CHAPTER 4

ROLE OF INTERNATIONAL ORGANIZATIONS, EXPERT GROUPS, REGIONAL BODIES

4.1. International development of money laundering law and regulation - Convention and Treaties

Efforts by the United Nations to combat organized crime can be traced to 1975, when the 5th UN Congress on the Prevention of Crime and the Treatment of Offenders examined changing dimensions of criminality, focusing on the notion of crime as business. Although the focus on organized crime continued, it was overshadowed for much of the 1980s by more specific concerns over drug trafficking and money laundering. These concerns resulted in the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in December 1988, which superseded earlier conventions signed in 1961 and 1971 and, in effect, established the framework for subsequent efforts to combat drug trafficking and money laundering. Many of the international conventions are largely hard law obligations, though alongside soft law are also used. It is a fact that soft laws have impressive influence in the global fight against money laundering. The Vienna Convention created three categories of criminal offenses related to money laundering, although it did not use the term “money laundering” in any of the three categories. Another area where the G-7 and the United Nations have complemented each other’s activities pertain to the activities carried out by criminal organizations to legitimize the proceeds of their activities, a complex process summarized in the term money laundering. The 1988 Vienna Convention highlighted the need to do something about the proceeds crime, illicit

484 supra note 107; p188
485 Hard laws need to be ratified by State before it comes into effect
markets, and money laundering. Similarly, the 1970 UN Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was intended to prevent illicit trafficking in art and antiquities. In contrast to these earlier initiatives, the draft convention focuses not on particular items that are trafficked but on more generic issues. Accordingly, it establishes four offenses: participation in an organized criminal group, money laundering, corruption, and obstruction of justice.

The basic difference between the 1988 Vienna Convention and the 2000 Palermo Convention is that the former applies only for drug related offences while the later applies to all serious crime. UN was the first international organization to take action against money laundering, and it is significant because of its ability to establish international law. Though the UN initially concentrated on drug related money laundering, it later expanded the scope to many other serious crimes, especially terrorism and financing of terrorism. FATF which is an international trend setter in the area, took cognizance of various international conventions while framing standards in AML/CFT for national regimes.

4.1.1 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotrophic Substances, 1988 (Vienna Convention)

The 1988 Vienna Convention was an initial effort and the participating governments were so diverse, there are differences in each country’s criminalization of money laundering, enforcement methods, methods of convictions and range of punishments. Despite the fact that the UN had just adopted its 1988 anti-drug convention, the G7 countries with the USA, UK and France in particular were not satisfied that these measures would be sufficient to prevent the use of financial institutions for the laundering of drug proceeds. In 1988 at the G7 meeting in Harrisburg, USA proposed for the creation of a task force to promote the programme of the Vienna Convention, which was opposed at that time by France was later reinstated
by them a year later at the G7 Paris summit in 1989 on the condition that they had the initial Chairmanship and that the tax offences be included in the FATFs. But. Switzerland, Austria and Luxemburg agreed to support the effort only if tax issues were taken off the agenda. After consensus and compromises, the FATF was initially established as an ad-hoc body but which has continued to be a major agenda-setter in prevention of money laundering\textsuperscript{486}.

This is one of the most important international treaties in the past 50 years. It not merely requires its signatory states to criminalise the laundering of drug money, and to confiscate it where found, but lays down so far as possible a common wording for the criminal statutes, and a common mode of enforcement. It also requires full and prompt co-operation between the signatory states for the enforcement of these laws anywhere in the world. This agreement in December 1988 commits all countries that ratify it to introduce a comprehensive criminal law against laundering the proceeds of drug trafficking and to introduce measures to identify, trace, and freeze or seize the proceeds of drug trafficking. The UK was one of the first countries to ratify this Convention which has been ratified by over 50 countries\textsuperscript{487}. The treaty also promotes international cooperation as a key to reducing the global threat of money laundering and requires states to provide assistance in obtaining relevant financial records when requested to do so without regard to domestic bank secrecy laws\textsuperscript{488}. One of the first formal definitions of money laundering to gain international recognition is that found in the Vienna Convention. The key elements of this definition include the conversion of illicit cash to a less suspicious form, so that the true source or ownership is concealed and a legitimate source is created. This definition was used by many countries when they drafted anti-money laundering laws\textsuperscript{489}. The scope of the Convention is to oblige parties to criminalize and confiscate drug trafficking and money laundering. It also provides international cooperation in all aspects of investigation, prosecution, and judicial

\textsuperscript{486} supra note 106; p9
\textsuperscript{487} http://www.laundryman.u-net.com/page12_internl_initiatives1.html accessed 18/01/2014
\textsuperscript{488} http://www.unl.edu/eskridge/cj394 laundering.docb accessed 18/01/2014
\textsuperscript{489} http://www.aic.gov.au/media_library/conferences/gambling/mcdonnell.pdf accessed 18/01/2014
proceedings, including extradition and mutual legal assistance. Article 3(1)(a) regulates the criminalization of illicit drugs and psychotropic substances. This article obliges each party to establish a comprehensive list of activities involved in drugs-trafficking that are considered criminal offences under its domestic laws. This includes production, manufacture, cultivation, possession or purchase of any narcotic or psychotropic substances. This article also includes manufacture, transportation, or distribution of any equipment, materials or substances, known to be used for manufacturing illicit drugs. In addition, this article also required each participating party to criminalize the organization, management, or financing of the drug offences enumerated in the convention.

4.1.2 Political Declaration 1988

The Law Enforcement, Organized Crime and Anti-Money-Laundering Unit of UNODC is responsible for carrying out the Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism, which was established in 1997 in response to the mandate given to UNODC through the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The Unit's mandate was strengthened in 1998 by the Political Declaration and the measures for countering money-laundering adopted by the General Assembly at its twentieth special session, which broadened the scope of the mandate to cover all serious crime, not just drug-related offences\textsuperscript{490}.

This foresaw inter alia the\textsuperscript{491}

\begin{quote}
"Establishment of an effective financial and regulatory regime to deny criminals and their illicit funds access to national and international financial systems, thus preserving the integrity of financial systems worldwide....." including
\end{quote}

\textsuperscript{490}www.unodc.org/moneylaundering accessed 30/11/2014
\textsuperscript{491} supra note 130; p124
(1) Customer identification and verification requirement applying the principle of “know your customer” in order to have available for competent authorities the necessary information on the identify of clients and the financial movements that they carry out

(2) Financial record keeping

(3) Mandatory reporting of suspicious activity

(4) Removal of bank secrecy impediments to efforts directed at preventing, investigating and punishing money laundering....”

4.1.3 Suppression of the Financing of Terrorism Convention, 1999 (SFT)

It may not be common knowledge that there was an UN Convention for the Suppression of the Financing of Terrorism proposed on 9th Dec 1999 which was open for signature from Jan 10, 2000 to December 21, 2011. Prior to 9/11 only 41 member nations had signed it, but soon followed up by 91 more members. The Convention required ratification by 22 member nations, which was lacking at the time of 9/11, but subsequently on 10th April 2002 the Convention came into force. International Convention for the Suppression of the Financing of Terrorism (the SFT Convention, 1999), requires ratifying countries to criminalize terrorism, terrorist organizations, and terrorist acts. It applies to the offense of direct involvement or complicity in the intentional and unlawful provision or collection of funds, with the intention or knowledge that any part of the funds may be used to carry out any of the offenses described in the convention, or an act intended to cause death or bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act. The convention requires each country to take appropriate measures, in accordance with its domestic legal principles, for the detection and freezing, seizure, or forfeiture of funds used or allocated for the purposes of committing the described offenses. The
convention came into force on April 10, 2002\textsuperscript{492}. In terms of the 1999 International Convention for the Suppression of Financing of Terrorism, those offences are deemed to be extraditable, and signatories must establish their jurisdiction over these offences to make the punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite violators, cooperate in preventive measures and exchange information and evidences needed in related criminal proceedings\textsuperscript{493}. The financing of terrorism was an international concern even prior to the attacks on the US in September 2001, and in response to this concern the UN adopted International Convention for the Suppression of Financing of Terrorism 1999. This Convention requires ratifying states to criminalize terrorism, terrorist organizations and terrorist acts\textsuperscript{494}. The Convention requires each state party to take appropriate measures, in accordance with its domestic legal principles, for the detection and freezing, seizure, or forfeiture of any funds used or allocated for the purposes of committing the offences described, as well as 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. The offences referred to in the Convention are deemed to be extraditable offences between state parties under existing extradition treaties and under the Convention itself. It will not only strengthen India's reach against those financing terrorism but also act as a check against generation and accumulation of black money through terrorism or organized crime\textsuperscript{495}. This Convention has a major shortcoming as it does not provide for a monitoring agency to oversee enforcement of the Convention. However the Convention has been supplemented by the UN Security Council Resolution 1373 of September 28, 2011 and since the Resolution has been placed under Chapter VII of the UN Charter, it empowers the Security Council to enforce it terms by using measures ranging from sanctions to use of military force\textsuperscript{496}.

\begin{itemize}
\item\textsuperscript{492} supra note 230; p5
\item\textsuperscript{493} supra note 368; p57
\item\textsuperscript{494} supra note 1; p-III-4
\end{itemize}
4.1.4 UN Convention against Transnational Organised Crime, 2000 (Palermo Convention)

The Palermo Convention is important because its AML provisions adopt the same approach previously adopted by the FATF in its 40 Recommendations on money laundering. The Palermo 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. Palermo Convention was of significance because of the fact that it was the firstly legally binding UN instrument in the field of organized and serious crime. Signatory countries pledge to (1) criminalise offences committed by organized crime groups including corruption and corporate or company offences (2) combat money laundering and seize the proceeds of crime (3) accelerate and extend the scope of extradition (4) protect witness testifying against criminal groups (5) strengthen cooperation to locate and prosecute suspects (6) enhance prevention of organized crime at the national and international levels (7) develop a series of protocols containing measures to combat specific acts of transnational organized crime.

The Convention aims to promote international cooperation to prevent and combat transnational organized crime. The scope of this Convention covers the prevention, investigation, and prosecution of participants in an organized criminal group (article 5), the laundering of crime proceeds (article 6), corruption (article 8), and obstruction of justice (article 23). However, one thing that should be noted is that these crimes must be transnational in nature. Regarding the criminalization of laundering criminal proceeds, this Convention formulates it identical to the Vienna Convention and the Strasbourg Convention. The difference lies in the predicate crime as a result of which the proceeds have been generated. If the former links the predicate crime to drugs-related crimes and the latter does not link it to any specific crime but leaves it

497 supra note 368; p58
open ended to the state parties, this Convention encourages state parties to consider the widest range of predicate crimes including serious crimes, participation in organized criminal groups, corruption, and the obstruction of justice.

The treaty has two main goals. One is to eliminate differences among national legal systems, which have blocked mutual assistance in the past. The second is to set standards for domestic laws so that they can effectively combat organized crime. The new convention also aims to tackle the root cause of transnational crime-profit. It will include strong measures that will allow law enforcers to confiscate criminal assets and crack down on money laundering. And it will call for the protection of witnesses. The treaty and its protocols were drafted by a special committee involving more than 120 UN member countries and adopted in November 2000 by the Millennium General Assembly. They were opened for signature at a high-level meeting in Palermo, Italy, the following month and will go into force after 40 governments have ratified them. The new treaty seeks to align national laws in criminalizing acts committed by organized criminal groups. Under the convention, this behaviour includes organizing, directing or aiding serious offences committed by an organized criminal group. And it entails agreeing with one or more other persons to commit a serious crime for financial or other material gain. Transnational crime nets huge profits, which are laundered through licit businesses or stashed in "safe" accounts. Cutting off these funds or hindering their storage could cause major damage to the running of entire criminal networks498.

4.1.5 United Nations Convention against Corruption 2003(UNCAC)

The issue of money laundering was also taken up in the United Nations Convention against Corruption 2003 and are summarized in Art-14 captioned “Measures to prevent Money laundering”, Art. 52 “Prevention and detection of transfer of proceeds of crime” and Art.54 “Mechanism of recovery of property through international cooperation in confiscation”. The basic idea here is to prevent money

laundering related to corruption though the actual measures foreseen in dealing with the problem of money laundering are not limited to corruption related money laundering alone, but to all types of transfers related to the illicit acquisition of personal wealth. Thus in the preamble of the convention speaks of the need to “prevent, detect and deter in more effective manner international transfer of illicitly acquired assets and to strengthen international cooperation in asset recovery”. The underlying “proceeds of crime” are defined in Art.2 as “any property derived from or obtained, directly or indirectly through the commission of an offence”\textsuperscript{499}.

4.1.6 Political Declaration and Plan of Action, 2009

The 2009 Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to counter the World Drug Problem was adopted at the High level segment of the 52\textsuperscript{nd} Session of the CND 12\textsuperscript{th} March 2009. Art.29 of the declaration states that “illicit crop cultivation and illicit drug production, manufacturing, distribution and trafficking have been increasingly consolidated into a criminally organized industry generating enormous amounts of money laundered through the financial and non financial sectors..” Parties to the Declaration committed themselves to “strengthening the effective and comprehensive implementation of regimes for countering money laundering and to improving international cooperation including judicial cooperation, to prevent, detect and prosecute such crimes, dismantle criminal organizations and confiscate their illicit proceeds. Member states decided to establish 2019 as a target date for States to eliminate or reduce significantly and measurably money laundering related to illicit drugs. Art.50 (UN Political Declaration 2009) states that the laundering of money derived from illicit drug trafficking and other serious crime continues to be a global problem that threatens the security and stability

\textsuperscript{499} supra note 130; p 125
of financial institutions and systems, undermines economic prosperity and weakens governance systems.\textsuperscript{500}

\subsection*{4.1.7 Salvador Declaration on Comprehensive Strategies for Global Challenges, 2010 (Salvador, 2010)}

The international efforts were followed up later in 2010 by the “Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World” was signed again calling upon MemberStates to take measures.\textsuperscript{501} The 2010 “Salvador Declaration on Comprehensive Strategies for Global Challenge: Crime Prevention and Criminal Justice System and Their Development in a Changing World” was adopted by the 12\textsuperscript{th} UN congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12\textsuperscript{th} to 19\textsuperscript{th} April 2010) Art.22 of the Declaration emphasized the need for adoption of effective measures to implement the provisions on preventing, prosecuting, and punishing money laundering contained in the UN Convention against Transnational Organized Crime and UN Convention against Corruption, and encouraged member states to develop strategies to combat money laundering based on the provisions of these two Conventions. In Art.23 it goes a step further and encourages “Member states to consider developing strategies or policies to combat illicit financial flows and to curb the harmful effects of uncooperative jurisdictions and territories in tax matters” In Art.24 of the Declaration recognized the need to deny criminals and criminal organizations the proceeds of their crime, and called on Member states to adopt effective mechanism for the seizure, restraint, and confiscation of proceeds of crime and to strengthen international cooperation to ensure effective and prompt asset recovery.

\textsuperscript{500} ibid
\textsuperscript{501} supra note 454; p7
4.1.8 Financial Action Task Force (FATF)

The FATF, a 36-member inter-governmental body established by the 1989 G-7 Summit in Paris, has primary responsibility for developing a worldwide standard for AML and CFT. It works in close cooperation with other key international organizations, including the IMF, World Bank, the United Nations, and FATF-style regional bodies. The work of the FATF has been supported by the G-7 and the G-20, most recently in the context of initiatives to address the 2008-2009 international financial crisis and its aftermath. Less than a year after money laundering was first addressed in Vienna Convention- a legally binding international agreement, the leaders of the then G-7 countries agreed to establish the FATF as a platform for coordinating and strengthening their efforts to “follow the money” and to “take profits out of crime”\textsuperscript{502}. At the 1989 Paris summit, the G7 leaders issued a firm statement supporting and advocating ratification of the 1988 UN Convention. They nevertheless chose to set up a separate body, called the FATF, to implement the AML regime. FATF is a policy making body which works towards generation of necessary political will to bring about national legislative and regulatory reforms\textsuperscript{503}. In an initial phase, the rule makers did indeed operate in a technical environment. When established in the year 1989, FATF entered a field which did not exit before and new to a regulatory. Being a nascent domain only a handful of experts from a limited member states drafted the 40 Recommendations. In the mid 90s the environment changed as more and more actors in private, public, national and international entered the AML field, and thereafter it was no longer technical. Rather it showed symptoms of institutional environment. Instead of relying on the expertise along, FATF tried to enhance the participation of various actors in the field. Since the G7 had no secretariat or statute, the FATF office was established at the OECD. FATF was mooted by G7 specifically because they saw a deficiency in the UN’s ability to fight drugs. Contrary to the G7/8, the UN has worldwide membership, but reaching consensus is often difficult. Its bureaucratic structure and lack of resources

\textsuperscript{502} supra note 25; p139

make the organization ineffective. Rivalries between groups of nations also complicate efficient execution of tasks and collective management.\textsuperscript{504}

In 1990, within a year after its creation, the FATF drafted Forty Recommendations to counter money laundering. Instead of creating an international law, the Recommendations preferred harmonization of domestic laws through ‘soft law.’ Though the quasi-legal instrument does not have a binding force, when a sufficient number of nations adopt it, the instrument has political, institutional and moral backing. After the September 2001 attacks in the US, FATF mandate was expanded to include combating the financing of terrorism (CFT). The FATF recommendations are today endorsed by more than 170 jurisdictions, and is currently developing into international AML standards (FATF 2008) Unlike the FATF system, however, the UN Convention does not establish an enforcement system that generates useful information about compliance, because the Convention’s provisions regarding the detection of criminal financial activity are extremely vague. In the preamble to the Action Plan, reference was made to a United Nations Commission on Narcotic Drugs resolution which \textit{de facto} elevated the status of the FATF as the global standard in the fight against money laundering. The far more detailed FATF recommendations were thus \textit{de facto} introduced through the back-door into the international system as the standard setters for fight against money laundering. FATF 40 recommendations set out principles for action, as they permit flexibility in implementing principles according to the country’s own particular requirements and constitutional provisions. Although not binding as law upon any country, the 40 recommendations have been widely endorsed by the international community and relevant organizations as the international standard of AML. FATF’s Forty Recommendations on Money Laundering and its nine Special Recommendations on Terrorist Financing constitute the international standards on AML/CFT. Therefore, the legal framework of a country’s money laundering regime should be consistent with these standards. Meeting the international standards almost always requires legislative and/or regulatory action depending upon the legal system of

\textsuperscript{504} supra note 119; p5
the country, its laws and rules. Any inconsistency with international standards may neutralize or negate the money laundering regime. If there are potential conflicts, additional legal or legislative actions may be needed to eliminate them to achieve a legal framework that satisfies international standards. FATF recommendations covered the criminal justice system and law enforcement, the regulation of financial system, international cooperation, and criminalization of money laundering, with predicate offenses that traversed beyond trafficking in drugs. In effect, the recommendations can be understood as an attempt to establish an anti-money laundering regime with two broad components. The FATF emphasized the need for legislative measures to enable authorities to identify, trace, evaluate, and confiscate laundered money or property of corresponding value. In addition, it opposed anonymous accounts and highlighted the need for measures to gather information about true identify of the persons on whose behalf transactions were carried out. The Recommendations try to approach AML regime with two broad components. The first component pertain to domestic regulatory regime which encompasses monitoring and reporting of cash transactions above a limit, reporting of suspicious transactions, mandate of KYC norms by banks, and customer due diligence measures. The second component relate to international cooperation encompassing mutual legal assistance treaties, cooperation in investigation and sharing of information. Though not a formal convention the Recommendations has provided a bench mark for member states. FATF has also other roles to play like monitoring the progress of member states through Mutual Evaluation and to review money laundering trends, techniques and counter measures and to share this information with member s to enhance their capacity to respond innovative techniques in money laundering. The main feature of FATF recommendations is that they have a mixed preventive and repressive character. Although the recommendations of the FATF and CFATF (Carribean FATF- formed in Jamaica in November 1992) have no formal basis in international law, it can be said that they are at least politically binding since they have been ratified by the individual

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505 supra note 230; p3
506 supra note 107; p124
countries. To date, FATF has successfully monopolized rule-making authority in this field, as a large number of states have started to implement its standards. Overall FATF has been widely regarded as a successful rule maker. Empirical study suggests that international organization imposes limits on the way they exert force, and FATF uses blacklist only to nudge states to cooperate. Though FATF 40 recommendations are comprehensive, some argue that flaws also exist. Such as absence of recommendation of protection of civil and human rights. This raises concern particularly in the context of increasing powers available to regulatory and law enforcement agencies, to identify, investigate and prosecute money laundering.

The first role of FATF is to monitor the progress of the member states in implementing measures to counter money laundering through annual self-assessments and more detailed mutual evaluations. This is done through review processes that provide opportunities to put considerable moral and political pressure on jurisdiction which are not in compliance with the recommendations. Under FATF pressure, for example, Austria grudgingly agreed to deal with anonymous savings accounts that ran counter to notions of transparency and accountability. Setting standards would be of little unless there is a mechanism in place for seeing whether they were adhered to. The FATF assesses formal compliance with the prescribed standards and their effective implementation, through a process of Mutual Evaluation. This involves assessment of a country by experts from other countries, who will thoroughly examine whether the country is fully compliant with each of FATF Recommendations, or if not, where they fell short. A report is presented to the FATF Plenary Session, and two years later the country must report what it has done to remedy those areas where the report has found weakness. Strength of the FATF is endorsed to the willingness of its Members to undertake self-assessment and mutual evaluation process against the 40 Recommendations. The 31 members of FATF do not merely develop recommendations.

507 supra note 22; p54-55
508 Dieter Kerwer & Rainer Hulsse “How International Organizations rule the world – The case of the FATF on Money Laundering”; p64
509 supra note 107; p123
and interpretative notes. The mission and objective of the organization include implementation of 40 Recommendations through two pronged approach (a) self assessment exercise and (b) a more detailed mutual evaluation procedure\textsuperscript{510}.

In order to encourage all countries to adopt measures to prevent, detect and prosecute money launderers the FATF has adopted a process of identifying those jurisdictions which serve as obstacle to international cooperation in the area. The process uses a twenty three point criteria/parameter, which are consistent with the 40 Regulations to identify such Non Cooperating Countries and Territories (NCCT) and place them on a publicly available list. In the event of an NCCT country not making sufficient progress in implementing the Regulations, counter measures may be imposed. In addition to the application of applying special attention to business relationship and transaction from such countries, FATF can also impose further counter measures which may be applied in a gradual, proportionate and flexible manner. The counter measures may also include FATF member countries terminating transactions with financial institutions from such a country. The black list of FAT is transparent with regard to the conditions under which a country gets on the black list or not, as it publishes the criteria for identifying countries and territories non co-operative in anti money laundering and terrorist financing, along with the assessment of blacklisted countries and the development of these countries regarding the criteria. Black lists at the most are soft law arrangements, as there is no fine or penalty for blacklisted countries. So, intergovernmental organizations can just hope that international community will react and punish the listed countries by withdrawing from business and by reducing exports or imports. It can only hope that compliant banks and institutions will avoid dealing with them\textsuperscript{511}. Expertise played a pivotal role even in drawing a blacklist of money laundering havens. Throughout the NCCT process, FATF ensured openness, fairness and objectivity in its evaluation, as experts developed the evaluation criteria. The whole process was aimed not to arbitrarily blacklist a jurisdiction, but to make an objective

\textsuperscript{510} supra note 410; p53
\textsuperscript{511} Brigitte Unger and Joraw Ferwerda (2008), “Regulating Money Laundering and Tax Havens – The Role of Blacklisting”, Tjalling C. Koopmans Research Institute; p13
assessment by neutral experts. Thus legitimacy was considered important even if simply looks like power politics. FATF did not simply impose coercive measures upon uncooperative countries but tried to endow these measures with legitimacy. FATF has considered its rule making process as an expertise that produces useful and correct solutions, and not political compromises.

If one goes by the annual blacklist published by the FATF and noticing countries disappearing from the list every year, it would give an impression that the control is very effective. It is seen that between the period 1999 to 2006 less countries seemed to engage in laundering, as the list goes. As of 13th October 2006 there are no NCCTs., and countries seem to be eager to disappear from the list. It can be concluded that FATF blacklisting of non cooperative countries is no longer a way of identifying money laundering countries. While the FATF money laundering blacklist is now empty, there are only three countries all of them European, left on the OECD blacklist, which is a shorthand description of ‘the list of uncooperative tax havens’. These three European countries left are Andorra, Liechtenstein, and Monaco. However, it is possible to reconcile the existence of the blacklist with an understanding of FATF as a standard setter. The crucial insight is that the blacklist only plays a limited role in how FATF works. Firstly to recall, FATF had been a successful rule maker even before it resorted to this mechanism. After its revival in 2007 it is clear that it was not a temporary aberration. Though the blacklist aims for basic acceptance, the problem is how to make States comply with AML rules, when the regulations have only a force of voluntariness.

The blacklist for money laundering and terrorist financing is ambiguous with regard to transparency as well. Rawlings and Sherman concluded that the national blacklists used by countries tend to be out of date, inaccurate and arbitrary, and that the methodologies used to compile blacklists are often opaque and do not tend to

512 supra note 511; p4
513 supra note 508; p63
follow any formal procedure. There is a debate on how far the two black lists are reliable (FATF & OECD) The OECD black list has been criticized as one which is being incomplete, as big and powerful countries are missing. By the criteria set out by the OECD, the United States is now guilty of practicing harmful tax competition. The view which supports this is that banks in the US are the depositories for hundreds of billions of dollars from non-residents whose interest income it not taxed, while resident interest income is taxed at 30%. This ‘no tax’ policy of the US has kept this large sum of money in the banking system since 1921. According to one view FATF was hijacked by its important member state, the USA. It was opined that Clinton administration was the force behind the NCCT process. There is no evidence to point out that FATF abandoned its pursuit of blacklisting to safeguard its legitimacy as a voluntary standard setter. Another explanation point out that the reason for abandonment of black list is all countries in the list had by then implemented AML regulations. Another view points out to the limited administrative support FATF had to cope up with additional workload of NCCT process. Other view is that international financial institutions, such as IMF opposed the NCCT practice pointing out that the practice is against the nature of the Fund. Ultimately, the FATF has threatened an economic embargo of any recalcitrant state refusing to mend its wayward ways. From a policy perspective such economic sanctions have history of negative impact without accomplishing the desired results. FATF hard-line approach in letter and spirit violates two Charters of UN, as well as other international Conventions. Any measure to compel compliance with Recommendations, and such compulsion which is contrary to the UN Charter and other conventions, may also threaten the integrity and legitimacy of decades long international efforts to combat money laundering. Assuming arguendo, that money laundering does threaten the peace among nations, there remains no international justification for imposing sanctions upon the targeted “non-compliant” jurisdictions for

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514 supra note 511: p12
515 supra note 508: p66
516 Todd Doyle, “Cleaning up Anti Money Laundering Strategies – Current FATF tactics needlessly violate International Law” Houston Journal of International Law, Vol.24-2; p281
any failure to act, or for not acting in a way prescribed by G-7 nations\textsuperscript{517}. The FATF’s new “comply-or-else” policy will not only discourage provisional membership, but may also lead to resentment. It may also force certain jurisdictions to supply wrong information, or by passing a AML legislation without any efforts to implement it. Common sense dictates that adoption a most effective legislation without full political backing of a state is unlikely to yield desired results. According to British counter-laundering consultant Nigel Morris, the FATF has consistently overlooked the failures of its own members, while blacklisting of some countries led to pressure and resulted in hurriedly passing AML laws without the financial, technical and human wherewithal\textsuperscript{518}.

FATF members have turned their attention to specific money laundering mechanism such as information remittance system, trade-related schemes, internet banking, and company formation agents, resulting in money laundering typologies. To strengthen the global AML network FATF is committed to broaden its membership to include new countries, and creation of regional grouping like for example the creation of ESAAMLG (Easter and South African Anti-Money Laundering Group) in August 1999. FATF has constantly sought to extend the scope of AML measures sectorally, geographically and functionally. In the first half of 2000 FATF published criteria for identifying non cooperative jurisdiction. Fifteen jurisdiction with serious systemic problems were identified.

Though FATF has tried to enhance its legitimacy by taking the view of experts and new members, there is no proof that its standards have been complied with accepting such with a legitimacy. A thorough analysis indicate that FATF legitimization efforts have played a role in enhancing compliance with its rules. This assumption is based on two counts. First many non FATF members had complied with its rules, much before the black listing or coercive moves. Secondly FATF puts much efforts in legitimizing its rules and makes it public as to how important it considers the views of

\textsuperscript{517} ibid; p297
\textsuperscript{518} supra note 227; p783
experts and their participation\textsuperscript{519}. The prospect of sanctions would imperil one of the FATF’s most impressive sources of legitimacy—the fact that compliance with the organization’s guidelines has been secured despite the fact that participation is voluntary and its recommendations non-binding. The case of anti-money laundering offers an excellent illustration of how this specific form of global rule-making involves a specific institutionalization of power. FATF understood that compliance of its own members alone would not be enough., and it needs to secure compliance of non-members, in effect global compliance, if it wanted to rule out money laundering.

FATF recommendations were considered to be legitimate precisely because they were written by neutral experts with superior knowledge of the problem. If countries are convinced of the fact that rules are made by experts, it provides solutions to all of them A study of FATF plenary meetings would reveal that it is not a political forum but a gathering of experts. Hence, FATF leaves little doubt its most important meetings are dominated by experts\textsuperscript{520}. More than that, FATF has encouraged development of regional groups to adhere to the same standards. By the U.S. government’s count, about 130 jurisdictions - representing about 85\% of world population and about 90 \% of global economic output - have made political commitments to implementing the Forty Recommendations\textsuperscript{521}. The expertise base in the FATF is also a signal to non-members that it is an impartial regulator. The legitimacy of its measures is based on the fact that they are backed by experts. Overall, numerous procedural features of the AML regime make it reasonable that expertise is at least one important helpful factor for rule-following. The pacesetter behind most of the AML initiative was and still is the FATF. The forty recommendations are a comprehensive blue print for action against money laundering. They cover the criminal justice system and law enforcement, the financial system and its regulation and international cooperation. While FATF has always framed its guidelines as legally non

\textsuperscript{519} supra note 508; p60
\textsuperscript{520} ibid; p55
binding ‘recommendations’ it developed strong compliance mechanism that applied not only to its members, but also against non members.

For many years FATF was restricted to the principal twenty six industrialized countries of which five are commonwealth members. However in line with its new strategy for increasing the effectiveness of international anti money laundering efforts, in 1999 it was decided to expand its membership to a number of strategically important countries who can play a major regional role. The FATF has no formal constitution, and Prof Peter Aldridge, head of school of law at Queen Mary, University of London suggested that it needed one, as it had operated on a adhoc and temporary basis for the last few decades. If it was to be a standing body it should in his view, be properly constituted and established by an international convention. The FATF has small secretariat and limited membership and operate by consensus. Prior to the creation of FATF there was a chasm in the global governance of crime. British politicians and officials became increasingly embarrassed at allegations in international forum such as FATF, the UN and the EU that Britain was allowing its offshore territories to behave like pirates. FATF emphasizes that it wants to remain an exclusive organization, and this perhaps has prompted it to limit its members, to retain its current structure and character. However FATF is still far from being an inclusive standard-setter, as a member of thirty four is hardly universal and smaller countries without strategic relevant continue be excluded from standard setting process.

From its inception the focus of FATF has been to circumvent the physical movement of currency and abuse of financial institutions for laundering purpose. It was only during 2006 that the FATF took note of the threat of TBML and issued its first typology report on the subject, which was later followed by Best Practices Paper on TBML in the year 2008, and thereafter report on Money Laundering Vulnerabilities in free Trade Zones of 2010. However in spite of the concerns raised by many commentator.

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522 supra note 21; p16
523 supra note 299; p14
524 supra note 59; p306
525 supra note 508; p58
and recognition of the problem as early as in 2006, FATF Recommendations revised in the year 2012 again failed to specifically address the issue of TBML\textsuperscript{526}.

Although FATF is termed as a universal organization, among the limitations are that it is not a formal organization and it has limited membership and limited permanent staff. FATF’s limitation affects its legitimacy and its ability to make and implement policies both with the governments and private sector. FATF nations should be careful in using their influence responsibly, and not to take advantage of their dominant position in bullying other jurisdictions, and interfering with the sovereignty of a State. Two wrongs do not make a thing right, and hence to eliminate one form of lawlessness by resorting to another is a recipe for failure. Therefore FATF should withdraw its threat sanctions, and instead encourage members to implement AML laws within their domestic borders\textsuperscript{527}. And finally, since membership in FATF is voluntary, members always have the option of escaping sanctions by leaving the organization. Non-members do not have this option, but the black list was short-lived. Overall, the sanctions attached to anti-money laundering standards are so weak that they are best classified as standards rather than coercive rules. To conclude, despite the fact that money laundering is a policy problem that should require binding rules, regulators dealt with it by standards. The FATF process of selecting countries and jurisdiction which are not meeting the minimum international standards was quite controversial, as was the process to delist them once they met those standards. Adherence to the antimony laundering-rules seems to follow the logic of power politics, and the non FATF members have little choice as the combined economic power of members outweigh their powers. Therefore, non-members, to put it in a paradox, are forced to comply voluntarily\textsuperscript{528}. All available statistics show that the amount of criminal proceeds that have been confiscated in recent years are continuously increasing, demonstrating that


\textsuperscript{527} supra note 516; p306

\textsuperscript{528} supra note 126; p622,627
the member states of the FATF are achieving continuous progress in their fight against financial crimes.

Complementing the systematic efforts by the FATF to develop and extend an effective AML regime has been the creation of informal networks such as Financial Intelligence Units (FIUs), the U.S. Treasury’s Financial Crimes Enforcement Network (FINCEN) and Australia’s AUSTRAC. This cooperation is formalized through establishment of Egmont Group. The regular meeting among members benefit sharing of information through network of FIUs linked by secure internet connections. The formal meetings merely provide a framework to enhance the co-operative effort. Both the UN and FATF have played critical role in setting international norms. While the UN did this through Conventions, FATF has established a mechanism of performance review of national governments and imposition of peer pressure, which has prove effective in establishing a regulatory approach to money laundering, at not all States are signatories to International Conventions529.

4.1.9 UN Global Programme Against Money Laundering - GPML

UN is actively operating a programme called GPML headquartered in Vienna, Austria. It has the ability to adopt international treaties or conventions that have the effect of law in a country once that country has signed, ratified and implemented the convention, depending upon the country’s constitution and legal structure. In certain cases the UN Security Council has authority to bind all member countries through Resolution, regardless of the action of independent members. It has through UNDCP initiated an international agreement to combat drug trafficking and money laundering the Vienna Convention in 1988, which came into force on 11th November 1990. The obligations resulting from the 1988 Convention was further detailed in 1998 Political Declaration and the related Action Plan (“Countering Money Laundering”) passed unanimously by the UN General Assembly at its 20th special session on the World

529 supra note 107; p125,129
Drug Problem held 8 to 10\textsuperscript{th} June 1998 The 1988 Vienna Convention is today almost universally adhered to (184 state parties as of July 2010) and has formed for many countries the basis for their anti-money-laundering legislation. The GPML is a research and assistance project with the goal of increasing the effectiveness of international action against money laundering by offering technical expertise, training and advice to member countries upon request. IMoLIN is a one-stop anti-money laundering/countering the financing of terrorism research resource, which was established in 1998 by the United Nations on behalf of a partnership of international organizations involved in AML/CFT. The UNODC is a subsidiary body of the UN, established in 1946 with the aim of assisting ECOSOC, in supervising the application of the international drug control treaties and advising the Council on all matters pertaining to the control of narcotic drugs, psychotropic substances and their precursors\textsuperscript{530}. In 1991 the UN General Assembly established a Commission on Crime Prevention and Criminal Justice within the ECOSOC, which ensured the involvement of national governments in the efforts to combat transnational organized crime. At the inaugural meeting of the commission, Judge Giovanni Falcone, a renowned anti-Mafia figure in Italy who was subsequently assassinated by the Mafia, proposed a global conference to establish the basis for enhanced international cooperation against organized crime\textsuperscript{531}.

4.1.10 UN Resolution 1373

Resolution No.1373 of UN also established Counter Terrorism Committee (CTC) to monitor the performance of member countries in building a global capacity against terrorism. CTC which is comprised of 15 members of Security Council, is not a law enforcement agency. It does neither issues any sanction nor does it prosecute or condemn individual countries. While all international Conventions require signing, ratification and implementation by countries to have domestic law in force, a Security Council Resolution passed in response to the threat of international peace under Chapter

\textsuperscript{530} supra note 454; p4
\textsuperscript{531} supra note 107; p118
VII of UN Charter is binding upon all UN member countries. The UN Security Council Resolution 1373 adopted on 28th September 2001 oblige countries to (a) deny all forms of support to terrorist groups (b) prohibit active or passive assistance to terrorism (c) suppress provision of safe haven or support for terrorists, including steps towards freezing of assets of persons/organization/entities involved in terrorist acts (d) cooperate with all member countries in criminal investigation and sharing of information about planned terrorist acts and operations\textsuperscript{532}.

4.1.11 UN Resolution\textsuperscript{1267}

The Committee of Resolution No.1267 issues list of individuals and entities whose assets are to be frozen and puts in place procedures to make additions or deletions to the list on the basis of representation from Member states. The recent list is available from the website of 1267 Committee\textsuperscript{533}.

4.2 International Organizations & Other Agencies

The role of major International Organisations such as United Nations, IMF World Bank, Commonwealth Secretariat, Interpol, OECD, etc. are very important especially in the context of Anti-Money Laundering regulations as they play a crucial role in formulating and advising the content of enactments passed by member nations and thus play the pivotal role in the AML Processes. The guidance and draft model legislations issued by these international organizations from time to time are of significant use to the member nations who generally follow these model enactments in their domestic legislations.

\textsuperscript{532} supra note 1; p-III-5
\textsuperscript{533} ibid; p-III-6
4.2.1 United Nations

The purpose of Palermo Convention is to promote international cooperation in preventing and combating transnational organized crime more effectively. Countries are required to take measures against smuggling of migrants by land, sea, and air as well as manufacturing and trafficking of firearms and ammunition. The United Nations is one of the most experienced global providers of AML training and technical assistance. The UN Global Programme against money laundering, Proceeds of Crime and Financing of Terrorism (GPML) part of the UNODC was established to assist member states to comply with the UN conventions and other instruments that deal with money laundering and terrorist financing. The AML/CFT Mock Trial Program is an important training activity, designed to support and enhance judiciary capacities in dealing with complex financial crime cases. The long-term objective of this Program is to develop a methodology and a prototype of mock trials that could be used in other developing countries. The UN office on Drugs and Crime provides technical assistance on legislative drafting, financial intelligence, capacity building, and a range of other services to aid government and law enforcement agencies, implement their obligations under Vienna Convention and related AML initiatives. The effectiveness of the Security Council’s effort to combat money laundering and the financing of terrorism can be measured in various ways, such as the exponential increase in the ratification of counter-terrorism conventions. By requiring the states to take steps to combat the financing of terrorism and calling for ratification of the 2001 Convention, the Security Council has helped to lay the essential legal foundation for all cooperation, which is, indisputably, a significant achievement. The criticism that Security Council resolutions take a selective approach to financial crime by focusing only on the financing of terrorism without requiring prudential identification and detection mechanism appears to have no basis. Although terrorist financing and money laundering differ in both purpose and practice, development of mechanisms to protect all financial systems will ultimately prevent or intercept suspicious transactions, regardless of their ultimate

The interaction between money laundering and the financing of terrorism and of the necessitates for a single approach to combating them. Keeping that in mind it has chosen to interpret resolution 1373 (2001) broadly by viewing anti-money laundering mechanisms as one of the modalities for combating the financing of terrorism. IMoLIN, a one-stop AML/CFT research resource, which was established in 1998 by the United Nations on behalf of a partnership of international organisations involved in anti-money laundering. AMLU presently administers and maintains IMoLIN on behalf of the following 10 partner organisations: the Asia Pacific Group on Money Laundering (APG), the Caribbean Financial Action Task Force (CFATF), Commonwealth Secretariat, the Council of Europe–MONEYVAL, the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), the EuroAsian Group (EAG), the Financial Action Task Force (FATF), Financial Action Task Force on Money Laundering in South America (GAFISUD), Interpol, and the Organization of American States (OAS/CICAD). Within IMoLIN is AMLID, a unique password-protected service, having data base of AML/CFT laws of countries in an easily searchable format. Within that GPML also maintains the largest available online legal library of AML/CFT national legislation. The database now contains legislation from some 163 jurisdictions and, since January 2005, more than 300 new and amended AML/CFT laws and regulations were included in the database.

4.2.2 International Monetary Fund (IMF)

The IMF’s engagement in anti-money laundering and countering the financing of terrorism dates from early 2001. Until 2001 IMF resisted proactive involvement in AML measures but in the new political climate IMF has become more involved in AML/CFT policy due to prudential and macroeconomic effects of money laundering on national and international financial systems. In November 2001 the IMF issued a


[536] supra note 41; p53-54
communiqué calling on all members to ratify and fully implement the UN instruments to counter terrorism. Then in the summer of 2002 the IMF and World Bank commenced a 12-month joint pilot programme of assessments of the international standards conducted with the FATF and OGBS. From the summer of 2002 to April 2004, 41 countries were assessed for compliance with the international standards. The World Bank and the IMF during 2003–04 responded to requests from more than 100 countries to help them build institutional capacity to fight money laundering and terrorist financing. The technical assistance provided mainly focused on framing laws compatible to international standards, improving coordination between regional partners and government departments, and to build institutional capacity for financial sector. They have continued to work with the FATF, FATF-style regional bodies (FSRBs) and the OGBSs on the worldwide programme of anti-money laundering and counter-terrorist financing evaluations and assessments. IMF is concerned about the consequences of money laundering as it undermines the integrity and stability of financial systems, distort international capital flows, and discourage foreign investment. They have negative impact on a country’s financial stability and macroeconomic performance resulting in welfare losses. In the present scenario of increasingly interconnected world, these negative effects are global. Problems in one country can quickly spread to others, especially in the region. During the past the efforts of IMF helped in shaping domestic and international AML policies. These include over 70 AML assessments, providing inputs for implementation of financial integrity related issues, fund supported programs, and research projects. IMFs broad experiences in exercising surveillance over members’ economic systems has been helpful in providing financial integrity advice in the context of compliance with AML/CFT standards. To keep in line with the growing importance of financial integrity issues in the AML and CFT related program, the IMF Executive Board in 2004 agreed to make the AML assessment ad capacity development activities as regular part of their work. On June 1, 2011, the Executive Board discussed a report reviewing the evolution

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of the IMF’s AML/CFT program over the past five years and provided guidance as to how to move forward in this area. Following this, on December 14, 2012, a Guidance Note on the inclusion of AML/CFT in surveillance and financial stability assessments (FSAs) was issued. On March 12, 2014, the IMF Board reviewed the Fund’s AML/CFT strategy, and in the process (i) endorsed the revised FATF AML/CFT standard and assessment methodology, (ii) encouraged staff to continue its efforts to integrate financial integrity issues into its surveillance and in the context of Fund-supported programs, when financial integrity issues are critical to achieve program objectives, and (iii) decided that AML/CFT issues should continue to be addressed in all FSAPs but on a more flexible basis.

An example of IMF surveillance in AML/CFT policy is its study on FIUs tracing their development over ten years. With more than 80 FIUs gained admission into the Egmont Group the informal international association of FIUs established in 1995, and many more countries planning to establish an FIU or improve the effectiveness of the existing ones.

4.2.3 The World Bank

The World Bank and the IMF, the two premiere global financial institutions, have declined to take a leading role on the cross-border dirty-money issue. They are playing a secondary role, but not one in the front.

As a former World Bank official put it the Bank and the Fund are primarily concerned with their owners, that is wealthy countries. They are extension of national bureaucrats, favor for status-quo and are not for experiments, and will not touch issues such as illicit flows and capital flight.

538 The IMF and the Fight Against Money Laundering and Financing of Terrorism - April 2014
539 supra note 153; p253
4.2.4 The Common Wealth of Nations

In May 1996, Commonwealth Secretariat produced a model law on the prohibition of money laundering, which provides a basis from which domestic legislation can be developed. In June 1996 the Commonwealth Finance Ministers agreed to endorse a comprehensive and practical set of guidance notes for financial sector, which was revised and updated in July 2000 and further revised in July 2003.

4.2.5 INTERPOL

A discussion of international cooperation to combat transnational crime would not be incomplete without considering the efforts of Interpol. Established in 1923 and based in Lyon, France, Interpol has National Central Bureaus (NCBs) in member states, operates in four official languages (Spanish, French, English, and Arabic), and seeks to facilitate mutual assistance between law enforcement agencies in different countries. In spite of its successes, however, Interpol’s role has always been limited because its legal status has been somewhat hazy. Moreover, it is often described as a “policemen’s club” rather than a more formal international organization. Even if it is a weakness, it is also one of its strengths. In the long term, the transnational trust network it creates among police officers of different jurisdictions for its formal operations is important.

4.2.6 Organisation of Economic Co-operation and Development (OECD)

OECD has identified around 47 countries which are engaged in harmful tax practices. To counter this many OFCs argue that because of high tax rates in OECD countries, citizens and corporate are driven to their jurisdiction and therefore the members of later have to improve their tax regime, and not to compel OFCs to raise their taxes. Of course the variety of services offered by OFCs may not only facilitate

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540 supra note 235; p125
541 supra note 107; p126
tax avoidance and tax evasion, but also money laundering. and hence it must be ensured that the money flowing through OFCs is legal and legitimate in its origin.

4.2.7 European Union / European Commission (EU/EC)

The European Union consists of 15 countries and is a precursor to the integration of various nations in Europe. Historically a Committee of experts were instrumental in developing money laundering policies to EU and the Vienna Convention is the reflection of efforts of countries belonging to EU. Prior to its renaming as EU, the Council of Europe community issued EC Council Directive 91/308 of June 10,1991 on prevention of use of financial system for the purpose of money laundering. The need for European Community intervention countering the criminal use of the system was deeply felt, especially due to prevalent scenario of freedom of capital movements and the principle of the freedom to supply financial services. The Commission was eager to demonstrate that the benefits of moving capital across borders did not accrue to organized crime. Law and order considerations had been put forward to justify former capital movement, while it was important to prove that freedom of capital movements did not provide criminals with increased opportunities to move funds around, especially within an increasingly globalised economy. One development of particular significance took place in September 1990 the Committee of Ministers of the Council of Europe adopted a new Convention on laundering, search, seizure and confiscation of the proceeds of crime, known as Council of Europe Convention. The decision to expand the definition of money laundering beyond its traditional association with drug trafficking, in Council of Europe Convention was not entirely unexpected, as it finds support in the legislative practice that existed in certain states such as Swiss Penal Code. The decision was also influenced by FATF recommendation report in 1990 to consider

542 supra note 410; p4
543 supra note 30; p42
expanding the scope of offence of money laundering to reach any other crime for which there is a link to narcotics or to all serious crimes. The activities of European Union in the field of AML policies have not only resulted in Money laundering directive which is binding on all 15 member states.

The EU being sui generic compared with other policy makers like the UN, has also unique legal instruments to be used. The reasons for this harmonization development at EU level was due to the reason that member states did not have uniform set of rules to deal with money laundering, as the definition, preventive methods and nature of punishments varied among jurisdiction. Indeed before the Directive 91/308/EEC only one member state was criminalized money laundering. So it was commonly held that mere unilateral measures would not be effective against money laundering. The EU has considered the best way to approach money laundering problem is to increase the co-operation between the member states and to harmonize the AML laws of the member states by both negative and positive integration. The local measures like the one in EU will result in geographical shift in the launderers activity whose desire is to find and take advantage of a weakest link in the global regulatory chain. This is illustrated by Zagaris as ”balloon theory” according to him if the AML measures are tightened in one jurisdiction, the launderer will move to other jurisdiction where the legislation is in its infancy, like a balloon when squeezed in some spot will balloon to other directions.

Because the members of the EU have a common foreign policy, and these members having enormous influence in most international organizations and groups that make AML policy, the EUs Policy on AML has importance beyond EU. The European Union (EU) has issued two Directives on the Prevention of the Use of the Financial System for Money Laundering purpose, to achieve level playing field across EU. In June 1991 the European Parliament and Council adopted the First European Directive on Prevention of the Use of the Financial System for the Purpose of Money

545 supra note 70; p23
546 supra note 9; p17,33
Laundering. The Directive required all member states to amend their national laws so as to prevent their domestic financial systems from being exploited for the purposes of laundering money.\textsuperscript{547}

Council of Europe was established in 1949 with a human right focus. It was originally conceived as an organization ensuring and evangelizing the values underpinning the European Convention on Human Rights. For some years it filled the gap left by the diffidence of the EU to broach matters of criminal law. The Council of Europe does not have the power as does the EU to bind the UK. It does however have express power to deal in the area of criminal law. EC extends its membership to many of the area in particular Central and Eastern Europe, in or from which dirty money is suspected to originate. In late 70s concern over growing number of criminal acts like kidnapping prompted the EC to examine the problems that had arisen in European Countries as a result of money laundering.\textsuperscript{548} Europe has for a long time interested in supporting AML issues, starting with early initiative of Council of Europe in 1980. The EU has issued subsequently three Money Laundering Directives, in 1991, 2001 and 2005. There are several discerning trends in the EU's AML directive for example (i) linking with FATF standards is strong and in many ways binding (ii) G7 members such as UK and France at the forefront are eager to push comprehensive regional standards (iii) countries with long history of off-shore status such as Luxemborg are experiencing intense pressure to address potential weaknesses.\textsuperscript{549} Until the mid 80s the political and public opinion perceived the European communities were not affected by organized crime. The long tradition of legislative measures against money laundering in the US has exerted pressure on launderers to seek shelter elsewhere, and the EU areas without internal borders can be seen to be one possible choice for them. Other argument is that US forced the EU to show to the world that they want to act in an unified manner.\textsuperscript{550} In June 1991 the European Parliament and Council adopted the 1\textsuperscript{st} European Directive on

\textsuperscript{547} supra note 537; p34
\textsuperscript{548} supra note 102; p95-96
\textsuperscript{549} supra note 421; p6
\textsuperscript{550} supra note 9; p45
prevention of the use of the Financial System for the purpose of money laundering, when it recognized that money laundering will not only damage individual institution, but the financial system, and economy as a whole. In December 2001 the European Parliament adopted the 2nd directive to amend and extend the first. The 3rd directive was adopted in October 2005 and there is to be a two year period for its adoption and hence should be implemented by all member states by the end of 2007. The 1st directive of 1991 has three clear objectives. Firstly, it established the EC as a transnational security actor by containing both regulatory and criminal law provisions, but as criminal law competences fell outside ECs competence, Art.2 was included the wording “member states shall ensure that money laundering as defined in this Directive is prohibited” All the member states were thus required to introduce legislation which made money laundering a criminal offence. The second objective of the Directive is to put a lot of pressure on financial institutions both economically and morally, and made the persons behind the counter to act as moral filters. The third objective is prevention strategy was mostly seen in Art.6 which touched a nerve by lifting banking secrecy, and financial institutions were no more allowed to hold anonymous bank accounts. Convention No. 141 of 1990 from the Council of Europe, laid down a comprehensive system of rules aimed at covering all procedural aspects connected with money laundering – from the initial investigations to the adoption and execution of the confiscation sentence. It provided for special mechanisms promoting the widest possible cooperation required to deny criminal organizations access to money laundering instruments and to the proceeds of crime. The fact that all EU Member States have signed and ratified Convention No.141, an infrequent occurrence for Council of Europe instruments, illustrates the value placed upon this instrument.

The first Directive was confined to credit and financial institutions as they were considered to be the most vulnerable of being used by money launderers, although member states were encouraged to extend the requirements to other industries or sectors where there was considerable threat of handling money from criminals. The

551 supra note 9; p54-56
Directive was also restricted to drug trafficking as defined in the Vienna Convention. However, member states were asked to consider extending it to other serious criminal activity. The limitations of the First Directive were the subject of extensive discussion and hence consultations were put in place before bringing the Second Directive. It resulted in two major proposals. First to extend drug trafficking to all serious crimes including tax evasion, and secondly the controversial one being the proposal to bring non-financial sectors also into net.

When the Second Directive was adopted in 2001 it did not contain a precise definition of serious crime but let this to be reconsidered by the Commission, which was requested to present further proposals in 2004. Terrorist financing was also left to be dealt with under the heading of serious crime. After FATF made significant amendments to the 40 Recommendations which was to be applied in a consistent manner across the EU, it was consequently agreed by the member states and the Commission that a completely new Directive to fully replace the First and Second Directives should be introduced. 14 July 1999 saw the Commission present a proposal for an amended Directive that became known as the Second Money Laundering Directive. Its aim was to refine existing provisions and to plug perceived gaps arising out of the successful implementation of the first directive. Important among this was extending the scope of predicate offences to all forms of large-scale criminal activity with links to organised crime which are liable to generate significant ‘launderable’ revenues. Following the European Council of October 1999. An entire paragraph was dedicated to actions necessary to countermoney laundering. In particular, the European Council affirmed that Money laundering is at the very heart of organised crime. It should be rooted out wherever it occurs. The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime.

552 supra note 537; p27
553 supra note 544; p61,63
The introduction of the Third Money Laundering Directive was met with heavy criticism. The European Union released the Directive in a climate where some Member States had not fully implemented the reforms contained in the Second Money Laundering Directive of 2001. Criticism was also levelled at the European Union’s release of the Third Money Laundering Directive ahead of evaluating the impact of the Second Money Laundering Directive reforms. The 3rd AML directive (2005/60/EC) is the most wide ranging of the three and represents a significant step towards a more comprehensive approach. The directive incorporates FATF 40 recommendations and bring certain degree of coherence between international and European measures for fighting ML. Another harmonization efforts was made when the new council of Europe Convention on Laundering, Search, Seizure and Confiscation of proceeds of crime and Financing of Terrorism was opened up for signature in May 2005. It was signed by 22 states including Netherlands. The convention leaves it to the latitude of each Signatory State to decide which approach to use in determining predicate offences as long as the 20 crimes listed in the Appendix of Convention are covered\(^{554}\).

The European community and its Member States have participated actively in the development of international and regional money laundering counter measures from their inception. These include the 1988 Vienna Convention, and the Council of Europe 1990 money laundering Convention. Also significantly, the community Member States and the European Commission have participated in the Financial Action Task Force (FATF) either from the commencement of its operations or shortly thereafter, taking an active part in the development of the famous 40 Recommendations. These internationals standards were therefore quite influential in the development of the Community response against money laundering. In 1991, the first EC money laundering Directive when it was adopted, became the first major regional instrument adopting a near comprehensive AML framework\(^{555}\). There has also been lots of criticism that EUs

\(^{554}\) supra note 173; p130

new risk based approach results in a too flexible definition of \textit{actus reus} of money laundering crime. The broad character of AML law is regarded to be necessary to respond to the ever changing nature of the phenomenon, termed as the Chameleon threat. On the other hand too flexible terms may fail to provide clear guidance and would lead to inconsistencies\textsuperscript{556}. For many years the Council of Europe has prioritised its activities in the legal sphere. Its efforts to promote modernization of the law and closer cooperation among its members have resulted in the conclusion of more than 160 international treaties and conventions, out of which more than twenty concern matters relating to criminal law. In several ways the 1990 Council of Europe convention on laundering, search, seizure and confiscation of proceeds from the crime goes farther than the UN Convention of 1988. For instance, the obligation to criminalize the money laundering is not restricted to drug trafficking offences, as it extends to any “predicate offences”. The legislative history explains that such measures should at least be made applicable to serious crimes and to offences that generate huge profits\textsuperscript{557}. The European Commission has noted that money launderers generally do not look for the highest rate of return on the money they launder, but rather search for a place for investment, which easily allows the recycling of money even at the cost of accepting a lower rate of return. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime opened for signature on 8\textsuperscript{th} November 1990 is open to all states including its non members, hence not bestowed with moniker ‘European Convention’. The 1991 European Money Laundering Directive, which asked the states only to prohibit money laundering, though was in principle limited to dealing with the proceeds from drug trafficking offences, allowed states to extend the application field to other types of criminal activity as well. in its 1999 proposal to amend the Money Laundering Directive the European Commission, stressed for extension of the directives application field to fraud, corruption and other illegal activities damaging or likely to damage the European Communities financial interests. All preventive AML

\textsuperscript{556} supra note 9; p74  
\textsuperscript{557} supra note 368; p65
measures adopted at an international level are focused on the role of financial institutions. Thus the very first international instrument which tentatively attempted to deal with the problem, the Council of Europe Measures against Transfer and Safekeeping of Funds of Criminal Origin comprises four preventive measures, three of which are related to the role of financial institutions.\(^{558}\)

4.3 **Expert Groups**

4.3.1 **Financial Action Task Force (FATF)**

FATF is the principal organ that is spearheading the fight against money laundering on a global scale. It was set up following the concerns about money laundering expressed by the G-7 Summit in the year 1989. The FATF operates out of the OECT office in Paris but is not a part of it. FATF, being an intergovernmental body, whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The FATF is therefore a ‘policy making’ body that works to generate the necessary political will to bring about legislative and regulatory reforms.

4.3.2 **Basel Committee**

The Basel Committee on Banking Supervision was formed in 1974 by central bank governors of Group of 10 countries (Note actually the group is 13 Belgium, Canada, France, Germany, Italy, Japan, Luxemburg, Netherlands, Spain, Sweden, Switzerland, UK and USA) Individual countries are represented by their central bank or by authority responsible for overall supervision of banking sector in the absence of a central bank. Basel standards and guidelines are adopted with expectation that relevant

\(^{558}\) supra note 70; p118
authorities within each jurisdiction take all steps to implement the suggested measures. Three of the Committee’s supervisory measures concern money laundering, and they are (1) Statement on Principles in Money Laundering (2) Core Principles for Banking and (3) Customer Due Diligence. In 1988 the Basel Committee issued its “Statement on Prevention of Criminal Use of the Banking System for the purpose of Money Laundering (Statement on Prevention)” Four principles are contained in the Statement (a) proper customer identification (b) high ethical standards and compliance with statutes (c) cooperation with law enforcement agencies (d) policies and procedures to adhere to the statement. The Statement cautions that banks may be unwittingly used by criminals

In 1997 the Basel Committee issued its “Core Principles for Effective Banking Supervision (Core Principles)” which provides a comprehensive blueprint for an effective banking supervisory system. Of the total 23 core principles, the core principle 15 deal with laundering which reads as “Banking supervisors must determine that banks have adequate policies, practices and procedures in place, including strict “know your customer” rules, that promote high ethical and professional standards in the financial sector and prevent the bank from being used intentionally or unintentionally by criminals” In addition to the above the Committee in 1999 issued “Core Principle methodology” which has 11 specific criteria and 5 additional criteria to help assess the KYC policy. Important point is that these additional criteria refer to the FATF 40 recommendations. In October 2001 the Committee issued an extensive paper on KYC titled “Customer Due Diligence for Banks” These KYC standards are intended to benefit banks beyond their fight against money laundering by protecting the safety and soundness of the banks and the integrity of the banking system as a whole

559 supra note 1; p-III-3,14
560 supra note 1; p14-16
4.3.3 Financial Intelligence Unit (FIU)

FIUs are national government authorities that receive, analyze, and disseminate financial information and intelligence for the purpose of uncovering and prosecuting crime. Though their functions vary among jurisdictions, FIUs are statutorily empowered to receive a wide variety of financial information from diverse sources. FIUs have access to information from other domestic government sources, including those administering customs, tax, pension and criminal laws as well as from foreign FIUs. FSF (Financial Stability Forum) provides a cross disciplinary forum for those interested in regulatory matters to meet, discuss and pursue various initiatives with respect to the international financial system. FIUs can be classified by their nature, as purely administrative or run by the police or a judicial authority. In some jurisdictions such as UK for example a police force is charged with the responsibility of receiving and analyzing reports made by the financial institutions. The secrecy obligation imposed on FIUs is very important in several respects. First it enables FIUs to exercise their functions as an intermediary between financial institutions and law enforcement agencies. Secondly the secrecy duty also protects the personnel of reporting institutions. Thirdly in so far as the information disclosed is protected by the right to privacy the secrecy duty of course also protects the right to privacy of the individuals to whom the information disclosed relates.

Primary goal of a financial investigation is to identify, trace, and document the movement of funds so as to locate the assets which are subject matter of investigation. Such investigations seek to discover the financial trail left by the criminals. The pressing need for data analysis of financial crime is one of the reason for proliferation of FIUs around the globe and their growing importance in detecting, preventing and prosecuting laundering offences. FIUs vary from country to country but the core functions of receiving, analyzing and disseminating information remains the same. Financial institutions must report all suspicious transactions to a centralized repository.

561 supra note 133; p40
562 supra note 70; 190
Only on analyzing the data, FIUs can detect suspected criminal transactions. Analytical function of FIU is supported by legal authority, adequate human resources and technical capability by a country.\textsuperscript{563}

4.3.4 World Customs Organisation (WCO)

WCO based in Brussels does a collaborative effort on international scale by customs authorities of countries worldwide, and WCO is also deeply concerned with AML measures By its very nature WCO plays a fairly proactive role in curbing money laundering by way of investigation and disseminating information.\textsuperscript{564}

4.3.5 Financial Stability Forum (FSF)

The Financial Stability Forum (FSF) was convened in April 1999 to bring together senior officials from 26 national authorities, six international financial institutions, seven international standard-setting, regulatory and supervisory groupings, two committees of central bank experts and the European Central Bank to promote international financial stability through information exchange and co-operation in financial supervision and surveillance. In May 2000 the FSF encouraged a number of offshore centers to undertake necessary reforms and then requested the IMF to put in place an assessment programme that would ensure long-term progress in these jurisdictions As at the end of August 2004 almost all of the 42 countries which the FSF had identified as having offshore financial activities had undergone an initial assessment by the IMF.\textsuperscript{565}

\textsuperscript{563} supra note 1; p-VII-2,4
\textsuperscript{564} supra note 26; p226
\textsuperscript{565} supra note 537; p10
4.3.6 EGMONT Group

To combat money laundering governments have created agencies to analyze information submitted by financial institutions. These agencies are commonly known as FIU. They serve as the focal point for the national AML because they provide for the exchange of information between financial institutions and law enforcement agencies. To join the Egmont group a country’s FIU must meet the Egmont definition of an FIU. A member must also commit to act in accordance with the Egmont Group’s principles for Information Exchange between FIU for money laundering cases. Members have access to a secure private web site to exchange information. Combating money laundering requires the expertise of specialized law enforcement agencies. Under the portents of the Egmont Group a loosely organized group of national FIUs was formed. The definition of an FIU contains three basic functions. Firstly any FIU has a ‘repository function’ in the sense that the unit is called upon to be the central repository of information on money laundering. Second is the ‘analysis function’ relating to processing of the information it receives, by normally providing added value to it. Processing information may allow an FIU to decide whether or not the information warrants a judicial investigation. The last function is its ‘clearing house’ function as the unit serves as a conduit for facilitating the exchange of information on unusual or suspicious financial transactions.\textsuperscript{566}

4.3.7 Group of 7 Countries (G-7)

Since 1978 the G7 partners have worked together effectively, to counter terrorism. In the first stage between 1978 to 1980 terrorism was the G7 agenda, and in 1981 Ottawa summit G7 started to take action against the problem. In 1984 London Summit G7 highlighted several goals including the issue of raising of funds through drug trafficking. In 1986 Tokyo summit was the first G7 document expressing a vague commitment to lead international effort against terrorism and established the first

\textsuperscript{566} supra note 70; p184
network of expert groups on terrorism. In 1995 Ottawa Ministerial Declaration on Countering of Terrorism called upon all states to strive and take steps countering terrorism and to bring domestic legislation in harmony with international conventions by the year 2000. In 2001 G7 issued a second report about fighting the abuses of Global Financial System and continued to monitor the work of FATF. In 2002 G7/G8 issued several documents and reports on combating the financing of terrorism. The money laundering problem became relevant for G7/G8 before long and in eighty’s many documents issued highlighted the need of fighting money laundering\(^{567}\).

### 4.3.8 Wolfsberg Group of Banks

On October 30, 2000 a new initiative to combat money laundering was unveiled, and what distinguishes this from others is that it has been initiated by private sector banks. Eleven private sector banks signed the Wolfsberg Principles which are non binding set of guidelines concerning money laundering, governing relationship between private banks and their clients. Some critics are of the view that the initiative is a attempt to pre-empt further governmental control towards private banking\(^{568}\). The main thrust of Wolfberg principles is to convince national and international regulatory agencies to adopt risk-based approach to AML issue. While the traditional rule based approach was ineffective because it stipulated measures based on a pre-defined criteria or set-threshold, while the risk based approach which is more flexible as it leaves the priorities to the institutions\(^{569}\).

\(^{567}\) supra note 19; p23-30

\(^{568}\) supra note 5; p262

4.4 Regional Groups

4.4.1 Asia Pacific Group (APG)

The Asia/Pacific Group on Money Laundering (APG) was officially established as an autonomous regional anti-money laundering body in February 1997 at the Fourth Asia Pacific Money Laundering Symposium held in Bangkok, Thailand. The purpose of the APG is to facilitate the adoption, implementation and enforcement of internationally accepted anti-money laundering and anti-terrorist financing standards set out in the recommendations of the apex body FATF. It is a voluntary body though it is not a party of any international organization or does it derive its existence through a Treaty. It takes into account periodical developments in AML law and the initiatives taken by other international organizations and bodies, to promote a consistence global response. The procedures of APG is based on consensus among members.\(^{570}\)

4.4.2 Caribbean Financial Action Task Force (CFATF)

After the inception of FATF, and following its model, 26 member countries from the Caribbean basis and the USA have lined together to promulgate ad implement various AML efforts under the banner of Caribbean Financial Action Task Force – CFATF. In 1991 the Prime Minister of Aruba initiated the move as he was concerned about the influx of drug money into Aruba. Only in October 1996 when a formal MOU was signed the organization was formed. Non members but co-operating nations include, USA, Canada, Mexico, France and Great Britain, Argentina, Holland. It takes active role in AML regime of Caribbean and Latin American regions. It has a 19 Recommendations modeled following the FATF recommendations.\(^{571}\)

\(^{570}\)http://fiuindia.gov.in/international-apg.htm accessed on 18/8/14

\(^{571}\)supranote 62; p234
4.4.3 Europol

Europol is a regional police organization of Europe. Its membership comprises of police forces in the EU. It is active in countering money laundering measures by coordinating with investigations. Over the years Europol have built up substantial experience in fighting drug trafficking, illicit immigration networks and trafficking in human beings, illicit vehicle trafficking, cybercrime, money laundering and forgery of money. Europol is the European central office to combat euro counterfeiting also.

4.4.4 Eastern and Southern Africa Anti-Money Laundering Group (ESSAMLG)

The purpose of the Eastern and Southern Africa Anti-Money Laundering Group (ESSAMLG) is to combat money laundering by implementing the FATF Recommendations. This effort includes co-ordinating with other international organizations concerned with combating money laundering, studying emerging regional typologies, developing institutional and human resource capacities to deal with these issues, and coordinating technical assistance where necessary. ESAAMLG enables regional factors to be taken into account in the implementation of anti-money laundering measures. ESAAMLG was launched at a meeting of Ministers and high-level representatives in Arusha, Tanzania, on 26-27 August 1999. A memorandum of understanding (MoU) based on the experience of the FATF and other FATF-style regional bodies was agreed to at that meeting. Following the signature of the MoU by seven of the potential members, ESAAMLG came into formal existence. All members are Commonwealth countries which have committed to the FATF Forty Recommendations. The group held its first meeting on 17-19 April 2000 in Dar es Salaam, Tanzania. Following the events of 11 September 2001, ESAAMLG expanded its scope to include the countering of terrorist financing. ESAAMLG members participate in a self-assessment process to assess their progress in implementing the
FATF Forty Recommendations. The ESAAMLG Secretariat is located in Dar es Salaam, Tanzania\textsuperscript{572}.

### 4.4.5 MONEYVAL Committee

The object of MONEYVAL is to ensure that its member states in the Council of Europe have put in place, an effective system to counter money laundering and terrorist financing and to comply with the relevant international standards in these fields. It has been impressed upon the member states that these standards are compatible to those contained in the recommendations of the FATF, including the Special Recommendations on Terrorist Financing, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organised Crime, the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism, the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and the relevant implementing measures and the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, concluded within the Council of Europe\textsuperscript{573}.

### 4.5 Global Enforcement Regime

#### 4.5.1 Territorial Jurisdiction

As historically nation states restricted their criminal law to their boundaries, launderers took advantage of this limited jurisdiction by moving proceeds across national borders. Although a large number of international organizations have started

\textsuperscript{572} http://www.fatf-gafi.org/pages/easternandsouthernafricaanti-moneylaunderinggroupesaamlg.html accessed 18/01/2014

\textsuperscript{573} http://www.coe.int/t/dghl/monitoring/moneyval/About/MONEYVAL\_in\_brief\_en.asp accessed on 20/01/2015
ruling the world through standards, their importance is seldom acknowledged. The reason is a lack of understanding of why international organizations find soft rules attractive and how they should become effective. Indeed it is a common complaint by many developing countries that developed jurisdictions pay too little heed to the economic impact of large amounts of capital being transferred out of the developing world. Engaging in trade or any kind of financial transaction involving a jurisdiction subject to a financial embargo is a serious criminal offence, but it is not itself money laundering.

In most cases the proceeds of a crime are located may lack jurisdiction over the offence which took place abroad and as a result may be unable to order confiscation of these proceeds. Laundering offence may give jurisdiction to a state in whose jurisdiction the laundering activity took place but the predicate crime took place in a jurisdiction abroad. Even if the state lacks prescriptive jurisdiction for the predicate offence, criminalization of money laundering nevertheless allows the judicial authorities of a state to order confiscation of proceeds located in another. Often every single laundering act will be considered as a new money laundering offence and as a consequence such offence can be repeated number of times. Courts in certain jurisdiction such as Belgium consider the offence as collective and single, while in USA for each offence an indictment is awarded.\textsuperscript{574}

\section*{4.5.2 Extra Territorial Jurisdiction}

When a government of one state wants to enforce internationally a transnational crime, it will try to make this offence illegal under international law. That certain conduct is considered as international offence mostly follows from an international convention, but can also follow from customary practices among states. In order to be used as basis for proceedings in respect of laundering, a predicate offence committed abroad, must have the nature of a criminal offence in the country where it was

\textsuperscript{574} supra note 70, p215-219
committed and in the domestic law. FATF Recommendation 1, in paragraph five, provides that predicate offenses should extend to criminal conduct that occurred outside the country’s borders, if that conduct constituted an offense in the other country and would have constituted an offense had it occurred domestically. This is the so-called “dual criminality” standard that is the minimum requirement. A system will work only well if there are no loopholes. Thus, there is a clear need for universal participation in international money laundering efforts at the global level, and a high degree of transparency. Otherwise the system will remain only as strong as its weaker link and will be exploited by organized crime. The problem does not seem to be a lack of international instruments but more likely, shortcomings in the implementation of existing instruments. Dual criminality is a long standing requirement in extradition law of most of the countries. Under the dual criminality principle an act is not extraditable unless it constitutes a crime under the law of both the state requesting extradition and the state from the extradition is sought. The justification for the principle is that it ensures that a person’s liberty is not restricted when his/her conduct is not recognized as criminal in the state receiving an extradition request. The political, economic and social interests of countries are often affected by, and related to, the region in which the country is located. Acts of the neighboring countries perhaps has the greatest effect on its close neighbors, especially in the area of law enforcement and economic relations. These regional bodies provide the opportunity for essential interests to be pursued and for co-operative mechanisms to be developed. The Asia Pacific Group on money laundering APG, one such group currently consists of 26 members.

More than physical persons, juridical persons are internationally active to a great extent. Unlike the former the latter can be present in more than one country at the same time. The application of nationality principle to foreign corporate crimes, however requires the solving the basic question of how the nationality of an institution which is a

575 supra note 230; p13
576 supra note 130; p130
577 supra note 112, p61
578 supra note 21; p25
corporation should be determined. Double criminality as a precondition for extra territorial jurisdiction should not been as purporting to safeguard the legality principle, but as a mechanism for avoiding conflict of laws. Without the requirement of double criminality the nationality principle would create a risk that individuals and corporations alike would be confronted with obligations under their national law that would conflict with the territorial law\textsuperscript{579}.

US authorities in particular tried to pierce foreign banking secrecy by issuing extra-territorial disclosure orders, that is disclosure orders in respect of information held abroad. Although most states are now in principle willing to lift foreign banking secrecy laws on the request of a foreign state, for the purpose of foreign money laundering investigation, this willingness is not absolute, but is subject to a number of legal conditions and exceptions. The effectiveness of the fight against ML that is the impact on crime (both predicate crime and the crime of money laundering) is moreover difficult to measure as the extent of the existing crime is a matter of speculation\textsuperscript{580}.

The question of whether a state has jurisdiction to order confiscation of the proceeds from predicate offence coincides with the question of whether the state has jurisdiction over than offence, as confiscation in principle is a criminal sanction which is imposed for the offence. The money laundering offence gives jurisdiction to a state in whose territory the money laundering acts took place and hence it allows it to take action in respect of proceeds that are located in its territory, but derived from an offence outside its jurisdiction. Thus even if a state lacks prescriptive jurisdiction in respect of the predicate offence, the criminalization of money laundering nevertheless allows the judicial authorities of that state to order the seizure or confiscation of the proceeds located in its territory which would otherwise be excluded. American law enables civil forfeitures of proceeds from a number of designated offences against a foreign nation, namely drug offences in respect of which it is required that they be punishable both under American law and according to the \textit{lex loci delicti} with at least one year

\textsuperscript{579} supra note 70; p233,236 \\
\textsuperscript{580} ibid; p318,424
imprisonment – 18 USC 981 (a) (1) (B)\textsuperscript{581}. Apart from administrative assistance, another new trend in international evidence gathering is the use in particular by the US law enforcement authorities is unilateral measures which purport to give an extra territorial reach in order to obtain evidence. Although this trend is most notable in respect of evidence gathering, there are also examples of extra territorial seizures or even extra territorial confiscation of assets. Unlike the fiscal offence exception, the political offense exception which originated in the law of extradition is intended to protect individual rights. It protects persons who have committed the offence against the political institutions of a state and who are therefore deemed not to stand a chance of receiving a fair trial in that country\textsuperscript{582}.

4.5.3 National & International Co-Operation

The international community could consider the possibility to introduce effective punitive measures, such as a financial quarantine for every country that did not adhere to the international standards\textsuperscript{583}. Cleaner money presumably like cleaner air comes with a price. Increasing scrutiny of money flow may result in loss of customers who may migrate to competing systems which are less regulated. Regardless of the volume of money flowing through a bank, routine reporting systems can be burdensome, and especially the requirement to report ‘suspicious transactions’ can be a nightmare depending on penalties for non compliance\textsuperscript{584}.

4.5.4 Mutual Legal Assistance

The mere existence of an agreement is not an appropriate measure, which in reality amounts to cooperation. To make information exchange work there must be a

\begin{footnotes}
\item \textsuperscript{581} ibid; p216-217
\item \textsuperscript{582} supra ntoe 70; p300
\item \textsuperscript{583} supra note 19; p19
\item \textsuperscript{584} supra note 227; p796
\end{footnotes}
political will and a commitment to the rule of law. In a number of cases, governments have agreed to cooperate but the agreement has been a cosmetic cover to protect the local money laundering industry. Art. 7(1) of VC declares that Parties shall afford one another the widest measures of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with Art. 3 Para 1. Art. 9 refers to other forms of cooperation and training. Art. 8, of MLC requires parties to afford each other upon request, the widest possible measures of assistance in the identification and tracing of instrumentalities, proceeds, and other property liable to confiscation.

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585 supra note 20; p93
586 supra note 70; p261