Money Seizure Act and the Bank Secrecy Act Amendments*];

Tax Evasion, Drug Trafficking, and Money Laundering as They Involve Financial Institutions: Hearings on H.R. 1367, H.R. 1474, H.R. 1945, H.R. 2785, H.R. 3892, H.R. 4280, and H.R. 4573 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 99th Cong., 2d Sess. (1986).

12. See, e.g., Pasztor, *House Panel Backs Broader Definition, Tougher Penalties for Money Laundering*, Wall St. J., July 30, 1986, at 48, col. 1.

those provisions will be subjected to legal challenges during the next few years.

As Congress has begun to iron out the wrinkles and fill in the loopholes in the Bank Secrecy Act, so have the law enforcement agencies made progress in identifying and prosecuting money laundering operations. The Treasury Department, including the Office of the Assistant Secretary for Enforcement, Customs and the IRS, have, by law, assumed the lead in investigating violations of the Bank Secrecy Act (Title 31). In the case of IRS, these investigations frequently have gone hand in hand with tax evasion (Title 26) investigations. Justice Department agencies also have been increasingly active in this area. The DEA, pursuant to its Title 21 authority to investigate narcotics violations, has become involved wherever a money laundering operation has been linked to drug trafficking.¹³ The FBI has increasingly become involved in investigating money laundering activities linked to racketeering and other Title 18 federal crimes.¹⁴ Finally, the U.S. Attorney's Offices, and sections of the Justice Department's Criminal Division—including the Office of International Affairs, the Narcotics and Dangerous Drugs Section, and the Assets and Forfeiture Section—have coordinated the investigations and prosecutions.¹⁵

Over the past few years, enforcement of the Bank Secrecy Act has improved dramatically. The table below lists the total number of CTR's filed annually between 1979 and 1985.¹⁶ (In 1975, it is worth noting, only 3,418 CTR's were filed.) The dramatic jump in the last year can be explained in good part by the reaction of banks to the well publicized prosecution of the Bank of Boston in early 1985 for its failure to file a large number of CTR's. In January, 1986, 271,630 CTR's were filed, more than in all of 1980.

13. See Mangan, *Investigating the Laundering of International Drug Money*, 10 DRUG ENFORCEMENT, Fall 1983, at 12-16.

14. Among its first endeavors in this area was Operation Bancoshares, a two-and-a-half year undercover investigation in which agents laundered money to gather information on the financial side of drug trafficking. See, e.g., Jaynes, *F.B.I. Traces Flow of Drug Financing*, N.Y. Times, Aug. 5, 1981, at A1, col. 1.

15. The role which other agencies, such as the Comptroller of the Currency, the Federal Reserve Board, the FDIC, the SEC and others, play in supervising compliance with the Bank Secrecy Act is not discussed in this paper. See THE CASH CONNECTION, *supra* note 9, at 17-27; see also *Hearing: Domestic Money Laundering: The First National Bank of Boston*, *supra* note 11.

16. The source of the table is *Hearings: Drug Money Seizure Act and the Bank Secrecy Act Amendments*, *supra* note 11, at 33-36.

**TOTAL CURRENCY TRANSACTION REPORTS RECEIVED BY
THE IRS**

1979	1980	1981	1982	1983	1984	1985
121,000	241,850	352,112	405,213	513,782	707,246	1,832,000

TFLEC, established by the Treasury Department in January 1982, has presumably become increasingly adept at manipulating the information derived from these forms to identify people and organizations involved in money laundering. The other agencies also have increased their levels of expertise in this area. Most notably, the IRS, with its long experience in investigating financial chicanery, has increased the proportion of its Criminal Investigative Division (CID) agents dedicated to narcotics-related prosecutions from six to eight percent in 1980 to roughly twenty-five percent of its 2800 agents in 1985.¹⁷ In the non-drug area, the IRS has developed its investigation of offshore tax evaders in Operation DOME, an acronym for Domestic-Offshore Monetary Exchange.¹⁸ The tax agency also has established a small intelligence unit, known as the Tax Haven Project, to improve its analysis of money laundering operations. One of the techniques developed by this unit has been the computerized cross-tabulation of TECS information with data provided by other regulatory and law enforcement agencies.

Perhaps the most successful law enforcement approach to Title 31 financial investigations has been the multi-agency task force, best epitomized by Operation Greenback in Miami.¹⁹ Coordinated by a federal prosecutor and operating under the control of a federal grand jury, with the power to issue subpoenas and call witnesses to testify, its information-gathering power has been substantial. So too, many of the bureaucratic and legal restrictions that inhibit the sharing of expertise, information and informants among agents from traditionally competitive agencies have been alleviated.²⁰

Despite the improvements in law enforcement operations,

17. See U.S. DEP'T OF THE TREASURY, *TAX HAVENS IN THE CARIBBEAN BASIN* (1984).

18. See Ricks, *Tax Evaders Find Foreign Banks Aren't Havens of Secrecy Anymore*, *Wall St. J.*, Aug. 14, 1985, at 25, col. 4.

19. See Blau, *Role of the Narcotic and Dangerous Drug Section in the Federal Government's Fight Against Drug Trafficking*, 11 *DRUG ENFORCEMENT* 1, 16-19 (1984) (brief description of Operation Greenback's activities).

20. For instance, the strictures of 26 U.S.C. § 6103 (1954), which substantially limit the IRS's power to share tax return information with other agencies, do not apply to information obtained pursuant to the Bank Secrecy Act.

however, it would be inaccurate to assert that the money laundering problem is virtually solved, or that focusing on money laundering represents any sort of panacea in the fight against organized crime and drug trafficking. Most illicitly derived money continues to be successfully laundered. Indeed, we still remain largely ignorant of the overall scope of the problem and challenge.²¹ Although most of this article focuses on the international aspects of money laundering, it is important to realize that most dirty money, including most drug money, is almost certainly laundered without ever leaving the United States. Experts estimate that the size of the underground American economy is \$60 billion to \$600 billion a year, a range which suggests that not only is a tremendous amount of money laundered in this country, but also that law enforcement agencies are unable to determine what portion of the money is tied to the underground economy.²² Stated more specifically, it is perhaps impossible to tell whether the rate of compliance with the Bank Secrecy Act's CTR and CMIR requirements is ten percent or fifty percent.

Most law enforcement agents involved in this area agree that the more sophisticated criminal organizations are able to keep at least a step ahead of the government's efforts. The techniques available for laundering even substantial amounts of dirty money are virtually limitless. Law enforcement agencies, with their relatively limited resources, are constantly discovering new methods. Countering them often necessitates extensive additional resources and onerous regulations.

The challenges in this area are even greater and more complicated in the international financial arena. U.S. law enforcement agents are at a severe disadvantage in collecting information and evidence of American crimes from abroad. The greatest obstacles are posed by the financial secrecy laws of a host of foreign states. Only in the last few years has the United States made strides in penetrating these laws. Ten years ago law enforcement agents were virtually helpless when a paper trail of dirty money led abroad. Today, options occasionally exist to follow that trail.

21. An analysis by the intelligence community estimated that "some \$5-15 billion of the \$50-75 billion in illegal drug money earned in the United States probably moves into international financial channels each year." See *THE CASH CONNECTION*, *supra* note 9, at 13.

22. The "underground economy" is typically defined as including both illegally earned money and legally earned money on which taxes have been evaded. See the discussion of this issue in *R. BLUM*, *supra* note 7, at 55-60.

In assessing what has been done and what can be done in the area of combatting international money laundering, it is important to recognize two other, intricately related issues. The first is the use of offshore tax havens to reduce, avoid, and evade American taxes on both legally and illegally derived revenue. The second is the use of those same havens by citizens of other countries not only to escape paying taxes, but also to circumvent currency control regulations. Both of these issues will be discussed in greater depth below.

III. INTERNATIONAL MONEY LAUNDERING: THE NEED FOR FOREIGN ASSISTANCE

American law enforcement agencies essentially want three things: information, evidence, and the body—that is, the criminal.²³ The types of information or intelligence desired can be separated into three categories: strategic, tactical, and operational.²⁴ Strategic intelligence involves the big picture: which countries are being used to launder money, how much money is being laundered, what is the final destination of much of the money, and so on. Tactical intelligence involves the more specific information necessary to target and develop investigations: identities of traffickers, their financial advisors, and banks involved in laundering money, and the techniques and routes utilized by them. Finally, operational intelligence involves the detailed information needed to make cases. This includes both the information necessary to identify and follow a paper trail, such as bank account numbers and the identities of the beneficiaries or principals of secret trusts or bank accounts, as well as the short notice time, place and identity tips which allow law enforcement agents to arrest either fugitives or persons engaged in a crime at the time of arrest (such as for attempting to take more than \$10,000 in or out of the United States without filing a CMIR).

The sources of this information vary. Much of it is acquired domestically from government forms such as the CTR's and CMIR's, from data bases such as TFLEC which analyze these

23. Kenney, *Structures and Methods of International and Regional Cooperation in Penal Matters*, 29 N.Y.L. SCH. L. REV. 39 (1984)(overview of the legal aspects to international cooperation against crime).

24. The categorization is somewhat crudely modeled after that used by the DEA Office of Intelligence.

forms, and in the course of law enforcement investigations. When information must be acquired from abroad, the sources are similarly varied, ranging from the foreign governments themselves to law enforcement agencies, banks and informants. The willingness of foreign governments to cooperate depends on a number of factors: their overall relationship with the United States, their susceptibility to American pressure, their concern for reputation, their attitude toward financial and other criminal activities, the power and influence of their financial sector, and their perception of how cooperating with American financial investigations will affect their economic well-being. Foreign governments are not, however, unitary actors. At times, one sector of the government, perhaps a specific ministry or regulatory agency, will extend cooperation to American investigators without other sectors of the government being fully apprised of their actions.

Cooperation from foreign law enforcement agencies and agents is thus only partially dependent on their governments' stated positions. Some will merely reflect their governments' positive or negative policies in this area. Some will feel bound to uphold their countries' secrecy laws. Some will have been corrupted by the criminal elements (and will often reflect corruption in high levels of the government). On the other hand, many foreign law enforcement agents are willing to extend cooperation far beyond that desired or even realized by their governments. Their motivations no doubt vary, ranging from a sense of professionalism and police comradeship which transcends national borders, to a sense of resentment at the illicitly derived wealth of the financial elite, to the personal relationships which develop between them and their American counterparts.

The willingness of banks to cooperate with financial investigations is sporadic at best. In the United States, efforts to encourage banks to report suspicious transactions to law enforcement and regulatory agencies have met with substantial resistance and indifference. More often than not, their cooperation has been compelled by either subpoenas or threats of prosecution. The anti-drug bill passed by Congress in mid-October 1986 includes a number of incentives for banks to cooperate more willingly in money laundering investigations. One provision makes the act of money laundering itself illegal, thereby greatly increasing the criminal liability of bank officials who know or have reason to know that they are handling dirty money for their customers. Another amends the Right

to Financial Privacy Act of 1978 by expanding the ability of financial institutions to voluntarily cooperate with law enforcement agencies. Other provisions expand the Title 31 reporting requirements to include a host of financial instruments and transactions not yet covered.

In the absence of cooperation from foreign governments, the United States has few tools at its disposal in attempting to extract information from offshore banks. Over the past few years, prosecutors have utilized subpoenas with increasing frequency to obtain information from abroad. This tactic, which has generated substantial resentment and anger around the world—not only in the Caribbean but also in England, Canada, Switzerland, West Germany, and other leading members of the global financial system—is discussed below.

A second method relied upon by U.S. law enforcers in the absence of foreign government cooperation is the use of informants. The information which these individuals provide frequently has proven crucial in acquiring both tactical and operational intelligence. Sometimes the information is provided by foreign law enforcement officials against the wishes of their superiors—who may be either corrupt or strict enforcers of the nation's secrecy laws. Or it may be provided by airport officials and employees who become aware of movements of currency into or out of the country. Or it may come from bank employees, ranging from tellers to high-level officers, who provide information on bank account numbers, deposits, transfers, customers and so on. Whatever their motivations, whether it be money,²⁵ friendship, a promise of immunity, a sense of honesty, or a desire to cause harm to someone else, the cultivation of these informants is heavily dependent upon the skills and resources of U.S. law enforcement agents abroad. The principal obstacle they face is the opposition of the host governments. Even those that are willing to allow DEA agents substantial latitude in narcotics investigations are rarely willing to extend the same latitude to financial investigations, which often necessitate breaches of their secrecy laws.

In part because of foreign government resistance, relatively

25. One of the recent amendments to the Bank Secrecy Act enacted in 1984 is 31 U.S.C. § 5323 (Supp. II 1984), which provides for rewards of up to \$150,000 for information on title 31 violations which lead to criminal fines, civil penalties, or forfeitures. Insofar as there are no restrictions on this money being paid to foreign informants, this provision has the potential to substantially increase the incentives to foreigners to provide information.

few U.S. law enforcement agents are assigned to foreign information collection in this area. The DEA has more agents stationed overseas than all other U.S. law enforcement agencies combined. Although many of its 205 agents (and fifteen intelligence analysts) abroad do devote some time and resources to collecting financial intelligence, it is not a priority—except in Switzerland. The reasons probably include the historical agency disposition toward going after the drugs instead of the money, as well as their lack of statutory authority to investigate Title 31 violations. The Customs presence overseas is limited to less than a dozen countries, and their principal priority appears to be high technology smuggling. Only in Panama is money laundering even a secondary priority. IRS's presence overseas includes only thirty-one Revenue Service representatives in fifteen countries, only two of whom have Criminal Investigation Branch (CID) backgrounds. Its principal efforts in this area are apparently focused on the Caribbean and Mexico. The FBI, with roughly the same size presence overseas as the IRS, is far less operationally oriented than the DEA. With the exception of Canada, Italy and Switzerland, where the FBI has become involved in investigating narcotic cases and related financial flows, its participation is quite limited. All of these agencies occasionally supplement their overseas offices by sending additional agents from headquarters or other domestic offices to gather intelligence, to investigate international aspects of domestic cases, or to undertake undercover operations. The extensive limitations imposed by American, foreign and international law, by sensitivities of national sovereignty, and by an assortment of logistical and bureaucratic difficulties, however, oblige the United States to rely primarily on foreign law enforcement agencies for information collection abroad.

A substantial limitation with information obtained from both domestic and foreign informants is that it frequently is not usable in court. There are two basic reasons for this. The first is that disclosing the information obtained in court often requires "burning the informant," that is, disclosing his identity. This both destroys the informant's potential as a source of intelligence for future cases and places his life in jeopardy. The second is that the information, particularly that obtained from abroad, often fails to meet the evidentiary requirements of American law, which require documents to be certified and authenticated. Although the United States has taken steps in recent years to ease the admissibility of information collected abroad, there are only limited ways of circumventing the

former problem.²⁶

IV. LEGAL MECHANISMS FOR OBTAINING INFORMATION FROM ABROAD

In addition to undertaking law enforcement operations and recruiting informants abroad, the United States utilizes an assortment of legal mechanisms to collect both intelligence and admissible evidence from abroad. The most successful of these, and the one which is widely considered the wave of the future, has been the negotiation of legal assistance treaties and exchange-of-information agreements with foreign governments.²⁷ Some of these treaties and agreements provide for general assistance in criminal matters, others for assistance only in narcotics cases, and others for assistance in tax matters. All of these treaties, including the tax agreements, have proven valuable in prosecuting drug traffickers on an array of federal charges. There has been a considerable acceleration in the negotiation of all these treaties in the last few years.

Negotiations on the first mutual legal assistance treaty (MLAT) began over fifteen years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. The need for such a treaty reflected continuing frustration over obstacles to international cooperation in criminal legal matters. Although Swiss judicial authorities possessed the power to penetrate their country's secrecy laws, the law limited their authority to use those same powers on behalf of requests from foreign authorities. Requests for assistance by letters rogatory, which required justice ministries to communicate through their respective foreign ministries, tended to prove time-consuming and exasperating. The absence of any agency in the foreign country with a sufficient interest or incentive to act willingly on behalf of American requests also hindered cooperation. Even when information was forthcoming, it frequently was not provided in a form admissible in American courts. Lastly, differences in both substantive criminal law and criminal procedure greatly complicated the

26. The Comprehensive Crime Control Act of 1984 included a few provisions to improve the admissibility of foreign evidence in American courts. 18 U.S.C. §§ 3505, 3507 (1982). See U.S. DEP'T OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984, *supra* note 10, ch. XII, pt. K, at 176-77.

27. See Nadelmann, *Negotiations in Criminal Law Assistance Treaties*, 33 AM. J. COMP. L. 467 (1985)(thorough discussion of the negotiation of mutual legal assistance treaties).

process of deciphering and complying with requests from abroad. After years of negotiation, a U.S.-Swiss MLAT went into effect in 1977.²⁸ Eight years later, over 300 requests from the United States had been handled by Swiss authorities, and a smaller number of Swiss requests by the Americans.

Although the treaty resolved many of the problems noted above, it has proven to be something less than a panacea. An extensive right of appeal available to those affected by American requests has contributed to substantial delay in Swiss compliance with American requests.²⁹ The Swiss refusal to permit information provided by them to be used in tax evasion prosecutions has created limitations and tensions.³⁰ Variations in cantonal law (comparable to some extent to variations in state law in the United States) have led to no small amount of confusion.³¹ Despite these and other problems, however, U.S.-Swiss cooperation in law enforcement matters has generally been excellent, with both sides able to work out their respective complaints. The Swiss Federal Assembly's passage of a Federal Act on International Mutual Assistance in Criminal Matters (IMAC) in early 1981, which codified and expanded many of the treaty's provisions, has also benefitted the United States and other countries.³² Of all the FSJ's, the Swiss

28. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 (entered into force Jan. 23, 1977). The text of the treaty and a section-by-section analysis are provided in TREATY WITH THE SWISS CONFEDERATION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, Senate Exec Doc. F, 94th Cong., 2d Sess. (1976).

29. Indeed, the Comprehensive Crime Control Act of 1984 included three provisions specifically intended to address this problem. The first is a new section, 18 U.S.C. § 3506 (Supp. 1984), which requires a national or resident of the United States who files a formal opposition in a foreign court to an official U.S. request for evidence to serve a copy of that pleading on the United States. The second new provision, 18 U.S.C. § 3292 (Supp. II 1984), permits a court to suspend the running of the statute of limitations in cases in which the indictment has been delayed by the need to obtain foreign evidence. The third provision is an amendment to 18 U.S.C. § 3161(h) (1982) which allows exclusions from the running of the Speedy Trial Act in cases delayed by the need to obtain evidence abroad. See U.S. DEP'T OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984, *supra* note 10, ch. XII, pt. K, at 176-79.

30. The MLAT does allow information to be utilized in tax evasion cases if the United States can demonstrate that high-level organized crime figures are the subject of the investigation.

31. J. FEDDERS, J.B. HARRIS, R.M. OLSEN & B.A. RISTAU, TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMODATIONS 1759-71 (1984) [hereinafter J. FEDDERS](copies of correspondence between U.S. and Swiss judicial officials which address these problems).

32. Frei, *International mutual assistance in criminal matters: the Swiss Federal Act*, 8 COMMONWEALTH L. BULL. 794 (1982)(summarization of the Swiss legislation by Dr. Lionel

have proved by far the most forthcoming in assisting foreign law enforcement agencies.³³

As a result of the dramatic increase in the need for international judicial assistance in criminal matters, the Justice Department's Criminal Division created an Office of International Affairs (OIA) in 1979. At about the same time, and in response to similar needs (as well as an increase in legal matters involving the intelligence community), the Legal Adviser's Office in the State Department added an Office of Law Enforcement and Intelligence (L/LEI). Together, the individuals in these two offices have assumed the lead in negotiating both legal assistance and extradition treaties. They have been joined in their negotiations by representatives from other agencies and sections with an interest in a specific treaty, including the Narcotic and Dangerous Drugs Section in the Criminal Division, the Tax Division, the Treasury Department, and the SEC. OIA has also served as the consultant and channel for most international requests, both incoming and outgoing, for legal assistance in criminal matters. In addition, the Office of Citizens Consular Services in the Bureau of Consular Affairs (CA/OCS/CCS) has worked in tandem with OIA in both processing letters rogatory and attempting to obtain information and documents through informal means.

Over the past few years, the United States has negotiated eight other MLATs—with Turkey, the Netherlands, Colombia, Italy, Morocco, Canada, Thailand and the Cayman Islands. In addition, a number of other countries—including West Germany, Sweden, Jamaica, Panama, the Bahamas and Mexico—are in varying stages of treaty negotiations with the United States. To date, only the Turkish,³⁴ Dutch³⁵ and Italian³⁶ treaties have entered into

Frei, Chief of the International Legal Assistance Section of the Swiss Federal Office for Police Matters).

33. Recent developments, including the Swiss willingness to freeze the assets of fallen dictators such as Ferdinand Marcos and Jean-Claude Duvalier, and to cooperate in U.S. investigation of insider trading schemes, provide further evidence of their growing cooperation. See Tagliabue, *The Swiss Stop Keeping Secrets*, N.Y. Times, June 1, 1986, § 3, at 4 col. 3; *Swiss Banks Easing Secrecy*, N.Y. Times, May 19, 1986, at D6, col. 4.; see also Schapiro, *Swiss Banks Still Sell Secrecy*, Nation, Sept. 6, 1986, at 1 (more skeptical view).

34. Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, 32 U.S.T. 3111, T.I.A.S. No. 9891 (entered into force January 1, 1981). A section-by-section analysis of the treaty is provided in TREATY WITH THE REPUBLIC OF TURKEY ON EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS, Sen. Exec. Rep. No. 18, 96th Cong., 1st Sess. (1979).

35. Treaty on Mutual Assistance in Criminal Matters, June 12, 1981, T.I.A.S. No. 10734

force. A combination of political and technical considerations have held up Colombian ratification of their MLAT.³⁷ The treaty with Morocco is awaiting that country's ratification.³⁸ The treaties with Canada and Thailand, both signed in March 1985, have yet to work their way through legislative channels.³⁹ The same is true of the treaty negotiated with the British on behalf of the Caymans, which was signed on July 3, 1986.

The selection of countries with which the United States has negotiated MLATs has not always been determined purely by the specific need for such a treaty.⁴⁰ In the Turkish case, it was requested in response to the United States' desire for a prisoner transfer treaty. In other cases, MLAT negotiations have emerged out of efforts to negotiate or re-negotiate extradition treaties in which there was much greater interest. More recently, negotiations have been prompted, and on occasion held up, by foreign governments' substantial concern and anger over American assertions of judicial extraterritoriality (affectionately, and sometimes cynically, referred to as "E.T.").

V. EXTRATERRITORIALITY IN THE CARIBBEAN: BRITISH DEPENDENCIES PAST AND PRESENT

The essence of E.T. is the American claim of extraterritorial effect of American laws. When this claim has been limited to charging drug traffickers who have never entered the United States

(entered into force September 15, 1983). A section-by-section analysis of the treaty is provided in *TREATY ON MUTUAL LEGAL ASSISTANCE WITH THE KINGDOM OF THE NETHERLANDS*, Sen. Exec. Rep. No. 36, 97th Cong., 1st Sess. (1981).

36. Treaty on Mutual Assistance in Criminal Matters, with a Memorandum of Understanding, Nov. 2, 1982, T.I.A.S. No.____ (entered into force Nov. 13, 1985). A section-by-section analysis of the treaty is provided in *TREATY WITH THE ITALIAN REPUBLIC ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS*, Sen. Exec. Rep. No. 36, 98th Cong., 2d Sess. (1985).

37. The treaty with Colombia, which may be renegotiated at the demand of the Colombians, was signed in Washington, August 20, 1980. The text of the treaty, and a section-by-section analysis, are provided in *MUTUAL LEGAL ASSISTANCE TREATY WITH THE REPUBLIC OF COLOMBIA*, Sen. Exec. Rep. No. 35, 97th Cong., 1st Sess. (1980) (Sen. Treaty Doc. 97-11).

38. The treaty with Morocco was signed at Rabat October 17, 1983. The text of the treaty, and a section-by-section analysis, are provided in *CONVENTION ON MUTUAL LEGAL ASSISTANCE WITH THE KINGDOM OF MOROCCO*, Sen. Exec. Rep. No. 35, 97th Cong., 1st Sess. (1980) (Sen. Treaty Doc. 98-24).

39. The treaty with Canada was signed at Quebec March 18, 1985. It was the first MLAT to be personally signed by a U.S. president. The treaty with Thailand was signed at Bangkok the following day by the U.S. Attorney General, Edwin Meese III.

40. See Nadelmann, *supra* note 27 (fuller discussion of the events leading to MLAT negotiations).

with violation of American laws, it has not occasioned much objection from foreign governments. But when similar claims have impinged on the freedom of foreign governments to pursue foreign and economic policies of their choosing, acrimonious disputes have resulted.⁴¹ Initially, the principal area of concern was legal actions brought by American prosecutors and business competitors under American antitrust laws. More recently, American efforts to impede the flow of high-technology to the Soviet Union and to disrupt the construction of the gas pipeline by European contractors have generated substantial indignation. Perhaps the most pervasive example of E.T., however, has been the demands by U.S. prosecutors for production of documents and other evidence located abroad which are deemed necessary to government investigations and court proceedings. Such demands, most often issued in the form of subpoenas for documents or testimony, have placed the recipients in the uncomfortable position of having to choose between complying, and thereby violating their own domestic law, and refusing to comply and thereby being charged with contempt by the American court. Indignant foreign governments have responded by enacting "Protection of Trading Interest" statutes, otherwise referred to (by Americans) as "blocking statutes," that forbid local banks and companies from complying with such demands.⁴² The latest manifestation of conflict in this area has been the reaction to the SEC's "waiver-by-conduct" proposal, under which any investor who utilizes a foreign bank or brokerage firm to buy or sell securities in a U.S. market would thereby waive his right to keep his identity secret from the SEC and to withhold his foreign bank accounts and trading secrets.⁴³ Insofar as such a provision conflicts with the financial secrecy laws of a number of countries, the foreign reaction has been overwhelmingly negative. The Swiss, according to one report, "told the SEC to abandon the proposal or risk jeopardizing U.S.-Swiss agreements on law enforcement."⁴⁴ No doubt the two countries will work out the problem, but the threat is indicative of the strains which American asser-

41. See Dam, *Economic and Political Aspects of Extraterritoriality*, 19 INT'L LAW. 887, 887 (1985)(Kenneth Dam, the former Deputy Secretary of State begins by stating, "Controversies over the extraterritorial application of United States law have taken on increasing importance in our foreign policy.").

42. See CRIME AND SECRECY, STAFF STUDY app., *supra* note 7 (selection of these and other financial secrecy statutes).

43. See Ingersoll, *SEC Proposal to Override Foreign Laws On Bank Secrecy Draws Wide Criticism*, Wall St. J., Feb. 11, 1985, at 13, col. 1.

44. *Id.*

tions of E.T. can generate.⁴⁵

A major reason for asserting E.T. has been the frustration of prosecutors and law enforcement agents in following the paper trail of illicit activities once it leads abroad. More often than not, the trail has led to Caribbean branches of European and Canadian banks. American prosecutors have utilized a variety of techniques, all of which have angered both Caribbean and European governments, in order to penetrate the financial secrecy laws which attract the illicit revenues. They have subpoenaed a Cayman Island bank official while he was visiting the United States;⁴⁶ subpoenaed attorneys and agents for a foreign corporation;⁴⁷ subpoenaed the Miami branch of a Canadian bank for records maintained in the bank's Bahamian, Caymanian, and Antiguan branches;⁴⁸ subpoenaed the American subsidiary of a Swiss trading corporation for records of the parent held in Switzerland;⁴⁹ and obtained a court order compelling the target of an investigation to consent to disclosure of the records sought in the subpoena.⁵⁰ American courts have validated all of these techniques, often on the basis of a "balancing test" which has determined that the grand jury process and American law enforcement interests outweigh the interests of the foreign jurisdiction in maintaining financial secrecy. Of at least equal concern to those jurisdictions has been the efforts of American law enforcement agents to secure information without benefit of the courts, such as by the recruitment of informants. In one case involving an IRS operation called "Project Pirate," a Caymanian police official was induced to come to the United States and reveal information in violation of Caymanian law. In another case involv-

45. See J. FEDDERS, *supra* note 31 (excellent collection of materials dealing with this area).

46. *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

47. *United States v. Bowe*, 694 F.2d 1256 (11th Cir. 1982).

48. *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir.), *cert. denied*, 462 U.S. 1119 (1983).

49. *United States v. Marc Rich*, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); see also Comment, *International Paper Chase: Federal Grand Jury Subpoena Duces Tecum in Conflict with Swiss Nondisclosure Law*, 11 BROOKLYN J. INT'L L. 149 (1985)(discussion of *Marc Rich*).

50. *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. denied*, 105 S. Ct. 328 (1984). The waiver concept was first accepted in *United States v. Quigg*, (unpublished opinion, D. Ver. 1981), reprinted in J. FEDDERS, *supra* note 31, at 2174-80. The Eleventh Circuit's decision in *Ghidoni* has since been followed by the Fifth Circuit in *United States v. Cid-Molina*, 767 F.2d 1131 (5th Cir. 1985) and, with some reservations, by the Second Circuit in *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985). See Culverhouse & Ross, *Off-shore Bank Accounts*, CRIM. JUST., Summer 1986, at 13 (brief discussion of the cases).

ing "Project Haven," American law enforcement agents arranged for the hotel room of a visiting Bahamian bank official in Miami to be broken into, and the contents of his briefcase photographed.⁵¹

Employment of such methods did not preclude U.S. officials from also utilizing the channels preferred by the FSJ governments. This involved primarily the use of letters rogatory, which in turn often required that local counsel be hired to pursue the requests in the local courts. One notable example of the use of such channels was the *Interconex* case, which involved a four-year paper chase through Swiss and Caymanian courts.⁵² Although the chase ultimately proved successful, its cost in time and money persuaded the Justice Department of the need to negotiate legal assistance treaties and to seek alternative avenues for obtaining evidence. Other requests were stymied by the unwillingness and inability of foreign governments to obtain the requested documents, and by the banks' practice of notifying the subject of an investigation of the request, thus allowing him to move or otherwise disguise his funds.⁵³

In 1976, the *Field* case (involving the Caymanian banker who was compelled to give testimony before a U.S. grand jury) persuaded the Cayman government to tighten its financial secrecy laws and increase the sanctions for unauthorized disclosure.⁵⁴ When this proved ineffective in deterring American assertions of E.T.,⁵⁵ the Caymans' case was taken up by the British, who represent them in their foreign policy, and by the Canadians, whose banks were those principally affected. The motivations of

51. This case led to the Supreme Court's decision in *United States v. Payner*, 447 U.S. 727 (1980), holding that the violation of the banker's fourth amendment rights did not prevent the information obtained from being used in prosecuting those whose names were revealed as a result of the violation. See R. GORDON, *TAX HAVENS AND THEIR USE BY UNITED STATES TAXPAYERS—AN OVERVIEW* 114-15 (1981) (commonly referred to as "The Gordon Report"); see also Tigar & Doyle, *International Exchange of Information in Criminal Cases, Transnational Aspects of Criminal Procedure*, 1983 MICHIGAN Y.B. INT'L LEGAL STUD. 77.

52. The case is discussed in Shine, *Transnational Litigation in Criminal Matters: A Case Study of the Interconex Prosecution*, in J. FEDDERS, *supra* note 31, at 533; see also Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U.J. INT'L L. & POL. 999 (1984); Weiland, *The Use of Offshore Institutions to Facilitate Criminal Activity in the United States*, 16 N.Y.U.J. INT'L L. & POL. 1115, 1122 (1984); *Crime and Secrecy, Hearings*, *supra* note 7, at 109-111, 228-233.

53. J. FEDDERS, *supra* note 31. American financial institutions have frequently been guilty of the same practice. See, e.g., *THE CASH CONNECTION*, *supra* note 9, at 34.

54. See R. GORDON, *supra* note 51, at 15-17.

55. None of the individuals interviewed by the author appeared to know of a case in which Cayman authorities have prosecuted someone for violating the secrecy laws.

the British, beyond their legal obligation to represent the Caymans, included their concern for the economy of their dependency, their general objection to any American exercise of E.T. as well as to the principle of an American court presuming to "balance" the interest of another country, and their attachment to the *Tournier* principle of financial confidentiality.⁵⁶ The Canadians' motivations overlapped with those of the British; in addition, they were upset not only by the threats to their (politically influential) banks but by the unilateral nature of the American actions despite Canada's excellent record of cooperation in all other law enforcement matters.⁵⁷ As for the Caymanians, their basic objective was to preserve, by whatever means possible, their lucrative reputation as a reliable FSJ's.

Two basic problems emerged as the E.T.-bank secrecy dispute evolved during the late 1970's and into the 1980's. The first involved *how* the United States would attempt to acquire information and evidence. The second concerned which areas warranted compromises in financial secrecy and which did not. Although a number of the E.T. cases involved prosecutions for drug trafficking, even more were Title 26 (tax evasion) cases, some of which targeted drug traffickers. Other cases involved an array of Title 18 and other violations, ranging from mail, wire, securities and insurance fraud to bribery, kickbacks, and illegal corporate campaign contributions.⁵⁸ Given the taboos associated with the drug traffic, all FSJ's were hard pressed to resist cooperating in this area. Indeed, the United States could claim that the 1961 Single Convention on Narcotic Drugs, which most FSJ's had signed, mandated cooperation in this area. Many FSJ's were also willing to supply documents where the U.S. investigation centered on crimes that were also recognizable under the FSJ's laws. Their discomfort began with the use of financial records to prosecute drug traffickers

56. The leading English case of *Tournier v. National Provincial and Union Bank* states that there is a duty of confidentiality between a banker and his customers. See Clarke, *Bank Secrecy Jurisdictions in the English-Speaking Caribbean and Atlantic Regions*, in CRIME AND SECRECY, STAFF STUDY, *supra* note 7, at 181-85.

57. April & Fried, *Compelling Discovery and Disclosure in Transnational Litigation: A Canadian View*, 16 N.Y.U.J. INT'L L. & POL. 961 (1984)(summary of some of the Canadian views by one of the Canadian MLAT negotiators, Jonathan Fried); see Graham, QC, *Reflections on United States Legal Imperialism: Canadian Sovereignty in the Context of North American Economic Integration*, 40 INT'L J. 478 (1985)(overview of the E.T. issue from the Canadian perspective).

58. See R. BLUM, *supra* note 7, at 73-118 (sample listing of cases involving illicit offshore transactions).

and other criminals on tax evasion charges connected with their more serious crimes. It extended to include requests for cooperation in cases involving insider trading, the Foreign Corrupt Practices Act, and violations of other U.S. laws that had no parallels in the FSJ's criminal codes. When the American requests were based on charges of no more than evasion of income tax on legally derived revenue, most FSJ's absolutely refused to cooperate.

In October 1982, the United States, the British and the Cayman government entered into a Gentleman's Agreement to cooperate in criminal investigations, such as of drug trafficking, where the mutuality of offense requirement was met.⁵⁹ The agreement, however, proved of limited utility in enhancing Caymanian cooperation or preventing U.S. prosecutors from obtaining grand jury subpoenas.⁶⁰ One year later, the issue finally came to a head after the Cayman Grand Court twice enjoined the Bank of Nova Scotia from releasing documents held in the Caymans. Under pressure from the Bank of Nova Scotia, which was incurring substantial fines as a result of its failure to comply with the subpoena, the British intervened and obliged the Caymanian governor to order that the documents be disclosed.

The tensions generated by this and other E.T. issues led to a November 1983 meeting between the American Deputy Secretary of State, Kenneth Dam, and the British Minister for Foreign and Commonwealth Affairs, Malcolm Rifkind. One outcome of the meeting was the establishment of a number of working groups to resolve various disagreements over E.T. One of these was specifically tasked to examine the problem of Caribbean money laundering. At about the same time, and in response to tensions over E.T. with a number of governments, the Justice Department ordered that all subpoenas to institutions in the United States for records located abroad be cleared through OIA. (The order, issued by Associate Attorney General D. Lowell Jensen, became known as "The Jensen Memorandum.") The need for such a requirement was readily apparent. It reflected the recognition that federal and other prosecutors, in their quest for evidence, would utilize whichever

59. J. FEDDERS, *supra* note 31, at 737-43 (letters clarifying each government's interpretation of the agreement).

60. Disagreement over the extent and significance of the agreement was ultimately resolved by the Eleventh Circuit Court of Appeals, which deemed the agreement "not a binding, enforceable agreement but rather an experimental and tentative alternative for the production of documents." See *United States v. Bank of Nova Scotia*, 740 F.2d 817, 829 (11th Cir. 1984) (often referred to as "Nova Scotia II").

means seemed most effective and expedient, regardless of their broader consequences. By requiring that all international requests be channeled through OIA, the Justice Department hoped to provide some coordination to the foreign policy of evidence gathering. OIA could also inform prosecutors of more effective and less abrasive techniques for gathering evidence, some of which involved its own informal arrangements with foreign counterparts. OIA's coordinating role was also deemed necessary because of its role in negotiating MLAT's as well as extradition and prisoner transfer treaties. This role has required that the OIA negotiators not only be familiar with the breadth of American requests for assistance, but also that they be able to exercise some control over the flow because of their potential impact on negotiations as well as established relationships.⁶¹

Another outcome of the Dam-Rifkind meeting was the initiation of negotiations between the United States and British officials on a legal assistance agreement with the Cayman Islands. Unlike the other MLAT's negotiated by the United States, this one was limited, at the request of the British, to cooperation in narcotics cases and predicated on the provisions against drug trafficking in the international Single Convention on Narcotic Drugs.⁶² American law enforcement agencies were divided as to the advisability of negotiating a legal assistance treaty limited solely to drug investigations, but it was decided to accept the British condition. Two formal negotiation sessions were held, in February and May 1984. Each was followed by a session between the British team and the Cayman Government. The Caymanians, under some pressure from the British officials, accepted the necessity for an agreement but expressed their concern that the agreement not provide a means for the IRS to engage in "fishing expeditions."⁶³ They also sought to limit the use of subpoena *duces tecum* by American prosecutors

61. On occasion, the OIA negotiators have been unpleasantly surprised and embarrassed to discover an unknown request from some prosecutor generating tensions with their counterparts from abroad. Prior to the issue of the Jensen memorandum, prosecutors were not even required to consult, much less seek approval from, OIA before obtaining a subpoena for records held abroad. The only ostensible requirement was contained in the infrequently read U.S. Attorney's Manual. It required that prosecutors check with the Justice Department before taking any action that might have an impact on foreign relations.

62. The Single Convention on Narcotic Drugs, *done* Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204 (entered into force December 13, 1964; for the United States, June 24, 1967).

63. They were, however, willing to permit information which they provided to be used to prosecute drug traffickers on title 26 charges.

seeking evidence. The American negotiators responded to the first concern by agreeing that the Attorney General would certify that any request was for a narcotics-related prosecution. In what constituted their principal concession, the Americans also agreed to waive their prerogative of obtaining a subpoena *duces tecum* and to confine their requests in narcotics cases to the procedures specified in the agreement.⁶⁴

The agreement was signed by the British and U.S. governments on July 26, 1984 and entered into force on August 29, when the Caymanian implementing legislation took effect.⁶⁵ Little more than a year later, over fifty requests had already been transmitted. Most of these were processed quite rapidly, for a number of reasons. Unlike the MLAT with the Swiss, the Cayman agreement specified that any American request be kept confidential by both the Cayman Attorney-General and the provider of the documents. So too, the legislation implementing the agreement did not provide for the extensive procedural hurdles which have hampered Swiss compliance with American requests. Finally, the typical MLAT requirement that a request be accompanied by supporting documents was waived in the Cayman agreement. All that was required was a certificate by the U.S. Attorney General stating that the request fell within the scope of the agreement.⁶⁶ Each of these provisions, as well as the fact that it was entirely one-sided, represented significant advantages over a typical MLAT from the American perspective. For this reason, some U.S. officials were reluctant to trade in the executive agreement for a full-fledged MLAT with the Caymans.

64. The waiver of the subpoena option was viewed sceptically by those with less faith in the effectiveness of international agreements. The agreement did not, however, prevent the Americans from obtaining subpoenas in non-narcotics cases.

65. Exchange of Letters Between the United Kingdom and the United States Concerning the Cayman Islands and Matters Connected with Resulting from any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961 as Amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961. The Agreement can be found at 24 I.L.M. 1110 (1985). The Caymanian implementing legislation is reproduced at 24 I.L.M. 937 (1985). Because the agreement was an executive agreement rather than a full-fledged MLAT, the Senate's ratification was not required. See generally Comment, *Piercing Off-shore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example*, 20 TEXAS INT'L L.J. 133 (1985)(discussion of events and cases).

66. Indeed, the reluctance of prosecutors to supply evidence in support of a request under a MLAT (or a letter rogatory for that matter) has been a principal limitation of the MLAT process. That reluctance has stemmed from the fear that the information would be released—because of corruption, carelessness, or legal process—thus jeopardizing the success of the investigation and/or the source of the information.

Article 7 of the Cayman agreement stipulated, however, that the signatories enter into full-fledged MLAT negotiations before the end of 1985. During the first half of 1986, further negotiating sessions were held in London and Washington. On July 3, the completed MLAT was signed in Georgetown, Grand Cayman by representatives of the U.S., British, and Cayman governments.⁶⁷ It was the first between the United States and a Caribbean FSJ, as well as the first MLAT of any kind signed by the British. The principal disadvantage from the U.S. perspective was that the Attorney General's certification could no longer substitute for the need to provide supporting documents spelling out the alleged offense. A significant advantage, however, was that assistance was no longer limited to drug cases. Indeed, the British even agreed to cooperate in cases, such as insider trading and violations of the Foreign Corrupt Practices Act, in which the mutuality of offense requirement was not met. Although tax offenses were explicitly excluded from the scope of the treaty, the British also agreed that evidence provided by Caymanian authorities could be used for tax prosecutions predicated on other offenses.

Among Caymanians, debate over the treaty has been heated, as it was following the signing of the 1984 agreement. In an election held a few months after the agreement went into effect, the accord with the United States was a major campaign issue. Many of those in the government were ousted from office. Some observers suspected that the signing of the agreement was responsible, and that the old government was perceived as having gone soft, caving in to pressures exerted by the Americans and the British.⁶⁸ Despite the fallout from the 1984 agreement, and despite heated debate over the new MLAT, the Cayman legislature passed the necessary implementing legislation only weeks after the treaty was signed. The British approval process is expected to involve nothing more than formalities. Ratification by the U.S. Senate is all that remains to effect the treaty. Although no political objections are anticipated, the process of submitting MLAT's to the Senate has proven to be a time-consuming one. In all likelihood, the MLAT

67. Treaty Between the United Kingdom of Great Britain and Northern Ireland and the United States of America Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters. See Nash, *U.S. and Caymans Sign Crime Pact*, N.Y. Times, July 4, 1986, at D10, col. 2.

68. Conflicting reports also suggested either that the police chief of the Caymans had been forced out of office for appearing too forthcoming with the Americans, or that he had merely retired in due course.

with the Caymans will become effective in 1987.

The paramount question, not only in the eyes of the Caymanians but in those of all other FSJ's as well, has been the impact of the agreement on the Caymans' bank industry. Some bankers have suggested that an outflow of funds to Panama and other FSJ's followed the signing of the initial agreement. Others have indicated that the outflow has been negligible, and that in fact the agreement benefited the Caymans' reputation and attracted business. Given the general agreement that drug money constitutes only a small proportion of all FSJ's funds, the latter reports are easily plausible. Their credence is substantiated by the fact that the increase in funds held by Swiss banks did not abate after the signing of their MLAT. According to recent reports, the number of banks opening branches in the Cayman Islands continues to climb. Just days before the MLAT was signed, an article appeared in *The Miami Herald* on the Cayman banking industry, its title: *Caymans grow as "Geneva of the Caribbean."*⁶⁹

Both the agreement and the treaty with the Caymans were expected to serve as models for future agreements with other FSJ's, particularly those, like the Caymans, that remain dependencies of the British. At the signing of the initial agreement, Malcolm Rifkind suggested that the Cayman agreement might be repeated with a number of the other Caribbean dependencies such as Anguilla, the British Virgin Islands, Montserrat, and the Turks and Caicos Islands. This assurance was repeated by British officials in a diplomatic note in June 1985 and again at the signing of the Cayman MLAT in July 1986.

In March 1985, the Turks and Caicos Islands hit the front page of American newspapers when its chief minister and two other high-ranking officials were arrested in a DEA undercover operation in Miami on drug trafficking charges.⁷⁰ Although the arrest

69. Russell, *Caymans Grow as "Geneva of the Caribbean,"* *Miami Herald*, June 22, 1986, at F1, col. 2.

70. See Nordheimer, *Head of Isles Near Bahamas Accused of Drug Plot*, *N.Y. Times*, Mar. 6, 1985, at A1, col. 4; Balmaseda, *Remote Islands' Top Officials Held in Drug Smuggling Plot*, *Miami Herald*, Mar. 6, 1985, at A1, col. 1; Thornton, *Caribbean Prime Minister Arrested in Miami on Drug Charges*, *Washington Post*, Mar. 6, 1985, at A16, col. 4. The reaction to the arrest in the Turks and Caicos was split, with many people angered by the arrest and the fact that the resident British governor had cooperated with the DEA. See Tomb, *Drug Arrests of Three Top Ministers Divide Poverty-Stricken Islands*, *Miami Herald*, Mar. 12, 1985, at A1, col. 4; Thornton, *Drug Arrests Raise Islands' Tension*, *Washington Post*, Mar. 11, 1985, at A1, col. 4; Treaster, *In Old Pirate Haunt, Daunting News of*

may not have been a determining factor, negotiations between the British and the Americans focused on the Turks and Caicos as the next target for a drug cooperation agreement. No doubt the fact that the islands had long been linked to drug smuggling, and that they had become probably the second largest of the British FSJ's in the Caribbean after the Caymans, also contributed to the decision to focus on the Turks and Caicos. On September 18, 1986, American and British negotiators signed an agreement that was virtually identical to the one signed two years earlier concerning the Caymans.⁷¹ Within weeks, the legislature of the Turks and Caicos had passed the necessary implementing legislation. Since ratification of the agreement by the U.S. Senate was not necessary, the agreement entered into effect in October 1986. It is reasonable to assume that similar agreements will be negotiated with the other three British FSJ dependencies in the near future. Indeed, both Anguilla and the British Virgin Islands already have passed the necessary implementing legislation in anticipation of the signing of similar agreements on their behalf.

Together with the Cayman Islands, the Bahamas has been identified as a principal FSJ utilized by drug traffickers and other criminals.⁷² Until late 1984, its government proved at least as uncooperative as that of the Caymans in refusing to provide assistance to American investigations.⁷³ In turn, the Justice Department pursued a confrontational approach in its efforts to obtain information and evidence. Efforts to improve cooperation in this area were continually hampered by a number of factors, including extensive high-level corruption, tension over American law enforcement operations in the Bahamas targeted at corrupt officials, and exposés in the American media regarding both these issues. During late 1983, matters came to a head when American DEA and FBI agents were declared *persona non grata* and when reports of high-level government involvement in drug trafficking obliged Prime Minister Pindling to set up an independent Commission of Inquiry.⁷⁴

Drug Trade, N.Y. Times, Mar. 13, 1985, at A2, col. 3.

71. Shenon, *Pact Gives U.S. Access to Data in Drug Haven*, N.Y. Times, Sept. 19, 1986, at B2, col. 1.

72. See CRIME AND SECRECY, STAFF STUDY, *supra* note 7, at 54-62 (discussion of the Bahamas); R. BLUM, *supra* note 7, at 133-46 (discussion of the Bahamas).

73. Stuart, *U.S.-Bahamian Relations Are Straining Under Drug Investigations*, N.Y. Times, Sept. 23, 1983, at A21, col. 1.

74. One explosive exposé was delivered by NBC Nightly News on September 5, 1983. It cited American officials who claimed that major drug traffickers, reportedly including the infamous fugitive, Robert Vesco, were paying off Bahamian officials including the prime

By late 1984, both governments had begun to reverse direction and restore their relationship. American law enforcement agents were invited back and joint drug enforcement operations undertaken. At about the same time, the Commission of Inquiry completed its report.⁷⁵ Among its recommendations were that a MLAT be negotiated, and "that problems connected with the revenue laws of the United States . . . be set aside when negotiating an agreement to trace drug related funds."⁷⁶ Accordingly, MLAT negotiations began in January 1985. As this article went to press, Bahamian officials anticipated that an MLAT agreement similar to that concerning the Caymans would be signed before the end of 1986. Unlike the Cayman situation, however, the principal U.S. concern in the Bahamas has continued to be not with drug money laundering but with the transshipment of marijuana and cocaine from Colombia through the Bahamian archipelago. By late 1986, both the Reagan administration and Congress were complimenting the Pindling Government on its apparently wholehearted cooperation in drug enforcement matters.⁷⁷

VI. TRYING TO CLOSE THE DOOR ON DIRTY MONEY: THE CASE OF PANAMA

The FSJ of greatest present concern to the United States is, without doubt, Panama. It is regarded as the preferred haven of Latin American drug traffickers. (The English-speaking Caymans and Bahamas are supposedly preferred by the "Anglo" traffickers and other English-speaking criminals.) Its secrecy laws are the least penetrable of virtually all FSJ's. Unlike the Bahamas, where corruption in high places is tempered by a reputable court system and a substantial percentage of honest law enforcement agents and other government officials, Panama is often viewed as corrupt to

minister. A second NBC Nightly News Report, on February 22, 1984, cited a DEA report in which Prime Minister Pindling was reported to have taken bribes from a Colombian trafficker.

75. Many of the Commission's findings were detailed in a thorough report on corruption in the Bahamas that appeared in *The Miami Herald* in late 1984. See Hiaasen & McGee, *A Nation for Sale*, *Miami Herald*, Sept. 23-28, 1984 (six-part series).

76. REPORT OF THE COMMISSION OF INQUIRY (APPOINTED TO INQUIRE INTO THE ILLEGAL USE OF THE BAHAMAS FOR THE TRANS-SHIPMENT OF DANGEROUS DRUGS DESTINED FOR THE UNITED STATES OF AMERICA, NOVEMBER 1983—DECEMBER 1984), BAHAMAS (DECEMBER 1984) at 285. The Commission also noted that the United States had failed to respond to earlier proposals by Attorney General Paul Adderley to enter into negotiations. *Id.* at 353-56.

77. See Brinkley, *In Fighting Drug Traffic, Attitude Wins the Aid*, *N.Y. Times*, Oct. 7, 1986, at A28, col. 3.

the hilt. According to various reports, the proper connections and payoffs can insure that drug money flown into the country is greeted at military airstrips and transported (by Brink armored trucks) directly to the designated bank.⁷⁸ It is assumed that this could not continue without the permission of the effective ultimate authority in the country, General Manuel Antonio Noriega, to whom all military and law enforcement agencies report. As one commentator has written, the Panamanian Defense Force "has become, by common consent among Panamanians, a well-oiled machine that runs on corruption, drug deals and sufficient power to impose or depose five presidents in the last three years."⁷⁹

Until recently, the Panamanian Defense Force and the banking and business communities had firmly resisted American pressures to provide exceptions to their secrecy laws. Their motives have been viewed cynically by American law enforcement agents. Unlike the Swiss, who point to Nazi efforts to identify and seize Jewish assets in Swiss banks as the original basis for their financial secrecy statutes, or the Commonwealth FSJ's, whose secrecy roots lie in the common law banker/customer privilege of confidentiality, Panama's lucrative laws stem strictly from a desire to foster business. They have rejected any principles which might create exceptions to those same laws. Panamanian law is strictly territorial in its approach to crimes committed abroad. Unless a crime under Panamanian law has been committed in Panama, there is no legal authority for their law enforcement agencies or prosecutors (*fiscales*) to cooperate. Although Panama has cooperated against drug trafficking per se, it has drawn a clear line at providing any financial or other protected records.⁸⁰

Nonetheless, Panama's political, military, and banking leaders have repeatedly claimed that they would be willing to cooperate in financial investigations of drug traffickers if a way could be found to do so without harming the country's reputation for banking secrecy. They argue that only a small percentage of the assets held in their banks derive from drug trafficking. Their principal concern is not that they will lose the few billions which drug traffickers have

78. See, e.g., Penn, *Panama Is Becoming Top Spot to Deposit Illegal Narcotics Profits*, Wall St. J. Nov. 3, 1983, at 1, col. 1.

79. LeMoyné, *The Opposition Takes Cover in Panama*, N.Y. Times, Oct. 13, 1985, at E3, col. 1; see also CRIME AND SECRECY, STAFF STUDY, *supra* note 7, at 77-85 (discussion of Panama); R. BLUM, *supra* note 7, at 147-60 (discussion of Panama).

80. The one much cited exception was the access to records which Panama offered to U.S. authorities investigating the massacre in Jonestown, Guyana.

deposited in Panama to other FSJ's, but that any MLAT with the United States will be misperceived by other depositors as a potential threat to the confidentiality of their accounts. Given the numerous attractions of Panama's well-developed financial industry, including its sophisticated communications facilities, easy access to all Latin America, and time-tested secrecy laws, their concerns may well be exaggerated.

Although no one doubts that Panama plays a significant role in the drug money laundering area, there is no reliable evidence regarding the total amounts of drug and other illicitly earned money laundered through the country's banks. Explanations vary, for instance, regarding the billion-plus surplus of dollars which the Panama National Bank ships to the U.S. Federal Reserve each year. Indeed, the entire question of how cash dollars move throughout the international financial system is one replete with speculation and uncertainty. Although there is general agreement that most legitimate business transactions of any size do not require the use of cash, there are any number of reasons why people engaged in essentially legitimate business transactions might utilize cash. Typically, the explanation is that they have something to hide, either from tax authorities or from other fiscal authorities enforcing currency control regulations. In the shaky and inflation-ridden economies of Latin America and elsewhere, dollars often represent the best hedge against inflation, overvalued exchange rates, political instability, and the avarice of governments. In countries in which letters of credit drawn on national banks are often not accepted, it also represents one of the few unchallengeable instruments of financial exchange.

Of course, relying on dollars to conduct financial transactions can be quite problematic. Large amounts of dollars are bulky; they present serious security problems; and they produce no income. It is assumed that most dollars transported abroad to be laundered eventually find their way back to the United States. More often than not, the route back is via correspondent bank accounts which foreign banks and branch offices maintain in the United States. American law enforcement agencies acknowledge that the CTR and CMIR requirements have not proven very effective in recording the volume of these inter-bank cash flows. Even when the proper forms are filled out, they only indicate which banks are engaging in large-scale dollar transactions—not where those dollars came from in the first place.

Among the few certainties in this area is that a few FSJ's, including Panama, Switzerland, the Bahamas, the Cayman Islands, and Hong Kong, are responsible for the vast majority of dollar shipments to the United States from abroad.⁸¹ It is impossible to say what percentage of this is drug money. In the case of Panama, a number of other considerations complicate the analysis. First, Panama utilizes the American dollar as its national currency, thus making any comparisons with other countries, and inferences about the percentage of smaller-denomination bills being shipped to the United States, of ambiguous significance.⁸² Second, the presence of the Colón Free Zone, which attracts the cash business of drug traffickers, high-tech smugglers and legitimate businessmen alike, ensures a substantial flow of dollars through the country. Third, flight capital from the rest of Latin America is generally acknowledged as the source of most of the \$35 billion deposited in Panamanian banks.⁸³ The bottom line of Panamanian policy is that nothing will be done which might endanger the continued presence of those deposits in their banks.

One argument which American negotiators have advanced in their negotiations with FSJ's, and in particular with Panama, is that refusing to accept dirty money, such as money from drug traffickers, is a prerequisite to establishing a reputation as a secure and legitimate financial haven. Cleaning up their reputation, they have argued, would attract more than enough funds to compensate for the flight of dirty money deposits. Leading members of the banking community, particularly among the representatives of multinational foreign banks, have proven receptive to this argument. They must contend, however, with the vested interests which continue to profit from the drug traffic. These include not only members of the banking community, particularly among the local banks, but also military officers and politicians who receive "gratuities" from the traffickers for facilitating the laundering of

81. The information available indicates that, "for example, in 1982, the total shipments of U.S. currency to and from West Germany amounted to \$12 million, and shipments to and from France amounted to \$8.8 million." *THE CASH CONNECTION*, *supra* note 9, at 17. Those amounts represent less than one percent of the totals being shipped from some of the FSJ's.

82. Over a billion dollars per year is shipped to the Federal Reserve in the United States by the National Bank of Panama, which acts as a clearinghouse for dollars received and disbursed by Panamanian banks. An additional amount is exported directly by banks in Panama to correspondent and other banks in the United States and elsewhere.

83. An estimated \$30 billion represents foreign holdings. The total of offshore liquid investment by the Latin American private sector is estimated at \$60 to \$75 billion. See Silk, *Latin Nations' Capital Flight*, N.Y. Times, Apr. 17, 1985, at D2, col. 1.

their money.

Beyond negotiating MLAT's, an additional response of the FSJ's to the problem of money laundering has been the promise and occasional implementation of legislation and regulations which address the issue.⁸⁴ The Swiss have taken the lead in this respect, with both the government and the banking community itself involved in regulating the financial industry. One notable component has been a Convention on Diligence which requires bankers to properly identify all new depositors and assure that their deposits are not criminally derived.⁸⁵ The Caymans, and to a lesser extent the Bahamas, have also increased their self-regulation in recent years. The British and Canadian governments appear to have encouraged this process, in good part because many of the more prominent banks are headquartered in their countries.

Panama has lagged somewhat in this regard. Its banking industry is largely homegrown, like the Swiss, but without the same standards of conduct. The British and Canadian multinational banks, with their increasing interest in stepped-up regulation, are largely absent. The publication in early 1985 of a Code of Ethics by the Panama Banking Association (the bankers' private association) was viewed by some as a step in the right direction, and by others as a mere sop to appease the Americans and deter action by the government. The impression of one leading banker is that there are no more than five to eight banks in the country that would turn away a million dollars in cash, although reports have surfaced of people having difficulty finding a reputable bank to accept hundreds of thousands of dollars with no questions asked. The Panama Banking Commission, which oversees the management of the nation's banks, is primarily concerned with loan portfolios and pays scant attention to the sources of banks' deposits. At most, they want to ensure that banks are not taken over by drug traffickers or other organized criminal elements.

The greatest hope of the United States may lie with the foreign bankers and their perception that cleaning up Panama's reputation is in their interest. Led by a representative of a Swiss bank, a number of foreign bankers have assumed a leading role in drafting the code of ethics and encouraging local banks to abide by its

84. See CRIME AND SECRECY, STAFF STUDY, *supra* note 7; R. BLUM, *supra* note 7 (discussion of the efforts of the FSJ's in this area).

85. See R. BLUM, *supra* note 7, at 163.

provisions. Their influence and expertise is such that they have participated directly in Panama's MLAT negotiations with the United States. This exceeds even the role which Swiss banks played in their government's MLAT negotiations with the United States, when the bankers were actively consulted but not included. Indeed, any public/private distinction in describing the members of the Panamanian negotiating team is ambiguous because of the overlapping and revolving-door nature of government service and private sector activity in Panama.

In late 1984, Nicolas Barletta, one of the principal founders of Panama's banking industry, was elected to the presidency (in an election reportedly fixed by the military). At first, the prospects for negotiating an MLAT appeared to improve. Two negotiation sessions took place in December 1984 and May 1985. On March 1, 1985, the government seized a bank involved in money laundering.⁸⁶ Leading members of the Panama Banking Association assured U.S. negotiators that they would support the MLAT process. To avoid antagonizing the Panamanians, the Justice Department denied prosecutors' requests for *Nova Scotia*-type subpoenas to obtain information held in Panama.⁸⁷ Most indications appeared favorable.

In late September 1985, however, the presidential revolving door swung again. When President Barletta suggested that an independent commission be appointed to investigate a murder which most Panamanians believed had been sanctioned by the military, he was forced to resign from office.⁸⁸ With the MLAT negotiations once again derailed, the Justice Department reversed stride and assented to prosecutor requests for *Nova Scotia*-type subpoenas. Some months later, two new developments heightened the pressure on the Panamanian government to respond to U.S. concerns. On April 21, 1986, Reagan administration officials, including Assistant Secretary of State Elliott Abrams and Customs and DEA agents, testified before the Senate Foreign Relations Subcommittee for Inter-American affairs, chaired by Senator Jesse Helms. The law enforcement officials in particular spoke bluntly of the Panamanian

86. The bank was the First Interamericas Bank, owned by a DEA fugitive, Gilberto Rodriguez Orejuela. The seizure resulted from a joint American-Panamanian investigation.

87. The controversial subpoenas are delivered to U.S. branches of international banks for records held in the banks' FSJ branches. See *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).

88. See Le Moyne, *Elements in Ouster of Panama Chief: Beheading and a Power Duel*, N.Y. Times, Oct. 2, 1985, at A12, col. 1.

Defense Force's domination of local politics and its role in drug trafficking and money laundering operations.⁸⁹ Two months later, the investigative reporter, Seymour Hersh, brought General Noriega's face to the front page of U.S. newspapers with an exposé on the Panamanian leader's involvement in drug trafficking, arms smuggling, and money laundering.⁹⁰ Drawing on evidence compiled by the American intelligence community, Hersh revealed that although the intelligence agencies had known of Noriega's involvement in such activities for some time, they had refrained from acting against him because of his valuable cooperation in other intelligence matters. Sentiment had gradually shifted, however, as evidence of Noriega's illicit activities mounted and as it became apparent that the general was regarded as a highly valuable intelligence source by the Cuban Government as well.

Apparently the two developments had the desired effect. Barletta's successor, former Vice President Eric Arturo Delvalle, renewed discussions between his government and U.S. officials over enhancing cooperation in drug and money laundering cases. In June, a U.S. delegation visited Panama; two months later, the Panamanian Attorney General, Carlos A. Villalaz, headed a delegation to Washington.⁹¹ Little progress was made as the Panamanians continued to resist the notion of a MLAT, which they contended would threaten their banking industry. Instead, they outlined to U.S. officials a bill that the government would introduce in the National Assembly when the legislature reconvened on October 1, 1986. Although the proposed legislation provides for stiff penalties for bank transactions related to drug trafficking, it apparently is not sufficient to appease the U.S. government.⁹² No doubt the American skepticism can be explained in good part by the susceptibility of Panama's criminal justice system to political and financial influences. While the United States may welcome promises by Latin American governments to punish drug traffickers themselves, experience has demonstrated that there is no substitute for prosecution in a U.S. federal court.

All indications strongly suggest that vested interests in Pan-

89. See Chardy, *U.S. Voices Concern over Military's Role in Panama*, Miami Herald, Apr. 22, 1986, at A3, col. 1.

90. Hersh, *Panama Strongman Said to Trade in Drugs, Arms and Illicit Money*, N.Y. Times, June 12, 1986, at A1, col. 1.

91. These developments are recounted in Labrut, *U.S., Panama Still Feud Over Bank Secrecy*, Miami Herald, Aug. 18, 1986, at BM19, col. 1.

92. See *id.* (description of the proposed legislation).

ama are primarily interested in putting off the inevitable for as long as possible, and in reaping the maximum possible benefits in the short run. Panama's rulers cannot help but recognize that, despite all the rhetoric, drugs and money laundering are not the leading priority of the U.S. government insofar as Panama is concerned. Foremost among American priorities is the continued security of the canal. That is followed by the desire to ensure Panamanian cooperation with U.S. policies in Central America, and by a general desire for political stability in Panama. Evidence linking General Noriega with the Cubans, and with arms supplies to communist guerrillas in Colombia, suggest that the Americans may increasingly view the general as expendable, provided a friendly successor can be assured. But even politics aside, the widespread resistance to a MLAT among Panamanians will be difficult to overcome. The examples provided by Switzerland, the Caymans and other Caribbean FSJ's cannot help but assuage some of the fears of Panama's banking leaders. In the final analysis, however, it seems that the United States will be obliged to pursue tougher policies against Panama to secure greater cooperation against money laundering. Panama promises to be one of the most problematic of FSJ's for U.S. law enforcement agencies for some time to come.

VII. LAUNDERING MONEY TO EVADE TAXES

There was some confusion among the Panamanians when they first began considering a MLAT: they thought that it would allow them to qualify for certain benefits under the Caribbean Basin Initiative (CBI). When Congress enacted the CBI in mid-1983, it attached a number of conditions intended to induce greater cooperation in law enforcement matters.⁹³ Those countries wishing to become beneficiaries of the duty-free treatment provided for in the CBI were required to take steps to cooperate with the United States against drug trafficking and in the extradition of American citizens.⁹⁴ Most countries, including Panama (but excluding the Bahamas), were quickly deemed to have met this requirement and were appropriately designated. In addition, a further incentive was attached to the CBI in the form of an amendment to section 274 of the Internal Revenue Code allowing tax-deductible conventions to be held in the Caribbean. Eligibility for this potential boon to their

93. See Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2701 (Supp. II 1984).

94. *Id.* §§ 2701(a)(2), (b)(6) & (7).

tourist industry was contingent on the Caribbean government negotiating an agreement with the Treasury Department providing for the exchange of information necessary to enforce the tax laws of the United States (and the beneficiary country). The requisite exchange would include "information which may otherwise be subject to nondisclosure provisions of the local law of the beneficiary country such as provisions respecting bank secrecy and bearer shares."⁹⁵

Jamaica was the first to become eligible for the convention tax benefit, although it did so even before the CBI benefits were formally extended by negotiating a protocol to its pre-existing tax convention with the United States.⁹⁶ On November 3, 1984, Barbados became the first country to avail itself of the CBI benefits when it signed an exchange of information agreement that met the terms of the Initiative.⁹⁷ Barbados' principal incentive, however, was not the convention tax benefit, but a 1984 amendment to the Tax Code allowing potentially lucrative Foreign Sale Corporations (FSC's) to be set up in whichever countries agreed to the exchange of information agreement.⁹⁸ By mid-1985, a similar agreement had been reached with Costa Rica, but it had yet to be ratified over a year later.

The most recent of the FSJ's to sign an exchange of tax information agreement is Bermuda. The British dependency in the Atlantic has traditionally exercised far greater autonomy in its foreign relations than Britain's Caribbean dependencies. It also has proven atypical in a number of other respects: its economy is stronger than most; its financial sector is better developed and more self-regulated; its government is more forthcoming, even to the point of taking the initiative, in criminal investigations; and its leadership is generally more sophisticated and honest than most. In 1984, the Bermudan government expressed concern that U.S. law enforcement efforts in the Caribbean might increase the flow of drugs and dirty money through Bermuda. It sought greater cooperation with the United States in preventing this, and also expressed interest in obtaining the CBI benefits. Negotiations fol-

95. I.R.C. § 274(h)(6)(C) (1982).

96. Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, July 17, 1981, T.I.A.S. No. 10207 (entered into force December 29, 1981).

97. Agreement for the Exchange of Information with respect to Taxes, November 3, 1984, T.I.A.S. No. ____ (entered into force November 3, 1984).

98. See I.R.C. § 921 (1984).

lowed, culminating on July 11, 1986 when an extensive bilateral tax agreement was signed.⁹⁹

The relevance of these agreements to the problem of laundering drug money remains uncertain. At the very least, they provide an additional weapon which IRS agents can use to pursue drug traffickers and their assets. They also suggest that the signatory governments would be forthcoming in MLAT negotiations if the need for such treaties arose.¹⁰⁰ The real breakthrough, however, will occur in the unlikely event that a leading FSJ signs such an agreement. None of the countries which have thus far signed on are regarded as significant FSJ's. The one exception, to some extent, is Costa Rica, which was suspected of trying to position itself as a future FSJ should Panama falter for any reason. Of the leading FSJ's in the Caribbean, the Cayman Islands has expressed little interest in the CBI inducements, and Panama's tourist industry is probably too insignificant to warrant sacrificing the substantial business which the banking industry would lose.

The only potential candidate with even an outside chance of signing such an agreement is the Bahamas; its doing so would represent a dramatic turnabout from the very recent past. Only in early 1985 was it approved for the minimum duty-free treatment which almost all other intended beneficiaries of the CBI had already received. The administration had delayed the designation until the Bahamas offered greater assistance in opposing drug trafficking. The willingness of the Pindling Government in early 1985 to participate in a joint interdiction campaign, to let DEA agents return to the islands, and to commence MLAT negotiations, all contributed to the designation. The only reason that the Bahamas can be viewed as a potential candidate for the exchange of tax information agreement is that an estimated seventy-five percent of its legitimate GNP is derived from tourism, and seventy-five percent of its two million tourists each year are American citizens.¹⁰¹ This contrasts with the estimated thirteen to fifteen percent (and

99. Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland (On Behalf of the Government of Bermuda) and the Government of the United States of America Relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters.

100. Other positive indications can be detected in the growing number of tax conventions which include language providing for cooperation in cases of "fraud" or which explicitly require cooperation in criminal prosecutions for tax offenses.

101. House Foreign Relations Committee, Memorandum on a Staff Study Mission to the Bahamas (November 3, 1983).

1,200 to 2,000 jobs) which the financial sector contributes.¹⁰² Nonetheless, it is far from clear that the benefit to the tourist industry would outweigh the substantial cost to the financial sector. Any attempt to persuade the Bahamas to negotiate such an agreement would run up against not only the political power of the financial sector but the principle of bank secrecy as well. Even the Commission of Inquiry, after reviewing the problem of money laundering, stated that, "[T]he Bahamas should not be instrumental in the enforcement of the taxation laws of another country."¹⁰³ As of late 1986, the Bahamian government continued to express little interest in negotiating a tax agreement with the United States.

The U.S. Treasury Department, which is responsible for negotiating the CBI and other tax agreements, has not been an enthusiastic advocate of using tax provisions to prosecute drug traffickers and other criminals. Unlike the Justice Department, the Treasury Department's traditional concern has focused not on the criminal prosecution of tax offenders but on the collection of revenue. Another institutional disposition has been opposition to the use of tax incentives to accomplish non tax-related objectives, particularly when those incentives exist outside the United States. The exchange-of-information provisions in the CBI thus reflect, in part, a trade-off which the revenue collectors demanded. The provisions also, however, represented a growing recognition within the Treasury Department that improved information exchange is necessary, both to counter the increasing use of offshore tax shelters and to compensate for the lax enforcement of tax laws in many other countries.¹⁰⁴ Lastly, although the tax sections of the Treasury Department have remained primarily concerned with civil audits, there is a growing realization of the role which criminal sanctions and enforcement can play in inducing compliance with U.S. tax laws.

Coordination between the Justice and Treasury Departments in this area has increased from nil to a minimal level as the Treasury perspective has shifted. Treasury Department negotiators have continued to focus on the avoidance of double taxation as

102. See CRIME AND SECRECY, STAFF STUDY, *supra* note 7, at 55; R. BLUM, *supra* note 7, at 135.

103. See COMMISSION OF INQUIRY REPORT, *supra* note 76, at 285.

104. The increasing use of offshore tax shelters had stemmed in part from anti-tax shelter provisions introduced into the Tax Code in recent years, and the need for tax shelter promoters to go offshore where the IRS lacked compulsory process.

their principal concern in tax convention negotiations. But they are also coming to recognize the importance of exchange-of-information provisions to the Justice Department and even to some of their own concerns. The two departments also have a mutual interest, as the Panama case demonstrated, in avoiding any misperception by the FSJ's that the MLATs and CBI tax exchange agreements are related. Neither agreement directly harms the interests of either department since both agreements aid in the prosecution of drug traffickers and others on tax charges and discourage criminals from utilizing signatory countries to launder their dirty money. The possibility exists, however, that the negotiation of one may advance or prejudice the chances of negotiating the other.

The list of FSJ's is extensive and varied, both within and without the Caribbean, depending on which features one employs in characterizing a jurisdiction as such.¹⁰⁵ Within the Caribbean, different lists include not only the Cayman Islands, the Turks and Caicos, the Bahamas, Montserrat, Anguilla, and the British Virgin Islands, all of which already have been discussed, but also Dominica, St. Lucia, St. Kitts, St. Vincent, Antigua, the Netherlands Antilles, the U.S. Virgin Islands, and Puerto Rico. Outside the Caribbean, Hong Kong, Singapore, and Bahrein are regarded as major FSJ's in the Asian region, with Nauru, Vanuatu, Taiwan, the Philippines, Seychelles, the United Arab Emirates, and the American territories of Guam and the Marianas all aspiring to join their ranks. In Europe, Switzerland, Luxembourg, and Liechtenstein are regarded as the major FSJ's, with increasing competition from Austria, Cyprus, Monaco, Malta, Andorra, the Italian territory of Campione d'Italia and the British isles of Guernsey, Jersey, and the Isle of Man. Others which provide sufficient financial secrecy to be included on some FSJ lists are the Netherlands, Canada, West Germany, France, and Hungary. Indeed, some would put the City of London at the top of the list. If one speaks broadly of havens for flight capital of all sorts, however, there is no FSJ which can compete with the United States. Most of these countries have as little interest in helping the United States enforce its tax laws as we have in helping some of them and many others enforce restrictions on currency flows or imported goods.

105. The use of FSJ's in the Caribbean to launder dirty money and engage in other criminal activities is discussed at length in *CRIME AND SECRECY, STAFF STUDY*, *supra* note 7; R. BLUM, *supra* note 7. Excellent country sketches are provided of the Bahamas, the Cayman Islands, Panama, Bermuda, Antigua, Montserrat and Switzerland.

Some Treasury Department officials express optimism that an increasing number of governments are coming to the realization that there is a strong mutual interest in cooperating against tax evasion. During the last two years, Council of Europe and OECD member governments have begun drafting a multilateral Convention on Mutual Administrative Assistance in Tax Matters which some anticipate will eventually blossom into an international regime with the same stature and significance which the international trade regime, GATT, once claimed. Although the provisions must inevitably represent the least common denominator at this early stage, the symbolic significance is regarded as of tremendous importance, not least in terms of sending a message to the Swiss that their open door to tax evaders cannot go on forever. On a far smaller scale, there is talk of reaching a similar agreement among the members of the Organization of Eastern Caribbean States. Because such agreements would provide for more extensive exchange of information than the avoidance-of-double-taxation tax conventions which the United States has already negotiated with some three dozen countries, they would offer new opportunities for prosecuting drug traffickers and other criminals on tax charges.

Ultimately, the two greatest obstacles to detecting and deterring the laundering of drug money internationally are (1) the existence of FSJ's, which justify their secrecy laws by claiming that most of the money which they attract is relatively clean and that they have no responsibility to participate in the enforcement of other nations' tax laws; and (2) the sheer magnitude of international financial flows (hundreds of billions of dollars each day), which is such as to obscure even the largest flows of dirty money. Against these obstacles, all the efforts of law enforcement agencies at present are but a pittance. On the other hand, U.S. government efforts to monitor the movement of large amounts of cash, and to enlist other governments in that effort, have created the first obstacles to the laundering of dirty money. They have provided the basis for an increasing level of knowledge, information and expertise in this area. And they have been accompanied by a growing realization that other types of transnational crime, especially those that have little to do with smuggling, pose potentially grave threats as well. Not only tax fraud, but also consumer, computer, banking, securities, and management fraud, as well as a host of other crimes which take advantage of FSJ's secrecy laws to avoid detection, are receiving increasing attention from law enforcement and regulatory agencies around the world. Indeed, one of the most important con-

sequences of current efforts in detecting drug money laundering is the impetus which those efforts provide to law enforcement efforts in these other areas.

VIII. MULTILATERAL APPROACHES

A recurrent argument made by the FSJ's is that even if they turn away dirty money, it will only go elsewhere. The strength of this argument is undeniable, although there are limits to it. Certain FSJ's are particularly attractive to money launderers for any variety of reasons, including proximity to the United States or Latin America, ease and frequency of flights to the haven, reliability of financial institutions, and sophistication of communications facilities. Panama, the Caymans, and the Bahamas fit most of these descriptions. Many other FSJ's are less reliable in terms of handling large amounts of cash, or inconvenient to get to, or pose some other problems. Forcing traffickers to rely on less convenient havens would create greater costs and risks for them, and make them more vulnerable. A second limit to the argument's merits is that as the number of FSJ's cooperating against drug money laundering increases, so does the pressure on those which have yet to cooperate. At the same time, there is no denying the force of the FSJ's argument, or the compelling need for a multilateral approach to the problem. To date, much of the impetus for such an approach has been left up to the United States, although some governments are beginning to show increased interest. In a number of cases, the primary source of that interest is the realization that helping to trace the paper trail of dirty money may lead to forfeiture of drug traffickers' assets into their national treasuries.

Over the past few years, the multilateral approach has been pursued via several avenues. One, which remains fairly dormant, is the consideration given to negotiating a multilateral MLAT. Members of the European Economic Community (EEC) signed such a treaty in 1959, and the African states have circulated a draft of model arrangements.¹⁰⁶ The idea reportedly was broached at one time in the Organization of American States (OAS), but no action was taken. For a number of reasons, the United States has thus far

106. European Convention on Mutual Assistance in Criminal Matters, EUROPEAN TREATY SERIES No. 30; Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, EUROPEAN TREATY SERIES No. 99. The African draft can be found at 23 I.L.M. 103 (1984).

preferred to pursue the bilateral approach. First, a bilateral treaty almost always goes further than a multilateral one, which often must be watered down to reflect the lowest common denominator of agreement. Second, the bilateral approach permits a government to choose its treaty partners, and avoids the problem of being obliged to provide information to an unfriendly or untrustworthy government. Third, many of the problems involved in reconciling diverse legal systems, such as the common law systems of the United States and the British Commonwealth with the civil law systems dominant in Europe and other continents, are only now being worked out.¹⁰⁷ In the American view, the time is far from ripe to attempt a multilateral MLAT.

Regional MLATs, however, are another matter. As the United States initially hoped, the Cayman agreement and treaty have provided a model for other negotiations, especially with the many FSJ's that are members of the British Commonwealth. The British government, which originally demanded that any initiatives or pressures for such arrangements come from the United States, has proven increasingly forthcoming. The United States also has encouraged the International Criminal Police Organization, known as INTERPOL, to take the lead in pursuing multilateral approaches to the money laundering problem. That organization's sensitivity to the issue emerged in the early 1980s when various criminal investigations around the world pointed up the need for better coordination in tracing dirty money. One response, coordinated by the U.S. National Central Bureau of INTERPOL, was the creation of a working group to address the problem in the Caribbean. With participation by the United States, Canada, St. Lucia, Barbados, Montserrat, Anguilla, and the Turks and Caicos, the group held its third meeting in Anguilla in April 1985 and drafted model legislation on identifying, tracing and seizing criminal assets.¹⁰⁸ The draft, which had been designed largely by the American delegation with the assistance of OIA, was drawn from foreign and American

107. See Nadelmann, *supra* note 27 (discussion of how U.S. MLAT negotiators have sought to resolve such differences).

108. The initial meeting was held in Curaçao in May 1983, and attended by the United States, Canada, Argentina, Venezuela, the Cayman Islands, and the Netherlands Antilles. The second meeting was held in St. Lucia in August 1984, and attended by the same participants as the Anguilla meeting with the exception that Venezuela attended and Montserrat did not. The latter two meetings were also attended by a representative from the Customs Cooperation Council. A fourth meeting, held in the Bahamas in April 1986, was devoted to more operational aspects of dealing with money laundering, such as the installation of new telecommunications equipment to enhance inter-island law enforcement cooperation.

legislation, the MLATs, and the Cayman agreement and its implementing legislation. It has since been circulated worldwide to the governments of all INTERPOL members, a number of which have enacted legislation modeled on its provisions.

Other regional INTERPOL groups are watching the actions that the Caribbean countries have taken in this area to determine whether they should follow suit. In late 1985, American delegates offered similar model legislation at a meeting of the East Asia/Pacific group, which includes a number of the up-and-coming FSJ's. In Europe, the INTERPOL Secretariat established a financial assets group (FOPAC) following the General Assembly meeting in Cannes in 1983. Staffed by two Americans, it has focused its efforts on sensitizing law enforcement agencies in Europe and elsewhere to the need for and benefits of financial flow investigations, and to informing them of the techniques which have been developed.¹⁰⁹ FOPAC's efforts, materials and intelligence have helped strengthen the hand of law enforcement agencies seeking greater support in this area from their governments. The INTERPOL division also has cooperated with the Customs Cooperation Council (CCC), sought greater participation from the United Nations Fund for Drug Abuse Control (UNFDAC) and generally offered coordination and information exchange in international financial investigations. At least in Europe, INTERPOL has been primarily responsible for what action has been taken on the declarations by the Council of Europe's drug enforcement group, known as the Pompidou Group, with respect to money laundering.

INTERPOL's involvement in this area, particularly insofar as it includes encouraging legislation and treaties, has been complemented by the role of the United Nations. Following a meeting in 1980 by the U.N. Division of Narcotic Drugs to discuss this issue,¹¹⁰ a multinational "Expert Group on the Forfeiture of the Proceeds of Drug Crimes" was created. At two meetings in Vienna in late 1983 and 1984, the group reviewed the efforts which had been taken around the world to date, and encouraged the enactment of legislation and the negotiation of bilateral, regional and international agreements to help identify, trace, seize, freeze and forfeit

109. Among FOPAC's efforts has been the compilation of a Financial Assets Encyclopaedia which summarizes the currency control and asset forfeiture laws of 58 member countries.

110. See U.N. REPORT ON THE MEETING ON FINANCIAL ASSETS AND TRANSACTIONS RELATED TO ILLICIT DRUG TRAFFIC, U.N. Doc. E/CN.7/657/Add.2 (October 22, 1980).

proceeds of drug trafficking.¹¹¹ The experts agreed that all efforts were complementary in this area, and that all avenues should be pursued. Among their specific recommendations was that the principal international drug control treaty, the 1961 Single Convention on Narcotic Drugs (and 1972 Protocol) be either amended or supplemented by an additional convention which would specifically address the issues of money laundering and asset forfeiture. The benefits of such an addition to international legislation were perceived as threefold: it would provide a multilateral framework for nations negotiating bilateral agreements; it would provide guidance to governments interested in enacting legislation in this area; and it would increase the pressure on non-conforming governments to follow step. The report of the experts' second meeting included their suggestions for such a convention.

In reviewing other efforts being undertaken, the Expert Group noted the work of INTERPOL and the negotiation of MLATs and the Cayman agreement by the United States. Among the regional efforts noted were those of the Caribbean states, as well as those of the Pompidou Group and similar efforts by members of the Association of South East Asian Nations (ASEAN). The CCC's efforts in expanding mutual administrative assistance in customs matters were also mentioned, both in regard to a joint CCC-INTERPOL Mediterranean conference held in Lisbon in mid-1984, and in regard to the Nairobi Convention on assistance in customs matters.¹¹² Also noted was the work of the Commonwealth Secretariat, including the Legal Division's drafting of model legislation and a Commonwealth MLAT, and its Commercial Crime Unit's development of intelligence on dirty money flows. Finally, the group noted the existence of another U.S. "expert group," on international cooperation to combat international tax evasion and avoidance, which it was hoped would contribute additional approaches to tackling the problem.

Since late 1984, efforts have been underway to draft a new Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Early drafts have focused on improving interna-

111. See U.N. Doc. DND/WP.1983/23 (October 31, 1983); U.N. Doc. MNAR/1984/13 (November 2, 1984).

112. The Nairobi Convention is formally known as the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offenses. The relevant provision is Annex X, which covers illicit drug traffic and related financial operations. As of 1983, there were 13 parties to the Convention.

tional cooperation in the law enforcement aspects of drug control, including extradition, mutual legal assistance, financial investigations, and asset forfeiture.¹¹³ The INTERPOL model legislation, the Expert Group's recommendations, and the individual legislation of a variety of governments all have provided guidance in drafting the provisions on money laundering. The draft will be discussed and refined at the annual meeting of the U.N. Commission on Narcotic Drugs in February 1987 and at a U.N. International Conference on Drug Abuse and Illicit Trafficking in June 1987, both to be held in Vienna. If no significant obstacles arise, the new drug convention will probably be signed in 1988, after which it must be ratified by individual governments before it takes effect.

IX. GOVERNMENT COMPETITION FOR BLACK MARKET DOLLARS

A complementary dimension to the international money laundering problem involves the efforts of non-FSJ governments to keep money from fleeing their countries. Particularly in Latin America, many governments appear to have realized the relative futility of currency control regulations and have adopted other techniques, some of which benefit money launderers. These basically involve creating incentives for drug traffickers and others involved in the underground economy to keep their money in the country's banks and to bring money earned abroad into the country.

The Colombian government, even as it cracks down on drug trafficking and increases its asset forfeiture powers, has taken measures to minimize the loss of drug money from the economy. In Peru, the government has eliminated the requirement to register one's name when purchasing certificates of deposit. This in effect eases the money laundering process since bearer CDs function like cash and are almost as difficult to trace.¹¹⁴ There is also substantial curiosity among Americans interested in this area as to what role

113. See U.N. REPORT OF THE SECRETARY GENERAL ON IMPLEMENTATION AND DEVELOPMENT OF INTERNATIONAL INSTRUMENTS ON THE CONTROL OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, U.N. Doc. E/CN.7/1987/2 (June 17, 1986).

114. See 11 The Andean Report (April 1985) at 41-43 (efforts of the Peruvian and Colombian governments in this area). The Peruvian government has also found another way to profit off the drug traffickers' need for currency exchange. Three times a week, the Banco Continental sends a plane full of soles to Tingo Maria and returns with dollars and bearer CDs. The basis of this profitable practice of arbitrage is the difference in the soles/dollars exchange rate between Lima and the coca center, where dollars are more abundant than in the capital.

Mexico plays in money laundering. Transporting dollars over the border may be the easiest way of getting dirty money out of the country.¹¹⁵ There is insufficient evidence, however, to indicate whether it is also the most frequent. In Ecuador, major banking officials are reportedly involved in providing short-term financing to drug traffickers at exorbitant interest rates. And in Argentina, there is increasing evidence that the highly developed banking system is being used to launder money and transfer it around the world. It is impossible to estimate what share of this is drug money as opposed to revenue from other sectors of Latin America's tremendous underground economy. While Argentina's banks have not developed as a haven for dirty money because of concern over the country's political and economic instability, its banking system has nonetheless been utilized to wire and otherwise transfer dirty money to Europe, Asia and elsewhere.

X. CONCLUSION

As long as drug traffickers and other criminals continue to profit from their activities, their need to launder dirty money will persist. Unless the United States drastically curtails the relatively free flow of money within its borders, most of that laundering will continue to occur within the United States. Not just banks but lawyers, travel agents, real estate brokers, retail stores, and other businesses which deal in relatively large amounts of cash will continue to be used by criminals to launder their money. Imposing increasingly onerous regulations requiring them to report large-scale transactions, including those which do not involve cash, will be difficult and costly. If those regulations are perceived as too burdensome, or if the information acquired by the government is abused by government officials, a resulting backlash may set law enforcement efforts back substantially—just as the Right to Financial Privacy Act did a number of years ago.

As for the minority of billions which gets laundered abroad each year, efforts to stop that activity will continue to run up against substantial obstacles: borders which are even more porous going out than coming in; the reluctance of dollar-hungry foreign banks, businesses, and governments to turn away dollars no matter how dirty the money may be; and the tremendous international

115. See, e.g., Gerth, *Mexico Drug Profits Flowing to U.S.*, N.Y. Times, June 3, 1986 at A3, col. 1.

underground economy, reflecting not only traditional criminal activity but capital flight from inflation, instability, high taxes and duties, and so on. In this sea of black market dollars, drug money will rarely be readily discernible.

This article has discussed the unilateral, bilateral, and multilateral efforts of the United States with respect to the international laundering of drug money. These efforts have essentially been oriented toward obtaining three things: information, evidence, and the body (i.e., the criminal). Over the past few years, the United States has made substantial strides in all of these areas. The negotiation of MLATs, special narcotics cooperation agreements, and tax exchange-of-information agreements has facilitated the flow of information, particularly in forms admissible in American courts. Unilateral U.S. measures have increased the overall availability of information, most notably through stepped-up enforcement of the reporting requirements of the Bank Secrecy Act. Foreign governments have proven increasingly forthcoming both in supplying information and evidence as well as taking the initiative in bank regulation, financial investigations and multilateral activities. And, although I have not discussed the matter in this article, the number of governments willing to extradite criminals for money laundering offenses is gradually increasing.¹¹⁶

It is hoped that these efforts will make it increasingly difficult for drug traffickers to launder money. As the number of safe havens dwindle, and the multinational capacities of their pursuers expand, disposing of drug profits will become a source of both increased trouble and risk. Theoretically, the result will be greater disincentives to engaging in drug trafficking, increased costs to traffickers and consumers, better chances of catching, imprisoning and impoverishing those who do profit from trafficking, and a corresponding benefit to the governments which seize those profits.

Despite the infinite variety of money laundering techniques available to drug traffickers, the above logic is difficult to challenge. At this relatively early date in multilateral and even unilat-

116. For instance, in 1984 the Betancur Government in Colombia finally agreed to extradite some of its citizens to the United States to face charges related to drug trafficking. One of those turned over, Hernan Botero, was from a powerful and wealthy family and had been charged only with money laundering violations, not drug trafficking per se. The decision to treat Botero the same as those involved directly in drug trafficking reportedly created a major stir in Colombian financial circles. See Robbins & Ames, *Money Laundering*, Bus. Wk., Mar. 18, 1985, at 74, 79 (cover story).

eral efforts to deal with money laundering, law enforcement agencies can only improve in their efforts. Simply creating an international exception to financial secrecy laws in narcotics cases will go a long way toward increasing the insecurity and vulnerability of large-scale drug trafficking organizations. The same is true of asset forfeiture legislation around the world, which can improve foreign governments' incentives to cooperate in drug money laundering cases.

It is important to realize that the United States has used a variety of techniques to make progress in its efforts against money laundering. With foreign countries, carrots and sticks, as well as powers of suggestion, have all been used. The sticks, in the form of subpoenas, and public criticism by the government, Congress and the media, often have proven particularly effective. The carrots, in the form of the CBI and other incentives, also have had some positive effect, but perhaps not as much as hoped. The suggestions that cooperation might be in their own best interests, coming as they do with the political suasion of the United States, have certainly not hurt, although their impact has been questionable. Given the inevitably incremental nature of progress in this area, there is little choice but to continue pursuing each of these approaches.

A fairly safe assumption with which to conclude is that five years from now substantial progress will have been made in the international effort against transnational crime, and against international drug money laundering in particular. The number of MLATs to which the United States is a party will have doubled or tripled. Tax exchange-of-information agreements will also have proliferated. The efforts of the United States, INTERPOL, and others to encourage legislation dealing with identifying, tracing, freezing, seizing, and forfeiting drug-derived revenues will have met with substantial success. A new Single Convention with provisions addressing this issue will have been adopted and approved by dozens of countries. As a result of all this, drug traffickers trying to launder their funds will be faced with far greater challenges than they are today.

Domestically, there are also reasons for optimism. The Bank Secrecy Act and other laws aimed at tracing and seizing drug-related assets have been strengthened recently and will no doubt be further so. The same is true of compliance with those laws. So long as these laws and their enforcement are able to avoid occasioning a

severe backlash, the drug trafficker's task of laundering his money will become increasingly hazardous.

The biggest unknown concerns the broader context which I have sought to address. On the one hand, increasing concern worldwide with all other forms of transnational economic crime will no doubt redound to the benefit of the government detective trying to trace the trafficker's paper trail. On the other hand, the desparate economic condition of much of Latin America, the Caribbean, and other regions will continue to affect their commitment to international law enforcement and their willingness to turn away dirty money. Unless they are able to find alternative sources of revenue, they will be hard pressed to play by the same rules as the financially and economically sophisticated nations. That, in the final analysis, represents perhaps the greatest challenge to success in this enterprise.