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REVISITING NOVEL APPROACHES TO COMBATING THE
FINANCING OF CRIME: A BRAVE NEW WORLD REVISITED

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THIS paper discusses recent approaches by the United States and international organizations in combating the financing of crime. In particular, it looks at efforts to construct an international financial enforcement regime.

At present, the new transnational crimes take advantage of globalization, trade liberalization and exploding new technologies to perpetrate diverse crimes and to move money, goods, services and people instantaneously for purposes of perpetrating violence for political ends.¹ Transnational crime groups and criminals live and operate in a borderless world. Increasingly, transnational criminals are diversifying their crimes, instrumentalities, markets and networks. Their intelligence networks and the coincidence of economic and political power enable them to quickly transfer parts of their operations and enterprises to territories that they can

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1. Much of this introduction is adopted from Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime*, 44 WAYNE L. REV. 1402, 1402-05 (1998).

dominate (e.g., "gray areas" in which governments do not effectively control, including Afghanistan and parts of Pakistan and Yemen)² and/or operate surreptitiously (e.g., with sleeper cells).³ While the U.S. government has determined that transnational organized crime and terrorism are national security threats and has implemented various initiatives to combat transnational organized crime and terrorism,⁴ the U.S. government is actively seeking more significant policy and legal initiatives to conceptualize and establish effective international enforcement regimes. Some policy-makers believe that many more transformations in the U.S. legal system are required to combat the new transnational crimes.⁵

The international community and countries such as the United States have enacted a substantial amount of new legislation and have developed initiatives to combat new transnational crimes, such as cybercrime, intellectual property crimes, international tax crimes, terrorism and organized crime.⁶ Globalization, free trade and information technology have facilitated borderless transnational criminal operations. As transnational crime, especially terrorism, increases and transnational criminal groups proliferate, national governments are challenged to prevent and combat transnational criminals who operate in a borderless world.

Cybercrime exemplifies the difficulty that occurs when the law tries to keep pace with the tremendous changes in technology that enable criminals to perpetrate diverse crimes, such as theft of money in bank accounts, identity theft, pornography, hate crimes and a vast range of new criminal behavior. The international community is struggling to develop an enforcement regime, whereby they can use the new technology to assist

2. See GRAY AREA PHENOMENA: CONFRONTING THE NEW WORLD DISORDER (Max G. Manwaring, ed. 1993) (discussing gray area phenomena, whereby terrorists and criminals use portions of countries not effectively controlled to hide and operate criminal enterprises).

3. See, e.g., Peter A. Lupsha, *Transnational Organized Crime Versus the Nation-State*, 2 TRANSNAT'L ORG. CRIME 21, 21-48 (1996) (analyzing threat of sleeper cells in nation-states and suggesting steps that must be taken to combat them).

4. See *Interview with the Hon. Richard A. Clarke, Special Assistant to the President and Senior Director, Global Issues and Multinational Affairs, National Security Council*, NOV. 30, 1995, 1 TRENDS IN ORG. CRIME 5-9 (1996).

5. See, e.g., SENATOR JOHN KERRY, THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA'S SECURITY 31 (1997).

6. On October 22, 1995, President Clinton used the occasion of his fourteen minute speech before the fiftieth anniversary of the U.N. to announce a number of new initiatives against transnational organized crime. See *Remarks of President Clinton to the United Nations on the Occasion of the 50th Anniversary of the Creation of the United Nations*, 31 WEEKLY COM. PRES. DOC. 1909 (Oct. 22, 1995) [hereinafter *Remarks to the U.N.*]. A later executive order extended economic sanctions against certain Colombian narcotics trafficking organizations. See *Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers*, Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 21, 1995) [hereinafter *Anti-Drug Trafficking Executive Order*]. For the text of President Directive 42 on transnational crime, see White House, *Presidential Directive on International Organized Crime, Summary Sheet*, Oct. 22, 1995 [hereinafter *Presidential Directive*].

in the identification, investigation and prosecution of the cybercriminals. In this regard, the proposed Council of Europe Convention Against Cyber-crime provides a strong potential mechanism.

Intellectual property and counterfeiting crimes have grown tremendously in the last couple of decades. Criminals counterfeit everything from software to cosmetics and clothing. The international community and governments have tried a combination of international trade law, such as Trade in Related Intellectual Property Services (TRIPS) and the North American Free Trade Agreement (NAFTA), to criminalize transnational intellectual property crimes. For instance, in the United States, trade associations such as the International Intellectual Property Association and the Motion Picture Society of America have exerted pressure on the U.S. government to bring an action against Mexico because of the alleged lack of criminal prosecution by the Mexican government against persons who intentionally violate intellectual property law. Indeed, these same U.S. trade associations succeeded in persuading the NAFTA signatories to include provisions requiring criminal prosecution and civil action against violators of intellectual property law.

Money laundering is an example of the type of crime that governments and the international community have criminalized only since the mid-1980s. Through international conventions, such as the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the international community has extended the use of a new anti-money laundering enforcement regime globally. Signatories are required to criminalize laundering offenses and are required to initiate asset forfeiture and confiscation as remedies. These conventions require a broad range of international judicial cooperation, including evidence gathering and extradition, and suggest a range of more customized bilateral cooperation agreements. Institutionally, the prevalence of money laundering has spawned the establishment of financial investigative (or intelligence) units (FIUs) around the world. The Egmont Group, which is an association of FIUs, meets regularly to facilitate cooperation among FIUs and develop uniform approaches to core issues. Anti-money laundering initiatives have given rise to new organizations and groups, such as the Financial Action Task Force on Anti-Money Laundering (FATF). Growing out of the industrial Group of 7 meetings, FATF has developed cutting edge requirements on legal, financial and external relations with respect to anti-money laundering provisions. Among the many legal transformations brought by anti-money laundering laws is the erosion of bank and financial secrecy.

In the aftermath of the terrorist attacks of September 11, 2001 on the United States, the emphasis of the U.S. government and the international community on counter-terrorism financial enforcement is increasing. The U.S. government has invoked a war paradigm and initiated a comprehen-

sive financial strategy aimed at detecting, through financial transfers, transnational terrorist movements and plans, with the purpose of preventing new terrorist attacks. The strategy is designed to investigate, prosecute and seize terrorist assets by applying many of the anti-money laundering due diligence requirements commonly used by the private sector to counter-terrorism. Simultaneously, the United States applies its economic sanctions regime to terrorist states, persons and entities. The United States strategy is to develop comprehensive international counter-terrorism financial enforcement.

While the international community has engaged in tax enforcement cooperation for many years through the exchange of information provisions within income tax treaties and exchange of information agreements, many national courts have traditionally taken the position that one country will not help collect the taxes of another country. Therefore, courts typically refuse to enforce foreign tax judgments and even deny requests for assistance in the absence of a binding international convention requiring assistance. During the last two or three decades, the international community has developed multilateral conventions, such as the 1983 Council of Europe and Organisation for Economic Co-operation and Development (OECD) Convention on Mutual Administrative Assistance in Tax Matters, to overcome the traditional judicial reluctance to help foreign tax authorities. Furthermore, international organizations of tax authorities have met regularly to develop uniform approaches, networks and conventions to reduce gaps in tax laws and strengthen enforcement cooperation. Increasingly, national governments have criminalized tax fraud and evasion and required extensive and draconian reporting regimes that include administrative penal laws for non-compliance.

The international community has developed offshore blacklisting as a means to accelerate compliance with new "soft law." In 1999 and 2000, governments and international organizations continued their active efforts to increase regulatory and criminal enforcement of various laws to stem the tide of transnational crime. These efforts were reflected in the criminalization of various businesses and financial transactions, the imposition of new due diligence measures on the private sector, a concomitant weakening of privacy and confidentiality laws, strengthened penalties for non-compliance with regulatory efforts and new law enforcement techniques (*e.g.*, undercover sting operations, wiretapping, expanded powers to search homes and businesses and controlled deliveries).

A major development in 2000 was the almost simultaneous issuance of blacklists against non-compliant organizations. Within a one-month period, the OECD issued its harmful tax competition initiative with a list of tax havens that did not agree to make a public commitment to bring their practices into compliance; the Financial Stability Forum (FSF) issued its report on offshore financial centers (OFCs), classifying OFCs into three

levels of compliance with international standards; and the FATF issued its list of fifteen non-complying countries.

The simultaneous issue of blacklists was an attempt to jumpstart the anti-money laundering enforcement regime and confer a greater status on soft laws in international law and politics. The FATF's decision in October 2000 to continue blacklisting the fifteen noncooperative countries, together with the lack of any new commitments by the OECD harmful tax competition initiative and the decision by the International Monetary Fund (IMF) to take over the OFC work of the FSF, made companies, investors and a broad range of the private sector reconsider the structure of their investments.

The convergence of the various initiatives shows a determination by intergovernmental organizations to combine development of an international financial enforcement subregime, which includes international tax and anti-money laundering policy, with the new international financial architecture, particularly the work by the FSF.

Countries such as Italy and the United States have pioneered national legislation to combat organized crime. On December 15, 2000, the signing by 124 countries of the U.N. Convention on Transnational Organized Crime in Palermo, Italy signified the start of the construction of an international enforcement regime against transnational organized crime. Its three protocols: 1) to prevent, suppress and punish trafficking in persons; 2) to combat the smuggling of migrants by land, air and sea; and 3) to curb the illicit transfer of firearms, represent a new effort to attack transnational organized crime activity. The Convention employs some of the same methods as the U.N. Counterdrug Convention (*e.g.*, requiring signatory countries to enact anti-money laundering and asset forfeiture techniques against transnational organized crime).

The challenges of transnational criminality at the millennium are substantial. Unless nation-states become better at networking and cooperating with each other, they will lose power to transnational criminals who operate in a borderless world. In order to gain and maintain respect for their democracies, States must develop international enforcement regimes that are balanced and maintain fundamental and international human rights. To achieve success in combating transnational crime, criminal justice authorities must become more adept at working with non-criminal legal professionals, diplomats, international affairs experts and a host of other specialists. For instance, criminal justice professionals must study international organization theory and chart the creation, emergence and evolution of international enforcement regimes. Indeed, new transnational crimes and responses in the context of globalization will continue to pose a significant challenge to the lives of legal and other professionals.

This paper examines recent approaches by the United States and the international community to combat the financing of various types of international crime. In particular, it looks at narcotics, organized crime, taxa-

tion, economic sanctions, money laundering and counter-terrorism financial enforcement. The selection was based on considerations of space and allocation of work among our panel. In particular, one of the panelists is focusing on forfeiture,⁷ which normally would have been a focus of this paper.

I. UNITED STATES NOVEL APPROACHES TO COMBATING THE FINANCING OF INTERNATIONAL CRIME

The United States government has taken the position that many forms of transnational crime are a national security threat and has taken various initiatives to combat such threats by continuously and actively seeking more significant policy and legal initiatives to conceptualize and establish effective regimes. Some leading policymakers have worked to develop more transformations in both the United States and international legal systems.⁸

Especially in the 1990s, the U.S. government enacted a substantial amount of new legislation and developed initiatives to combat transnational organized crime. Included in these efforts was the designation of certain persons as narcotics kingpins and then using economic sanctions against them, such as blocking their assets.⁹ The United States has taken significant measures against drug trafficking, anti-money laundering, transnational corruption, trafficking in human beings, international terrorism, fiscal offenses and organized crime.¹⁰

An essential component of the U.S. strategy to combat the financing of transnational crime has been asset forfeiture, especially civil and administrative forfeiture. At times, the United States has prioritized confiscating the crime proceeds and disrupting criminal groups over bringing persons to justice. The dangers of counter-terrorism, however, do not always allow the luxury of deferring arrests to try to get to the upper echelons of criminal groups.¹¹

7. For an earlier discussion by this author, see Bruce Zagaris, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 EMORY INT'L L. REV. 446 (1991).

8. See, e.g., KERRY, *supra* note 5, at 31 (arguing that U.S. legal "instruments" are too antiquated to combat transnational criminal organizations).

9. See *Remarks to the U.N.*, *supra* note 6 (proposing five initiatives to U.N. that would help combat transnational organized crime). For a discussion of the economic sanctions, see the Anti-Drug Trafficking Executive Order and the *Presidential Directive*, *supra* note 6.

10. See Bruce Zagaris, *Clinton Administration Prepares International Organized Crime Initiative*, 12 INT'L ENFORCEMENT L. REP. 196, 196-97 (1996) (discussing activities of U.S. Executive during Clinton Administration); *U.S. Congress Considers Suggestion on Combating International Organized Crime*, 12 INT'L ENFORCEMENT L. REP. 116, 116-20 (1996) (same).

11. See WHITE HOUSE, INTERNATIONAL CRIME CONTROL STRATEGY 7 (May 1998) (proposing asset seizure of international criminals as principal law enforcement objective).

The United States has served as an international pioneer in many of the organizational aspects of combating transnational crime, including the financial aspects of crime. For instance, the United States has posted a variety of liaison enforcement officers overseas, helped transform legal regimes and developed bilateral law enforcement working groups on specific areas of transnational crime. The United States has also given technical and financial assistance to create training centers—such as the International Law Enforcement Academy in Budapest—and to enable judicial enforcement directed against transnational organized crime in areas like Central and Eastern Europe.

A. *Narcotics Control*

Since the 1980s, the U.S. government has enacted a number of laws to combat the financial aspects of narcotics trafficking. For instance, the Anti-Drug Abuse Act of 1986 criminalized money laundering. It established Currency Transaction Reports (CTRs), requiring that all currency transactions of \$10,000 or more be reported to the federal government. The Money Laundering Prosecution Improvements Act of 1988, part of the Anti-Drug Abuse Act of 1988, added three new elements: 1) reduced threshold-reporting requirement permitting geographical targeting; 2) erosion of financial privacy; and 3) enhanced penalties for violators.¹²

Section 4702 of the 1988 Act required the U.S. Department of Treasury to negotiate information-sharing agreements concerning financial data with key drug producing or drug-transit states. The so-called Kerry Amendments, named after Senator John F. Kerry, were designed to permit United States and other national enforcement forces to go after the profits of drug trafficking in order to reduce the ability of drug dealers to launder narco-profits; in effect, to hit these criminals where it hurts most—their pocket books.¹³ The United States, however, was only able to conclude a few agreements and abandoned its efforts to secure such agreements.

Part of the strategy of the Bush administration has been to focus on high value traffickers, operations and drug shipments. The goal is to remove key persons from the trafficking chain and thereby disrupt the operations of narcotics cartels and traffickers.¹⁴

A major component of United States counter-narcotics enforcement has been the use of task forces, operated by the Organized Crime Drug Enforcement Task Force (OCDEF) Program. OCDEF utilizes the expertise of multiple federal agencies, as well as a number of state and local law enforcement offices, to coordinate investigations and prosecutions of sophisticated and diversified criminal drug-related and money laundering enterprises. The expertise of these groups are quite broad, covering fi-

12. See Raphael Francis Perl, *The United States, in* INTERNATIONAL HANDBOOK ON DRUG CONTROL 72-73 (Scott B. MacDonald & Bruce Zagaris eds., 1992).

13. *Id.* at 73.

14. *Id.*

nancial and tax information and data on trafficking organizations and gang activity. Prior to the reorganization that created the Department of Homeland Security, the participating federal agencies included the Drug Enforcement Administration, Customs, Alcohol Tobacco and Firearms, Coast Guard, U.S. Marshals Service, Internal Revenue Service, Federal Bureau of Investigation, Justice Department's Tax and Criminal Divisions and Immigration and Naturalization Service.¹⁵ OCDETF operates in thirteen regions. The Law Enforcement Coordinating Committees (LECCS), chaired by U.S. attorneys, actively assist OCDETF.¹⁶

Narcotics provisions borrowed the concept of forfeiture provisions from the Racketeer Influenced and Corrupt Organizations Act (RICO). They allow the government to institute criminal forfeiture proceedings against any defendant in a felony case covered by the statute, including drug offenses and fraud. These provisions require persons convicted of a listed offense resulting in imprisonment of more than one year to forfeit any property "constituting, or derived from any proceeds" obtained as the result of the crime and any property used to commit or facilitate the crime.¹⁷

An important difference between the Controlled Substances Act and RICO is that in the former, the government enjoys a presumption in support of forfeiture if it shows by a preponderance of the evidence at the criminal trial that the property was acquired at the time the crimes were committed or within a reasonable time thereafter and that "there was no likely source for the property other than the violations of the controlled substances law."¹⁸

During the 1980s, the Uniform Controlled Substance Act and the federal RICO statute served as models for state forfeiture statutes. Virtually all of the states in the United States enacted some form of the Uniform Controlled Substances Act.¹⁹

B. *Organized Crime*

The most utilized provisions directed at combating the financing of crime are those found in the RICO statute²⁰ and the Controlled Substances Act.²¹

The RICO forfeiture provisions state that any interest acquired or maintained from acts prohibited by the RICO provisions are subject to

15. *Id.* at 75.

16. *Id.* at 76.

17. 21 U.S.C. § 853(a) (2005).

18. *Id.* § 853(d)(2). For a useful discussion of U.S. forfeiture laws, see Robert D. Luskin, *Forfeiture Status: A Brief Survey and History*, in THE SECOND NATIONAL INSTITUTE ON FORFEITURES AND ASSET FREEZES 8 (ABA Criminal Justice Sec., 1992).

19. Luskin, *supra* note 18, at 9 (citing 9 Uniform Law Annotated 198 *et seq.*).

20. 18 U.S.C. §§ 1961-1968 (2001).

21. 21 U.S.C. § 853 (2005).

forfeiture.²² Additionally, any property “constituting, or derived from, any proceeds” obtained directly or indirectly from racketeering activity is subject to forfeiture. The statute defines property to include real property, tangible and intangible personal property. Many states have enacted RICO statutes that contain forfeiture provisions.²³

The U.S. government, in cooperation with Italy and international organizations, such as the United Nations, has been active in helping interested countries, such as Mexico, develop their own organized crime legislation to facilitate the investigation and prosecution of organized crime. As a result, Mexico enacted a Federal Organized Crime Act on October 18, 1996.²⁴

C. *Anti-Money Laundering*²⁵

Since the initiation of international anti-money-laundering (AML) efforts in the mid-1980s, various substantive mandates have been established.²⁶ Nations are now required to criminalize money-laundering activities through the proactive tracing, freezing and seizing of the instrumentalities and proceeds of serious crime and the forfeiting of them to law enforcement personnel.²⁷ Financial institutions and their employees must practice what is known as due diligence. They are bound by law to help law enforcement officials by “knowing their customers;” identifying and reporting suspicious transactions to authorities; training employees; hiring compliance officers; and obtaining outside audits of their compliance with AML standards. Neither governments nor financial institutions may cite secrecy or privacy as a reason for refusing to follow any of these obligations.

The United States spurred the growth of the AML regime early on and has been a leader in its expansion to cover more entities, activities and nations ever since. The main AML provisions are found in Titles 12, 18

22. 18 U.S.C. § 1963(a) (2001).

23. Luskin, *supra* note 18, at 9.

24. See Rodrigo Labardini, *Mexico's Federal Organized Crime Act*, 11 U.S.-MEX. L.J. 133 (2003) (focusing on drug trafficking as most pervasive form of organized crime in Mexico in relation to Mexico's organized crime law).

25. This and the following sections are taken from Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regime After September 11, 2001*, 22 BERKELEY J. OF INT'L L. 124 (2004).

26. For background on some of the early anti-money laundering (AML) law, see Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy*, 19 BROOK. J. INT'L L. 871, 872-78 (1993).

27. The purpose of forfeiture is to disable the criminal from continuing to perpetrate crimes and to distribute to law enforcement and/or victims the ill-gotten gains. Indeed, a good portion of the budgets of law enforcement agencies in the U.S. and other countries comes from forfeiture. An enormous cottage industry dealing with the freezing and forfeiture of assets has arisen. For background on AML forfeiture laws, see DAVID B. SMITH, *PROSECUTION AND DEFENSE OF FORFEITURE CASES* (2004).

and 31 of the U.S. Code. The Bank Secrecy Act of 1970 (BSA),²⁸ a precursor to AML efforts, was intended to deter money laundering and the use of secret foreign bank accounts by improving the detection and investigation of criminal, tax and regulatory violations. It demanded an investigative "paper trail" for large currency transactions by establishing regulatory reporting standards and requirements, and imposed civil and criminal penalties for noncompliance.²⁹

The Money Laundering Control Act of 1986,³⁰ part of the Anti-Drug Abuse Act of 1986, was a watershed development in U.S. money movement regulation. It created three new criminal offenses for money laundering activities by, through or to a financial institution: 1) knowingly helping launder money; 2) knowingly engaging in (including by being willfully blind to) a transaction of more than \$10,000 that involves property acquired through criminal activity; and 3) structuring transactions to avoid the BSA reporting requirements. It authorized, for the first time, the seizure and forfeiture of cash, or property related to such cash, where the owner causes a financial institution to fail to file a required BSA report.³¹

The Money Laundering Control Act directed banking regulators to require insured financial institutions to establish and maintain reporting procedures that comply with the BSA.³² The Money Laundering Control Act also amended the Right to Financial Privacy Act (RFPA)³³ by clarifying the type and amount of information a financial institution can voluntarily give law enforcement authorities without notifying its customers.³⁴ Additionally, the Money Laundering Control Act amended and restricted the BSA exemption requirements, whereby banks obtained an exemption for various customers whose business required them to work with and deposit considerable amounts of cash (*e.g.*, restaurants, laundromats and nightclubs).³⁵

28. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 18 U.S.C. and 31 U.S.C.).

29. *See, e.g.*, I.R.S. Currency Transaction Report Form 4789 (requiring banks to report any transfer of funds in amount greater than \$10,000). In some instances, this monetary threshold can sink as low as \$3,000. *See* 31 C.F.R. § 103.29 (2004).

30. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 18 U.S.C. §§ 1956-1957 (2001)).

31. 18 U.S.C. § 981 (Supp. V 1987) (providing civil forfeiture provisions); 18 U.S.C. § 982 (Supp. V 1987) (detailing criminal forfeiture provisions); *see* Charles Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Bank Secrecy*, 22 INT'L LAW. 69, 81-82 (1988) (discussing forfeiture).

32. 12 U.S.C. § 1818(s)(1) (Supp. V 1987); *see* 12 U.S.C. § 1953 (1982).

33. Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (codified in scattered sections of 31 U.S.C.), *reprinted in* 1978 U.S.C.C.A.N. 9305.

34. Money Laundering Control Act, § 1353(a)-(b) (amending Right to Financial Privacy Act §§ 1103, 1109, 1113, codified in 12 U.S.C. §§ 3403(c), 3409, 3413 (1) (Supp. V 1987)).

35. *Id.* Section 1353(a)-(b) authorized financial institutions—or officers, employees or agents thereof—to disclose identifying information concerning any individual or account involved in any suspected illegal transaction. This section of

The Anti-Drug Abuse Act of 1988³⁶ strengthened the AML scheme by significantly increasing civil and criminal sanctions for laundering crimes and BSA violations, including forfeiture of “any property, real or personal, involved in a transaction or attempted transaction” in violation of the reporting laws³⁷ and requiring more precise identification and recording of cash purchases of certain monetary instruments. In addition, the Anti-Drug Abuse Act allows the Department of the Treasury to obligate financial institutions to file additional, geographically targeted reports;³⁸ requires the Treasury to negotiate bilateral international agreements covering the recording of large U.S. currency transactions and the sharing of such information;³⁹ and increases the criminal sanctions for tax evasion when money from criminal activity is involved.

The Housing and Community Development Act of 1992⁴⁰ allows regulators to close or seize financial institutions that violate AML statutes by suspending or removing institution-affiliated parties that have violated the BSA or have been indicted for money laundering or criminal activity under it, by appointing a conservator or receiver or by terminating the institution’s charges. The Housing and Community Development Act further forbids any individual convicted of money laundering to engage in unauthorized participation in any federally insured institution.

Additionally, the Housing and Community Development Act required Treasury to issue regulations compelling national banks and other depository institutions to identify which of their account holders (other than other depository institutions or regulated broker dealers) are non-bank financial institutions (*e.g.*, money transmitters or check-cashing services). Pursuant to the Housing and Community Development Act, the Treasury, along with the Federal Reserve, promulgated regulations obligating financial institutions and other entities that cash checks, transmit money or perform similar services to maintain records of domestic and international wire transfers so that they can be made available for law enforcement investigations. The Housing and Community Development Act also established a BSA Advisory Group that includes representatives from the

the 1986 Act also empowered courts, pursuant to grand jury subpoena, to order financial institutions not to notify affected customers of the existence of the subpoena or of the information revealed to the grand jury. *Id.*

36. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of the U.S.C.).

37. 31 U.S.C. § 5317(c) (2001).

38. *See* 31 C.F.R. § 103.26 (2004).

39. Anti-Drug Abuse Act § 4702 (codified at 31 U.S.C. § 5311); *see* 134 CONG. REC. § 15,993 (daily ed. Oct. 14, 1988) (passing Amendment 3697). The Kerry Amendment required the President to impose penalties and sanctions on recalcitrant governments when the Treasury advised the President or formally reported that a foreign country was not negotiating in good faith to reach an agreement. *Id.* § 4702(e).

40. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified as amended in scattered sections of U.S.C.).

Departments of Treasury and Justice, the Office of National Drug Control Policy and other interested persons and financial institutions. The group's main goal is to develop harmonious private-public cooperation to prevent money laundering.

The Housing and Community Development Act also gave Treasury the authority to require financial institutions to adopt AML programs that include internal policies, procedures and controls; designation of a compliance officer; continuation of an ongoing employee-training program; and an independent audit function to test the adequacy of the program. Financial institutions and their employees are also required to file suspicious activity reports on transactions relevant to possible violations of law or regulations. The Housing and Community Development Act however, protects institutions and their employees from civil suits arising from such reports. The American Bankers' Association and the banking industry had long sought such a safe harbor.⁴¹ A financial institution or employee, however, may not disclose to the subject of a referral or grand jury subpoena that a criminal referral has been filed or a grand jury investigation has been started concerning possible money laundering or violation of the BSA. Employees who improperly disclose information concerning a grand jury subpoena for bank records are subject to prosecution.

Together, the above-mentioned requirements comprise the due diligence standards imposed on institutions covered by AML laws.⁴² They represent far-reaching mandates of information sharing between private entities and governmental law enforcement agencies. They override privacy statutes in the name of enhanced crime-fighting capabilities. They also erode the contractual and ethical principles of privacy and confidentiality that are important to banks, financial institutions and intermediaries, as well as professionals involved in the international transfer of wealth.⁴³

Thus in 1998, when new regulations were proposed that would have required banks and eventually other financial institutions to develop "Know Your Customer" programs,⁴⁴ the industry balked. Bankers recog-

41. For more information on the ABA's involvement in the U.S. AML scheme, see ANTONIO CALZADA ROVIROSA ET AL., *ANTI-MONEY LAUNDERING AND ANTI-TERRORIST FINANCING POLICY IN THE POST-SEPTEMBER 11TH ERA: A PRELIMINARY ANALYSIS OF THE IMPACT ON FINANCIAL INSTITUTIONS IN THE UNITED STATES* 4.2.1 (2002).

42. Other statutes also added to the standards of due diligence. See, e.g., Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. 105-310, 112 Stat. 2941 (codified as amended at 31 U.S.C. § 5341 (2005)) (requiring Treasury to work with state and local officials and to plan and implement national AML strategy).

43. See the discussion of confidentiality in Antony G.D. Duckworth, *The Trust Offshore*, 32 VAND. J. TRANSNAT'L L. 879, 927-29 (1999) (discussing differences in culture regarding confidentiality with financial affairs throughout different countries).

44. The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of Thrift Supervision simultaneously proposed substantially similar rules. See, e.g., Know Your Customer, 63 Fed. Reg. 67,536 (proposed Dec. 7, 1998).

nized the broad implications for private banking and offshore accounts that the imposition of such requirements would have in forcing them to design, implement and regularly update and adjust their "Know Your Customer" internal control systems. Due to enormous opposition from an unusual coalition of private sector groups, both from the far left and far right, the proposed regulations were withdrawn.⁴⁵

The private sector groups were not appeased for long. Just two and a half years later, the USA PATRIOT Act⁴⁶ amended section 352 of the BSA, requiring financial institutions to practice enhanced due diligence on high-risk products, including those aimed at servicing persons on certain lists of designated terrorists and Senior Foreign Political Figures (also known as Politically Exposed Persons or PEPs); private banking clients; certain financial intermediaries; foreign shell banks; foreign correspondent accounts; as well as transactions with non-cooperative countries and territories.⁴⁷ Although not quite as stringent as the earlier proposed regulations, the new requirements were similar in many respects and indeed are often referred to as "Know Your Customer" rules.⁴⁸

American leadership on the international financial enforcement front peaked in 2001 with new withholding regulations that had a dramatic impact on foreign investment in the United States. They required foreign investors to reveal the ultimate beneficial ownership of complex structures that include multiple layers of businesses or else incur a thirty-one percent withholding tax on all receipts from their U.S. investments, including dividends, capital gains, royalties and interest.⁴⁹ Fiduciaries and their counsel had to review over 200 pages of extremely complex rules that distinguish among complex, simple and grantor trusts and repeatedly cross-reference various sections of the Internal Revenue Code and Internal Revenue Service regulations.⁵⁰ Understanding the dense and compli-

45. See, e.g., Know Your Customer, 64 Fed. Reg. 14,845 (withdrawn Mar. 29, 1999); Robert O'Harrow, Jr., *Disputed Bank Plan Dropped; Regulators Bow to Privacy Fears*, WASH. POST, Mar. 24, 1999, at E01 (reporting that civil liberties activists, both liberal and conservative, complained rules would expand government's ability to track people).

46. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

47. The FATF later incorporated the idea into its 2003 revision of its Recommendations. See Press Release, Organisation for Economic Co-operation and Development, New Anti-Money Laundering Standards Released (June 20, 2003), available at http://www.oecd.org/document/25/0,2340,en_2649_201185_2789401_1_1_1_1,00.html.

48. See BASEL COMMITTEE ON BANKING SUPERVISION, CUSTOMER DUE DILIGENCE FOR BANKS (2001); see also BASEL COMMITTEE ON BANKING SUPERVISION, CONSOLIDATED KYC RISK MANAGEMENT (2003) (supplementing former).

49. See Fredrickson & Byron, P.A., *IRS' New Withholding Rules for Nonresident Aliens* (2001), at http://www.fredlaw.com/articles/tax/tax_01_02_des.html (explaining consequences for not following rules).

50. To better understand how difficult it was for the industry to understand the new rules, see Jonathan Crowther, *New U.S. Withholding Rules Explained* (Dec. 1,

cated language was all the more difficult for non-English speakers. Hence, there arose a proliferation of model "Know Your Customer" agreements with countries less than ninety days before the regulations took effect.⁵¹

Banks and fiduciaries also needed to enforce the Qualifying Intermediary Regulations by implementing a new bureaucracy, complete with regular audits by the IRS or another entity approved by the IRS.⁵² Simultaneously, they had to review, with the aid of newly purchased bureaucratic software, the latest changes to the U.S. unilateral extraterritorial export control laws, such as the Foreign Narcotics Kingpin Designation Act.⁵³ They also had to buy separate software and hire separate compliance officers for the Office of Foreign Asset Control regulations. Indeed, due to the complex nature of the two sets of regulations, it would be foolhardy to try to implement both through one compliance officer.

D. *Economic Sanctions*

The United States has used economic sanctions against drug traffickers, terrorists, organized criminals (*e.g.*, narco-kingpins) and money launderers. In October 1995, President Bill Clinton signed an executive order⁵⁴ to freeze any assets of the Cali cartel,⁵⁵ which at the time was allegedly responsible for eighty percent of the cocaine and fifteen percent of the heroin entering the United States.⁵⁶ President Clinton said he had directed his Attorney General and the Secretaries of the Treasury and State to identify countries that help in money laundering and to notify them that, unless they adhere to the international standards set forth in the FATF's Forty anti-money-laundering recommendations, the United States would consider imposing sanctions that could prevent them from

2000), at http://www.getyourmoneyworking.com/2001/JAN/27/Wealth_Management/Tax/D010127240.html.

51. See, *e.g.*, Guernsey Financial Services Commission, *New U.S. Withholding Tax Rules* (Aug. 1, 2000), at <http://www.gfsc.guernseyci.com/news/archive/uswitholdingtax.html> (making available online generic non-US investor "qualified intermediaries" agreement with IRS).

52. See TIM BENNETT, *TOLLEY'S INTERNATIONAL INITIATIVES AFFECTING FINANCIAL HAVENS 124-25* (2001) (discussing qualifying intermediary (QI) regime).

53. Foreign Narcotics Kingpin Designation Act, Pub. L. No. 106-20, 113 Stat. 1606, 1626-1636 (1999) (codified as amended at 21 U.S.C. §§ 1901-1908).

54. Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 24, 1995).

55. *Remarks to the U.N.*, *supra* note 6; see also John F. Harris, *U.N. Anniversary Celebration Opens with Notes of Discord: Clinton Urges Global Effort Against Crime*, WASH. POST, Oct. 23, 1995, at A01 (providing background on speech); Alison Mitchell, *U.S. Freezes Assets of Cartel in new Effort Against Drugs*, N.Y. TIMES, Oct. 23, 1995, at A11 (same).

56. For additional discussion of the executive order on which this discussion is based, see Bruce Zagaris, *Constructing a Hemispheric Initiative Against Transnational Crime*, 19 FORDHAM INT'L L.J. 1888, 1888-92 (1996).

doing business in the United States and prevent them from making electronic transfers of money through banks in the United States.⁵⁷

The executive order, issued under the International Emergency Economic Powers Act⁵⁸ (IEEPA), authorizes the President to take action in the case of an "unusual and extraordinary threat . . . to the national security."⁵⁹ It requires U.S. financial institutions to search for and freeze accounts held in the names of persons or companies determined by the government to assist or have a significant role in international drug trafficking.⁶⁰ The order forbids U.S. businesses and officials from trading with those individuals and front companies.⁶¹ Pursuant to the executive order, the United States has identified principals in the Cali cartel and other narcotics organizations whose property would be subject to the freeze. All of these individuals are based outside the United States.

The most innovative substantive legal component of the Clinton effort to combat organized crime was the decision to use the IEEPA to freeze assets and try to prevent U.S. persons from dealing with companies owned and/or controlled by drug traffickers. This measure logically extends from the finding in 1986, by former President Ronald Reagan, that international drug trafficking poses a serious threat to the U.S. national security, a finding reiterated many times thereafter. The measures are an attempt to impose an economic embargo on seemingly more legitimate enterprises of cartels, because the United States will try to persuade other countries to join its economic embargo against the allegedly criminal enterprises.

The Clinton executive order is an extension of the threat to identify, isolate and punish countries and financial institutions that do not comply with international standards of anti-money laundering. It is based on the 1988 amendments introduced by Senator Kerry to the 1988 Anti-Drug Abuse Act.⁶² Jonathan Winer, who served as a Kerry staffer, was Assistant Secretary of State for International Narcotics and Law Enforcement in the

57. *Remarks to the U.N.*, *supra* note 6.

58. International Emergency Economic Powers Act, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-1708 (1988)).

59. 50 U.S.C. § 1701(a) (1988).

60. *See* Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 24, 1995).

61. *Id.* For further discussion of the executive order, see Bruce Zagaris, *Clinton Administration Issues Order Blocking Assets and Prohibiting with Significant Narcotics Traffickers*, 11 INT'L ENFORCEMENT L. REP. 484 (1995) (surveying prohibitions on trade with businesses in response to Clinton Administration's desire to freeze assets from money laundering).

62. *See* 1988 Anti-Drug Abuse Act, Pub. L. No. 100-690 § 4702 (to be codified at 31 U.S.C. § 5311) (providing critical analysis of Kerry Act provisions); 134 CONG. REC. S15,993 (daily ed. Oct. 14, 1988) (passing Amendment 3997 introduced by Senator Kerry); *see also* Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—A United States Perspective*, 22 GEO. WASH. J. INT'L L. & ECON. 465, 476-79 (1989) (explaining steps taken by federal government to fight narcotics trafficking by tracking international transactions involving large sums of U.S. currency).

Clinton administration. The citing of, and threat to sanction, transgressor countries and financial institutions is an effort to force other countries to pay better attention and adhere to U.S. and international enforcement policies. The difficulty is finding an internationally acceptable method to evaluate countries that have been deficient in implementing anti-money laundering procedures.

E. *Criminal and Quasi-Criminal Tax Offenses*

The proactive use of criminal and quasi-criminal law concerning transnational tax matters is a unique facet of U.S. criminal and enforcement policy. U.S. citizens and residents for tax purposes must declare and pay taxes on their worldwide income. The aggressive use by such persons and business entities of offshore entities, various mechanisms to obtain deductions, conceal income and misstate income may constitute tax crimes.⁶³ Criminal provisions for the same conduct may also apply under Title 18 of the United States Code. Provisions of the Code include those for conspiracy,⁶⁴ false statements to government agencies⁶⁵ and mail frauds.⁶⁶

A number of federal programs exist to target certain types of business transactions, transactions with certain countries and entries of persons to and from the United States. Various inter-agency investigations and computer programs can assist in both investigations and prosecutions.⁶⁷ The use of these programs has increased and become more effective following changes made to U.S. law enforcement in the aftermath of terrorist attacks on September 11, 2001.

The United States has raised revenue by targeting multinational enterprises that are perceived as not paying their fair share of taxes. The perception is based partly on the belief that these enterprises either shift profits to related enterprises in low tax countries or arbitrarily shift the costs of international operations to U.S. enterprises, thereby reducing net income and taxes owed the United States. As a result of the decrease in

63. See 26 U.S.C. § 7201 (1988) (discussing evading tax liability); *id.* § 7203 (Supp. 1993) (describing consequences of failing to file tax return, supply information or pay tax); *id.* § 7206 (1988) (filing false documents, including returns); *id.* § 7602(2) (aiding or assisting in preparation of false return); *id.* § 7207 (falsifying documents as to any material matter).

64. See 18 U.S.C. § 371 (1988) (detailing mode by which violation may occur).

65. *Id.* § 1001.

66. *Id.* § 1341.

67. See, e.g., Bruce Zagaris & David R. Stepp, *Criminal and Quasi-Criminal Customs Enforcement Among the U.S., Canada and Mexico*, 2 *IND. INT'L & COMP. L. REV.* 337, 380 (1992) (discussing Treasury Enforcement Compliance System (TECS), computer program to collect and review financial and immigration records from multiple agencies).

taxes owed to the United States, a series of laws and regulations in the transfer pricing area evolved.⁶⁸

The U.S. tax laws and regulations have dramatically increased the amount of recordkeeping and reporting required of multinational enterprises.⁶⁹ These new requirements are accompanied by a major rise of severe economic penalties and loss of procedural rights for taxpayers who do not comply.⁷⁰ Simultaneously, the Internal Revenue Service substantially improved its procedural rights. Consequently, tax authorities are able to demand information, extend the statute of limitations, prevent the introduction of foreign documents not immediately available to them during an examination⁷¹ and completely disregard records where the taxpayer has not timely furnished such information.⁷²

U.S. tax authorities have concluded tax information and related mutual assistance agreements with their counterparts to provide improved means for tax agents to obtain and verify information and documents from multinationals directly from their foreign counterparts.

II. POST-SEPTEMBER 11, 2001: THE U.S. COUNTER-TERRORISM FINANCIAL ENFORCEMENT REGIME—THE MERGING OF AML, CTFE AND SANCTIONS⁷³

Shortly after the September 11, 2001 terrorist attacks, President Bush issued a series of executive orders extending and tightening counter-ter-

68. The United States has imposed penalties on multinational enterprises in transfer pricing cases. The Internal Revenue Code describes transfer pricing as follows:

[T]he Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses.

I.R.C. § 482 (1986).

69. For example, the IRS requires maintenance of very detailed records on how transfer pricing is figured contemporaneous with the filing of income tax returns. See I.R.C. §§ 6038A, 6039C (1986) (requiring information with respect to certain foreign-owned corporations and foreign corporations engaged in U.S. business); see also *id.* § 6038A(b) (detailing information secretary may prescribe by regulation). The appointment of agents is also required in the U.S. where ones do not exist, allowing multinational enterprises to be served summons. *Id.* § 6038A(b)(1).

70. The Internal Revenue Code imposes penalties of \$1,000 for each year in which the reporting corporation fails to maintain information and records as required by § 6038A(b). *Id.* § 6038A(d).

71. *Id.* § 982(a). If the taxpayer, however, establishes reasonable cause for the failure to provide the documentation requested, the documents may be introduced. *Id.* § 982(b).

72. *Id.* § 6038A(d)(3) (stating that treatment of such transaction is within discretion of secretary).

73. This section is derived substantially from Bruce Zagaris, *The Merging of the Counter-Terrorism and Anti-Money-Laundering Regimes*, 34 LAW & POL'Y INT'L BUS. 45, 48-73 (2002).

rorism financial enforcement (CTFE) laws, which are intended to dry up the funding of terrorists and terrorist organizations. These orders were followed by the establishment of new investigative teams in numerous law enforcement agencies and the passage of the USA PATRIOT Act, which criminalized various business and financial transactions, expanded law enforcement powers, imposed new due diligence measures on the private sector that weakened privacy and confidentiality laws and increased penalties for non-compliance with regulatory efforts.

A. U.S. Sanctions Against Terrorists and Terrorist Organizations⁷⁴

On September 24, 2001, President George W. Bush issued an executive order that immediately froze U.S. financial assets of, and prohibited U.S. transactions with, twenty-seven different entities.⁷⁵ The listed entities included terrorist organizations, individual terrorist leaders, a corporation that serves as a front for terrorism and several nonprofit organizations.⁷⁶ The executive order was issued under the authority of IEEPA,⁷⁷ the National Emergencies Act,⁷⁸ section 5 of the United Nations Participation Act of 1945, as amended,⁷⁹ and 3 U.S.C. § 301. President Bush also cited as legal bases the United Nations Security Council Resolution 1214 of December 8, 1998, Resolution 1267 of October 15, 1999, Resolution 1333 of December 19, 2000, and Resolution 1363 of July 30, 2001.⁸⁰

The Administration believed, as it still does, that many of the targeted terrorist individuals and groups, such as Osama bin Laden and Al Qaeda, operate primarily overseas and have little money in the United States.⁸¹ As a result, it announced to foreign governments, unwilling to block these terrorists' ability to access funds in foreign accounts or to share information, that the United States has the authority to freeze a foreign bank's assets and transactions in the United States. Legally, the executive order authorizes this action by empowering the Secretary of the Treasury, in

74. This section is derived substantially from Bruce Zagaris, *U.S. Initiates Sanctions Against bin Laden and Associates*, 17 INT'L ENFORCEMENT L. REP. 480, 480-85 (2001).

75. Exec. Order No. 13,224, 3 C.F.R. 786, 790 (2002), *reprinted as amended in* 50 U.S.C.A. § 1701 (2005) [hereinafter Exec. Order No. 13,224].

76. Executive Order on Terrorist Financing: Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism, 37 WEEKLY COMP. PRES. DOC. 1358 (Sept. 24, 2001) [hereinafter Remarks] (authorizing financial sanctions against foreign terrorists and their associates).

77. 50 U.S.C. § 1701-1707 (2005).

78. *Id.* § 1601 (2005).

79. 22 U.S.C. § 287(c) (2005).

80. Exec. Order No. 13,224, *supra* note 75, at 786.

81. *Id.* at 789-90 (recounting patterns of terrorist activity identified by State Department as threats). See Remarks, *supra* note 76 (declaring imminent threat by people from foreign countries).

consultation with the Secretary of State and the Attorney General, to take whatever action may be necessary or appropriate.⁸²

The following persons are subject to the blocking order: (1) foreign persons determined by the Secretary of State to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of the United States, its foreign policy, economy or citizens; (2) persons determined by the Secretary of the Treasury to be owned or controlled by, or to act for or on behalf of any persons listed under the order or any other persons determined to be subject to it; (3) persons determined by the Secretary of the Treasury to assist in, sponsor or provide financial, material or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed under the order or determined to be subject to it; (4) persons determined by the Secretary of the Treasury to be otherwise associated with those persons listed under the order or determined to be subject to it.⁸³

The executive order's other principal prohibitions include: (1) transacting or dealing in blocked property either by U.S. entities (including overseas branches, but not foreign subsidiaries) or within the United States; (2) for American entities and those in the United States only, evading or avoiding, or attempting to evade or avoid, any of the order's prohibitions; (3) conspiring to violate any of the order's prohibitions; and (4) making donations intended to relieve human suffering to persons listed under the order or determined to be subject to it.⁸⁴

Practically speaking, the terrorist sanctions introduced by Executive Order 13,224 largely overlapped then-existing U.S. terrorist sanctions administered by the Department of Treasury Office of Foreign Assets Control, i.e., the Terrorism Sanctions Regulations⁸⁵ and the Foreign Terrorist Organizations Sanctions Regulations.⁸⁶ Under the Terrorism Sanctions Regulations, the Office blocks the property of persons posing a significant risk of disrupting the Middle East peace process. Under the Foreign Terrorist Organizations Sanctions Regulations, U.S. financial institutions must block all funds in which foreign terrorist organizations have an interest. Most of the persons listed in the executive order were already listed as Specially Designated Global Terrorists under the Terrorism Sanctions Regulations or as Foreign Terrorist Organizations under the Foreign Terrorist Organizations Sanctions Regulations.⁸⁷

82. Exec. Order No. 13,224, *supra* note 75, at 787.

83. *Id.*

84. *Id.* at 787-88. The last prohibition only applies to donations made by U.S. nationals. *Id.*

85. Exec. Order No. 12,947, 60 Fed. Reg 5079 (Jan. 25, 1995), *reprinted as amended in* 50 U.S.C. § 1701 (2003).

86. 31 C.F.R. § 597 (2001), *reprinted as amended in* 50 U.S.C. § 1701 (2003).

87. For a complete and current list of individuals and organizations subject to blocking orders promulgated under the authority of Executive Order 13,224, the Terrorism Sanctions Regulations, the Terrorism List Governments Sanctions Regulations and the Foreign Terrorist Organizations Sanctions Regulations, see Office

The newer sanctions also significantly expanded on existing ones. First, they are broader than the Terrorism Sanctions Regulations because their reach extends beyond terrorists that pose a significant risk of disrupting the Middle East peace process. Second, and most importantly, the sanctions are broader than the Foreign Terrorist Organizations Sanctions Regulations in that they require blocking actions by all U.S. entities, not just financial institutions. Third, the new sanctions make it easier to designate more individuals as terrorists because anyone "associated" with terrorists can be listed. Now, the U.S. government will block the U.S. assets of and bar U.S. market access to foreign banks that can be linked to terrorists in any way, unless they agree to freeze those terrorists' assets. While foreign subsidiaries appear to be beyond the scope of the executive order, any link between them and a terrorist could be treated as an "association" warranting sanction.

B. *New U.S. Investigative Teams Targeting Terrorist Financial Networks*⁸⁸

Creating lists of terrorists is not enough to establish a working CTFE regime; however, the proper infrastructure to undertake this work successfully is also necessary. To that end, the United States has established new intra- and interagency groups, such as the Policy Coordinating Committee on Terrorist Financing and Operation Green Quest, to prioritize the identification of terrorists and the blocking of their finances.⁸⁹ To organize the high-level effort against terrorist financing, the National Security Council established the Policy Coordinating Committee on Terrorist Financing soon after the attacks of September 11, 2001. Its purpose is to vet, approve and recommend proposed strategic policy relating to terrorist financing and to coordinate U.S. efforts in that direction.⁹⁰

In October 2001, the U.S. Treasury Department created a new investigative team to target terrorist organizations fronting as legitimate businesses and organizations. Operation Green Quest includes prosecutors from the Justice Department as well as investigators from the Internal Rev-

of Foreign Assets Control, *What You Need to Know About U.S. Sanctions*, at <http://www.treas.gov/offices/eotffc/ofac/sanctions/terrorism.html> (last visited Jan. 31, 2005) [hereinafter OFAC List].

88. This section is derived substantially from Bruce Zagaris, *U.S. Forms New Investigative Team to Target Terrorist Financial Networks*, 17 INT'L ENFORCEMENT L. REP. 519, 519-20 (2001).

89. See, e.g., *U.S. Senate Committee on Banking, Housing, and Urban Affairs: "Counterterrorism Initiatives in the Terror Finance Program"*, 108th Cong. 3-5 (2003) (statement of David Aufhauser, General Counsel, U.S. Dep't of Treasury) [hereinafter Aufhauser] (highlighting nuances with which U.S. government officials can operate to cease "financial pipeline" of terrorism around world); *Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the Senate Comm. on Finance*, 107th Cong. 8-9 (2002) (statement of Alan Larson, Under Sec'y for Economic, Business and Agricultural Affairs, Dep't of State) (outlining "global strategy" that includes multilateralism with national and international support).

90. See Aufhauser, *supra* note 89, at 5 (outlining establishment of committee by National Security Council after terrorist attacks on September 11, 2001).

enue Service, the Customs Service, the Federal Bureau of Investigation and other agencies.⁹¹ By taking a systems-oriented approach, the group tackles terrorist financing in a different manner from other similar agencies.⁹² It is intended to be proactive by identifying future sources of terrorist financing and dismantling their activities before they can take root.⁹³ Thus, it has targeted activities that have been connected with terrorist financing, such as counterfeiting, credit card fraud, drug trafficking and cash smuggling, as well as illicit charities and financial institutions and *hawalas*—the undocumented asset transfers common in the Middle East and Asia.⁹⁴

The FBI has also established its own CTFE agency: the Terrorist Financing Operations Section (TFOS) of the FBI's Counterterrorism Division. TFOS participates on the Policy Coordinating Committee on Terrorism Financing and serves as a mini-version of that body within the FBI.⁹⁵ It also provides intelligence and investigative support to field offices, other agencies and foreign governments.⁹⁶ TFOS's work has led to many successful law enforcement actions. With the assistance of foreign authorities, TFOS disrupted Al Qaeda financing in the United Arab Emirates, Pakistan, Afghanistan and Indonesia.⁹⁷ In the United States, TFOS efforts have resulted in the dismantling of a Hezbollah procurement and fund-raising network tied to cigarette smuggling and a charity that was sending money to Al Qaeda.⁹⁸

The establishment of the task forces illustrates the depth of the United States' commitment to CTFE and its dedication to combining the many areas of expertise of various agencies to maximize success. The government is training investigators to think in new ways, develop international relationships and cooperate with the private sector. Nevertheless, these efforts face a daunting infrastructural challenge. The enormous reorganization of the U.S. government, necessary after the establishment of the Department of Homeland Security, has led to turf wars, funding staff-

91. See Peter Spiegel, *US Team Created to Target al-Qaeda Finances*, FIN. TIMES, Oct. 26, 2001, at 5 (detailing participation of various government agencies).

92. See *Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the Senate Comm. on Finance*, 107th Cong. 10 (2002) (statement of Jimmy Gurlulé, Under Sec'y for Enforcement, U.S. Dep't of Treasury) [hereinafter Gurlulé] (discussing magnitude of terrorist financial support).

93. See Spiegel, *supra* note 91 (underscoring predictive methods by which agencies work in tandem to prevent future terrorist attacks).

94. See *id.* (describing specific targets of current agency activity).

95. See *U.S. Senate Committee on Banking, Housing, and Urban Affairs: "Counterterror Initiatives in the Terror Finance Program"*, 108th Cong. 2-3 (2003) (statement of John S. Pistole, Assistant Dir., Counterterrorism Div., Fed. Bureau of Investigation) (expressing desire for "incremental" weathering of terrorist assets).

96. See *id.* at 4-5 (discussing multi-national investigations of terrorist financing spearheaded by TFOS).

97. See *id.* at 5 (citing successful operations within certain countries in context of increased cooperation with entities within private sector).

98. See *id.* at 12 (highlighting investigative assistance offered by TFOS).

ing problems and demoralization.⁹⁹ It is hoped that the new Executive Office for Terrorist Financing and Financial Crimes within the Department of the Treasury can successfully lead U.S. AML/CTFE efforts during the transition period and beyond.¹⁰⁰

C. *The USA PATRIOT Act*¹⁰¹

On October 26, 2001, President George W. Bush signed into law the USA PATRIOT Act.¹⁰² Title III of the Act, concerning efforts designed to combat international money laundering and terrorism financing, greatly strengthened the CTFE regime and even more fully incorporated AML schemes through enhanced due diligence requirements.

Section 311 of the Act added a new section, 5318A, to the BSA.¹⁰³ It gives the Secretary of the Treasury discretionary authority to impose one or more of five special measures on foreign jurisdictions or their institutions, foreign financial institutions or one or more types of accounts, if the Secretary determines that the entity poses a "primary money laundering concern" to the United States. The special measures include: (1) requiring additional record-keeping or reporting for particular transactions; (2) requiring identification of the foreign beneficial owners of certain accounts at a U.S. financial institution; (3) requiring identification of customers of a foreign bank who use an interbank payable-through account opened by a foreign bank at a U.S. bank; (4) requiring the identification of customers of a foreign bank who use certain correspondent accounts opened by that foreign bank at a U.S. bank; and (5) restricting or prohibiting the establishment or maintenance of certain interbank correspondent or payable-through accounts, after consultation with the Secretary of State, the Attorney General and the Chairman of the Federal Reserve Board.¹⁰⁴ Measures (1) through (4) cannot be imposed for more than 120 days except by regulation, and measure (5) may only be imposed by regulation.

99. See John Mintz, *Government's Hobbled Giant; Homeland Security is Struggling*, WASH. POST, Sept. 7, 2003, at A1 (discussing problems plaguing Department of Homeland Security).

100. Press Release, U.S. Dep't of Treasury, U.S. Treasury Department Announces New Executive Office for Terrorist Financing and Financial Crimes, (Mar. 3, 2003) (announcing formation and explaining duties of Executive Office for Terrorist Financing and Financial Crimes).

101. This section is derived substantially from Bruce Zagaris, *U.S. Enacts Counterterrorism Act with Significant New International Provisions*, 17 INT'L ENFORCEMENT L. REP. 522, 522-25 (2001).

102. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49 and 50 U.S.C.).

103. See *id.* § 311, 115 Stat. at 298 (introducing amendments to existing law).

104. See *id.* § 311, 115 Stat. at 300-04 (detailing specific discretionary measures afforded Secretary of Treasury).

Section 313 added subsection (j) to 31 U.S.C. § 5318 to prohibit depository institutions and securities brokers and dealers operating in the United States from establishing, maintaining, administering or managing correspondent accounts for foreign shell banks, other than shell bank vehicles affiliated with recognized and regulated depository institutions.¹⁰⁵ On December 14, 2002, final rules were issued on obtaining certain information with respect to correspondent accounts for foreign shell banks.¹⁰⁶ As evidence that terrorist supporters use shell banks and correspondent accounts to collect and move money, Treasury cited its November 7, 2001 listing of Bank al-Taqwa, a Bahamian-based shell bank, as a terrorist financing source.¹⁰⁷

Pursuant to section 314, the Secretary of the Treasury issued regulations on September 26, 2002, to encourage cooperation among financial institutions, financial regulators and law enforcement officials and to permit the sharing of information by law enforcement and regulatory authorities with those institutions regarding persons reasonably suspected, on the basis of credible evidence, of engaging in terrorist acts or money laundering activities.¹⁰⁸ The section also allows (with notice to the Secretary of the Treasury) the sharing among banks of information regarding possible terrorist or money laundering activity and requires the Secretary of the Treasury to publish a semi-annual report containing a detailed analysis of patterns of suspicious activity and other appropriate investigative insights derived from suspicious activity reports (SARs) and law enforcement investigations. The reports provide guidance to the financial industry on the utility and patterns of filings SARs and the government use of the same. These provisions give financial institutions and their employees a “qualified” safe harbor protection from liability when they provide information to another institution about a former employee’s employment record.¹⁰⁹ On March 16, 2005, the Senate Permanent Subcommittee on Investigations, which was instrumental in shaping the provisions of the USA PATRIOT Act, proposed a more robust use of Section 314(b) when financial institutions are trying to trace transactions in connection with internal investigations.

105. See *id.* § 313, 115 Stat. 306-07 (noting restrictions on brokerage firms with exception to some firms that are already subject to U.S. government agencies).

106. See 31 C.F.R. pt. 103 (2002).

107. *PATRIOT Act Oversight: Investigating Patterns of Terrorist Financing: Hearing Before the House Financial Subcomm. on Oversight and Investigations*, 108th Cong. 10 (2002) (statement of Juan C. Zarate, Deputy Assistant Sec’y, Terrorism and Violent Crime, U.S. Dep’t of Treasury).

108. See 31 C.F.R. § 103.100, 103.110 (2002) (encouraging interdependence among government agencies).

109. See Robert B. Serino, *Money Laundering, Terrorism, & Fraud*, ABA BANK COMPLIANCE 22, 24 (Mar./Apr. 2002) (explaining allowances of disclosure between two institutions hiring same, suspect individual).

The Treasury Department significantly expanded the role of the Financial Crimes Enforcement Network (FinCEN), an information conduit between law enforcement and financial institutions.¹¹⁰ To obtain customer account information, federal law enforcement agencies merely had to submit a form to FinCEN that required them only to identify the agency and certify that the information pertained to a case concerning money laundering or terrorism.¹¹¹ After it received the form, FinCEN would ask financial institutions and businesses to supply information on the relevant accounts or transactions.¹¹²

The system, however, proved problematic initially. Financial institutions received many information requests per day, often addressed to the wrong person with only a week to respond.¹¹³ In response to complaints from the American Bankers Association,¹¹⁴ FinCEN stopped all such information requests from U.S. law enforcement agencies for four months in order to retool the system to give financial institutions more time and to solve other problems.¹¹⁵ Since then, the system has been used to share the names of over 250 persons suspected of terrorist financing and has resulted in over 1,700 matches, 700 tips and 500 case referrals that were passed on to law enforcement officials.¹¹⁶ In addition, under its new

110. See Financial Mgmt. Serv., U.S. Dep't Treasury, *Strategic Plan for Fiscal Years 2003-2008* 15-16 (Sept. 30, 2003), available at http://fms.treas.gov/strategic_plan/strat_plan_2003.pdf (stressing analytical idea sharing among network members despite certain "external factors" that may modify FinCEN outlook). Treasury has also promised to provide the financial sector with more information, such as typologies of money laundering or terrorist financing schemes and updates on the latest criminal trends. See Jimmy Gurulé, Under Sec'y for Enforcement, Dep't of Treasury, Speech Before the American Bankers' Association Money Laundering Conference (Oct. 22, 2001), available at <http://www.tres.gov/press/releases/po707.htm> ("At every stage of our efforts, we must work in close partnership with other government agencies, the private sector, and our global partners to achieve success.").

111. *To Relief of Many, U.S. Treasury Halts Flood of '314(a)' Requests*, 14 MONEY LAUNDERING ALERT 1 (Dec. 2002) (noting ease of obtaining customer account information).

112. See *id.* (describing procedural methods used by Financial Crimes Enforcement Network (FinCEN)).

113. *Progress Since 9/11: The Effectiveness of U.S. Anti-Terrorist Financing Efforts: Hearing Before the House Fin. Servs. Subcomm. on Oversight & Investigations*, 108th Cong. 5 (2003) (statement of John J. Byrne on behalf of American Bankers Association) (drawing attention to failures of communicative paths between businesses and financial institutions).

114. Letter from John J. Byrne, Senior Counsel and Compliance Manager, American Bankers Association, to Financial Crimes Enforcement Network, Special Information Sharing (Apr. 2, 2002), available at <http://www.aba.com/NR/rdonlyres/CDA74BEE-3E41-42D4-B7E0-C32E94B32D07/21554/USAPatriotsec314commentletter92.pdf>.

115. See Press Release, Financial Crimes Enforcement Network, FinCEN to Reinstate USA PATRIOT Act Section 314(a) Information Requests (Feb. 6, 2003), available at http://www.fincen.gov/314a_pressrelease02062003.pdf (describing revisions to FinCEN procedural methods for information sharing).

116. Aufhauser, *supra* note 89, at 8-9, 11.

CTFE powers, FinCEN has supported over 2,600 terrorism investigations and the expansion of the suspicious activity report regime has resulted in financial institutions filing over 2,600 such reports on possible terrorist financing.¹¹⁷

Several sections of the USA PATRIOT Act broadened the reach of law enforcement and the judiciary. Section 315 amended 18 U.S.C. § 1956 to add foreign criminal offenses and certain U.S. export control violations, customs, firearm, computer and other offenses to the list of crimes that are “specified unlawful activities” for purposes of the criminal money laundering provisions. The broadening of predicate offenses for criminalizing money laundering enabled U.S. prosecutors to help foreign law enforcement agencies who might otherwise have difficulty prosecuting someone or seizing funds outside their country.¹¹⁸

Section 317 gave U.S. courts extraterritorial jurisdiction over foreign persons committing money-laundering offenses in the U.S., foreign banks opening bank accounts and foreign persons who convert assets ordered forfeited by a U.S. court. It also permits a U.S. court dealing with such foreign persons to issue a pre-trial restraining order or take other action necessary to preserve property in the United States to satisfy an ultimate judgment. In addition, section 318 expands the definition of financial institution for purposes of 18 U.S.C. §§ 1956 and 1957 to include those operating outside of the United States.

Section 319 amended U.S. asset forfeiture law¹¹⁹ to treat funds deposited by foreign banks in interbank accounts with U.S. banks as having been deposited in the United States for purposes of the forfeiture rules.¹²⁰ The terrorist, but not the bank, can oppose the forfeiture action.¹²¹ The Attorney General and Secretary of the Treasury are authorized to issue a sum-

117. See *id.* at 11 (discussing banking institution responsibilities as analyzing of banking patterns and cooperating with federal law enforcement officials).

118. *Dismantling the Financial Infrastructure of Terrorism: Hearing Before the House Comm. on Fin. Servs.*, 107th Cong. 7 (2001) (statement of Michael Chertoff, Assistant Att’y Gen., Crim. Div., U.S. Dep’t of Justice) (illustrating international cooperativity through discussion of investigation of suspected Hizballah member in North Carolina).

119. 18 U.S.C. § 981 (2001).

120. See *United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 Banco Espanol de Credito, Spain*, 295 F.3d 23, 27 (D.C. Cir. 2002) (upholding jurisdiction of U.S. courts to order forfeiture of property located in foreign countries); see also *The Financial War on Terrorism & the Administration’s Implementation of the Anti-Money Laundering Provisions of the USA PATRIOT Act: Hearing Before the Senate Comm. on Banking, Housing & Urban Affairs*, 107th Cong. 7 (2002) (statement of Michael Chertoff, Assistant Att’y Gen., Crim. Div., U.S. Dep’t of Justice) (describing case of Belizean money launderers whose assets became recoverable by Act).

121. See *id.* at 14 (asserting that banks lack standing to challenge forfeiture action).

mons or subpoena to any such foreign bank and to seek records, wherever located, that relate to such a correspondent account.¹²²

Section 325 authorized the Secretary of the Treasury to issue regulations concerning the maintenance of concentration accounts by U.S. depository institutions, in order to ensure such accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner.¹²³ Similarly, pursuant to section 326, the Secretary of the Treasury promulgated final rules establishing minimum standards for financial institutions and their customers regarding the identity of customers who open new accounts.¹²⁴ The standards require financial institutions to verify customers' identities, consult with lists of known and suspected terrorists at account openings and maintain records.¹²⁵

Section 373 of the Act amended 18 U.S.C. § 1960 to prohibit unlicensed money services businesses. In addition, such businesses must file suspicious activity reports with law enforcement officials.¹²⁶ Pursuant to section 356, the Secretary of the Treasury promulgated final rules requiring broker-dealers to also file suspicious activity reports.¹²⁷ In the future, the Treasury Department will issue similar regulations regarding other financial institutions, including futures commission merchants, commodity trading advisors, commodity pool operators and investment companies.

III. THE WORK OF INTERNATIONAL ORGANIZATIONS

Intergovernmental organizations (IGOs) have played a key role in conceptualizing and creating the international financial enforcement regimes through conventions, resolutions and recommendations.¹²⁸ By establishing standards, mechanisms and institutions to deal with the acutely transnational problems of transnational corruption, international narcotics control, transnational organized crime, economic sanctions, money laundering and terrorist financing, they set the framework for the neces-

122. In relation to forfeiture, section 320 amended 18 U.S.C. section 981 to allow the United States to institute forfeiture proceedings against any proceeds of foreign predicate offenses located in the U.S. Section 323 allowed the government to seek a restraining order to preserve the availability of property subject to a foreign forfeiture confiscation judgment.

123. Treasury has not yet issued any such regulations.

124. See 31 C.F.R. § 103.121 (2003) (requiring banks to implement "Customer Identification Program").

125. See *id.* (stating requirements of "Customer Identification Program").

126. See *id.* § 103.20 (stating requirements of reports by money services businesses).

127. See *id.* § 103.19 (stating requirements of reports by brokers or dealers in securities).

128. For background on the work of international organizations in the AML realm, see WILLIAM C. GILMORE, *DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES* 51-152 (3d ed. 2004) (detailing efforts of United Nations and Financial Action Task Force in combating money laundering).

sary international cooperation. Although these standards have traditionally been comprised of "soft law," in recent years, IGOs have started to impose compliance regimes through evaluation mechanisms, "naming and shaming" and economic sanctions.

In particular, the aforementioned almost simultaneous issuance of blacklists in 2000 against non-cooperative countries and territories was an attempt to jumpstart the merging of the AML and CTFE regimes, conferring on soft laws a greater status in international law and politics.

But because international financial enforcement laws have developed at such a rapid rate, there are inconsistencies in legislation, implementation and enforcement that present difficulties for international cooperation. Further, legal systems differ in their organization, procedures, substantive law and cultural traditions. A nation with an Islamic legal system and another rooted in the common law may have difficulty bridging differences in their concepts of the proper procedures and ultimate goals. Reaching an understanding on these issues can also be extremely difficult because privacy laws, confidentiality laws, AML statutes and asset forfeiture statutes often encompass competing societal objectives.

As IGOs continue to strive for uniform legislation governing the international financial enforcement regime many of the gaps and obstacles that arise from conflicts of laws will be resolved. Major problems remain in resources and political will to carry out the transformations of law in international financial enforcement. This will take time, however, because the normal course for creating international legal norms has been to agree initially on narrow sets of legal principles and policies, and then to broaden them. Already, cooperation has increased substantially, especially in Western Europe and to a lesser extent the Western Hemisphere, among regional groups that share similar institutions and legal systems and that interact within a common criminal justice organization. Indeed, the efforts of IGOs such as the United Nations, the OECD, the Council of Europe, European Union (E.U.) and the Financial Action Task Force on Money Laundering have been largely responsible for the international acceptance of the AML/CTFE regime.

A. *Narcotics Control*

The U.N. pioneered the 1988 Vienna Convention against the Trafficking in Illegal Narcotic and Psychotropic Substances, which contains the requirements to criminalize money laundering and immobilize the assets of persons involved in illegal narcotics trafficking. The U.N. Office on Drugs and Crime Prevention (UNODCCP) provides technical assistance on legislative drafting, financial intelligence, capacity building and a range of services to help governments and law enforcement agencies implement their obligations under the U.N. Vienna Drug Convention and related anti-money laundering initiatives. The U.N. has also developed a counter-money laundering initiative against offshore financial centers. The

UNODCCP has provided model laws on laundering, confiscation and international cooperation.¹²⁹ The U.N. International Drug Control Program has issued a Model Money Laundering and Proceeds of Crime Bill.¹³⁰

On October 25, 2001, the UNODCCP received commitments from thirty-one offshore financial centers to participate in the U.N.'s global program to develop financial regulation to combat money laundering that fulfills internationally accepted standards. The U.N. is working with regional FATF-style bodies and other international organizations in this initiative.

B. *Organized Crime*

On December 15, 2000, 124 countries signed the United Nations Convention on Transnational Organized Crime during a four-day high-level signing conference in Palermo, Italy.¹³¹ The Convention against Transnational Organized Crime, concluded at the Tenth session of the Ad Hoc Committee established by the General Assembly to deal with this problem, is a legally binding instrument committing States that ratify it to taking a series of measures against transnational organized crime. These measures include the creation of domestic criminal offenses to combat organized crime, the adoption of new sweeping frameworks for mutual legal assistance, extradition, law enforcement cooperation and technical assistance and training.

At a ceremony on December 12, 2000, the Convention Against Transnational Organized Crime (TOCC) and its original two protocols, one to prevent, suppress and punish trafficking in persons, especially women and children, and the other against the smuggling of migrants by land, sea and air, were opened for signature. There are currently ninety-four parties to the TOCC and 147 signatories; it entered into force on September 29, 2003.¹³²

129. See U.N. Office on Drugs and Crime, *Global Programme Against Money Laundering, Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime* (1999), available at <http://www.imolin.org/imolin/ml199eng.html> [hereinafter *Global Programme Against Money Laundering*].

130. See U.N. Office on Drugs and Crime, *Model Money Laundering, Proceeds of Crime and Terrorist Financing Bill 2003* (2003), available at <http://www.imolin.org/imolin/poctf03.html> [hereinafter *Model Money Laundering*].

131. See Press Release, United Nations, More Than 120 Nations Sign New U.N. Convention on Transnational Organized Crime, As High-Level Meeting Concludes in Palermo (Dec. 15, 2000), available at <http://www.unis.unvienna.org/unis/pressrels/2000/cp392.html>; see also Alessandra Stanley, *Palermo Shows Off as a Cleaned-Up Mafia Capital*, N.Y. TIMES, Dec. 13, 2000, at A3 (providing additional background information on Palermo meeting).

132. See U.N. Office on Drugs and Crime, *Signatories to the UN Convention Against Transnational Crime and Its Protocol*, available at http://www.unodc.org/unodc/crime_cicp_signatures.html (describing adoption of Convention) [hereinafter *Signatories*].

1. *The TOCC*¹³³

The Convention seeks to strengthen the power of governments in combating serious crimes. The new treaty will provide the basis for stronger common action against money-laundering, greater ease of extradition, measures on the protection of witnesses and enhanced judicial cooperation. It will also create a funding mechanism to assist countries in implementing the Convention. The Convention aims to help countries synchronize their national laws, so that no uncertainty will exist as to whether a crime in one country is also a crime in another.¹³⁴

Signatory countries undertake the following commitments in the TOCC: (1) to “criminalize offenses committed by organized crime groups, including corruption and corporate or company offenses;” (2) to combat “money-laundering and the proceeds of crime;” (3) to accelerate and extend the scope of extradition; (4) to “protect[] witnesses testifying against criminal groups;” (5) to strengthen cooperation to locate and prosecute suspects; (6) to enhance prevention of organized crime at the national and international levels; and (7) to “develop[] a series of protocols containing measures to combat specific acts of transnational organized crime.”¹³⁵

The provisions of the instruments can also be divided into seven general categories: definitions, requirements to criminalize, domestic measures to combat organized crime activities, international cooperation obligations, training and technical assistance, prevention, technical and other provisions.

a. Definitions

The initial Articles of each of the instruments define the important terms, provide for the elements of offenses that must be established pursuant to the instruments and determine the circumstances in which the provisions of the respective instruments will apply.¹³⁶ The definitions will serve to standardize terminology among countries that act against transnational organized crime.

b. Requirements to Criminalize

The TOCC creates four specific crimes to combat areas of crime that are commonly used in support of transnational organized crime activities: (1) participation in the activities of an “organized criminal group” and

133. See *Convention Against Transnational Organized Crime*, G.A. Res. 55/25, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383 (2000) [hereinafter TOCC].

134. See *id.*

135. U.N. Office on Drugs and Crime, *After Palermo: An Overview of What the Convention and Protocols Hope to Accomplish*, available at <http://www.odccp.org/palermo/sum1.html> (last visited June 12, 2005).

136. See TOCC, *supra* note 133, at 4, 32, 41 (providing “Use of terms” for each section of Convention).

“organizing, directing, aiding, abetting, facilitating or counseling” serious crimes involving organized criminal groups (Art. 5); (2) money laundering (Art. 6); (3) corruption where a link exists to transnational organized crime (Art. 8); and (4) obstruction of justice, including the use of corrupt (*e.g.*, bribery) or coercive means (physical force, threats or intimidation) to influence testimony, other evidence or the actions of any law enforcement or other justice official (Art. 23).¹³⁷ In addition, the Protocols create additional crimes that deal with their basic subject matter (*e.g.*, trafficking in persons, smuggling of migrants, smuggling of illicit manufacture of firearms).¹³⁸ Most countries will punish these crimes by four years or more and will hence come within the Convention as “serious crimes.” The Protocols also create more minor offenses (*e.g.*, falsification of travel documents, defacement of firearm serial numbers) that support their basic policy goals. The Convention only applies to these offenses where the Protocol so provides. Countries that ratify the instruments must enact legislation making these activities domestic offenses if such laws do not already exist.

c. Domestic Measures to Combat Organized Crime Activities

Signatories must adopt domestic laws and practices that would prevent or suppress certain types of organized crime-related activities.¹³⁹ For example, to combat money laundering, signatories must require their banks to maintain accurate records and have them available for inspection by domestic law enforcement officials.¹⁴⁰ Signatories cannot allow anonymous bank accounts and bank secrecy cannot be used to shield criminal activities.¹⁴¹ Additional domestic offenses, such as failing to keep or produce bank records, must be established to support these measures. Trafficking in persons and the smuggling of migrants will be combated by the relevant Protocols that contain minimum standards for the manufacture, issuance and verification of passports and other international travel docu-

137. *See id.* at 5-6, 8, 21 (stating that each “state party” shall adopt laws criminalizing such offenses as defined by Convention).

138. *See id.* at 33, 42 (requiring criminalization of “trafficking in persons” and “smuggling of migrants”). A third Protocol, adopted later and not attached to the original document containing the Convention and first two Protocols, addresses issues surrounding firearms. *See Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Part and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/255, U.N. GAOR, 55th Sess., at 4-5 U.N. Doc. A/RES/55/255 (2001) (requiring criminalization of illicit manufacturing or trafficking of firearms) [hereinafter *Firearms Protocol*].

139. *See TOCC, supra* note 133, at 6 (requiring countries to criminalize money laundering).

140. *See id.* at 7 (requiring countries to adopt “comprehensive domestic regulatory and supervisory regime”).

141. *See id.* at 7 (stating that regulatory “regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions”).

ments.¹⁴² While some of the measures are mandatory, others have greater flexibility as to whether states will implement a measure and, if so, how.¹⁴³

d. International Cooperation Obligations

To facilitate the necessary international cooperation against transnational organized crime, signatories have agreed to assist one another in dealing with transnational organized crime as a general problem, and to assist in dealing with specific cases. Cooperation under the TOCC includes mutual legal assistance and extradition (Arts. 16 and 18) and other specific measures, such as law enforcement cooperation and collection and exchange of information.¹⁴⁴ While these provisions are similar to traditional provisions already in place in many regional or bilateral agreements, the large number of countries expected to ratify the Convention will facilitate much broader legal assistance and extradition than presently exists. These provisions are intended to set minimum standards only. Signatories are encouraged to extend cooperation in bilateral or regional arrangements. A requested State may also not refuse assistance because of bank secrecy (Art. 18(8))¹⁴⁵ or because the alleged offense also involves “fiscal matters” (Art. 18(22)).¹⁴⁶

The Convention also provides the general basis to conduct joint investigations (Art. 19),¹⁴⁷ cooperate in special investigative procedures, such as electronic surveillance and general law-enforcement cooperation (Arts. 20 and 27).¹⁴⁸ The Protocols supplement these provisions in some areas. The Protocols provide for additional, more specific types of cooperation, such as assistance with the tracing of firearms, or assistance with the identification of nationals who are found in other countries as smuggling migrants, trafficked persons or organized crime offenders.¹⁴⁹

e. Training and Technical Assistance

Several Articles require signatories to maintain national expertise in dealing with transnational organized crime problems that require ade-

142. *See id.* at 46 (requiring states to ensure travel documents are not easily forged).

143. *Compare id.* at 7 (stating that each state party “shall institute a comprehensive domestic regulatory and supervisory regime for banks . . .”), *with id.* at 10 (“State Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime . . .”).

144. *See id.* at 15-20 (stating agreement on mutual legal assistance).

145. *See id.* at 16.

146. *See id.* at 19.

147. *See id.* at 20 (encouraging formation of bilateral or multilateral agreements or agreements on case-by-case basis to establish “joint investigative bodies”).

148. *See id.* at 20, 23-24 (requiring states to take such measures permitted by domestic law).

149. *See id.* at 35-36 (implementing specific measures for exchanging information regarding trafficking in persons).

quate training facilities.¹⁵⁰ Due to resource limitations of developing countries, the Convention and Protocols provide for technical assistance projects in which developed countries would help with technical expertise, resources or both. For instance, Article 30(2)(b) requires signatories to strengthen “financial and material assistance to support the efforts of developing countries” to combat transnational organized crime and to implement the Convention.¹⁵¹ Article 30(2)(c) requires “adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism” to support such efforts.¹⁵² Articles 14(3) and 30(2)(c) call for signatories to give “special consideration” to the use of confiscated proceeds of crime for this purpose, subject to domestic legal restrictions.¹⁵³ According to paragraph nine of the draft resolution, the General Assembly is to adopt the Convention and operate a designated account mentioned in Article 30 within the U.N. Crime Prevention and Criminal Justice Fund.¹⁵⁴ Article 30 also encourages signatories to start contributions immediately, in order to help developing countries to prepare implementing the Convention.¹⁵⁵

f. Prevention

Article 31 of the TOCC and Protocols require signatories to adopt measures to prevent various types of transnational organized crime. These measures include the taking of security precautions, training of officials, maintaining general records about crime and specific records to control key activities, such as the import/export of firearms and the issuing and verification of travel documents.¹⁵⁶

g. Technical and Other Provisions

The concluding provisions of each instrument provide for technical and procedural matters such as the procedures for signing, ratification and coming into force.¹⁵⁷ Pursuant to Article 36(1), the TOCC opened at a signing ceremony at Palermo, Italy on December 12-15, 2000 and thereafter at the U.N. Headquarters in New York until December 12, 2002.¹⁵⁸ Instruments certifying the ratification by signatories will be filed thereafter at U.N. Headquarters, and the Convention enters into force on the ninety-

150. *See id.* at 24-25 (providing that each state shall “initiate, develop or improve specific training programmes for its law enforcement personnel”).

151. *Id.* at 25.

152. *Id.*

153. *Id.* at 12, 25-26.

154. *See id.* at 3 (encouraging member states to contribute to account).

155. *See id.* at 25-26 (calling for states to make “adequate and regular voluntary contributions”)

156. *See id.* at 26-27 (listing measures states are required to take).

157. *See id.* at 29, 38, 49 (providing details about “signature, ratification, acceptance and accession”).

158. *See id.* at 29 (providing times Convention shall be open to sign).

eth day after the day on which the fortieth such ratification is filed (Arts. 36(3) and 38).¹⁵⁹ As mentioned, the Convention entered into force on September 29, 2003.

2. *Protocols*

a. Protocol to Prevent, Suppress and Punish Trafficking in Persons¹⁶⁰

The Protocol is to “prevent and combat” trafficking in persons and facilitate international cooperation against such trafficking. It criminalizes and requires control and cooperation measures against traffickers and provides for assistance to protect and assist the victims. “Trafficking in persons” is intended to include a range of cases where organized crime is exploiting human beings and there exists duress and a transnational aspect, such as the movement of people across borders or their exploitation within a country by a transnational organized crime group. Drafters have had difficulty in including the wide range of coercive means used by organized crime (*e.g.*, abduction, force, fraud, deception or coercion) and distinguishing between consensual acts or treatment. The Protocol has seventy-six parties and 117 signatories and entered into force on December 25, 2003.¹⁶¹

b. Protocol Against the Smuggling of Migrants by Land, Air and Sea¹⁶²

The Protocol is to combat smuggling by prevention, investigation and prosecution of offenses, and by promoting international cooperation among the signatories. Signatories must strengthen their national legislation to criminalize and prosecute certain crimes, open information channels and promote international law enforcement cooperation. The Protocol will also safeguard the human rights and other interests of smuggled migrants by promoting international cooperation for that purpose. It will only deal with activities involving an “organized criminal group.”¹⁶³ State Parties must criminalize the smuggling of migrants, which includes the procurement of either illegal entry or illegal residence in order to obtain any financial or other benefit, whether direct or indirect (Art. 6).¹⁶⁴ Signatories must criminalize the procurement, provision, possession or production of a fraudulent travel or identity document where this occurred for the purpose of smuggling migrants (Art. 6).¹⁶⁵ The Protocol

159. *See id.* at 29-30 (calling for instruments of ratifications to be deposited with Secretary General).

160. *See generally id.* at 31-39 (providing text of Protocol and supplementing TOCC).

161. *See Signatories, supra* note 132 (stating status of Protocol).

162. *See generally* TOCC, *supra* note 133, at 40-48 (providing text of Protocol supplementing TOCC).

163. *See id.* at 42 (stating scope of application of Protocol).

164. *See id.* at 42-43 (stating requirements of states to criminalize certain offenses).

165. *See id.* at 42.

is not intended to criminalize migration itself; it provides that migrants should not be liable to prosecution for a Protocol offense “for the fact of having been [smuggled],” but does not exclude liability for the smuggling of others or other offenses, even where the accused is also a migrant him or herself.¹⁶⁶

Part II gives states that encounter ships that are smuggling, or believed to be smuggling migrants, adequate authority to arrest the migrants and smugglers and to preserve evidence while respecting the sovereignty of the states, if any, to which the ships are flagged or registered.¹⁶⁷ These provisions emulate the U.N. Convention on the Law of the Sea (1982), the U.N. Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and interim measures prepared by the International Maritime Organization (IMO). The Protocol has sixty-four parties and 112 signatories. It entered into force on January 28, 2004.¹⁶⁸

c. Protocol Against Illicit Manufacturing of or Trafficking in Firearms¹⁶⁹

The Protocol is to combat the illicit transfer of firearms from one country to another. Signatories must: (1) pass new laws to eradicate the illegal manufacturing of firearms, tracking existing illicit weapons and prosecuting offenders; (2) cooperate to prevent, combat and eliminate the illegal manufacturing and trafficking of firearms; (3) tighten controls on the export and import of firearms; and (4) exchange information about illicit firearms.¹⁷⁰

To bridge gaps in import/export controls on transporting firearms, signatories must adopt new controls, including: (1) establishing an effective system for the export, import and international transit licensing of firearms; (2) confirming that firearms are licensed or authorized by importing countries before granting export licenses; (3) denying the transit, re-export, re-transfer or trans-shipment of firearms to any destination without written approval from the exporting country and licenses from receiving countries; and (4) strengthening controls at export points for firearms.¹⁷¹

The Protocol requires international cooperation to combat illicit manufacturing or smuggling, such as cooperation with the tracing of firearms (Art. 12(4)), the sharing of information about offenders and their

166. *Id.*

167. *See id.* at 43-44 (providing for “[m]easure against the smuggling of migrants by sea”).

168. *See Signatories, supra* note 132 (stating status of Protocol).

169. *See generally Firearms Protocol, supra* note 138 (providing text of Protocol supplementing TOCC).

170. *See id.* at 4, 6, 7 (listing requirements that states criminalize certain offenses, maintain export and import controls and exchange information on such offenses).

171. *See id.* at 6-7 (providing guidelines for export and import controls).

methods (Art. 12(2)) and more general scientific or forensic matters related to firearms (Art. 12(3)). Specific bilateral or regional cooperation agreements are encouraged (Art. 13) and more general forms of mutual legal assistance and investigative cooperation are covered by the relevant provisions of the Convention itself. The Protocol requires the establishment of a contact body in each State to implement the Protocol and liaison with other countries (Art. 13(2)), exchange of experience and training (Art. 14) and technical assistance (Art. 16). Signatories must seek cooperation from manufacturers, dealers, importers, exporters and commercial carriers of firearms (Art. 13(3)).

The Protocol has thirty parties and fifty-two signatories and has not yet entered into force. Under Article 18, it requires forty parties to deposit their ratification to the Convention before it enters into force.¹⁷²

d. Relationship Between the Convention and Protocols

Article 37 of the Convention provides that States must ratify the Convention before they can be a party to any of the Protocols.¹⁷³ Hence, each Protocol must be read and applied in conjunction with the main Convention. Countries may be a party to the Convention only, but not to a Protocol only. The various articles of all four instruments take into consideration the relationship. The main Convention has general provisions dealing with such matters as cooperation, technical assistance and legal assistance. Each Protocol has more specific provisions supplementing and adapting these rules for application to the specific problems associated with trafficking in persons, smuggling migrants and trafficking in firearms.

Countries involved with cases under one of the Protocols may rely on the general provisions of the Convention where the offense involved is established by the Convention or is a "serious crime" as defined by the Convention and the offense is "transnational in nature and involves an organized criminal group,"¹⁷⁴ or where the offense is established by the Protocol and the text of the Protocol specifically states that some or all of the general provisions of the Convention apply.

e. Summary and Conclusion

The Convention and the three Protocols will help foster a significant amount of transformation of law in the operation of criminal justice, international cooperation and demands on the private sector. They create a number of new crimes, provide for harmonized approaches to the crimes covered and facilitate broad cooperation against these complex crimes. While they emulate some of the mechanisms used to combat international

172. See *Signatories*, *supra* note 132 (stating status of Protocol).

173. See TOCC, *supra* note 133, at 29-30 (stating also that party to Convention is not bound by Protocol unless it becomes party to Protocol)

174. See *id.* at 5 (defining scope of application).

narcotics trafficking, the scope of action goes well beyond counter drug activity.

C. *Economic Sanctions*

Multilateral cooperation in economic sanctions may serve three useful functions: “[increasing] the moral suasion of the sanction[s], . . . help[ing] isolate the target country from the global community psychologically as well as economically and preempt[ing] foreign backlash, thus minimizing corrosive friction within the alliance.”¹⁷⁵ Multilateral cooperation helps overcome the proactive extraterritorial implementation of economic sanctions, a policy that has incurred the wrath of many countries and caused enormous foreign policy and economic costs.¹⁷⁶ Among the major players for cooperation in economic sanctions have been the U.N. and the E.U.

An example of a multilateral sanctions program that worked was the U.N. sanctions against Iraq. It was the “longest operating, most comprehensive and most controversial” in U.N. history.¹⁷⁷ The program had all kinds of problems. Many analysts and of course the Bush administration, argued prior to the Iraq war that the sanctions were a failure. The system of containment that sanctions helped bring, however, actually eroded Iraqi military capabilities. The sanctions program forced Iraq to accept inspections and monitoring and even obtained concessions from Iraq on political issues such as the border dispute with Kuwait. Despite the leakage and corruption in the sale of Iraqi oil, the sanctions program significantly reduced the revenue available to Iraq, prevented the building of Iraqi defenses after the Persian Gulf War and blocked the import of critical materials and technologies for producing weapons of mass destruction (WMD).¹⁷⁸

In May 2002, the Security Council approved a “smart” sanctions package, illustrating that the system could continue to contain and deter Saddam Hussein.¹⁷⁹ After the various inspections following the U.S. invasion in March 2003, the successes became evident.¹⁸⁰ The bogus claims that Iraq had reconstituted its WMD programs were exposed.¹⁸¹ The costs of the invasion and occupation are continuing to rise. When economic sanctions are unilateral or have little multilateral support, such as the long-

175. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 96 (2d ed. 1990).

176. See BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S LEGAL REGIME* 252-54 (1988).

177. George A. Lopez & David Cortright, *Containing Iraq: Sanctions Worked*, 83 *FOREIGN AFF.* 90, 91 (July/Aug. 2004).

178. See *id.* (discussing impact of sanctions).

179. See *id.* (arguing that sanctions could contain and deter Saddam).

180. See *id.* (noting that unfortunately, only after war started, was it realized that Iraqi military had been “decimated” by “the strategy of containment”).

181. See *id.* (same).

standing Cuban sanctions, these sanctions are not as effective as the truly multilateral ones.

1. *International Tax Enforcement Cooperation*

a. OECD

In May 1999, the OECD introduced a harmful tax practices initiative designed to combat tax evasion, level the playing field among sovereigns in tax policy and facilitate better cooperation in tax matters.¹⁸² The OECD subsequently published a blacklist of so-called tax havens and called for the jurisdictions listed to make a commitment to ending their harmful tax practices.¹⁸³ A country became a tax haven by having two of the following four elements: (1) no or low taxes; (2) ring-fencing or discrimination in the types of persons eligible for tax preferences (typically offering incentives to only foreigners); (3) lack of transparency in the operation of the tax laws; and (4) inadequate exchange of tax information.¹⁸⁴

The key development in the OECD's plan to eliminate harmful tax competition (HTC) was the Bush administration's withdrawal of support for part of the initiative. On May 10, 2001, then U.S. Treasury Secretary Paul O'Neill clarified the U.S. reservations on the OECD's harmful tax practices initiative, creating further uncertainty as to the outcome of the initiative.¹⁸⁵ Former Treasury Secretary O'Neill wrote:

I am troubled by the underlying premise that low tax rates are somehow suspect and by the notion that any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system. I also am concerned about the potentially unfair treatment of some non-OECD countries. The United States does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems. The United States simply has no interest in stifling the competition

182. See Organisation for Economic Co-operation and Development (OECD), *About Harmful Tax Practices*, at http://www.oecd.org/about/0,2337,en_2649_33745_1_1_1_1_37427,00.html (last visited Mar. 10, 2005) (discussing OECD's goals in eradicating harmful international tax practices).

183. See OECD, *Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Matters: Progress in Identifying and Eliminating Harmful Tax Practices*, 17 (2000), available at <http://www.oecd.org/dataoecd/9/61/2090192.pdf> (last visited Mar. 10, 2005) (listing tax havens).

184. See *id.* at 10 n.4 (listing key factors in identifying jurisdictions containing tax havens).

185. See Rob Nichols, *Confronting OECD's Notions on Taxation*, WASH. TIMES, May 10, 2001, A15 (stating position of United States).

that forces governments—like businesses—to create efficiencies.¹⁸⁶

Mr. O'Neill did note that although the United States has:

[A]n obligation to enforce our tax laws as written because failing to do so undermines the confidence of honest taxpaying Americans in the fairness of our tax system. [The country would] not turn a blind eye toward tax cheating in any form. That means pursuing those who illegally evade taxes by hiding income in offshore accounts.¹⁸⁷

To support his argument, Mr. O'Neill referred to John Mathewson's use of a bank account in the Cayman Islands, in which ninety-five percent of his customers were U.S. citizens.¹⁸⁸ Mathewson's cooperation enabled the IRS to obtain tax evasion convictions and collect substantial back taxes from more than twenty of his clients.¹⁸⁹

During the last week of June 2001, the media announced that the OECD had reached, in principle, a compromise on its harmful tax practices initiative.¹⁹⁰ Following the OECD's Fiscal Affairs Committee meeting June 26-27, the organization refocused its program on the exchange of banking and financial information with OECD governments and deferred pressuring jurisdictions identified as tax havens into resetting their tax rates. The initiative will now require only the thirty-two so-called tax haven countries to agree to take action on exchange of tax information and transparency. The deadline of July 31, 2001, at which time those tax havens failing to make the commitment would be put on the blacklist was extended until November 30, 2001.

On June 29, 2001, the OECD announced that Aruba was the tenth jurisdiction to make a commitment to the harmful tax practices principles. The other jurisdictions that made similar commitments were Bermuda, the Cayman Islands, Cyprus, the Isle of Man, Malta, Mauritius, the Netherlands Antilles, San Marino and the Seychelles.¹⁹¹

186. Paul O'Neill, *Confronting OECD's Notions on Taxation*, WASH. TIMES, May 10, 2001, at A17 (criticizing OECD's harmful tax competition).

187. *See id.* (suggesting importance of executing U.S. tax laws without extraneous interferences).

188. *See id.* (giving example of U.S. attempts to eradicate offshore tax havens).

189. *See id.* (highlighting number of tax evaders prosecuted through one case). *See generally* Bruce Zagaris, *U.S. Announcement of Partial Withdrawal from Harmful Tax Initiative Creates Uncertainties*, 17 INT'L ENFORCEMENT L. REP. 284, 284-86 (2001) (providing background on U.S. partial withdrawal from OECD's harmful tax policies initiative).

190. *See* Michael M. Phillips, *Accord Is Reached by U.S. and Allies on Tax Havens*, WALL ST. J., June 28, 2001, at A4 (explaining compromise between U.S. and other members of OECD).

191. *See* Bruce Zagaris, *OECD Reaches Compromise in Principle on Harmful Tax Practices*, 17 INT'L ENFORCEMENT L. REP. 332, *passim* (2001) (reporting OECD's

The OECD harmful tax competition initiative aims to level the playing field in the imposition of taxes and ability to raise revenue. It cited the erosion of members' tax base by preferential regimes and especially by tax havens. The OECD defines a tax haven by the existence of two or more of the following criteria: zero or low tax rates, ring fencing or discrimination.

In November 2000, the OECD released the OECD HTC Memorandum of Understanding (MOU), which contains a series of obligations that the targeted "tax haven" jurisdictions were required to undertake if they were to avoid the blacklist and its attendant sanctions. Major problems remain in the proposed obligations set forth in the OECD HTC MOU.¹⁹² They significantly exceed those called for in the OECD report, *Improving Access to Bank Information for Tax Purposes*.¹⁹³ This report was designed to encourage agreement within the OECD on the best way to improve cooperation. The latter report constantly provides alternative options and uses words such as "encourages" whereas the OECD HTC MOU makes the obligations mandatory without any wiggle room. In fact, the targeted countries would be required to have administrative practices in place to ensure that the legal mechanism for exchange of information functions effectively and can be monitored, including having personnel responsible for ensuring that requests for information are answered promptly and efficiently, and that personnel are trained or experienced in obtaining such information. Ironically, one OECD country, Canada, reserves the right to decline a request when it lacks sufficient resources to conduct exchanges of information and hence believes that such exchanges cannot be reciprocal.¹⁹⁴ If Canada believes that such exchanges cannot be reciprocal due to its shortage of administrative resources, then it is not surprising that the much smaller targeted countries are also taking the position that such exchange obligations cannot be reciprocal and, similar to the Canadian viewpoint, would want to take a restrictive view of such obligations. The targeted countries have a more important obligation: the need to protect their economic security and well-being.¹⁹⁵

In essence, the OECD is signaling that the targeted countries should respond forthwith to the requests for exchange of information and have

change in focus from pressuring tax havens to increasing intra-organizational exchange of banking information).

192. See OECD, *OECD Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices*, at <http://www.tax-news.com/asp/res/MOUrev20novR1.pdf> (last visited on Mar. 10, 2005) (outlining OECD framework for creation of tax norms).

193. See OECD Committee on Fiscal Affairs, *Improving Access to Bank Information for Tax Purposes*, 13-19 (Mar. 24, 2000), available at <http://www.tax-news.com/asp/res/bankinfo.pdf> (delineating plan to increase data exchange capability).

194. See Steven S. Heller & Boris Stein, *International Mutual Assistance Through Exchange of Information*, 75 *CAHIERS DE DROIT FISCAL INT'L* 259, 268 (1990) (noting limits of obligation to provide assistance).

195. See also Richard J. Hay, *Offshore Financial Centres: The Supranational Initiatives*, 28 *TAX PLANNING INT'L REV.* 1 (2001) (discussing problems with exchange of information), available at <http://www.itpa.org/open/archive/richardhay.rtf>.

derided some of the targeted countries for taking too much time responding to requests. The time for response, however, is often to ensure that the requests are properly concerned with an offense covered by the treaty. Further, sometimes an interested person may have recourse to a court to protect their own rights and ensure that the request complies with the treaty, the constitution and any other applicable provisions.

Some OECD members (i.e., Austria, Luxembourg and Switzerland) have even insisted on covering criminal tax enforcement through a Mutual Assistance in Criminal Matters Treaty. Hence, the MOU to the United States-Luxembourg tax treaty explains that certain information from financial institutions may be obtained and provided to "certain U.S. authorities" only in accordance with the proposed United States-Luxembourg MLAT.¹⁹⁶ As a result, the United States delayed the effective date of the income tax treaty to coincide with the MLAT's taking effect.¹⁹⁷

The upshot of these and other controversies over exchange of information is that, even if the OECD only proceeds on exchange of tax information, there will be many substantive and procedural policy disputes concerning achieving a level playing field between the OECD and targeted countries in the making of policy and its fair implementation. Indeed, there are just as many controversies involving transparency,¹⁹⁸ but it is instructive to consider the FATF's counterpart initiative and its privacy and human rights implications.

On June 3-4, 2004, Germany hosted a meeting of the OECD Global Forum on Taxation in Berlin.¹⁹⁹ The meeting was convened to further discuss the process of achieving the objective of a global level playing field based on high standards of transparency and effective exchange of information in tax matters.²⁰⁰ The meeting brought together over 100 representatives from forty-two governments, both OECD and non-OECD, that are committed to that objective.²⁰¹ The meeting was co-chaired by Mr.

196. Bruce Zagaris, *Luxembourg and U.S. Conclude Tax Treaty Whose Ratification Process Awaits Conclusion of a MLAT*, 12 INT'L ENFORCEMENT L. REP. 171, 172 (1996) (explaining unique disposition of treaty).

197. See Bruce Zagaris, *Developments in Mutual Cooperation, Coordination and Assistance Between the U.S. and Other Countries in International Tax Enforcement*, 27 TAX MGMT INT'L J. 506, 508-09 (1998) (describing recent developments in U.S. tax treaties).

198. See also Bruce Zagaris, *Application of OECD Tax Haven Criteria to Member States Shows Potential Danger to U.S. Sovereignty*, 22 TAX NOTES INT'L 2298, 2299-2301 (May 7, 2001) (discussing transparency issues); Bruce Zagaris, *Issues Low Tax Regimes Should Raise When Negotiating with the OECD*, 22 TAX NOTES INT'L 523, 529-30 (Jan. 29, 2001) (explaining transparency issues from low-tax regimes' perspective).

199. See generally, Press Release, OECD, Outcome, Conclusion of the Meeting of the OECD Global Forum on Taxation in Berlin, 3-4 (June 4, 2004), at http://www.oecd.org/document/5/0,2340,en_2649_201185_31967429_1_1_1_1,00.html (describing meeting and resolutions).

200. See *id.* ("The meeting focused on specific proposals . . . set[ting] forth a process for moving towards a global level playing field consistent with the objective of high standards of transparency and information exchange . . .").

201. See *id.* (noting participation).

Papali'i, Tommy Scanlan, Governor of the Central Bank of Samoa and Mr. Bill McCloskey, Chair of the OECD's Committee on Fiscal Affairs.²⁰²

The meeting focused on specific proposals made by a sub-group of the Global Forum, established at the Ottawa Global Forum meeting in October 2003.²⁰³ The proposals set forth a process for moving toward a global level playing field consistent with the objectives of high standards of transparency and information exchange in tax matters in a way that is fair, equitable and permits fair competition between all countries, large and small, OECD and non-OECD.²⁰⁴

The Global Forum looks forward to engaging in a dialogue with financial centers that up to now have not participated in the process.²⁰⁵ It also looks forward to reviewing the outcome of the compilation of current practices in transparency and information exchange at a future Global Forum meeting.

The reference to the fact that the Global Forum looks forward to engaging in a dialogue with financial centers that have not yet participated in the process is further explained by the OECD paper *A Process for Achieving a Global Level Playing Field*, which was issued June 4, 2004.²⁰⁶ In particular, the following countries have been identified as "significant financial center[s]" that should be included in the process: Andorra, Barbados, Brunei, Costa Rica, Dubai, Guatemala, Hong Kong-China, Liberia, Liechtenstein, Macao-China, Malaysia (Labuan), Marshall Islands, Monaco, Philippines, Singapore and Uruguay.²⁰⁷

Both the OECD and E.U. are striving to achieve effective exchange of information and transparency by 2006, a deadline that is likely to be extended due to continuing controversies. In order to accomplish this goal, they need a level playing field. An unknown variable is whether the E.U. and OECD should provide incentives to the participating countries. For instance, the E.U. savings tax directive requires the state from which the investor resides to share some of the revenue withheld with the country that withholds. Similarly, under the Caribbean Basin Recovery Act, the U.S. government provides incentives to countries entering into tax information exchange agreements with the United States. Indeed, the OECD harmful tax practices initiative is still very much a work in progress.

202. *See id.* (listing key actors).

203. *See id.* (describing establishment of group).

204. *See id.* (delineating objectives of group's proposals).

205. *See id.* (commenting on interest in opening up future dialogue with current non-participating group members).

206. *See* OECD Global Forum on Taxation, *A Process for Achieving a Global Level Playing Field*, at <http://www.oecd.org/dataoecd/13/0/31967501.pdf> (last visited Mar. 10, 2005) (outlining OECD's plan to level economic playing field for all nations).

207. *See id.* (naming financial centers).

b. United Nations

In December 2004, at the eleventh meeting in Geneva, the Ad Hoc Group of Experts on International Cooperation in Tax Matters addressed the issue of mutual assistance in tax collection, which is not dealt with in Article 26 of the United Nations Model Double Taxation Convention concerning exchange of information. The subject of a new international instrument for promoting international assistance in tax collection in the form of a multilateral convention on mutual administrative assistance in tax matters was explored during the meeting. The Ad Hoc Group recommended the inclusion of new provisions on mutual assistance in tax collection. As a result, more developing countries will now have a model provision to facilitate the inclusion of mutual assistance in their own income tax treaties. The U.N. provisions leave open the potential for developing countries to request some type of economic incentives in exchange for including mutual assistance provisions in their tax treaties.

The U.N. General Assembly has adopted a resolution renaming the Ad Hoc Group of Experts on International Cooperation in Tax Matters the Committee or Group of Experts on International Cooperation in Tax Matters. Its role would be, *inter alia*, to continue to work on the U.N. Model Double Taxation Convention between Developed and Developing Countries, the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, provide a framework for dialogue among national tax authorities to enhance and promote international tax cooperation, provide a framework for dialogue to enhance and promote international tax cooperation among national tax authorities, consider how existing international tax norms could affect different groups of countries and consider how new and emerging issues could affect international cooperation in tax matters and develop recommendations for appropriate responses. In essence, the international tax work of the U.N. would have a stronger institutional framework.

c. European Union

The expanded E.U. is now a major force in all international organizations, especially the OECD. In this context its efforts to finalize a savings tax directive have become exceedingly important in terms of influencing other initiatives, such as the OECD harmful tax practices initiative.

On April 19, 2004, Joseph Deiss, Switzerland's President, said his country, which is not a E.U. member, would not cooperate without a separate agreement on border controls and seven other arrangements with the E.U. on matters such as agriculture and the environment.²⁰⁸ That same

208. See generally Andrew Parker, *Swiss Prepared to Delay EU Tax Directive*, FIN. TIMES, Apr. 19, 2004, at 6 (describing standoff between Switzerland and E.U. over separate agreement on border controls).

day, the E.U. announced that a separate dispute involving a customs levy on Swiss exports could be resolved in the coming weeks.²⁰⁹

The E.U. savings tax directive cannot take effect in January 2005 unless the Swiss Government has agreed to participate, along with the United States, Andorra, Liechtenstein, Monaco and San Marino. Mr. Deiss and the Swiss Government are concerned that the Schengen Convention might dilute its banking secrecy regime due to ambiguous provisions on information exchange between countries. The Swiss government wants concessions to ensure its authorities need not exchange information on tax evasion, which is not a criminal offense in Switzerland.²¹⁰

The Swiss government is also deferring an agreement to participate in the OECD's proposals to exchange banking information with OECD countries until 2006. The proposal aims to verify people's tax liabilities. Austria, Belgium and Luxembourg also refused to support the 2006 deadline due to their banking secrecy system.²¹¹

The dispute between the E.U. and the Swiss over a customs levy on Swiss exports arose anew after the Swiss showed annoyance in February 2004 at the imposition of an apparently new tax on re-exports to the E.U. on certain Swiss-made products.²¹² The E.U. claims that the tax on goods re-exported to the E.U. from Switzerland was "not new" and that all E.U. Members, except Germany, had been imposing the tax for some time.²¹³ Officials from both the E.U. and Switzerland have denied suggestions from some observers that the customs levy was imposed to increase the pressure on the Swiss authorities to agree to participate in the Savings Tax Directive.²¹⁴

The Swiss' insistence on conditioning their participation in the savings tax directive on achieving agreements on other pending matters is the latest in a long series of negotiations aimed at effectuating the directive. The Swiss, however, did reach a compromise with the United States regarding international tax enforcement cooperation in tax matters by developing a definition for tax offenses qualifying for cooperation. This

209. See Ulrika Lomas, *EU Claims Agreement Imminent On Swiss Re-export Tax Dispute* (Apr. 20, 2004), at <http://www.tax-news.com/asp/story/story.asp?storyname=15755> (reporting resolution of E.U./Switzerland dispute regarding customs tax).

210. See Marc G. Corrado, *The Supreme Court's Impact on Swiss Banking Secrecy: Societe Nationale Industrielle Aerospatiale v. United States District Court*, 37 AM. U. L. REV. 827, 841-42 (1988) (explaining that Swiss law criminalizes tax fraud but not tax evasion).

211. See Parker, *supra* note 208 (explaining extent of standoff between E.U. and other nations over new tax evasion standard).

212. See Lomas, *supra* note 209 (noting Swiss government's anger over E.U. re-export tax).

213. See *id.* (describing E.U.'s attempts to refute Swiss government's notion that new re-export taxes have been levied against them).

214. See *id.* (reporting denials by both Switzerland and the E.U. concerning possible use of re-export tax to pressure Swiss into adopting E.U. Savings Tax Directive).

agreement represented a compromise that bridged much of the gap between the differences in tax crimes in the two countries.²¹⁵

On April 26, 2004, E.U. member States agreed to new legislation designed to enhance authorities' cooperative efforts to clamp down on direct tax evasion.²¹⁶ The legislation outlines certain areas where member States can undertake cross-border activities and engage in information exchange, including income, company and capital gains taxation.²¹⁷

"Modern technology and increased cross-border activity have made it more important than ever for information exchange and cooperation between tax administrations to be improved," E.U. Taxation Commissioner Frits Bolkestein said in a statement released after the Council of Ministers approved the legislation.²¹⁸ "Tax dodgers and cheats must not be allowed to get a free ride on the backs of honest taxpayers."²¹⁹ The specific provisions in the legislation provide for several things:

[T]he possibility for member States to conduct simultaneous control checks of the locally based activities of taxpayers operating in several countries of the E.U. and to share the information obtained with each other; assurance that a member State that has been requested to supply information will, if requested, carry out certain administrative procedures on behalf of another member state such as serving the taxpayer with an amended assessment; and assurance that when a member state has to initiate inquiries to obtain information needed by another country's tax agency, it will treat the inquiry as if it were acting on its own behalf, as the procedures are generally less complicated in domestic cases, and provide the information more quickly.²²⁰

"The legislation is a follow up to a report approved by E.U. member States in 2000 that indicated E.U. legislation was inadequate to fight tax fraud as well as to deal with the problems of under-invoicing and over-invoicing."²²¹ In summation, "[t]he commission said the new legislation

215. *Id.*

216. See Press Release, European Commission, Direct Taxation: Commission Welcomes Adoption of Directive Strengthening Co-operation to Combat Fraud (Apr. 26, 2004), at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/539&format=HTML&aged=0&language=en&guiLanguage=en> (announcing agreement between E.U. member states "that is designed to speed up the flow of information between the tax authorities" of those states).

217. See *id.* (outlining elements of Directive). See generally Joe Kirwin, *EU Member States Back Measure to Bolster Crackdown on Tax Evasion*, BNA DAILY TAX REP., Apr. 27, 2004, at G-5 (summarizing provisions within E.U.'s new legislation "designed to enhance authorities' cooperative efforts to clamp down on direct tax evasion").

218. See Kirwin, *supra* note 217 (expressing importance of cross-border information exchange between E.U. member states to combat tax evasion).

219. *Id.*

220. See *id.* (describing provisions of E.U. agreement).

221. *Id.*

would complement other E.U. laws including the pending information exchange agreement on savings income.”²²²

d. Council of Europe

On January 25, 1988, the Council of Europe and the OECD opened for signatures the Convention on Mutual Administrative Assistance in Tax Matters.²²³ On June 28, 1989, the United States signed it.²²⁴ On September 18, 1990, the U.S. Senate approved the treaty and it entered into force with respect to the United States on April 1, 1995.²²⁵

Countries that are members of the Council of Europe, the Organization for Economic Cooperation and Development (OECD), or both, are eligible parties to the treaty. Currently the treaty is in force in the following eight countries: Azerbaijan, Belgium, Denmark, Finland, Iceland, the Netherlands, Norway, Poland, Sweden and the United States.²²⁶ Canada, France and the Ukraine have signed, but have not ratified.²²⁷

The Convention is not a typical tax treaty. Despite some vague references in the protocol, the Convention does not refer to the elimination of double taxation. Instead, it provides a mutual assistance treaty to prevent the evasion and avoidance of all taxes other than customs duties. It provides for a wide range of exchange of information between any two countries that are parties to the Convention. It also provides for assistance in the collection of taxes and in the services of documents. The United States, however, entered reservations on these types of assistance. Hence, the United States will not assist in collecting taxes and will only serve documents by mail.

e. Organizations of Tax Administrators

There is a web of international organizations, organized by regions mostly, for tax administrators to meet regularly, discuss matters of mutual interests and develop model agreements, laws, best practice approaches and initiatives. These organizations include the Pacific Association of Tax Administrators (PATA), the Inter-American Center of Tax Administrators

222. See *id.* (noting legislation’s broad implications on additional E.U. laws that regulate tax-based information exchanges).

223. See Kenneth Klein, *Introduction to Council of Europe-Organisation for Economic Co-Operation and Development, Convention on Mutual Administrative Assistance in Tax Matters*, 27 I.L.M. 1160 (1988) (summarizing convention, offering brief description of created legislation), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/127.htm> (providing full text and brief discussion of the resolution).

224. See Council of Europe, *Convention on Mutual Administrative Assistance in Tax Matters: Signatures*, at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=127&CM=8&DF=2/15/05&CL=ENG> (last visited Mar. 10, 2005) (noting date of U.S. signing).

225. See *id.* (reporting date that U.S. adopted and effectuated treaty).

226. See *id.* (noting countries who have ratified treaty).

227. See *id.* (listing signatories who have yet to ratify treaty).

(CIAT), the Caribbean Organization of Tax Administrators (COTA) and the Nordic Group.²²⁸

f. Ad Hoc Initiatives

Periodically tax authorities of different countries cooperate on matters of mutual interest, including matters of mutual enforcement interest, such as tax shelters. During the weekend of April 23, 2004, the United States, the United Kingdom, Australia and Canada announced they were planning the creation of a Joint International Tax Shelter Information Center (JITSIC), an international task force to combat abusive tax avoidance schemes.²²⁹

Tax officials from the four countries met in Williamsburg, Virginia, to plan the development of a task force to combat tax-avoidance schemes.²³⁰ Operations for the task force, staffed jointly between the four countries, could be established in New York as early as the summer of 2005.²³¹ This task force will function as part of a broader plan to combat tax avoidance promoters and encourage cooperation and information sharing between the nations.

The task force will help create an Internet portal designed to keep an online tally of tax avoidance schemes and shell companies, "encapsulating" a list of anti-tax avoidance plans.²³² If it is successful, the task force could save the governments of the participating countries billions of U.S. dollars in lost revenue and serve as a template for other developed nations, similar to the OECD.²³³

The plan includes identifying tax-avoidance schemes and the firms that facilitate tax avoidance; pooling the participating nations' experience, techniques and proven practices; facilitating action across international boundaries; and examining developments in the tax industry to cut potential problems off at the start.²³⁴

The four participating countries bring different specialized experience in fighting tax avoidance to the task force. The United Kingdom's expertise lies in identifying and uncovering avoidance schemes, especially

228. See *Review of the Inputs to the Substantive Preparatory Process and the International Conference on Financing for Development, Note by the Secretary-General*, U.N. Preparatory Committee for the International Conference on Financing for Development, 3rd Sess., pt. 2, Annex 1, Agenda Item 2, U.N. Doc. A/AC.257/xx (2001), at http://www.un.org/esa/ffd/aac257_27a1.pdf (Oct. 2001) (listing organizations).

229. See generally Sirena J. Scales, *Multination Task Force Created to Combat Abusive Tax Avoidance*, 2004 WORLDWIDE TAX DAILY 81-3, at 81-3 (2004) (describing Williamsburg, Virginia meeting between tax officials of four nations).

230. See *id.* (stating that countries planned "the development of a task force to battle tax-avoidance schemes").

231. See *id.* (speculating on date of setup for task force's operations).

232. See *id.* (discussing duties of task force).

233. See *id.* (explaining potential benefits of cooperation).

234. See *id.* (listing plan's goals).

concerning Value Added Tax (VAT), whereas the U.S. specializes in corporate and income tax avoidance and offshore tax shelters.²³⁵

To execute the plan formally the four countries signed a MOU, by which the signatories agree to form a JITSIC. It will supplement the continuing work of tax administrations in identifying and stopping abusive tax avoidance transactions, arrangements and schemes (which the MOU refers to as "abusive schemes").²³⁶

The MOU provides for the JITSIC operations. The signatories will each appoint officials to the JITSIC, who are trained and experienced in tax examinations as they relate to abusive tax schemes.²³⁷ The headquarters of the JITSIC will be in Washington, D.C. An Executive Steering Group will be established to coordinate, oversee and evaluate the work of the JITSIC.²³⁸ It will hold meetings periodically in each member nation. Pursuant to the domestic procedures of the signatories, the members of JITSIC for that party will be delegated the ability to act as competent authorities for purposes of bilateral exchanges of information.²³⁹ After twelve months the signatories will conduct an initial review of the JITSIC operations.²⁴⁰

On May 3, 2004, the U.K. tax authorities issued a statement that an initial focus of the work will target "the ways in which financial products and derivative arrangements are used in abusive tax schemes by corporations and individuals to reduce their tax liabilities and the identification of promoters developing and marketing those products and arrangements."²⁴¹ One media article reported that thirty leading U.K. companies face investigations into their use of a tax avoidance scheme that could deprive the U.K. Government of £1bn (\$1.8bn) in revenues.²⁴²

Officials involved in establishing the task force explained that part of the long-term plan involved encouraging France and the OECD to take an active role in the anti-avoidance activities. If the OECD joins the effort, the result could be significant, especially for the jurisdictions and schemes targeted.²⁴³ For jurisdictions that may be the targets of the initiatives of

235. *See id.* (noting that each party brings different expertise to cooperative).

236. U.S. Internal Revenue Service, *U.S. Establishes Joint Task Force on Abusive Tax Shelters with Canada, Australia, and U.K.*, 2004 WORLDWIDE TAX DAILY 86-13, at 86-13 (2004) (announcing signing of agreement).

237. *See id.* (noting personnel appointed to Joint International Tax Shelter Information Centre (JITSIC)).

238. *See id.* (listing executive oversight established for JITSIC).

239. *See id.* (discussing legal ability to exchange information between JITSIC members).

240. *See id.* (presenting full text of memorandum of understanding (MOU)).

241. Andrew Parker, *UK Companies Face Probe Over Use of Tax Avoidance Scheme*, FIN. TIMES, May 4, 2004, at 1.

242. *See id.* (stating that "[m]ore than 30 leading UK companies face investigations into their use of a tax avoidance scheme that could deprive the government of Pounds 1bn in revenues").

243. *See Scales, supra* note 229, at 81-3 (describing potential savings of cooperation).

the task force, the issues of a level playing field, blacklists, economic sanctions and others that existed and continue in the design and implementation of the OECD's harmful tax practices initiative are likely to arise. Meanwhile, the IRS has various initiatives to contest tax shelters. A federal grand jury in the Southern District of New York is presently investigating international tax shelter activities. The U.S. Congress, especially the Senate Permanent Investigative Subcommittee, has also reviewed the abuse of various tax shelters. As the revenue of the participating countries continues to suffer erosion, due to the ability of professional advisers and taxpayers to take advantage of gaps among tax laws and systems, revenue authorities and other interested persons undoubtedly will scrutinize the ability of the JITSIC to produce results.

D. *Anti-Money Laundering and Counter-Terrorism Financial Enforcement*

An area of dynamic development for international organizations has been in anti-money laundering and counter-terrorism financial enforcement.

1. *Global Organizations*

a. The United Nations

i. Conventions

The United Nations pioneered international AML cooperation with the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which requires signatories to criminalize money laundering and immobilize the assets of persons involved in illegal narcotics trafficking.²⁴⁴ Because the Convention was an initial effort and the participating governments were so diverse, there were differences in each country's criminalization of money laundering, enforcement methods, number of convictions and range of punishments.²⁴⁵ Nevertheless, subsequent efforts have drawn from the Vienna Convention and utilize, wherever possible, the same terminology and systematic approach. The U.N. pioneered the 1988 Vienna Convention against the Trafficking in Illegal Narcotic and Psychotropic Substances, which contains the requirements to criminalize money laundering and immobilize the assets of persons involved in illegal narcotics trafficking.

The 1999 International Convention for the Suppression of the Financing of Terrorism prohibits direct or complicit involvement in the international and unlawful provision or collection of funds, attempted or actual, with the intent or knowledge that any part of the funds may be

244. See generally *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, U.N. SCOR, 53rd Sess., U.N. Doc. E/CONF.82/15, reprinted in 28 I.L.M. 493, 493-96 (1989) (presenting full text of treaty).

245. See *Global Programme Against Money Laundering*, *supra* note 129 (presenting model legislation).

used to carry out any of the offenses described in the Convention.²⁴⁶ Such acts include those intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population and any act intended to compel a government or an international organization to take action or abstain from taking action.²⁴⁷ The Convention's offenses are deemed to be extraditable crimes; signatories must establish their jurisdiction over them, make them punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite those offenders, cooperate in preventive measures and countermeasures and exchange information and evidence needed in related criminal proceedings.²⁴⁸

The Convention requires each signatory to take appropriate measures, in accordance with its domestic legal principles, for the detection, freezing, seizure and forfeiture of any funds used or allocated for the purposes of committing the listed offenses.²⁴⁹ Article 18(1) requires signatories to subject financial institutions and banking professionals to "Know Your Customer" requirements and the filing of suspicious transaction reports.²⁵⁰ Additionally, Article 18(2) requires signatories to cooperate in preventing the financing of terrorism through the licensing of money service businesses and other measures to detect or monitor cross-border transactions.²⁵¹

Another treaty with important AML/CTFE provisions is the 2000 Palermo Convention Against Transnational Organized Crime,²⁵² which contains three supplementary protocols: (1) to prevent, suppress and punish trafficking in persons, especially women and children; (2) to stop the smuggling of migrants by land, sea and air; and (3) to stop the illicit manufacturing of and trafficking of firearms, their parts, components and ammunition.²⁵³ This Convention seeks to strengthen governmental power in combating serious crimes by providing a basis for stronger common action against money laundering through synchronized national laws, so that no uncertainty exists as to whether a crime in one country is also a crime in another. Signatory countries pledge to: (1) criminalize offenses committed by organized crime groups, including corruption and corporate or company offenses; (2) combat money laundering and seize the proceeds of crime; (3) accelerate and extend the scope of extradition; (4) protect

246. See *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 54/109, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/109, reprinted in 39 I.L.M. 270, 271-72 (2000) (summarizing broad prohibitions developed during Convention).

247. See *id.* at 271 (presenting full text of convention).

248. See *id.* at 273 (noting punishable offenses).

249. See *id.* at 274 (explaining requirements convention places on member countries).

250. See *id.* at 277 (describing requirements placed on banking community).

251. See *id.* (presenting convention's monitoring requirements).

252. See TOCC, *supra* note 133 (presenting full text of convention).

253. See *id.* (describing supplemental protocols).

witnesses testifying against criminal groups; (5) strengthen cooperation to locate and prosecute suspects; (6) enhance prevention of organized crime at the national and international levels; and (7) develop a series of protocols containing measures to combat specific acts of transnational organized crime.²⁵⁴ The signatories must establish regulatory regimes to deter and detect all forms of money laundering, including customer identification, record keeping and reporting of suspicious transactions.²⁵⁵ In these respects, the Convention's provisions are similar to those found in the FATF's Forty Recommendations.²⁵⁶

In addition to conventions, the U.N. Office on Drugs and Crime has drafted model laws such as the Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime²⁵⁷ and, in response to its expansion into the realm of CTFE, the Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill.²⁵⁸ The Office on Drugs and Crime provides technical assistance on legislative drafting, financial intelligence, capacity building and a range of services to help governments and law enforcement agencies implement their obligations under the Vienna Convention and related AML initiatives.²⁵⁹

ii. Security Council Resolution 1373²⁶⁰

On September 12, 2001, the United Nations Security Council adopted Resolution 1368, condemning the 9/11 attacks and calling on all States to work together to quickly bring to justice those who perpetrated them, as well as those "responsible for aiding, supporting or harboring the perpetrators."²⁶¹ The Resolution also called on the international community to increase efforts "to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant interna-

254. *See id.* (presenting pledges of signatory nations).

255. *See id.* (explaining member nations' requirements).

256. Compare The World Bank and International Monetary Fund, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, III-3-III-4 (Mar. 30, 2003), at <http://www1.worldbank.org/finance/assets/images/03-chap03-f.qxd.pdf> (listing TOCC provisions), with *id.* at III-9 (discussing FATF Forty Recommendations).

257. *See Global Programme Against Money Laundering*, *supra* note 129 (presenting full text of model legislation).

258. *See Model Money Laundering*, *supra* note 130 (displaying bill).

259. *See id.* (listing numerous technical services provided by U.N. Office on Drugs and Crime).

260. *See, e.g., Bruce Zagaris, The United Nations Acts to Combat Terrorism*, 17 INT'L ENFORCEMENT L. REP. 469, *passim* (2001) (describing passing of and contents of U.N. resolution); Bruce Zagaris, *UN Security Council Hears Progress of Counter-Terrorism Committee*, 18 INT'L ENFORCEMENT L. REP. 113, *passim* (2002) (noting counter-terrorism developments).

261. *See* S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. at § 3, U.N. Doc. S/RES/1368 (2001) (reacting to 9/11 attacks on U.S.).

tional anti-terrorist conventions and Security Council resolutions.”²⁶² Finally, the Resolution expressed the Security Council’s preparedness to take “all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism.”²⁶³

On September 28, 2001, the Security Council adopted the U.S.-sponsored Resolution 1373, which called on all member States to: (1) “prevent and suppress the financing of terrorist acts;” (2) freeze without delay the resources of terrorists and terror organizations; (3) prohibit anyone from making funds available to terrorist organizations; (4) suppress the recruitment of new members by terrorism organizations and eliminate their weapon supplies; (5) “deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens” to terrorists; (6) “[a]fford one another the greatest measure of assistance in connection with criminal investigations” involving terrorism; (7) prevent the movement of terrorists or terrorist groups by effective border controls and control over travel documentation; and (8) cooperate in any campaign against terrorists, including one involving the use of force.²⁶⁴

While it contains strong language, the resolution still has gray areas, such as its failure to define the term “terrorist.” Invoking Chapter 7 of the U.N. Charter, which requires all member States to cooperate and gives the Security Council authority to take action, including the use of force, against those who refuse to do so, the resolution draws on several commitments that have already been made in treaties and past resolutions and made them immediately binding on all member States.²⁶⁵ Many of its clauses require changes in national laws, such as those dealing with border controls and asylum.²⁶⁶

From an implementation perspective, an important aspect of Resolution 1373 is the establishment of the Counter-Terrorism Committee

262. *Id.* § 4. The resolutions especially to be adhered to included the specifically-mentioned Resolution 1269, S.C. Res. 1269, U.N. SCOR, 54th Sess., 4053rd mtg., U.N. Doc. S/RES/1269 (1999) (encouraging nations to fight terrorism); as well as Resolution 1267, S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999) (demanding Taliban to deliver Osama bin Laden to international authorities); and Resolution 1333, S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000) (demanding Taliban to stop supporting terrorism).

263. See S.C. Res. 1368, *supra* note 261, § 5.

264. See S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001) (explaining new terrorism-related requirements). No terrorist organizations were specifically cited in the resolution. *Id.*

265. See Serge Schmemmann, *U.N. Requires Members to Act Against Terror*, N.Y. TIMES, Sept. 29, 2001, at A1 (discussing nature of resolution).

266. Human Rights Watch has noted the possibility that these changes may involve new and overbroad statutes that will impinge on basic liberties. See Human Rights Watch, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights 4-5 (Mar. 25, 2003), at <http://www.hrw.org/un/chr59/counterterrorism-bck.htm> (noting that Resolution 1373 calls for tough measures, but makes no assurances that member states respect international human rights).

(CTC) of the Security Council, consisting of all members of the Council, to monitor member States' implementation of the resolution.²⁶⁷ The CTC is divided into three five-member subcommittees, each of which oversees one-third of the U.N. member States.²⁶⁸ All member States must report to the CTC on the steps they have taken toward implementation.²⁶⁹ It is the duty of the CTC to review these reports and advise the appropriate subcommittee on whether it should follow up with a particular member state to achieve compliance with the resolution and whether the member state requires assistance in that regard.²⁷⁰ Although the CTC will not define terrorism in a legal sense, its work will help develop minimum standards for an international CTFE regime.

iii. Initial Results

On August 25, 2004, the United Nations Analytical Support and Sanctions Monitoring Team issued its first report pursuant to U.N. Resolution 1526 concerning Al Qaeda and the Taliban and associated individuals and entities. Unfortunately, the report was not positive.²⁷¹

Al Qaeda provides practical and religious inspiration. Any group that shares its political objectives and religious beliefs and has the necessary initiative, resources and determination can make attacks in its name, using similar methodology. Al Qaeda has inspired such "franchise" or "copycat" operations whereby groups with little or no direct contact with the central leadership can become affiliates. For instance, the group responsible for bombing commuter trains in Madrid on March 11, 2004, had no organizational link with Al Qaeda leadership. The attacks were done by people who were relatively well established and integrated within their community and were not considered by Spanish authorities to pose an imminent threat.

Iraq provides a focus for Al Qaeda activity and propaganda. It has provided an attractive alternative to fighters who might otherwise have

267. See S.C. Res. 1373, *supra* note 264, § 6 (discussing implementation of resolution).

268. See Counter-Terrorism Committee, *How Does the CTC Work with States?* (2003), at <http://www.un.org/Docs/sc/committees/1373/work.html> (describing function and organization of CTC).

269. See *id.* (same)

270. See *id.* (same).

271. See United Nations Security Council, *Letter Dated 23 August 2004 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities Addressed to the President and the Security Council*, U.N. Doc. S/2004/679 (2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/469/63/PDF/N0446963.pdf> (noting that five years after Security Council adopted Resolution 1267, threat of Al Qaeda continues and thus Security Council should consider new and different efforts to manage terrorist threats). See generally Warren Hoge, *U.N. Seeks Tighter Sanctions as Qaeda Skirts Money Controls*, N.Y. TIMES, Aug. 31, 2004, at A7 (addressing financial ability of Al Qaeda and need for additional United Nations sanctions and efforts to combat Al Qaeda threat).

gone to Afghanistan. The Afghan authorities note a correlation between the levels of activity in Iraq and the number of attacks in their own country.

Most importantly, the report finds that there is no prospect of an early end to attacks from Al Qaeda-associated terrorists. The terrorists will continue to attack targets, both Muslim and non-Muslim, according to the resources they have available and the opportunities that occur. They will look for ways to attack both high profile and soft targets.

Without an internationally accepted definition of terrorism, Security Council sanctions against the Taliban, Al Qaeda and their associates apply to a list of designated individuals, groups and entities. The list should reflect international agreement on which groups and individuals pose the greatest danger. For several reasons, the list has started to lose credibility and operational value. It now requires updating in terms of its relevance and accuracy.

The report states that, while the sanctions against the financing of terrorism have had some effect and some millions of dollars of assets have been frozen, these sanctions should be updated based on how Al Qaeda raises and transfers its money. The travel ban and arms embargo should be revised to reflect current Al Qaeda methodology.

The Security Council wants to consider new measures to enhance international cooperation and to support national efforts. The Analytical Support and Monitoring Team has proposals for the improvement of the current measures and ideas from which new ones might be formulated. The team thinks it can generate wider support for the list by the introduction of technical improvements and the submission of new names. The team also believes it can encourage closer operational cooperation between States to make the international environment more difficult for Al Qaeda-related terrorism.

The report opines that the sanctions regime has had limited impact. Al Qaeda has shown great flexibility and adaptability in staying ahead of such sanctions. Al Qaeda's structure has evolved to its current manifestation as a loose network of affiliated underground groups with certain common goals. Some countries have questioned the efficacy and relevance of the sanctions. Some countries have regarded the measures imposed by the Security Council as too difficult to enforce and of secondary importance to other counter-terrorism activity within their jurisdiction.

A practical problem has been that the consolidated list contains names of individuals whose full identity and whereabouts are uncertain. To make the list more useful, the report recommends that the names be accompanied by date of birth, nationality and passport information. The list must correct inconsistencies and inaccuracies in the spelling and transliteration of names and seek a standard approach. Twenty-one states have submitted names for inclusion on the list, which at the time of the report comprised 143 individuals and one entity associated with the Taliban and

174 individuals and 111 entities associated with Al Qaeda. The comparatively small number of countries contributing to the list suggests that many States are reluctant to provide names. Issues of due process and concerns over the definition of Taliban and Al Qaeda may also make some States reluctant to provide names for inclusion on the list. The list has had to avoid accusations of political point scoring and of subjectivity.

An unresolved issue is the procedure by which a name may be removed from the list, whether by a listing State or as a result of appeal by the individual or entity concerned. Subject to the agreement of the Committee, the Monitoring Team plans to examine current de-listing procedures, especially concerning appeals against listings submitted by individuals or entities that have difficulty in doing so through their governments. The report recommends developing mechanisms to remove the names of dead persons as soon as circumstances allow and to enable countries to notify the 1267 Committee when someone on the list is detained and share internationally any useful information that results from their investigation. The report recommends that national authorities ensure that security and intelligence agencies are aware of the list and its purpose, as well as those with responsibility for the enforcement of the sanctions. The Monitoring Team will suggest how entries might be standardized and the general format of the list improved. The Monitoring Team will review the sections of the Committee's guidelines that are relevant to the list and recommend revisions if appropriate.

A major consideration is that Al Qaeda's operations are economical. Only the sophisticated attacks of September 11, 2001, required funding of more than six figures. The embassy bombing attacks in Kenya and Tanzania in August 1998, the October 2000 attack on the USS Cole in Aden, the Bali bombings in October 2002, the 2003 bombing of the Marriott Hotel in Jakarta, the November 2003 attacks in Istanbul and the March 2004 attacks in Madrid individually cost well under six figures.²⁷²

The report expressed concerns that although many States have merely amended anti-money-laundering legislation to cover terrorist crime, terrorist-related financial transactions generally occur before the crime, while the CTFE laws are designed essentially to deal with the proceeds of crime. Increasingly Al Qaeda and its associates are using alternative means to raise and move their assets in ways that are less open to scrutiny. The Monitoring Team will recommend to the Committee that States circulate the consolidated list beyond their banks to non-bank financial institutions and to any non-financial entities where assets might be held. The Monitoring Team will look at the increased use of alternative remittance systems, cash couriers and charities and other nonprofit organizations to fund terrorist operations.

272. See Hoge, *supra* note 271 (noting that each terrorist attack since September 11, 2001 cost less than \$50,000).

The report finds an important reason for non-reporting has been the complexity and volume of reports required from States that clearly lack the capacity to produce them. Some States lack the human resources necessary to produce reports and the national supervisory and coordination mechanisms needed to gather the information required. A need exists for some States to bring their national agencies responsible for counter-terrorism into the reporting process. The quality of the reports varies. The reporting culture of States is partly to blame. Some States find it easier to report what has been done politically rather than at the operational level. The questions asked appear to overlap in some cases with the reporting requirements of the Counter-Terrorism Committee, exacerbating the confusion as to where the boundaries between the two Committees are.

The Monitoring Team will consult a wide range of national authorities directly engaged in counter-terrorism to develop ideas as to what further measures might be useful for the Security Council to consider. The Monitoring Team will endeavor to engage States, that through a lack of capacity or other reasons, make less of a contribution to international efforts against Al Qaeda-associated terrorism than they might otherwise make.²⁷³

b. Financial Action Task Force on Money Laundering²⁷⁴

In 1989, the G7²⁷⁵ established the FATF to serve as an international clearinghouse for ideas and recommendations on how to curtail money laundering.²⁷⁶ In keeping with the post-September 11th international trend of merging AML and CTFE regimes, however, the FATF has since expanded its mission to include efforts to stem terrorist financing. Operationally, the FATF relies on a sophisticated network of FATF-style regional bodies throughout the world to elaborate typologies charting money laundering trends and formulate appropriate responses and mutual evaluations customized to respond to the circumstances of the members of such bodies.²⁷⁷

273. For more information on the U.N. sanctions against Al Qaeda and the Taliban, see Bruce Zagaris, *UN Reports Problems with International Sanctions Against Al Qaeda*, 20 INT'L ENFORCEMENT L. REP. 476, 477 (2004) (describing global Al Qaeda network).

274. This section is derived substantially from Bruce Zagaris, *FATF Adopts New Standards to Combat Terrorist Financing*, 17 INT'L ENFORCEMENT L. REP. 493 (2001).

275. The G7, now the G8 with the addition of Russia, was comprised of heads of state of the United States, Canada, Japan, France, Germany, Italy, Britain and the European Community. See University of Toronto G8 Information Centre, *What is the G8?*, at http://www.g7.utoronto.ca/what_is_g8.html (last modified Jan. 25, 2005) (describing participants and substance of G8 summit).

276. See FATF, *More About the FATF and its Work*, at http://www1.oecd.org/fatf/AboutFATF_en.htm (last modified May 14, 2004) (describing tasks of FATF in combating money laundering and terrorist financing worldwide). The FATF currently has thirty-one member countries and territories. *Id.*

277. These include the Caribbean FATF, the FATF in South America, the Asia/Pacific Group on Money Laundering, the Eastern and Southern Africa Anti-

The FATF's recently updated Forty Recommendations,²⁷⁸ when combined with the eight (and now nine) Special Recommendations on Terrorist Financing,²⁷⁹ create a comprehensive laundry list of every major step nations and institutions should take to combat money laundering and terrorist financing. They cover ratification of international agreements, criminalization of relevant activities, due diligence requirements and the kinds of financial institutions that are bound to meet them, assistance to foreign countries and implementation of terrorist list sanctions. Each FATF member must self-assess its compliance with the Recommendations and report to the FATF, which will then "name and shame" non-cooperating countries and territories (NCCTs).²⁸⁰ FATF standards require financial institutions to pay enhanced scrutiny to transactions with persons in NCCTs. Hence, adverse economic consequences occur from making the list of NCCTs.

If an NCCT does not take effective measures to address and solve the problems the FATF views as non-compliance with the world AML/CTFE regime, the FATF can recommend that counter-measures be taken against the NCCT. These sanctions punish entities located within NCCTs by establishing enhanced due diligence requirements for financial institutions that deal with them and notification to their business partners that they may be money launderers.²⁸¹ These measures have been in effect against

Money Laundering Group and the MONEYVAL Committee. *See id.* (noting regional and international anti-money laundering initiatives, including regional and national bodies and work performed in reviewing money laundering trends). In addition to the organizations discussed herein, the G8, the G20, the International Monetary Fund, the World Bank, the World Customs Organization, the Commonwealth Secretariat, Europol, Interpol, the International Organization of Securities Commissions, the Financial Stability Forum, the Egmont Group of Financial Intelligence Units, the Basel Committee on Banking Supervision, the Offshore Group of Banking Supervisors, the European Central Bank and various development banks play important roles in developing the international AML/CTFE regime through raising awareness, developing methodologies, building institutional capacity and research and development. *See id.* (same).

278. FATF, *The Forty Recommendations* (2003), at http://www1.oecd.org/fatf/40Recs_en.htm.

279. FATF, *Special Recommendations on Terrorist Financing* (Oct. 31, 2001), at http://www1.oecd.org/fatf/pdf/SRecTF_en.pdf.

280. For the current list of Non-Cooperative Countries and Territories, see FATF, *Non-Cooperative Countries and Territories (NCCTs)*, at http://www1.oecd.org/fatf/ncct_en.htm (last modified Oct. 27, 2004). In deciding whether or not to identify a country or territory as non-cooperative, the FATF considers twenty-five criteria; further criteria govern removal from the list of NCCTs. *See* FATF, *Annual Review of Non-Cooperative Countries or Territories*, App. 1-2 (June 30, 2003), at http://www1.oecd.org/fatf/pdf/NCCT2003_en.pdf (setting forth list of criteria for non-cooperative countries or territories).

281. FATF, *Annual Review of Non-Cooperative Countries or Territories*, *supra* note 280, App. 2.

Nauru since December 2001,²⁸² and other nations, such as Ukraine and Myanmar, have been threatened with them.²⁸³

In 2002, the FATF, in partnership with the World Bank and International Monetary Fund, created a new methodology to assess nations' compliance with AML/CTFE standards, drawing heavily from the FATF's Forty Recommendations and Eight Special Recommendations on Terrorist Financing, as well as international conventions.²⁸⁴ The FATF will utilize this methodology in future NCCT evaluations and the IMF and World Bank have included it as part of their own assessments of their members in pursuance of a program resulting from the extension of a one-year pilot program ending November 2003.²⁸⁵

c. IMF/World Bank Group

Until 2001 and thereafter, the IMF resisted proactive involvement in anti-money laundering and counter-terrorist financial enforcement. It perceived its role as helping with financial regulation, but not in enforcement and criminal law. More recently, as its large shareholders have demanded that it become more actively involved in the AML and CTF regulatory and enforcement regimes, the IMF has begun to quickly participate. Subsequently, the IMF decided to become involved in AML/CFT policy due to prudential and macroeconomic effects of money laundering on national and international financial systems. In particular, the IMF worried that money laundering and large-scale criminal organizations would undermine, corrupt and destabilize markets and even smaller economies. The tell-tale signs have been in inexplicable changes in money demand, greater prudential risks to bank soundness, contamination effects on legal financial transactions and greater volatility of international capital flows and exchange rates due to unanticipated cross-border asset transfers.

The IMF is contributing to the efforts of the FATF in several important ways, consistent with the IMF's core areas of competence. As a collaborative institution with near universal membership, the IMF is a natural forum for sharing information, developing common approaches to issues

282. *See id.* at 12 (noting history of Nauru's non-compliance).

283. *See id.* at 10-11 (noting history of Ukraine and Myanmar's non-compliance); Press Release, FATF, FATF Decides to Impose Counter-Measures on Myanmar (Nov. 3, 2003), at http://www1.oecd.org/fatf/pdf/PR-20031103_en.pdf (asking members to take countermeasures against Myanmar because it has not addressed deficiencies noted in June 2001).

284. *See generally* FATF, *Methodology for Assessing Compliance with Anti-Money Laundering and Combating the Financing of Terrorism Standards* (Oct. 11, 2002), at http://www1.oecd.org/fatf/pdf/meth_2002_en.pdf (describing system and associated assessment criteria used to combat money laundering and terrorist financing).

285. *See* Press Release, IMF, IMF Executive Board Approves 12-Month Anti-Money Laundering Pilot Project (Nov. 22, 2002), at <http://www.imf.org/external/np/sec/pr/2002/pr0252.htm> (summarizing money laundering pilot project and uses by various groups).

and promoting the AML and CTF regulatory and enforcement policies and standards developed by FATF. In addition, the Fund has unique expertise due to its broad experience in conducting financial sector assessments, providing technical assistance in the financial sector and exercising surveillance over members' exchange systems.

After September 11, 2001, the IMF identified new ways to advance its contribution to international efforts to combat money laundering and the financing of terrorism. In cooperation with the World Bank, it took some important steps:

(1) It added the FATF Forty Recommendations and Eight Special Recommendations on Terrorist Financing to the list of areas and associated standards and codes for which Reports on the Observance of Standards and Codes (ROSCs) can be prepared.

(2) In partnership with the World Bank, the FATF and the FSRBs, it participated in a twelve-month pilot program of AML/CFT assessments of forty-one jurisdictions, which was completed in October 2003. A further twelve assessments have been completed since then.

(3) Along with the World Bank, it substantially increased technical assistance to member countries on strengthening financial, regulatory and supervisory frameworks for AML-CFT. In 2002-2003, there were eighty-five country-specific technical projects benefitting sixty-three countries and thirty-two regional projects reaching more than 130 countries. In 2004, the pace of technical assistance has intensified further.

Following a March 2004 review of the pilot program, the IMF Executive Board agreed to make AML/CFT assessments a regular part of IMF work. It also endorsed the revised FATF Forty Recommendations as the standard for which AML/CFT ROSCs will be prepared, as well as a revised methodology to assess compliance with that standard. Drawing on the positive experience under the twelve-month pilot program, the Executive Board decided to expand the Fund's AML/CFT assessments and technical assistance work to cover the full scope of the expanded FATF recommendations.

AML/CFT assessments are usually prepared within the framework of the Financial Sector Assessment Program (FSAP), another joint IMF-World Bank initiative, which is specifically designed to assess the strengths and weaknesses of financial sectors. The IMF conducts the AML/CFT assessments with the FSAP as part of voluntary assessments of Offshore Financial Centers.

The initiative taken by the IMF has catapulted multilateral development banks (MDBs) into the business of providing technical assistance and surveillance with respect to AML and CTF regulatory and enforcement regimes. For instance, the Inter-American Development Bank has provided substantial technical and financial assistance to its members in establishing FIUs.

The universal membership of countries in the IMF and regional MDBs has minimized some of the more controversial aspects of FATF's standards. At least the small countries have a seat at the tables and believe that the setting and implementation of AML/CFT policies have more legitimacy. Nevertheless, even in the IMF and MDBs, small countries believe the process does not afford adequate abilities to present their views. Another contribution of the IMF and World Bank to establish AML/CTF regulatory and enforcement regimes is the publication of professional literature.

2. *Regional Organizations*

Regional organizations have been important actors in formulating and implementing AML and CTFE regimes. Organizations with universal membership can have difficulty designing and implementing policies and laws that are customized to the needs of various regions because each one has unique institutions, legal systems and cultures. By working more closely with area states, a regional organization can gain the respect of governmental and non-governmental actors, thus increasing the level of its authority and effectiveness in accomplishing regional priorities. This cooperation is essential to the success of the new AML/CTFE regime.²⁸⁶

a. Europe

The Council of Europe's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime obligates signatories to cooperate in the AML regime.²⁸⁷ The E.U.'s Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, amended in December 2001,²⁸⁸ is significant in its breadth; it applies due diligence requirements to numerous actors in the private sector, including lawyers and accountants, whenever they conduct a financial transaction or engage in financial planning. Because European nations dominate the FATF and many other international organizations,²⁸⁹ their policies play a critical political role in the design and implementation of the AML/CTFE regime.

286. For additional discussion of the interplay between national governments and non-governmental organizations, see Bruce Zagaris, *International Money Laundering*, in INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH TO THE MANAGEMENT OF COOPERATION, 138, 138-42 (Robert S. Jordon ed., 4th ed. 2001) (discussing various groups and participation in regulation of international money).

287. See Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148 (1991) (outlining duties of parties under treaty).

288. Council Directive 2001/97/EC amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 2001 O.J. (L 344) 76.

289. See FATF, *Members and Observers*, at http://www1.oecd.org/fatf/members_en.htm (last modified Jan. 27, 2005) (listing FATF members).

Ten days after the September 11th attacks on the United States, officials from the E.U. member States met to show their solidarity. At the meeting, the European Council called for the broadest possible global coalition against terrorism, to act under the auspices of the U.N., and approved over thirty measures to expand the AML/CTFE regime in Europe.²⁹⁰ These included agreements to introduce a Europe-wide arrest warrant,²⁹¹ adopt a common definition of terrorism,²⁹² create a list of known and presumed terrorists, establish joint investigative teams and make combating terrorism and its financing a higher law enforcement priority²⁹³ and implement all international AML/CTFE agreements as soon as possible²⁹⁴ and support the Indian proposal to draft a comprehensive U.N. convention on international terrorism.²⁹⁵ The Council also called for each member state to establish a Financial Intelligence Unit, a central

290. See Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, 2001 O.J. (SN 140) 1, available at http://europa.eu.int/comm/external_relations/110901/actplan01.pdf [hereinafter Council Meeting] (stating E.U.'s unequivocal support for United States and broad measures that will be enacted to support American people); Peter Norman, *Assault on America Europe Responds—Stage Set for Leaders to Show Solidarity*, FIN. TIMES, Sept. 21, 2001, at 4 (noting European Union's break from norms in foreign policy to show support for United States); Peter Norman, *Stronger Ties Urged Between Police Forces*, FIN. TIMES, Sept. 20, 2001, at 4 (highlighting cooperative steps taken by European Union since September 11 attacks to ensure security and protection of citizens).

291. The agreement entered into force on January 1, 2004. See Directorate-General, Justice and Home Affairs, European Commission, *European Arrest Warrant to Replace Extradition* (2002), available at http://www.nd.edu/~nanovic/events/european_arrest_warrant2002.pdf (providing that agreement will go into effect at beginning of 2004).

292. See Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, 2001 O.J. (L 344) 93, amended by Council Common Position of 12 September 2003 updating Common Position 2001/93/CFSP on the Application of Specific Measures to Combat Terrorism and repealing Common Position 2003/482/CFSP, 2003 O.J. (L 229) 42 (setting forth definitions for persons, groups and entities involved in terrorist acts).

293. See, e.g., Press Release, United States Mission to the European Union, U.S., E.U. Sign Legal Assistance, Extradition Treaties (June 25, 2003), at <http://www.useu.be/TransAtlantic/US-EU%20Summits/June2503WashingtonSummit> (noting efforts of cooperation between European Union and United States and recognizing treaties aimed at fighting international terrorism).

294. The six E.U. members who had not yet signed the International Convention for the Suppression of the Financing of Terrorism by the time of the meeting did so within one month after the meeting. See International Convention for the Suppression of the Financing of Terrorism (Dec. 9, 1999), at http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp (summarizing signature, ratification and declarations and reservations of all participating countries).

295. The proposal is currently being considered by a working group of the United Nations, along with a draft international convention for the suppression of acts of nuclear terrorism. See *Report of the Working Group on Measures to Eliminate International Terrorism*, U.N. GAOR 6th Comm., 57th Sess., pt.1, Agenda Item 160, U.N. Doc. A/C.6/57/L.9 (2002) (summarizing efforts to draft comprehensive convention on international terrorism).

state agency serving as a clearinghouse for information related to money laundering.²⁹⁶

In 2002, the E.U. released its first list of terrorists, terrorist organizations and their supporters, similar to the U.S. list.²⁹⁷ The regulations governing the E.U. list, however, also provide for greater safeguards against the mistaken listing of non-terrorists, including checks before listing, an appeals process and sanctions for wrongly listing entities. They also exempt from freezing any funds related to everyday living as well as those used to cover legal costs.²⁹⁸

On December 7, 2004, the E.U. finance ministers agreed to the third directive on anti-money laundering, targeting in part the measures specifically used to finance terrorism.

The European Parliament still must approve before the directive becomes law. It will require any business that accepts payments in cash exceeding 15,000 euros (\$19,992) to file currency transactions reports. Additionally, persons wanting to send 15,000 euros in cash or more outside the E.U. must obtain special permission.

The proposed directive requires financial institutions to identify their clients in cases of suspicious transactions. They will also have to identify the beneficiary owner of a business deal or transaction to make sure suspect individuals cannot use business fronts. E.U. efforts to crack down on methods used to finance terrorism have been criticized in the past by Bush administration officials. The United States, however, has welcomed this latest move, especially the restrictions on the movement of 15,000 euros in cash. As adopted by the E.U. Council of Economic and Finance Ministers, the directive will include the following: the obligation of financial institutions to identify the beneficial owner of a business or related transaction in order to ensure full “know your customer” and transparency; the introduction of the so-called risk-based approach whereby institutions that are affected by the directive must assess for themselves to what extent they must carry out client identification (i.e., “Know Your Customer”) measures; ex-

296. See Council Meeting, *supra* note 290 (setting forth efforts to combat funding of terrorism; Egmont Group of Financial Intelligence Units, *Statement of Purpose*) (June 13, 2001), at http://www1.oecd.org/fatf/pdf/EDstat-20016_en.pdf (establishing cooperation among Financial Intelligence Units participating in Egmont Group).

297. See Council Regulation (EC) 881/2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban, 2002 O.J. (L 139) 9, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/1_139/1_13920010523en0090010.pdf (outlining persons, groups and entities subject to freezing of funds); see also Council Regulation (EC) 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, 2001 O.J. (L 344) 70, available at http://europa.eu.int/eur-lex/pri/oj/dat/2001/1_344/1_34420011228en00700075.pdf (establishing regulations to be imposed on persons, groups or entities facilitating terrorism).

298. See Council Regulation (EC) 881/2002, *supra* note 297 (noting exceptions to frozen funds).

tension of the scope of the directive to cover all companies that accept cash payments of 15,000 euros and not just specific "risk" groups; and a requirement for each member state to supervise the compliance of the measures by the affected institutions. The Commission said it hoped the final adoption of the revamped money-laundering directive would be approved before the end of 2005.

b. The Americas

In 1996, the Organization of American States (OAS), comprised of all thirty-five independent nations in the Americas,²⁹⁹ established the Inter-American Drug Abuse Control Commission to combat drug abuse, including AML measures.³⁰⁰ To that end, the Commission wrote Model Regulations that include provisions regarding the establishment of FIUs and CTFE measures after 2002.³⁰¹ Also in that year, another OAS body, the Inter-American Committee Against Terrorism (CICTE),³⁰² helped prepare the Inter-American Convention Against Terrorism, which—building on existing international instruments—includes many AML/CTFE provisions such as due diligence and mutual assistance requirements.³⁰³ Together, these bodies operate training seminars, provide technical assistance to OAS member States and release reports on the current state of the AML/CTFE regime in the Americas. They have also worked with the Inter-American Development Bank to fund member States' efforts to eliminate money laundering and the financing of terrorism and establish and effectively operate FIUs.³⁰⁴

299. See Organization of American States (OAS), *About the OAS, Member States and Permanent Missions* (2005), at <http://www.oas.org/documents/eng/member-states.asp> (last visited Jan. 26, 2005) (listing OAS member states).

300. See Statute of the Inter-American Drug Abuse Control Commission, OAS AG/Res. 1457, 27th Sess. OAS Doc. XXVII-O/97, Articles 1-32 (1997), available at <http://www.cicad.oas.org/EN/basicdocuments/Statute.asp> (establishing and defining mission of Inter-American Drug Abuse Control Commission).

301. See Inter-American Drug Abuse Control Commission, *Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses* (2003), available at http://www.cicad.oas.org/Lavado_Activos/ENG/ModelRegulations.asp (establishing Financial Intelligence Units).

302. See OAS, *Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, OAS A.G. Res. 1650, 29th Sess., OAS Doc. XXIX-O/99 (1999), at <http://www.oas.org/juridico/english/ga-res99/eres1650/htm> (establishing Inter-American Committee against Terrorism to promote cooperation to prevent, combat and eliminate terrorism).

303. See Organization of American States, *Inter-American Convention Against Terrorism*, OAS A.G. Res. 1840, 32nd Sess., OAS Doc. XXXII-O/02 (2003), at http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840.htm (adopting Inter-American Convention Against Terrorism).

304. For instance, in May 2001, the Bank's Multilateral Investment Fund approved a \$1,230,000 grant to assist eight South American countries in their efforts to establish and improve their Financial Intelligence Units. See Press Release, Inter-American Development Bank, Multilateral Investment Fund Approves Financing to Fight Money Laundering in Latin America (June 26, 2002), at http://www.iadb.org/news/display/prview.cfm?PR_Num=142/02&Language=English

The Caribbean Financial Action Task Force (CFATF), the oldest FATF regional style organization, is one of the most active FATF-style regional bodies.³⁰⁵ Often working together with the Caribbean Anti-Money Laundering Program, the CFATF organizes symposia and training courses for regulators and private sector professionals to increase awareness and expertise within the region about AML and CTFE initiatives.³⁰⁶ It has also created its own list of Nineteen Recommendations to mirror those of the FATF, but tailored to meet the unique needs of the Caribbean region.³⁰⁷ The primary focus of the CFATF, however, has been on drafting and testing typologies of money laundering in the fields of non-bank financial institutions, casinos and the gaming industry; international transactions, cyberspace, illegal trade in guns, free trade zones and terrorist financing.³⁰⁸ These typologies are then used to help craft the FATF's own typology reports.³⁰⁹ CFATF has also provided significant technical assistance and training to its members.

IV. PROBLEMS OF ENFORCEMENT, FUTURE ISSUES AND THE WAY FORWARD

In the aftermath of the plane hijackings and bombings of the World Trade Center and the Pentagon, efforts during the Bush administration to combat the financing of transnational crime have focused very intently on counter-terrorism enforcement. To a large extent the U.S. government has had success in persuading the leading international organizations to proactively engage in the design, implementation and enforcement of counter-terrorism financial enforcement. Increasingly, international organizations are establishing groups and mechanisms to ensure implementation and sanctions against countries or private sector persons who do not fulfill the new rules. The implications for national governments and international organizations include the establishment of a new enforcement regime with new substantive and procedural laws and new institutions, such as an FIU.

(noting funds approved to assist South American countries in fighting money laundering).

305. See Caribbean Financial Action Task Force, *Overview*, at <http://www.cfatf.org/eng> (last visited Mar. 15, 2005) (summarizing activities of Caribbean Financial Action Task Force).

306. See, e.g., Press Release, CFATF Secretariat, IADB Project (Feb. 19, 2003), available at http://www.cfatf.org/news/viewnews.asp?pk_news=12.

307. See CAFATF, *Revised CFATF 19 Recommendations* (revised Oct. 20, 1999), at <http://www.cfatf.org/eng/recommendations/cfatfrev/index.pdf> (outlining recommendations).

308. See CAFATF, *The CFATF Money Laundering Typology Programme* (1998), at <http://www.cfatf.org/eng/annrep/97-98.html> (discussing typology exercises conducted by task force); see also CAFATF, *Summary* (1998), at <http://www.cfatf.org/eng/annrep/97-98.html> (discussing results of terrorist financing typology exercise).

309. See FATF, *Report on Money Laundering Typologies 2002-2003* (Feb. 14, 2003), at http://www1.oecd.org/fatf/pdf/TY2003_en.pdf (outlining process to prepare FATF typologies).

In looking at the future, we must focus on some basic issues posed by persons who are analyzing the anti-money laundering enforcement regime:³¹⁰

1. Are multilateral conventions working? Are they solutions? Yes, to some extent multilateral conventions work, insofar as they constitute only one of many tools of international policy. They work by disrupting transnational organized crime and other criminal groups. They work insofar as they impose a legal obligation on states and can be implemented effectively. In that regard, most new multilateral conventions, such as the U.N. Convention against Transnational Organized Crime and the proposed U.N. Convention on Transnational Corruption, have anti-money laundering provisions.

They are not total solutions insofar as they do not address the underlying causes of certain types of criminality, such as transnational terrorism. As long as the underlying causes from which terrorism and other crimes emanate are not addressed, anti-money laundering and counter-terrorism financial enforcement are quite limited. For instance, the U.S. anti-money laundering policy against drugs and weapons in the Americas has shortcomings because it is increasingly out of sync with the rest of the world. In this regard, the Clinton administration sold Plan Colombia as an international counter-narcotics program even though the E.U. refused to participate because it viewed the program as a militarization of the counter-narcotics efforts and a gift to the Texas helicopter industry. The Bush administration has not tried to sell Plan Colombia as an international program, but has expanded it to include counter-terrorism.

Anti-money laundering and counter-terrorism financial enforcement have not worked well at stopping the flow of arms into the Americas, in part because the U.S. government and private sector have not prioritized the issue of halting the spread of conventional arms. One of the first acts of the Bush administration was to block the U.N. proposed conventional arms trafficking convention. Subsequently, the Bush administration successfully opposed the bioterrorism convention and cancelled the Anti-Ballistic Missiles Treaty over the protests of U.S. allies. Hence, anti-money laundering and counter-terrorism financial enforcement are not substitutes for an effective multilateral policy. Rather, they can be effective if they are key elements of a comprehensive approach to one or more enforcement issues.

310. This discussion is from Bruce Zagaris, *Money Laundering: New Challenges and Emerging Issues*, in THE 2002 COMMONWEALTH SECRETARIAT OXFORD CONFERENCE ON THE CHANGING FACE OF INTERNATIONAL CO-OPERATION IN CRIMINALS MATTERS IN THE 21ST CENTURY, 199, 219-20 (Aug. 27-30, 2002 Commonwealth Secretariat). The questions in this section were posed by Di Stafford, Commonwealth Secretariat, at the opening of the Commonwealth Secretariat's 2002 Oxford Conference on the Changing Face of International Co-operation in Criminal Matters in the 21st Century on August 27, 2002.

The conventions are limited insofar as they have no or insufficient mechanisms to implement their requirements. Hence, some multilateral conventions, such as the OECD Convention Prohibiting the Bribery of Foreign Officials, the Inter-American Convention Against Corruption and the UNTOCC have established implementation mechanisms, such as those to conduct regular oversight and evaluation of the implementation by signatories.

2. How is international policy made? In the international anti-money laundering and financial regulatory area, informal groups, such as the G-8, FATF, the Basle Group and the Financial Stability Forum (FSB), make much of the policy—which is “soft” and non-binding law—but increasingly implemented through self- and mutual-evaluation and non-cooperative mechanisms. The latter mechanisms sometimes blacklist non-cooperative jurisdictions that can become the subject of economic sanctions, which are characterized as “countermeasures.”

3. How are standards developed? The standards of informal groups such as FATF and the FSB and international organizations such as the OECD are developed through exercises and meetings of representatives to these organizations in conjunction with small secretariats and with no or very limited input from other persons, such as regional-style FATF bodies, affected non-member bodies and occasionally private persons. To the extent these groups, countries and persons are invited to comment on existing proposals, it is usually at the end of the regulatory process. To the extent international organizations, such as the IMF and World Bank Group have become involved, their universal membership, governance and transparency standards have enhanced the legitimacy of the AML/CTFE standards. Similarly, in the Western Hemisphere, the establishment of the OAS’s Multilateral Evaluative Mechanism (MEM) concerning implementation of counter-drug standards has replaced the U.S. government’s own system of publishing evaluations and imposing economic sanctions and reduced diplomatic tension. The involvement by the OECD and the OAS in the implementation of anti-corruption laws have contributed positively to the identification of problems and education of states and interested parties.

4. To what extent are countermeasures used? FATF has begun its initiative against non-cooperative countries and has issued countermeasures only against Nauru. It has, however, named over fifteen other jurisdictions at various points. Against these countries FATF members and non-members have exercised enhanced scrutiny against transactions from such jurisdictions, thereby limiting and making more difficult such financial transactions and services. In counter-narcotics, no countries have joined the United States in applying economic sanctions to narco kingpins. In counter-terrorism, the U.N., the E.U. and individual countries, such as the United States, have sanctions. The coordination of such sanctions is still in transition.

What works is a mixture of multilateral efforts, such as multilateral evaluative mechanisms, similar to those the IMF and the Organization of American States have implemented. When the design and implementation of countermeasures are through an international organization with universal membership and proper democratic governance and transparency mechanisms and the countermeasures are designed and implemented in accordance with international law, the countermeasures can be effective.

What does not work is a wholly unilateral approach, such as the annual International Narcotics Control Strategy Report and the U.S. narcotics kingpin sanctions implemented by the Office of Foreign Assets Control. They may work as a complement to multilateral measures.

5. Is there a level playing field? This is a controversial topic that requires a judgment on the distribution of political power and its application. To counter the arguments about the need for a level playing field, FATF has expanded its membership—recently admitting Mexico, Brazil and Argentina, and making South Africa an observer. In addition, FATF's Consultation Paper, in revising the Forty Standards, provided a ninety-day comment period open to all persons. To help establish a level playing field, FATF is increasingly involving the IMF/World Bank to undertake reviews. The inclusion of civil society has helped to make the decision-making over establishing and implementing policy more inclusive.

The IMF has prepared anti-money laundering and counter-financial enforcement standards to include in performing evaluations of countries in the Financial Sector Assessment Program (FSAP) and offshore financial center assessments. The IMF/World Bank has also helped improve technical assessment delivery in response to assessments and requests.³¹¹ During the second week of January 2003, the CFATF responded to the IMF/World Bank methodology by expressing support of the goals, but recommended more collaboration with the CFATF and its members, and better inclusion of experts from within the region in the evaluation teams.³¹²

6. What works and what does not? What works is the use of hard law in the way of multilateral conventions and legislation by economic integration organizations (*e.g.*, the E.U.) together with soft law combined with mutual evaluation mechanisms and the potential of countermeasures. Another element that works is the establishment of common national institu-

311. See Bruce Zagaris, *World Bank Group Proceeds on Money Laundering and Terrorism Financing Work*, 19 INT'L ENFORCEMENT L. REP. 78, 78-79 (2003) (discussing progress by IMF/World Bank in addressing money laundering and counter-terrorism financial enforcement); IMF, *Intensified Work on Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT)* (Sept. 10, 2002), at <http://www.imf.org/external/np/mae/aml/2002/eng/091002.htm> (summarizing responses to questionnaire regarding aspects of AML/CFT systems).

312. See Bruce Zagaris, *Caribbean FATF Dialogues with IMF/World Bank on Proposed Methodology*, 19 INT'L ENFORCEMENT L. REP. 77, 77 (2003) (noting CFATF response to AML/CFT methodology prepared by FATF and IMF/World Bank). http://www.ofii.org/insourcing/insourcing_study.pdf.

tions, such as the FIUs, along with an international counterpart, the Egmont Group. The establishment of common specialized law enforcement institutions facilitates common legislative, regulatory and enforcement approaches. The Egmont Group helps networking among FIUs.

In CTFE efforts, what does not work is to violate the rule of law by using a war paradigm against a criminal phenomenon. This is especially true when governments violate basic international human rights by detaining persons indefinitely without access to courts or lawyers, freeze assets of persons without affording them ample due process to contest their designation and refusing to allow the unfreezing of assets so that the asset holders can continue their basic subsistence and hire counsel of their choice. In CTFE, it does not work to dismantle the charitable organizations that provide humanitarian assistance in sensitive parts of the world, such as Palestine, unless governments simultaneously provide adequate substitutes for humanitarian assistance and provide ways to enable people to make a living. Similarly, unless U.S. policy in the Western Hemisphere and the rest of the world succeeds in delivering jobs, basic living standards and democratic institutions, the CTFE will not improve, but diminish U.S. security.

The economic costs and privacy losses of AML and CTFE are significant. The twin budget and balance of payments deficits have caused, for the first time in fifty years, foreign direct investment (FDI) in the United States to decline precipitously. The revulsion to the perception of unilateral, extraterritorial U.S. regulatory and enforcement authority, and the reduced value of the dollar and returns on U.S. direct investment is causing foreigners to withdraw their money from the United States and is causing others to simply defer making new U.S. FDI. For instance, on October 19, 2004, the Organization for International Investment released a study showing that the flow of FDI into the United States plummeted from a peak inflow of \$314 billion in 2000 to just \$29.8 billion in 2003, a drop of more than ninety percent.³¹³

The real challenge for anti-money laundering and counter-terrorism financial enforcement laws is the effort to simultaneously expand significantly the components of due diligence (*e.g.*, the need to make suspicious transaction reports (STRs)) and the persons covered (*e.g.*, security broker-dealers, insurance companies and trust and corporate service providers and gatekeepers) while meeting the demands of a responsible international organization for governability, transparency and democracy. The sweeping proposed transformations of law will not happen overnight without the potential of sacrificing their legitimacy. In the meantime, interna-

313. See Alison Bennett, *U.S. Policy Should Recognize Major Role Of Foreign Firms in U.S. Economy*, *OFII Says*, DAILY REP. FOR EXEC., Oct. 20, 2004, at G-7; Matthew J. Slaughter, *Insourcing Jobs: Making the Global Economy Work for America*, 15 (Oct. 2004), at http://www.ofii.org/insourcing/insourcing_study.pdf (detailing foreign direct investment (FDI) capital flows into United States from 1994 to 2004). http://www.ofii.org/insourcing/insourcing_study.pdf.

tional and national legal systems must accommodate the legal and diplomatic tensions that will inevitably arise and produce challenges because of fundamental rights and *lucanae*.

Internationally what is needed are institutions with universal membership making decisions, operating with transparency, governance, and linked to regional and bilateral mechanisms. More uniform national institutions (*e.g.*, FIUs) and laws are required. On a national level, strengthened centralized direction for CFE is required with high-level supervision, such as the National Security Council. In fact, on March 3, 2003, U.S. Treasury Secretary John Snow announced the creation of a new Executive Office for Terrorist Financing and Financial Crimes (EOTF/FC) reporting directly to the Deputy Secretary. The Office has the responsibility of coordinating and leading the Treasury Department's efforts to combat terrorist financing and other financial crimes, both within the United States and abroad.³¹⁴

International human rights provide a sword for private sector persons who are impacted by the privatization of law enforcement and may be the targets of criminal and law enforcement proceedings. Yet, the international human rights institutions and mechanisms have not kept pace and sometimes are not always as well integrated into the new conventions and regimes as they should be. Some IGOs, such as the Commonwealth Legal Secretariat, have endeavored through conferences and consultations to keep the balance in their programs. International human rights institutions and mechanisms, however, have trouble when they collide with the war and national security paradigms, whether they are directed against the "war on drugs," the "war on organized crime" or the latest "war on terrorism," even when the wars are still being waged simultaneously and despite the fact that some "wars" (*e.g.*, the "war on drugs") have been fought now for over three decades.

At the time, IGOs imposed the Eight Special Recommendations adopted by FATF in December 2001; most countries had substantial unfinished AML work on all levels (*e.g.*, legislative, financial and enforcement systems). For instance, some countries were still trying to establish FIUs, extend predicate crimes to all serious crimes. The new CTF enforcement requirements, especially the imposition of the requirement to check names against multiple international and even national lists (*e.g.*, the United States), are major legislative, administrative and resource burdens on countries in the Americas. They must meet these requirements as part of a series of counter-terrorism enforcement requirements, including the U.S. Container Security Initiative, the upgrading of security at airports,

314. See Bruce Zagaris, *U.S. Creates Office for Terrorist Financing and Financial Crimes (EOTF/FC)*, 19 INT'L ENFORCEMENT L. REP. 175 (2003) (summarizing responsibilities of EOTF/FC); Press Release, U.S. Treasury Department Office of Public Affairs, U.S. Treasury Department Announces New Executive Office for Terrorist Financing and Financial Crimes, (Mar. 3, 2003), at <http://www.ustreas.gov/press/release/js77.htm> (same).

notification of the United States of aircraft passengers, substantial immigration changes and so forth. These new requirements, while part of the international system, arise mainly from the U.S. reaction to the attacks of September 11, 2001. At the same time, access to the U.S. financial system is restricted by the AML changes in the USA PATRIOT Act and the demands of the Qualifying Intermediary Regulations. Simultaneously, their emigrants have more difficulty entering the United States, remaining once they enter due to new immigration law restrictions and making remittances. All these requirements and burdens come at a time when travel and commerce are choked by the parallel occurrences of slackened economic demand due to post-9/11 and the Iraq attack.

Part of the ability of the U.S. government to sustain the AML and CTF enforcement regime will be the extent to which the world endorses and wholeheartedly and enthusiastically implements the mechanisms. The premise of the USA PATRIOT Act and the export control and CTF enforcement regulations is that, as the superpower and the greatest market in the world, the U.S. government can charge a premium for its regulatory and enforcement machinery. For the first time in five decades, however, FDI into the United States not only has not grown, but also has declined rather precipitously. Indeed, the G-7 finance ministers expressed concern over the twin evils of the U.S. budget and trade deficits and its drag on the international economy.³¹⁵ Even more importantly, the ability to attract foreigners to buy U.S. bonds does not compare to the period of the late 1970s and 1980s or even the 1990s. Arab-Americans have pulled and continue to withdraw their assets from the United States out of fear of U.S. sanctions, revulsion to U.S. foreign policy in the region and declining returns on their investments. Other persons around the globe are also starting to withdraw or just not select the United States as their main channel of investment. They are partly concerned about the overreaction by the Bush administration in terms of privacy and regulation, the adverse returns on their capital and the increasing diplomatic isolation of the United States.

The new demands on the countries' AML and CTF regulatory and enforcement systems come with the usual rhetoric that technical, financial assistance will be forthcoming, and of course, that evaluations and "naming and shaming" will follow. Although many countries support the demand for strengthened AML and CTF mechanisms, they are sensitive to the costs these measures may have for development, especially at a time when many economies are suffering a significant economic downturn.

Many of the countries, especially the ones who have been on black-lists, are sensitive to new requirements unless they will have ownership of the formulation, application and enforcement of the rules. Hence, many

315. See Filippis Vittorio, *G7 Leaders Say 'Twin' U.S. Deficits a Crisis for Global Economy* (Apr. 18, 2005), at <http://www.watchingamerica.com/liberation000015.html>.

Western Hemisphere countries will monitor and try to influence any restart of the FATF/NCCT process.

Globalization, liberalization and free trade enable persons increasingly to develop various entities and products to move money. The development of the new international financial architecture (NIFA) and corporate governance by the Financial Stability Forum, which the IMF has taken over, have brought a web of interlinked "quasi-legal, global standards"³¹⁶ that IGOs are developing to minimize the bumps in globalization brought by the contagion from the Asian and other regional crises. As the soft law standards of IGOs evolve slowly into hard law, banks, financial institutions, nation-states, businesses and other interested persons necessarily must conduct their affairs in increasingly gray areas. The new risks brought by the fluidity of the soft law standards implemented with increasing countermeasures will require more planning and attention to diverse legal and regulatory standards.

The Egmont Group of financial investigative (also known as intelligence) units (FIUs) is developing networking among the national regulators of anti-money laundering and providing an increasing uniformity to the anti-money laundering law.

For many years, the United States has pioneered new enforcement mechanisms in international criminal law. The United States devised the proactive use of enforcement liaison officials abroad, the use of undercover sting operations, surveillance, controlled deliveries, anti-money laundering and financial enforcement remedies such as asset forfeiture. Until now, the United States has pioneered many new techniques in CFT enforcement, persuading the U.N., the FATF and other organizations to proactively adopt its proposed mechanisms. The ability to continue to lead internationally on innovative institutions and mechanisms will require continued credibility and trust internationally. The perception that the United States adamantly refused to participate and even harmed some of the major proposed humanitarian and/or enforcement mechanisms and institutions, including the Kyoto Treaty, the conventional arms convention, the landmines treaty, the International Criminal Court, the cancellation of the Anti-Ballistic Missile Treaty with Russia, the conceptualization and proactive use of the "war paradigm" for terrorist incidents, the refusal to accord treatment according to the law of war and international human rights conventions or the U.S. Constitution for persons detained after 9/11, the assertion of the doctrine of pre-emption to invade Iraq³¹⁷ and the running dispute with North Korea, are eroding the

316. See Bruce Zagaris, *Life and Annuity Products in the Context of Transformation of the Rules Affecting Offshore Financial Centres: Changing Rules Require Enhanced Due Diligence – Part I*, J. INT'L BANKING REG., available at [http://www.ipi.com.au/ipi/IPI.nsf/LookupPDF/emin/\\$file/emin.pdf](http://www.ipi.com.au/ipi/IPI.nsf/LookupPDF/emin/$file/emin.pdf).

317. See Anthony Shadid, *Old Arab Friends Turn Away from U.S.*, WASH. POST, Feb. 26, 2003, at A1 (discussing Arab discontent with United States' invasion of Iraq).

credibility of the United States as a country that respects the rule of law.³¹⁸ Unless the U.S. government takes a more mainstream position on many of the aforementioned issues, its ability to lead on the AML and CTF regulatory and enforcement regime will become exceedingly difficult.³¹⁹

In the end CTF enforcement has limited utility unless it is complemented by effective foreign policy. In that regard, the dedicated ways in which a handful of persons self-financed their preparations for terrorism in the United States and readily sacrificed their lives made CTF controls difficult. Most importantly, the amounts of financing they received were not great and did not apparently come from proceeds of crime. In the context of the increased economic and civil liberties, costs of due diligence and the difficulties of identifying people with no criminal records and modest amounts of wealth, the CTF enforcement regime is likely to produce very limited results. In contrast, a more effective foreign policy that coordinates with IGOs and especially Western Europe in dealing the Israel-Palestine dispute in an evenhanded way will produce far more dividends than the resources invested in a CTF enforcement regime.

In terms of the U.S. AML and CTF regimes, there are no silver bullets. The U.S. government should realize that these tools are just one of many measures by which to respond to a horrible phenomenon. As alarming as transnational terrorism is, the crime is a continuation of a longstanding effort to employ violence to change policies. New forms of terrorism, such as the bombing of the U.S. District Courthouse in Oklahoma City, the terrorist bombing of U.S. embassies in Africa and the 9/11 terrorist incidents, reflect the reality of modern terrorism which takes advantage of globalization and technology.

One of the prospective solutions is to require that future free trade and economic integration arrangements include, up-front as part of the document, more regulatory and enforcement mechanisms. This notion seems quite futuristic to a country that had trouble including in the North American Free Trade Agreement some very mild and passive provisions for side agreements on the environment and labor. In effect, cataclysmic terrorist incidents are forcing the United States, and the world, to renegotiate provisions on trade, investment and money flows on a restrictive and ad hoc basis. One of the difficulties is that discussions are occurring in an institutional vacuum. For instance, in the Western Hemisphere, no international organization has any meaningful authority over enforcement. As a result, countries make promises to abide by soft law or even sign conventions. The maze of soft and hard law obligations and the lack of compli-

318. See JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS*, 349-59 (2004) (summarizing recent United States deviations from rule of law and implications).

319. For an earlier discussion of this problem during the Clinton administration, see Bruce Zagaris, *A Look At . . . The Future of Internationalism: Beyond National Interests*, WASH POST, Apr. 18, 1999, at B3 (discussing tension between United States diplomacy and ability to combat transnational crime).

ance mechanisms, however, enable criminals to identify, spot and utilize the lucanae or the point of weakest enforcement.

An essential requirement of a successful Western Hemisphere AML and/or CTF enforcement regime is an institution with authority and resources to help, on a daily basis, to implement and administer the rules and to help with compliance and enforcement. The mechanism should be the Americas Committee on Crime Problems, which would be modeled after the Europe Committee on Crime Problems, which functions under the Council of Europe.³²⁰ The Americas Committee on Crime Problems would be under the Organization of American States.³²¹ In the meantime, the countries operate on an ad hoc basis. Although there is a meeting of the Attorneys General and Ministry of Justice of the OAS approximately once every two years, the major countries in the Hemisphere have not given the group any authority. The region needs new leadership with an international perspective and enough vision and stature to propose and persuade countries to invest in regional legal machinery. In this regard, the decision by the Canadian Government to become involved in the OAS and the Inter-American legal machinery has helped significantly.

Clearly, the form of new architecture of the Americas in the wake of globalization and the explosion of regional free trade groups is murky. Regionalism in the Americas in the next century will not reflect the traditional patterns of regionalism of the 1970s or 1980s. It will be a function of the national policies of the countries of the hemisphere and the various strategies toward regionalism and subregionalism that they represent. In turn, these strategies will be "related to their positions in the larger hierarchy of power and trade in the Americas."³²² In the short run, free trade and globalization will increase opportunities for transnational criminals, especially organized crime groups, to move money, goods, people and technology for their own ends. Eventually governments will react, first to individual crimes and eventually on a more comprehensive basis.

The sophisticated transformations of the law and culture mandated by the development of an international criminal and enforcement cooper-

320. For a discussion of the Council's Committee on Crime Problems, see Scott Carlson & Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551, 551-79 (1991) (discussing European model and advocating creation of similar model in Americas).

321. For a discussion of more comprehensive anti-crime regime development applied to the Americas, see Zagaris, *supra* note 56, at 1888-1902 (suggesting need for regional initiative on international criminal cooperation and criminal justice); Bruce Zagaris & Constantine Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 119-33 (1986) (advocating creation of Americas Committee on Crime Problems).

322. W. Andrew Axline, *Conclusion: External Forces, State Strategies, and Regionalism in the Americas*, in FOREIGN POLICY & REGIONALISM IN THE AMERICAS 199, 214 (Gordon Mace & Jean-Philippe Therien eds., 1996).

ation regime require expertise, significant resources, substantial political commitment, training and economic benefits.

To the extent extra-regional players (*e.g.*, international organizations and governments) facilitate governments and regional organizations to control and evolve the new regime of international anti-corruption enforcement, the regime will be able to successfully combat transnational criminals. Strategic planners should not regard transnational corruption and related crime as static. Many of the perpetrators are clever. They have significant and even enormous resources. They are willing to make alliances with other criminal groups and even with governments and political leaders when such alliances are beneficial. Unless regional organizations representing diverse countries in the hemisphere and extraregional forces in support of the international criminal cooperation and enforcement regime become equally as dynamic in devising new mechanisms, cooperative activities and overcoming traditional barriers, they will see their power eroded and the international system will become increasingly infected.

Small governments and extra-regional players must facilitate global governance, wherein a shift of power and functions occur away from the state—up, down and sideways—to supra-state, sub-state and non-state actors.³²³ The power shift must occur partly through networking and voluntary associations. Global governance and a new world order are slowly replacing the state, which is disaggregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies (including new ones such as FIUs), executives and even legislatures—are networking with their counterparts regionally and extraregionally, creating a dense web of relations that comprises a new, trans-governmental order. Current international criminal and related problems—transnational corruption, international drug trafficking, money laundering, transnational organized crime, terrorism, bank fraud, cybercrimes and securities fraud—create and sustain these relations. Government institutions have formed networks of their own, ranging from the OECD Working Group on Bribery, the Basle Committee of Central Bankers, to the FATF on a universal level, and on a regional level, the European Committee on Crime Problems, OAS Working Group on Probity and Public Ethics, the Inter-American Drug Abuse Control Committee's (CICAD) group of money laundering experts and the Caribbean FATF.

International organizations, governments and non-governmental organizations must facilitate networking among judges and other relevant

323. See Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFF., 50, 50-66 (1997) (discussing how nation-state is becoming obsolete as resources and threats that matter disregard governments and borders and states are sharing powers that defined their sovereignty with corporations, international bodies and proliferating universe of citizens groups).

officials, so that they can start a global community of laws.³²⁴ They share values and interests based on their belief in the law as distinct but not divorced from politics and their views of themselves as professionals who must be insulated from direct political influence. This global community reminds each participant that his or her professional performance is being monitored or supported by a larger audience.³²⁵

Governments, universities and think tanks with criminal justice, international law, economic integration, international organizations, foreign policy, national security studies and the like,³²⁶ should stimulate research and discussion on the above issues. Politicians should start the consultative process as well, so that political proposals receive consideration from citizens of countries throughout the world. Shaping the course of relations between the governments and the world as a whole will test the ability of law to contribute positively to the dynamic change that is inevitable. In this regard, seminars such as the one for which this paper was prepared are a necessary component of the work to develop the conceptual foundation and dialogue to bring the change required.

324. For a discussion of integration within the intra-Caribbean system and transnational functional relations, such as in anti-narcotics action, justice and human rights, currencies, finance and banks, see CHRISTOPH MÜLLERLEILE, CARICOM INTEGRATION PROGRESS AND HURDLES: A EUROPEAN VIEW 84-135 (1996).

325. Anne Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF., 183, 183-87 (1997) (discussing effects of disaggregation of states).

326. For example, the Center for Strategic and International Studies has provided private and public fora for discussions by the Mexican Attorney General on Mexican-U.S. drug and criminal cooperation. See Center for Strategic & International Studies, *CSIS at a Glance* (2005), at <http://www.csis.org/about/index.htm> (stating dedication "to providing world leaders with strategic—and policy solutions to—current and emerging global issues").