United Nations E/C.18/2005/10/Add.3

Economic and Social Council

Distr.: General
22 November 2005

Original: English

Committee of Experts on International Cooperation in Tax Matters
First session
Geneva, 5-9 December 2005

Tax cooperation and cross-border tax crime: Roles of international organization and potential roles for the United Nations*

Summary

The United Nations Committee of Experts on International Cooperation in Tax Matters may want to explore what, if any actions, are appropriate in the efforts to combat tax crimes through non-tax mechanisms. The issue has arisen in the consideration of strengthening the articles on exchange of information and mutual assistance. In the Declaration of Monterrey the United Nations and the Committee of Experts is charged with helping developing countries become more effective in efforts to mobilize capital for development. The high incidence of cross- border tax issues and the lack of effective measures to prevent and combat such tax crimes limits the capacity of developing countries to mobilize capital for development purposes.

A number of international organizations are already working on projects concerning anti-money laundering and transparency of corporate vehicles. In this regard, a new sub-regime of financial and anti-money laundering due diligence has arisen, whereby banks, financial institutions, and gatekeepers are subject to new requirements of knowing their clients, providing enhanced due diligence on a range of high-risk transactions involving private banking, politically exposed persons, and persons from risky countries, safeguarding information, establishing compliance programs, identifying and report suspicious activities, and so forth.

This short report will identify some of the ongoing projects to help assess the extent to which the United Nations Committee of Tax Experts can liaise and/or supplement these activities.

* The present paper was prepared by Mr. Bruce Zagaris. The views and opinions expressed are those of the author and do not necessarily represent those of the United Nations.

I. International Organizations active in flight capital and related issues (Anti-money laundering, transparency of corporate vehicles)

1. A variety of international organizations are active in initiatives related to cross-border tax crimes. These efforts include, *inter alia*: anti-money laundering, governance and transparency of corporate vehicles and fiscal systems, international financial architecture, anti-corruption, counter-terrorism financial enforcement and tax administration and policy. A number of international organizations with universal membership, such as the UN and the IMF/World Bank Group, are active in legal areas related to cross-border tax crime.

2. 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 region 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, increasing its authority and effectiveness in accomplishing regional priorities. This cooperation is essential to the success of the new AML/CTFE regime.[2]

A IMF/World Bank

3. Until 2001 and thereafter, the International Monetary Fund (IMF) resisted proactive involvement in anti-money laundering and counter-terrorist financial enforcement. It perceived its role as helping with financial regulation but not enforcement and criminal law. More recently, as its large shareholders have demanded that it become more actively involved in the anti-money laundering (AML) and counter-terrorism financial (CTF) regulatory and enforcement regimes, the IMF has begun to quickly participate.[3] Subsequently, the IMF decided to become involved in AML/CFT policy due to the 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 included inexplicable changes in money demand, greater prudential risks to bank soundness, contamination effects on

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[2]For additional discussion of the interplay between national governments, and inter- and non-governmental organizations, see Bruce Zagaris, *International Money Laundering, in* ROBERT S. JORDAN, INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH TO THE MANAGEMENT OF COOPERATION 138-42 (4th ed. 2001).

[3]For an early justification of IMF's role in AML policy, see Michael Camdessus Managing Director of the International Monetary Fund at the Plenary Meeting of the Financial Action Task Force on Money Laundering, "Money Laundering: the Importance of International Countermeasures", February 10, 1998 http://www.imf.org/external/np/speeches/1998/021098.htm.

legal financial transactions, and greater volatility of international capital flows and exchange rates due to unanticipated cross-border asset transfers.[4]

4. The IMF is contributing to the efforts of the Financial Action Task Force on Money Laundering (FATF) in several important ways, consistent with the IMF's core areas of competence. As a collaborative institution with nearly universal membership, the IMF is a natural forum for sharing information, developing common approaches to issues, 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 member's exchange systems.[5]

5. 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 a number of important steps:

> (1) It added the FATF 40 Recommendations and 8 Special Recommendations onTerrorist 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.
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> (2) In partnership with the World Bank, the FATF and the FSRBs it participated in a 12-month pilot program of anti-money laundering and combating the financing of terrorism (AML/CFT) assessments of 41 jurisdictions, which was completed in October 2003. A further 12 assessments have been completed since then.
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> (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 2002-03, there were 85 country-specific technical projects benefitting 63 countries, and 32 regional projects reaching more than 130 countries. In 2004, the pace of technical assistance has intensified further.

6. 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 40 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 12-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.

7. 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

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4 *Id.*

5 For background see IMF, *The IMF and the Fight against Money Laundering and the Financing of Terrorism, IMF Factsheet* (Sept. 2004).

conducts the AML/CFT assessments with the FSAP as part of voluntary assessments of Offshore Financial Centers.[6]

B. Financial Action Task Force

The work of the FATF has concerned preventing and combating money laundering. Periodically within the FATF the discussion of whether to include tax crimes has arisen. Essentially, the current FATF revised recommendations deal with tax crimes implicitly. They require FATF members to criminalize money laundering from all serious crime. Recommendation 1 requires countries to apply money laundering to all serious crimes, "with a view to including the widest range of predicate offenses." "Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one year's imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punished by a minimum penalty of more than six months imprisonment." [1]

In addition Recommendation 1 provides that "predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically."[2]

C. OECD

8. In May 1999, the OECD initiated a harmful tax practices initiative designed the combat tax evasion, level the playing field among sovereigns in tax policy, and facilitate better cooperation in tax matters. The OECD subsequently published a blacklist of so-called tax havens and called for the jurisdictions listed to make a commitment to remove their harmful tax practices. 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.

9. During the last week of June 2001, the media announced that the Organization for Economic Cooperation and Development had reached in principle a compromise on its harmful tax practices initiative.[9] Since the OECD's Fiscal Affairs Committee meeting June 26-27, the organization refocused its program on the exchange of banking and financial information with

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6 *Id.*

[1] FATF, the Forty Recommendations (http://www.fatf-gafi.org), accessed Nov. 14, 2005.

[2] *Id.*

9 Michael M. Phillips, *Accord Is Reached By U.S. and Allies on Tax Havens*, WALL ST. J., June 28, 2001, at A11, col. 1.

OECD governments and away from pressuring jurisdictions identified as tax havens to reset their tax rates. The initiative will now only require the so called tax haven countries to agree to take action on exchange on tax information and transparency.

10. In November 2000, the OECD released the OECD HTC Memorandum of Understanding, which contains a series of obligations that the targeted "tax haven" jurisdictions were required to undertake to avoid the blacklist and its attendant sanctions. The Model Agreement is available on the OECD Web site at http://www.oecd.org/ctp/. It seeks to promote international cooperation in tax matters through exchange of information. The Model Agreement contains two models prepared in light of the commitments undertaken by all Participating Partners.

11. Major problems remain in the proposed obligations in the OECD HTC Memorandum of Understanding.[10] They significantly exceed those called for in the OECD reporting, "Improving Access to Bank Information for Tax Purposes."[11] The 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.

12. The Model Agreement covers information exchange upon request for both civil and criminal tax matters. It requires that information be provided, even where the requested country may not need the information for its own tax purposes, so that the requesting country can enforce its own tax laws. Under the Model Agreement, contracting parties further agree that their competent authorities must be able to obtain and provide information held by banks, other financial institutions, and persons acting in an agency or fiduciary capacity and to obtain and provide information regarding the ownership of persons. The Model Agreement also has important safeguards to protect the legitimate interests of taxpayers. For example, a request for information can be declined if the information would disclose a trade or business secret or if the information is protected by the attorney-client privilege. The Model Agreement further ensures that countries are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a specific taxpayers. In this connection, the Agreement specifies what type of information a requesting country needs to provide to a requested country to show the foreseeable relevance of the information to the request. Finally, the Model Agreement requires that any information exchanged be treated as confidential and subjects disclosure of the information to third persons or third countries to the express written consent of the requested country. The Model Agreement has formed the basis for several tax information exchange agreements. The Committee's working party on Tax Evasion and Avoidence is also using the Model Agreement as a basis for revising Article 26 of the EOCD Model Tax Convention on Income and Capital.[12]

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10 OECD Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices, OECD Web site (http://www.oecd.org).

11 Committee on Fiscal Affairs, OECD, *Improving Access to Bank Information for Tax Purposes* (declassified 24 Mar. 2000).

12 OECD, *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report* 13 (Feb. 2004).

13. In fact, targeted countries would be required to establish administrative practices to ensure that legal mechanisms for information exchange function effectively and can be monitored. Such practices include having personnel responsible for ensuring that requests for information are answered promptly and efficiently, and having personnel trained or experienced in obtaining such information. Ironically, one OECD country, Canada, has admitted that it lacks sufficient resources to conduct exchanges of information and hence believe that such exchanges cannot be reciprocal.[13] If Canada believes that such exchanges cannot be reciprocal due to its shortage of administrative resources, then the much smaller targeted countries are not surprisingly also taking the position that such exchange obligations cannot be reciprocal and, similar to the Canadian viewpoint, want to take a restrictive view of such obligations. The targeted countries have a more important perspective: the need to protect their economic security and well being.[14]

14. Some OECD members (i.e., Austria, Luxembourg and Switzerland) have insisted on covering criminal tax enforcement through a Mutual Assistance in Criminal Matters Treaty.

15. Hence, the MOU to the U.S.-Luxembourg tax treaty explains that certain information of financial institutions may be obtained and provided to "certain U.S. authorities" only in accordance with the proposed U.S.-Luxembourg MLAT. As a result, the U.S. delayed the effective date of the income tax treaty to coincide with the MLAT's taking effect.[15]

16. The upshot of these and other controversies over information exchange is that, even if the OECD only proceeds on exchanging tax information, there will be many substantive and procedural policy disputes concerning achieving a level playing field between the OECD and targeted countries during policymaking and implementation. Indeed, there are just as many controversies involving transparency,[16] but it is instructive to consider the FATF's counterpart initiative and privacy and human rights implications.

17. The OECD has a number of other initiatives related to cross-border tax crimes, including the initiative on transparency in corporate vehicles and the initiative to override bank secrecy and improve transparency and mutual assistance.

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13 Stephen S. Heller/Boris Stein, Canada, *International Mutual Assistance Through Exchange of Information*, LXXVb CAHIERS DE DROIT FISCAL INT'L 259, 265 (1990).

14 For additional discussion of the problems with exchange of information, see Richard J. Hay, *Offshore Financial Centres: The Supranational Initiatives*, TAX PLANNING INT'L Rev. 1, 5 (Feb. 2001).

15 *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, 508-9 (Oct. 9, 1998); *Luxembourg and U.S. Conclude Tax Treaty Whose Ratification Process Awaits Conclusion of a MLAT*, INT'L ENFORCEMENT L. REP. 171 (May 1996).

16 For a discussion of the transparency issues, see Bruce Zagaris, *Application of OECD Tax Haven Criteria to Member States Shows Potential Danger to U.S. Sovereignty*, TAX NOTES INT'L 2298, 2299-2301 (May 7, 2001); Zagaris, *Issues Low-Tax Regimes Should Raise When Negotiating with the OECD*, TAX NOTES INT'L 523, 529-30 (Jan. 29, 2001).

D. EU – 3rd Directive on Money Laundering

18. On December 7, 2004, the European Union finance ministers agreed to the third directive on anti-money laundering, partially targeting methods used to finance terrorism.[17] On May 26, 2005, the European Parliament approved the proposed Third Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.[18][19]

19. The European Parliament must approve the directive before it 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 or more in cash outside the EU must obtain special permission.

20. As adopted by the EU Council of Economic and Finance Ministers, the directive will include the following: the obligation of financial institutions and gatekeepers, which include law firms and accounting firms, 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; extension 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.

21. The Third Anti-Money Laundering Directive builds on existing EU legislation (see IP/04/832), incorporating into EU law the June 2004 revisions of the Forty Recommendations of the Financial Action Task Force (FATF). The Directive applies to the financial sector as well as the gatekeepers, that is, lawyers, notaries, accountants, real estate agents, trust and company service providers. The scope also embraces all providers of goods, when payments are made in cash in excess of € 15,000. Persons subject to the Directive must identify and verify the identity of their customer and of its beneficial owner, and to monitor their business relationship with the customer; report suspicious transactions of money laundering or terrorist financing to the Financial Intelligence Unit; and take supporting measures, such as ensuring a proper training of the personnel and the establishment of appropriate internal prevention policies and procedures.

22. The proposed Directive would expand the anti-money laundering obligations to providers of services to companies and trusts and life insurance intermediaries. It would go beyond the FATF requirements in encompassing within its scope all persons dealing in goods or providing services for cash payment of €15,000 or more.

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17 *EU Finance Ministers Settle On Anti-Money Laundering Revisions*, DAILY REP. FOR EXEC., Dec. 9, 2004, at A-13.

18 European Commission, *Approval of New Directive Will Boost Fight against Money Laundering and Terrorist Financing*, Press Release, IP/05/616, May 26, 2005.

19 European Commission, Approval of New Directive Will Boost Fight against

E. Council of Europe Convention

23. On May 9, 2005, the Council of Europe (CoE) announced an agreement that would pave the way for the signing of the revised European Convention on Money Laundering (CoE ML Convention). The revised convention will supersede the CoE's 1990 Convention.[20] 46 countries participate in the 1990 Convention.

24. The CoE ML Convention is the only single dedicated international treaty covering both the prevention and the control of money laundering and the financing of terrorism. The existing legally binding international instruments provide for a range of specific measures focusing on law enforcement and international cooperation (e.g., criminalization of money laundering, confiscation, provisional measures, international cooperation), but the preventive aspects are mostly left unregulated by international law or, at best, are addressed in somewhat general terms.

25. The proposed Convention addresses a number of issues not considered as directly relevant to the 1990 Convention's original objective (e.g., measures related to the prevention of money laundering). [21]

F. Other Regional Organizations (i.e., OAS)

26. A number of regional organizations are active in preventing and combating money laundering. In 1996, the Organization of American States (OAS), comprised of all 35 independent nations in the Americas,[22] established the Inter-American Drug Abuse Control Commission, to combat drug abuse, including through AML measures.[23] To that end, the Commission wrote Model Regulations that include provisions regarding the establishment of Financial Intelligence Units and, after 2002, CTFE measures as well.[24] Also in that year,

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[20] For a copy of the revised version of the convention text, see http://www.coe.int; for the explanatory memorandum, see the same website, CM(2005)34 Addendum 2 final; for background see *EU, Council of Europe Deal on "Opt-Out' Clears Way for Treaty Signing in Warsaw*, DAILY REP. FOR EXEC., May 10, 2005, at A-1.

[21] For a copy of the revised version of the convention text, see http://www.coe.int; for the explanatory memorandum, see the same website, CM(2005)34 Addendum 2 final; for background see *EU, Council of Europe Deal on "Opt-Out' Clears Way for Treaty Signing in Warsaw*, DAILY REP. FOR EXEC., May 10, 2005, at A

[22] ORGANIZATION OF AMERICAN STATES, ABOUT THE OAS, MEMBER STATES AND PERMANENT MISSIONS, *at* http://www.oas.org/documents/eng/memberstates.asp (n.d.).

[23] AG Res. 813, OAS AG, 16th Sess., OAS Doc. XVI-O/86 (1986).

[24] INTER-AMERICAN DRUG ABUSE CONTROL COMMISSION, MODEL REGULATIONS CONCERNING LAUNDERING OFFENSES CONNECTED TO ILLICIT DRUG TRAFFICKING AND OTHER SERIOUS OFFENSES (2002).

another OAS body, the Inter-American Committee Against Terrorism,[25] created 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.[26] Together, these bodies operate training seminars, providing technical assistance to OAS member states, and release reports on the current states 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.[27]

II. Bilateral and unilateral mechamisms

27. Looking at the U.S. government as an example of bilateral and unilateral mechanisms to obtain assistance and gain custody over individuals charged with tax crimes, we can see a number of initiatives to facilitate investigation and prosecution of cross-border tax crime.

A. Evidence Gathering

28. Recently the U.S. has concluded a series of mutual assistance in criminal matters treaties (MLATs). They are a more effective and efficient substitute for letters rogatory when compulsory process is required to obtain evidence in a requested state or when specific procedures must be complied with for the requested evidence to be admissible at a criminal trial in the requesting state.

29. In 1999, the U.S. Department of Justice's Office of International Affairs made close to five hundred requests for international assistance on behalf of state and federal prosecutors and received over one thousand requests for assistance from abroad. MLATs are important because they make assistance obligatory as a matter of international law, whereas letters rogatory are executed solely on the basis of comity. A request for assistance cannot be refused unless specifically allowed by the terms of the treaty, and the grounds for refusal of assistance under MLATs are quite limited. An MLAT, either by itself or together with implementing legislation, provides a way for a requesting state to overcome foreign bank secrecy and business confidentiality laws that otherwise can frustrate U.S. investigations. For instance, such provisions are included in the treaties with Romania and Russia. MLATs provide an opportunity to develop procedures to obtain foreign evidence in a form admissible in U.S. courts, especially in the context of U.S. complex and stringent evidentiary rules, including its hearsay rules and U.S. right to confrontation of witnesses that may not have an analogue in countries with an inquisitorial system rather than the U.S. adversarial system. MLATs also provide a framework for cooperation in the tracing, seizure and forfeiture of criminal assets.

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[25]AG Res. 1650, OAS AG, 29th Sess., OAS Doc. XXIX-O/99 (1999).

[26]Inter-American Convention Against Terrorism, June 3, 2002, AG Res. 1840, OAS AG, 32nd Sess., OAS Doc. XXXII-O/02 (entered into force July 10, 2003).

[27]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. Press Release, Inter-American Development Bank, Multilateral Investment Fund Approves Financing to Fight Money Laundering in Latin America (June 26, 2002).

Hence, bilateral MLATs can provide a predictable and effective regime for obtaining evidence in criminal cases.

30. The OAS Convention on Mutual Assistance in Criminal Matters is an example of a multilateral MLAT. It was negotiated at the OAS starting in the mid-1980's, and was adopted and opened for signature by the OAS General Assembly on May 23, 1992. The U.S. signed it on January 10, 1995. The U.S. played an important role in the treaty and hence it is similar to the U.S. Government's typical modern bilateral MLATs. However, unlike the U.S. typical modern MLATs, it will not serve as the legal basis for asset sharing, such as the sharing of forfeited assets, which the negotiators determined was best left for bilateral agreements. The Optional Protocol was negotiated at the OAS in the early 1990's, was adopted and opened for signature by the OAS General Assembly on June 11, 1993, and was signed by the U.S. on January 10, 1995. The OAS Convention has certain limitations regarding assistance in cases involving tax offenses. Article 9(f) provides a party may decline assistance in investigations and proceedings involving certain tax offenses. The U.S. consistently opposed this provision during the negotiation of the Convention. Hence, it proposed an additional protocol to enable assistance in tax matters. The first article of the protocol removes the discretion of Protocol signatories to refuse assistance on the grounds that a tax offense is involved. The second article clarifies that the limited dual criminality provision in Article 5 of the Convention should be interpreted liberally in cases involving tax offenses. Witten explained the Administration recommends the inclusion of two Understandings in its instrument of ratification for the Convention, and one Understanding in its instrument of ratification for the Related Optional Protocol. The proposed texts would clarify the views of the U.S. about certain provisions of the Convention and Protocol.[28]

1. Traditional vs. Modern Approach to Coverage and Requirement of Dual Criminality

31. MLATs enable prosecutors to obtain in admissible form a wide variety of evidence, such as deposition testimony, bank records, and other documents.

32. Whereas MLATs traditionally covered a limited number of series of crimes that were listed in an appendix to the treaty,[29] today modern MLATs do not contain a general "dual criminality" requirement. Hence, those treaties require a requested state to render assistance ven though the acts in relation to which the requesting country seeks assistance would not consitute an offense under the laws of the requested state. However, the U.S. MLATs with the Bahamas, the Cayman Islands and Korea, rather than eliminating a dual criminal requirement and excluding specific offenses from coverage by the treaty, impose a dual criminality requirement and supplement such offenses with a list of offenses as to which both countries agree to render assistance in the absence of dual criminality.

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28 For additional background on the Senate Foreign Relations Hearing on the proposed MLATs, *see* Bruce Zagaris, *Senate Foreign Relations Committee Recommends Ratification of Criminal Cooperation Treaties*, 16 INT'L ENFORCEMENT L. REP. 1006-9 (Nov. 2000).

29 U.S.-Swiss MLAT, signed May 25, 2973, entered into force Jan. 23, 1977, 27 U.S.T. 2019; T.I.A.S. 8302.

33. A country can invoke assistance under an MLAT not only after the requesting country has brought charges, but also during the investigative stage of a criminal case, including the grad jury stage.

34. There are a variety of multilateral agreements on drug trafficking, transnational corruption, and anti-money laundering that require signatories to render mutual assistance pursuant to the treaty in question.

2. Alternatives to MLATs

a. Letters Rogatory

35. Letters rogatory is one of the most commonly used method of obtaining evidence through compulsory process in the U.S. 28 U.S.C. §1782 allows a foreign tribunal to obtain evidence in foreign criminal proceedings. A tribunal can include an investigating magistrate in a civil law country who conducts investigations to determine whether criminal charges should be brought against certain persons. A foreign tribunal or an interested person may initiate a letter rogatory or other request for judicial assistance in a criminal matter. In its discretion a U.S. district court can grant or refuse an order and may impose conditions on rendering such assistance. Usually, if it grants assistance, a U.S. district court will appoint a person referred to as a "commissioner" to supervise the taking of testimony in connection with rendering judicial assistance. If the foreign court does not prescribe the procedure to be used in executing the request, §1782 prescribes the application of the Federal Rules of Civil Procedure. A person who testifies pursuant to a U.S. court order may assert any legally applicable privilege under the laws of the U.S. or the country in which the relevant proceeding is pending.

36. U.S. jurisprudence has allowed prosecutors in common law countries to compel the testimony of witnesses in the U.S. even though no proceeding is pending before a foreign court provided an actual criminal investigation exists in connection with which the testimony is requested; the testimony is requested in order to use it in a proceeding before a court in the requesting state if criminal charges are brought; and criminal proceedings are imminent or very likely.[30]

37. An example of the use of letters rogatory to obtain evidence in the U.S. in a tax case is a Russian request. On November 1, 2000, the U.S. Circuit Court of Appeals for the Ninth Circuit affirmed a district court's dismissal of a motion brought on an anonymous defendant (whose identity is under seal) to dismiss letters rogatory proceedings brought under 28 U.S.C. §1782 to assist the Russian Federation in connection with an ongoing criminal investigation of alleged tax fraud in activities of the anonymous defendant.[31]

b. Compulsory Ways to Obtain Information Unilaterally

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30 *In Re Request for International Judicial Assistance, Brazil,* 936 F.2d 702, 706 (2d Cir. 1991); *In Re Letter of Request from Crown Prosecution Service,* 870 F.2d 686, 689-92 (D.C. Cir. 1989); *In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago,* 848 F.2d 1151, 1155-56 (11th Cir. 1988), *cert. denied,* 488 U.S. 1005 (1989).

31 U.S. v. Sealed 1, 2000 U.S. App. LEXIS 27216 (9th Cir. Nov. 1, 2000).

38. In criminal tax cases the United States has used at least nine different methods of coercion to obtain documentary information or evidence situated abroad, to obtain testimony from witnesses resident or located abroad, and to secure the transfer of private assets to the United States. [32]

(1) Since 1926, federal courts have been able to issue a subpoena directing a U.S. citizen or resident in a foreign country to return to the U.S. appear as a witness before the issuing court with penalties for failure to appear.

(2) In transnational criminal cases involving transactions between a U.S. corporation or person and a related corporation in a foreign country, in which records are located in the foreign country and the laws of such country protect the records from disclosure due usually to confidentiality laws, the U.S. will resort to coercive measures (e.g., subpoena) to obtain evidence located abroad when (a) the documents or other tangible evidence is in the possession, custody, or control of the alleged wrongdoer or a related entity; (b) the U.S. has personal jurisdiction over the alleged wrongdoer; and (c) the production of the evidence is not protected by an evidentiary privilege. Most cases have upheld such coercive measures on a U.S. entity and reject the argument that the production of documents by a related foreign entity would violate the laws of the country where the documents were located.[33]

(3) U.S. prosecutions have successfully compelled documents from abroad when the documents have been in the possession of a third party who was not a target of the investigation or a defendant in the prosecution, such as documents of foreign banks or corporations or of foreign branches of U.S. banks or corporations with which the target or defendant did business.[34]

(4) U.S. prosecutors can subpoena persons who are transiting the U.S. to testify in a criminal trial or grand jury.[35]

(5) Assuming the U.S. has personal jurisdiction over an entity, U.S. prosecutors can subpoena the production of records or foreign entities on custodian or agent of the records over whom the U.S. has personal jurisdiction.[36]

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32 For a discussion generally of coercive means by the U.S. to obtain information in international criminal cases, *see* M. Abbell and B. Ristau, [3] INTERNATIONAL JUDICIAL ASSISTANCE - CRIMINAL OBTAINING EVIDENCE (1990), Chapter 5, on which this discussion relies in part

33 *Marc Rich & Co., A.G. v. United States*, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *United States v. Vetco, Inc*., 644 F.2d 1234 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

34 *See, e.g., Re Sealed* 825 F.2d 494 (D.C. Cir. 1987); *In re Grand Jury Proceedings of Nova Scotia*, 740 F.2d 817 (11th Cir.), *cert. denied*, 469 U.S. 1006 (1984).

35 *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Re Grand Jury Proceedings (Bowe)*, 694 F.2d 1256 (11th Cir. 1982). *See also Re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987).

(6) To circumvent foreign bank secrecy laws, prosecutors persuade U.S. courts to issue an order directing the account holder to tell the bank to provide the records of any account in the bank, on which the signatory is authorized to draw, to the designated governmental recipient.[37]

(7) Sometimes U.S. prosecutors have obtained orders from federal courts directing targets of U.S. criminal investigations and defendants in U.S. criminal cases not to take action abroad to block the effort of U.S. prosecutors from obtaining evidence.[38]

Two other unilateral coercive means exist to obtain information in tax cases.

(8) Compelling the Repatriation of Assets to Pay Fine or Taxes or for Purposes of Forfeiture. In cases in which a person, over whom a U.S. court has personal jurisdiction and who has substantial assets abroad, is subject to a civil or criminal fee or tax jurisdiction and the persons either has no or insufficient assets in the U.S. to satisfy the fine or judgment, the U.S. court can issue a judgment[39], directing that assets in another country belonging to the person be forfeited to the U.S. In at least one case a U.S. district court upheld its power under 26 U.S.C. § 7402(a) to compel a person against whom it had imposed a valid, final tax judgment to repatriate sufficient assets from abroad to satisfy the judgment.[40]

(9) Imposing Tax Levy on Bank in the U.S. for Funds of Taxpayer Located in a Foreign Branch. The U.S. Internal Revenue Service has authority to collect a jeopardy assessment against a taxpayer by filing a notice of levy on the headquarters or branch of a bank in the U.S. under circumstances in which the taxpayer/customer had an account at a branch or headquarters of the bank in a foreign country. Through the levy, the IRS has looked to force the bank to transfer the assets to the U.S. for the IRS to satisfy a tax levy. Funds deposited by a customer in an account in a foreign bank are an obligation of that bank and not of its U.S. headquarters or branch. Hence, such a levy may be of questionable validity, especially if the U.S. office of the bank did not participate in the transactions by which the funds were deposited in the foreign branch or headquarters.

(10) A variation on the above mechanisms of issuing subpoenas to third party recordholders is the use of John Doe Subpoenas.

B. Extradition Treaties

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36 *Re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987); *Re Grand Jury Proceedings (Bowe)*, 694 F.2d 1156 (11th Cir. 1982).

37 *Doe v. United States*, 101 L.Ed2d 184 (1988).

38 *United States v. Davis*, 767 F.2d 1025, 1036-40 (2d Cir. 1985); *see also, Garpeg, Ltd. v. United States*, 583 F.Supp. 789, 797-99 (S.D.N.Y. 1984).

39 The court uses its authority under 18 U.S.C. § 1963 or 21 U.S.C. § 853.

40 *United States v. McNulty*, 446 F. Supp. 90 (N.D. Cal. 1978).

1. *Traditional Non-Coverage of Fiscal Offenses*

39. Traditionally, extradition treaties have not included fiscal offenses. In part, countries historically omitted fiscal offenses due to the chaotic and divergent fiscal and economic structures prior to the twentieth century. The divergency continued after World War II with the emergence of socialism and communism in Eastern and Central Europe. Most governments perceived a lack of acceptance of fiscal violations and hence do not want to agree to extradite except between compatible economic systems.[41]

2. *Modern Approach*

40. Only since the 1970s has the United States begun to include fiscal offenses in extradition treaties. The U.S. extradition treaties in the 1970s and 1980s that use the dual criminality to define extraditable offenses authorize extradition from the United States for fiscal offenses to the extent that the requested offense satisfies the dual criminality requirement. Additionally, in many of the extradition treaties that utilize the list method for state offenses along with the straight dual criminality method for federal offenses, willful tax evasion is an extraditable offense. Clearly a trend exists both on the part of the U.S. and other countries to include fiscal offenses as an extraditable offense.

41. Money movement offenses are closely related. For instance, a related but separate offense may be exchange control. In some countries this offense is a fiscal offense whereas in others it is a customs offense. More importantly in recent years is the rise of money laundering offenses and their inclusion in bilateral and multilateral (*e.g.*, the Vienna U.N. Drug Convention of 1988).

42. One problem that may affect the extraditability of a tax case is whether the signatory countries criminalize the same types of tax offenses. The substantive distinctions between tax evasion and tax fraud may enable defense counsel to successfully argue that the crimes are sufficiently distinguishable that extradition should not be granted.[42]

3. *Speciality*

43. 18 U.S.C. §3192 contains a statutory requirement of speciality whereby the U.S. or a state of the U.S. is not allowed to prosecute a person extradited to it for an offense committed prior to surrender and for which the requested country did not allow extradition, until the person has been afforded a "reasonable" opportunity to leave the U.S. and does not do so. All

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41 *See, e.g.*, Sack, *Non-Enforcement of Foreign Revenue Laws In International Law and Practice*, 81 U. PA. L.REV. 559 (1933).

42 For a discussion of these differences and the impact of international criminal cooperation, *see* Zagaris and Fantauzzi, *The Application of Foreign Criminal Laws to U.S. Businesses Abroad*, 1 INT'L QUARTERLY 124, 134-42 (Oct. 1989); Zagaris, *The Defense of Transnational Tax and Money Laundering Offenses* 2-10, THE ALLEGED TRANSNATIONAL CRIMINAL (Int'l Bar Assoc. Paper July 4-6, 1991 Munich).

U.S. extradition treaties now in force have a speciality provision.[43] Hence, if a requested country extradites Mr. Y for making a false statement on his tax return, the U.S. cannot prosecute him for assault and battery. However, in many cases the U.S. prosecutes the person in a superceding indictment for crimes arising out of the facts of the indictment. The best way to limit the scope of prosecution is to make the extradition order very clear and limited. There is ample litigation due to ambiguities about the extradition order.[44]

44. While some courts try to discern for themselves whether the requested states would have objected to the courts' assertion of jurisdiction to try the defendants for the offense in question,[45] the best method is for the court to require the prosecution to make the inquiry whenever the court determines the relator has raised the issue in a meaningful way.[46]

4. *Evidentiary Considerations*

45. A majority of U.S. extradition treaties provide that the surrender of a requested person will occur only upon such evidence of criminality that, according to the laws of the place where the person is found in the requested country, would justify his arrest and commitment for trial if the crime or offense had been committed there. Such provisions require a requested country

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43 For a fuller discussion of the rule of speciality, *see* Abbell, *supra,* at 328-39; Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE, *supra,* at 429-85.

44 *See, e.g., United States v. Billman*, 1996 WL 267329 (4th Cir. 1996) (U.S. had right to prosecute defendant for mail fraud and wire fraud after the French clarified the extradition order); *United States v. Saccoccia*, 58 F.2d 754, 764-69 (1st Cir. 1995), *cert. denied*, 517 U.S. 10-05 (1966) (U.S. redacted RICO predicate acts concerning cash transaction reporting (CTR) violations from indictment after the requested sate clarified its denial of extradition for substantive CTR offenses, and its authorization of extradition on RICO charges including the CTR violations as predicate acts); *United States v. Kahn*, 993 F.2d 1368 (9th Cir. 1993) (Pakistan's extradition warrant did not include the charge of using a communications facility to commit a narcotics crime); United *States v. Merit*, 962 F.2d 917 (9th Cir.), *cert. denied*, 506 U.S. 9124 (1992) (the requested state clarifies that its extradition order covered only two of fourteen counts in indictment for extradition); *United States v. Ledher-Rivas*, 955 F.2d 1510, 1519-21 (11th Cir.), *cert. denied*, 506 U.S. 924 (1992) (A Colombian extradition order did include Continuing Criminal Enterprise (CCE) charge in the extradition request); *United States v. Casamento*, 887 F.2d 1141, 1185 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990) (the Spanish extradition order included CCE charge in extradition request); *United States v. Sensi*, 879 F.2d 888 (D.C. Cir. 1989 (concerning British extradition warrant and whether the charges in extradition request was authorized); *United States v. Cuevas*, 847 D.2d 1417 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) (application of ambiguous Swiss extradition order to determine scope of authorized prosecution); *United States v. Jetter*, 722 F.2d 371 (8th Cir. 1983) (Costa Rican extradition order allowed prosecution for CCE charge in indictment upon which extradition requested).

45 *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962).

46 *See* Abbell, *supra*, at 389-90, citing *United States v. Gallo-Chamorro*, 48 F.3d 502, n. 7 (11th Cir.), *cert. denied*, 516 U.S. 811 (1995) (defendant was not able to obtain a copy of the essential, restrictive Colombian diplomatic note until seven days after sentencing).

to apply its domestic standard for arresting and committing persons for trial for violations of its criminal laws in determining whether the U.S. has provided sufficient evidence in connection with its extradition request. This standard varies from country to country. Since it is a matter completely dependent on the criminal laws and practices of the requested country, a U.S. lawyer or his client who needs to know how the standard for arrest and commitment for trial will be applied in such a country should obtain the advice of competent counsel in the requested country.

5. *Mitigating Factors to Refuse Extradition*

46. A significant number of post-1960 U.S. extradition treaties have provisions relating to the effect of a requested person's age or health, or other humanitarian considerations, on his or her extradition. The British decision on the *Pinochet* case illustrates the resort to such considerations to deny extradition.[47] There are three basic types of provisions in U.S. extradition treaties. The situation that normally arises is whether the requested state should refuse extradition if it believes special circumstances relating to a requested person's age, health, or other personal condition would make his or her extradition "incompatible with humanitarian considerations."

47. When a requested state is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, counsel for the relator may challenge the extradition to the U.S. on various humanitarian grounds, especially the potentially inhumane conditions of imprisonment or inhuman punishment[48] that the relator would face if extradited to the U.S.[49] The ability to raise defenses on various humanitarian grounds has increased in the aftermath of the U.S. detentions of persons classified as "enemy combatants" since the terrorist incidents of September 11, 2001, and their denial of access to counsel and courts.[50]

6. *Procedural Issues*

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47 *Britain Frees Pinochet*, 16 INT'L ENFORCEMENT L. REP. 697 (April 2000); Andrew Parker, Jonathan Guthrie and Mark Mulligan, *Pinochet Flies Home After UK Formally Ends Detention*, FIN TIMES, Mar. 3, 2000, at 1, col. 1 (British Interior Minister Jack Straw on March 2, 2000 declared that the 94-year-old Pinochet was not fit to face trial after suffering brain damage caused by strokes the preceding autumn and hence Straw dismissed extradition requests from Spain, Belgium, France and Switzerland).

48 For an example of denial of extradition due to inhuman punishment in the U.S., *see* Bruce Zagaris, *Austria Denies Extradition to U.S. Due to Human Rights Considerations*, 17 INT'L ENFORCEMENT L. REP. 458 (Nov. 2001); Bruce Zagaris, *Austria Turns Over Weiss to U.S. on Fraud Charges*, 18 INT'L ENFORCEMENT L. REP. 348 (Aug. 2002); Bruce Zagaris, *U.S. Court Denies U.S. Government Weiss Resentence Motion Despite Austria Conditions*, 18 INT'L ENFORCEMENT L. REP. 402 (Oct. 2002).

49 Abbell, *supra*, at 341-342; Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE, *supra*, at 832-33.

50 Joel Brinkley, *Report Says U.S. Human Rights Abuses Have Eroded Support for Efforts against Terrorism*, N.Y. TIMES, Jan. 15, 2003, at A1, col. 1.

48. Whereas U.S. statutes regulating extradition from the U.S. have a relatively limited effect on these procedures, the laws of other countries typically have a significant impact on the procedures governing extradition to the U.S., partly because they often have an important number of provisions that contain substantive rules concerning extradition from these countries. Due to the importance of foreign procedural laws in regulating extradition to the U.S., the interested persons involved with a potential or actual request by the U.S. for extradition from a foreign country should be aware not only of the procedural provisions of the applicable treaty, but also of the procedural provisions of the foreign country's extradition laws. The nuances of a requested country's extradition procedures may not be readily apparent on the face of its extradition statutes and the applicable treaty. Hence, the advice of qualified counsel in the requested country is required. Normally, advice of qualified counsel in the requested country is needed at the earliest possible time so that nuances in the foreign law can be understood and strategy formulated on a timely basis.

7. *Provisional Arrest*

49. Because of the ease with which an accused can flee and since requesting countries cannot prepare and submit formal, fully documented requests on short notice (duly translated and responsive to the varying procedural requirements of each requested country), extradition treaties allow for provisional arrest and detention of fugitives pending receipt of formal, fully documented extradition requests.[51]

50. The extradition treaties describe the method of making a request; the conditions for making a request; the required contents of a request; the action required of a requested country (the U.S.); the notification of action taken by a requested country; the length, and method of computing the length, of the period of provisional detention; and the effect of release from provisional detention because of the failure of a requesting country to make a formal, fully documented request in a timely manner.[52]

51. Unlike U.S. extradition statutes, most foreign countries have extradition statutes that expressly regulate the substantive and procedural requirements governing provisional arrest. Many provisions in these foreign statutes merely supplement the provisional arrest provisions in these countries' treaties with the U.S. and are consistent with those provisions. In case of inconsistencies between the statutory and treaty provisions, the treaty provision ordinarily will take precedence in civil law countries and the statutory provision in common law countries.[53] Defense counsel will want to check the extradition laws of the requested country and obtain the advice of qualified counsel in the requested country concerning the statutory requirements for provisional arrest and any inconsistencies between the statutory and treaty provisions.

8. *Alternatives to Extradition*

52. In some cases the U.S. can obtain custody over an individual whom it cannot extradite.

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51 Extradition Treaty, 1983, U.S.-Jamaica, T.I.AS. No. __, Art. X.

52 *Id.*

53 Abbell, *supra,* at 316, 351.

It does this by asking the country where the person is located to deport him or her. If the accused is a U.S. citizen, the U.S. will revoke his passport and inform the country that the person is there illegally. The State Department may revoke the passport of a U.S. citizen pursuant to 22 C.F.R. §§ 51.70 through 51.76, thereby depriving the fugitive/relator of a travel document and making it difficult for such person to travel or even remain abroad. The U.S. can revoke a passport if the person has an outstanding federal warrant of arrest for the commission of a felony.[54] The State Department can also revoke one's passport if the person is subject to a criminal court order, condition of probation, or condition of parole prohibiting him to depart the U.S. under threat of arrest.[55] Revocation may also occur if the person is the subject of a request for extradition or provisional arrest for extradition that has been presented to the requested state.[56] Revocation may also happen if the person is subject to imprisonment or supervised released due to a conviction for a federal or state felony drug offense and the person used a passport or otherwise crossed an international border in committing the offense.[57]

54. Deportation laws in some countries provide efficient ways to deport people. If the person has not entered the foreign country properly, s/he often has few rights. Once the person is deported, the U.S. will then be able to try or punish him or her. The returned person also has now right to protection from the rule of speciality, unless the requested state obtains a written promise from the U.S. that the rule of speciality will apply.[58]

55. Sometimes the fugitive/relator can avoid deportation if s/he enters the requested state on the basis of a valid passport other than a U.S. passport or at least if s/he has a valid non-U.S. passport, especially a passport of the requested state. In this regard, many countries offer citizenship to persons whose parents or grandparents were citizens. Other countries offer economic nationality, whereby an individual can acquire nationality by making a substantial investment.[59]

56. For example, if the accused is a bonafide Irish citizen, it would be legally and diplomatically difficult for Ireland to revoke the citizenship, assuming the citizenship was properly obtained. To revoke one's citizenship without substantive reasons would denigrate the value of citizenship. Revocation of a residency permit or more importantly citizenship is not

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54 22 C.F.R. §§ 51.70(a)(1) and 51.72(a).

55 22 C.F.R. §§ 51.70(a)(2) and 51.72(a).

56 22 C.F.R. §§ 51.70(a)(4) and 51.72(a).

57 22 C.F.R. §51.71(a) and 51.72(a).

58 Abbell, *supra,* at 372-73. U.S. Department of Justice, Criminal Resource Manual, § 610.

59 For background on obtaining economic nationality, *see, e.g.*, Marshall J. Langer, THE TAX EXILE REPORT: CITIZENSHIP, SECOND PASSPORTS AND ESCAPING CONFISCATORY TAXES (2d ed. 1993-94); Marshall J. Langer, CHOOSE GRENADA FOR YOUR SECOND CITIZENSHIP AND PASSPORT (2000). However, in 2002 many of the economic nationality programs were cancelled or suspended due to abuse of the programs and use of nationality and passports for illegal purposes.

often done as an alternative to extradition. When it occurs, the case should be important, especially since Ireland is a country in which the rule of law is important. It should also be a case where the fugitive/relator is a person with no standing whatsoever in Ireland and his offense makes him easily disposable. There is a very small chance that the U.S. could successfully request, considering that the U.S. has extensive political leverage with Ireland.

57. Another alternative to extradition is kidnaping, either by force[60] or by luring.[61] The latter is rarely employed and requires explicit high-level governmental permission. Luring is occasionally used. It happens when the U.S. Government through use of a subterfuge falsely attracts a relator to enter a country where the U.S. can arrest him. Because of the sensitivity of abducting defendants outside the U.S. (by government agents or the use of private persons, like bounty hunters or private investigators), prosecutors must have advance approval by the Department of Justice Office of International Affairs before using such tactics.[62] Because some countries may perceive a lure of a person from its territory as an infringement on its sovereignty and will not extradite such a person, a prosecutor must consult with the Office of International Affairs, U.S. Department of Justice before s/he undertakes a lure to the U.S. or a third country.[63]

58. Rarely a country whose sovereignty was offended by a kidnaping or a lure has persuaded the U.S. to return the person to the country and then seek the extradition of the person.[64]

C. Unilateral Mechanisms - Money Laundering: The British AML Regime

59. The British AML Regime has affected solicitors and accountants in a number of areas, especially in tax planning. The British regulatory and law enforcement authorities have taken the position that laundering applies to domestic and overseas tax crimes:

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60 *See United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Collier v. Vaccaro*, 51 F.2d 17 (4th Cir. 1931).

61 For instances of luring, *see, e.g., United States v. Yunis*, 924 F.2d 1086, 1092-93 (D.C. Cir. 1991); *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983) and 732 F.2d 404 (5TH Cir. 1984); United States v. Reed, 639 F.2d 896 (2d Cir. 1981); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

62 U.S. Department of Justice, *United States Attorneys Manual*, § 9-15.610.

63 *Id.*, § 9-15.630.

64 *See United States v. Hills*, 765 F,2d 381m 383 n.2 (E.D. Mich. 1991) (Canadian authorities arrested alleged robber of Windsor, Canada bank on the U.S. side of Windsor-Detroit tunnel after hot pursuit); *Vaccaro v. Collier*, 38 F.2d 862 (D.Md. 1930). *See also* H. Kurtz, *For U.S. Bounty Hunters, National Boundaries Are Little or No Constraint*, WASH. POST, May 15, 1987, at A23 (bounty hunter used to arrest Canadian in Canada); 4 Hackworth, DIGEST OF INTERNATIONAL LAW §345 (U.S. has occasionally sought and obtained the return of a person abducted from the U.S. by foreign law enforcement officials).

60. On January 5, 1998, Dilwyn Griffiths of HM Treasury said:

> Broadly speaking, UK law makes no real distinction between laundering the proceeds of tax crimes and of any other serious crime, and the principle of dual criminality extends to the laundering of the proceeds of tax crimes committed to other jurisdictions.

61. On May 19, 1998, Andrew Edwards of the Home Office said:

> The UK's all crime money laundering legislation was certainly intended to cover fiscal predicate offence, and I believe there is now general acceptance of that.

62. On February 1, 1999, the Rt. Hon. Jack Straw, MP, home secretary, said:

> Tax...offences are criminal offences like any other. The legislation as originally enacted [in 1993] does not treat them in any way as a special case, and there is no reason why an exception should be made of them now...Realistically...there is no prospect of the Government changing the law in this area.[65]

63. In May 1998, the British Government announced that for the first time UK Inland Revenue officers would be attached to the NCIS. The NCIS officials would have two areas of responsibility: monitoring any reported frauds to ascertain whether tax issues exist on which offenders can be pursued, even if other action is difficult, and processing information about tax evasion generally, whether concerning UK taxes or foreign taxes. At present they transmit reports relating to any suspected EU tax evasion to the relevant fiscal authority.

64. In March 1999, Robin Cook, the secretary of state for foreign and Commonwealth affairs, issued a white paper that would not allow the dependent territories, such as the Cayman Islands and Bermuda, to introduce all-crimes money laundering legislation that specifically excluded fiscal crimes.

65. Among the unresolved issues that additional legislation or English courts apparently still had to address as of a few years ago were:

1. What does the Criminal Justice Act mean by "the proceeds of criminal conduct" in relation to tax offenses?
2. What is meant by "being concerned with an arrangement" in Sec. 93A of the C.A.?
3. Should a subjective or objective test be applied to the interpretation of the provisions "having reasonable grounds to suspect that any property is...another person's proceeds of criminal conduct" in Sec. 93C of the Criminal Justice Act?
4. What protection exists outside the UK for UK professionals who have damaged a client's business interests or reputation by making a SAR that turns out to be unfounded?
5. What other work can be done for a suspicious client?
6. Is submitting an incomplete tax return "false accounting" ? [66]

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65 John Rhodes, *The Impact of UK Money-Laundering Legislation on Fiscal Crime*, 2000 WORLD TAX CONFERENCE REPORT 33:1, 2-3 (2001).

66 *Id*. at 33:6.

66. Increasingly, banks, financial institutions and gatekeepers must know and abide by international (e.g., FATF and EU) and foreign AML regimes. The United Kingdom is an example of a foreign AML regime. The U.K. is important for U.S. persons because of the amount of U.S.-U.K. transactions. The U.K. AML regime is also important because the U.K. is an important international financial center and its AML regime applies to gatekeepers such as lawyers, trustees, and accountants.[67]

9. Proceeds of Crime Act 2002 (POCA)

67. The Proceeds of Crime Act 2002 (POCA) sought to consolidate existing laws on the confiscation of criminal proceeds and laws relating to money laundering, to improve the efficiency of the recovery process and to increase the amount of illegally obtained assets recovered.

68. The key aspects of POCA are:

a. Broadening of the definition of the regulated sector (which had covered mostly financial institutions) to include estate agents, lawyers, accountants, insolvency lawyers, tax advisors, auditors, company and trust formation agents, and businesses dealing in any good where a transaction involves cash payment of €15,000 or more.

b. Extension of the definition of criminal conduct for the predicate offenses and terrorist offenses to all crimes.

c. Establishment of a new "failure to report" offense for the regulated sector.

10. Sec. 340(2) POCA– New All Crimes Test (Feb. 2003)

69. In February 2003, POCA amendments extended money laundering from the proceeds of indictable crimes, drugs and terrorism to the proceeds of <u>any</u> criminal conduct. In this regard, Section 340(2) defines criminal conduct comprehensively with an international perspective:

> "Criminal conduct is conduct which
> (a) constitutes an offence in any part of the United Kingdom, or
> (b) would constitute an offense in any part of the United Kingdom if it occurred there."

11. Application of Criminal Laws to the Regulated Sector (Sec. 330)

70. Sec. 330 (POCA) applies criminal laws to persons in the regulated sector who fail to disclose a suspicion to a nominated officer. In particular Sec. 330 states as follows:

> "(1) A person commits an offence if each of the following three conditions is satisfied

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67 For useful background see Monty Raphael, Peters & Peters, London, *Tightening the Noose: The Proceeds of Crime Act, AML, and Regulation for Trustees*, International Trusts Congress, Dec. 7, 2004, on which this section relies in part.

(a) The first condition is that he
(i) knows or suspects, or
(ii) has reasonable grounds for knowing or suspecting that another person is engaged in money laundering.

(b) The second condition is that the information or other matter –
(i) on which his knowledge or suspicion is based, or
(ii) which gives reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector.

(c) The third condition is that he does not make the required disclosure as soon as is practicable after the information or other matter comes to him.

12. Definition of Regulated Sector

71. Schedule 9 of the POCA defines the regulated sector enormously broadly, including: banks, credit unions; any activity equivalent to raising money; money transmitters; insurance businesses; dealing in investments as principal or as agent; arranging deals in investments managing investments; safeguarding and administering investments; sending dematerialized instructions; establishing (and taking other steps in relation to) collective investment schemes; and advising on investments.

72. POCA 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003 further broadens the definition of "regulated sector" to include, among other things: estate agency work; the provision by way of business of advice about the tax affairs of another person by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual; the provision by way of business of accountancy services by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual; the provision by way of business of legal services by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual and which involves participation in a financial or real property transaction (whether by assisting in the planning or execution of any such transaction or otherwise by acting for, or on behalf of a client in any such transaction); and the provision by way of business of services in relation to the formation, operation or management of a company or a trust.

13. Objective Test "Reasonable Grounds" [Sec. 330 (2)]

73. Sec. 330(2) imposes an objective test, whereby persons in the regulated sector must exercise a higher level of diligence in the handling of their transactions. It holds persons in this sector to a standard requiring them to act competently and responsibly in relation to information that ought to raise suspicions of money laundering.

14. Training Defense [Sec. 330(7)b)]

74. A person will not commit an offence if he has not been provided with such training by his employer as set forth by the Secretary of State by Order. POCA 2002 (Failure to Disclose Money Laundering: Specified Training) Order 2003 (amended by the Money Laundering Regulations 2003) provides that the necessary training is that given under Regulation 3(10)(c)(ii) of the regulations. This provides that relevant employees must:

"be given training in how to recognise and deal with transactions which may be related to laundering."

75. Relevant Guidance [Sec. 330(8)] is provided in deciding whether a person has committed a crime under this section. The court must consider whether he/she followed any relevant guidance issued by a supervisory authority or other appropriate body which has been approved by the Treasury and published so as to be known by those likely to be affected by it.

15. Carve Out for Lawyers – Legal Privilege [Sec. 330(6)(b)]

76. A legal professional adviser can take advantage of a legal privilege defense if s/he receives the information in privileged circumstances. In this regard, "Section 330(6)(b)(10): Information or other matters comes to a professional legal adviser in privileged circumstances if it is communicated or given to him–

> (a) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client
> (b) by (or by a representative of) a person seeking legal advice from the adviser, or
> (c) by a person in connection with legal proceedings or contemplated legal proceedings."

77. The defense of legal privilege will not apply for information or other matter that is communicated or given with the intention of furthering a criminal purpose. [Sec. 330(11)].

78. Some suits have challenged the application of the current EU money laundering directive. A German Constitutional Court held the directive invalid insofar as it concerned criminal defense counsel. The Belgian bar has challenged the directive and the European Court of Justice is considering the case.

D. Money Laundering - The US Approach, Especially the PATRIOT Act

79. Even before the USA Patriot Act and essentially since 1986, federal and state prosecutors have brought a number of prosecutions and asset forfeiture cases (civil, administrative and criminal) against lawyers engaged in money laundering. *See, e.g.*, *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001); *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001). The robust prosecutorial activities have made most lawyers careful to comply with U.S. federal and state money laundering laws, and the very comprehensive reporting regime that extends to related areas, such as terrorist financing and export control.

80. On October 26, 2001, President George W. Bush signed into law the USA PATRIOT Act.[68] 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 into it, such as through enhanced due diligence requirements. The application of the USA Patriot Act contains a broadening of the ability of the U.S. regulatory community to obtain intelligence and investigative information on financial transactions and a concomitant obligation of the regulated community to furnish such information.

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68 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.

81. 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.[69] 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 and law enforcement investigations. 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.[70]

82. Thus, Treasury significantly expanded the role of the Financial Crimes Enforcement Network (FinCEN), an information conduit between law enforcement and financial institutions.[71]

83. To obtain customer account information, federal law enforcement agencies had merely 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.[72] After it received the form, FinCEN would ask financial institutions and businesses to supply information on the relevant accounts or transactions.[73] Law enforcement agencies have proactively used the ability to obtain information on a broad range of law enforcement matters concerning money laundering. Some matters may also involve cross-border tax offenses.

84. 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

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69 31 C.F.R. § 103.100, 103.110 (2002).

70 *See* Robert B. Serino, *Money Laundering, Terrorism, & Fraud*, ABA BANK COMPLIANCE 22 (Mar/April 2002).

71 *See* FINANCIAL CRIMES ENFORCEMENT NETWORK (FINCEN), 2003-2008 STRATEGIC PLAN (2003). 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 Secretary for Enforcement, Department of the Treasury, Speech Before the American Bankers' Association Money Laundering Conference (Oct. 22, 2001).

72 TO RELIEF OF MANY, U.S. TREASURY HALTS FLOOD OF '314(A)' REQUESTS, 14 MONEY LAUNDERING ALERT 1 (Dec. 2002).

73 *Id.*

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.[74]

85. Section 317 gives U.S. courts extraterritorial jurisdiction over foreign persons committing money laundering offenses in the U.S., over foreign banks opening bank accounts, and over 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. sections 1956 and 1957 to include those operating outside of the U.S.

86. Section 319 amended U.S. asset forfeiture law[75] to treat funds deposited by foreign banks in interbank accounts with U.S. banks as having been deposited in the United States for the purposes of the forfeiture rules.[76] For example, if a terrorist has money in a foreign bank that has a correspondent account at a U.S. bank, a federal court can now order the U.S. bank to seize the foreign bank's money from the account. The foreign bank is then expected to recover its money by debiting the terrorist's account.[77] The terrorist, but not the bank, can oppose the forfeiture action. The Attorney General and Secretary of the Treasury are authorized to issue a summons or subpoena to any such foreign bank and to seek records, wherever located, that relate to such a correspondent account.[78]

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74 *Dismantling the Financial Infrastructure of Terrorism: Hearing Before the House Comm. on Fin. Servs.*, 107th Cong. 7 (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice).

75 18 U.S.C. § 981 (2001).

76 *See United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 in Banco Espanol de Credito, Spain*, 295 F.3d 23 (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 Attorney General, Criminal Division, U.S. Department of Justice) (describing a case of Belizean money launderers whose assets were made recoverable by the Act).

77 *See* Stefan D. Cassella, *Forfeiture of Terrorist Assets Under the USA PATRIOT Act of 2001*, 34 L. & POL'Y INT'L BUS. 7, 14 (2002).

78 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., and section 323 allowed the government to seek a restraining order to preserve the availability of property subject to a foreign forfeiture confiscation judgment.

87. Section 325 authorized the Secretary of the Treasury to issue regulations concerning the maintenance of concentration accounts by U.S. depository institutions 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.[79] 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.[80] The standards require financial institutions to verify customers' identities, consult with lists of known and suspected terrorists at account openings, and maintain records.

88. 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.[81] Pursuant to section 356, the Secretary of the Treasury promulgated final rules requiring broker-dealers to also file suspicious activity reports.[82] In the future, Treasury will issue similar regulations regarding futures commission merchants, commodity trading advisors, commodity pool operators, and investment companies.

III. Criminalization of cross-border tax crimes

A. In General

89. Countries have taken several initiatives to prosecute cross-border crimes that may involve tax offenses. The most prevalent is the EU gatekeeper initiative as reflected in the British legislation. However, a Canadian court enjoined enforcement of the Canadian gatekeeper provision and the Canadian government agreed to work with the bar association in promulgating a new regime. A second approach is the U.S. approach which has tightened the use of wire and mail fraud statutes along with the use of the money laundering regime.

B. Use of Wire and Mail Fraud Statutes in the U.S.

1. *Bank of New York*

90. On February 16, 2000, Lucy Edwards, an employee with the Bank of New York, and Peter Berlin plead guilty to wire and mail fraud. Their fraud was helping persons in Russia evade Russian income taxes. Convictions of wire and mail fraud have been sustained where the only underlying jurisdiction act in the U.S. was the receipt or making of a communication concerning the wrongdoing in the U.S.

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79 Treasury has not yet issued any such regulations.

80 31 C.F.R. pt. 103 (2003).

81 31 C.F.R. pt. 103 (2002).

82 *Id.*

2. *Pasquantino*

91. On April 26, 2005, the U.S. Supreme Court ruled, 5-4, that a scheme to defraud a foreign government of tax revenue violates the wire fraud statute, notwithstanding the "revenue rule," a common law rule that generally bars courts from enforcing the tax laws of foreign sovereigns.[83]

92. The court's majority, written by Justice Clarence Thomas, said the plain terms of the wire fraud statute, 18 U.S. Code Section 1343, criminalizes the foreign smuggling operation engaged in by the defendants, and under which the defendants were convicted does not derogate from the common-law revenue rule.

93. The case arises out of the emergence of a Canadian black market for liquor once Canada increased its alcohol taxes to a level greatly exceeding comparable United States taxes. The Canadian taxes then due on alcohol bought in the U.S. and brought to Canada were approximately double the liquor's purchase price. Capitalizing on this situation, defendants David and Carl Pasquantino, residents of Niagara Falls, New York, developed a scheme where, with the help of drivers such as co-defendant Arthur Hilts, they would purchase large quantities of low-end liquor from discount liquor stores in Maryland, transport the liquor to New York, store it there, and then smuggle the liquor into Canada in the trunks of cars. The enterprise began in 1996 and continued through May 2000. The drivers avoided paying taxes by hiding the liquor in their vehicles and failing to declare the goods to Canadian customs officials.

94. Eventually the two Pasquantinos and Mr. Hilts were indicted and convicted of federal wire fraud for carrying out a scheme to smuggle large quantities of liquor into Canada from the U.S. The Pasquantinos, while in New York, ordered liquor over the phone from discount package stores in Maryland.

95. Before trial, the defendants moved to dismiss the indictment on the ground it stated no wire fraud offense. Defendants contended that the U.S. government lacked a sufficient interest in enforcing the revenue laws of Canada and hence that they had not committed wire fraud. The District Court denied the motion and the case went to trial. The jury convicted the defendants of wire fraud.

96. The Defendants appealed their convictions to the U.S. Court of Appeals for the Fourth Circuit, and argued that the prosecution contravened the common-law revenue rule because it required the court to take cognizance of the revenue laws of Canada. The panel agreed 2-1 and reversed the convictions.[84]

97. The Court of Appeals granted rehearing *en banc*, vacated the panel's decision, and affirmed defendants convictions. It concluded that the common-law revenue rule, instead of barring any recognition of foreign revenue law, merely allowed courts to refuse to enforce the tax judgments of foreign nations, and hence did not preclude the U.S. government from prosecuting the defendants.[85]

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83 *Pasquantino v. United States*, United States Supreme Court, No. 03-725, April 26, 2005.

84 *Pasquantino v. United States*, 305 F. 3d 291, 295 (4th Cir. 2002).

85 *Pasquantino v. United States*, 336 F. 3d 321, 327-29 (4th Cir. 2003).

98. The U.S. Supreme Court granted certiorari to resolve a conflict in the Courts of Appeals over whether a scheme to defraud a foreign government of tax revenue violates the wire fraud statute.[86]

99. The majority opinion said the defendants' smuggling operation satisfied the two elements of the wire fraud statute that the defendants disputed. First, Canada's right to uncollected excise taxes on the liquor imported into Canada by the defendants was "property" in its hands, within the meaning of the statute, the majority concluded. Second, the majority reasoned that the defendants' plot was a "scheme or artifice to defraud" Canada of taxes it was entitled to collect.

100. The majority opinion rejected the defendants' argument that, to avoid reading the wire fraud statute to derogate from the common law revenue rule, the court should construe the otherwise applicable language of the statute to except frauds directed at evading foreign taxes. The majority concluded that the wire fraud statute derogates from no well-established revenue rule principle.

101. According to the majority, where a statute impinges on or conflicts with a common law rule, the application of the statute depends on whether the statute speaks directly to the question addressed by the common law rule and whether the common law rule is a well-established one. Before it may conclude that Congress intended to exempt the current prosecution from the broad reach of the wire fraud statute, the Court must find that the common-law revenue rule clearly barred such a prosecution. After examining the state of common law revenue rule jurisprudence as of 1952, the year Congress enacted the wire fraud statute, the majority concluded: "We are aware of no common-law revenue rule case decided as of 1952 that held or clearly implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes." The majority concluded that, as of 1952, the extent to which the revenue rule barred indirect recognition of foreign revenue laws was unsettled.

102. The majority also found that the "traditional rationales" for the revenue rule "do not plainly suggest" the broad sweep that the defendants claimed for the rule. For instance, the revenue rule was primarily to guard against judicial evaluation of the policy-laden enactments of other sovereigns. This case, the majority reasoned, creates little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns. The majority explained that enforcing the wire fraud statute gives effect to freeing interstate wires from fraudulent use, irrespective of the object of the fraud. Hence, it poses no risk of advancing the policies of Canada illegitimately. The other reason for the revenue rule – that courts lack the competence to examine the validity of unfamiliar foreign tax schemes – did not apply because the court had uncontroverted testimony of a government witness that the defendants' scheme aimed at violating Canadian tax law.

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86 *Pasquantino v. United States*, 541 U.S. 972 (2004). Compare *United States v. Boots*, 80 F. 3d 580, 587 (1st Cir. 1996) (holding that a scheme to defraud a foreign nation of tax revenue does not violate the wire fraud statute), with *United States v. Trapilo*, 130 F. 3d 547, 552-553 (2d Cir. 1997) (holding that a scheme to defraud a foreign nation of tax revenue does not violate the wire fraud statute).

103. The majority rejected the notion that the conviction gives "extraterritorial effect" to the U.S. wire fraud statute, stating they used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue and their offense was complete the moment they executed the scheme inside the U.S.

104. The dissent, written by Justice Ginsburg, criticized the majority opinion for "ascrib[ing] an exorbitant scope to the wire fraud statute, in disregard of our repeated recognition that 'Congress legislates against the backdrop of the presumption against extraterritoriality.'"

105. The dissent also observed that Congress has explicitly addressed international smuggling through a statute that provides for criminal enforcement of the customs laws of a foreign nation only when that nation has a reciprocal law criminalizing smuggling into the United States. According to the dissent, Canada has no such reciprocal law. Additionally, the matter of mutual assistance in the collection of taxes is addressed in a treaty between the United States and Canada, Ginsburg said.

106. The dissent also focused on the majority's failure to take account of Canada's primary interest in the matter at stake and the interaction of U.S. statutes with enforcement treaties. The dissent observed that U.S. citizens who have committed criminal violations of Canadian tax laws are subject to extradition to stand trial in Canada, and Canadian courts are the courts most competent to judge the extent to which the government of Canada has been defrauded of its taxes.[87]

107. The decision will give concern to U.S. professionals, especially accountants, lawyers, bankers, real estate advisers, and security advisers who help advise on foreign laws, especially in countries that have significant tax crimes. Inevitably, they use the U.S. wires or mails in the advice. The decision is likely to cause the exercise of more care. For instance, in the Bank of New York case Lucy Edwards and Peter Berlin were convicted of wire and mail fraud for helping persons in Russian evade Russian income taxes.[88] The decision should encourage revenue authorities pursue their revenue and tax criminals in the U.S.

IV. Potential roles for the UN

108. To assess potential roles for the UN in preventing and combating cross-border tax crimes requires a review of current UN roles and institutional capacities. Indeed an entire paper is required to adequately assess the capabilities of the UN in law enforcement.

A. Current Roles

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87 For more information *see* Raul Cabrera and Alison Bennett, *Common Law Revenue Rule Not Bar To Smugglers' Wire Fraud Prosecution*, DAILY REP. FOR EXEC., April 27, 2005, at G-9; Patti Waldmeir, *Foreign Tax Fraud Put Within Reach of US Law*, FIN. TIMES, April 27, 2005, at 4, col. 1.

88 *BoNY suspects plead guilty*, CNN MONEY, Feb. 16, 2000; *Russian money launderers plead guilty*, BBC NEWS, Feb. 16, 2000.

109. The UN Office on Drugs and Crime (UNODC) (Treaty and Legal Affairs) in Vienna makes a crucial contribution to the fight against organized crime. The Global Programme against Money Laundering (GPML) is the key instrument of the United Nations Office on Drugs and Crime in this task. Through GPML, the United Nations helps Member States to introduce legislation against money laundering and to develop and maintain the mechanisms that combat this crime. The programme encourages anti-money laundering policy development, monitors and analyses the problems and responses, raises public awareness about money laundering, and acts as a coordinator of joint anti-money laundering initiatives by the United Nations with other international organizations.

110. Strategies include granting technical assistance to developing countries, organizing training workshops, providing training materials, transferring expertise between jurisdictions, conducting research and analysis and gathering data.

111. Established in 1997, the Centre for International Crime Prevention (CICP) is the United Nations office responsible for crime prevention, criminal justice and criminal law reform. The CICP works with Member States to strengthen the rule of law, to promote stable and viable criminal justice systems and to combat the growing threats of transnational organized crime, corruption and trafficking in human beings. Since October 2002, the Centre for International Crime Prevention (CICP) has been renamed the UNODC Crime Programme.

112. 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 Crime[89] and, in response to its expansion into the realm of CTFE, the Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill.[90] 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.[91]

1. Terrorism

113. Terrorism constitutes a threat to international peace and security, and it is contrary to the purposes and principles of the United Nations. UNODC's Global Programme against Terrorism is an integral part of the United Nations' collective action against terrorism. The Programme, working closely with the Counter-Terrorism Committee of the Security Council, provides technical assistance to Member States and promotes international cooperation against terrorism.[92]

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89 U.N. Office on Drugs and Crime, Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime (1999).

90 U.N. Office on Drugs and Crime, Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill (2003).

91 U.N. OFFICE ON DRUGS AND CRIME, GLOBAL PROGRAMME AGAINST MONEY LAUNDERING, *at* http://www.unodc.org/unodc/en/money_laundering.html (n.d.).

92 UNDOC, *Crime Prevention and Criminal Justice* http://www.unodc.org/unodc/en/crime_prevention.html, accessed Nov. 14, 2005.

a. The 1999 International Convention for the Suppression of the Financing of Terrorism

114. The 1999 International Convention for the Suppression of the Financing of Terrorism prohibits direct involvement or complicity 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 used to carry out any of the offenses described in the Convention, such as those acts 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.[93] Offenses are deemed to be extraditable crimes, and signatories must establish their jurisdiction over them, make them punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite them, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings.

115. 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.[94] Article 18(1) requires signatories to subject financial institutions and other professionals to "Know Your Customer" requirements and the filing of suspicious transaction reports. Additionally, article 18(2) requires signatories to cooperate in preventing the financing of terrorism insofar as the licensing of money service businesses and other measures to detect or monitor cross-border transactions are concerned.

b. Security Council Resolutions 1368 and 1373

116. On September 12, 2001, the United Nations Security Council adopted Resolution 1368, condemning the attacks of the day before 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 harbouring the perpetrators."[95] 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 international anti-terrorist conventions and Security Council resolutions."[96] Finally, the Resolution expressed the Security Council's preparedness to take

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93 International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000) (entered into force Apr. 10, 2002).

94 *Id.*

95 S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. at § 3, U.N. Doc. S/RES/1368 (2001).

96 *Id.* at § 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 the 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 the Taliban to stop

"all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism."[97]

117. 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 terrorism; (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 haven to terrorists; (6) afford one another the greatest measure of assistance in 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.[98]

118. 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 members 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 drew on several commitments that have already been made in treaties and past resolutions and made them immediately binding on all member states.[99] Many of its clauses require changes in national laws, such as those dealing with border controls and asylum.[100]

119. From an implementation perspective, an important aspect of Resolution 1373 is the establishment of the Counter-Terrorism Committee (CTC) of the Security Council, consisting of each member of the Council, to monitor member states' implementation of the resolution.[101] The CTC is divided into three five-member subcommittees, each of which oversees one-third of the U.N. member states. All member states must report to the CTC on the steps they have taken toward implementation, and it is the duty of the CTC to review these reports and advise the appropriate subcommittees 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

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supporting terrorism).

97 S.C. Res. 1368, *supra* note 89, at § 5.

98 S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001). No terrorist organizations were specifically cited in the resolution. *Id.*

99 Serge Schmemann, *U.N. Requires Members to Act Against Terror*, N.Y. TIMES, Sept. 29, 2001, at A1.

100 Human Rights Watch has noted the possibility that these changes may involve new and overbroad statutes that will impinge on basic liberties. HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE, 4-5 (2003).

101 S.C. Res. 1373, *supra* note 92, at § 6.

that regard.[102] Although the CTC will not define terrorism in a legal sense, its work will help develop minimum standards for an international CTFE regime.

2. Corruption

120. Corruption is a complex social, political and economic phenomenon. The Global Programme Against Corruption targets countries with vulnerable developing or transitional economies by promoting anti-corruption measures in the public sphere, private sector and in high-level financial and political circles. The Judicial Integrity Programme identifies means of addressing the key problem of a corrupt judiciary.[103]

121. On September 15, 2005, the United Nations announced that the UN Convention against Corruption received the 30th ratification it requires to take effect as Ecuador deposited its ratification during the treaty event of the UN World Summit.[104]

122. The Convention will take effect 90 days after the deposit of the 30th ratification.

123. In December 2003, the Convention opened for signature. More than 100 countries have signed. The Convention requires signatories to criminalize transnational corruption.

124. Chapter II requires each signatory to take preventive anti-corruption measures, including establishing a preventive anti-corruption body or bodies, measures for the public sector, codes of conduct for public officials, public procurement and management of public finances, public reporting, measures relating to the judiciary and prosecution services, private sector measures, measures to promote active participation of civil society and groups outside the public sector, and measures to prevent money-laundering.

125. Chapter III requires a variety of steps for signatories, including criminalizing the bribery of national public officials, foreign public officials and officials of public international organizations, embezzlement, misappropriation of other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, embezzlement of property in the private sector, laundering of the proceeds of crime, concealment, obstruction of justice, liability (criminal, civil or administration) of legal persons, participation and attempt. In addition to providing for the wide range of criminal offenses, the Chapter requires a variety of other measures, such as protection of witnesses, experts and victims, protection of reporting persons, and establishing or ensuring the existence of a body or bodies or persons specialized in combating corruption through law enforcement.

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102 COUNTER-TERRORISM COMMITTEE, HOW DOES THE CTC WORK WITH STATES?, *at* http://www.un.org/Docs/sc/committees/1373/work.html (n.d.).

103 UNDOC, *Crime Prevention and Criminal Justice* http://www.unodc.org/unodc/en/crime_prevention.html, accessed Nov. 14, 2005.

104 UN News Service, *UN Convention against Corruption Gets Go-Ahead after 30 Ratifications*, Sept. 15, 2005 (http://www.un.org).

126. Chapter IV of the Convention requires signatories to provide a variety of international enforcement on request of other countries, including mutual assistance, transfer of criminal proceedings, extradition, and joint investigations. Chapter V of the Convention concerns asset recovery. It provides for the prevention and detection of transfers of proceeds of crime, mechanisms for recovery of property through international cooperation in confiscation, international cooperation for purposes of confiscation, special cooperation, return and disposal of assets, consideration to establishing a financial intelligence unit to help in international cooperation, and bilateral and multilateral agreements and arrangements to enhance the effectiveness of international cooperation.

127. Chapter VI concerns technical assistance and information exchange. It calls for each signatory to initiate, develop or improve specific anti-corruption training and technical assistance, collection, exchange and analysis of information on corruption, and other measures, such as implementation of the Convention through economic development and technical assistance.

128. Chapter VII establishes mechanisms for implementation, such as the establishment of a Conference of the States Parties to the Convention to improve the capacity of and cooperation between signatories to achieve the goals of the Convention and promote and review its implementation. In this connection, the UN Secretary-General will convene the Conference of the States Parties not later than one year following the entry into force of the Convention. In this regard the Secretary-General must provide the necessary secretariat services to the Conference of States Parties.

129. Antonio Maria Costa, Executive Director of the UN Office on Drugs and Crime (UNODC), said the Convention will help confront corruption's toll on development at a press conference following the Convention's entry into force. Costa explained that the Convention will affect private sector corruption to some extent. In addition, through provisions on banking transparency and money laundering, the Convention will help combat organized crime.[105]

130. For instance, Article 35 of the Convention requires each signatory to take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate proceedings against those responsible for that damage in order to obtain compensation. Hence, in the future governments, businesses who believe they lost contracts and business due to corruption, and even civil society may bring lawsuits claiming compensation.

131. Because of the universal application of the Convention and its implementation by the United Nations, the Convention will catapult the new international norms and international enforcement of corruption.[106] It will supplement the existing array of international conventions on this subject. For instance, current treaties on transnational corruption include the OECD Convention on Combating bribery of Foreign officials in International Business Transactions, the Inter-American Convention against Corruption, the Council of Europe Criminal and Civil Law Conventions on Corruption.

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105 *Id.*

106 For a discussion of the new international norms, see Stuart H. Deming, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 93-131 (ABA Sec. Of Int'l Law 2005).

132. The requirement in the Convention of an agency to implement the provisions gives rise to the potential for the establishment in each country of an agency focusing on corruption. The establishment of such an agency would emulate the establishment in the 1970s and 80s of narcotics agencies[107] and in this decade of the anti-money laundering agencies (financial intelligence units).

133. Article 12(2)(3) of the Convention requires private sector to take steps to ensure the accurate auditing of all their accounts. Article 12(2)(4) requires signatories to ensure that bribes are not tax deductible. There are a number of other provisions in the Convention that relate to the interaction between cross-border bribery and tax policy.

3. Organized Crime

134. Criminal groups have established international networks to carry out their activities more effectively through sophisticated technology and by exploiting today's open borders. The Global Programme against Transnational Organized Crime maps the latest trends among organized criminal groups and highlights their potential worldwide danger so that preventive action can take place.

135. Another treaty with important AML/CTFE provisions is the 2000 Palermo Convention Against Transnational Organized Crime,[108] which contains three supplementary protocols: one to prevent, suppress and punish trafficking in persons, especially women and children; another to stop the smuggling of migrants by land, sea and air; and a third to stop the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

136. This Convention seeks to strengthen the power of governments to combat 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 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. 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.[109] In these respects, the Convention's provisions are similar to those found in the Forty Recommendations of the Financial Action Task Force on Money Laundering.[110]

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107 *See generally* Ethan A. Nadelman, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT (1993).

108 Convention Against Transnational Organized Crime, Dec. 12, 2000 (entered into force Sept. 29, 2003).

109 *Id.*

110 PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND

B. Future

137. The best way for the Committee to work on cross-border tax crimes, given its lack of resources, the number of other international organizations and other groups working on related enforcement initiatives and the controversial aspect of the issue, would seem to be to liaise and support various groups, including especially those in the UN system.

138. The Committee may want to urge the accession to the most important conventions, such as the revised European Convention on Money Laundering. Before the signing of the revised convention in May 2005, of the countries outside the CoE only Australia had joined even though many other countries have professed the importance of enhanced international money laundering cooperation as a priority policy. Similarly, the Committee should study and consider interacting with the committees in charge with implementing many international conventions, including the ones on transnational organized crime, transnational corruption, and money laundering. There is the potential to have these groups focus on the tax or tax-related aspects of their task of implementing the conventions. Similarly, the Committee may want to liaise with international organizations and groups, especially ones with universal membership, in charge of implementing soft law standards.

139. A number of institutions that are emerging to implement new international standards of preventing and prosecuting money laundering – namely the Financial Intelligence Units (FIUs) and the Egmont Group, which is in charge of assisting the FIU in their work – may play significant roles in preventing and combating cross-border tax crimes. The Committee may be able to make an important difference in strengthening the capacity of governments by communicating with and influencing some of these emerging institutions and groups rather than necessarily trying to create new groups and mechanisms that will responsibilities and authorities that overlap with those of the FIUs and anti-corruption bodies.

140. In the future the UN and other international organizations, such as the IMF, need to find a way to include in its standard setting process and implementation non-governmental organizations, such as associations of the regulated (e.g., bankers, money-service businesses, ACAMS, gatekeepers, and so forth, especially since FATF has only recently tried to reach out to NGOs and the regulated community). Without an appropriate outreach, the government-private sector partnership or the IGO-private sector partnership will not contain the requisite components of governance, transparency, and democracy. Indeed, the marches and demonstrations by some NGOs during the IMF/World Bank annual meetings target the lack of process for the NGO community. However, the regulated community has not yet effectively reached out to the UN and IMF and other IGOs for them to have a more effective participatory process even though the IGOs play a critical role in policymaking and implementation, including regulatory and enforcement matters.

141. A need also exists for penetrating and well thought out studies of the role of various actors, including IGOs and especially the IMF in relation to other IGOs, governments and NGOs in constructing an international financial enforcement regime and especially the

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subregimes of AML and CTF. This requires an application of international regime theory to the history, evolution, and future of the regimes.[111]

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111 For background generally on regime building *see* MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM (John Gerard Ruggie, ed.) (1993); for a discussion of constructing AML regimes, *see* Bruce Zagaris, *International Money Laundering* (Illustrative Case 7), in Robert S. Jordan, INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH TO THE MANAGEMENT OF COOPERATION 138-42 (4th ed. 2001); Bruce Zagaris and Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money Laundering Policy*, 19 BROOKLYN J. OF INT'L L. 872-965 (1993).