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

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

4.

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

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 l

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 custo

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,

[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

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explanatory memorandum, see the same website, CM(200
background see 86.2 o2

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

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

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 m

(6) To circumvent foreign bank secrecy laws,

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 la26(h)-18.2218.2211(r)-19( )7772(o

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

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

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

(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

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, Ass

87. Section 325 authorized the Secretary of the Treasur

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 -15.5546( )-160.665(l)-15.332alsl lll bla[illegible]

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. profese cop5.5546TJ .2211(e)-15.5546( )-18.2211(a)-15.3303

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 an

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

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.o 15.55.72 Tm [(O)-0.910326(E)2.232

126. Chapter IV of the Convention requires signatories t

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 1

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